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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

*On Petition for Writ of Certiorari
To the Supreme Court of South Carolina*

Appellate Case No. 2017-001330
Unpublished Opinion No. 2019-UP-110
(Rehearing denied June 5, 2019)

Kenji Kilgore,

Petitioner,


v.

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

Respondents.

APPENDIX FOR
PETITION FOR CERTIORARI

Anderson, South Carolina
June 27, 2019


Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
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attorneydonaldsmith@gmail.com
Attorney for Petitioner

Other Counsel of Record:

Robert E. Davis, Esquire
WARD Law firm
223 East Pine Street
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(864) 591-2369
(864)-585-3090
Attorney for Respondents

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED

DEC 11 2017

SC Court of Appeals

Kenji C. Kilgore,

Appellant,

v.

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

Respondents.

APPELLANT'S AMENDED RECORD ON APPEAL

Anderson, South Carolina
December 6, 2017



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Other Counsel of Record:

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Spartanburg, SC 29304
Attorney for Respondents

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COMPLAINT
07/1/15

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON:)

Kenji C. Kilgore,)

Plaintiff,)

vs.)

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

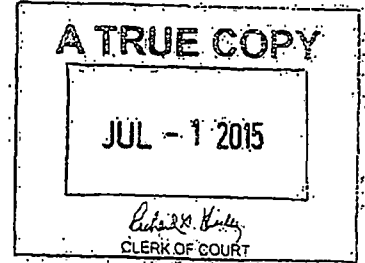
Defendants.)

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

Case No. 2015-CP-04-01605

COMPLAINT



Plaintiff would respectfully allege and show unto the Court the following:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff is a citizen and resident of Greenwood County, South Carolina.
2. Upon information and belief, the Estate of Samuel Joe Dixon ("Joe Dixon"), is an estate in Anderson County, South Carolina.
3. Upon information and belief, Defendants Samuel E. Dixon ("Samuel Dixon") and Fredda L. Dixon, ("Fredda Dixon") are citizens and residents of Anderson County, South Carolina.
4. The Court has jurisdiction over all parties and subject matter raised herein, and venue is proper in Anderson County.

FACTUAL ALLEGATIONS

5. Prior to July 2012, Plaintiff began living in a house at 240 Thompson Road, Starr, SC 29684, in Anderson County.
6. Samuel and Fredda Dixon owned the real estate that Plaintiff rented to live in.

7. Samuel and Fredda Dixon's son Joe Dixon was Plaintiff's roommate at the rented house:

8. On or about July 2, 2012, Joe Dixon shot Plaintiff several times without provocation inside the rented house.

9. As a result of the gunshots, Plaintiff suffered severe injuries to Plaintiff's person.

FIRST CAUSE OF ACTION AGAINST ESTATE OF JOE DIXON
(Assault)

10. Plaintiff hereby reiterates and realleges Paragraphs 1-9 as though set forth herein verbatim.

11. Joe Dixon created a reasonable apprehension of immediate harmful or offensive touching in Plaintiff by pointing and presenting a handgun at Plaintiff and shooting him.

12. Joe Dixon's actions were done intentionally.

13. As the direct and proximate result of the aforesaid intentional acts or omissions of Joe Dixon, Plaintiff:

- a. Was painfully injured;
- b. Was subject to the administration of medication;
- c. Was subject to pain, mental anguish, suffering, and discomfort over a period of time;
- d. Has incurred substantial medical bills; and
- e. Has been limited in his participation in recreational activities from which, prior to the accident, he derived a great deal of personal enjoyment and satisfaction.

14. Joe Dixon acted in reckless and wanton disregard for the life and safety of others.

15. Plaintiff is entitled to such actual and consequential damages as an enlightened jury should award.

16. Plaintiff is entitled to damages for loss of enjoyment of life, compensation for limitations to his ability to participate in and derive and derive pleasure from the normal activities of daily life, and his inability to pursue his talents, recreational interest, hobbies, and avocations.

17. Plaintiff is entitled to damages for pain and suffering because of physical discomfort and emotional response to the sensation of pain caused by the injury and mental anguish for shock, fright, emotional upset, and/or humiliation.

**SECOND CAUSE OF ACTION AGAINST ESTATE OF JOE DIXON
(Battery)**

18. Plaintiff hereby reiterates and realleges Paragraphs 1-17 as though set forth herein verbatim.

19. Joe Dixon's shooting of Plaintiff constituted a harmful or offensive touching without consent,

20. Joe Dixon intended to commit the contact when he took several shots at Plaintiff.

21. Joe Dixon's actions were done intentionally.

22. As the direct and proximate result of the aforesaid intentional acts or omissions of Joe Dixon, Plaintiff:

- a. Was painfully injured;
- b. Was subject to the administration of medication;
- c. Was subject to pain, mental anguish, suffering, and discomfort over a period of time;
- d. Has incurred substantial medical bills; and

e. Has been limited in his participation in recreational activities from which, prior to the accident, he derived a great deal of personal enjoyment and satisfaction.

23. Joe Dixon acted in reckless and wanton disregard for the life and safety of others.

24. Plaintiff is entitled to such actual and consequential damages as an enlightened jury should award.

25. Plaintiff is entitled to damages for loss of enjoyment of life, compensation for limitations to his ability to participate in and derive and derive pleasure from the normal activities of daily life, and his inability to pursue his talents, recreational interest, hobbies, and avocations.

26. Plaintiff is entitled to damages for pain and suffering because of physical discomfort and emotional response to the sensation of pain caused by the injury and mental anguish for shock, fright, emotional upset, and/or humiliation.

**FOR A THIRD CAUSE OF ACTION AGAINST SAMUEL E. DIXON AND FREDDA L.
DIXON
(Negligence)**

27. Plaintiff hereby reiterates and realleges Paragraphs 1-26 as though set forth herein verbatim.

28. Samuel E. Dixon and Fredda L. Dixon owed Plaintiff a duty to warn him, prior to him moving into their house, of the danger posed by Joe Dixon, their son and his roommate, because of his propensity for violence and erratic behavior.

29. Samuel and Fredda Dixon breached this duty by acting in a careless, negligent, grossly negligent, reckless, and unlawful manner as hereinafter set forth and in the following particulars:

- a. In failing to warn Plaintiff of their son's propensity for violence;
- b. In failing to warn Plaintiff of their son's recent history of erratic behavior prior to the incident; and
- c. In failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same and similar circumstances.

30. As the direct and proximate result of the aforesaid negligent and careless acts or omissions of Samuel and Fredda Dixon, Plaintiff:

- a. Was painfully injured;
- b. Was subject to the administration of medication;
- c. Was subject to pain, mental anguish, suffering, and discomfort over a period of time;
- d. Has incurred substantial medical bills; and
- e. Has been limited in his participation in recreational activities from which, prior to the accident, he derived a great deal of personal enjoyment and satisfaction.

31. Samuel and Fredda Dixon acted in reckless and wanton disregard for the life and safety of others.

32. Plaintiff is entitled to such actual and consequential damages as an enlightened jury should award.

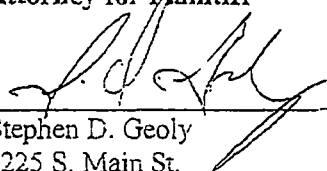
33. Plaintiff is entitled to damages for loss of enjoyment of life, compensation for limitations to his ability to participate in and derive and derive pleasure from the normal activities of daily life, and his inability to pursue his talents, recreational interest, hobbies, and avocations.

34. Plaintiff is entitled to damages for pain and suffering because of physical discomfort and emotional response to the sensation of pain caused by the injury and mental anguish for shock, fright, emotional upset, and/or humiliation.

WHEREFORE, Plaintiff prays for the following relief:

1. For actual, incidental, consequential, special, and punitive damages such as should be awarded by a jury at the trial of this case;
2. For a trial by jury;
3. For costs and legal fees; and
4. For such other and further relief as the Court deems just, equitable, and proper.

THE GEOLY LAW FIRM
Attorney for Plaintiff



Stephen D. Geoly
1225 S. Main St.
Greenwood, SC 29646
(864)223-3352
Fax (864)223-3400

Greenwood, South Carolina

July 4, 2015

ANSWER
11/09/15



STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
OF ANDERSON COUNTY
C. A. NO.: 2015-CP-04-01605

Kenji C. Kilgore,)
)
Plaintiff,)

**DEFENDANTS' ANSWER TO
PLAINTIFF'S COMPLAINT**

vs.)

(JURY TRIAL DEMANDED)

Estate of Samuel Joe Dixon, Samuel E.
Dixon, and Fredda L. Dixon,)
)
Defendants.)

Samuel E. Dixon and Fredda L. Dixon, Defendants, answering the Complaint, will show
this Court that:

1. All allegations not expressly admitted, modified, or explained are denied.
2. Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 1, 2, 4, and 9.
3. Defendants admit paragraph 3.
4. Defendants deny paragraphs 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, and 34.
5. In response to paragraphs 10, 18, and 27, Defendants reallege and incorporate in this paragraph the relevant and consistent allegations and responses contained in this Answer.

FOR A FIRST DEFENSE

6. Defendants reallege and incorporate in this paragraph the relevant and consistent allegations and responses contained in the preceding paragraphs of this Answer.

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7. Plaintiff's action against the Defendants should be dismissed for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

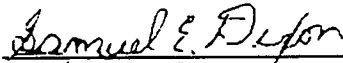
8. Defendants reallege and incorporate in this paragraph the relevant and consistent allegations and responses contained in the preceding paragraphs of this Answer.
9. Plaintiff's action against the Defendants is barred by the doctrine of self-defense.

FOR A THIRD DEFENSE

10. Defendants reallege and incorporate in this paragraph the relevant and consistent allegations and responses contained in the preceding paragraphs of this Answer.
11. Any injuries and damages sustained by Plaintiff were due to and proximately caused by the negligence, carelessness, and recklessness of Plaintiff. As a result, Plaintiff should be barred from any recovery against Defendants in this action.

WHEREFORE, the Defendants ask this Court to issue an order dismissing the Complaint with prejudice, awarding the Defendants the cost incurred in defending this matter, and such other further relief as this Court deems just and proper.

Respectfully submitted, ,



Samuel E. Dixon

Pro Se

230 Thompson Road
Anderson, South Carolina 29624
864-296-4948

NOV
Dated: ~~Oct~~ 9 2015
Anderson, South Carolina

MOTION TO DISMISS

03/04/16

MOTION FEE PAID

ENTERED
136

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)
)
Kenji C. Kilgore,)
)
Plaintiff,)
)
vs.)
)
Estate of Samuel Joe Dixon,)
)
Samuel E. Dixon, and)
)
Fredda L. Dixon,)
)
Defendants)

IN THE COURT OF COMMON PLEAS
(Jury Trial Demanded)

MOTION TO DISMISS
SAMUEL E. DIXON AND FREDDA L. DIXON
C/A#: 2015-CP-04-1605

Samuel E. Dixon and Fredda L. Dixon move to dismiss the Complaint against them for failure to state a cause of action upon which relief can be granted.

THE WARD LAW FIRM, P.A.
Attorneys for Defendants Samuel E. Dixon
and Fredda L. Dixon



Robert E. Davis
233 South Pine Street
P. O. Box 5663
Spartanburg, South Carolina 29304
(864) 591-2369
(864) 585-3090 (facsimile)

2/29, 2016.

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ANDERSON, SC
2016 MAR -4 PM 8:20
COMMON PLEAS AND
GENERAL SESSIONS

BRIEF IN SUPPORT OF
MOTION TO DISMISS

04/28/16

COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON) (Jury Trial Demanded)

Kenji C. Kilgore,)

Plaintiff,)

vs.)

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

Defendants)

**BRIEF IN SUPPORT OF MOTION TO DISMISS
SAMUEL E. DIXON AND FREDDA L. DIXON**

C/A#: 2015-CP-04-1605

Samuel E. Dixon and Fredda L. Dixon move to dismiss the Complaint against them for failure to state a cause of action upon which relief can be granted. South Carolina does not recognize any duty that Samuel E. Dixon and Fredda L. Dixon owed to Plaintiff that would entitle Plaintiff to recover against them. This Court, therefore, should dismiss Samuel E. Dixon and Fredda L. Dixon from this action as a matter of law.

Facts Alleged In the Complaint

In the Complaint, Plaintiff alleges:

1. Prior to July 2012, Plaintiff began living in a house at 240 Thompson Road, Starr, SC 29684 in Anderson County. (Paragraph 5)
2. Samuel and Fredda Dixon owned the real estate that Plaintiff rented to live in. (Paragraph 6)
3. Samuel and Fredda Dixon's son Joe Dixon was Plaintiff's roommate at the rented house. (Paragraph 7)
4. On or about July 2, 2012, Joe Dixon shot Plaintiff inside the rented house by the

criminal acts of a third party. (Paragraph 20).

