

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2018-001908

Dorothy Jackson, Individually,
and as Guardian ad Litem for
Jordan B., a minor under the
age of eighteen (18) years,

Appellant,

v.

Allen Clack and Claudia
Dean,

Defendants,

Of Whom Claudia Dean is

Respondent.

RECORD ON APPEAL

Barry B. George
Paige B. George
1419 Bull Street
Columbia, South Carolina 29201
(803) 254-7222
Attorneys for Appellant

George Verner Hanna, IV
Howser Newman and Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
Attorney for Respondent

RECEIVED
JUN 17 2019
SC Court of Appeals

INDEX

Order of September 10, 2018 Granting Summary Judgment.....	1
Order of September 21, 2018 Denying Summary Judgment	7
Order of September 27, 2018 Granting Summary Judgment.....	12
Order of October 8, 2018 Denying Motion to Reconsider.....	14
Order of October 15, 2018 Appointing Guardian ad Litem.....	16
Complaint.....	18
Answer of Claudia Dean.....	21
Transcript of September 5, 2018 Hearing.....	27
Motion for Summary Judgment.....	36
Memorandum in Support of Motion for Summary Judgment	38
Motion to Reconsider Court’s September 10, 2018 Order	56
Motion to Reconsider Court’s September 27, 2018 Order	68
Email of September 19, 2018.....	87
Email of September 21, 2018.....	90
Email of September 24, 2018.....	93
Email of September 25, 2018.....	94
Email of October 4, 2018.....	98
Testimony	
Deposition of Jordan B. – Direct Examination by Mr. Eddy	103
Deposition of Jordan B. – Direct Examination by Mr. Bell	107
Deposition of Dorothy Jackson – Direct Examination by Mr. Eddy	109
Deposition of Claudia Dean – Direct Examination by Mr. George.....	114
Deposition of Alan Clack – Direct Examination by Mr. George.....	117
Certificate of Appellant.....	118

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B , a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

**ORDER GRANTING DEFENDANT
CLAUDIA DEAN'S MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

This matter came before the Court on September 5, 2018, for a hearing on a Motion for Summary Judgment submitted on behalf of Defendant Claudia Dean ("Dean"). Based upon the record before the Court and the arguments made by counsel, Dean's Motion for Summary Judgment is hereby GRANTED.

II. FINDINGS OF FACT

Plaintiff Whitney Jackson, Individually, and as Guardian ad Litem for Jordan B (hereinafter "the Minor"), a minor under the age of eighteen (18) years (hereinafter "Plaintiff") alleges that the Minor was injured in a drowning incident at a pool party held at Dean's home. On May 24, 2014, the minor was alleged to have been taken to Dean's home by his baseball coach Defendant Allen Clack. While at the party, the minor was alleged to be a licensee of Dean and the minor was alleged to have sunk to the bottom of a pool and suffered injury. Specifically, Plaintiff alleges that Dean caused Plaintiff's injuries by: allowing the Minor to go swimming knowing the

Minor could not swim; in failing to monitor the Minor while the Minor was in the pool; in failing to inspect the premises; and, in creating an unsafe condition.

Based upon the record submitted to the Court I make the following relevant findings of fact: 1) I find Dean was at the beach on the date of the incident and not present at the pool party held at her home; 2) I find Jackson nor the minor ever informed anyone that the Minor allegedly could not swim; and 3) I find that the near drowning incident took in the shallow end of the pool.

CONCLUSIONS OF LAW

a. Applicable law

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SCRCP 56(c). When a party makes a motion for summary judgment that is supported by evidence, the adverse party may not rest on the allegations of the Complaint to overcome the motion but must demonstrate, by affidavit or other evidence, that a genuine issue of fact exists. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The nonmoving party must make an affirmative effort to set forth specific facts showing that there is a genuine issue for trial in order to overcome a summary judgment motion. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Moreover, while a court must view the facts in a light most favorable to the non-moving party, “a court cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Bloom v. Ravoira*, 339 S.C. 417, 423 (2000) (internal citations and quotation marks omitted).

The elements for a cause of action for the tort of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996).

Negligence is not actionable unless it is the proximate cause of the plaintiff's injury. Hanselmann v. McCardle, 275 S.C. 46, 267 S.E.2d 531 (1980). Proximate cause requires proof of (1) causation in fact and (2) legal cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Legal cause is proved by establishing foreseeability, i.e., that the injury occurred as a natural and probable consequence of the defendant's negligence. *Id.* at 72, 393 S.E.2d at 916. See also Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978); Stone v. Bethea, 251 S.C. 157, 161 S.E.2d 171 (1968). Although foreseeability of some injury from an act or omission is a prerequisite to the plaintiff establishing proximate cause, it is not necessary for the defendant to have contemplated the particular event which occurred. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990). Rather, it is sufficient if the defendant should have foreseen that his negligence would probably cause injury to someone. *Id.*

The duty a landowner may owe to a person present on her property varies based on the category of the person on her land. If the person entering on to her land is a social guest they are termed a licensee. "A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent. The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him..." Neil v. Byrum, 288 S.C. 472, 473, 343

S.E.2d 615, 616 (1986). There are two exceptions to this rule imposing upon a possessor a duty to “use reasonable care to discover [the person entering] and avoid injury to him in carrying on activities upon the land” and to “use reasonable care to warn [the person entering] of any concealed dangerous conditions.” Id.

b. Application of facts to law

Dean is alleged to have allowed the minor to swim in the pool knowing that the minor could not swim. However, it is the unrefuted testimony of Dean and Clack, that Dean was not present on the day of the party having taken a trip to the beach. Therefore, she did not allow the minor to swim. In addition, Jackson and the minor admitted that they did not inform anyone that the minor could not swim. Thus, there is no merit to the allegations that anyone could have knowingly allowed the minor to swim knowing that he could not, much less someone who was not even present.

Dean is also alleged to have failed to monitor the Minor while he was in the pool. However, as with the previous allegations, Dean was not present at the pool party and therefore this allegation also fails as it would have been an impossibility for Dean to monitor.

Plaintiff alleges that Dean failed to inspect the premises and created an unsafe condition. However, Plaintiff has introduced no evidence that an inspection of the premises would have prevented any injury to the Minor. Indeed, Plaintiff has introduced no evidence that there was an unsafe condition on the property that contributed to the Minor’s injuries. Jackson argued in her deposition and Jackson’s counsel argued at the hearing that Dean should have had markings on the side of the pool or rope delineating the depth of the pool so as to warn of the deep end. However, as the minor has no memory of the accident, it is the uncontroverted testimony of Clack that the incident occurred in the shallow end of the pool. Therefore, any arguments related to

markings, warnings or barriers that should have or could have been in place to warn or mark the deep end of the pool are irrelevant as the Minor's injuries were suffered in the shallow end of the pool.

Finally, Plaintiff's attorney argued at the hearing that as a licensee, Defendant had an absolute duty to avoid injury to the licensee in carrying on activities on the land. Plaintiff's attorney argued that because the Minor suffered an injury on Defendant's land that Defendant had breached her duty to the Minor. The Court finds this argument to be without merit. Plaintiff's counsel's argument overstates the duty a landowner owes to a licensee. The court finds that because the Minor was a licensee, Dean owed the Minor no duty except: a) avoid injury to the licensee in carrying on activities on the land and b) to warn of concealed dangerous conditions. Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). I find that neither duty is applicable to the facts of this case as there is no evidence that Dean was carrying on activities on her land that could potentially cause harm. In addition, I find that the pool is not a concealed condition as it is both open and obvious.

NOW, THEREFORE, based upon the foregoing,

IT IS HEREBY ORDERED that summary judgment be entered in favor of Defendant Dean in the above-captioned action. This Order does not end Plaintiffs' claim against Defendant Clack.

AND IT IS SO ORDERED.

The Honorable John C. Hayes, III
Presiding Circuit Court Judge

September ____, 2018



Chester Common Pleas

Case Caption: Whitney Jackson individually and as GAL for , plaintiff, et al VS
Allan Clack , defendant, et al
Case Number: 2016CP1200342
Type: Order/Summary Judgment

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-10 06:37:30 page 6 of 6

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)
)
Whitney Jackson individually and as)
Guardian ad Litem for Jordan B) a)
Minor under the age of eighteen (18) years,)
)
Plaintiffs,)
)
v.)
)
Allen Clack and Claudia Dean,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

ORDER

This matter comes before this Court on Plaintiffs’ Motion to Reconsider the Court’s Order granting Defendant Dean’s Motion for Summary Judgment.

Based on the written motion of the Plaintiffs, this Court hereby sets aside its September 10, 2018 order and issues this Order denying Defendant Dean’s Motion for Summary Judgment.

FACTS/PROCEDURAL HISTORY

This civil action was brought on behalf of the Plaintiffs for injuries the minor Plaintiff, Jordan B ; sustained on May 24, 2014 when he drowned and became unresponsive during a pool party on the property of Defendant Claudia Dean. The minor Plaintiff had been brought to the residence of Defendant Dean by Defendant Clack who is also a party to this lawsuit. Defendant Dean testified in her deposition that she had two weeks’ notice of the pool party; that she had warned Stephanie Dobbs who was throwing the party to “make sure that there are plenty of people watching the kids”; that her swimming pool had hooks for a rope to delineate the deep end from the shallow end of her pool; and; that she did not have such a rope on her pool on the date of the accident.

CASE LAW/ANALYSIS

I. Standard of Review

“In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Catawba Indian*

Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751 (2007)). “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *South Carolina Rules of Civil Procedure*, Rule 56(c). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Gadson v. Hembree*, 364 S.C. 316, 613 S.E. 2d 533 (2005) and *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)) “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *Id.* (citing *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *Singleton*, 377 S.C. 185 (citing *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007)). “Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Singleton*, 377 S.C. 185 (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)).

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (2009).

II. Owner's Duty to Child Licensee

“[An] owner or occupier of land may be liable for injuries to children of tender years, whether licensees or trespassers, in either of two situations.” *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 493, 151 S.E.2d 435 (1966) (emphasis added). The second situation stated in *Lynch* was

where [a dangerous thing] so left exposed that [children] are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the **person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them, from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.** *Id.* (quoting *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965)) (emphasis added)

“The owners and occupiers of real property are held by the law in some respects to a different standard of liability in cases of injuries to children, coming upon their premises, from that under which they stand with respect to adult persons.” *Franks v. Southern Cotton Oil Co.*, 79 S.C. 10, 58 S.E. 960 (1907) (quoting Thompson on Neg. § 1024).

“[A] property owner may owe a heightened duty to children beyond that owed to adult licensees or trespassers where a dangerous instrumentality is involved.” *Dennis by Evans v. Timmons*, 313 S.C. 338, 340, 437 S.E.2d 138, 140 (Ct. App. 1993) (citing *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 494, 151 S.E.2d 435, 436 (1966)). An occupier “must take into account childish impulses and propensities in keeping the premises reasonably safe.” *Hughes v. Children’s Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977) (emphasis added).

CONCLUSION

It is clear from Defendant Dean’s testimony that she anticipated the harm that could have come to any child and did come to the minor Plaintiff swimming in her pool. This Court finds that a swimming pool is a dangerous instrumentality; and, therefore Defendant Dean had a heightened duty and was bound to take “reasonable pains to guard” her pool. *Lynch*, 248 S.C. 490. Defendant Dean in her own deposition testified that she had warned Ms. Dobbs to have sufficient supervision of the children; that her pool had hooks for a rope to delineate the shallow end from the deep end, and that she did not have a rope in her pool the day of the accident. These are facts that can lead to several inferences as to the duty and breach of duty of Defendant Dean and should be left to the consideration of a jury. One such inference being that Defendant Dean did breach her heightened duty to children she knew would be swimming in her pool by failing to have a rope in the pool. A jury could reasonably determine that that breach of duty was a proximate cause of the minor Plaintiff’s injuries; and, that Defendant Dean had anticipated harm to children swimming in her pool.

The instant case is a suit lying in negligence and the burden of proof placed on the Plaintiffs is a preponderance of the evidence. Therefore, the Plaintiffs need only establish a mere scintilla of evidence as to genuine issues of facts or inferences that can be made therefrom. Viewing the facts in the light most favorable to the Plaintiffs, this Court finds that the Plaintiffs have exhibited a mere scintilla of evidence such to survive summary judgment as to Defendant Dean.

ORDER

Therefore, **IT IS ORDERED AND ADJUDGED**, that Plaintiffs' Motion to Reconsider is hereby GRANTED.

Therefore, **IT IS ORDERED AND ADJUDGED**, that Defendant Dean's Motion for Summary Judgment is hereby DENIED.

AND IT IS SO ORDERED.



Chester Common Pleas

Case Caption: Whitney Jackson individually and as GAL for , plaintiff, et al VS
Allan Clack , defendant, et al

Case Number: 2016CP1200342

Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 14:24:00 page 5 of 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B ; a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

ORDER

This matter originally came before the Court on September 5, 2018, for a hearing on a Motion for Summary Judgment submitted on behalf of Defendant Claudia Dean (“Dean”). The Court later granted Defendant Dean’s Motion for Summary Judgment by Order dated September 10, 2018. Thereafter, Plaintiff file a Motion to Reconsider which the Court granted by Order dated September 21, 2018. However, upon additional reflection the Court has determined that it erred in granting the Motion to Reconsider and that Dean did all that is required of a swimming pool owner under the circumstances. Therefore, the Court hereby sets aside its Order dated September 21, 2018 and reinstates its Order dated September 10, 2018 granting Summary Judgment in favor of Dean.

IT IS HEREBY ORDERED that summary judgment be entered in favor of Defendant Dean in the above-captioned action. This Order does not end Plaintiffs’ claim against Defendant Clack.

AND IT IS SO ORDERED.

The Honorable John C. Hayes, III
Presiding Circuit Court Judge

September ____, 2018



Chester Common Pleas

Case Caption: Whitney Jackson individually and as GAL for , plaintiff, et al VS
Allan Clack , defendant, et al
Case Number: 2016CP1200342
Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-27 08:59:15 page 2 of 2

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B , a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

ORDER

This matter originally came before the Court on September 5, 2018, for a hearing on a Motion for Summary Judgment submitted on behalf of Defendant Claudia Dean (“Dean”). The Court later granted Defendant Dean’s Motion for Summary Judgment by Order dated September 10, 2018. Thereafter, Plaintiff file a Motion to Reconsider which the Court granted by Order dated September 21, 2018. However, upon additional reflection the Court determined that it erred in granting the Motion to Reconsider, and by Order dated September 27, 2018, set aside its Order dated September 21, 2018 and reinstated its Order dated September 10, 2018 granting Summary Judgment in favor of Dean. Whereupon, Plaintiff filed another Motion to Reconsider on October 3, 2018. The Court now finds that its Order dated September 27, 2018 fully and adequately disposes of the issues raised in Plaintiff’s October 3, 2018 Motion to Reconsider.

IT IS HEREBY ORDERED that Plaintiff’s October 3, 2018 Motion to Reconsider is denied. This Order does not end Plaintiff’s claim against Defendant Clack.

AND IT IS SO ORDERED.

The Honorable John C. Hayes, III
Presiding Circuit Court Judge

October ____, 2018



Chester Common Pleas

Case Caption: Whitney Jackson individually and as GAL for , plaintiff, et al VS ,
Allan Clack , defendant, et al
Case Number: 2016CP1200342
Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-10-08 13:45:22 page 2 of 2

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER)	
)	Civil Action No.: 2016-CP-12-00342
Whitney Jackson, Individually, and as)	
Guardian ad Litem for Jordan B)	
Minor under the age of eighteen (18) years,)	AMENDED ORDER FOR APPOINTMENT
Plaintiff(s),)	OF GUARDIAN AD LITEM
)	
vs.)	
)	
Allan Clack and Claudia Dean,)	
Defendant(s).)	
_____)	

It appearing from the Petition attached hereto that the Guardian ad Litem previously appointed in this matter is now deceased, and that the appointment of a successor Guardian ad Litem is needed in order to bring and/or continue any action necessary against the Defendants responsible for damages to the minor herein.

And it further appears that Dorothy M. Jackson, the maternal grandmother and temporary custodian of the minor child, Jordan B..., would be a proper person to be so appointed, it is therefore,

ORDERED that the said Dorothy M. Jackson be, and she hereby is, appointed as Guardian ad Litem for Jordan B..., a minor child under the age of eighteen (18) years, to institute and do whatever necessary to protect the rights of said minor and in any action that may be brought on his behalf.

AND IT IS SO ORDERED.

Sue K. Carpenter, Clerk of Court
Chester County

Chester, South Carolina
October ____, 2018



Chester Common Pleas

Case Caption: Whitney Jackson individually and as GAL for , plaintiff, et al VS
Allan Clack , defendant, et al

Case Number: 2016CP1200342

Type: Order/Appointment Of Guardian Ad Litem

So Ordered

Sue K. Carpenter, Chester County Clerk of Court

Electronically signed on 2018-10-15 11:47:47 page 2 of 2

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS

Whitney Jackson, Individually, and as)
Guardian ad Litem for Jordan B. ; a)
minor under the age of eighteen (18) years,)
Plaintiff,)

2016CP1200342

vs.)

Allan Clack and Claudia Dean,)
Defendants.)

COMPLAINT
(Jury Trial Requested)

FILED

2016 AUG 22 P 12:33

CLERK OF COURT
CHESTER CO S.C.

The Plaintiff, complaining of the Defendants herein, alleges:

1. That the Plaintiff, Whitney Jackson, is a resident of the County of Chester, State of South Carolina; and that the Plaintiff is the duly appointed Guardian ad Litem for the minor, Jordan B.
2. That, upon information and belief, the Defendants, Allan Clack and Claudia Dean, are residents of the County of Chester, State of South Carolina.
3. That the minor Plaintiff, Jordan B. ; was born on
4. That the minor Plaintiff, Jordan B. ; was unable to swim.
5. That on May 24, 2014, Dorothy Jackson, Grandmother of the minor Plaintiff, Jordan B., carried the minor Plaintiff to the home of the Defendant, Allan Clack, located in the County of Chester, State of South Carolina, to play with Defendant Clack's son.
6. That Defendant Clack later called Dorothy Jackson, Grandmother of the minor Plaintiff, Jordan B., and asked if he could take the minor Plaintiff to the home of Defendant, Claudia Dean, located in the County of Chester, State of South Carolina, for a birthday party and to go swimming in Defendant Dean's swimming pool.
7. That Defendant Clack was informed that the minor Plaintiff, Jordan B., could not swim and that he should return the minor Plaintiff to the home of the Grandmother's sister.
8. That on May 24, 2014, Defendant Clack transported the minor Plaintiff to the home of the Defendant, Claudia Dean, for a birthday party and swimming in Defendant Dean's swimming pool.

9. That on May 24, 2014, the minor Plaintiff was a licensee of Defendant, Claudia Dean, at her home located in the County of Chester, State of South Carolina; that the minor Plaintiff was allowed to enter the swimming pool and sank to the bottom of the pool causing him severe and painful bodily injuries.

10. That as a result of the above, the minor Plaintiff suffered injuries in and about his body, all of which has and will cause him to undergo much physical pain and suffering, has and will cause him to have to spend money on medical services, and will cause him to be permanently injured.

