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

Appellate Case No. 2018-001908

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

v.

Allen Clack and Claudia Dean . . . . . *Defendants,*

Of Whom Claudia Dean is . . . . . *Respondent.*

FINAL BRIEF OF RESPONDENT

George V. Hanna, IV
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
ghanna@hnblaw.com
Attorneys for Respondent

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

Appellate Case No. 2018-001908

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

v.

Allen Clack and Claudia Dean . . . . . *Defendants,*

Of Whom Claudia Dean is . . . . . *Respondent.*

FINAL BRIEF OF RESPONDENT

George V. Hanna, IV
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
ghanna@hnblaw.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES & OTHER AUTHORITY

STATEMENT OF ISSUE ON APPEAL

1. **The Circuit Court Was Correct In Granting Respondent's Motion for Summary Judgment.**

   A. There Is No Genuine Issue Of Material Fact

   B. Further Discovery Is Not Needed

STATEMENT OF THE CASE

On August 22, 2016, Whitney Jackson, Individually and as Guardian ad Litem for Jordan B. (the "Minor") filed a lawsuit against Allan Clack ("Clack") and Claudia Dean ("Dean"). (R. pp. 18-20). The Complaint asserted a negligence cause of action for injuries allegedly sustained by the Minor while on the premises of Dean and in the care of Clack. Appellant filed an Answer on November 3, 2016. (R. pp. 21-26). Depositions of Dean, Clack, the Minor and the Minor's grandmother, Dorothy Jackson, were taken on December 19, 2017. Although Appellant deposed Dean and Clack, Appellant did not serve any written discovery on either of the defendants during the pendency of the action.

Dean filed a motion for summary judgment on December 28, 2017, on the grounds that there was no genuine issue of material fact as to whether Dean owed or breached any duty to the Minor. (R. pp. 36-37). Dean filed a memorandum in support of her motion on September 4, 2018. (R. pp. 38-55). Appellant did not serve or file any affidavits or memorandum of law in opposition to Dean's motion for summary judgment.

A hearing on Dean's motion was held before the Honorable John C. Hayes, III, Circuit Court Judge, on September 5, 2018. After taking the matter under advisement, Judge Hayes issued an Order granting Summary Judgment. Judge Hayes addressed each allegation of negligence from the Complaint, as well as those raised at the hearing. The court found there was no question of

material fact and that Dean was entitled to judgment as a matter of law. Specifically, Judge Hayes held that there was no evidence that Dean: 1) knowingly allowed the minor to swim while knowing the minor could not swim; 2) failed to monitor the Minor while he was in the pool; 3) failed to inspect the premises; 4) created an unsafe condition; or 5) failed to place adequate markings delineating the shallow end of the pool from the deep end. In addition, the court rejected Appellant's legal argument raised at the hearing that Dean owed an absolute duty to avoid injury to a licensee in carrying on activities on the land. (R. pp. 1-6).

Appellant filed a Motion to Reconsider on September 18, 2018, alleging two separate but interrelated arguments. First, Appellant argued the Court erred by finding that there was no genuine issues of material fact as to whether the Minor nearly drowned in the deep end or the shallow end. Specifically, Appellant submitted a hearsay statement that was not presented to the court prior to or at the hearing on Respondent's motion for summary judgment in an effort to establish a question of fact as to where in the pool the drowning occurred. Second, Appellant argued that Dean owed a heightened duty to the Minor. (R. pp. 56-67). The same day the Motion to Reconsider was filed, the Court sent an e-mail to counsel indicating it had changed its mind and wanted to deny Dean's Motion for Summary Judgment as a scintilla of fact evidence was present. Counsel for Respondent sent an e-mail to the Court pointing out that Appellant was impermissibly relying on hearsay to create a question of fact. (R. pp. 87-88). Thereafter, an Order was entered denying summary judgment. (R. pp. 7-11). After additional e-mail correspondence between the Court and counsel for Appellant related to comments raised in Respondent's September 19, 2018 correspondence, the Court reinstated its original Order Granting Summary Judgment to Dean (R. pp. 93-95; pp. 12-13). Appellant filed a second Motion to Reconsider on October 4, 2018, realleging essentially the same two arguments from the first Motion to Reconsider and also arguing

that additional discovery is needed. (R. pp. 68-81). On October 4, 2018, counsel for Respondent sent an e-mail to Judge Hayes taking issue with Appellant's newly raised argument regarding the need to complete additional discovery. (R. pp. 98-99). Thereafter, the Court issued an Order Denying the second Motion to Reconsider. (R. pp. 14-15). This appeal followed.