5. Joe Dixon intentionally shot Plaintiff. (Paragraphs 12 & 21)

Standard of Review

Pursuant to Rule 12(b)(6), SCRPC, a trial court must dismiss a claim when the pleadings, taken in the light most favorable to the plaintiff, fail to allege facts to constitute a cause of action. See James F. Flanagan, South Carolina Civil Procedure 101 (3d. ed. 2010). A Rule 12(b)(6) motion tests the legal sufficiency of the allegations in the pleading. Id. “All well pleaded allegations are taken as true but not conclusions of law, and not necessarily inferences drawn by the plaintiff from the facts.” Id. at 102. Whether a duty exists as a necessary element in a negligence action is a question of law for the trial court. Skinner v. South Carolina Dept. of Trans., 383 S.C. 520, 523, 681 S.E.2d 871, 873 (2009).

Argument

Samuel E. Dixon and Fredda L. Dixon owed no duty to Plaintiff for the alleged criminal act of a third party.

I. Samuel E. Dixon and Fredda L. Dixon Owed No Duty As Landlords.

South Carolina does not recognize a duty for landlords to protect tenants from criminal activity. Cramer v. Balcor Property Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994).

In Cramer, the Decedent was murdered in her apartment by the criminal act of a third party. Decedent’s Estate brought suit against Decedent’s landlords arguing the landlords owed a duty to protect Decedent/Tenant from the criminal acts of a third party. The United States District Court for the District of South Carolina certified the following question to the South Carolina Supreme Court:

Does a landlord owe a duty to a tenant to provide security in and around a leased premises so as to protect the tenant from criminal activity of third parties?

Id. at 441, 441 S.E.2d at 317. Noting that a “landlord cannot be expected to protect [tenants] against

the wiles of felony any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself,” the South Carolina Supreme Court failed to recognize such a duty. Id. at 443, 441 S.E.2d at 318.

Plaintiff, therefore, cannot make allegations against Samuel E. Dixon and Fredda L. Dixon that they owed any duty arising out the landlord tenant relationship based on the facts alleged in the Complaint. Id.

II. Samuel E. Dixon and Fredda L. Dixon Owed No Duty to Warn.

“South Carolina law does not recognize a general duty to warn of the dangerous propensity of others.” Bishop v. South Carolina Dep’t of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 82 (1998).

In Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct.App. 2014), *cert. granted*, the mother of several minors, Roe, brought suit against Bibby, the wife of a man accused of molesting the minors. Bibby was aware that her husband had previously molested a minor, their daughter, in the past. Despite this knowledge and her status as the wife of a child molester, the South Carolina Court of Appeals held that a mere familial relationship is not enough to create any duty to warn. Id. at 295-96; 763 S.E.2d at 649-50. For such a duty to exist, there must be an allegation and proof of the ability to monitor, supervise and control an individual’s conduct that is created by statute or a commercial agreement coupled with a specific threat against the victim. Id.; see, e.g., Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (assuming special relationship between psychiatrist and patient/injurer); Faile v. South Carolina Dep’t of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002) (finding special relationship between Department of Juvenile Justice and dangerous juvenile/injurer over whom it had custody per court order); Bishop v. South Carolina Dep’t of

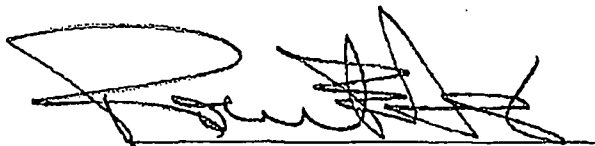
at 86, 502 S.E.2d at 81 (finding special relationship between Department of Mental Health and involuntarily-committed patient/injurer in its custody); Rogers v. S.C. Dep't of Parole & Cmty. Corr., et al., 320 S.C. 253, 464 S.E.2d 330 (1995) (assuming special relationship between state agencies charged with prisoner parole and prisoner/injurer who was being released from custody (but finding no specific threat)).

In this case, there exists no allegations or evidence that would permit such an allegation under Rule 11, SCRPC, that Samuel and Fredda Dixon had the ability to monitor, supervise and control another adult, Joe Dixon, or that any specific threats were made against Plaintiff. Accordingly, Samuel E. Dixon and Fredda L. Dixon are entitled to judgment as a matter of law. Id.

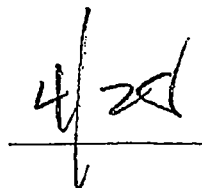
Conclusion

This case should have never been filed against Samuel E. Dixon and Fredda L. Dixon. They cannot be liable to Plaintiff for the allegations in this case. This Court, therefore, should grant their motion to dismiss.

THE WARD LAW FIRM, P.A.
Attorneys for Defendants Samuel E. Dixon
and Fredda L. Dixon



Robert E. Davis
233 South Pine Street
P. O. Box 5663
Spartanburg, South Carolina 29304
(864) 591-2369
(864) 585-3090 (facsimile)

 2016.

ORDER
05/02/16

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON
 IN THE COURT OF COMMON PLEAS AND CLERK'S OFFICE
 ANDERSON SC

FORM 4
 JUDGMENT IN A CIVIL CASE

Case No. 2015-CP-04-1605



Kenji C Kilgore Estate of Samuel Joe Dixon
 2016 MAY -2 AM 11: 04

PLAINTIFF(S)	COMMON PLEAS AND GENERAL SESSIONS	DEFENDANT(S)
Submitted by:		Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant

- DISPOSITION TYPE (CHECK ONE)**
- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
 - DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
 - ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
 - ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
 - DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

MOTION CONTINUED TO PERFECT SERVICE

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
 The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

2155 4-29-16
 Circuit Court Judge Judge Code Date

ORDER OF MEDIATION

06/07/16

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON
 IN THE COURT OF COMMON PLEAS

FILED-CLERK'S OFFICE
 ANDERSON SC

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2015CP0401605



Kenji C Kilgore

2016 JUN -7 PM 12:33

Estate Of Samuel Joe
 Dixon

Samuel E Dixon

COMMON PLEAS AND
 GENERAL SESSIONS

Fredda L Dixon

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: **Kathy M. Hall, ADR Coordinator**

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court;

Mediation shall be completed on or before September 30, 2016. Please see attached correspondence from Robert Eric Davis.

ORDER INFORMATION

This order ends does not end the case.

Additional information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

J. Cordell Maddox, Jr.
 Circuit Court Judge – J. Cordell Maddox, Jr.

2131
 Judge Code

6/3/16
 Date

For Clerk of Court Office Use Only

Feb

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Stephen Drew Geoly 1225 S. Main St. Greenwood, SC 29646

Samuel E Dixon 230 Thompson Road Anderson, SC 29624
Robert Eric Davis PO Box 5663 Spartanburg, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Richard A. Shirley

Court Reporter

Richard A. Shirley - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-CLERKS OFFICE
ANDERSON SC
2016 JUN -7 PM 12:33
COMMON PLEAS AND
GENERAL SESSIONS

LETTER OF PREVIOUS COUNSEL

06/13/16

The State of South Carolina.



OFFICE OF THE SOLICITOR
EIGHTH JUDICIAL CIRCUIT



Tel: (864) 942-8824
Fax: (864) 942-8830

Abbeville
Greenwood
Laurens
Newberry

2015CP0401605

DAVID M. STUMBO
SOLICITOR

June 10, 2016

To Whom It May Concern:

Please be advised that Stephen Geoly is the attorney of record on the case of The State of South Carolina v. Ricky Yeldell in Greenwood County General Sessions. This matter is set for jury qualification and selection on Monday, June 13, 2016.

If you have any questions or comments, please do not hesitate to call.

Sincerely,

C. Lance Sheek
Assistant Solicitor

FILED-CLERK'S OFFICE
ANDERSON SC
2016 JUN 13 AM 9:48
COMMON PLEAS AND
GENERAL SESSIONS

MOTION TO COMPEL SETTLEMENT

11/07/16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	(Jury Trial Demanded)
Kenji C. Kilgore,)	
)	
Plaintiff,	)	MOTION TO COMPEL SETTLEMENT
vs.)	
	)	C/A#: 2015-CP-04-1605
Estate of Samuel Joe Dixon,)	
Samuel E. Dixon, and)	
Fredda L. Dixon,)	
)	
Defendants.)	

Defendants move to compel a settlement reached and reported to the Court in August 2016. Samuel E. Dixon and Fredda L. Dixon moved in February 2016 to have the claims against them dismissed for failure to state a cause of action upon which relief can be granted. A hearing was set on April 29, 2016 before Judge McIntosh, and Plaintiff's counsel failed to appear due to a lack of notice. The hearing was rescheduled and notice provided to Plaintiff's counsel of record. Before the hearing was conducted, however, Plaintiff's counsel and the undersigned entered into settlement negotiations. As confirmed by the attached letter of August 3, 2016, the parties agreed to "a settlement amount of \$1,250 in exchange for a receipt and release of Defendants and a dismissal with prejudice of all claims in the case." Defendants complied with the terms of the settlement and a check was sent to Plaintiff along with a Receipt and Release and Stipulation of Dismissal on August 9, 2016. Furthermore, this Court was notified that the hearing on the motion filed in February was no longer necessary, and the hearing was removed from the docket. Plaintiff, however, has failed to return the Release and Dismissal. Defendants request that this Court compel settlement, dismiss this case with prejudice, note on the record that all claims against Defendants arising out of

Plaintiff's Complaint are released, and award attorney's fees and costs for having to file this Motion.
In the alternative, Defendants request a dismissal of this case pursuant to the Motion previously filed
and award attorney's fees and costs.

THE WARD LAW FIRM, P.A.
Attorneys for Defendants

s/Robert E. Davis
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Dated: November 7, 2016.

ELECTRONICALLY FILED - 2016 Nov 07 3:08 PM - ANDERSON - COMMON PLEAS - CASE#2015CP0401605

ORDER OF DISMISSAL
01/24/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS)
))
COUNTY OF ANDERSON	)	(Jury Trial Demanded))
))
Kenji C. Kilgore,))
))
Plaintiff,))
))
	)	vs.)
	)	Order Dismissing Case)
))
Estate of Samuel Joe Dixon,))
	)	C/A#: 2015-CP-04-)
	)	1605)
))
Samuel E. Dixon, and))
Fredda L. Dixon.))
))
Defendants))
))

On January 23, 2017, personally appeared before me Attorney Robert Davis on a Motion to Dismiss the Complaint.¹ Based on the evidence presented and applicable law, this Court dismisses this case with prejudice.

Procedural History

A hearing on a defense motion to dismiss was originally set for April 29, 2016. Defense counsel appeared for the hearing, but the motion was continued due to a notice issue with Plaintiff's attorney. The hearing was rescheduled for June 13, 2016. Plaintiff's attorney developed a conflict a few days before the June hearing. Another hearing was rescheduled for August 2016. Before the August hearing, this Court was notified of a settlement, and the motion was removed from the roster.

¹ In the alternative, a Motion to Compel Settlement was filed. Because this Court finds the Complaint should be dismissed as to all Defendants, the Motion to Compel Settlement was not reached.

On or about November 7, 2016, a Motion to Compel Settlement was filed as an alternative to the previous defense motion. The Motion alleges that on or about August 9, 2016, a settlement check, release, and stipulation of dismissal was sent to Plaintiff's attorney. None of the settlement documents or the settlement check were returned by Plaintiff. By letter to the Court, it was requested that both motions be scheduled for a hearing.

On December 22, 2016, the clerk of court scheduled a hearing on the pending motions and notice was given to all counsel of record. The hearing was set for January 23, 2017, at 11:00.

On January 19, 2017, Attorney Davis wrote the Court and all attorneys of record that he desired for the hearing in this case to go forward for January 23, 2017, but he was also scheduled for a jury trial in the Anderson Court of Common Pleas for a term also beginning on January 23, 2017. Attorney Davis advised that his case was second for trial, and he needed to appear for a roster meeting and jury qualification with Judge Hocker. Attorney Davis indicated that he would appear for the hearing in this case once he obtained permission from Judge Hocker following jury qualification.

On January 23, 2017, Attorney Davis appeared before me shortly before 11:00 for the hearing on this case. He had previously been present for the roster meeting and jury qualification before Judge Hocker. No attorneys appeared for Plaintiff. This Court delayed the hearing while counsel of record for Plaintiff were attempted to be contacted. After a delay and verifying with the clerk of court that Plaintiff's counsel were notified of the hearing, this Court moved forward with hearing.