11. That the Plaintiff, Whitney Jackson, is the mother of the minor Plaintiff, Jordan B. [redacted] and has incurred medical expense as a result of injuries to Jordan B. [redacted] in the accident on May 24, 2014

12. A. That the Defendant, Allan Clack, was willful, wanton, negligent, grossly negligent, careless, and reckless in the following particulars, to-wit;

- (a) in allowing the minor Plaintiff to go swimming knowing the minor Plaintiff could not swim;
- (b) in failing to monitor the minor Plaintiff while the minor Plaintiff was in the swimming pool;
- (c) in failing to inspect the premises;
- (d) in creating an unsafe condition; and,
- (e) such particulars as the evidence at trial may show;

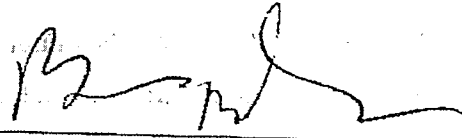
B. That the Defendant, Claudia Dean, was willful, wanton, negligent, grossly negligent, careless, and reckless in the following particulars, to-wit;

- (a) in allowing the minor Plaintiff to go swimming knowing the minor Plaintiff could not swim;
- (b) in failing to monitor the minor Plaintiff while the minor Plaintiff was in the swimming pool;
- (c) in failing to inspect the premises;
- (d) in creating an unsafe condition; and,
- (e) such particulars as the evidence at trial may show;

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs herein, said acts being in violation of the case and statute laws of the State of South Carolina.

13. That the Plaintiffs are informed and believe they are entitled to judgment against the Defendants for actual damages in the amount to be determined by a jury, and an appropriate amount of punitive damages.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual damages in the amount to be determined by a jury; an appropriate amount of punitive damages; for the costs of this action; and for such other and further relief as this Court may deem just and proper.



BARRY B. GEORGE
PAIGE B. GEORGE
ATTORNEY FOR THE PLAINTIFFS
1419 Bull Street
Columbia, South Carolina 29201
(803) 254-7222

August 16, 2016

FILED
2016 AUG 22 12:33
CLERK OF COURT
CHESTER CO S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B ; a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

ANSWER ON BEHALF OF
DEFENDANT CLAUDIA DEAN

(Jury Trial Demanded)

FILED

2016 NOV - 3 2 3 10

CLERK OF COURT
CHESTER CO S.C.

The Defendant, Claudia Dean, by and through her undersigned attorneys, hereby answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. Except as is hereinafter specifically admitted, each and every allegation contained in said Complaint is denied.

2. The Defendant is without information sufficient to admit or deny the allegations contained in Paragraph One (1) of the Complaint

3. As to the allegations contained in Paragraph Two (2) of the Complaint, the Defendant admits that she is a resident of Chester County; however, Defendant is without information sufficient to admit or deny the remaining allegations contained in Paragraph Two (2) of the Complaint.

4. The Defendant is without information sufficient to admit or deny the allegations contained in Paragraphs Three (3), Four (4), Five (5), Six (6) and Seven (7) of the Complaint.

5. The Defendant admits, upon information and belief, the allegations contained in Paragraph Eight (8) of the Complaint.

6. As to the allegations contained in Paragraph Nine (9) of the Complaint, Defendant admits that she allowed her daughter-in-law to host a birthday party at the pool located on her

property while the Defendant was out of town on the date alleged and that, upon information and belief, the minor Plaintiff had a near drowning incident while doing handstands in the shallow end of the pool. Defendant denies the remaining allegations contained in Paragraph Nine (9) not consistent herewith.

7. The Defendant is without information sufficient to admit or deny the allegations contained in Paragraphs Ten (10) and Eleven (11) of the Complaint.

8. As the allegations contained in Paragraph Twelve (12) subpart A, with subparagraphs a through e, those allegations do not pertain to this Defendant and as such no response is required.

9. The Defendant denies the allegations contained in Paragraph Twelve (12) subpart B, with subparagraphs a through e.

10. The Defendant denies the allegations contained in Paragraph Thirteen (13) of the Complaint.

11. As to the final unnumbered Paragraph of the Complaint, consisting of the prayer for judgment, the Defendant denies that the Plaintiff is entitled to judgment or any relief whatsoever.

FOR A SECOND DEFENSE

12. Any injuries and damages sustained by the minor Plaintiff as set forth in the Complaint, upon information and belief, were due to and caused by the sole negligence, recklessness, willfulness and wantonness of the minor Plaintiff in one or more of the following particulars:

- (a) In failing to observe any defect, obstruction or unsafe condition on the premises, if any there was;
- (b) In swimming when the Plaintiff knew he could not swim;
- (c) In failing to keep a proper lookout and observe conditions existing on the premises; and

(d) In such other particulars as may be shown at trial;

all in violation of the statutes and laws of the State of South Carolina, and by reason thereof, Plaintiff is not entitled to recover from the Defendant.

FOR A THIRD DEFENSE

13. Any injuries and damages sustained by the Plaintiffs as set forth in the Complaint, upon information and belief, were due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff, Whitney Jackson in one or more of the following particulars:

(a) In allowing the minor Plaintiff to attend a swimming party, when she knew the minor Plaintiff could not swim;

(b) In such other particulars as may be shown at trial;

all in violation of the statutes and laws of the State of South Carolina, and by reason thereof, Plaintiff is not entitled to recover from the Defendant.

FOR A FOURTH DEFENSE

14. Any injuries and damages as were allegedly sustained by the Plaintiffs at the time and place alleged in the Complaint, if any, upon information and belief, were due to and proximately caused by the negligence, recklessness, willfulness and wantonness of the Plaintiffs, which contributed more than fifty (50%) percent to cause the accident and the Plaintiff's resulting injuries and damages, if any, in one or more of the following particulars as heretofore set forth in the Second and Third Defenses stated above, which allegations are realleged and incorporated herein by reference, and therefore the Defendant has no liability to the Plaintiffs.

FOR A FIFTH DEFENSE

15. Even assuming the Defendant was careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied, and even if any such conduct on her part operated as a greater than fifty (50%) percent cause of the accident and the Plaintiff's resulting injuries and damages, if any, which is also expressly denied, the Defendant is entitled to a

determination as to the percentage which the Plaintiffs negligent, grossly negligent, reckless and willful conduct contributed to this accident and to a reduction of any amount awarded to her by an amount equal to the percentage of her own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A FIFTH DEFENSE

16. That if any injury or damage was sustained as alleged in the Plaintiff's Complaint, then the Plaintiffs were fully informed of the risk arising out of and connected with the alleged incident, which risk was assumed by the Plaintiffs and for which the Defendant is not liable and the Defendant pleads assumption of risk as a bar to this action.

FOR A SIXTH DEFENSE

17. That the Plaintiff's Complaint fails to state a claim upon which relief can be granted, and therefore, should be dismissed pursuant to Rule 12 of the S.C.R.C.P.

FOR A SEVENTH DEFENSE

18. The Defendant would show that the Plaintiff is barred from recovery because if any defects or unsafe condition existed on Defendant's property as alleged in the Complaint, such defects were open and obvious.

FOR AN EIGHTH DEFENSE

19. Any injuries and damages sustained by the Plaintiffs arising out of the incident referred to in the Complaint, resulted solely, upon information and belief, from the sole acts and omissions of a third party, which sole acts or omissions or intervening acts or omissions were the proximate cause of any injuries or damages sustained by the Plaintiffs, and therefore the Defendant has no liability to the Plaintiffs, and the Complaint should be dismissed with prejudice.

FOR A NINTH DEFENSE

20. The Defendant pleads the Recreation Use Statute as a complete bar to Plaintiff's claims in this case.

FOR A TENTH DEFENSE

21. Any claim on behalf of the Plaintiffs for punitive damages is barred by the provisions of the United States and the South Carolina Constitutions.

22. That Plaintiff's claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article 1, Section 3, of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.

23. That Plaintiff's claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, for even if it could be argued that a standard governing the imposition of punitive damages exists, this standard is void for vagueness.

24. That the Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, in that the amount of punitive damages is based upon the wealth of the Defendants.

25. That the Plaintiff's claim for punitive damages violates the Federal doctrine of separation of powers and Article 1, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

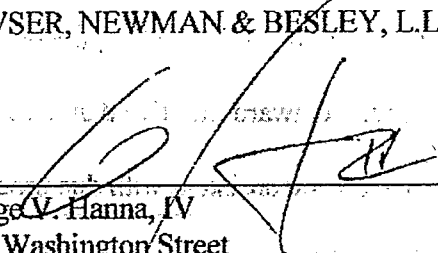
FOR AN ELEVENTH DEFENSE

26. That Defendant reserves and do not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendant demands that the same be dismissed, with costs, and for such other and further relief as the Court deems just and proper.

HOWSER, NEWMAN & BESLEY, L.L.C.

By:


George V. Hanna, IV
1508 Washington Street
P.O. Box 12009
Columbia, South Carolina 29211
(803) 758-6000
ATTORNEYS FOR THE DEFENDANT

FILED

2016 NOV - 3 P 3:10

CLERK OF COURT
CHESTER CO S.C.

November 1, 2012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHESTER
2016-CP-12-342

Dorothy Jackson, et al.

Vs.

Allen Clack and Claudia Dean

Chester, South Carolina

September 5, 2018

Before the Honorable John C. Hayes

APPEARANCES

For the Plaintiffs: Barry George

For the Defendants: George Hanna

Reported by: Michael C. Watkins

Official Court Reporter

1 MR. HANNA: My name is George Hanna, I'm here on behalf
2 of defendant Claudia Dean who is the moving party. I filed
3 a memo yesterday but I'm not sure if it got -- I've brought
4 an extra copy of the -- it's deposition testimony, it's
5 really not the beefy, it's only about four pages.

6 THE COURT: And you represent who?

7 MR. HANNA: I represent Claudia Dean. This is a cause
8 of action -- a little boy named Jordan B was in the
9 custody -- or not the custody, but was visiting with
10 defendant Clack and apparently went to a party at Ms. Dean's
11 house where she had a pool. Ms. Dean would have been out of
12 town at the time and basically I think it was, without
13 getting too complicated, her ex -- her son's ex-wife's son
14 who is like a stepson to her, anyway was having a birthday
15 party at the pool and invited various people to come. Mr.
16 Clack was invited and somehow Mr. B ended up going to
17 the pool. While he was at the pool he had a near drowning
18 incident which is what this lawsuit is about. The plaintiff
19 has brought -- has made various allegations against Ms. Dean
20 and we're moving for summary judgment as a matter of law
21 because none of those -- there is no genuine issue of
22 material fact as related to any of those. The first
23 allegation against Ms. Dean is that she allowed Mr. B
24 to swim in her pool knowing that he couldn't swim. And the
25 undisputed testimony in the case is; A, Mrs. Dean wasn't

1 there. She was Myrtle Beach that week and wasn't at the
2 party at all. B, Mr. B nor his guardian ever told
3 anybody that the boy couldn't swim. So because he never
4 told anybody he couldn't swim nobody at the pool party
5 possibly could have knowingly allowed him to swim not
6 knowing that. Second of all, Ms. Dean wasn't even there so
7 she couldn't have possibly allowed that to happen, I think
8 that's undisputed, there's no question about that. A second
9 allegation against Mrs. Dean is that she failed to monitor
10 the minor while he was in the pool. Again, Mrs. Dean was
11 not present, she was out of town. This pool party was being
12 held by her daughter-in-law, or ex-daughter-in-law and a
13 bunch of parents that were there. She wasn't even there,
14 therefore it wasn't possible for her to have been monitoring
15 this child while he was in the pool. They also allege that
16 she failed to inspect the premises and created an unsafe
17 condition. There is no evidence that has been introduced
18 into the record at all that any inspection would have
19 prevented an injury to him. Mrs. Jackson, who was the
20 guardian of the minor, in her deposition stated that there
21 should have been markings or some kind of rope showing which
22 side of the pool was the deep end versus the shallow end.
23 That's the only allegation I'm aware of about the condition
24 of the pool. And the undisputed testimony in the case is
25 that this near drowning incident occurred in the shallow end

1 of the pool, therefore whether there were markings or not is
2 totally irrelevant because the kid was in the shallow end to
3 begin with. It's not like he was fooled into thinking that
4 he was in the deep end somehow. The whole thing happened in
5 the shallow end, undisputed testimony, no one can say
6 otherwise, and so I don't think there is any way that this
7 allegation of negligence can hold. And then finally there's
8 some allegation about him being a licensee. But the law
9 related to licensees is they have no duty to inspect the
10 premises, they only have a duty to avoid injury to the
11 licensee, or to warn of dangerous or concealed conditions.
12 There were no dangers or concealed conditions, the pool
13 itself was open and obvious. There's just no allegation at
14 all that would support a verdict against Mrs. Dean, who
15 wasn't there. Basically what this is is it happened on her
16 property while she was not present, and whatever happened
17 there is not her business it would be our position in the
18 case. Thank you.

19 THE COURT: All right. Yes, sir?

20 MR. GEORGE: Yes, sir. My name is Barry George from
21 the Richland County bar. The problem is that whole defense
22 is that she wasn't there. Well, she should have been there.
23 In the deposition of Ms. Dean she knew about this party
24 possibly two weeks before it happened, to know that somebody
25 is going to bring children to your home to use your pool and

1 you abandon the house instead of staying there and seeing
2 that everything was going right you go to the beach. That's
3 what she did. And then she was asked what instructions did
4 you give to the person who was supposed to be watching over
5 this pool. She didn't give her any instructions. She said
6 just make sure there's enough people here to watch the
7 children. She did not inquire how many kids are going to be
8 there, who is going to come with them, who is going to be
9 watching them. She did absolutely nothing but abandon the
10 property. And I asked Ms. Dean, I said, "Your swimming
11 pool, how deep is it on the deep end? How deep -- what is
12 the depth? Eight and a half feet. On the shallow end of
13 the pool how much is it? Three and a half feet. Now,
14 Ms. Dean, you have on your pool a place that you can hook
15 ropes to divide the shallow from the deep, and these -- this
16 rope has floats on it in case somebody is having trouble
17 they can catch on to the float." I said, "Did you have
18 those floats knowing these children were coming over there
19 to swim in this pool, did you have these floats in the
20 pool?" She said, "I hadn't had those floats in the pool for
21 over two years." So she did not inquire who was going to be
22 watching the children. She did -- knowing for two weeks
23 that they were coming over there -- I asked her, "What kind
24 of safety equipment did you have at the pool knowing these
25 children were coming over there? I had none." And she kept

1 saying, "I wasn't there." Well, that's the whole case, she
2 should have been there. This kid was ten years old. And in
3 his deposition the question was asked, "Did anybody ever ask
4 you could you swim?" Nobody ever asked him that. In his
5 deposition he said there was no parental supervision at the
6 pool. That's in his deposition. So we have a ten year old
7 kid who was laying at the bottom of a pool. They thought he
8 was dead, and then they finally got him up, had to air-vac
9 him to Charlotte and they brought him back and he stayed in
10 the hospital for about five days. Now, when they tried to
11 call Ms. Dean to tell her what had happened she was at the
12 beach. She found out about this the next day and -- but she
13 was called to tell her what had happened, but she said
14 because her dog had died she was not taking any calls. So
15 what she did was she did create an unsafe condition here.
16 She has a swimming pool, which can be dangerous especially
17 for children, she knew they were coming, she took no
18 precaution to protect them. She did not give any
19 instructions to the people who were supposed to be in charge
20 of it after she left, none. She didn't say, "Check the
21 children, see can they swim. Check with their parents. Who
22 is coming? How many people are going to be watching these
23 children?" None of that was done by Ms. Dean. She can't
24 say just because I am not there I'm not responsible. She
25 can't stick her head in the sand and dodge her

1 responsibility for this kid, and that's our position. Not
2 only do we think you should deny this motion, we think at
3 trial we would probably get a directed verdict against
4 Ms. Dean.

5 THE COURT: Well, have you got some law on all of those
6 to support that argument? Have you got any case law?

7 MR. GEORGE: No, sir, I don't have any. But there's
8 some here about -- in this brief that says --

9 THE COURT: You're talking about --

10 MR. GEORGE: I'm going to read you some --

11 THE COURT: But the brief you're reading is on behalf
12 of Ms. Dean.

13 MR. GEORGE: I know, but this is the law on the duty
14 owed to a licensee.

15 THE COURT: Whose brief is it, that's what I wanted to
16 know.

17 MR. GEORGE: The law applies to him and me as the same
18 I would think.

19 THE COURT: I understand, I just wanted to know whose
20 brief it was.

21 MR. GEORGE: It was his, sir.

22 THE COURT: What does it say?

23 MR. GEORGE: It says, "A licensee has no duty except to
24 avoid injury to the licensee in carrying on activities on
25 the land." So they do have a duty to see that this person

1 was not hurt on the land, that's the law that we have here.

2 THE COURT: All right. Any follow-up?

3 MR. HANNA: I would simply note that, A, there is --
4 he's alleging a bunch of duties that my client is owed
5 without being able to cite a single statute or any case law
6 at all to support the idea that there was a duty that she
7 should have been there, that she should have inquired. She
8 did say that the parents had to be there and there were. In
9 fact, there were five or six parents around, and the reason
10 this kid is alive today is because they were there
11 monitoring and they pulled the kid out of the pool. In
12 fact, there was an EMT and a nurse there that revived the
13 child immediately upon getting him out of the pool. Also,
14 the idea again, the markings in the pool is a red herring
15 because the child was in the shallow end when it happened,
16 there was no question there. And then finally I would note
17 that the caring on activities on the land refers to doing
18 some activity on your land that might harm some other, it
19 doesn't mean you have an absolute right or duty to prevent
20 injury to people on your land. And on that I would rest my
21 case. Thank you.

22 THE COURT: Mr. George --

23 MR. GEORGE: Yes, Your Honor.

24 THE COURT: -- briefly?

25 MR. GEORGE: The rule is we think we have a legitimate

1 jury question here. The law is if the plaintiff has a mere
2 scintilla of evidence the case must go to a jury. And not
3 only do we think we have a mere scintilla here, we think we
4 have more than that, we think we have a legitimate jury
5 question here.

6 THE COURT: All right. I'll take it under advisement
7 then. Thank you both.

8 (End of the hearing.)

9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B. a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

**DEFENDANT CLAUDIA DEAN'S
MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFF'S
COMPLAINT**

FILED
2017 DEC 28 A 11:49
CLERK OF COURT
CHESTER CO. S.C.

PLEASE TAKE NOTICE that the Defendant, Claudia Dean, by and through the undersigned attorneys, will move before the Presiding Judge of the Court of Common Pleas, on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel for an Order granting this Defendant's Motion for Summary Judgment against the Complaint of Plaintiff Whitney Jackson, Individually, and as Guardian ad Litem for Jordan B. a minor under the age of eighteen (18) years, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as to the within action because there are no genuine issues of material facts and because this Defendant is entitled to judgment as a matter of law.

This motion is based upon the following grounds: 1) the Plaintiffs have not presented any evidence to support the contention that Defendant Dean contributed to the cause of the accident; 2) the testimony that Defendant Dean did not contribute to the cause of the accident is unrefuted. This Motion is further based upon the pleadings, the discovery responses of the parties, the depositions taken in this case or which may be taken and any affidavits and/or memorandum of law to be filed by this Defendant.

RESPECTFULLY SUBMITTED,

HOWSER, NEWMAN & BESLEY, L.L.C.

