IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MELISSA HANDY, AS ADMINISTRATRIX
OF THE ESTATE OF RICCO HANDY AND
ON BEHALF OF THE WRONGFUL DEATH
BENEFICIARIES OF RICCO HANDY — APPELLANTS

VS. — Cause No. 2010-CA-01513

WADDELL A. NEJAM d/b/a BELLEVUE
PLACE APARTMENTS — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF WADDELL A. NEJAM d/b/a BELLEVUE PLACE APARTMENTS, APPELLEE

ORAL ARGUMENT NOT REQUESTED

Thomas Y. Page, MSB #[redacted]
H. Gray Laird, MSB #[redacted]
Jan F. Gadow, MSB #[redacted]
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Suite 200
P.O. Box 1163
Jackson, MS 39215-1163
(601) 420.0333
(601) 420.0033 – facsimile

COUNSEL FOR APPELLEE

CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. Melissa Handy, as Administratrix of the Estate of Ricco Handy, the Estate of Ricco Handy, the Wrongful Death Beneficiaries of Ricco Handy, Appellants;

b. Joe N. Tatum, Counsel for Appellants;

c. Waddell A. Nejam d/b/a Bellevue Place Apartments, Appellee;

d. Thomas Y. Page, H. Gray Laird, Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Appellee;

e. Latrice Westbrook, trial and appellate Counsel for Appellant;

d. Honorable Swan Yerger (retired), trial judge.

e. Honorable Jeff Weill, Sr., Hinds County Circuit Court Judge

THIS, the 30th day of August, 2011.

Jan F. Gadow

Thomas Y. Page
H. Gray Laird
Jan F. Gadow

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument is not necessary to a resolution of the issue on appeal. The issue presented involves application of law to undisputed facts; the parties' positions are clear and the record uncomplicated. The facts and legal arguments can be adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUE

The trial court properly granted summary judgment in favor of Waddell A. Nejam because, as a matter of law, Nejam breached no duty owed to Ricco Handy.

I. INTRODUCTION

When Ricco Handy entered the swimming pool at the apartment complex where his uncle lived, he was 17 years old and did not know how to swim. He was not pushed into the pool or otherwise forced into the water, which was clearly marked at the 3, 6, and 9 foot depths, and he knew he was not protected by a lifeguard. There was no hidden danger. Ricco's teenaged cousin who accompanied him at the pool was also unable to swim, but unlike Ricco, the other teenager carefully stayed in the shallow end of the swimming pool. For some unknown reason, Ricco intentionally and without regard to the known and obvious risk, voluntarily made his way into the deep end of the pool, not once, but twice. Unfortunately and tragically, Ricco was unable to make it back to the shallow end after his second deep water maneuver and he drowned, but his drowning is not the result of any breach of duty owed by Waddell Nejam, the owner of the apartment complex.

II. STATEMENT OF THE CASE

This appeal originated in August 2007 when Melissa Handy filed a complaint against Waddell Nejam, d/b/a Bellevue Place Apartments (hereinafter "Nejam"), for the wrongful death of Ricco Handy . (C.P. 6) This complaint alleges that Ricco Handy drowned in the swimming pool at Bellevue Place Apartments, as a result of Nejam's negligence. (C.P. 7) Nejam answered in a timely fashion, denied all allegations of negligence and asserted certain defenses, including that Ricco Handy's drowning occurred as a result of his own negligence or that of others for whom Nejam is not responsible, contributory and/or comparative negligence and comparative fault, and intervening and superseding acts of other parties. (C.P. 9-13)

On September 1, 2009, Nejam filed a motion for summary judgment. (C.P. 87-97) Two weeks later Handy filed a response in opposition to Nejam's motion for summary judgment. (C.P. 120-27) With permission from the trial court, Handy then filed an amended complaint on September 25, 2009, adding Nejam Properties, LLC, as an additional defendant. (C.P. 41-42, 83, 139-42) Nejam filed a reply to Handy's response in opposition to motion for summary judgment in April 2010, prompting Handy's supplemental response in May 2010. (C.P. 157-63, 279-88) Nejam Properties answered in May 2010, denying liability and asserting the same defenses as previously asserted by Waddell, and thereafter joined in Nejam's motion for summary judgment. (C.P. 319-24, 397)

