THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2016-CP-12-00342

RECEIVED
JUN 17 2019
SC Court of Appeals

Dorothy M. 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.

# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT HAD ESTABLISHED A MERE SCINTILLA OF EVIDENCE AS TO THE NEGLIGENCE OF RESPONDENT DEAN?
2. DID THE LOWER COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BEFORE DISCOVERY WAS COMPLETE?

## STATEMENT OF THE CASE

This action was commenced on August 22, 2016 by Whitney Jackson, Individually and as Guardian ad Litem for minor Jordan B. in the Court of Common Pleas in the Sixth Judicial Circuit. Jackson's Complaint contained negligence causes of action against both Respondent Dean and Defendant Clack.

Depositions were had on December 19, 2017. Following the depositions in this matter, Respondent Dean filed a Motion for Summary Judgment which was heard by the Honorable John C. Hayes, III on September 5, 2018. In an order dated September 10, 2018, the court granted Respondent Dean's motion for Summary Judgment.

Appellant subsequently filed a Motion to Reconsider on September 18, 2018. In an order dated September 21, 2018, the Court reversed its decision and denied Summary Judgment as to Respondent Dean.

Following legal arguments by email between counsel and Judge Hayes, Judge Hayes issued an order reinstating its September 10, 2018 which granted Summary Judgment to Respondent. Appellant filed a second Motion to Reconsider on October 3, 2018 which was denied by Judge Hayes in an order dated October 8, 2018 from which Appellant has appealed.

The original guardian ad litem in this matter is deceased. An order appointing Dorothy Jackson as guardian ad litem for minor Jordan B. was signed on October 15, 2018.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56(c), [South Carolina Rules of Civil Procedure]." Holst v. KCI Konecranes Intl. Corp., 390 S.C. 29, 35, 699 S.E.2d 715 (Ct. App. 2010) (citing Companion Prop & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* (citing Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d. 862, 863 (1997). "In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Id.*

"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, 203 (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." Montgomery v. CSX Transp., Inc., 376 S.C. 37, 656 S.E.2d 20, 29 (2008). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Singleton, 659 S.E.2d at 202.

"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)).

"In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." Crolley v. Hutchins, 300 S.C. 355, 356, 387 S.E.2d 716, 717 (Ct. App. 1989) (citing South Carolina Insurance Company v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

"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) (citing Hook v. Rothstein, 275 S.C. 187, 268 S.E.2d 288 (1980) (emphasis added) "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. "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 facts and that the moving party is

entitled to judgment as a matter of law." South Carolina Rules of Civil Procedure, Rule 56(c).

The Supreme Court has held that "in 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. 381 S.C. 326, 330, 673 S.E.2d, 801, 803 (2009) (emphasis added)

## STATEMENT OF FACTS

On May 24, 2014, the minor Plaintiff, Jordan B. (age 10), was dropped off at the home of Defendant Clack by his grandmother to spend the day with the Clack family while she attended a funeral. (R. p. 110, lines 14-17). Defendant Clack was also Jordan's baseball coach. (R. p. 112, lines 20-21). While attending the funeral, Jordan B.'s grandmother received a text asking if Jordan could attend a birthday pool party with the Clacks. (R. p. 110, lines 21-24). Ms. Jackson initially said no but after persistence on the part of Jordan and the Clacks she relented. (R. p. 111, lines 1-6)

Defendant Clack took Jordan B. to the home of Respondent Dean where the birthday party was being held. (R. p. 117, lines 10-13). Respondent Dean owned the home and had knowledge two weeks prior that a pool party would be held on her property on May 24. (R p. 114, lines 21-24). Respondent Dean's pool had hooks for a rope to delineate the shallow end from the deep end but did not have the rope in the pool water. (R. p. 115 line 17 – R. p. 116 line 14). She instructed her then daughter-in-law who was a host of the party to "make sure that there are plenty of people watching the kids." (R. p. 115 line 2-4).

While at the pool party, Jordan B., who was 4'8" at the time, sank to the bottom of the pool and became unresponsive. (R. p. 103, lines 10-22). Defendant Clack testified in his deposition that Jordan drowned "where the hump goes down" [in the pool]. (R. p. 49) (Depo Alan Clack 22:14 (Dec. 19, 2017)) Jordan B. testified that Defendant Clack's son told Jordan he had gone under in the deep end. (R. p. 107 line 25 – R. p. 108 line 7). Jordan woke up in the back of an ambulance.

(R. p. 103 line 12 – R. p. 104 line 22). He was revived but sustained physical and mental injuries and was hospitalized for four days. (R. p. 113 line 3) While in the hospital, Jordan B. began having nightmares that he was drowning. (R. p. 113 lines 18-19; R. p. 106 lines 1-11). He would be treated and prescribed sleeping medication by a therapist for the mental after effects from drowning. (R. p. 105 lines 18-19).