By: _____

George V. Hanna, IV
Trevor Eddy
1508 Washington Street
P.O. Box 12009
Columbia, South Carolina 29211
(803) 758-6000

ATTORNEYS FOR THE DEFENDANT CLAUDIA DEAN

December 21, 2017

FILED
2017 DEC 29 A 9 49
CLERK OF COURT
CHESTER CO S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B ; a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

**DEFENDANT CLAUDIA DEAN'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

This Defendant, Claudia Dean, ("Defendant"), by and through her undersigned attorneys, moves before the Presiding Judge of the Court of Common Pleas, Sixth Judicial Circuit, for an Order granting Defendant's Motion for Summary Judgment, pursuant to Rule 56, S.C. R. Civ. P., as to the within action, because Plaintiff has failed to produce evidence sufficient to raise a genuine issue of material fact regarding whether this Defendant contributed in any way to the accident and Plaintiff's resulting injuries.

STATEMENT OF FACTS

Plaintiff Whitney Jackson, Individually, and as Guardian ad Litem for Jordan B (hereinafter "the Minor"), a minor under the age of eighteen (18) years (hereinafter "Plaintiff") alleges that the Minor was injured in a drowning incident at a pool party held at Defendant Claudia Dean's home. On May 24, 2014, the minor was alleged to have been taken to Dean's home by his baseball coach Defendant Allen Clack. Plaintiff's Complaint ¶ 5-8. While at the party, the minor was alleged to be a licensee of Dean and the minor was alleged to have sank to the bottom of a pool and suffered injury. Plaintiff's Complaint ¶ 9. Specifically, Plaintiff alleges

that Defendant Dean caused Plaintiff's injuries by: allowing the Minor to go swimming knowing the Minor could not swim; in failing to monitor the Minor while the Minor was in the pool; in failing to inspect the premises; and, in creating an unsafe condition.

Written discovery has been exchanged by the parties and the deposition of the Minor; Dorothy Jackson, the Minor's grandmother; Claudia Dean; and, Allen Clack have been taken. With discovery completed, Defendant Dean has moved for summary judgment because there are no genuine issues of material facts and because this Defendant is entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). While the party seeking such a judgment carries the initial burden of demonstrating the absence of any genuine issue of material fact, Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)), and "all evidence and inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party[.]" Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004) (citing Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)), "[t]he trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of the party's case." Harris v. Rose's Stores, Inc., 315 S.C. 344, 346, 433 S.E.2d 905, 906 (Ct. App. 1993).

A question of law, not fact, exists "when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence." Young v. Hyman Motors, 199 S.C. 233, 19 S.E.2d 109, 113 (1942) (citing National Bank v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581, 582 (1934)). Although "an issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror[.], this rule does not authorize the submission of speculative, theoretical and hypothetical views to the jury." Small v. Pioneer Machinery, Inc., & Timberjack, Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). Accordingly, "when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court [because] verdicts may not be permitted to rest upon surmise, conjecture, or speculation." *Id.*

ARGUMENT

The elements for a cause of action for the tort of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996).

Negligence is not actionable unless it is the proximate cause of the plaintiff's injury. Hanselmann v. McCardle, 275 S.C. 46, 267 S.E.2d 531 (1980). Proximate cause requires proof of (1) causation in fact and (2) legal cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Legal cause is proved by establishing foreseeability, i.e., that the injury

occurred as a natural and probable consequence of the defendant's negligence. *Id.* at 72, 393 S.E.2d at 916. See also Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978); Stone v. Bethea, 251 S.C. 157, 161 S.E.2d 171 (1968). Although foreseeability of some injury from an act or omission is a prerequisite to the plaintiff establishing proximate cause, it is not necessary for the defendant to have contemplated the particular event which occurred. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990). Rather, it is sufficient if the defendant should have foreseen that his negligence would probably cause injury to someone. *Id.*

The duty a landowner may owe to a person present on her property varies based on the category of the person on her land. If the person entering on to her land is a social guest they are termed a licensee. "A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent. The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him..." Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). There are two exceptions to this rule imposing upon a possessor a duty to "use reasonable care to discover [the person entering] and avoid injury to him in carrying on activities upon the land" and to "use reasonable care to warn [the person entering] of any concealed dangerous conditions." *Id.*

I. Plaintiff Has Failed as a Matter of Law to Make a Showing Sufficient to Establish Negligence on the Part of Defendant Dean

Dean is alleged to have allowed the minor to swim in the pool knowing that the minor could not swim. However, it is the unrefuted testimony of Dean and Clack, that Dean was not present on the day of the party having taken a trip to the beach (*Deposition of Claudia Dean P. 10 L 24-25; P. 11 L 1-13; Deposition of Alan Clack P 28 L 21-23*). Therefore, she did not allow the minor to swim. In addition, Jackson and the minor admitted that they did inform anyone that the minor could not swim. (*Dorothy Jackson Depositions P. 21 L 6-8; P. 24 L 8-9; Jordan*

B deposition P. 44, L6-12). Therefore, there is no merit to the allegations that anyone could have knowingly allowed the minor to swim knowing that he could not, much less someone who was not even present.

Dean is also alleged to have failed to monitor the Minor while he was in the pool. However, as with the previous allegations, Dean was not present at the pool party and therefore this allegation also fails as it would have been an impossibility for Dean to monitor.

Plaintiff alleges that Dean failed to inspect the premises and created an unsafe condition. However, Plaintiff has introduced no evidence that an inspection of the premises would have prevented any injury to the Minor. Indeed, Plaintiff has introduced no evidence that there was an unsafe condition on the property that contributed to the Minor's injuries. Jackson argued in her deposition that Dean should have had markings on the side of the pool or rope delineating the depth of the pool so as to warn of the deep end. (*Deposition of Dorothy Jackson P 39 L 10-15*). However, as the minor has no memory of the accident, it is the uncontroverted testimony of Clack that the incident occurred in the shallow end of the pool. (*Deposition of Jordan B P 57 L 10-14; P 58 L 8-10; P 60 L 25; P 61 L 1-2; Deposition of Alan Clack P 22 L 4-12*). Therefore, any arguments related to markings, warnings or barriers that should have or could have been in place to warn or mark the deep end of the pool are irrelevant as the Minor's injuries were suffered in the shallow end of the pool.

Finally, as Plaintiff has argued that the Minor was a licensee, Dean owed the Minor no duty to inspect the premises. See *Neil v. Byrum*, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (holding that a landowner owes a licensee no duty except to a) avoid injury to the licensee in carrying on activities on the land and b) to warn of concealed dangerous conditions). The duty

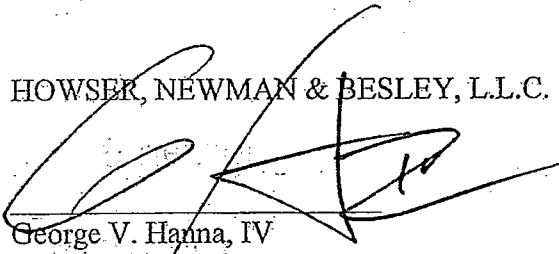
of a landowner to inspect is only owed to invitees. See Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977).

CONCLUSION

Defendant Dean is entitled to summary judgment on all of Plaintiff's claims because Plaintiff has failed to present evidence that Defendant Dean breached a duty owed to Defendant and that said breach caused the Minor's injuries, because Plaintiff has not produced any evidence to create a question of fact as to whether Dean negligently caused the Minor's injuries. For the foregoing reasons, Defendant respectfully requests that this Court grant Defendant's Motion for Summary Judgment and that this Court enter an Order dismissing Plaintiff's claims against Defendant.

HOWSER, NEWMAN & BESLEY, L.L.C.

BY:


George V. Hanna, IV
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
ATTORNEYS FOR DEFENDANT CLAUDIA DEAN

August 31, 2018



Southern Reporting, Inc.

Condensed Transcript of the
Deposition of

Jordan B.

12/19/2017

Jackson v. Clack, et al.
2016-CP-12-00342

COPY

Southern Reporting, Inc.
Phone: 803.749.8100
Fax: 803.749.9991

Email: Depos@southernreporting.net

1 the May 24th date of '14?
 2 A. Yes, I have.
 3 Q. And you had been over there to play with his
 4 children?
 5 A. Yes. Yes, sir.
 6 Q. Was it one son in particular?
 7 A. I played with both of them.
 8 Q. Okay. Was one of them about your age?
 9 A. Yes.
 10 Q. And which one was that?
 11 A. Whugray?
 12 Q. Okay. Whugray? And the other one was older or
 13 younger?
 14 A. Younger.
 15 Q. Okay. So up to before the 14th -- excuse me,
 16 before May of '14 -- 24 May of '14, roughly how
 17 many times had you been to his house?
 18 A. One -- one time.
 19 Q. All right. Had he ever -- had Coach Alan ever
 20 taken you with the family anywhere else --
 21 A. Yes.
 22 Q. -- other than to and from baseball?
 23 A. Yes.
 24 Q. Where did he take you?
 25 A. We went to the Mexican restaurant, and that was it.

1 Q. Okay. So did you all play baseball the 23rd or the
 2 22nd of May of '14?
 3 A. I don't recall.
 4 Q. The 24th of May of '14 was a Saturday.
 5 A. Yes, it was.
 6 Q. And you were not playing ball that day?
 7 A. No, I wasn't.
 8 Q. And you're telling us that you called Coach Alan?
 9 A. Yes, I did.
 10 Q. To get permission to come over there?
 11 A. Yes, sir.
 12 Q. And did you talk to him?
 13 A. Yes, I did.
 14 Q. And what did you ask him?
 15 A. I asked Coach Alan may I -- "Coach Alan, may I
 16 please come over to your house for a little while?"
 17 Q. And his answer was?
 18 A. Yes.
 19 Q. Okay. And did you establish a time you were going
 20 to show up?
 21 A. I said, "I'll be there in a little bit."
 22 Q. All right. Roughly what time did you call him?
 23 A. Twelve o'clock.
 24 Q. Twelve o'clock?
 25 A. Yes, sir.

1 Q. Okay. Roughly what time did you show up?
 2 A. 12:10.
 3 Q. And your grandmother dropped you off?
 4 A. Yes, sir.
 5 Q. Now, did your grandma come into the house, or did
 6 Coach come out to the car, or did you just -- how
 7 did that go about?
 8 A. I went -- my grandma -- I had got out of my
 9 grandmother's car and knocked on the door.
 10 Q. Okay. And who came to the door?
 11 A. Coach Alan.
 12 Q. And took you into the house?
 13 A. Yes.
 14 Q. He didn't go out to the car and talk to the
 15 grandmother or anything like that?
 16 A. No, he didn't. I don't recall.
 17 Q. I'm sorry?
 18 A. I don't recall.
 19 Q. Okay. So you all played in the house about a half
 20 hour roughly?
 21 A. Yes. Yes, sir.
 22 Q. And then how -- how did you find out that Coach
 23 Alan and his family was going somewhere else?
 24 A. Coach Alan said he's leaving in a little bit to go
 25 to a pool party.

1 Q. All right. And you had -- at that point you had
 2 not been invited to a pool party?
 3 A. No, sir.
 4 Q. You asked to go?
 5 A. Yes, I did.
 6 Q. Well, when you asked to go, did you tell the coach,
 7 "Coach, I can't swim, but I want to go to this pool
 8 party?"
 9 A. No, I did not tell him I couldn't swim.
 10 Q. So you didn't -- you didn't tell him you couldn't
 11 swim?
 12 A. No, sir.
 13 Q. All right. So you asked more than once at the
 14 house? In other words -- well, let me put it this
 15 way. When you asked the first time, what was his
 16 answer?
 17 A. I think he might have said -- he probably said,
 18 "You have to call your grandmother first."
 19 Q. Okay. Well, who called Grandma?
 20 A. I did.
 21 Q. And who talked to Grandma?
 22 A. I did.
 23 Q. And what did you say to Grandma?
 24 A. I said, "Grandma Dot, can I -- may I go to the pool
 25 party with Coach Alan?"

Page 57

1 Q. -- and then all the guys say, "Let's get back in?"
 2 A. Yes.
 3 Q. And nothing unusual with that?
 4 A. No.
 5 Q. Did you jump in or walk down the stairs?
 6 A. I jumped in on the shallow end.
 7 Q. You keep using the word shallow end.
 8 A. Yes.
 9 Q. Why -- why do you keep using that definition?
 10 A. Because, sir, it was the shallow end. I jumped
 11 into --
 12 Q. Right. But you don't know which end you got hurt
 13 in, do you?
 14 A. No.
 15 Q. Okay. IF I told you everybody else is going to say
 16 you got hurt in the shallow end, are you going to
 17 dispute that?
 18 MR. GEORGE: Object to the form of that
 19 question. We haven't had any testimony of
 20 that.
 21 MR. BELL: I understand.
 22 Q. Answer the question. This is a deposition. Do you
 23 understand?
 24 A. Yes.
 25 Q. Has anybody ever told you you were in the deep end?

Page 58

1 A. Yes.
 2 Q. Who?
 3 A. Darby.
 4 Q. Who's Darby?
 5 A. Coach Alan's son.
 6 Q. When did he say that?
 7 A. Whenever I was at the hospital.
 8 Q. Okay. Well, you have no recollection as to what
 9 happened?
 10 A. No, sir.
 11 Q. Did you ever do any hand stands with your head
 12 under water and your feet up in the air while you
 13 were there --
 14 A. I don't recall.
 15 Q. -- before you lost memory?
 16 A. I don't recall.
 17 Q. Did you ever put your face under water while you
 18 were there before you lost this memory?
 19 A. Yes, sir.
 20 Q. And what caused you to put your face under water?
 21 A. Just playing around.
 22 Q. What type of playing would you do to put your face
 23 under water?
 24 A. Dead man's float.
 25 Q. Dead man's float. Describe that for me. What do

Page 59

1 you do?
 2 A. You just -- I guess you just like lay flat and go
 3 like that (indicates). Just lay flat like.
 4 Q. So you're floating on your stomach?
 5 A. Yes, sir.
 6 Q. And you -- somebody's calling it a dead man's
 7 float, and you put your face in the water?
 8 A. Yes. Yes, sir.
 9 Q. To where it's -- your head's -- the water's kind of
 10 up to your ears or what?
 11 A. Yeah, up to your ears.
 12 Q. Okay. So what did the coach do wrong?
 13 A. The coach?
 14 Q. Yeah.
 15 A. The coach didn't -- he didn't ask me could I swim.
 16 Q. But you didn't tell him you couldn't swim either,
 17 did you?
 18 MR. GEORGE: Let him answer the question
 19 instead of arguing with him.
 20 MR. BELL: I thought --
 21 MR. GEORGE: Let him answer the question.
 22 Q. Answer the question.
 23 A. He didn't ask me could I swim. And there was --
 24 there was really no parental supervision around the
 25 pool.

Page 60

1 Q. No parental supervision?
 2 A. Supervision around the pool, sir.
 3 Q. How many adults were there?
 4 A. Maybe five.
 5 Q. Okay. But you never told the coach you couldn't
 6 swim, did you?
 7 A. No, I didn't, sir.
 8 Q. Okay. Well, what caused you to get hurt? Have you
 9 got any idea?
 10 A. Tell him I probably couldn't swim.
 11 Q. I'm sorry?
 12 A. Tell him I -- tell him I couldn't swim.
 13 Q. I understand that. But what caused you to ingest
 14 water?
 15 A. I don't know.
 16 Q. Okay. Did any -- did anybody hold you under the
 17 water?
 18 A. No, sir.
 19 Q. Were you all playing enough roughhousing to where
 20 it was getting rather physical with anyone?
 21 A. No, sir.
 22 Q. Okay. So what's the last thing you remember before
 23 being in the ambulance?
 24 A. I don't remember nothing else.
 25 Q. Well, what do you last remember before the

Page 61

1 ambulance thing is what I'm saying?

2 A. Getting back into the pool.

3 Q. Getting back into the pool after the pizza?

4 A. Yes, sir.

5 Q. You don't know how long you'd been back in the pool

6 when you got pulled out?

7 A. No, sir.

8 Q. So again, the next thing you remember is being in

9 the ambulance?

10 A. That's -- yes, sir.

11 Q. And do you remember going to Charlotte?

12 A. Yes, sir.

13 Q. Your aunt was there first?

14 A. Yes, sir.

15 Q. She gave you some type of explanation. Where does

16 she live?

17 A. In Rock Hill.

18 Q. Okay. She gave you some type of -- she wasn't at

19 the party, was she?

20 A. No.

21 Q. All right. And then who came in second?

22 A. My grandmother.

23 Q. Okay. She wasn't at the party, your grandmother?

24 A. Yes. Grandmother and Coach Alan was there.

25 Q. I understand. But I said she wasn't at the party -

Page 62

1 - the pool party?

2 A. Yes, she was not at the party.

3 Q. Okay. Did she ever tell you what she thought

4 happened?

5 A. No.

6 Q. So you stayed in the hospital for four days. You

7 then left the hospital. And is that when you went

8 to see Teresa Ormond who --

9 A. Yes.

10 Q. I know her.

11 A. Yes, sir.

12 Q. She's in Lancaster. And I understand that you've

13 probably never seen the notes. Well, assuming she

14 gets brought to court, she's going to say that you

15 came in on 6/9. Does that sound familiar, of '14?

16 A. Yes.

17 Q. Said you've had nightmares every night since the

18 incident on 5/24.

19 A. Yes.

20 Q. Does that sound familiar?

21 A. Yes, sir.

22 Q. And what did she do to help alleviate or get rid of

23 the nightmares?

24 A. She -- she talked to me about it, and she gave me -

25 - and she prescribed me with some sleeping pills.

Page 63

1 Q. She did, or your regular MD did, your regular

2 doctor did?

3 A. No, she did.

4 Q. Ms. Ormond subscribed you some sleeping pills?

5 A. I think so.

6 Q. Okay. Well, do you remember them giving you a

7 floatation device --

8 A. No.

9 Q. -- to sleep in the bed with you? Or do you

10 remember that talk?

11 A. She recommended -- she recommended me buying a

12 floatie.

13 Q. A floatie?

14 A. Yes. Yes, she did.

15 Q. Did you never get one?

16 A. No, I never got one.

17 Q. So you didn't have anything in your bed to --

18 A. No. No, sir.

19 Q. -- grab hold of or anything like that? All right.

20 Well, the second visit looks like it's June 23rd.

21 Said you'd been sleeping better, decreasing

22 nightmares. Does that sound right?

23 A. Yes. Yes, it does.

24 Q. Third visit, August 23rd of '14, do you remember

25 that visit at all?

Page 64

1 A. I don't know.

2 Q. Said you were sad. Do you remember why you were

3 sad?

4 A. No, sir.

5 Q. Said, "He was gone from -- from his mother for a

6 month while he was in foster care." Do you

7 remember what that was about?

8 A. Yes, sir.

9 Q. That happened in August of '14?

10 A. Yes, sir.

11 Q. That was making you sad?

12 A. Yes, sir.

13 Q. "Client did state he went swimming and is not

14 having any more nightmares." So you got back in

15 the pool after August?

16 A. Yes, sir.

17 Q. Okay. Son, I apologize, but you brought the

18 lawsuit. I'm having to get these questions out of

19 you. Do you want to take a little break?

20 A. (Shakes head side to side.)

21 Q. Okay. It also mentioned that you were not having

22 any more nightmares. Was that true?

23 A. Yes, sir.

24 Q. Well, if you didn't have any more nightmares as of

25 August 23rd -- and I understand you were being



Southern Reporting, Inc.

Condensed Transcript of the
Deposition of

Alan Clack

12/19/2017

Jackson v. Clack, et al.
2016-CP-12-00342

COPY

Southern Reporting, Inc.