Standard of Review

Pursuant to Rule 12(b)(6), SCRCP, a trial court must dismiss a claim when the pleadings,

taken in the light most favorable to the plaintiff, fail to allege facts to constitute a cause of action. See James F. Flanagan, South Carolina Civil Procedure 101 (3d. ed. 2010). A Rule 12(b)(6) motion tests the legal sufficiency of the allegations in the pleading. Id. “All well pleaded allegations are taken as true but not conclusions of law, and not necessarily inferences drawn by the plaintiff from the facts.” Id. at 102. Whether a duty exists as a necessary element in a negligence action is a question of law for the trial court. Skinner v. South Carolina Dept. of Trans., 383 S.C. 520, 523, 681 S.E.2d 871, 873 (2009).

Facts Alleged In the Complaint

In the Complaint, Plaintiff alleges:

1. Prior to July 2012, Plaintiff began living in a house at 240 Thompson Road, Starr, SC 29684 in Anderson County.
2. Samuel and Fredda Dixon owned the real estate that Plaintiff rented to live in.
3. Samuel and Fredda Dixon’s son Joe Dixon was Plaintiff’s roommate at the rented house.
4. On or about July 2, 2012, Joe Dixon shot Plaintiff inside the rented house by the criminal acts of a third party.
5. Joe Dixon intentionally shot Plaintiff.

Dismissal of Samuel and Fredda Dixon

Samuel E. Dixon and Fredda L. Dixon argue they owed no duty to Plaintiff for the alleged criminal act of a third party. I agree.

I. Samuel E. Dixon and Fredda L. Dixon Owed No Duty As Landlords.

South Carolina does not recognize a duty for landlords to protect tenants from criminal

activity. Cramer v. Balcor Property Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994).

In Cramer, the Decedent was murdered in her apartment by the criminal act of a third party. Decedent's Estate brought suit against Decedent's landlords arguing the landlords owed a duty to protect Decedent/Tenant from the criminal acts of a third party. The United States District Court for the District of South Carolina certified the following question to the South Carolina Supreme Court:

Does a landlord owe a duty to a tenant to provide security in and around a leased premises so as to protect the tenant from criminal activity of third parties?

Id. at 441, 441 S.E.2d at 317. Noting that a "landlord cannot be expected to protect [tenants] against the wiles of felony any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself," the South Carolina Supreme Court failed to recognize such a duty. Id. at 443, 441 S.E.2d at 318.

Plaintiff, therefore, cannot make allegations against Samuel E. Dixon and Fredda L. Dixon that they owed any duty arising out the landlord tenant relationship based on the facts alleged in the Complaint. Id.

II. Samuel E. Dixon and Fredda L. Dixon Owed No Duty to Warn.

"South Carolina law does not recognize a general duty to warn of the dangerous propensity of others." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 82 (1998).

In Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct.App. 2014), *cert. granted*, the mother of several minors, Roe, brought suit against Bibby, the wife of a man accused of molesting the minors. Bibby was aware that her husband had previously molested a minor, their daughter, in the

past. Despite this knowledge and her status as the wife of a child molester, the South Carolina Court of Appeals held that a mere familial relationship is not enough to create any duty to warn. Id. at 295-96; 763 S.E.2d at 649-50. For such a duty to exist, there must be an allegation and proof of the ability to monitor, supervise and control an individual's conduct that is created by statute or a commercial agreement coupled with a specific threat against the victim. Id.; see, e.g., Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (assuming special relationship between psychiatrist and patient/injurer); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002) (finding special relationship between Department of Juvenile Justice and dangerous juvenile/injurer over whom it had custody per court order); Bishop v. South Carolina Dep't of Mental Health, 331 S.C. at 86, 502 S.E.2d at 81 (finding special relationship between Department of Mental Health and involuntarily-committed patient/injurer in its custody); Rogers v. S.C. Dep't of Parole & Cmty. Corr., et al., 320 S.C. 253, 464 S.E.2d 330 (1995) (assuming special relationship between state agencies charged with prisoner parole and prisoner/injurer who was being released from custody (but finding no specific threat)).

In this case, there exists no allegations that Samuel and Fredda Dixon had the ability to monitor, supervise and control another adult, Joe Dixon, or that any specific threats were made against Plaintiff. Accordingly, Samuel E. Dixon and Fredda L. Dixon are entitled to judgment as a matter of law. Id.

Dismissal of The Estate of Samuel Joe Dixon

This Court also finds that no action has been commenced against the Estate of Samuel Joe Dixon within the time required by law.

Samuel Joe Dixon died on July 7, 2012. An Estate was opened with Anderson County

Probate Court under case number 2012ES0400758. According to the Probate Court files, an affidavit of notice of creditors was published for the Estate of Samuel Joe Dixon in the News-Chronicle on August 1, 8, and 15, 2012. A final accounting for the Estate of Samuel Joe Dixon was signed on February 3, 2015 and the Estate closed. There is no evidence that Plaintiff ever presented a claim to the Estate of Samuel Joe Dixon pursuant to the times required by S.C. Code Ann. §§ 62-3-801 & 62-3-803. Furthermore, there is no evidence that any service took place on the Estate of Samuel Joe Dixon, which would properly commence an action, pursuant to Rule 4, SCRCPP, or S.C. Code Ann. § 15-5-530.

Accordingly, the claims against the Estate of Samuel Joe Dixon are time barred.

IT IS THEREFORE ORDERED that this case is DISMISSED WITH PREJUDICE.



Anderson Common Pleas

Case Caption: Kenji C Kilgore VS Estate Of Samuel Joe Dixon , defendant, et al
Case Number: 2015CP0401605
Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2017-01-24 16:15:10 page 7 of 7

ELECTRONICALLY FILED - 2017 Jan 24 4:48 PM - ANDERSON - COMMON PLEAS - CASE#2015CP0401605

MOTION FOR RECONSIDERATION
02/02/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)	
Kenji C. Kilgore,)	
Plaintiff,	)	MOTION FOR RECONSIDERATION
)	
vs.)	
Estate of Samuel Joe Dixon,)	
Samuel E. Dixon, and	)	C/A#: 2015-CP-04-1605
Fredda L. Dixon,)	
Defendants)	
_____)	

Pursuant to the Rule 59(E) of the South Carolina Rules on Civil Procedure, Plaintiff Kilgore files this Motion to Reconsider the Order of this Court, dated January 23, 2017. In support of which, Plaintiff presents the following:

INTRODUCTION

Plaintiff filed this action for the tortious injuries that he suffered when Samuel Joe Dixon shot him five times. Plaintiff named Mr. Dixon and his parents, Samuel E. Dixon and Fredda L. Dixon, as tortfeasors. It was, and remains, Plaintiff's contention that Joe Dixon was mentally ill and that is the reason that he was shot. It is also his contention that Mr. and Mrs. Dixon were aware of the volatile mental state overwhelming their son, yet they did nothing to warn Mr. Kilgore of his condition.

STANDARD OF REVIEW

A motion under Rule 59(e) has long been viewed as a "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) *as cited in Elam v. South Carolina Department of Transportation*, 361 S.C. 9 (2004), 602 S.E.2d 772 (SC: South Carolina). A party may wish to file such a motion when he believes the court has

misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id.

Plaintiff reiterates that his causes of action against Defendants are sufficiently stated. .

ARGUMENTS

In order to establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996).

In *Doe v. Batson*, The Court of Appeals discussed two possible sources of liability for the parent of an adult child residing in the home: (1) a duty to warn arising from a special relationship or circumstance, and (2) a duty to warn based on premises liability.

Contrary to Defendants' assertions, they have a duty to warn Plaintiff of the danger posed by their son, Joe Dixon, considering that they know of his violent tendencies. In fact, instead of informing Plaintiff of their son's recent history of erratic behavior, they even allowed their son to be Plaintiff's roommate.

While it is true that under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); Rogers v. South Carolina Dep't of Parole & Cmty Corr., 320 S.C. 253, 464 S.E.2d 330 (1995); Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). An exception to this rule was enumerated in the case of *Faile*, which states:

We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. *See generally*, Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990). *Id.*

This case would fall under the second exception, since Defendants Samuel and Fredda were the parents of Joe. This parental relationship between the Defendants and the injurer, charges the defendants with the ability to control, supervise, and control their son who lived on their property. In fact, they were aware of the difficulties that their son was facing. They told Plaintiff they thought that their son was "doing better". Mr. and Mrs. Dixon had notice of his mental issues, as well as his volatile temper. Hence, he moved back to their property from his own home on First Avenue, where he had lived with his wife and children.

Defendant argues that Joe Dixon had not made specific threats against Plaintiff and, therefore, does not fall under the exception. But, the rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care the injury is no longer speculative in nature. The recognized reckless, unstable behavior exhibited by Joe Dixon prior to the shooting, was something of which his parents were aware.

CONCLUSION

It is undisputed that Joe Dixon was suffering from mental difficulties. His parents knew it. They expressed their appreciation that Mr. Kilgore has moved in with him because they believed their son was doing better. Mr. Kilgore did not know what that meant.

He was not aware of what had precipitated said comment. Had Joe been depressed due to his divorce? Was he drinking excessively when he was alone? Was he using illicit drugs excessively? Mr. Kilgore was not privy to the meaning of this statement.

He had no idea to what degree Joe was suffering. Clearly, if he would have been aware of the truth, he would not have put himself in harm's way. Kenji Kilgore was shot five times by his friend, for a reason that he will never know. Joe's suffering finally got the best of him following the tragedy, when he took his own life.

Little discovery has been conducted in this matter. Plaintiff believes that discovery will provide the Court with the necessary evidence to allow him to have his day in Court. However, "the paucity of the record makes it impossible...to determine the merits" of Kenji's argument. Doe v. Batson, 338 S.C. 291, 525 S.E.2d 909 (Ct.App. 1999). Whether the Dixons had a duty to Mr. Kilgore will be ferreted out with the completion of the aforementioned discovery. Plaintiff prays for the Court to reconsider the prejudicial dismissal of his claim.

s/Donald L. Smith
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Anderson, South Carolina
February 2, 2017.

RESPONDENT'S BRIEF AND MEMORANDUM
IN OPPOSITION TO THE MOTION FOR
RECONSIDERATION

02/08/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ANDERSON	)	(Jury Trial Demanded)
)	
Kenji C. Kilgore,)	
)	
Plaintiff,	)	BRIEF IN OPPOSITION TO MOTION TO
	)	RECONSIDER
vs.)	
)	
Estate of Samuel Joe Dixon,	)	C/A#: 2015-CP-04-1605
Samuel E. Dixon, and)	
Fredda L. Dixon,)	
)	
Defendants)	
)	

This Court should deny Plaintiff's Motion to Reconsider the Dismissal of Samuel E. Dixon and Fredda L. Dixon as a matter of law.¹ In the Order of Dismissal, this Court correctly considered the allegations contained in the Complaint pursuant to Rule 12(b)(6), SCRCPP. This Court properly found Samuel E. Dixon and Fredda L. Dixon owed no duty to Plaintiff based on what was alleged in the Complaint. Nothing has changed.

Nineteen months after filing the Complaint and after the statute of limitations has long expired, Plaintiff has dreamed up allegations in a Motion to Reconsider that do not appear anywhere in the Complaint.² For the first time ever in the Motion to Reconsider, Plaintiff hypothesizes that Samuel Joe Dixon (the alleged shooter) was mentally ill. However, the words "mentally ill" do not appear anywhere in the Complaint. Furthermore, and supporting the decision to dismiss the

¹ Plaintiff does not raise any issues with the dismissal of The Estate of Samuel Joe Dixon. It is, therefore, presumed that Plaintiff concedes to that dismissal.

² Samuel E. Dixon and Fredda L. Dixon would also challenge whether Plaintiff could have even made such allegations in the Complaint and comply with Rule 11, SCRCPP.

Complaint even more, the Complaint contains no allegation that Samuel E. Dixon and Fredda L. Dixon knew or should have known of any “mental illness.”

Plaintiff’s wild arguments in a Motion to Reconsider that do not appear in the Complaint do not entitle Plaintiff to any relief. This Court properly viewed this matter pursuant to Rule 12(b)(6), SCRCPP, which tests the legal sufficiency of the allegations in the pleading. See James F. Flanagan, South Carolina Civil Procedure 100-101 (3d. ed. 2010). Plaintiff’s Complaint was and remains deficient because it does not raise any duty owed by Samuel E. Dixon and Fredda L. Dixon to Plaintiff. Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct.App. 2014), *cert. granted*.