## ARGUMENTS

I. APPELLANT HAS ESTABLISHED MORE THAN ONE ISSUE OF MATERIAL FACT REGARDING THE NEGLIGENCE OF RESPONDENT DEAN; THEREFORE, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The instant case is one based in negligence and Appellant's burden of proof is the preponderance of the evidence. Therefore, the non-moving party (Appellant) is only "required to submit a mere scintilla of evidence in order to withstand [Respondent's] motion for summary judgment." Hancock, 673 S.E.2d at 803. 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. at 802. 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 in Hancock 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 if it was a dangerous condition, Respondent had no duty to warn since the elevation change was an open an obvious condition." Id. The Court of Appeals in Hancock affirmed the lower court. Id. The Supreme Court **reversed** finding "**Respondent knew or should have known that a dangerous condition existed**" and that "**Respondent should have anticipated the harm**." Id. at 803. (emphasis added)

Respondent Dean is the owner of the property where the incident that makes the basis of Appellant's action took place. She had allowed her daughter-in-law Stephanie Dobbs to hold a birthday party for her son at Respondent Dean's pool on her property. The following are exchanges during Respondent Dean's 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.**

(R. p. 114 line 12 – R. p. 115 line 4)

Q: And I have some pictures here that I was looking at. It looks like there is a place on this pool for 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 am saying is that at the pool there is a place to separate the shallow portion form the deep portion; is that correct?

A: Yes.

Q: And is this – it's a rope that you do this and it has floats on it; is that correct?

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

Q: Was there – when is the last time you had a rope in the pool dividing the shallow from the deep?

A: Probably several years.

Q: There wasn't one on the day of this incident, 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 depth 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.

(R. p. 115 line 17 – R. p. 116 line 20)

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

Jordan B. was a licensee on the property of Respondent Dean as he was a social guest. Neil v. Bynum, 288 S.C. 472, 343 S.E.2d 615 (1986). Respondent Dean, as the landowner, had a duty "to conduct activities on the land so as not to harm the licensee." Additionally, Jordan was of the tender age of ten (10). "[A] property owner may owe a heightened duty to children beyond that owed to adult

licensees or trespassers when 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).

"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 person." 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.

Respondent's pool on her property was an artificial creation. A swimming pool "attracts the childish instincts of children." Respondent Dean should have taken reasonable precautions to protect the children swimming in her pool knowing that children play in pools. Respondent cannot say that she did not know of the childish instincts of children swimming in a pool as she advised her daughter in law to make sure there were enough adults supervising the children swimming. A pool is a dangerous instrumentality because of the inherent danger of drowning.

Respondent testified that her pool had hooks to suspend a rope to delineate the shallow from the deep end. Respondent testified that she had not placed the rope in the pool for years and it was not in the pool the day Jordan was injured.

Jordan testified in his deposition that Defendant Clack's son told him he drowned in the deep end of the pool. Defendant Clack himself testified that Jordan "drowned" where the pool's hump was. Respondent had a social duty to have taken the precaution of suspending the rope to signal to the children in the pool that they were entering the deep end of the pool. Respondent's failure to have the rope in the pool is a material fact for a jury to consider; and, in itself, establishes a mere scintilla of evidence that Respondent was negligent.

Respondent Dean had a duty to conduct activities on her land "so as not to harm the licensee." Singleton, 377 S.C. at 185. Respondent 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 than children at the party and a pool lacking a rope to delineate the deep end from the shallow. There is at minimum a mere scintilla of evidence that the Respondent conducted an activity on her land that was likely to and did cause harm to Jordan B. An owner of land can be liable for injuries "to children of tender years, whether licensees or trespassers" when the person (here Respondent) "so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to [children], from its being so exposed, and is bound to **take reasonable pains to guard it, so as to prevent injury to [children.]"** Lynch v. Motel Enterprises, Inc., 248 S.C. 490, 493, 151 S.E.2d 435 (1966) (quoting Everett v. White, 245 S.C. 331, 140 S.E.2d 582 (1965) (emphasis added)

Respondent had a heightened duty knowing that children would be swimming in her pool; she did not take reasonable steps to prevent injuries to the

minors she knew would be swimming; and, as a result, Jordan B. was injured. As evidenced by Respondent's testimony, the harm was foreseeable to her.

Additionally, Appellant points to the struggle by Judge Hayes in the lower court in determining whether summary judgment should be granted as to Respondent. Appellant argues that Judge Hayes granting summary judgment, then denying summary judgment, then granting summary judgment is a mere scintilla of evidence that there exists a material issue of fact in this case. Clearly, as evidenced by Judge Hayes action, there is more than once conclusion or inference that can be drawn from the facts herein and summary judgment should be denied as to Respondent.

## II. THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE DISCOVERY HAD NOT BEEN COMPLETED SPECIFICALLY, THE DEPOSITION OF DEFENDANT CLACK'S SON HAD NOT BEEN HAD.

Also, Appellant argues that discovery is not complete in this matter; and, therefore, Respondent's Motion for Summary Judgment was untimely. 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.

(R. 107 line 25 – R. 108 line 7)

As evidenced by the excerpt of Jordan B.'s deposition above, Defendant Clack's son has testimony that should be taken as to where in the pool Appellant drowned. Respondent did not identify Defendant Clack's son as a witness in this matter nor identified his expected testimony. The fact that Defendant. Clack's son has not been deposed shows that Appellant and minor Plaintiff has not received a full opportunity to complete discovery; and therefore, Respondent's motion for Summary Judgment was premature.

Respondent will argue that any assertion made by Defendant Clack's son to Jordan B. is hearsay. However, that is a prior statement made by a witness who would be subject to cross examination at trial; and there falls under a hearsay exception. Therefore, that statement can be considered.

## CONCLUSION

Appellant has established a mere scintilla of evidence from which to overcome Respondent's Summary Judgment motion; therefore, this Court should reverse the order of the Circuit Court granting summary judgment or Respondent.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHESTER COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 17, 2019

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