The original Guardian ad Litem, Whitney Jackson, died during the pendency of this action. An Order appointing Dorothy Jackson ("Jackson")—the Minor's grandmother—as Guardian ad Litem was entered on October 15, 2018. (R. pp. 16-17).

STATEMENT OF THE FACTS

Appellant 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 taken to Dean's home by his baseball coach, Clack. (R. p. 18). While at the party, the Minor allegedly sank to the bottom of Dean's pool and suffered injury. (R. p. 19). Appellant alleges that Dean caused Plaintiff's injuries by: (1) allowing the Minor to go swimming knowing the Minor could not swim; (2) in failing to monitor the Minor while the Minor was in the pool; (3) in failing to inspect the premises; (4) in creating an unsafe condition; and (5) in failing to place adequate markings delineating the shallow end of the pool from the deep end. Dean was not present on the day of the party, as she had taken a trip to the beach (R. p. 50; p. 52). *Deposition of Clack P 28 L 21-23*). Jackson also was not present. (R. p. 54). Jackson and the Minor admitted that they did not inform anyone that the Minor could not swim. (R. p. 45; 54). The Minor has no memory of the accident, and it is the uncontroverted testimony of Clack that the incident occurred in the shallow end of the pool. (R. p. 46-47; 49).

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.*

Carolina, Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (citing Rule 56(c), SCRCP). While the appellate court should review the evidence and inferences to be derived therefrom in a light most favorable to the non-moving party, *Lanham*, at 362, 563 S.E.2d at 333, summary judgment should be upheld where the evidence is susceptible of only one reasonable interpretation, *see Brooks*, at 403, 489 S.E.2d at 648 (citing *Clyburn v. Sumter County Sch. Dist. No. 17,* 317 S.C. 50, 52, 451 S.E.2d 885, 887–88 (1994)). In determining whether to grant summary judgment, a court must view the facts in a light most favorable to the non-moving party, but "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, 529 S.E.3d 710 (2000) (internal citations and quotation marks omitted).

ARGUMENT

1. The Circuit Court Was Correct in Granting Respondent's Motion for Summary Judgment.

A. There Is No Genuine Issue Of Material Fact

Appellant's argument that a genuine issue of material fact exists and precludes summary judgment is a house of cards. Appellant's entire argument is predicated upon an *alleged* dispute as to whether the Minor nearly drowned in the shallow end or the deep end of the pool. Based upon this unsupported premise, Appellant argues that a question of fact exists as to whether Dean was negligent by failing to utilize a rope to delineate the shallow end from the deep end of the pool.

As an initial matter, Appellant's argument that a question of fact exists as to the location of the near drowning incident is not preserved for appeal, as Appellant failed to raise this as a

disputed issue of fact until Plaintiff's first Motion to Reconsider.[1] *See, e.g., Estate of Gill v. Clemson Univ. Found*, 397 S.C. 419, 725 S.E.2d 516 (Ct. App. 2012) (issue first raised in motion to reconsider is not preserved); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (noting that an argument raised for the first time in a Rule 59(e) Motion is not preserved for appellate review); *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

However, even if Appellant's argument that an issue of fact exists as to the location of the drowning incident is preserved, which is denied, the fatal flaw in Appellant's argument is that she is impermissibly relying on inadmissible hearsay in order to create the alleged question of fact. A review of the actual deposition testimony of the Minor makes this abundantly clear:

> Q – But you don't know which end you got hurt in, do you?
>
> A – No
>
> Q – If I told you everybody else is going to say you got hurt in the shallow end, are you going to dispute that?
>
> Objection
>
> Q – Answer the question. This is a deposition. Do you understand?
>
> A – Yes
>
> Q – Has anybody ever told you were in the deep end?
>
> A – Yes
>
> Q – Who?
>
> A – Darby?
>
> Q – Who's Darby?

[1] At the hearing on Dean's motion for summary judgment, Appellant did not offer any rebuttal or challenge to Respondent's recitation of the facts of the case and contention that the undisputed evidence in the record established that the drowning incident occurred in the shallow end of Respondent's pool. (R. pp. 27-35).

A – Coach Alan's Son.

Q – When did he say that?

A – Whenever I was at the hospital.

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

A – No sir.

(R. p. 46).