Phone: 803.749.8100

Fax: 803.749.9991

Email: Depos@southernreporting.net

Page 21

1 A. At the time there was -- there was three of us
2 sitting from me to you from where he was at, sir.
3 Q. And were you all up on the deck, or were you all
4 down on the pool deck?
5 A. There was two of us sitting right beside the deck
6 on the deck, and there was a lady sitting on the
7 concrete right below us.
8 Q. Well, explain to me if you were from me to you,
9 what's that? Eight feet?
10 A. Eight to ten feet, sir.
11 Q. How did he drown?
12 A. He was sitting there doing hand stands with my two
13 sons. And they came up and said, "He's not coming
14 up." And before they said that, I was in the pool,
15 sir.
16 Q. So how long was he under water?
17 A. Maybe five seconds, ten seconds.
18 Q. So he drowned in five seconds?
19 A. Yes, sir.
20 Q. Is that your -- is that your testimony, that he was
21 in the pool under for five seconds when he drowned?
22 A. Right about that time, sir.
23 Q. Okay. And then you -- you didn't see him -- was he
24 on the bottom of the pool?
25 A. When I jumped in and got him?

Page 22

1 Q. Yeah.
2 A. He was sitting straight up, and I grabbed him by
3 the arm and pulled him out.
4 Q. Was he on the bottom of the pool?
5 A. He was on the shallow end at the bottom of the
6 pool.
7 Q. All right. So this happened at the shallow end?
8 A. Right there were the shallow end's got the little
9 bump, sir.
10 Q. I think there's been some testimony there was a
11 question that he was in the deep end.
12 A. No, sir.
13 Q. But he was not in the deep end?
14 A. He was right there where the hump goes down.
15 Q. Okay. Is there any kind -- that pool, does the
16 pool have a place for a hook for a rope with floats
17 on it to divide the -- the deep end from the
18 shallow end?
19 A. I can't testify to that, sir.
20 Q. Was there a rope up that day? Was it anything
21 there on the pool dividing the deep end from the
22 shallow end?
23 A. I can't remember, sir.
24 Q. So you were there eight to ten feet from him, and
25 you didn't see there was anything wrong with him?

Page 23

1 You were alerted by your son?
2 A. They were all sitting there doing hand stands and
3 splashing, sir.
4 Q. And the question was you did not see anything wrong
5 with him?
6 A. No, sir, I didn't.
7 Q. And you didn't notice anything wrong with him until
8 your son hollered, "He's not coming up"?
9 A. Yes, sir. That's when I was into the water.
10 Q. All right. So when you got in the water and got
11 him out, what was his condition?
12 A. He was unresponsive.
13 Q. Was he breathing at all?
14 A. Sir, you'll have to ask the certified EMT that was
15 there with us.
16 Q. Well, I'm talking -- who got him out of the water?
17 A. I got him out of the water and handed him to a
18 nurse and a first responder.
19 Q. Was he conscious when you got him out?
20 A. Sir, it happened so fast, I -- I snatched him under
21 the arm and he was straight out of the water to
22 Dwayne.
23 Q. And what happened to him -- when you took him out
24 of the water, what did you do with him?
25 A. They laid him flat and performed some CPR.

Page 24

1 Q. And who were these people?
2 A. Dwayne Shell and Brook Wade.
3 Q. Who -- is Dwayne Shell a friend of yours?
4 A. Both of them are, sir. He was at a friend's party.
5 Q. And who was the other person there? Dwayne Shell
6 and who?
7 A. Brook Wade.
8 Q. How long have you known Dwayne Shell?
9 A. Since probably third grade, sir.
10 Q. How long have you known Brook Wade?
11 A. Probably since high school, sir.
12 Q. What does she do?
13 A. She is a nurse.
14 Q. Where?
15 A. In North Carolina.
16 Q. And what did Mr. Shell do?
17 A. Sir, he performed CPR. To what extent would you have
18 to ask him.
19 Q. Did he have the equipment there?
20 A. He had a bag in his truck. He did, sir.
21 Q. What kind of truck did he have?
22 A. A pickup truck.
23 Q. Did he have an ambulance, or just a regular
24 vehicle?
25 A. He had his regular personal truck.

Page 25

1 Q. And where did -- after he performed this CPR on
2 Jordan, what happened then?
3 A. While they were doing that the ambulance was
4 called, and he was back alive before the ambulance
5 got there. Or back responsive.
6 Q. Are you talking about the helicopter?
7 A. No, sir, the ambulance came.
8 Q. The ambulance came first?
9 A. Uh-huh.
10 Q. When did the helicopter get involved in this?
11 A. I'm not sure when they did call them. You'd have
12 to check the records.
13 Q. Were you there -- did you see the helicopter?
14 A. Yes, sir. I was right there with Jordan Bowser.
15 Q. You were there at the Dean home when the ambulance
16 came and when the helicopter came?
17 A. Yes, sir. I didn't leave until the helicopter took
18 off. And I went to get Ms. Dorothy Jackson.
19 Q. What was your conversation like with Ms. Jackson
20 between when you picked her up at her house and the
21 hospital?
22 A. She was very relaxed. I asked her if we needed to
23 call Jordan's mother who I had no idea who she was.
24 And she says, "No, we don't need to get her
25 involved." And when we got to the interstate, her

Page 26

1 daughter called her. They got into it. They hung
2 up. Or Whitney hung up on Ms. Jackson. Two or
3 three minutes later she called back hollering. She
4 handed me the phone and she talked to me for a
5 second. Then she went back to Dorothy. She hung
6 up on her again. About five minutes later she
7 called again hysterical. I asked Ms. Dorothy do I
8 need to go to Myrtle Beach and get her. And both
9 of them said no.
10 Q. Did you have any conversation with Jordan's mother?
11 A. Whitney?
12 Q. Yeah.
13 A. Yes, sir. I just said I did.
14 Q. Okay. And what was that conversation about?
15 A. She asked me what happened. I told her. And she
16 said something about him swimming. I said, "Well,
17 Ms. Dorothy said he could swim, and he swam for two
18 or three hours."
19 Q. So you told Jordan's mother --
20 A. Yes, sir.
21 Q. -- in front of Ms. Jackson --
22 A. Yes, sir.
23 Q. -- that he had been swimming?
24 A. Yes, sir.
25 Q. So your testimony is that Jordan could swim?

Page 27

1 A. Yes, sir, he could. I sat there and watched him,
2 sir.
3 Q. Is this the first time you ever saw Jordan in a --
4 in a swimming pool?
5 A. Yes, sir, it is.
6 Q. Okay. Well, if you stated earlier that you were
7 responsible for the safety of Jordan Bowser since
8 you were the one that took him to the pool --
9 A. Yes, sir.
10 Q. -- then -- and he drowned while he was in your --
11 you had the responsibility of him, you failed in
12 your responsibility, didn't you, sir?
13 A. I don't believe I did, sir.
14 Q. Well, why did he drown?
15 A. Is he six feet under?
16 Q. Uh-huh.
17 A. No, he's not, sir.
18 Q. He did drown, didn't he?
19 A. He may have been unconscious or whatever for a few
20 seconds. But he was brought back to life.
21 Q. So it was your responsibility to see that he was
22 supposed to be safe, right?
23 A. Yes, sir.
24 Q. Okay. But he was not safe, was he?
25 A. He was -- he was safe, sir.

Page 28

1 Q. He was -- you call being pulling out of the water,
2 giving CPR safe?
3 A. Sir, accidents happen every day, do they not, sir?
4 Q. Not if somebody's supposed to be doing their duty,
5 they don't.
6 A. Okay. So you testify all accidents are avoidable?
7 Hope you never have one, sir.
8 Q. Well, if you assume responsibility for a ten-year-
9 old child, then you assume responsibility for him.
10 A. Yes, sir.
11 Q. When did you talk to Ms. Dean about this?
12 A. About the accident?
13 Q. Yeah.
14 A. It was a few days later.
15 Q. What was the gist of that conversation?
16 A. She asked what happened, and we told her. I think
17 she actually spoke to Stephanie prior.
18 Q. So this incident took place at Ms. Dean's home,
19 right?
20 A. Yes, sir.
21 Q. And you had no conversation with her about this
22 incident until two days later?
23 A. She was out of town, sir.
24 Q. Why was that?
25 A. Sir, you'll have to ask her.



Southern Reporting, Inc.

Condensed Transcript of the
Deposition of

Claudia Dean

12/19/2017

Jackson v. Clack, et al.

2016-CP-12-00342

COPY

Southern Reporting, Inc.

Phone: 803.749.8100

Fax: 803.749.9991

Email: Depos@southernreporting.net

1 A. Scott -- Jeffrey Scott.
 2 Q. Where does Ms. Dobbs live now?
 3 A. Pardon me?
 4 Q. Where does she live?
 5 A. I have no clue.
 6 Q. Did she work when she was with your husband?
 7 A. With my husband?
 8 Q. I mean with your son?
 9 A. Yes, she did.
 10 Q. Where did she work?
 11 A. She worked for the county.
 12 Q. Doing what?
 13 A. She now is with the coroner's department.
 14 Q. With who?
 15 A. Coroner. She's the deputy coroner or -- or
 16 coroner's assistant or something. I'm not exactly
 17 sure.
 18 Q. Is she -- are they divorced now?
 19 A. Yes. They were divorced a long time ago. Then
 20 they got back together.
 21 Q. On May the 24th, 2014, were they together at that
 22 time?
 23 A. They were together, but not married.
 24 Q. So they were divorced, but they were -- they were --
 25

1 A. I had left for the beach. I had a dog that I'd had
 2 for 13 years. And we were supposed to go to the
 3 beach the day before. I didn't go because she went
 4 into renal failure. They told me I could bring her
 5 home and let her spend the night. And I took her
 6 back the next day and they put her to sleep and we
 7 left for the beach.
 8 Q. So where were you on May the 24th, 2014?
 9 A. At the beach.
 10 Q. You were at what beach?
 11 A. Surfside -- I mean Garden City at Dunes Two.
 12 Q. So you were at the beach also on that day?
 13 A. I was.
 14 Q. Okay. When did you first find out about this
 15 incident that had happened at your home?
 16 A. Stephanie had called my phone that day, but I was
 17 distraught over my dog and I didn't answer any
 18 telephone calls. And I found out the next day.
 19 Q. So you didn't know about it until the 25th?
 20 A. Correct.
 21 Q. So you had had what, a week, two weeks notice that
 22 they were going to have this pool party at your
 23 house?
 24 A. Yes.
 25 Q. What instruction did you give Stephanie Dobbs about

1 A. Together.
 2 Q. Together. Okay. When did you first find out about
 3 this pool party on May 24th, 2014?
 4 A. I'm not sure. It was maybe a week or two before.
 5 She had asked me if she could have it.
 6 Q. Where was -- where was she living at the time?
 7 A. Pardon me?
 8 Q. Where was she living at the time?
 9 A. With my son, Jeffrey Scott Dean.
 10 Q. In Blackstock?
 11 A. In Blackstock.
 12 Q. And how many children did they have?
 13 A. None.
 14 Q. They had no children?
 15 A. No.
 16 Q. Well, who was having the pool party?
 17 A. Stephanie for Landon.
 18 Q. And who is Landon?
 19 A. He's my grandson by association.
 20 Q. That's not her child?
 21 A. It is her child.
 22 Q. It is her child?
 23 A. Yes. But it's not my son's child.
 24 Q. Okay. And what was your -- where were you on the
 25 day of this pool party?

1 having this pool party?
 2 A. The same as I give every time we've had one, make
 3 sure that there are plenty of people watching the
 4 kids.
 5 Q. And what --
 6 A. And we've had parties since 1980-something.
 7 Q. This pool that you have, how long is it, ma'am?
 8 A. It's 40.
 9 Q. And how many gallons of water does it hold?
 10 A. I can't tell you that.
 11 Q. This is a chlorine pool?
 12 A. Yes, it is.
 13 Q. At the diving board what is the depth there?
 14 A. Eight and a half feet.
 15 Q. And at the shallow part what is the depth there?
 16 A. I believe it's three -- three and a half feet.
 17 Q. And I have some pictures here that I was looking
 18 at. It looks like there is a place on this pool
 19 for some kind of rope or something to put across
 20 dividing the shallow from the deep. Is that
 21 correct?
 22 A. That's correct. But you can also tell because it's
 23 a lazy L. And the way the L's shaped is shallow to
 24 the deep.
 25 Q. What I'm saying is that at the pool there is a

ELECTRONICALLY FILED - 2018 Sep 04 2:34 PM - CHESTER - COMMON PLEAS - CASE#2016CP1200342



Southern Reporting, Inc.

Condensed Transcript of the
Deposition of

Dorothy Jackson

12/19/2017

Jackson v. Clack, et al.
2016-CP-12-00342

COPY

Southern Reporting, Inc.

Phone: 803.749.8100

Fax: 803.749.9991

Email: Depos@southernreporting.net

ELECTRONICALLY FILED - 2018 Sep 04 2:34 PM - CHESTER - COMMON PLEAS - CASE#2016CP1200342

Page 21

1 trunks could be provided for Jordan --

2 A. Yes, Mr. Clack said that.

3 Q. -- the entirety of your objections to him going to

4 the pool party were satisfied at that point?

5 A. Yes.

6 Q. When during these text messages did you tell Mr.

7 Clack that Jordan couldn't swim?

8 A. I didn't.

9 Q. Were you aware that Jordan couldn't swim?

10 A. Yes.

11 Q. Did you have any concerns about Jordan going to a

12 pool party and him not being able to swim?

13 A. No.

14 Q. Do you think it's a risk sending a kid to a pool

15 party that doesn't know how to swim?

16 A. No, not really.

17 Q. Do you think it's reasonable to let people

18 supervising a pool party know that one of the

19 children there can't swim?

20 A. I wasn't there.

21 Q. I'm going to repeat the question. If you're

22 sending your kid to a pool party, do you think it's

23 reasonable to let anybody at the pool party know

24 that kid can't swim?

25 A. Not really.

Page 22

1 Q. You don't think it's important to let them know?

2 A. I mean, that question was never asked. It was

3 never asked.

4 Q. You also didn't volunteer the information?

5 A. No.

6 Q. Generally speaking, would you say a kid that can't

7 swim is in a more dangerous position in a pool than

8 a kid that can swim?

9 A. Possibly.

10 Q. Do you think a kid that can't swim in a pool is at

11 a greater risk if the people supervising do not

12 know that he doesn't know how to swim? And that

13 was a complicated question. Do you want me to

14 rephrase that one?

15 A. Yeah, ask that again.

16 Q. So we've got two points.

17 A. Uh-huh.

18 Q. All right. Same kid is in both pools. This kid

19 doesn't know how to swim. We have adults

20 supervising both pools. In one pool all the adults

21 know that that kid doesn't know how to swim. In

22 the other pool none of the adults know that the kid

23 doesn't know how to swim. Which of those pools is

24 the child at a greater risk of harming himself in

25 the pool?

Page 23

1 A. Okay. So but do you think that the adults should

2 have asked the child? Because like I said again,

3 I'm not there. I'm not even there to tell them

4 that.

5 Q. Except you have communicated with him over your

6 phone.

7 A. Should the adult have asked the child, or should

8 the child have told the adult?

9 Q. So you don't think you were under any reason to

10 volunteer that information to people that were

11 going to be supervising your grandkid?

12 A. If it was asked.

13 Q. Why would you have limited yourself to only if they

14 asked if it was important? If my kid has diabetes

15 --

16 MR. GEORGE: Object -- object to the form of

17 the question.

18 Q. If my kid --

19 MR. GEORGE: It's argumentative and not calling

20 for an answer. You're making a statement.

21 Q. If my kid has diabetes, I'm going to let the folks

22 know if there's a particular susceptibility to that

23 kid, especially if he's going to be in an

24 environment where he --

25 A. Okay. Mr. Clack asked --

Page 24

1 MR. GEORGE: Let me make my objection. My

2 objection is to the relevancy of the question.

3 It's not important what Mr. Eddy would do.

4 That's not -- that's not a question that's

5 going to be answered in this court. That's my

6 objection.

7 Q. You still have to answer the question.

8 A. When Mr. Clack asked me could he go, he didn't ask

9 me could he swim, and I didn't volunteer.

10 Q. Do you think that if you had volunteered that

11 information if Jordan would have still drowned that

12 day?

13 A. I cannot answer that.

14 Q. Do you think it would have been less likely for him

15 to drown?

16 MR. GEORGE: Objection to the form of the

17 question.

18 A. I can't answer that either.

19 Q. Why can't you answer that question?

20 A. It's hypothetical.

21 Q. Let's make it a hypothetical then.

22 MR. GEORGE: Objection. No relevance.

23 Q. In this hypothetical do you think it would have

24 been less likely for him to drown if he would have

25 made anybody aware of his inability to swim?

1 Q. So besides the hospital, seeing Dr. Shropshire,
2 seeing the therapist --
3 A. Therapist.
4 Q. -- and Dr. Parsons, were there any other
5 interventions for Jordan?
6 A. Yes. He was sent to a neurological therapist
7 different from Ms. Oxmond. She -- I forget what
8 her name was. But she worked on the neurological
9 back side of therapy. She was a psychologist, but
10 she dealt more with I guess nerves or the -- the
11 way the brain worked.
12 Q. Did she ever give Jordan a diagnosis?
13 A. I'm sure she did. But I never saw it.
14 Q. How long did he see the neurotherapist as you said?
15 A. Once. Once.
16 Q. Any other doctors?
17 A. No.
18 Q. Did you take Jordan to see Dr. Shropshire after the
19 hospital?
20 A. Yes.
21 Q. Did Jordan's mother attend on that visit?
22 A. She may have been at work. Usually I did all the
23 taking the kids to the doctor.
24 Q. So the ENT routine visit with Dr. Parsons would --
25 did you take Jordan to that?

1 A. Yes. Yes.
2 Q. Was Jordan's mother present at that visit?
3 A. She probably was at work.
4 Q. Did you take Jordan to any of his appointments with
5 Teresa, the therapist?
6 A. All of them.
7 Q. Did you take Jordan to the rest of the ENT visits?
8 A. Yes.
9 Q. And you took Jordan to the neurotherapist?
10 A. Yes.
11 Q. Okay. Were you paying these bills?
12 A. No.
13 Q. Who was paying these bills?
14 A. Medicaid and his mother's job. Her job -- she had
15 insurance on her job.
16 Q. Have you had any conversations with Alan Clack
17 after the day that he drove you to the hospital?
18 A. No.
19 Q. Do you know who Claudia Dean is?
20 A. No.
21 Q. Have you ever met Claudia Dean?
22 A. No.
23 Q. Did Claudia Dean ever communicate with you to
24 invite Jordan over to a pool party?
25 A. No.