In August 2010, the trial court granted summary judgment in favor of Nejam and Nejam Properties via a memorandum opinion and order, then entered final judgment in favor of Nejam. (C.P. 469-74, 475) Handy appealed from both. (C.P. 476)

III. THE FACTS

Waddell A. Nejam was, at the relevant time, the sole owner of Bellevue Place Apartments, a small (38 units), well maintained complex in Jackson, Mississippi, just South of Fortification Street. (C.P. 342-43, 367, 368, 376) This two-story complex surrounds a small swimming pool. (C.P. 376) Water depth was marked on the side of the pool at 3 feet, 6 feet, and 9 feet. (C.P. 137, 166, 308) The resident manager of the complex, Ruby Heard, had lived at Bellevue Place in a unit adjacent to the pool for years prior to the incident at issue here. She often and routinely visually inspected the pool, ensured that pool safety appliances were in place, that the pump was working, that the water was clear, and otherwise made sure the pool was as it should be. (C.P. 309-10, 368, 375, 376, 378) Mr. Nejam did not own the property when the complex, including the swimming pool, was

designed and built. (C.P. 88)

Craig Handy moved into Bellevue Place in April 2007, at which time he dealt strictly with Ms. Heard, and signed a lease. The lease included regulations concerning the complex swimming pool, all of which Craig understood. (C.P. 170) The lease specifically stated that use of the pool was at the user's own risk, that there was generally no lifeguard or other safety personnel on duty, and that children under twelve must be accompanied by an adult. (C.P. 181, 130) Because he was clear about the pool rules, Craig never asked Ms. Heard or anyone else any questions about them. (C.P. 170) Craig did not know how to swim, he never used the complex pool, and in fact he had never been to the pool area prior to May 5, 2007. (C.P. 171, 172)

On that date, then seventeen-year-old Ricco Handy and his cousin, sixteen-year-old Courtney Handy, visited their uncle Craig at his Bellevue Place apartment. (C.P. 129, 169) The boys had played in a basketball game earlier that day and their uncle Craig, who watched their basketball game, drove them home with him after the game. (C.P. 175, 195) Once at Craig's apartment, the trio ate and started to watch a movie, then Craig went to his bedroom and fell asleep. According to Craig, Ricco woke Craig to ask him if the boys could go down to the pool; Craig gave them permission and warned them to be careful, then went back to sleep. (C.P. 176-77, 180, 196) According to Courtney, the boys had talked about going to the pool in front of Craig while they were eating, but when Craig fell asleep, Courtney and Ricco went down to the pool without asking Craig's permission. (C.P. 255-56) At no time did Craig tell the boys *not* to go to the pool. (C.P. 257) Craig did not know that Ricco couldn't swim. (C.P. 174)

When the boys reached the pool area, Henry Torrence, a tenant, was the only

person there. Torrence was not in the pool, but just relaxing and enjoying the weather. (C.P. 89, 198) Courtney said he didn't notice the sign with the posted pool rules and the flotation device hanging on it, but he did know there was no lifeguard present. (C.P. 164, 259, 270-71, 376, 379) The sign at the pool reflected the pool rules, including a limitation of two guests per apartment, that guests must be accompanied by a resident, and that swimming is at the swimmer's risk as there is no lifeguard on duty. (C.P. 164, 173, 371, 376) Ricco was able to read, write, understand and comprehend what he read. According to his mother, he would have been able to understand these posted pool rules. (R.E. 2[1], depo pp. 15-21, 56-57; Supplemental Record pp. 9-10, 30-31) His parents had admonished him not to get in swimming pools or other bodies of water because he couldn't swim and Ricco knew that if he disobeyed that advice, it would be a very dangerous situation. (R.E. 2, depo pp. 22-23, Supplemental Record 11, 32) There was no rope across the pool, dividing the shallow end from the deep. (C.P. 234)

The boys initially sat on the edge of the pool at the three foot deep end for a while, just talking. (C.P. 197) The water was clean and clear and the depth markers were open and obvious. (C.P. 166, 275, 308) Courtney, who couldn't swim, made sure to stay in water no higher than his waist. (C.P. 259) However, the 6'2" Ricco told Courtney he was going down to the six foot end of the pool, which he did – walking in the water and holding on to the side of the pool - then he came back to the shallow end. (C.P. 199-201)

---

1 Appellee's Record Excerpts contain a copy of the deposition testimony of Melissa Handy, which is contained in the Supplemental appellate record. This deposition testimony was attached as an exhibit to Nejam's Motion for Summary Judgment; however, although Handy's designation of the record for appeal encompassed this document, it was not included in the initial appellate record. Pursuant to the Motion to Correct Record and for Certification of Same and Agreed Order, a copy of this deposition testimony has been certified and added to the appellate record.