The alleged statement of Darby[2] is textbook hearsay. Appellant is relying not on what the Minor knows, but what Clack's son allegedly told the Minor for the truth of the matter asserted. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted"). Inadmissible hearsay cannot be used to refute a motion for summary judgment. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App 2002); *see also Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *aff'd*, 319 S.C. 79, 459 S.E.2d 850 (1995) ("A genuine issue of fact … can be created only by evidence which would be admissible at trial."). Since no exception to the hearsay rule applies to the alleged statement of Clack's son, Appellant cannot use this statement to overcome summary judgment.[3]

The only admissible testimony in the record before the Circuit Court concerning the location of the Minor's near drowning incident was the following testimony of Clack:

Q – was he on the bottom of the pool?

---

[2] Darby is Clack's son.

[3] Appellant contends that the alleged statement by Clack's son is admissible as a prior statement made by a witness. (Appellant's Brief 14). However, this exception does not apply. In *Hall*, the plaintiff similarly proffered his own deposition testimony concerning a statement allegedly made to him by a witness in an attempt to survive summary judgment. The *Hall* Court noted that the statement was hearsay, that it did not fall under any of the hearsay exceptions and that it could not be used to refute a motion for summary judgment. *Hall*, at 175-176.

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

Q – All right. So this happened at the shallow end?

A – Right there were the shallow end's got the little bump, sir.

Q – I think there has been some testimony there was a question that he was in the deep end.

A – No sir.

(R. p. 49).

Pursuant to South Carolina law, "[w]hen a motion for summary judgment is made and supported as provided in [Rule 56, *SCRCP*], an adverse party may not rest upon the mere allegations or denials of its pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(c), *SCRCP*. Here, Appellant failed to introduce any admissible evidence to refute that the near drowning incident occurred in the shallow end of the pool. The deposition testimony of Clack clearly demonstrates that the drowning incident happened in the shallow end. Appellant has failed to produce admissible evidence to challenge this testimony of Clack.

In light of the absence of any issue of fact as to where the Minor's drowning incident occurred, the lower court correctly determined that summary judgment was appropriate. Appellant has specified several alleged acts of negligence on the part of Dean, each of which was addressed and ruled upon by the lower court. Of the various acts of alleged negligence alleged by Appellant[4],

[4] Plaintiff alleges Dean was negligent for (1) allowing the Minor to swim while knowing the Minor could not swim; (2) failing to monitor the Minor in the pool; (3) failing to inspect her premises; (4) creating an unsafe condition on the property; and (5) failing to place adequate markings delineating the shallow end of the pool from the deep end. However, it is undisputed that Dean did not know that the Minor was even attending the party, let alone that the minor would be swimming in her pool and could not swim. It is also undisputed that the Minor did not tell anyone at the party that he could not swim. Furthermore, it is undisputed that Dean was not present at the pool party and that the Minor, along with the other children, were being actively monitored by adults in attendance. Plaintiff has failed to cite any controlling authority establishing that Dean had a duty to be present at the pool party to monitor the children,

Appellant relies most heavily on her allegation that Dean was negligent for failing to "suspend a rope [across the pool] to delineate the shallow from the deep end."(Appellant's Brief 11). Yet, as discussed above, the admissible evidence in the record is undisputed that the Minor's drowning incident occurred in the shallow end of the pool. Therefore, the absence of a rope had no causal connection to the Minor's accident. In fact, there is zero testimony in the record that the Minor was confused about the depth of the pool or that the depth of the pool contributed to his accident. It is pure speculation on the part of Appellant that the presence of a rope would have prevented the drowning incident. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 615-16 (Ct. App. 2009) (affirming summary judgment for the defendant where plaintiff's assertions of liability were speculative and based upon conjecture).

Finally, to the extent Appellant maintains that Dean owed a heightened duty to the Minor because he was a child, any such duty is not absolute. Moreover, any such duty does not create strict liability on the part of Dean. Thus, even if Plaintiff could establish that Dean owed Plaintiff a duty[5], Appellant must show a genuine issue of fact that Dean breached such duty to the Minor. Here, the lower court determined that, based upon the undisputed admissible facts in the record, there was no genuine issue of material fact that Dean did not breach any duty owed to the Minor, and thus, was entitled to summary judgment. Specifically, the lower court held that "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

---

particularly where, as here, all the children at the party were being monitored by numerous adults. Additionally, there is zero evidence that an inspection of the premises would have prevented any injury to the Minor.