1 Q. Did Claudia Dean ever mail you an invitation or in
2 another way communicate with you that Jordan was
3 invited over to a pool party?
4 A. No.
5 Q. Do you know where Claudia Dean's house is?
6 A. No.
7 Q. In what way do you think Claudia Dean contributed
8 to the injuries that your son alleges?
9 A. Other than the fact that it was her pool.
10 Q. Is there anything that you think Claudia Dean could
11 have done to avoid the injuries to your son?
12 A. She could have had ropes up, some markings on the
13 pool to let -- let them know -- let people know
14 where the shallow end was and where the deep end
15 was.
16 Q. Have you ever been to her pool?
17 A. No.
18 Q. Do you know if there are or are not measurements in
19 the pool that indicate where there's the deep end
20 and the shallow end?
21 A. I saw a picture.
22 Q. Have you seen pictures of the complete pool?
23 A. Yes.
24 Q. So you do know whether or not there are markings in
25 the pool that tell you whether or not you're in the

1 deep end or the shallow end?
2 A. I didn't see any.
3 Q. Okay. Whose picture is this that -- that you've
4 looked at before?
5 A. My attorney.
6 Q. Do you know how he acquired that picture?
7 A. I have no idea.
8 Q. Is there anything else you think I should know
9 about this situation in this case?
10 A. No.
11 Q. How do you think Jordan is doing these days?
12 A. He's -- he's doing well.
13 Q. How do you think his health is doing these days?
14 A. He's doing well.
15 Q. How do you think his fitness is doing these days?
16 A. He's doing well.
17 Q. How do you think his mood and anxiety is doing
18 these days?
19 A. It's -- it's a up and down situation. Some days
20 he's cheerful. Then there are days when he's not.
21 Q. How old is he?
22 A. He's 13.
23 Q. Could it be usual at the age of 13 getting ready
24 for a lot of changes going on in life and society
25 to have moods that go up and down?

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)
)
Whitney Jackson individually and as)
Guardian ad Litem for Jordan Bc , a)
Minor under the age of eighteen (18) years,)
)
Plaintiffs,)
)
v.)
)
Allen Clack and Claudia Dean,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

NOTICE OF MOTION AND
MOTION TO RECONSIDER

TO: George V. Hanna, IV, ESQUIRE, ATTORNEY FOR DEFENDANT DEAN

YOU WILL PLEASE TAKE NOTICE that Plaintiffs by and through their undersigned counsel will move before the Honorable John C. Hayes, Presiding Judge, Sixth Judicial Circuit, on the tenth (10th) day after service hereof or as soon as thereafter as counsel may be heard for an Order setting aside the Court's Order entered September 10, 2018 granting Defendant Dean's Motion for Summary Judgment. Plaintiffs received notice of the Court's order on September 10, 2018.

STANDARD OF REVIEW

"In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007)). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *South Carolina Rules of Civil Procedure*, Rule 56(c). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Gadson v. Hembree*, 364 S.C 316, 613 S.E. 2d 533 (2005) and *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)) "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences

to be drawn from them, summary judgment should be denied.” *Id.* (citing *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *Singleton*, 377 S.C. 185 (citing *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007)).

“Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Singleton*, 377 S.C. 185 (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)).

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (2009)

LAW/ANALYSIS

The Court in *Hancock* established that only a mere scintilla of evidence is required to get past summary judgment. *Id.* The civil action in *Hancock* was a premises liability action in which the plaintiff was injured when she tripped and fell in a parking lot in disrepair. *Id.* The deposition testimony of the plaintiff in *Hancock* was that the plaintiff had “tripped on a rock or something to that effect.” *Id.* The lower court granted summary judgment “finding that the change in the elevation of the parking lot caused Petitioner’s fall, that the change in elevation was not a dangerous condition, and that even it was a dangerous condition, Respondent had no duty to warn since the elevation change was an open and obvious condition.” *Id.* The Court of Appeals affirmed the lower court. *Id.* In addition to concluding that a mere scintilla of evidence is all that is need to survive summary judgment, the Supreme Court reversed the Court of Appeals finding “Respondent knew or should have known that a dangerous condition existed” and that “Respondent should have anticipated the harm” *Id.*

The following is an excerpt from the deposition of Jordan B. : the minor Plaintiff:

- Q: Has anybody ever told you were in the deep end?
- A: Yes.
- Q: Who?
- A: Darby.

Q: Who's Darby?

A: Coach Alan's son.

Q: When did he say that?

A: Whenever I was at the hospital.

(Depo. Jordan B. t 57:25 – 58:7 (December 19, 2017); see Exhibit 1)

Claudia Dean is the owner of the property where the incident that makes the basis of this lawsuit took place. The following are excerpts from her deposition:

Q: So you had had what, a week, two weeks notice that they were going to have this pool party at your house?

A: Yes.

Q: What instruction did you give Stephanie Dobbs about having this pool party?

A: **The same as I give every time we've had one; make sure that there are plenty of people watching the kids.**

(Depo. Claudia Dean 11:21 – 12:4 (December 19, 2017) (emphasis added); see Exhibit 2)

Q: And I have some pictures here that I was looking at. It looks like there is a place on this pool from some kind of rope or something to put across dividing the shallow from the deep. Is that correct?

A: That's correct. But you can also tell because it's a lazy L. And the way the L's shaped is shallow to the deep.

Q: What I'm saying is that at the pool there is a place to separate the shallow portion from the deep portion; is that correct?

A: Yes.

...

Q: There wasn't one on the day of this accident, was there?

A: No, there was not.

Q: All right. There's no marking of any kind along the side of the pool showing the dept of the pool is it?

A: No, there's not. Like I said, it's a lazy L, and it divides shallow, and then it slopes off into deep.

(Depo. Claudia Dean 12:17 – 13:3; 13:12 – 13:20 (December 19, 2017) (emphasis added); see Exhibit 2).

It is clear from the emphasized deposition testimony above that Defendant Dean clearly anticipated the harm that could have come to any child and did come to the minor Plaintiff swimming in Defendant Dean's pool.

Additionally, "a property owner may owe a heightened duty to children beyond that owed to adult licensees or trespassers where a dangerous instrumentality is involved." *Dennis by Evans v. Timmons*, 313 S.C. 338, 340, 437 S.E.2d 138, 140 (Ct. App. 1993) (citing *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 494, 151 S.E.2d 435, 436 (1966)). **An occupier "must take into account childish impulses and propensities in keep the premises reasonably safe."** *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977) (emphasis added).

"The owners and occupiers of real property are held by the law in some respects to a different standard of liability in cases of injuries to children, coming upon their premises, from that under which they stand with respect to adult persons." *Franks v. Southern Cotton Oil Co.*, 79 S.C. 10, 58 S.E. 960 (1907) (quoting Thompson on Neg. § 1024) "[O]ne who artificially brings or creates upon his own premises any dangerous thing which from its nature has a **tendency to attract the childish instincts of children to play with it** is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end they may be protected from injury while so playing with it, or coming in its vicinity." *Id.* (emphasis added)

The pool was an artificial creation on the property of Defendant Dean. Plaintiffs argue that a pool "attracts the childish instincts of children"; and therefore, Defendant Dean should be required to take reasonable precautions to protect children swimming in her pool. The pool being a dangerous instrumentality.

Defendant Dean testified that her pool had hooks to suspend a rope to delineate the shallow end from the deep end. She testified that there was no rope in the pool on the day that the minor plaintiff was injured. The minor Plaintiff testified that Defendant Clack's son told him that he was injured in the deep end of the pool. Defendant Dean should have taken the precaution to suspend such a rope to signal to the children that they were entering the deep end of the pool.

“[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*, 377 S.C. 185 (quoting *Landry v. Hilton Head Plantation Prop. Owners Ass’n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994)). Defendant Dean had a duty to conduct activities on her land “so as not to harm the licensee.” *Id.* Defendant Dean allowed a pool party with approximately ten children swimming to be had on her property while she was not there. There were fewer adults at the party than there were children and a pool which did not safely delineate the shallow end from the deep end. Plaintiffs argue that there is evidence that Defendant Dean conducted an activity on her land that was likely to and did cause harm to the minor Plaintiff. There is at minimum a mere scintilla of evidence to that effect though Plaintiffs argue they far surpass the level of a mere scintilla.

“[An] owner or occupier of land may be liable for injuries to children of tender years, whether **licensees** or trespassers, in either of two situations.” *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 493, 151 S.E.2d 435 (1966) (emphasis added).

The second situation which is most applicable here was stated by the Court in *Lynch*:

[t]hat although the dangerous thing may not be what is termed, an ‘attractive nuisance’... where it so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, **the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them, from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.** *Id.* (quoting *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965)) (emphasis added)

In *Lynch*, a seven-year-old had drowned in a motel pool to which he had previously been granted access. The Court allowed both an attractive nuisance theory to go to the jury as well as a negligence theory as presented in the second situation listed above. *Id.* The Court stated that issues were raised “as to whether the defendant’s agents and servants exercised reasonable care under the circumstances, or whether they were guilty of negligence or willfulness” and allowed a negligence theory to proceed to the jury against the owner of the property. *Id.*

In the instant case, Defendant Dean, by allowing the children to come swim at her pool, exposed her pool to Plaintiff B a minor; and, therefore, she was bound to take reasonable steps to prevent injury to him. The question of whether Defendant Dean exercised reasonable care

in protecting Plaintiff B from injury is a question for the jury. Plaintiffs have established a mere scintilla of evidence that Defendant Dean did not exercise reasonable care under the circumstances or take reasonable steps to avoid the injury that the minor Plaintiff incurred.

Defendant Dean had a heightened duty knowing that children would be swimming on her property; she did not take reasonable steps to prevent injuries to the minors she knew would be swimming; and, as evidenced by her deposition testimony, the harm was foreseeable to her.

Conclusion

The instant case is one based in negligence; and, therefore, the burden of proof placed on the Plaintiffs is a "preponderance of the evidence." According to the Court in *Hancock*, Plaintiffs need only show a mere scintilla of evidence that there is a genuine issue existing for trial to survive a motion for summary judgment.

Plaintiff B in his deposition testified that Defendant Clack's son stated that Jordan drowned in the deep end of the pool. The Court in *Singleton*, held that "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton*, 377 S.C. 185. This Court in its order granting summary judgment to Defendant Dean, made the finding that the incident that makes the basis of this lawsuit happened in the shallow end of Defendant Dean's pool. Clearly, the testimony of Defendant Clack's son Darby is needed to "further inquire" into what part of the pool Plaintiff B drowned; and, therefore, summary judgment is not appropriate according to *Singleton*. Additionally, this court should remove its finding that the drowning occurred in the shallow end as that is an issue for a jury to determine.

The cases stated above indicate that there is a heightened duty to children licensees. Defendant Dean knew that children would be swimming at her house. Defendant Dean anticipated that harm could come to children swimming in her pool as evidenced by her asking Ms. Dobbs if she would have plenty of adults to supervise the children. Defendant Dean testified that her pool had hooks for a rope to delineate the shallow end from the deep end and that she did not have such a rope for her pool. From these facts, a jury could reasonably conclude that Defendant Dean did not meet her heightened duty and did not take reasonable steps to prevent the injury to Plaintiff B. If a jury can come to more than one conclusion or inference on these facts as to the duty Defendant Dean had and whether she met that duty then summary judgment should not be granted. *Singleton*, 377 S.C. 185

Viewing the evidence in a light most favorable to the Plaintiffs, Plaintiffs have provided this court more than a mere scintilla of evidence that could lead a reasonable jury to conclude that Plaintiff B. [redacted] drowned in the deep end of the pool; that Defendant Dean had a heightened duty of care which she did not meet; that the injury to Plaintiff B. [redacted] was foreseeable; that Defendant Dean was negligent; and, that Defendant Dean's negligence was a proximate cause of Plaintiff Bowser's injuries. Therefore, summary judgment is not proper. To hold otherwise, would deprive Plaintiffs of a trial on disputed facts. *Singleton*, 377 S.C. 185.

Wherefore, based upon Rule 59(e) SCRPC, Plaintiff respectfully moves this Court to reconsider its Opinion and Order in these regards and to modify the Order to deny Defendant Dean's Motion for Summary Judgment.

s/Paige B. George
Paige B. George (SC Bar # 75124)
Barry B. George (SC Bar # 2417)
Law Office of Barry B. George
Attorney(s) for the Plaintiffs
1419 Bull Street
Columbia, South Carolina 29201
(803) 400-1219
lawyer@paigebgeorge.com

1 Q. -- and then all the guys say, "Let's get back in?"
2 A. Yes.
3 Q. And nothing unusual with that?
4 A. No.
5 Q. Did you jump in or walk down the stairs?
6 A. I jumped in on the shallow end.
7 Q. You keep using the word shallow end.
8 A. Yes.
9 Q. Why -- why do you keep using that definition?
10 A. Because, sir, it was the shallow end. I jumped
11 into --
12 Q. Right. But you don't know which end you got hurt
13 in, do you?
14 A. No.
15 Q. Okay. If I told you everybody else is going to say
16 you got hurt in the shallow end, are you going to
17 dispute that?
18 MR. GEORGE: Object to the form of that
19 question. We haven't had any testimony of
20 that.
21 MR. BELL: I understand.
22 Q. Answer the question. This is a deposition. Do you
23 understand?
24 A. Yes.
25 Q. Has anybody ever told you you were in the deep end?

- 1 A. Yes.
- 2 Q. Who?
- 3 A. Darby.
- 4 Q. Who's Darby?
- 5 A. Coach Alan's son.
- 6 Q. When did he say that?
- 7 A. Whenever I was at the hospital.
- 8 Q. Okay. Well, you have no recollection as to what
9 happened?
- 10 A. No, sir.
- 11 Q. Did you ever do any hand stands with your head
12 under water and your feet up in the air while you
13 were there --
- 14 A. I don't recall.
- 15 Q. -- before you lost memory?
- 16 A. I don't recall.
- 17 Q. Did you ever put your face under water while you
18 were there before you lost this memory?
- 19 A. Yes, sir.
- 20 Q. And what caused you to put your face under water?
- 21 A. Just playing around.
- 22 Q. What type of playing would you do to put your face
23 under water?
- 24 A. Dead man's float.
- 25 Q. Dead man's float. Describe that for me. What do

1 A. I had left for the beach. I had a dog that I'd had
2 for 13 years. And we were supposed to go to the
3 beach the day before. I didn't go because she went
4 into renal failure. They told me I could bring her
5 home and let her spend the night. And I took her
6 back the next day and they put her to sleep and we
7 left for the beach.

8 Q. So where were you on May the 24th, 2014?

9 A. At the beach.

10 Q. You were at what beach?

11 A. Surfside -- I mean Garden City at Dunes Two.

12 Q. So you were at the beach also on that day?

13 A. I was.

14 Q. Okay. When did you first find out about this
15 incident that had happened at your home?

16 A. Stephanie had called my phone that day, but I was
17 distraught over my dog and I didn't answer any
18 telephone calls. And I found out the next day.

19 Q. So you didn't know about it until the 25th?

20 A. Correct.

21 Q. So you had had what, a week, two weeks notice that
22 they were going to have this pool party at your
23 house?

24 A. Yes.

25 Q. What instruction did you give Stephanie Dobbs about

1 having this pool party?

2 A The same as I give every time we've had one; make
3 sure that there are plenty of people watching the
4 kids.

5 Q. And what --

6 A. And we've had parties since 1980-something.

7 Q. This pool that you have, how long is it, ma'am?

8 A. It's 40.

9 Q. And how many gallons of water does it hold?

10 A. I can't tell you that.

11 Q. This is a chlorine pool?

12 A. Yes, it is.

13 Q. At the diving board what is the depth there?

14 A. Eight and a half feet.

15 Q. And at the shallow part what is the depth there?

16 A. I believe it's three -- three and a half feet.

17 Q. And I have some pictures here that I was looking
18 at. It looks like there is a place on this pool
19 for some kind of rope or something to put across
20 dividing the shallow from the deep. Is that
21 correct?

22 A. That's correct. But you can also tell because it's
23 a lazy L. And the way the L's shaped is shallow to
24 the deep.

25 Q. What I'm saying is that at the pool there is a

1 place to separate the shallow portion from the deep
2 portion; is that correct?

3 A. Yes.

4 Q. And is this -- it's a rope that you do this and it
5 has floats on it; is that correct?

6 A. That is correct. But it also is a lazy L, and it
7 is significant that this part is shallow, the other
8 part is deep. Or it slopes.

9 Q. Was there -- when is the last time you had a rope
10 in the pool dividing the shallow from the deep?

11 A. Probably several years.

12 Q. There wasn't one on the day of this incident, was
13 there?

14 A. No, there was not.

15 Q. All right. There's no marking of any kind along
16 the side of the pool showing the depth of the pool,
17 is it?

18 A. No, there's not. Like I said, it's a lazy L, and
19 it divides shallow, and then it slopes off into
20 deep.

21 Q. Yeah. And were you ever given the name of the
22 young man that had the incident at your pool?

23 A. Yes, I was.

24 Q. And when were you given that, ma'am?

25 A. The next day whenever I talked to Stephanie.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)
)
Whitney Jackson individually and as)
Guardian ad Litem for Jordan B ; a)
Minor under the age of eighteen (18) years,)
)
Plaintiffs,)
)
v.)
)
Allen Clack and Claudia Dean,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

NOTICE OF MOTION AND
MOTION TO RECONSIDER

TO: George V. Hanna, IV, ESQUIRE, ATTORNEY FOR DEFENDANT DEAN

YOU WILL PLEASE TAKE NOTICE that Plaintiffs by and through their undersigned counsel will move before the Honorable John C. Hayes, Presiding Judge, Sixth Judicial Circuit, on the tenth (10th) day after service hereof or as soon as thereafter as counsel may be heard for an Order setting aside the Court's Order entered September 27, 2018 granting Defendant Dean's Motion for Summary Judgment. Plaintiffs received notice of the Court's order on September 27, 2018.

STANDARD OF REVIEW

"Summary judgment is appropriate only when it is perfectly clear that no genuine issue of material fact is involved and **further inquiry into the facts is not desirable** to clarify the application of the law." *Duck v. Wallace Associates, Inc.*, 313 S.C. 448, 451, 438 S.E.2d 269, 270 (Ct. App. 1993)(emphasis added) (citing *Hook v. Rothstein*, 275 S.C. 187, 268 S.E.2d 288 (1980)). Under Rule 56(c) of the South Carolina Rules of Civil Procedure ("SCRCP"), the Court should give every benefit of the doubt to the non-moving party. *Watters v. Terminix Service, Inc.*, 376 S.C. 658 S.E.2d 110 (Ct. App. 2008). "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 580 S.E. 2d 433 (2003) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1990) "[T]he non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence. . ." *Id.*

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. . .” *Clary v. Borrell*, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012). “In determining whether any triable issue of fact exists, the evidence and all **inferences** that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007)) (emphasis added). “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *South Carolina Rules of Civil Procedure*, Rule 56(c). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (citing *Gadson v. Hembree*, 364 S.C. 316, 613 S.E. 2d 533 (2005) and *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)) “Even when there is no dispute as to evidentiary facts, **but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.**” *Id.* (citing *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004) (emphasis added). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *Singleton*, 377 S.C. 185 (citing *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007)).

“Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Singleton*, 377 S.C. 185 (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)).

“**[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.**” *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (2009)

LAW/ANALYSIS

I. Anticipation of Harm/ Dangerous Condition

The Court in *Hancock* established that only a mere scintilla of evidence is required to get past summary judgment. *Id.* The civil action in *Hancock* was a premises liability action in which the plaintiff was injured when she tripped and fell in a parking lot in disrepair. *Id.* The deposition testimony of the plaintiff in *Hancock* was that the plaintiff had “tripped on a rock or something to that effect.” *Id.* The lower court granted summary judgment “finding that the change in the elevation of the parking lot caused Petitioner’s fall, that the change in elevation was not a dangerous condition, and that even it was a dangerous condition, Respondent had no duty to warn since the elevation change was an open and obvious condition.” *Id.* The Court of Appeals affirmed the lower court. *Id.* In addition to concluding that a mere scintilla of evidence is all that is needed to survive summary judgment, the Supreme Court reversed the Court of Appeals finding “**Respondent knew or should have known that a dangerous condition existed**” and that “**Respondent should have anticipated the harm**” *Id.* (emphasis added)

Claudia Dean is the owner of the property where the incident that makes the basis of this lawsuit took place. The following are excerpts from her deposition:

Q: So you had had what, a week, two weeks notice that they were going to have this pool party at your house?