Plaintiff improperly cites a South Carolina Court of Appeals decision of Doe v. Batson as creating “two possible sources of liability for the parent of an adult child residing in the home: (1) a duty to warn arising from a special relationship or circumstance, and (2) a duty to warn based on premises liability.”³ **What Plaintiff does not inform this Court, however, is that The South Carolina Supreme Court specifically vacated the South Carolina Court of Appeals decision on the exact same quotation given by Plaintiff. Doe ex rel. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 858-59 (2001).** After citing the exact sentence quoted by Plaintiff, the South Carolina Supreme Court said, “We vacate those portions of the of the Court of Appeals’ opinion suggesting potential sources of liability in this case.” Id.

The South Carolina Supreme Court decision in Doe, however, illustrates precisely that Plaintiff’s Complaint was deficient as a matter of law. When Doe was attempting to create some

³ Although Plaintiff did not include a citation in the brief, Plaintiff did specifically refer to the South Carolina Court of Appeals decision in Doe v. Batson, 338 S.C. 291, 296, 525 S.E.2d 909, 911 (Ct. App. 1999), *aff’d in part, vacated in part sub nom. Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

liability against Batson, Doe made the following specific allegations:

Doe's complaint against Batson alleged that Donald lived in Batson's home from 1991 to 1995, during which time he brought boys between the ages of ten and eighteen to Batson's home for the purpose of molesting them. Doe alleged that Batson was home on numerous of these occasions and that she knew, or should have known, that her son had young boys in his bed and had deviant sexual propensities. Doe alleged that Batson's failure to warn the boys' parents was negligent, willful, and wanton, demonstrated a reckless disregard for the rights, safety, and well-being of the young boys who were abused by her son, and that but for Batson's failure to warn the boys and their parents, the boys would not have been molested.

Id. at 318, 548 S.E.2d at 855. Not only did Plaintiff fail to make any of the specific allegations contained in Doe but Plaintiff could not under Rule 11, SCRPC, because Plaintiff and the alleged shooter did not live in the same house as Samuel E. Dixon and Fredda L. Dixon. Accordingly, the difference between the Complaint against Batson and the Complaint filed by Plaintiff actually proves that Plaintiff's Complaint was deficient as a matter of law.

Plaintiff's Motion fails to address the Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct.App. 2014), *cert. granted*, case and this Court's finding that the Complaint failed to contain "allegations that Samuel and Fredda Dixon had the ability to monitor, supervise and control another adult, Joe Dixon, or that any specific threats were made against Plaintiff." Despite Plaintiff's musings, the law in South Carolina does not create any parental liability for an adult child without "the ability to monitor, supervise and control" the other adult. Id. Plaintiff's failure to address this specific finding and the omission of any allegation of Samuel E. Dixon and Fredda L. Dixon "to monitor, supervise and control" another adult remains the fatal flaw in Plaintiff's case.

Finally, Plaintiff's request for more time to conduct discovery tests the boundaries of good faith. In the nineteen months that this case has been pending, Plaintiff has failed to engage in discovery in any manner. Plaintiff has not served any written discovery, requested depositions, or

even responded to Defendant's written discovery that was served on February 27, 2016. While discovery is not particularly relevant in this Rule 12(b)(6) motion, Plaintiff certainly is not entitled to relief for his own dilatory behavior. See Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003).

The bottom line is this Court made the correct legal decision to dismiss Plaintiff's Complaint. The same well-reasoned analysis contained in the Order still applies, and Plaintiff has not and cannot challenge it on any valid legal grounds. This Court, therefore, should deny Plaintiff's Motion to Reconsider.

THE WARD LAW FIRM, P.A.
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and Fredda L. Dixon

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February 8, 2017.

TRANSCRIPT OF HEARING

05/05/17

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON) COURT OF COMMON PLEAS

Kenji Kilgore,)
Plaintiff,)
v.) Case No. 15-CP-04-01605
Estate of Samuel Joe Dixon,)
Samuel E. Dixon and)
Fredda L. Dixon,)
Defendants.)

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on May 5th, 2017, before The Honorable R. Lawton McIntosh in the Court of Common Pleas for Anderson County; attended by counsel as follows:

APPEARANCES:

Donald L. Smith, Esq.
122 North Main Street
Anderson, South Carolina 29621
Appearing for Plaintiff

Robert E. Davis, Esq.
WARD LAW FIRM
223 East Pine Street
Spartanburg, South Carolina 29302
Appearing for Defendants

**TRANSCRIBED FOR VIVIAN CROSS,
CIRCUIT COURT REPORTER**

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

1 THE COURT: Please be seated. All
2 right, you're the last up for the day. This
3 is Kenji Kilgore versus the Estate of Samuel
4 Joe Dixon, Samuel E. Dixon and Fredda L.
5 Dixon.

6 It appears that previously I granted a
7 Motion to dismiss. The plaintiffs are asking
8 me to reconsider that as to Samuel E. Dixon
9 and Fredda L. Dixon but apparently not as to
10 the Estate. Is that correct, Mr. Smith?

11 MR. SMITH: That's correct.

12 THE COURT: Okay, sir. All right, I'll
13 be glad to hear from you, Mr. Smith.

14 MR. SMITH: Your Honor, may it please
15 the Court. Your Honor, this action stems
16 from a situation where the defendants' son
17 shot Mr. Kilgore, five times.

18 It is our contention that the parents
19 recognized the fragility of their deceased,
20 now-deceased son, and that they told Mr.
21 Kilgore that they were happy that he was
22 there because he apparently was ---

23 THE COURT: Do what now?

24 MR. SMITH: They said that they were
25 happy that Mr. Kilgore was there because

1 they'd noticed that the behavior and the
2 conduct of their son had gotten better,
3 essentially saying that his mental health had
4 gotten better because of Mr. Kilgore's
5 inclusion in his life, having someone there
6 to help and address any problems that he was
7 having. Then all of a sudden he was shot, as
8 I said, five times and that's what our case
9 stems from.

10 It is our contention of course that
11 discovery is necessary in an effort to prove
12 our case. I will say that someone else
13 started this case and then Mr. Davis had a
14 pending Motion, and we haven't done any
15 discovery. The plaintiff would simply ask
16 that he be allowed to do discovery on an
17 expedited basis so as to get the case ready
18 for trial.

19 THE COURT: Let me ask you this.
20 Obviously if you have a summary judgment
21 Motion pending, discovery would be a more
22 relevant inquiry as to the status of that.

23 The Motion to dismiss is just based on
24 the pleadings themselves without any real
25 intention to discovery or the lack thereof.

1 This is a 12(b)(6)?

2 MR. DAVIS: Yes, sir. Yes, sir.

3 THE COURT: Just one second, let me
4 read -- (upon review), all right. We're at
5 the Order, so -- I don't have the Rule in
6 here.

7 I read through your Brief just a minute
8 ago, Mr. Davis, but, uh, -- from a practical
9 standpoint a Motion to dismiss doesn't negate
10 the opportunity for the plaintiff the right
11 to replead; it's a moot point as long as done
12 within the statute of limitations. Under the
13 -- the Estate was beyond the statute of
14 limitations. As to the individual
15 defendants, ---

16 MR. DAVIS: Well, Your Honor, I think
17 the statute is -- I probably need to refresh
18 my recollection but, uh, if you'll bear with
19 it. I think it's expired as to them as well.

20 THE COURT: Well, ---

21 MR. DAVIS: The date was July 2, 2012.
22 So where we are, Your Honor, -- and, again, I
23 am Robbie Davis and I'm here on behalf of my
24 clients, Samuel E. Dixon and Fredda L. Dixon.
25 Your Honor, there is no legal basis to go

1 forward against them. As the Court is well
2 aware, they're nothing more than the parents
3 of the alleged shooter, Joe Dixon, who is now
4 deceased.

5 The Court probably analyzed this case the
6 first time under the case of *Rowe v. Biffy*
7 (phonetic), which was a 2014 case, was that
8 the wife of a man who harmed people who lived
9 together, under the same roof, which we don't
10 have here, would be liable for a duty to warn
11 other people of her husband's tendency to
12 harm. In that case it was the sexual
13 molestation of minors.

14 In that case, it went up and the South
15 Carolina general rule is that there is no
16 general rule to conduct -- to control the
17 conduct of another or to warn a third party
18 victim of danger. They did make an
19 exception, Your Honor, and that exception
20 says that under special relationship
21 exceptions when a defendant has the ability
22 to monitor, supervise and control another and
23 there's a specific threat of harm directed at
24 a specific individual, then potentially there
25 could be a duty to warn. In that case, you

1 know, where you have a husband and wife
2 living together under the same roof, with
3 the husband having committed this sexual
4 molestation in the past, they found that
5 there was no duty to warn.

6 That's not even what we have in this
7 case, Your Honor. We don't have the parents
8 and the son living under the same roof. We
9 don't have any allegations of an exception of
10 an ability to control, monitor, supervise and
11 control, to know of a direct threat of harm.

12 When we talk about controlling and
13 monitoring the -- controlling the acts of
14 another, the Court went on to give us some
15 explanation of what they meant by that.
16 Basically what they're talking about is a
17 statutory duty or a commercial duty to --
18 there's never been a case in South Carolina,
19 or any other jurisdiction that I know of,
20 where the parents of someone who has shot
21 another, who was an adult who doesn't even
22 live in your house, is found to be liable for
23 that shooting. It just simply is not the
24 law.

25 We contend that there is nothing about

1 the ability of the parents to control,
2 supervise or monitor the son at the time of
3 the alleged shooting or any specific harm.

4 But it really doesn't matter, because
5 parents just aren't liable for the actions of
6 an adult son. It's not -- there is not one
7 single case where -- if the Court had wanted
8 to say, 'hey, a parent can be liable for an
9 adult son', they could have said that. They
10 didn't.

11 So there is no legal basis to hold these
12 parents in this lawsuit any further.

13 The case that was raised in the Motion to
14 reconsider was a much older case, *Doe v.*
15 *Bounce* (phonetic). What was specifically
16 interesting about that is the part that was
17 raised was vacated. It's not the law in
18 South Carolina.

19 So the law we have is *Rowe v Biffy*. It's
20 not going to allege -- none of the elements
21 required to be alleged have been alleged,
22 they can't be. I would say that under Rule
23 11 that they can't be.

24 The statute of limitations has run.

25 As to any argument about discovery, Your

1 Honor, this case has been pending since July
2 2015.

3 MR. SMITH: I'm not sure about that.

4 MR. DAVIS: Well, the discovery is not
5 an issue. What this Court has done and what
6 this Court should continue to do is say,
7 'these parents don't live with, they don't
8 control, they don't monitor none of what is
9 alleged to have taken place', or even a
10 specific threat of harm. There is no basis
11 to keep them in this lawsuit any longer.
12 There is not a legal basis, there is nothing
13 that has been alleged in the Complaint as a
14 specific basis to do so. This case needs to
15 be dismissed.

16 THE COURT: Mr. Smith?

17 MR. SMITH: May it please the Court.
18 Your Honor, the plaintiff brought this action
19 against the parents of Mr. Dixon due to area
20 of blame. Now, I recognize that normally
21 that would not pass muster.

22 However, in this particular case the
23 parents knew of their son's mental
24 instability and made it a point to tell Mr.
25 Kilgore that his presence was beneficial to

1 their son.

2 I recognize that Mr. Davis is saying that
3 it was not under the same roof, however the
4 trailer that they were residing in, Mr.
5 Kilgore and Mr. Dixon, was right behind the
6 parents' house on the parents' property. He
7 had moved from his house -- when they first
8 got together, he'd moved into the trailer on
9 his parents' property due to his instability,
10 or at least that is our contention.

11 The fact that he was mentally unstable
12 is best seen by the fact that he committed
13 suicide shortly after shooting Mr. Kilgore.

14 They recognized his instability and
15 instead of alerting Mr. Kilgore that was a
16 possibility, they failed to do that.

17 Relating to a dog, and I'll use that as
18 sort of an analogy. But the dog appears
19 fine, everything's is good, and then the dog
20 bites a person, just -- Mr. Dixon, in his
21 mental state, it was such that he wasn't
22 capable of taking care of himself. That's
23 why he moved from his house to his parents'
24 trailer. Because of that, he wasn't making
25 his own decisions. That he shot his friend

1 of many years, then committed suicide days
2 later, uh, at the very least creates a
3 question of whether he was mentally ill or if
4 what he was doing -- if he was -- if his
5 parents were now his keeper, that is our
6 whole allegation, that they knew the problem
7 and they didn't share it with Mr. Kilgore
8 such that Mr. Kilgore would see something,
9 necessarily, upfront. They parents knew
10 that. They did not -- this was all that Mr.
11 Kilgore was shot, unfortunately. And,
12 unfortunately, Mr. Dixon passed soon away
13 thereafter. Which, as I said previously, I
14 think that underscores the fact that he was
15 mentally unstable.