According to Courtney, when Ricco was in the six foot section of the pool[2] the water hit between his breast and his neck. (C.P. 227) When Ricco tried to repeat this deep water maneuver[3], he purposely went under water, but then lost his grip on the edge of the pool and drifted away from the side, got into trouble, and didn't come back up. (C.P. 201-02, 240-42, 265-66) Courtney testified that Ricco had already lost consciousness at this point. (C.P. 202-03)

Torrence saw Ricco in the middle of the pool with his face underwater, moving his arms as if swimming underwater. (C.P. 372-73) Torrence also observed Courtney in the shallow end of the pool; Courtney gave no indication that he thought Ricco was in trouble. (C.P. 373-74) After a minute or so, Torrence asked Courtney whether Ricco could swim and whether he might be in trouble in the water. Torrence then jumped in to try to help Ricco, who had not lifted his face from the water, but Ricco pushed Torrence away several times. (C.P. 372-74) Lou Ann Peeples then arrived at the pool area, took in the scene, and retrieved the long pole with a net on the end of it and pushed it out toward Ricco, but he continued to push away instead of grabbing onto the pole or net. (C.P. 372-74) Another lady arrived, jumped into the pool, and was eventually able to help get Ricco to the side of the pool and pulled out of the water. (C.P. 373-74)

Courtney's version of these events differs somewhat. According to Courtney, when he saw Ricco was in trouble, he asked Torrence to help, but Torrence said he couldn't dive under water. (C.P. 202, 243) Instead, Torrence grabbed a long pole and used it to try to help Ricco get out of the pool. (C.P. 202-03) When this didn't work, Courtney ran

---

2 Interestingly, Courtney was able to identify when Ricco was in the 6 foot deep section of the pool despite his denial that he had seen any depth markers. (C.P. 166, 210, 227, 379)

3 Contradictorily, in a subsequently sworn Affidavit, Courtney stated that before he and Ricco went to the pool they discussed and agreed that neither of them would knowingly go into the deep end of the

up to Craig's apartment. (C.P. 204) When Courtney ran into the apartment and woke Craig to tell him that Ricco had slipped in the deep end of the pool[4] and Courtney needed help to get him out, Courtney called 911 on Craig's cell phone. Craig ran down to the pool area from his second floor apartment in time to see someone jump into the pool and pull Ricco up. At this point Craig grabbed Ricco and pulled him out of the pool. Ricco was unconscious. (C.P. 178, 248-51) Courtney estimated it was more then five minutes from the time Ricco first got in trouble in the pool until the time he was actually pulled out of the nine foot deep water. (C.P. 204-05)

Someone started CPR, an unidentified bystander called 911, then Craig sent Courtney to the apartment to get Craig's keys, then to the street to meet the ambulance. (C.P. 178-79, 207, 251) Craig didn't notice any poles or flotation devices in the pool area while waiting for the ambulance, which arrived only a couple of minutes after the 911 call. (C.P. 179) Likewise, Courtney did not notice any emergency phone or flotation devices in the pool area nor did he notice the depth markers painted on the side of the pool, though he said he was in shock. (C.P. 166, 198, 210, 246, 271-72, 308, 376, 379) Tragically, Ricco could not be saved.

Thomas Ebro, a nationally known aquatic safety consultant and specialist and founder of a water safety consulting firm, provided an Affidavit which states that Nejam breached the applicable standard of care by: failing to place a life-line rope divider in the pool, which was designed to have such a device installed; failing to place a bottom stripe inside the pool and proper depth markers to allow swimmers to discern the depth of the

---

pool. (C.P. 304)