A: Yes.

Q: What instruction did you give Stephanie Dobbs about having this pool party?

A: **The same as I give every time we’ve had one; make sure that there are plenty of people watching the kids.**

(Depo. Claudia Dean 11:21 – 12:4 (December 19, 2017) (emphasis added); see Exhibit 2)

Q: And I have some pictures here that I was looking at. It looks like there is a place on this pool from some kind of rope or something to put across dividing the shallow from the deep. Is that correct?

A: That’s correct. But you can also tell because it’s a lazy L. And the way the L’s shaped is shallow to the deep.

Q: What I’m saying is that at the pool there is a place to separate the shallow portion from the deep portion; is that correct?

A: Yes.

...

Q: There wasn't one on the day of this accident, was there?

A: No, there was not.

Q: All right. There's no marking of any kind along the side of the pool showing the dept of the pool is it?

A: No, there's not. Like I said, it's a lazy L, and it divides shallow, and then it slopes off into deep.

(Depo. Claudia Dean 12:17 – 13:3; 13:12 – 13:20 (December 19, 2017) (emphasis added); see Exhibit 2).

It is clear from the emphasized deposition testimony above that Defendant Dean clearly anticipated the harm that could have come to any child and did come to the minor Plaintiff swimming in Defendant Dean's pool.

Additionally, "a property owner may owe a heightened duty to children beyond that owed to adult licensees or trespassers where a dangerous instrumentality is involved." *Dennis by Evans v. Timmons*, 313 S.C. 338, 340, 437 S.E.2d 138, 140 (Ct. App. 1993) (citing *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 494, 151 S.E.2d 435, 436 (1966)). **An occupier "must take into account childish impulses and propensities in keep the premises reasonably safe."** *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977) (emphasis added).

"The owners and occupiers of real property are held by the law in some respects to a different standard of liability in cases of injuries to children, coming upon their premises, from that under which they stand with respect to adult persons." *Franks v. Southern Cotton Oil Co.*, 79 S.C. 10, 58 S.E. 960 (1907) (quoting Thompson on Neg. § 1024) "[O]ne who artificially brings or creates upon his own premises any dangerous thing which from its nature has a **tendency to attract the childish instincts of children to play with it** is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end they may be protected from injury while so playing with it, or coming in its vicinity." *Id.* (emphasis added)

The pool was an artificial creation on the property of Defendant Dean. Plaintiffs argue that a pool "attracts the childish instincts of children"; and therefore, Defendant Dean should be required to take reasonable precautions to protect children swimming in her pool. The pool being a dangerous instrumentality.

Defendant Dean testified that her pool had hooks to suspend a rope to delineate the shallow end from the deep end. She testified that there was no rope in the pool on the day that the minor plaintiff was injured. The minor Plaintiff testified that Defendant Clack's son told him that he was injured in the deep end of the pool. Defendant Dean should have taken the precaution to suspend such a rope to signal to the children that they were entering the deep end of the pool.

"[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*, 377 S.C. 185 (quoting *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994)). Defendant Dean had a duty to conduct activities on her land "so as not to harm the licensee." *Id.* Defendant Dean allowed a pool party with approximately ten children swimming to be had on her property while she was not there. There were fewer adults at the party than there were children and a pool which did not safely delineate the shallow end from the deep end. Plaintiffs argue that there is evidence that Defendant Dean conducted an activity on her land that was likely to and did cause harm to the minor Plaintiff. There is at minimum a mere scintilla of evidence to that effect though Plaintiffs argue they far surpass the level of a mere scintilla.

"[An] owner or occupier of land may be liable for injuries to children of tender years, whether licensees or trespassers, in either of two situations." *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 493, 151 S.E.2d 435 (1966) (emphasis added).

The second situation which is most applicable here was stated by the Court in *Lynch*:

[t]hat although the dangerous thing may not be what is termed an 'attractive nuisance'... where it so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the **person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them, from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.** *Id.* (quoting *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965)) (emphasis added)

In *Lynch*, a seven-year-old had drowned in a motel pool to which he had previously been granted access. The Court allowed both an attractive nuisance theory to go to the jury as well as a negligence theory as presented in the second situation listed above. *Id.* The Court stated that issues were raised "as to whether the defendant's agents and servants exercised reasonable care

under the circumstances, or whether they were guilty of negligence or willfulness” and allowed a negligence theory to proceed to the jury against the owner of the property. *Id.*

In the instant case, Defendant Dean, by allowing the children to come swim at her pool, exposed her pool to Plaintiff B _____, a minor; and, therefore, she was bound to take reasonable steps to prevent injury to him. The question of whether Defendant Dean exercised reasonable care in protecting Plaintiff B _____ from injury is a question for the jury. Plaintiffs have established a mere scintilla of evidence that Defendant Dean did not exercise reasonable care under the circumstances or take reasonable steps to avoid the injury that the minor Plaintiff incurred.

Defendant Dean had a heightened duty knowing that children would be swimming on her property; she did not take reasonable steps to prevent injuries to the minors she knew would be swimming; and, as evidenced by her deposition testimony, the harm was foreseeable to her.

II. Motion for Summary Judgment Premature/Findings of Fact not to be made by the Court.

The Court's role when the matter of summary judgment is before it is not to make factual determinations but rather to determine if there is no issue of material fact or inferences that can be made therefrom. *Singleton*, 377 S.C. 185. “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. . . .” *Clary v. Borrell*, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012). “Summary judgment is appropriate only when it is perfectly clear that no genuine issue of material fact is involved and **further inquiry into the facts is not desirable** to clarify the application of the law.” *Duck v. Wallace Associates, Inc.*, 313 S.C. 448, 451, 438 S.E.2d 269, 270 (Ct. App. 1993)(emphasis added) (citing *Hook v. Rothstein*, 275 S.C. 187, 268 S.E.2d 288 (1980)).

“Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E. 2d 433 (2003) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1990)).

The following is an excerpt from the deposition of Jordan B. _____ the minor Plaintiff:

Q: Has anybody ever told you were in the deep end?

A: Yes.

Q: Who?

A: Darby.

Q: Who's Darby?

A: Coach Alan's son.

Q: When did he say that?

A: Whenever I was at the hospital.

(Depo. Jordan B. : 57:25 – 58:7 (December 19, 2017); see Exhibit 1)

In the instance case, it is clear from the deposition testimony above that further inquiry into the facts is needed. Defendant Dean's motion for summary judgment is premature. Further "inquiry into the facts" is needed by way of the deposition testimony from Darby Clack. *Duck*, 313 S.C. 448. Three witnesses in this matter have been deposed and approximately fifteen witnesses have been identified. Defendant Dean in her Answers to Interrogatories (Exhibit 3) did not identify Darby Clack as a witness in this matter and the testimony expected to be received from him has not been identified. The fact that Darby Clack has not been deposed shows that Plaintiffs have not received a full opportunity to complete discovery; and, therefore, any motion for summary judgment is premature. The assertion made by Darby Clack to Jordan B. is hearsay which falls within an exception. It is a prior statement made by a witness who would be subject to cross examination at trial. Therefore, this Court can consider that statement in this matter. Most certainly the fact that Darby Clack was a witness in this matter is admissible and properly before the Court.

Conclusion

The instant case is one based in negligence; and, therefore, the burden of proof placed on the Plaintiffs is a "preponderance of the evidence." According to the Court in *Hancock*, Plaintiffs need only show a mere scintilla of evidence that there is a genuine issue existing for trial to survive a motion for summary judgment.

Plaintiff B in his deposition testified that Defendant Clack's son stated that Jordan drowned in the deep end of the pool. As pointed out above, that statement is a hearsay exception and can be considered by this Court. The Court in *Singleton*, held that "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application

of the law.” *Singleton*, 377 S.C. 185. This Court in its order granting summary judgment to Defendant Dean, made the finding that the incident that makes the basis of this lawsuit happened in the shallow end of Defendant Dean’s pool. Clearly, the testimony of Defendant Clack’s son Darby is needed to “further inquire” into what part of the pool Plaintiff B. drowned; and, therefore, summary judgment is not appropriate according to *Singleton*. Additionally, this court should remove its finding that the drowning occurred in the shallow end as that is an issue for a jury to determine. As stated in *Clary*, “[a] court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. . .” *Clary v. Borrell*, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012).

The cases stated above indicate that there is a heightened duty to children licensees. Defendant Dean knew that children would be swimming at her house. Defendant Dean anticipated that harm could come to children swimming in her pool as evidenced by her asking Ms. Dobbs if she would have plenty of adults to supervise the children. Defendant Dean testified that her pool had hooks for a rope to delineate the shallow end from the deep end and that she did not have such a rope for her pool. From these facts, a jury could reasonably conclude that Defendant Dean did not meet her heightened duty and did not take reasonable steps to prevent the injury to Plaintiff B. If a jury can come to more than one conclusion or inference on these facts as to the duty Defendant Dean had and whether she met that duty then summary judgment should not be granted. *Singleton*, 377 S.C. 185

Plaintiffs first argue that this motion is premature. Second, Plaintiffs argue that viewing the evidence in a light most favorable to the Plaintiffs, Plaintiffs have provided this court more than a mere scintilla of evidence that could lead a reasonable jury to conclude that Plaintiff B. drowned in the deep end of the pool; that Defendant Dean had a heightened duty of care which she did not meet; that the injury to Plaintiff B. was foreseeable; that Defendant Dean was negligent; and, that Defendant Dean’s negligence was a proximate cause of Plaintiff E.’s injuries. Therefore, summary judgment is not proper. To hold otherwise, would deprive Plaintiffs of a trial on disputed facts. *Singleton*, 377 S.C. 185.

Wherefore, based upon Rule 59(e) SCRCP, Plaintiff respectfully moves this Court to reconsider its Opinion and Order in these regards and to modify the Order to deny Defendant Dean’s Motion for Summary Judgment.

s/Paige B. George

Paige B. George (SC Bar # 75124)

Barry B. George (SC Bar # 2417)

Law Office of Barry B. George

Attorney(s) for the Plaintiffs

1419 Bull Street

Columbia, South Carolina 29201

(803) 400-1219

lawyer@paigebgeorge.com

1 Q. -- and then all the guys say, "Let's get back in"?

2 A. Yes.

3 Q. And nothing unusual with that?

4 A. No.

5 Q. Did you jump in or walk down the stairs?

6 A. I jumped in on the shallow end.

7 Q. You keep using the word shallow end.

8 A. Yes.

9 Q. Why -- why do you keep using that definition?

10 A. Because, sir, it was the shallow end. I jumped

11 into --

12 Q. Right. But you don't know which end you got hurt

13 in, do you?

14 A. No.

15 Q. Okay. If I told you everybody else is going to say

16 you got hurt in the shallow end, are you going to

17 dispute that?

18 MR. GEORGE: Object to the form of that

19 question. We haven't had any testimony of

20 that.

21 MR. BELL: I understand.

22 Q. Answer the question. This is a deposition. Do you

23 understand?

24 A. Yes.

25 Q. Has anybody ever told you you were in the deep end?

- 1 A. Yes.
- 2 Q. Who?
- 3 A. Darby.
- 4 Q. Who's Darby?
- 5 A. Coach Alan's son.
- 6 Q. When did he say that?
- 7 A. Whenever I was at the hospital.
- 8 Q. Okay. Well, you have no recollection as to what
9 happened?
- 10 A. No, sir.
- 11 Q. Did you ever do any hand stands with your head
12 under water and your feet up in the air while you
13 were there --
- 14 A. I don't recall.
- 15 Q. -- before you lost memory?
- 16 A. I don't recall.
- 17 Q. Did you ever put your face under water while you
18 were there before you lost this memory?
- 19 A. Yes, sir.
- 20 Q. And what caused you to put your face under water?
- 21 A. Just playing around.
- 22 Q. What type of playing would you do to put your face
23 under water?
- 24 A. Dead man's float.
- 25 Q. Dead man's float. Describe that for me. What do

1 A. I had left for the beach. I had a dog that I'd had
2 for 13 years. And we were supposed to go to the
3 beach the day before. I didn't go because she went
4 into renal failure. They told me I could bring her
5 home and let her spend the night. And I took her
6 back the next day and they put her to sleep and we
7 left for the beach.

8 Q. So where were you on May the 24th, 2014?

9 A. At the beach.

10 Q. You were at what beach?

11 A. Surfside -- I mean Garden City at Dunes Two.

12 Q. So you were at the beach also on that day?

13 A. I was.

14 Q. Okay. When did you first find out about this
15 incident that had happened at your home?

16 A. Stephanie had called my phone that day, but I was
17 distraught over my dog and I didn't answer any
18 telephone calls. And I found out the next day.

19 Q. So you didn't know about it until the 25th?

20 A. Correct.

21 Q. So you had had what, a week, two weeks notice that
22 they were going to have this pool party at your
23 house?

24 A. Yes.

25 Q. What instruction did you give Stephanie Dobbs about

1 having this pool party?

2 A. The same as I give every time we've had one; make
3 sure that there are plenty of people watching the
4 kids.

5 Q. And what --

6 A. And we've had parties since 1980-something.

7 Q. This pool that you have, how long is it, ma'am?

8 A. It's 40.

9 Q. And how many gallons of water does it hold?

10 A. I can't tell you that.

11 Q. This is a chlorine pool?

12 A. Yes, it is.

13 Q. At the diving board what is the depth there?

14 A. Eight and a half feet.

15 Q. And at the shallow part what is the depth there?

16 A. I believe it's three -- three and a half feet.

17 Q. And I have some pictures here that I was looking
18 at. It looks like there is a place on this pool
19 for some kind of rope or something to put across
20 dividing the shallow from the deep. Is that
21 correct?

22 A. That's correct. But you can also tell because it's
23 a lazy L. And the way the L's shaped is shallow to
24 the deep.

25 Q. What I'm saying is that at the pool there is a

ELECTRONICALLY FILED - 2018 Oct 03 4:14 PM - CHESTER - COMMON PLEAS - CASE#2016CP1200342

1 place to separate the shallow portion from the deep
2 portion; is that correct?

3 A. Yes.

4 Q. And is this -- it's a rope that you do this and it
5 has floats on it; is that correct?

6 A. That is correct. But it also is a lazy L, and it
7 is significant that this part is shallow, the other
8 part is deep. Or it slopes.

9 Q. Was there -- when is the last time you had a rope
10 in the pool dividing the shallow from the deep?

11 A. Probably several years.

12 Q. There wasn't one on the day of this incident, was
13 there?

14 A. No, there was not.

15 Q. All right. There's no marking of any kind along
16 the side of the pool showing the depth of the pool,
17 is it?

18 A. No, there's not. Like I said, it's a lazy L, and
19 it divides shallow, and then it slopes off into
20 deep.

21 Q. Yeah. And were you ever given the name of the
22 young man that had the incident at your pool?

23 A. Yes, I was.

24 Q. And when were you given that, ma'am?

25 A. The next day whenever I talked to Stephanie.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan B. [redacted], a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

**DEFENDANT CLAUDIA DEAN'S
ANSWERS TO CO-DEFENDANT
ALLEN CLACK'S FIRST
INTERROGATORIES**

**TO: FRANCIS L. BELL, JR., ESQUIRE, ATTORNEY FOR CO-DEFENDANT
ALLEN CLACK:**

Now comes counsel for the Defendant, Claudia Dean, answering Co-Defendant's First Set of Interrogatories, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, reserving and not waiving the attorney-client, work product, or any other privilege or immunity from disclosure which may attach to the information called for or responsive to these Interrogatories, and reserving all pertinent objections until at trial or any subsequent proceeding as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

Jordan O. B.

Chester, SC 29706
(No Statement)

Jordan B. [redacted] is the minor Plaintiff. He is expected to testify regarding the facts of the accident as well as his claimed damages.

Whitney Jackson
103 MLK Memorial Drive
Chester, SC 29706
(No Statement)

Whitney Jackson is the adult Plaintiff and believed to be the minor Plaintiff's mother. She is expected to testify regarding any knowledge she has of the accident as well as her claimed damages.

Dorothy Jackson
103 MLK Memorial Drive
Chester, SC 29706
(No Statement)

Dorothy Jackson is believed to be the minor Plaintiff's grandmother. She is expected to testify regarding any knowledge she has of the accident at issue.

Allen Clack
729 Great Falls Highway
Chester, SC 29706
(No Statement)

Allen Clack is a Defendant. He is expected to testify as to any knowledge he has of the accident at issue.

Claudia Dean
998 Mallard Creek Drive
Chester, SC 29706
(No Statement)

Claudia Dean is a Defendant. She is expected to testify as to any knowledge she has of the accident at issue.

Stephanie Bishop (Dodds Dean)
196 Two Creek Road
Blackstock, SC 29014
(No Statement)

Stephanie Bishop is the mother of Defendant Dean's grandson. She was the host of the pool party held at Dean's residence and is expected to testify regarding her knowledge of the accident at issue.

Dupree Clack
729 Great Falls Highway
Chester, SC 29706
(No Statement)

Dupree Clack is believed to be Allen Clack's wife and in attendance at the pool party in question. She is expected to testify as to any knowledge she has of the accident at issue.

Dwayne Hill
Address unknown

Dwayne Hill was in attendance at the pool party in question. He is expected to testify as to any knowledge he has of the accident at issue.

Brook Wayde
Address unknown

Brooke Wade was in attendance at the pool party in question. She is expected to testify as to any knowledge she has of the accident at issue.

The Defendant reserves the right to call as any witness listed by Plaintiffs or Co-Defendant in their discovery responses.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER:

Nine (9) photos of the Defendant Dean's property/pool taken on September 25, 2017;

3. List the name and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of this case.

ANSWER:

The Defendant has not retained in expert at this time but specifically reserves the right to do so.

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

See Answer to interrogatory number 1.

(Signature Page Follows)

HOWSER, NEWMAN & BESLEY, L.L.C.

By: _____

George V. Hanna, IV
1508 Washington Street
P.O. Box 12009
Columbia, South Carolina 29211
(803) 758-6000

ATTORNEYS FOR THE DEFENDANT
CLAUDIA DEAN

October 4, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER) IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
C/A NUMBER: 16-CP-12-00342

Whitney Jackson, Individually, and as
Guardian ad Litem for Jordan E , a
minor under the age of eighteen (18) years,

Plaintiff,

vs.

Allen Clack and Claudia Dean,

Defendants.