[5] The lower court held that the scope of the duty owed to licensees "was not 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." (R. p. 5).

end of the pool." (R. pp. 4-5). Accordingly, summary judgment was properly granted to Dean. *See Pryor v. Nw. Apartments*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (affirming summary judgment for the defendant where there was no evidence the defendant breached his duty of care.)

B. Further Discovery Is Not Needed

Appellant contends that summary judgment was premature and that she should have been afforded more time to conduct discovery. This contention is meritless. As an initial matter, this argument should not be considered by the Court, as it was raised for the first time in Appellant's second Motion to Reconsider of October 4, 2018, and thus, is not preserved for appellate review. *See Estate of Gill v. Clemson Univ. Found*, 397 S.C. 419, 725 S.E.2d 516 (Ct. App. 2012) (issue first raised in motion to reconsider is not preserved); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (noting that an argument raised for the first time in a Rule 59(e) Motion is not preserved for appellate review).

Even if Appellant's argument that summary judgment was prematurely granted is preserved on appeal, which is denied, Appellant cannot show that she was denied a full and fair opportunity to conduct discovery. "A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case . . .." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009). Moreover, the party must not have been dilatory in conducting discovery. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 113, 410 S.E.2d 537 (1991).

Here, Appellant maintains summary judgment was prematurely granted because discovery was incomplete. Specifically, Appellant alleges she needs more time to take the deposition of

Clack's son. However, Appellant had ample time to take this deposition prior to the hearing on Dean's motion for summary judgment. This case was initially filed on August 2, 2016. Meanwhile, Dean's Motion for Summary Judgment was not heard until September 5, 2018—more than a year after the case was filed and nine months after Dean's motion for summary judgment was filed. During this time, Plaintiff only took the depositions of Dean and Clack. These depositions were taken on December 19, 2017—the same date as the depositions of Jackson and the Minor. When these depositions were taken, Dean and Jackson both testified they were not present on the date in question and had no first-hand knowledge of the incident. Clack unequivocally testified that the incident occurred in the shallow end. The Minor did not remember what happened and only offered hearsay as to where the incident occurred in the pool. Dean filed her Motion for Summary Judgment on December 28, 2017, less than two weeks later. In the nine plus months that elapsed between the filing of the Motion for Summary Judgment and the hearing, Appellant knew or should have known that the only affirmative evidence in the record to dispute this key issue was based on hearsay. During this entire time, Appellant knew the identity of the hearsay declarant and never once made an effort to depose him.

In light of the above, Appellant simply cannot show that she did not have a full and fair opportunity to conduct discovery prior to the hearing on Respondent's Motion for Summary Judgment. Appellant has offered no explanation as to why the nine (9) months between the filing of Dean's motion for summary judgment and the hearing was insufficient time to conduct the discovery now requested. *See Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App.1995) (affirming summary judgment where appellants failed to put forth "a good reason why four months was insufficient time under the facts of [the] case to develop documentation in opposition to the motion for

summary judgment"). Appellant had the burden of prosecuting her action. *See McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) ("A plaintiff has the burden of prosecuting her action[.]"). Yet, she was dilatory in doing so. She had ample time—more than nine (9) months—to conduct any discovery she deemed necessary for the purposes of contesting Respondent's motion for summary judgment. For Appellant to argue for the first time in her second Motion to Reconsider that she needs more time to take the deposition of Defendant Clack's son strains credulity.[6]

CONCLUSION

For the reasons discussed above, as well as for any other ground appearing on the record, Respondents respectfully requests this Court affirm the circuit court's grant of summary judgment.

Respectfully submitted,

George V. Hanna, IV
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
ghanna@hnblaw.com
Attorneys for Respondent

June 17, 2019

[6] While Appellant argues in her brief that Dean never identified Clack's son as a witness, this contention is absurd given that (1) Appellant never served written discovery on Dean; (2) Appellant has long known that Dean was not present at the pool party and had no first-hand knowledge as to who was there; and (3) the Minor went to the party with Clack and his son, so Appellant presumably did not need to be told that Clack's son was there, as Appellant already knew this information.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 18 2019
SC Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2018-001908

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

v.

Allen Clack and Claudia Dean . . . . . *Defendants,*

Of Whom Claudia Dean is . . . . . *Respondent.*

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR.

BY: _____

George V. Hanna, IV
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
ghanna@hnblaw.com
jsilverberg@hnblaw.com
Attorneys for Respondent

June 18, 2019
Columbia, South Carolina