16 MR. DAVIS: Very briefly in response,
17 Your Honor. The allegation of knowledge is
18 simply unbelievable. I believe what they'd
19 have to show is the ability to monitor,
20 supervise and control.

21 Using the dog analogy, which was misused,
22 the master of a dog is able to supervise,
23 monitor and control the dog or are expected
24 to.

25 Parents, there is no legal authority that

1 says parents have the ability to control,
2 supervise or monitor an adult son absent some
3 special Order or something that's out there.
4 So what they are talking about here is way
5 outside the allegations of the pleadings.
6 But even looking at what has been said here
7 today is the allegation that you have a
8 mentally unstable son, mentally ill and
9 mentally unstable, does a parent have a duty
10 just because the son -- I don't think they
11 have.

12 THE COURT: First, this matter is
13 before me on a Motion for reconsideration of
14 my former grant of the 12(b)(6) Motion based
15 on the actual pleadings that were filed in
16 this matter. That's what I am constrained to
17 do, is to analyze my Order as to the initial
18 Complaint that was filed.

19 As to the initial Complaint that was
20 filed and which was dismissed by my Order, it
21 was defective. I don't mean defective, Mr.
22 Kilgore, -- it's just that it didn't have the
23 allegations that the lawyers were looking for
24 under the case law. Therefore, the dismissal
25 stands. It is without prejudice to Mr.

1 Smith, whatever he might be able to do as a
2 result of that Order being granted. So I
3 deny the Motion for reconsideration and let
4 the Order stand. Thank you. We will do a
5 From 4.

6 (HEARING CONCLUDED)
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ORDER DENYING THE
MOTION FOR RECONSIDERATION

05/08/17

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-01605

Kenji C. Kilgore

Estate of Samuel Joe Dixon et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER IS DENIED.

This order ends does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

ELECTRONICALLY FILED - 2017 May 08 2:11 PM - ANDERSON - COMMON PLEAS - CASE#2015CP0401605



Anderson Common Pleas

Case Caption: Kenji C Kilgore VS Estate Of Samuel Joe Dixon , defendant, et al
Case Number: 2015CP0401605
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2017-05-08 13:56:24 page 3 of 3

ELECTRONICALLY FILED - 2017 May 08 2:11 PM - ANDERSON - COMMON PLEAS - CASE#20 15CP0401605

Certification of Counsel

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED
DEC. 11 2017
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

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

Respondents.

**CERTIFICATE OF COUNSEL IN
APPELLANT'S AMENDED RECORD ON APPEAL**

I HEREBY CERTIFY that this Amended Record on Appeal contains all materials proposed to be included by the parties, and not any other material.

December 6, 2017



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APPENDIX B

FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

DEC 11 2017

R. Lawton McIntosh, Judge

SC Court of Appeals

Appellate Case No. 2017-001330

Kenji Kilgore,

Appellant,

v.

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

Respondents.

AMENDED FINAL BRIEF OF APPELLANT

Anderson, South Carolina
December 6, 2017



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Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) 2

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566 S.E.2d 536, 546 (2002) 3

Newton v. South Carolina Public Railways Comm'n, 319 S.C. 430,
462 S.E.2d 266 (1995) 5

Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) 2

Rickborn v. Liberty Life Insurance, Co., 321 S.C. 291, 468 S.E.2d 292 (1996)..... 3

Rowe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) 3

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE IN HIS CAUSE OF ACTION
- II. WHETHER THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS

STATEMENT OF THE CASE

Appellant filed this action for the tortious injuries he suffered when deceased Samuel Joe Dixon shot him five times.

Sometime prior to July 2012, Appellant began living in a house/trailer located at 240 Thomson Road, Starr, in Anderson County. Said property is owned by Appellee Spouses Dixon. Appellant was a roommate with Joe Dixon, son of Appellee Spouses. They had a harmonious relationship which can be considered as friendly, during Appellant's stay at the aforementioned property. Appellee Spouses expressed happiness/gratitude in having him as a tenant on their property as they had notice that their son's behavior had gotten better. (R. 56). Appellant had no idea that they were talking about their son's violent/volatile behavior.

On or about July 2, 2012, Joe Dixon shot Appellant five times, without provocation, inside the rented house/trailer. Several days after shooting Appellant, Joe Dixon committed suicide.

On July 1, 2015, Appellant filed a Complaint against the Estate of Joe Dixon and Spouses Dixon for negligence. (R. 1). On November 9, 2015, Appellee Spouses filed their Answer, and moved to dismiss the case for lack of cause of action on March 3, 2016. (R. 8). A hearing was scheduled for the motion, but Appellant's former counsel failed to appear due to lack of notice. (R. 27)

Appellee Spouses offered to settle the case, which the Appellant did not accept. Appellant had a change of counsel. Without giving new counsel the opportunity to conduct discovery proceedings, the Court ordered the dismissal of the case on January 24, 2017. (R. 30).

Appellant moved to reconsider the aforesaid Order on February 2, 2017 (R. 38), which the Appellee Spouses opposed on February 8, 2017. (R. 43). On May 8, 2017, the Court denied the Appellant's motion for reconsideration. (R. 62). Thus, this Appeal was brought.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

ARGUMENTS

I. APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE

In order to establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Rickborn v. Liberty Life Insurance, Co., 321 S.C. 291, 468 S.E.2d 292 (1996).

Appellant reiterates that Appellee Spouses had a duty to exercise that degree of care that a reasonable and prudent person would have exercised under the same and similar circumstances, including the duty to warn him of their son's mental health and violent behavior. While it is true that under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger, the court in Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) recognized five exceptions to this rule:

- (1) where the defendant has a special relationship to the victim;
- (2) where the defendant has a special relationship to the injurer;
- (3) where the defendant voluntarily undertakes a duty;
- (4) where the defendant negligently or intentionally creates the risk; and,
- (5) where a statute imposes a duty on the defendant. See generally, Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990). Id.

Appellant contends that this case presents a novel issue which the Court may regard as special circumstance that may warrant a duty to warn on the part of the Appellant. Not only are the Respondents the parents of the injurer, who suffers from mental illness and has violent tendencies, but also, the landlord of the Appellant, the victim of their son's criminal act.

Appellant reiterates that the parental relationship between the Respondents and deceased Joe Dixon, the injurer, charges the Respondents with the ability to control and supervise their son, who lived in their property. Doe v. Batson, 338 S.C. 291, 296, 525 S.E.2d909, 911 (Ct. App 1999) (*hereinafter referred as Batson I*). and the case of Rowe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) laid down this doctrine:

"The defendant may have a common law duty to warn potential victims under the 'special relationship' exception when the defendant 'has the ability to monitor, supervise and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'" Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting Bishop, 331 S.C. at 86, 502 S.E.2d at 81). It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. Bishop, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. "

Appellant believes that Respondents had the ability to monitor, supervise or control deceased Joe Dixon. Deceased son, despite not living under the same roof as the Respondents, was residing right behind the Respondents' house. With exercise of due diligence, the Respondents could have or should have easily walked over to their son's trailer/house to check on, monitor or supervise their son, considering that they knew of his mental illness and dangerous nature. That they are aware of their son's health problems was apparent with their previous conversation with the Appellant. Respondents told Appellant that their son "was doing better". Undoubtedly, Respondents had notice and/or knowledge of his mental issues, as well as volatile behavior.

Appellant argues that Respondents knew or should have known of a specific threat made to harm a specific person. They had already coaxed him into returning home from his marital home, following the devastating dissolution of his marriage. In this case, the specific threat was the mental condition of their son, who was capable of violence as evidenced by his shooting of the Appellant and his subsequent suicide. The specific person to be harmed was Appellant since he lived and stayed in the same house/trailer as the deceased.

As Appellant's landlord, Respondents had a duty to reasonably maintain safe conditions on their property. Under the special circumstances of this case, Appellant argues that a part of

the safe conditions required disclosure of Respondents' son's mental illness. Having knowledge of their son's volatile behavior and his ever-increasing mental instability, the Respondents were required to exercise a greater degree of care to secure the physical welfare of their tenant. This should be differentiated from a case where the criminal act or threat of harm comes from a third person, who is acting with complete cognizance of the act. In this case, the Respondents knew of their son's mental illness, but still allowed Appellant to rent their property and become roommates with their son and in turn, allowed Appellant to risk his life. What makes it worse is the reckless and/or negligent disregard of Appellant's welfare, by withholding information regarding what was truly an unstable, explosive environment. They deprived Appellant of the ability to weigh the pros and cons of leasing from them. In this sense, Respondents intentionally or recklessly created the risk of harm to the Appellant found herein.

In the alternative, Appellants argue that Respondents are liable for their negligence in failing to exercise that degree of care which a reasonably prudent people would have exercised under the same and similar circumstances.

It has long been held that the court cannot grant of a motion to dismiss for failure to state facts sufficient to constitute a cause of action if the facts alleged in the complaint, and inferences reasonably deducible therefrom, if proven, would entitle the plaintiff to relief on any theory of the case. *Newton v. South Carolina Public Railways Comm'n*, 319 S.C. 430, 462 S.E.2d 266 (1995); *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). Appellant has sufficiently averred the cause of action for negligence on the part of Respondents.

II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS.


The undersigned counsel was retained by Appellant a month before the January 24, 2017 Order. Very little discovery has been conducted in this matter. Counsel should be allowed to

pursue discovery, especially given the traumatic events which took place, and the subsequent mental scarring that followed an unbelievable experience. Outstanding motions prevented him from conducting discovery. Appellant believes that discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the *Batson I* case, where the Court declined to impose summary judgment before sufficient discovery could be completed. Whether the Respondents had a duty to Appellant will be ferreted out with the completion of the aforementioned discovery.

CONCLUSION

For all of the foregoing reasons, Appellant prays that this Honorable Court reverse the final judgment dismissing the case, and remand the same for further proceedings in the trial court with instructions regarding the completion of discovery.

December 6, 2017



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FORM 16
CERTIFICATE OF COUNSEL IN AMENDED FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED
DEC 11 2017
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.


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

Respondents.

CERTIFICATE OF COUNSEL IN AMENDED FINAL BRIEF

I HEREBY CERTIFY that Appellant's Amended Final Brief in the above-captioned case
complies with Rule 211 (b) SCACR.

December 6, 2017


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6

APPENDIX C

AMENDED FINAL REPLY BRIEF OF THE APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

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Respondents.

AMENDED FINAL REPLY BRIEF OF THE APPELLANT

Anderson, South Carolina
December 6, 2017

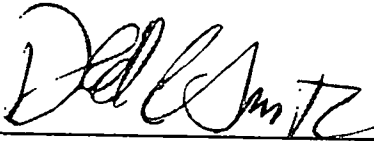

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STATEMENT OF THE ISSUES ON APPEAL

- I. WHETHER THE LOWER COURT WAS IN ERROR IN DISMISSING THE CASE FOR FAILURE TO STATE CAUSE OF ACTION
- II. WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS

ARGUMENTS

- I. **THE LOWER COURT ERRED IN DISMISSING THE COMPLAINT FOR FAILURE TO STATE SUFFICIENT FACTS TO CONSTITUTE CAUSE OF ACTION.**

Respondents in their Initial Brief argue that the lower court was justified in dismissing Appellant's complaint for failure to allege sufficient facts in his Complaint to constitute a cause of action. Appellant insists that he was able to mention facts sufficient to establish Respondents' legal duty to warn Appellant.

The Complaint stated that deceased Joe Dixon was Respondents' son and that he was living and/or staying in a property owned by Respondents. The said property was located at the back of Respondent's house. (R. 54).

Appellant contends that the parental relationship between the Respondents and deceased Joe Dixon, the injurer, charges the former Respondents with the ability to control and supervise their son. Appellants believe that Respondents need only have the ability, the means to control or supervise their son. Respondents, with due diligence, could have or should have easily walked over to their son's trailer/house to check on, monitor or supervise their son. This is particularly important considering that they knew, or should have known, that Joe was a danger to himself and to others after exhibiting violent tendencies.

That the Respondents were aware of their son's health problems was apparent with their previous conversation with the Appellant. Respondents told Appellant that their son "was doing

better” since they became roommates. Appellant asserts that the specific threat of harm in this case is the erratic and violent behavior of the deceased, as evidenced by his shooting of the Appellant and his subsequent suicide. The specific person to be harmed was Appellant since he was the deceased’s roommate.

Respondents argued that their son had not made specific threats against Plaintiff, and therefore does not fall under the “special relationship exception”. But the rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care, the injury is no longer speculative in nature.