CERTIFICATE OF SERVICE

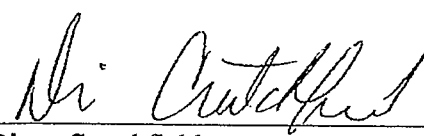
I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I have served the foregoing **DEFENDANT CLAUDIA DEAN'S ANSWERS TO CO-DEFENDANT ALLEN CLACK'S FIRST INTERROGATORIES** in the above-captioned case, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to the attorneys of record as indicated below:

ATTORNEY FOR THE PLAINTIFF:

Barry George
Paige B. George
Attorneys for the Plaintiff
1419 Bull Street
Columbia, SC 29201

ATTORNEY FOR DEFENDANT ALLEN CLACK:

Francis L. Bell, Jr.
FRANCIS BELL LAW FIRM, LLC
P.O. Box 867
Lancaster, SC 29721



Diane Crutchfield

October 4, 2017

From: Geov Hanna [mailto:ghanna@hnblaw.com]
Sent: Wednesday, September 19, 2018 4:17 PM
To: 'Hayes, John C. III'; 'Charlene'
Cc: 'Francis Bell'
Subject: RE: Motion to reconsider

Judge Hayes:

I have only just now had an opportunity to review the Plaintiff's motion and memorandum to reconsider. I am not sure that it is appropriate to raise this issue now or wait until a formal order has been filed and file a formal motion to reconsider myself. If it is please let me know. However, I would simply note that the Plaintiff has relied on hearsay testimony to create the alleged question of fact as whether Jordan B nearly drowned in the shallow or deep end of the pool. See the attached exhibit 2 which contains the excerpt from Jordan B's deposition starting at line 25 on page 59 and running through page 58 through line 10.

Q - Has anybody ever told you were in the deep end?

A - Yes

Q- Who?

A-Darby?

Q-Who's Darby?

A-Coach Alan's Son.

Q-when did he say that?

A-whenever I was at the hospital.

This is clearly hearsay and even more obviously so by the very next question and answer:

Q-Okay. Well, you have no recollection as to what happened?

A-No sir.

As stated in the attached case, inadmissible hearsay is not admissible to refute a motion for summary judgment. In summary, the only admissible evidence before the court was the testimony of Alan Clack that the incident occurred in the shallow end which was provided as an exhibit to my motion.

Q-was he on the bottom of the pool?

A-He was on the shallow end at the bottom of the pool.

(deposition of Alan Clack p. 22, lines 4-6).

Unless there is some additional basis for finding that "scintilla" of evidence exists that I am missing I would request that the court reconsider its reconsideration and stick with the original order.

Geov

George V. Hanna, IV
HOWSER, NEWMAN & BESLEY, LLC
1508 Washington Street
Post Office Box 12009
Columbia, SC 29211
Local: (803) 758-6000
Toll Free: (866) 207-6209
Fax: (803) 758-4445
ghanna@hnblaw.com

THIS MESSAGE MAY BE PROTECTED BY THE ATTORNEY/CLIENT, ATTORNEY WORK PRODUCT OR OTHER PRIVILEGES. IF YOU RECEIVED THIS MESSAGE IN ERROR, PLEASE SEND A REPLY TO LET ME KNOW, DELETE THE MESSAGE AND DO NOT FORWARD THIS MESSAGE TO ANY OTHER PERSON OR ENTITY. THANK YOU VERY MUCH FOR YOUR COOPERATION.

From: Geov Hanna
Sent: Wednesday, September 19, 2018 11:18 AM
To: Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>
Cc: 'Francis Bell' <FBell@fbell-law.com>
Subject: RE: Motion to reconsider

From: Hayes, John C. III <JHayesj@sccourts.org>
Sent: Wednesday, September 19, 2018 11:11 AM
To: blair@bellsouth.net
Cc: Geov Hanna <ghanna@hnblaw.com>
Subject: RE: Motion to reconsider

Mr. Hanna, my email to Mr. George came back. Would you forward this to him? JC

From: Hayes, John C. III
Sent: Wednesday, September 19, 2018 11:04 AM
To: 'blair@bellsouth.net' <blair@bellsouth.net>
Cc: 'ghanna@hnblaw.com' <ghanna@hnblaw.com>
Subject: Motion to reconsider

Gentlemen, looking at the submission by Mr. George I will reconsider and ask Barry to prepare an order denying the motion for summary judgement. Looking at the evidence in the light most favorable to Plaintiff, I find a scintilla of evidence present. JCH

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

---

**From:** Hayes, John C. III [mailto:JHayesj@sccourts.org]  
**Sent:** Friday, September 21, 2018 1:36 PM  
**To:** Geov Hanna; 'Charlene'  
**Cc:** 'Francis Bell'  
**Subject:** RE: Motion to reconsider

Barry, response? Let me know by next Tuesday. JCH

**From:** Geov Hanna [mailto:ghanna@hnblaw.com]  
**Sent:** Wednesday, September 19, 2018 4:17 PM  
**To:** Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>  
**Cc:** 'Francis Bell' <FBell@fbell-law.com>  
**Subject:** RE: Motion to reconsider

Judge Hayes:

I have only just now had an opportunity to review the Plaintiff's motion and memorandum to reconsider. I am not sure that it is appropriate to raise this issue now or wait until a formal order has been filed and file a formal motion to reconsider myself. If it is please let me know. However, I would simply note that the Plaintiff has relied on hearsay testimony to create the alleged question of fact as whether Jordan B. nearly drowned in the shallow or deep end of the pool. See the attached exhibit 2 which contains the excerpt from Jordan B. deposition starting at line 25 on page 59 and running through page 58 through line 10.

Q – Has anybody ever told you were in the deep end?

A – Yes

Q- Who?

A-Darby?

Q-Who's Darby?

A-Coach Alan's Son.

Q-when did he say that?

A-whenever I was at the hospital.

This is clearly hearsay and even more obviously so by the very next question and answer:

Q-Okay. Well, you have no recollection as to what happened?

A-No sir.

As stated in the attached case, inadmissible hearsay is not admissible to refute a motion for summary judgment. In summary, the only admissible evidence before the

court was the testimony of Alan Clack that the incident occurred in the shallow end which was provided as an exhibit to my motion.

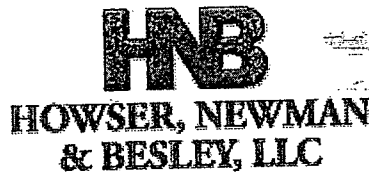
Q-was he on the bottom of the pool?

A-He was on the shallow end at the bottom of the pool.  
(deposition of Alan Clack p. 22, lines 4-6).

Unless there is some additional basis for finding that "scintilla" of evidence exists that I am missing I would request that the court reconsider its reconsideration and stick with the original order.

Geov

George V. Hanna, IV  
HOWSER, NEWMAN & BESLEY, LLC  
1508 Washington Street  
Post Office Box 12009  
Columbia, SC 29211  
Local: (803) 758-6000  
Toll Free: (866) 207-6209  
Fax: (803) 758-4445  
ghanna@hnblaw.com



THIS MESSAGE MAY BE PROTECTED BY THE ATTORNEY/CLIENT, ATTORNEY WORK PRODUCT OR OTHER PRIVILEGES. IF YOU RECEIVED THIS MESSAGE IN ERROR, PLEASE SEND A REPLY TO LET ME KNOW, DELETE THE MESSAGE AND DO NOT FORWARD THIS MESSAGE TO ANY OTHER PERSON OR ENTITY. THANK YOU VERY MUCH FOR YOUR COOPERATION.

**From:** Geov Hanna  
**Sent:** Wednesday, September 19, 2018 11:18 AM  
**To:** Hayes, John C. III <JHayesi@sccourts.org>; 'Charlene' <blair41@bellsouth.net>  
**Cc:** 'Francis Bell' <FBell@fbell-law.com>  
**Subject:** RE: Motion to reconsider

**From:** Hayes, John C. III <JHayesi@sccourts.org>  
**Sent:** Wednesday, September 19, 2018 11:11 AM  
**To:** blair@bellsouth.net  
**Cc:** Geov Hanna <ghanna@hnblaw.com>  
**Subject:** RE: Motion to reconsider

Mr. Hanna, my email to Mr. George came back. Would you forward this to him? JC

**From:** Hayes, John C. III

**Sent:** Wednesday, September 19, 2018 11:04 AM

**To:** 'blair@bellsouth.net' <blair@bellsouth.net>

**Cc:** 'ghanna@hnblaw.com' <ghanna@hnblaw.com>

**Subject:** Motion to reconsider

Gentlemen, looking at the submission by Mr. George I will reconsider and ask Barry to prepare an order denying the motion for summary judgement. Looking at the evidence in the light most favorable to Plaintiff, I find a scintilla of evidence present. JCH

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

Fw: Motion to reconsider

From: Paige George (lawyer@paigebgeorge.com)

To: ghanna@hnblaw.com; blair41@bellsouth.net; fbelle@fbelle-law.com; jhayesj@sccourts.org

Date: Monday, September 24, 2018, 01:08 PM EDT

Your Honor,

I noticed that Plaintiffs' proposed order was signed on Friday so I am not sure if you still needed a response to Mr. Hanna's email. So out of an abundance of caution, I am responding.

It is our position that there are genuine issues as to material facts and as to the inferences that can be made from the facts in this case such that granting Summary Judgment as to Defendant Dean would be inappropriate.

We believe we have surpassed the bar of a mere scintilla. There is direct testimony from Defendant Dean from which a jury could make an inference from that she anticipated harm to children swimming in her pool - Defendant Dean testified in her deposition that she warned Ms. Dobbs to "make sure that there are plenty of people watching the kids."

Additionally, the case law presented in our Motion to Reconsider shows that the owner of real property has a heightened duty as to child licensees; and, that where there is a dangerous instrumentality such as a pool, that the land owner has a duty to guard against injury.

Defendant Dean also testified that she had two weeks notice of the party; that her pool had hooks for a rope; and that she did not have a rope in her pool. From these statements by Defendant Dean in her deposition, a jury could infer that she had a duty that she breached.

Sincerely,

Paige B. George
Law Office of Barry B. George

--
Paige B. George, Attorney at Law
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201

Phone: (803) 400-1219
Fax: (803) 779-9351
lawyer@paigebgeorge.com

RE: Motion to reconsider

From: Hayes, John C. III (JHayesj@sccourts.org)

To: lawyer@paigebgeorge.com; ghanna@hnblaw.com; fbelle@fbelle-law.com; blair41@bellsouth.net

Date: Tuesday, September 25, 2018, 11:27 AM EDT

I can't rely on what may or may not happen at trial. I will stick with my last email. JCH

From: Paige George [mailto:lawyer@paigebgeorge.com]
Sent: Tuesday, September 25, 2018 10:03 AM
To: Geov-Hanna <ghanna@hnblaw.com>; Francis Bell <fbelle@fbelle-law.com>; Hayes, John C. III <JHayesj@sccourts.org>; Charlene Sloan <blair41@bellsouth.net>
Subject: Fw: Motion to reconsider

Your Honor,

If I could add one last thing that I originally omitted from my last email.

It is Plaintiffs' position that Darby Clack's statement would be admissible as an exception to the hearsay rule, as it is a prior statement by a witness who would be subject to cross examination at trial.

Paige

—
Paige B. George, Attorney at Law
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201

Phone: (803) 400-1219
Fax: (803) 779-9351
lawyer@paigebgeorge.com

From: Hayes, John C. III [mailto:JHayesj@sccourts.org]

Sent: Tuesday, September 25, 2018 9:35 AM

To: Geov Hanna; 'Charlene'

Cc: 'Francis Bell'

Subject: RE: Motion to reconsider

I do not think a motion to reconsider would be procedurally appropriate at this stage. However, I believe I erred in granting the motion to reconsider. Mr. Hanna, please draw an order for me to issue, sua sponte, setting aside the order granting the motion to reconsider and affirming the initial order of denial. I find that Defendant did all that is required of a swimming pool owner under the circumstances. JCH

From: Geov Hanna [mailto:ghanna@hnblaw.com]

Sent: Wednesday, September 19, 2018 4:17 PM

To: Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>

Cc: 'Francis Bell' <FBell@fbell-law.com>

Subject: RE: Motion to reconsider

Judge Hayes:

I have only just now had an opportunity to review the Plaintiff's motion and memorandum to reconsider. I am not sure that it is appropriate to raise this issue now or wait until a formal order has been filed and file a formal motion to reconsider myself. If it is please let me know. However, I would simply note that the Plaintiff has relied on hearsay testimony to create the alleged question of fact as whether Jordan B. nearly drowned in the shallow or deep end of the pool. See the attached exhibit 2 which contains the excerpt from Jordan B.'s deposition starting at line 25 on page 59 and running through page 58 through line 10.

Q – Has anybody ever told you were in the deep end?

A – Yes

Q- Who?

A-Darby?

Q-Who's Darby?

A-Coach Alan's Son.

Q-when did he say that?

A-whenever I was at the hospital.

This is clearly hearsay and even more obviously so by the very next question and answer:

Q-Okay. Well, you have no recollection as to what happened?

A-No sir.

As stated in the attached case, inadmissible hearsay is not admissible to refute a motion for summary judgment. In summary, the only admissible evidence before the court was the testimony of Alan Clack that the incident occurred in the shallow end which was provided as an exhibit to my motion.

Q-was he on the bottom of the pool?

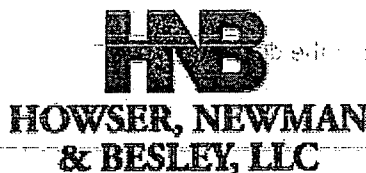
A-He was on the shallow end at the bottom of the pool.

(deposition of Alan Clack p. 22, lines 4-6).

Unless there is some additional basis for finding that "scintilla" of evidence exists that I am missing I would request that the court reconsider its reconsideration and stick with the original order.

Geov

George V. Hanna, IV
HOWSER, NEWMAN & BESLEY, LLC
1508 Washington Street
Post Office Box 12009
Columbia, SC 29211
Local: (803) 758-6000
Toll Free: (866) 207-6209
Fax: (803) 758-4445
ghanna@hnblaw.com



THIS MESSAGE MAY BE PROTECTED BY THE ATTORNEY/CLIENT, ATTORNEY WORK PRODUCT OR OTHER PRIVILEGES. IF YOU RECEIVED THIS MESSAGE IN ERROR, PLEASE SEND A REPLY TO LET ME KNOW, DELETE THE MESSAGE AND DO NOT FORWARD THIS MESSAGE TO ANY OTHER PERSON OR ENTITY. THANK YOU VERY MUCH FOR YOUR COOPERATION.

From: Geov Hanna
Sent: Wednesday, September 19, 2018 11:18 AM

To: Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>
Cc: 'Francis Bell' <FBell@fbell-law.com>
Subject: RE: Motion to reconsider

From: Hayes, John C. III <JHayesj@sccourts.org>
Sent: Wednesday, September 19, 2018 11:11 AM
To: blair@bellsouth.net
Cc: Geov Hanna <ghanna@hnblaw.com>
Subject: RE: Motion to reconsider

Mr. Hanna, my email to Mr. George came back. Would you forward this to him? JC

From: Hayes, John C. III
Sent: Wednesday, September 19, 2018 11:04 AM
To: 'blair@bellsouth.net' <blair@bellsouth.net>
Cc: 'ghanna@hnblaw.com' <ghanna@hnblaw.com>
Subject: Motion to reconsider

Gentlemen, looking at the submission by Mr. George I will reconsider and ask Barry to prepare an order denying the motion for summary judgement. Looking at the evidence in the light most favorable to Plaintiff, I find a scintilla of evidence present. JCH

CONFIDENTIALITY NOTICE This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

RE: Motion to reconsider - Jackson and Bowser v. Dean and Clack 2016-CP-12-00342

From: Geov Hanna (ghanna@hnblaw.com)
To: JHayesj@sccourts.org; fbell@fbell-law.com
Cc: lawyer@paigebgeorge.com; blair41@bellsouth.net
Date: Thursday, October 4, 2018, 02:30 PM EDT

Judge Hayes:

Plaintiff has filed another motion to reconsider in light of the most recent order you filed in this case that is discussed below. The new brief raise the same argument as the last motion to reconsider in that they are relying on hearsay testimony as a basis to create a question of fact. As to that issue, I would simply rely on the arguments I raised earlier in this same thread as well as the case of Hall v. Fedor, 349 SC 169, 561 SE.2d 654 (Ct.App 2002) I previously supplied to the court. In the alternative, the Plaintiff is now for the first time raising the additional issue that this same hearsay statement shows that further inquiry into the facts is needed and that summary judgment is premature. As a threshold issue, the attached case stands for the prospect that a party may not raise an issue on a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment. Therefore, the issue is not properly preserved for review.

As to merits of this new argument I would first point out that the source of the hearsay statement is the minor Plaintiff, Jordan Bowser. As noted in the deposition excerpt quoted below the hearsay statement he is relying on was something that Bowser heard in the hospital immediately after the incident in May 2014. In other words, the information that Plaintiff is now claiming it needs additional time to explore has been known to the Plaintiff for over 4 years. In addition, this case was initially filed on August 2, 2016. The Plaintiff has never served written discovery. So the extent they are suggesting the Defendant was late in providing a list of witnesses at the party, that is not case. The discovery responses that are attached to Plaintiff's motion were my client's (Defendant Dean) responses to the co-defendant's (Defendant Clack) interrogatories. Defendant Clack did not make an appearance in the case until July 11, 2017. Defendant Clack's discovery requests to Defendant Dean were served on August 7, 2017 and responded to on October 4, 2017 – exactly one year ago today. In the year since the identification of the non-party witness adults at the pool on the date of the incident, Plaintiff has taken two depositions - Defendant's Dean and Clack in December 2017. Both of whom, Plaintiff has known about since filing the case as they are the named Defendants. When those deposition were taken, Defendant Dean was not present on the date in question and had no first-hand knowledge of the incident. Defendant Clack unequivocally testified that the incident occurred in the shallow end – which as your honor found in your order granting summary judgment is the only affirmative testimony in the record as to where the incident occurred. Therefore, Plaintiff presumably knew or should have known for the past 10 months that they had no affirmative testimony to create a question of fact on this key issue.

For the foregoing reasons, we would request that the Court deny Plaintiff's latest motion to reconsider filed on October 3, 2018.

Geov

From: Paige George <lawyer@paigebgeorge.com>
Sent: Tuesday, September 25, 2018 11:33 AM
To: Hayes, John C. III <JHayesj@sccourts.org>; Geov Hanna <ghanna@hnblaw.com>; Francis Bell <fbell@fbell-law.com>; Charlene Sloan <blair41@bellsouth.net>
Subject: Re: Motion to reconsider

Understood. I was just responding to Mr. Hanna's argument regarding hearsay testimony and arguing that it was not inadmissible hearsay; and, therefore, the statement of Darby Clack made to Jordan B could be considered during an argument for summary judgment. We will await your order.

Sincerely,

Paige

Paige B. George, Attorney at Law
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201

Phone: (803) 400-1219

Fax: (803) 779-9351

lawyer@paigebgeorge.com

From: "Hayes, John C. III" <JHayesj@sccourts.org>
To: Paige George <lawyer@paigebgeorge.com>; Geov Hanna <ghanna@hnblaw.com>; Francis Bell <fbell@fbell-law.com>; Charlene Sloan <blair41@bellsouth.net>
Sent: Tuesday, September 25, 2018 11:27 AM
Subject: RE: Motion to reconsider

I can't rely on what may or may not happen at trial. I will stick with my last email. JCH

From: Paige George [<mailto:lawyer@paigebgeorge.com>]

Sent: Tuesday, September 25, 2018 10:03 AM

To: Geov Hanna <ghanna@hnblaw.com>; Francis Bell <fbell@fbell-law.com>; Hayes, John C. III <JHayesj@sccourts.org>; Charlene Sloan <blair41@bellsouth.net>

Subject: Fw: Motion to reconsider

Your Honor,

If I could add one last thing that I originally omitted from my last email.

It is Plaintiffs' position that Darby Clack's statement would be admissible as an exception to the hearsay rule as it is a prior statement by a witness who would be subject to cross examination at trial.