A complaint need not be drafted in order to adequately allege that Respondents had a duty to warn Appellant. Here, the Complaint stated that the Respondents were the parents of the deceased. The deceased, who had erratic and violent behavior, was still living within the vicinity of Respondents’ house. Respondents knew or should have known of their son’s violent disposition, and yet allowed Appellant to room with him, without advising Appellant of the threat to his life. Respondents knew that their son’s mental faculties had diminished, in particular, with the failure of his marriage.

II. THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE ANY DISCOVERY PROCEEDINGS.

The undersigned counsel substituted the previous counsel for the Appellant a month before the January 24, 2017 hearing. In that hearing, the lower court dismissed the case. Appellant’s counsel did not have enough time to engage in discovery proceedings. Appellant believes that discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the *Batson I* case, where the Court declined to impose summary judgment before sufficient discovery could be completed. Whether the Respondents

had a duty to Appellant will be ferreted out with the completion of the afore-mentioned discovery.

CONCLUSION

For these reasons, as well as those addressed in his Final Brief to this Court, Appellant respectfully requests that lower court's judgment or orders be reversed, and the case be remanded for trial.

Respectfully submitted,



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December 6, 2017.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
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R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

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Kenji Kilgore,

Appellant,

v:

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

Appellee.

**CERTIFICATE OF COUNSEL
IN AMENDED FINAL REPLY BRIEF**

I HEREBY CERTIFY that Appellant's Amended Final Reply Brief in the above-captioned case complies with Rule 211 (b) SCACR.

December 6, 2017



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APPENDIX D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

RECEIVED

DEC 04 2017

SC Court of Appeals

Kenji C. Kilgore

Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals.

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

Kenji Kilgore Appellant,

v.

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

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 COMPLAINT FAILED TO ALLEGE THE REQUIRED
 ELEMENTS TO ESTABLISH A LEGAL DUTY TO WARN 3

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 law concerning a duty to warn 3

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly dismiss Appellant's Complaint against Samuel E. Dixon and Fredda Dixon pursuant to Rule 12(b)(6), SCRCF, when Appellant failed to plead the required elements needed to establish a duty to warn?

2. Does Appellant have any basis to argue the need to pursue discovery on a Rule 12(b)(6), SCRCF, dismissal for failure to allege a legal duty when Appellant failed to pursue any discovery for almost two years while the case was pending?

STATEMENT OF THE CASE

In a Complaint filed on July 1, 2015, Appellant brought suit alleging Samuel Joe Dixon (hereinafter referred to as shooter) intentionally shot him. (R. p. 3 para. 12 & R. p. 4 para. 21) In addition to naming shooter, Appellant also named Respondents as defendants. Appellant, however, did not allege in the Complaint that Respondents had any "special relationship" with anyone, Respondents had "the ability to monitor, supervise, and control" shooter, or Respondents were aware of a "specific threat or harm" that shooter directed at Plaintiff.

On January 24, 2017, the trial court dismissed the Complaint against Respondents pursuant to Rule 12(b)(6), SCRCP.¹ (R. pp. 31-37) The trial court found the Complaint failed to establish Respondents owed a legal duty based on established and uncontested South Carolina law. (R. pp. 33-35)

Appellant filed a Motion to Reconsider as to Respondents on very narrow grounds: On May 8, 2017, the trial court denied Appellant's Motion to Reconsider. (R. pp. 63-65)

During the year and ten months this case was pending in the circuit court, Appellant never served or participated in discovery. (R. pp. 46-47)

¹The trial court also dismissed the Complaint against shooter because Appellant never commenced an action within the statute of limitations. (R. pp. 35-37) Appellant did not challenge this ruling with the trial court or on appeal.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND APPELLANT'S COMPLAINT FAILED TO ALLEGE THE REQUIRED ELEMENTS TO ESTABLISH A LEGAL DUTY TO WARN.

This Court should affirm the trial court's decision to dismiss Respondents pursuant to Rule 12(b)(6), SCRCP because (1) the trial court applied the proper law concerning a duty to warn and (2) Appellant's Complaint did not contain the required elements to state a cause of action for a duty to warn. In this appeal, Appellant does not raise any argument against either of these propositions.

A Rule 12(b)(6) motion tests the legal sufficiency of the allegations in the pleading. James F. Flanagan, South Carolina Civil Procedure 101 (3d. ed. 2010) "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002). "All well pleaded allegations are taken as true but not conclusions of law, and not necessarily inferences drawn by the plaintiff from the facts." Id. at 102. "An appellate court will uphold the trial court dismissal of a claim where the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Jean Hoefler Toal, Appellate Practice in South Carolina 244 (3d ed. 2016) (citing Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007)).

A. Appellant concedes the trial court applied the correct law concerning a duty to warn.

South Carolina law does not recognize a general duty to warn a third party or potential victim of danger or to control the conduct of another. Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). An exception exists, however, when a "special

relationship” exists with the injurer. Faile, 350 S.C. at 334, 566 S.E.2d at 546. The “special relationship” exception requires allegations of (1) “the ability to monitor, supervise and control an individual's conduct” and (2) “the individual has made a specific threat of harm directed at a specific individual.” Roe v. Bibby, 410 S.C. 287, 295-96, 763 S.E. 2d 645, 649-50 (Ct. App. 2014).

On appeal, Appellant does not challenge any of the law applied by the trial court. Therefore, to raise an exception to the general rule that no duty to warn exists, Appellant would have to allege in the Complaint a “special relationship” evidenced by (1) “the ability to monitor, supervise and control an individual's conduct” and (2) “a specific threat of harm directed at a specific individual.”

Id.

B. Appellant must concede the Complaint does not contain the required elements to create a duty to warn.

The trial court correctly held and the record on appeal proves the Complaint does not contain any allegations that Respondents had any “special relationship” with anyone, Respondents had “the ability to monitor, supervise, and control” shooter, or Respondents were aware of a “specific threat of harm” shooter directed at Plaintiff. (R. pp. 34-35) Accordingly, the trial court properly granted Respondents’ Rule 12(b)(6), SCRCPP, motion based on South Carolina law. Id.

In this appeal, Appellant does not and cannot argue the Complaint contains allegations sufficient to allege an exception to the general rule that Respondents had no duty to warn. In addition, without question, the Complaint is deficient—Appellant did not preserve any issue regarding the trial court’s Rule 12(b)(6), SCRCPP, ruling because Appellant did not present any argument to the trial court on this issue that the allegations in the Complaint were sufficient. Jean Hoefer Toal, Appellate Practice in South Carolina 185 (3d ed. 2016) (“The first step in preserving an issue for

appellate review is to actually raise it to the lower court.”)

C. Appellant has not raised any appellate issue challenging the Rule 12(b)(6), SCRPC, dismissal of Respondents.

Appellant simply has not presented any argument on appeal that the Complaint contains sufficient allegations to establish a duty to warn based on well established South Carolina law. “[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory manner without supporting authority.” Jean Hoefler Toal, Appellate Practice in South Carolina 208 (3d ed. 2016) (citing Jinks v. Richland Cnty., 355 S.C. 341, 585 S.E.2d 281 (2003)).

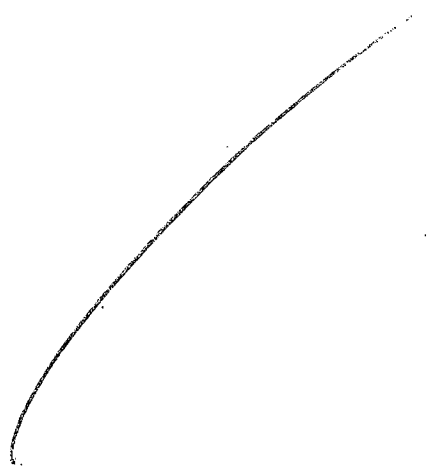
Appellant’s Appellate Brief actually supports the Rule 12(b)(6), SCRPC, dismissal of Respondents. Appellant’s Brief contain numerous statements regarding Respondent’s duty to warn that were not presented to the trial court and totally unsupported by the record on appeal.² These unsupported and improper statements on appeal, however, illustrate the type of allegations that Appellant needed to include in the Complaint. The failure of Appellant to make such allegations in the Complaint is exactly why the Appellant cannot prevail on this appeal.

² Appellants statements which contain no citation to the record are not preserved for appeal and should not be considered on appeal. Rule 201(h), SCAR. Furthermore, this Court should note that the only argument presented by Appellant to the trial court were the very limited arguments at the Motion to Reconsider hearing of May 5, 2017. Any attempt to expand those limited arguments which focus on a request for discovery and never addresses the sufficiency of the allegations contained in the Complaint, should be disregarded by this Court. Jean Hoefler Toal, Appellate Practice in South Carolina 187 (3d ed. 2016) (“Where the appellate argument differs from the ground for a party’s trial objection, the issue is not preserved.”)

II. APPELLANT HAS NO RIGHT TO DISCOVERY ON A RULE 12(b)(6) MOTION ESPECIALLY WHERE APPELLANT FAILED TO PURSUE ANY DISCOVERY FOR THE TWENTY-TWO MONTHS THE CASE WAS PENDING.

Appellant's request to conduct discovery on a Rule 12(b)(6), SCRCP, dismissal is totally without merit. Because a dismissal pursuant to Rule 12(b)(6), SCRCP, is based solely on the allegations within the four corners of the complaint, discovery is not necessary. See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

Furthermore, Plaintiff's request for more time to conduct discovery tests the boundaries of good faith. In the almost two years this case was pending below, Plaintiff failed to engage in discovery in any manner. (R. pp. 46-47) Plaintiff did not serve any written discovery, request depositions, or even respond to Defendant's written discovery that was served on February 27, 2016. (R. pp. 46-47) While discovery is not even relevant on a Rule 12(b)(6) motion, Plaintiff certainly is not entitled to relief for his own dilatory behavior. See Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003).



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

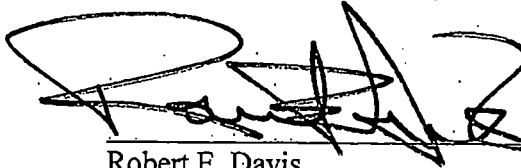
Kenji Kilgore Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



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APPENDIX E

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kenji C. Kilgore, Appellant,

v.

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

Appellate Case No. 2017-001330

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2019-UP-110
Submitted February 1, 2019 – Filed March 20, 2019

AFFIRMED

Donald Loren Smith, of Attorney Office of Donald
Smith, of Anderson, for Appellant.

Robert Eric Davis, of The Ward Law Firm, PA, of
Spartanburg, for Respondents.

PER CURIAM: Kenji Kilgore appeals the circuit court's dismissal of his negligence claim against Samuel E. Dixon and Fredda L. Dixon under Rule 12(b)(6), SCRCP, arguing (1) he sufficiently alleged the elements of negligence in

his complaint and (2) he was deprived of his right to pursue discovery. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: Rule 8(a), SCRPC ("A pleading which sets forth a cause of action . . . shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief . . ."); *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987) ("This requires a litigant to plead the ultimate facts which will be proved at trial . . ."); *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004) ("A trial [court] in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court."), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007); *id.* ("[I]n considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint."); *id.* at 470, 605 S.E.2d at 560 ("To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff."); *id.* ("The existence of a duty owed is a question of law for the courts."); *id.* ("In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law."); *id.* at 471, 605 S.E.2d at 560 ("Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger."); *id.* ("However, when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct." (quoting *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998))); *id.* ("This duty to warn arises when the individual has made a *specific threat of harm directed at a specific individual.*" (quoting *Bishop*, 331 S.C. at 86, 502 S.E.2d at 81)); *Wright v. PRG Real Estate Mgmt., Inc.*, 413 S.C. 276, 280, 775 S.E.2d 399, 401 (Ct. App. 2015) ("Generally, residential landlords do not owe tenants a duty to protect them from the criminal activity of third parties.").

As to Issue 2: *Marion*, 361 S.C. at 469, 605 S.E.2d at 559 ("[I]n considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.").

AFFIRMED.¹

LOCKEMY, C.J., and SHORT and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

APPENDIX F

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED
APR 04 2019
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

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

Respondents.

PETITION FOR REHEARING

Anderson, South Carolina
April 1, 2019



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PETITION FOR REHEARING OF THE ORDER DISMISSING APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED

APR 04 2019

SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

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

Respondents.

Pursuant to SCACR Rule 221(a) and SCACR Rule 240(i) Appellant Kenji Kilgore respectfully petitions this Court for a rehearing of Opinion No. 2019-UP-110, filed March 20, 2019. Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

Summary of Arguments

The Honorable Court of Appeals affirmed the dismissal of Appellant's case for failure to state facts sufficient to constitute a cause of action for negligence. Without discussing what facts were absent or missing from the Complaint, the Court simply stated general principles of the law.

Appellant believed that the Honorable Court misappreciated the duty to warn doctrine and overlooked its exceptions as it relates to the facts of this case. Appellant also believed that

the Honorable Court limited its ruling on negligence based on duty warn and failed to consider his allegations of common law negligence.

In his Final Brief, Appellant averred that the Respondents had a duty to exercise that degree of care that a reasonable and prudent person would have exercised under the same and similar circumstances. He also advanced that Respondents had a duty to warn him of their son's mental health and volatile behavior. Appellant further asserted that Respondents had a duty to reasonably maintain safe conditions on their property. This Honorable Court however focused only on negligence based on failure to warn. Citing Doe v. Marion, 361 S.C. at 471 (Ct. App. 2004), this Honorable Court ruled that "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Simply, the Honorable Court believed based on the Complaint, that there was no duty owed to the Appellant, and as such there is no cause of action for negligence.

Appellant reiterates that he has sufficiently alleged the elements of negligence. He avers that this Court misappreciated the above-mentioned principle laid down in Doe v. Marion, and insists that the same is not absolute. It recognizes exceptions as discussed in the case of Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Appellant maintains that the special circumstances of this case warrants a duty to warn on the part of the Respondents. Appellant claims that due to the special relationships of the Respondents to the Appellant (special relationship of defendant to the victim) and of the Respondents to Samuel Joe Dixon (special relationship of the defendant to the injurer). *Id.*

Appellant holds that the Court overlooked that the present case falls under the exception based on Respondents' negligent or intentional act of creating the risk. *Id.*

Appellant also insists that the Court failed to rule on Appellant's assertion that as landlord, Respondents' has a common law responsibility to act with due care. This Court has recognized in previous cases that "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Cooke v. Allstate Management Corp. 741 F. Supp. 1205 (D.S.C. 1990), citing Crowley v Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985).

ARGUMENTS

I.

THE RESPONDENTS HAVE A DUTY TO WARN APPELLANT BASED ON THE SPECIAL RELATIONSHIPS EXCEPTION.

Appellant admits that under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Appellant asserts that there are a number of cases that provide exception to this. The court in Faile, recognized five (5) exceptions to this rule as follows:

- (1) Where the defendant has a special relationship to the victim;
- (2) Where the defendant has a special relationship to the injurer;
- (3) Where the defendant voluntarily undertakes a duty;
- (4) Where the defendant negligently or intentionally creates the risk; and,
- (5) Where a statute imposes a duty on the defendant. See generally, Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990).

Faile, supra.

Appellant reiterates the special relationship between the parties give rise to a duty of care to prevent Samuel Joe from harming Appellant. Not only are the Respondents the parents of injurer, but they are also the landlord of herein Appellant.

Special Relationship of defendant with the injurer

Appellant maintains that Respondents are liable for their son's criminal acts because they had the ability to monitor, supervise or control him. Respondents contend that their son was an

adult at the time of the incident and as such, the rules on parental liability do not apply. But the case of Rowe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) laid down the following:

““The defendant may have a common law duty to warn potential victims under the ‘special relationship’ exception when the defendant ‘has the ability to monitor, supervise and control an individual’s conduct’ and when ‘the individual has made a specific threat of harm directed at a specific individual.’” Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting Bishop, 331 S.C. at 86, 502 S.E.2d at 81). It is not necessary for the injuring party to have made a threat while under the defendant’s control or custody. Bishop, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. “

Id.

Appellant asserts that the circumstances of this case fall under the said exception. Respondents have known of their son’s mental health issues and violent behavior. They had coaxed him into returning home from his marital house following the dissolution of his marriage. They had their son living in the trailer right behind their house. Respondents had easy access to their son, and with due diligence they could have easily walked over to the trailer to check and/or visit him.

Appellant avers that the son’s mental health condition and violent behavior were known to the Respondents prior to leasing their property to herein Appellant. In the years that son lived with them immediately preceding the tragedy, it is inferable that they were well acquainted than anyone with his mental disposition. Their knowledge of his condition is reflected in their previous conversation with the Appellant. Respondents expressed their gratitude to Appellant because they believed that their son was “doing better” since Appellant moved in the trailer. Undeniably, Respondents had notice of their son’s mental issues and volatile behavior

Special Relationship between Defendant and Plaintiff

Respondents leased their property to herein Appellant establishing a landlord-tenant relationship. It is well-established that a landlord generally owes no affirmative duty to a tenant to provide security from criminal activities of third persons. Wright v. PRG Real Estate Management, Inc. et al., Op. No. 27868 (S.Ct., March 20, 2019). *Wright*, identified four (4) exceptions to the this general rule: (a) affirmative acts exception; (b) concealed danger exceptions; (c) common area exception; and (d) the undertaking exception. Appellant believes that his case falls under the affirmative acts exception. Wright, citing the case of Cooke, supra.

II. THE RESPONDENTS HAVE A DUTY TO PROVIDE SECURITY UNDER THE AFFIRMATIVE ACTS EXCEPTION.

In *Wright*, the South Carolina Supreme Court had an occasion to expound on the affirmative acts exception. The Court held:

The affirmative acts exception is limited to situations where the landlord's direct action increases a tenant's risk of harm from criminal activities. Examples of such direct action may include a landlord giving out a master key to someone who should not have one, a landlord leaving an apartment door or window unlocked, or a landlord failing to secure a ladder that is used by a criminal to commit a crime. Such affirmative acts by the landlord may impose liability for criminal acts of third parties. On the other hand, the voluntary undertaking exception invokes section 323 and may be applicable when a landlord's actions are more attenuated. See Restatement (Second) of Torts § 323 (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."). Section 323 is the standard in South Carolina when analyzing voluntarily

assumed duties. The concept of the undertaking exception is not limited to a landlord's undertaking to make repairs.

Id.

In this case, landlord attempted to repair their son by keeping him in the trailer on their property, victim was like a service dog. Respondents benefitted from Appellant's stay in their property. Instead of Respondents taking care of their son, Appellant kept him company.

In applying the affirmative acts exception in this case, Appellant submits that Respondents' act of placing Appellant in the company of their son as a roommate, increased Appellant's risk of harm from criminal acts.

What makes the situation worse is the reckless and/or negligent disregard of Appellant's welfare. First, in withholding information regarding their son's mental health conditions and violent behavior, they deprived Appellant of the ability to weigh the pros and cons of leasing from them.

Integral to this duty to warn is the existence of a specific threat of harm directed at a specific person. ¹ Respondent argues that their son had not made specific threats against the Appellant and therefore does not fall under this exception. The rationale behind this line of cases is that an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care, the injury is no longer speculative in nature.

Appellant maintains that the specific threat in this case was the volatile behavior and mental condition of their son, who was capable of violence as evidence by his shooting of the

¹ This duty to warn arises when the individual has made a specific threat of harm directed at a specific individual. Bishop v. S.C Department of Mental health, 331 S.C. 86.

Appellant and his subsequent suicide. This threat of harm can only be directed to herein Appellant, whom Respondents themselves placed in the same trailer with son.

Secondly, Respondents failed to exercise reasonable degree of care which a reasonably prudent man would have exercised under the same and similar circumstances. Despite being aware of their son's mental illness and violent behavior, Respondents did not exert effort to discover if their son had access to or was in possession of a gun. They failed to take measures to prevent their son from having access to a gun while he had a roommate.

For these two reasons, Appellant believes that Respondents intentionally or recklessly created the risk of harm to the Appellant. Appellant submits that a duty of care arose from Respondents' acts that increased the risk of harm to Appellant.

**III.
THE RESPONDENTS HAVE A DUTY TO USE REASONABLE
CARE BASED ON THEIR UNDERTAKING.**

In Cramer, the Court explained that even though South Carolina law does not impose a duty on a landlord to protect a tenant from the criminal acts of third parties, a plaintiff is not precluded from asserting a general negligence principle. Cramer v. Balcor Property Management, Inc., 441 S.E.2d 317 (1994). A duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties. Id. at 319.

The basis for this duty is enshrined in the Restatement (Second) of Torts Section 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Appellant believed that when Respondents persuaded their son to stay and lived in their property, they undertook to care and look out for him considering his mental health condition and violent behavior. In effect, they voluntarily assumed the duties of a guardian of a mentally ill person. Appellant asserts that while Respondents had charge of him, they had a duty to exercise reasonable care to prevent him from harming others. Respondents breached this duty of care by (1) failing to take measures that their son had no access to a gun or any potentially dangerous weapon and (2) leasing their trailer to herein Appellant and joining them as roommates. In performing the undertaking, Respondents increased the risk of harm to herein Appellant.

Accordingly, when Appellant was shot by Respondents' son while under their custody and within their property, Respondents were liable for the harm inflicted by their son.

The instant case has similarities with the case of Crowley v. Spivey, 285 S.C. 397 (1985), 329 S.E.2d 774.

In Crowley, Timothy and Lynette Crowley had two minor children. They later divorced and custody was initially granted to Lynette. Lynette suffered from paranoid schizophrenia and was committed to Hall Institute. Upon receiving treatment for her paranoid schizophrenia, Lynette was released to the Spiveys (Lynette's parents). Custody of the children was later transferred to Timothy with Lynette granted visitation rights. Upon learning that Lynette bought a gun, Timothy informed the Spiveys that he would no longer permit any visitation outside his

home. The Spiveys assured father that they would supervise the children during Lynette's visitation with them in the Spiveys' house. During one visit, Lynette shot the two minors to death. Timothy filed two (2) wrongful death actions against the Spiveys based on negligence. The jury awarded damages to Timothy. The Court found that a duty of care existed in that based on Spivey's undertaking. The Court ruled that the duty of care was "grounded in the legal proposition that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Id. at 406.

In both Crowley and the instant case, the parents undertook to take their children in their custody and care, although not obligated to do so. Once their performance began, a common law duty to exercise reasonable care arose. Id. at 406, citing Roundtree Villas Association, Inc. v. 4701 Kings Corporation, 282 S.C. 415, 321 S.E. (2d) 46, 51 (1984).

Finally, in his Complaint, Appellant alleged that Respondents was negligent in failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same and similar circumstances. Appellant has also averred that he was a tenant in a trailer owned by Respondents. Appellant advances that Respondents had a duty to warn him under the premises liability law.

South Carolina recognizes that, to a certain degree and under certain circumstances, a property owner is liable to a person injured while on his or her property, if the injury sustained was caused by the property owner's negligence. In the case of Sims v. Giles, the Court provides that the level of care owed to a person present and injured in another person's property depends on the status or classification of the injured individual. Sims v. Giles, 541 S.E.2d 857 (S.C. Ct. App. 2001).

Sims recognized the following classes of individuals: invitees, licensees, adult trespassers and children.

Sims defined invitee as:

"An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Cl.App. 1997). "Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." Restatement (Second) of Torts § 332 cmt. a (1965). The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner. Parker v. Stevenson Oil Co., 245 S.C. 275, 140 S.E.2d 177 (1965); Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Cl.App. 1994).

"Phrased somewhat differently, it may be said that a person is an invitee on the land of another if he enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." 62 Am.Jur.2d Premises Liability § 87 (1990). See also Larimore, 340 S.C. at 444, 531 S.E.2d at 538 ("Because Larimore, [who was hired by the property owner to add vinyl siding to his home,] was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with [the property owner], Larimore was an invitee.").

Ibid.

Appellant avers that he can be considered an invitee, as he entered and stayed in Respondents' property with their express invitation, and his entry and stay is connected with their conduct of leasing property. The degree of care for an invitee is outlined as follows:

The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the

breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991).

Sims. Supra.

Applying this doctrine in this case, Respondents has a duty to warn Appellant of their son's mental health illness and violent behavior, which can be considered a hidden danger that the landowner had prior knowledge of.

Since the Honorable Court only addressed the issue of existence of duty of care owed by Respondents, the Appellant shall limit his arguments to this element of negligence. With these in mind, Appellant believes that his Complaint has stated facts regarding Respondents duty owed to the Appellant by reason of the landlord-tenant relationship and the undertaking of affirmative acts of the Respondents. The Complaint should not have been dismissed.

IV.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS.

Having established in the previous discussion that Appellant has set forth sufficient facts to establish a cause of action of negligence, Appellant respectfully requests this Honorable Court to address the failure of the Appellant to obtain discovery in this matter. Appellant maintains that the undersigned counsel was retained by the Appellant a month before the lower court issued its Order, dated January 24, 2017. There was very little discovery conducted in this matter. Counsel for Appellant should have been allowed to pursue discovery, especially given the traumatic events which took place, and the subsequent mental scarring that followed this tragedy. Outstanding motions prevented him from conducting discovery. Appellant believes that

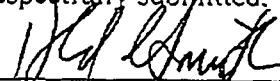
discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the Batson case², where the Court declined to impose summary judgment before the sufficient discovery could be completed.