Paige

--

Paige B. George, Attorney at Law
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201

Phone: (803) 400-1219

Fax: (803) 779-9351

lawyer@paigebgeorge.com

From: Hayes, John C. III [<mailto:JHayesj@sccourts.org>]

Sent: Tuesday, September 25, 2018 9:35 AM

To: Geov Hanna; 'Charlene'

Cc: 'Francis Bell'

Subject: RE: Motion to reconsider

I do not think a motion to reconsider would be procedurally appropriate at this stage. However, I believe I erred in granting the motion to reconsider. Mr. Hanna, please draw an order for me to issue, sua sponte, setting aside the order granting the motion to reconsider and affirming the initial order of denial. I find that Defendant did all that is required of a swimming pool owner under the circumstances. JCH

From: Geov Hanna [<mailto:ghanna@hnblaw.com>]

Sent: Wednesday, September 19, 2018 4:17 PM

To: Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>

Cc: 'Francis Bell' <FBell@fbell-law.com>
Subject: RE: Motion to reconsider

Judge Hayes:

I have only just now had an opportunity to review the Plaintiff's motion and memorandum to reconsider. I am not sure that it is appropriate to raise this issue now or wait until a formal order has been filed and file a formal motion to reconsider myself. If it is please let me know. However, I would simply note that the Plaintiff has relied on hearsay testimony to create the alleged question of fact as whether Jordan B nearly drowned in the shallow or deep end of the pool. See the attached exhibit 2 which contains the excerpt from Jordan B's deposition starting at line 25 on page 59 and running through page 58 through line 10.

Q – Has anybody ever told you were in the deep end?

A – Yes

Q- Who?

A-Darby?

Q-Who's Darby?

A-Coach Alan's Son.

Q-when did he say that?

A-whenever I was at the hospital.

This is clearly hearsay and even more obviously so by the very next question and answer:

Q-Okay. Well, you have no recollection as to what happened?

A-No sir.

As stated in the attached case, inadmissible hearsay is not admissible to refute a motion for summary judgment. In summary, the only admissible evidence before the court was the testimony of Alan Clack that the incident occurred in the shallow end which was provided as an exhibit to my motion.

Q-was he on the bottom of the pool?

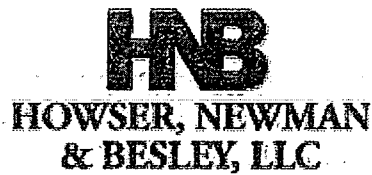
A-He was on the shallow end at the bottom of the pool.
(deposition of Alan Clack p. 22, lines 4-6).

Unless there is some additional basis for finding that "scintilla" of evidence exists that I am missing I would request that the court reconsider its reconsideration and stick with the original order.

Geov:

George V. Hanna, IV
HOWSER, NEWMAN & BESLEY, LLC
1508 Washington Street
Post Office Box 12009
Columbia, SC 29211
Local: (803) 758-6000

Toll Free: (866) 207-6209
Fax: (803) 758-4445
ghanna@hnblaw.com



THIS MESSAGE MAY BE PROTECTED BY THE ATTORNEY/CLIENT, ATTORNEY WORK PRODUCT OR OTHER PRIVILEGES. IF YOU RECEIVED THIS MESSAGE IN ERROR, PLEASE SEND A REPLY TO LET ME KNOW, DELETE THE MESSAGE AND DO NOT FORWARD THIS MESSAGE TO ANY OTHER PERSON OR ENTITY. THANK YOU VERY MUCH FOR YOUR COOPERATION.

From: Geov Hanna
Sent: Wednesday, September 19, 2018 11:18 AM
To: Hayes, John C. III <JHayesj@sccourts.org>; 'Charlene' <blair41@bellsouth.net>
Cc: 'Francis Bell' <FBell@fbell-law.com>
Subject: RE: Motion to reconsider

From: Hayes, John C. III <JHayesj@sccourts.org>
Sent: Wednesday, September 19, 2018 11:11 AM
To: blair@bellsouth.net
Cc: Geov Hanna <ghanna@hnblaw.com>
Subject: RE: Motion to reconsider

Mr. Hanna, my email to Mr. George came back. Would you forward this to him? JC

From: Hayes, John C. III
Sent: Wednesday, September 19, 2018 11:04 AM
To: 'blair@bellsouth.net' <blair@bellsouth.net>
Cc: 'ghanna@hnblaw.com' <ghanna@hnblaw.com>
Subject: Motion to reconsider

Gentlemen, looking at the submission by Mr. George I will reconsider and ask Barry to prepare an order denying the motion for summary judgement. Looking at the evidence in the light most favorable to Plaintiff, I find a scintilla of evidence present. JCH.
~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

1 A. No. I just walked -- I just walked along the  
2 edges.

3 Q. Okay. So generally you tried to stay where you  
4 could stand?

5 A. Yes.

6 Q. How tall are you?

7 A. Right now?

8 Q. Yes.

9 A. Five six.

10 Q. And about how tall would you have been when this  
11 accident happened?

12 A. Maybe four eight.

13 Q. That's a nice growth spurt right there. All right.  
14 So you all were playing around in the pool, you got  
15 some pool toys, you may have been playing some pool  
16 games, but not doing any roughhousing. What  
17 happens next?

18 A. I don't know. I don't know.

19 Q. What's the next thing you do know?

20 A. Just waking up.

21 Q. And where did you wake up?

22 A. In the back of a ambulance.

23 Q. Was there anyone in the ambulance you recognized?

24 A. Coach Alan was in there, and that was it.

25 Q. Did you have any idea where that ambulance was

1 located?

2 A. No.

3 Q. Do you know if the ambulance was moving?

4 A. No.

5 Q. What I mean by that -- let me rephrase. Was the  
6 ambulance sitting at the pool with the back doors  
7 open and everyone that was at the pool party  
8 sitting outside?

9 A. I don't know. I don't know. It might have been.

10 Q. But it also could have been moving somewhere else?

11 A. I don't know.

12 Q. Okay. Sometimes I have to ask stupid questions. I  
13 wasn't there, so I'm just trying to figure stuff  
14 out. And I appreciate your patience with me. All  
15 right. So you wake up in the ambulance. Coach  
16 Alan's there. You don't recognize anybody else.  
17 You're not sure where you are. Do you know where -  
18 - do you recall where you ended up?

19 A. I remember -- I remember being -- I remember the  
20 whole ride to the hospital.

21 Q. Do you remember what hospital that was?

22 A. It was somewhere in North Carolina.

23 Q. Now, when you came to in that ambulance did anybody  
24 tell you what was going on, why you were in an  
25 ambulance?

1 A. Sir?

2 Q. I don't know -- I don't -- do you remember the name  
3 of the hospital you went to?

4 A. No. No, I don't.

5 Q. Was that in North Carolina or --

6 A. I don't know.

7 Q. Do you have any recollection of how old you may  
8 have been?

9 A. Probably four.

10 Q. Jordan, you're doing a great job. You have a  
11 really good memory of events. A lot of my adult  
12 witnesses don't have as good a recollection of  
13 things. So good job on you. All right. So you  
14 get out of the hospital after four days which I'm  
15 sure was not a lot of fun. Did you seek any other  
16 medical treatment after getting out of the  
17 hospital?

18 A. I went to therapy. And my therapist prescribed me  
19 with sleeping -- sleeping medication.

20 Q. Do you remember the name of the therapist you went  
21 to?

22 A. No.

23 Q. Do you remember where he or she was located?

24 A. Lancaster.

25 Q. What time of year did this accident occur?

1 A. Because I used to have nightmares.

2 MR. BELL: I'm sorry, could you say that again?

3 A. I used to have nightmares.

4 Q. What kind of nightmares are we talking about?

5 A. That I would drown in my sleep.

6 Q. About how frequently would you say you had these  
7 nightmares?

8 A. Maybe -- whenever I first came back it was -- it  
9 happened repeatedly.

10 Q. Multiple times a night? Multiple times a week?

11 A. Multiple times a week.

12 Q. Did you have any of these nightmares when you were  
13 in the hospital?

14 A. No.

15 Q. When do you think you started having these  
16 nightmares?

17 A. The second week I came home.

18 Q. So pretty soon afterwards?

19 A. Yes.

20 Q. Now, this is a stretch here, but these -- these  
21 nightmares that you were having, do you think that  
22 some of these -- the images and things that were  
23 going on in your dreams were made up in your head,  
24 or do you think some of that was you actually  
25 recollecting some of the stuff that was happening

1 Q. -- and then all the guys say, "Let's get back in"?

2 A. Yes.

3 Q. And nothing unusual with that?

4 A. No.

5 Q. Did you jump in or walk down the stairs?

6 A. I jumped in on the shallow end.

7 Q. You keep using the word shallow end.

8 A. Yes.

9 Q. Why -- why do you keep using that definition?

10 A. Because, sir, it was the shallow end. I jumped  
11 into --

12 Q. Right. But you don't know which end you got hurt  
13 in, do you?

14 A. No.

15 Q. Okay. If I told you everybody else is going to say  
16 you got hurt in the shallow end, are you going to  
17 dispute that?

18 MR. GEORGE: Object to the form of that  
19 question. We haven't had any testimony of  
20 that.

21 MR. BELL: I understand.

22 Q. Answer the question. This is a deposition. Do you  
23 understand?

24 A. Yes.

25 Q. Has anybody ever told you you were in the deep end?

1 A. Yes.

2 Q. Who?

3 A. Darby.

4 Q. Who's Darby?

5 A. Coach Alan's son.

6 Q. When did he say that?

7 A. Whenever I was at the hospital.

8 Q. Okay. Well, you have no recollection as to what  
9 happened?

10 A. No, sir.

11 Q. Did you ever do any hand stands with your head  
12 under water and your feet up in the air while you  
13 were there --

14 A. I don't recall.

15 Q. -- before you lost memory?

16 A. I don't recall.

17 Q. Did you ever put your face under water while you  
18 were there before you lost this memory?

19 A. Yes, sir.

20 Q. And what caused you to put your face under water?

21 A. Just playing around.

22 Q. What type of playing would you do to put your face  
23 under water?

24 A. Dead man's float.

25 Q. Dead man's float. Describe that for me. What do

1

STIPULATIONS

2

It is stipulated by and between counsel for

3

the respective parties that all objections are

4

reserved until the time of trial, except as to

5

the form of the questions.

6

This deposition is being taken pursuant to the

7

South Carolina Rules of Civil Procedure.

8

- - - -

9

The reading and signing of this deposition is

10

waived by the deponent and counsel for the

11

respective parties.

12

Whereupon,

13

Dorothy Jackson, being duly sworn and

14

cautioned to speak the truth, the whole truth,

15

and nothing but the truth, testified as

16

follows:

17

EXAMINATION.

18

BY MR. EDDY:

19

Q. Good afternoon, Ms. Jackson. My name is Trevor

20

Eddy. I represent the defendant, Claudia Dean, in

21

this case. Have you ever given a deposition

22

before?

23

A. No, I have not.

24

Q. Okay. So I'm going to talk about a few ground

25

rules. Your attorney may have covered some of

1 Q. How long had she been gone?

2 A. Since Thursday.

3 Q. Was she there with friends, schoolmates, work,  
4 vacation?

5 A. Friends. It's a yearly thing on Memorial Weekend  
6 for her.

7 Q. She and her friends would go out to Myrtle Beach  
8 once a year?

9 A. Once a year.

10 Q. On Memorial Day Weekend?

11 A. On Memorial Day Weekend.

12 Q. And what happened on that Saturday morning? Walk  
13 me through those events.

14 A. That Saturday morning I had a funeral to go to.  
15 Jordan called the Clacks to see if he could come  
16 spend the day with them. So I dropped Jordan off  
17 at the Clacks around noon, a little after, and I  
18 proceeded to go on to the funeral. Now, after I  
19 got to the funeral I received a -- a text message  
20 from -- from Jordan. I can't recall whether it was  
21 from Jordan or from Mrs. Clack. But anyway, the  
22 message said that they were -- the Clacks were  
23 going to a birthday party I believe it was at -- at  
24 a pool and if Jordan could go. I told him no. I  
25 said, "Take Jordan next door to my sister's house,"

1           which would have been his aunt. Okay. So they  
2           texted me again, wanted to know if he could go. I  
3           told him again, "Take him either to his nana's or  
4           to my sister." I said, "He don't have any swim  
5           trunks anyway." So Mr. Clack texted me back and  
6           said that he had some extra trunks that Jordan  
7           could use. So I said okay.

8    Q.    This conversation was over text message?

9    A.    Yes.

10   Q.    Do you happen to have any of those text messages  
11           still on your phone?

12   A.    They're at home on a dead phone.

13   Q.    On a dead phone. That's too bad. Any part of this  
14           conversation take place over a phone call?

15   A.    No.

16   Q.    All over texts?

17   A.    Texts.

18   Q.    Because you were at a funeral?

19   A.    I was at a funeral.

20   Q.    Whose funeral was that?

21   A.    Robby Jackson's.

22   Q.    Was that a friend or a relation of yours?

23   A.    He was a friend I'd known all my life.

24   Q.    Who was looking after Chloe that day?

25   A.    I can't recall if it was her nana or my sister.

1 Jordan off at the Clacks' house, did you speak to  
2 anybody at the Clacks' house?

3 A. No, I did not.

4 Q. Did you talk to anyone over the phone at the  
5 Clacks' house?

6 A. No, I did not.

7 Q. Did you exchange any text messages with Mr. Clack?

8 A. Yes.

9 Q. Before you dropped him off?

10 A. No.

11 Q. Okay. Once you got to Mr. Clack's house -- had you  
12 ever been to Mr. Clack's house before?

13 A. Not inside, no, I have not.

14 Q. Had you ever been to the outside of the house?

15 A. Yes.

16 Q. So you knew where it was before this day?

17 A. Yes.

18 Q. And how did you come to have known that?

19 A. Well, Jordan used to walk around there sometimes.

20 It's not far from where I live. And he was his  
21 coach. He would either come pick Jordan up, or  
22 Jordan would meet him at his house.

23 Q. Had you ever dropped Jordan off at Mr. Clack's  
24 house before this day?

25 A. Yes.

1 bit. How long did you stay in the hospital  
2 personally?

3 A. I stayed as long as he stayed, the whole four days.

4 Q. Whole four days. Sleeping on a couch or a chair or  
5 something?

6 A. On a couch.

7 Q. Well, like I mentioned earlier, I just had a kid.  
8 And so I spent three or four days sleeping on a  
9 hospital chair. Not the most fun of chairs.

10 A. It's not the most fun. But, you know, you do what  
11 you have to do.

12 Q. Right. When he was discharged from the hospital  
13 did they give you -- the nurses or physicians give  
14 you any specific follow-up instructions?

15 A. Just watch him. They told me to watch him because  
16 he was experiencing those bad nightmares of  
17 drowning.

18 Q. So he was having nightmares in the hospital?

19 A. Correct.

20 Q. After he's discharged from a couple of days in the  
21 hospital, did you take him to -- for a follow-up  
22 with a family doctor or urgent care or anything  
23 like that?

24 A. His -- his pediatrician, yes.

25 Q. And that's Dr. Parsons?

1 A. I had left for the beach. I had a dog that I'd had  
2 for 13 years. And we were supposed to go to the  
3 beach the day before. I didn't go because she went  
4 into renal failure. They told me I could bring her  
5 home and let her spend the night. And I took her  
6 back the next day and they put her to sleep and we  
7 left for the beach.

8 Q. ~~So where were you on May the 24th, 2014?~~

9 A. ~~At the beach.~~

10 Q. You were at what beach?

11 A. Surfside -- I mean Garden City at Dunes Two.

12 Q. So you were at the beach also on that day?

13 A. ~~I was.~~

14 Q. Okay. When did you first find out about this  
15 incident that had happened at your home?

16 A. Stephanie had called my phone that day, but I was  
17 distraught over my dog and I didn't answer any  
18 telephone calls. And I found out the next day.

19 Q. So you didn't know about it until the 25th?

20 A. Correct.

21 Q. So you had had what, a week, two weeks notice that  
22 they were going to have this pool party at your  
23 house?

24 A. Yes.

25 Q. What instruction did you give Stephanie Dobbs about

1           having this pool party?

2    A.    The same as I give every time we've had one; make  
3           sure that there are plenty of people watching the  
4           kids.

5    Q.    And what --

6    A.    And we've had parties since 1980-something.

7    Q.    This pool that you have, how long is it, ma'am?

8    A.    It's 40.

9    Q.    And how many gallons of water does it hold?

10   A.    I can't tell you that.

11   Q.    This is a chlorine pool?

12   A.    Yes, it is.

13   Q.    At the diving board what is the depth there?

14   A.    Eight and a half feet.

15   Q.    And at the shallow part what is the depth there?

16   A.    I believe it's three -- three and a half feet.

17   Q.    And I have some pictures here that I was looking  
18           at. It looks like there is a place on this pool  
19           for some kind of rope or something to put across  
20           dividing the shallow from the deep. Is that  
21           correct?

22   A.    That's correct. But you can also tell because it's  
23           a lazy L. And the way the L's shaped is shallow to  
24           the deep.

25   Q.    What I'm saying is that at the pool there is a

1 place to separate the shallow portion from the deep  
2 portion; is that correct?

3 A. Yes.

4 Q. And is this -- it's a rope that you do this and it  
5 has floats on it; is that correct?

6 A. That is correct. But it also is a lazy L, and it  
7 is significant that this part is shallow, the other  
8 part is deep. Or it slopes.

9 Q. Was there -- when is the last time you had a rope  
10 in the pool dividing the shallow from the deep?

11 A. Probably several years.

12 Q. There wasn't one on the day of this incident, was  
13 there?

14 A. No, there was not.

15 Q. All right. There's no marking of any kind along  
16 the side of the pool showing the depth of the pool,  
17 is it?

18 A. No, there's not. Like I said, it's a lazy L, and  
19 it divides shallow, and then it slopes off into  
20 deep.

21 Q. Yeah. And were you ever given the name of the  
22 young man that had the incident at your pool?

23 A. Yes, I was.

24 Q. And when were you given that, ma'am?

25 A. The next day whenever I talked to Stephanie.

1 Q. There was no alcohol period?

2 A. No, sir.

3 Q. And tell me about what -- what kind of -- when you  
4 took him to the pool party, is it your thinking  
5 that you assumed responsibility for his safety?

6 A. We assumed responsibility for all of them's safety,  
7 sir.

8 Q. My question is --

9 A. Yes, sir, I do.

10 Q. -- when you took Jordan Bowser to this pool party  
11 on May 24th did you assume responsibility for his  
12 safety at that pool?

13 A. Yes, sir. He was with me.

14 Q. Okay. And tell me where were you all observing --  
15 how long -- how long had he been in the pool before  
16 he drowned?

17 A. He was in the pool at least an hour. Then we got  
18 out and ate. They waited 30 minutes before they  
19 got back in. And he was probably in there again  
20 another hour and a half, hour and 40 minutes, sir.

21 Q. And who was -- you said all these adults were  
22 there.

23 A. Yes, sir.

24 Q. How many would you say were there observing this  
25 pool?

Certificate of Counsel

---

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 14, 2019

/s/Paige B. George

Barry B. George

Paige B. George

1419 Bull Street

Columbia, South Carolina 29201

(803) 254-7222

Attorneys for Appellant

**RECEIVED**  
JUN 17 2019  
SC Court of Appeals