CONCLUSION

WHEREFORE, for the reason set forth above, Appellant respectfully requests that this Honorable Court grant rehearing in this case.

April 1, 2019

Respectfully submitted,



Donald L. Smith, #06699

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellant

² Doe v. Batson, 525 S.E.2d 909, 338 S.C. 291 (S.C. App., 1999).

FORM 7
PROOF OF SERVICE
FILING PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED
APR 04 2019
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

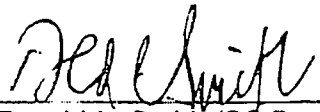
Estate of Samuel Joe Dixon, Samuel E. Dixon,
and Fredda Dixon

Respondents

PROOF OF SERVICE

I certify that I have served an original and six (6) copies of Appellant's Petition for Rehearing to the Appellate Clerk of Court and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and a copy of the same upon Respondents, by and through their counsel of record, Robert E. Davis, Esquire at Ward Law Firm, PA, 233 S. Pine St., Spartanburg, SC 29301, by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2019.

Anderson, South Carolina
April 1, 2019


Donald L. Smith (SC Bar#6699)
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Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

FORM 8
LETTER TO APPELLATE CLERK OF COURT
FILING PETITION FOR REHEARING

April 1, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: Kenji Kilgore v. Estate of Samuel Joe Dixon, Samuel E. Dixon and
Fredda Dixon
Appellate Case No. 2017-001330
Case No.: 2015-CP-04-1605

RECEIVED

APR 04 2019

SC Court of Appeals

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

- 1) Appellant's Petition for Rehearing;
- 2) A check amounting to Fifty Dollars (\$50.00) as motion/petition fees; and,
- 4) Proof of Service for the same.

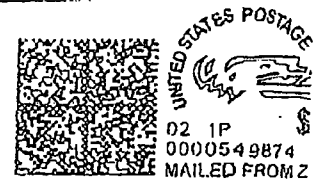
Sincerely,



Donald L. Smith, (Bar#6699)
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Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

cc:

Mr. Robert E. Davis, Esquire



Attorney Office of Donald Smith
122 N. Main Street,
Anderson, SC 29621

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APR 04 2019

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

APPENDIX G

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

RECEIVED
APR 12 2019
SC Court of Appeals

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

Kenji Kilgore Appellant,

v.

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

Respondent's Return to Appellant's
Motion to Reconsider

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

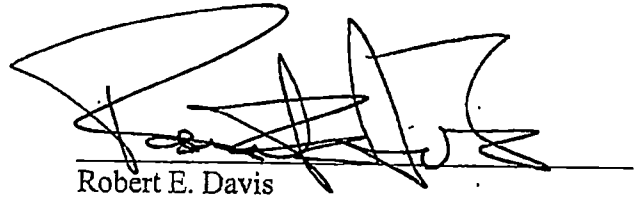
harm directed at a specific individual.” Roe v. Bibby, 410 S.C. 287, 295-96, 763 S.E. 2d 645, 649-50 (Ct. App. 2014). Appellant’s Complaint simply does not contain any allegations that Respondents had any “special relationship” with anyone, Respondents had “the ability to monitor, supervise, and control”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

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

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

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

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



Robert E. Davis
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233 South Pine Street
P. O. Box 5663
Spartanburg, South Carolina 29304
(864) 591-2369
(864) 585-3090 (facsimile)
Attorney for Respondents

April _____, 2019.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

RECEIVED
APR 12 2019
SC Court of Appeals

Kenji Kilgore Appellant,

v.

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

PROOF OF SERVICE

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

April 10, 2019.



Robert E. Davis
The Ward Law Firm, PA
233 South Pine Street
P. O. Box 5663
Spartanburg, South Carolina 29304
(864) 591-2369
(864) 585-3090 (facsimile)

THE WARD LAW FIRM, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 5663
SPARTANBURG, SOUTH CAROLINA 29304

H. SPENCER KING♦
K. LINDSAY TERRELL♦
ROBERT E. DAVIS*
JASON M. IMHOFF
JOHN E. ROGERS, II*
GINGER D. GOFORTH
C. REED TEAGUE
CHAD M. GRAHAM
T. JONATHAN CLARK

RUFUS M. WARD (1908-1988)
L. PAUL BARNES (1931-1986)
JAMES W. HUGGINS (1940-2017)

233 SOUTH PINE STREET
SPARTANBURG, S. C. 29302
OFFICE NO. (864) 573-8500
FAX. NO. (864) 585-3090

♦CERTIFIED MEDIATOR
*ALSO MEMBER NORTH CAROLINA BAR
*ALSO MEMBER GEORGIA BAR

E-mail: rdavis@wardfirm.com
Direct No. 864-591-2369

April 10, 2019

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APR 12 2019
SC Court of Appeals

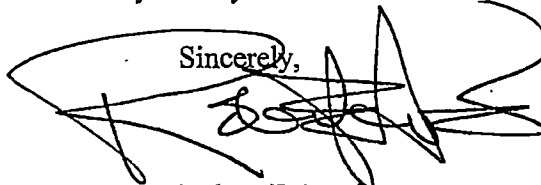
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

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

Sincerely,



Robert E. Davis

RED/awg

Enclosures

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

NE POST FIRST CLASS MAIL
04/10/2019
USPS POSTAGE \$001.90
ZIP 29302
041211259525

Robert E. Davis, Esquire
Ward Law Firm, PA
P. O. Box 5663
Spartanburg, SC 29304

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

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SC Court of Appeals

APPENDIX H

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED
APR 19 2019
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

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

Respondents.

**REPLY ON RESPONDENTS' RETURN TO APPELLANT'S
PETITION FOR REHEARING**

Pursuant to SCACR Rule 221(a) and SCACR Rule 240(f) Appellant Kenji Kilgore respectfully submits this Reply to Respondents' Return to Appellant's Petition for Rehearing, which was received by Appellant on April 12, 2019.

Contrary to Respondents contention in their Return to Appellant's Petition for Rehearing, Appellant did not fail to allege "special relationship" in his Complaint. "Special relationship" was established in the Complaint when Appellant stated that the "Respondents owned the real estate that Plaintiff rented to live in". (Summons and Complaint, R. p.1). Implied in this landlord-tenant relationship is the duty of the landlord to provide security for his tenant while in

his property¹, which includes the duty to warn or inform his tenant of danger in his property. Appellant believes that this duty is subsumed under “the general duty to exercise a degree of care which a reasonable and prudent person would have exercised under the same and similar circumstances”. (Appellant’s Complaint, R. p.6). Respondents’ failure to inform or warn Appellant of their son’s mental condition and aggressive behavior. The mere fact that they allowed Appellant to rent their property and placed him in the same room where their son stayed, knowing the latter’s unstable mental condition, is negligence/gross negligence itself.

The special relationship between the Respondents and the injurer. In his Complaint, Appellant alleged that Samuel Joe Dixon was Respondents’ son who lived in their property. (R. p. 4), and was the person who shot herein Appellant (R. p. 2). Appellant avers that Respondents knew or should have known of their son’s mental health issues when they had him stay on their premises. (R. p.4). Respondents had easy access to their son, and with due diligence they could have easily walked over to the trailer to check and/or visit him. They had the ability to monitor, supervise and control his conduct, which they failed to do. (R. p.4). By placing their son as Appellant’s roommate, Respondents increased the risk of the latter getting harmed.

That Respondents awareness of their son’s mental health problems was apparent with a conversation they had with the Appellant. Respondents told Appellant that their son “was doing better”. Undoubtedly, Respondents had notice and/or knowledge of his mental issues, as well as volatile behavior.

Appellant did not limit his case against Respondents on negligence based on duty to warn. Appellant believed that they also failed to take measures to prevent their son from having

¹ It is well-established that a landlord generally owes no affirmative duty to a tenant to provide security from criminal activities of third persons. Wright v. PRG Real Estate Management, Inc., et al., Op. No. 27868 (SCt., March 20, 2019). In this case, Samuel Joe is not a third person, and this case falls under the exception.

access to a gun considering his mental health issues. Any rational person would know that a person with aggressive behavior and mental health illness should not have access to guns, or any dangerous weapon.

Respondents further contend that Appellant failed to allege in the Complaint that they had prior knowledge of their son's mental health illness. Appellant believes that he satisfied the elements of negligence in this case: (a) Respondents' duty to exercise a degree of care which a reasonable and prudent person would have exercised under the same and similar circumstances, which includes the duty to provide security and warn or informed their tenant of dangers in their property; (b) Respondent failed to warn and/or informed Appellant of their son's mental health illness prior to renting their property to the latter; and, (c) Appellant was shot and sustained severe injuries due to Respondents' negligent acts. Appellant adequately pled a claim for negligence.

Regarding the issue of Respondents' duty to provide security and duty based on undertaking as being raised only during this Petition, Appellant argued in Final Brief that as his landlord, Respondents had a duty to reasonably maintain safe conditions on their property. (Final Brief of the Appellant, p. 4). Under the special circumstances of this case, Appellant argues that a part of the safe conditions required the disclosure of Respondents' son's mental illness. (Id., P. 5). Appellant has been consistent in his argument that Respondents, by knowingly keeping their son on their premises, had the responsibility to control and monitor his actions. Thus, Appellant's discussion of the duty to provide security and duty based on undertaking simply expounded on what Appellant has propounded in his Final Appellant's Brief and Final Reply Brief.

CONCLUSION

For all of the foregoing reasons, Appellant prays that this Honorable Court denies Respondents' Return and grant Appellant's petition for rehearing.

April 16, 2019



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attornevdonaldsmith@gmail.com
Attorney for Appellant

**FORM 7
PROOF OF SERVICE
FILING PETITION FOR REHEARING**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

RECEIVED

APR 19 2019

SC Court of Appeals

Kenji Kilgore,

v.

Appellant,

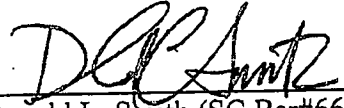
Estate of Samuel Joe Dixon, Samuel E. Dixon,
and Fredda Dixon

Respondents

PROOF OF SERVICE

I certify that I have served an original and six (6) copies of Appellant's Reply to Respondents' Return to Petition for Rehearing to the Appellate Clerk of Court and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and a copy of the same upon Respondents, by and through their counsel of record, Robert E. Davis, Esquire at Ward Law Firm, PA, 233 S. Pine St., Spartanburg, SC 29301, by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2019.

Anderson, South Carolina
April 16, 2019


Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

FORM 8
LETTER TO APPELLATE CLERK OF COURT
FILING PETITION FOR REHEARING

April 16, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

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SC Court of Appeals

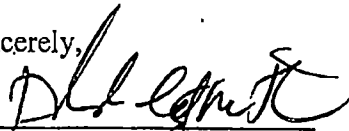
**RE: Kenji Kilgore v. Estate of Samuel Joe Dixon, Samuel E. Dixon and
Fredda Dixon
Appellate Case No. 2017-001330
Case No.: 2015-CP-04-1605**

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

- 1) Appellant's Reply to Respondents' Return to Petition for Rehearing; and,
- 2) Proof of Service for the same.

Sincerely,



Donald L. Smith, (Bar#6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

cc:

Mr. Robert E. Davis, Esquire



Attorney Office of Donald Smith
122 N. Main Street,
Anderson, SC 29621

RECEIVED
APR 19 2013
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

APPENDIX I

The South Carolina Court of Appeals

Kenji C. Kilgore, Appellant,

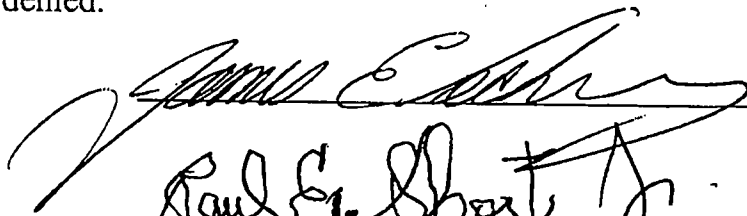
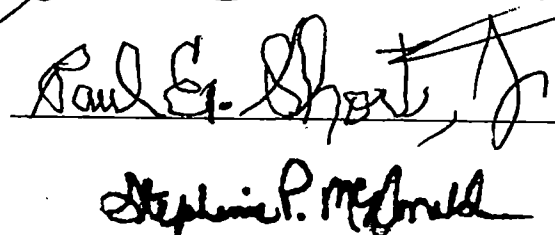

v.

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

Appellate Case No. 2017-001330

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Donald Loren Smith, Esquire
Robert Eric Davis, Esquire

FILED

June 5, 2019