4 Again Courtney contradicted his own testimony in his subsequently sworn Affidavit, which states that he meant to say Ricco waded out farther than he intended and could not climb back up the steep slope of the pool to the shallow end. (C.P. 304)

water; and failing to have an emergency phone accessible at the pool area. According to Ebro, these breaches were the proximate cause of Ricco's drowning and/or were a significant contributing cause of his drowning. Ebro further offered his opinion that Ricco would not have drowned if Nejam had provided a lifeline rope, bottom stripe, depth markings, an emergency phone, and an emergency action plan. (C.P. 131-34) However, Ms. Heard testified that the depth markers, but no lifeline rope, were in fact present on May 5, 2007. (C.P. 137, 308) Photographic evidence is in accord. (C.P. 166) Before Ricco Handy's drowning, there had been no drownings or near drownings at this property or at any of the properties owned by Mr. Nejam. (C.P. 349-50, 377)

IV. SUMMARY OF THE ARGUMENT

Ricco Handy entered the premises of Bellevue Place Apartments as an invitee, but when he exceeded the scope of his limited invitation to swim in the complex pool, his status shifted from invitee to licensee or trespasser. But regardless of whether Ricco was an invitee, a licensee, or a trespasser, as a matter of law Nejam satisfied any duties owed. Nonetheless, presuming Handy produced evidence to establish breach, there is no evidence to establish proximate cause. Handy's expert affidavit is insufficient, as a matter of law, to establish causation. And even if this expert affidavit is accepted and considered, there is still no evidence from which reasonable minds could rationally conclude that, had Nejam provide the pool equipment which Handy claims he had a duty to provide, Ricco would not have drowned. There is no genuine issue of material fact, Nejam is entitled to judgment as a matter of law, and this Court must affirm.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF WADDELL A. NEJAM BECAUSE, AS A MATTER OF LAW, NEJAM BREACHED NO DUTY OWED TO RICCO HANDY

A. Standard of Review

This Court reviews a circuit court's grant of summary judgment *de novo.* ***Kimbrough v. Keenum,*** 2011 WL 1467623, at *2 (¶ 9) (Miss.App. Apr. 19, 2011) (citations therein omitted); ***Hynes v. Ambling Management,*** 2011 WL 2536189, at *1 (¶ 5) (Miss.App. June 28, 2011) (citation therein omitted). If the evidence, viewed in the light most favorable to the non-movant, reveals no genuine issue of material fact and the moving party is entitled to judgment in his favor, summary judgment is appropriate. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 9). The evidence considered includes all pleadings, depositions, answers to interrogatories and admissions, and any affidavits. ***Hynes,*** 2011 WL 2536189, at *1 (¶ 5).

The non-movant may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 9). The non-movant's rebuttal must be supported by significant, probative evidence on each element of his claim, which requires more than a "'mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict.'" ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10) (quoting ***Lott v. Purvis,*** 2 So.3d 789, 792 (¶ 11) (Miss. App. 2009)); ***Kendrick v. Quin,*** 49 So.3d 645, 648 (¶ 7) (Miss. App. 2010) (citation therein omitted). Bare assertions are insufficient to avoid summary judgment. ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10) (citations therein omitted). If the non-movant fails to sufficiently establish any essential element of his claim, summary judgment is mandated. ***Patterson v. Tibbs,*** 60 So.3d 742, 753 (¶ 41) (Miss. 2011) (citing ***Buckel v. Chaney,*** 47 So.3d 148,

153 (Miss. 2010)); ***Albert v. Scott's Truck Plaza,*** 978 So.2d 1264, 1266 (¶ 6) (Miss. 2008) (citations therein omitted).

B. Applicable Premises Liability Law

For this negligence/premises liability claim to survive summary judgment, Handy was required to submit proof of duty, breach, causation and damages. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 11) (citing ***Wagner v. Mattiace,*** 938 So.2d 879, 883 (¶ 11) (Miss.App. 2006)); ***Hynes,*** 2011 WL 2536189, at *2 (¶ 6) (citation therein omitted); ***Albert,*** 978 So.2d at 1266 (¶ 6). The existence of a duty owed, which depends on the status of the injured party at the time of the injury, is a question of law. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 11) (citations therein omitted); ***Albert,*** 978 So.2d at 1266 (¶ 6). Where the facts are not in dispute, determination of status is also a question of law. ***Albert,*** 978 So.2d at 1267 (¶ 7) (citations therein omitted).

When an apartment resident invites another to his leased apartment for their mutual benefit or hospitality, the visitor is an invitee. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 6) (citing ***Little by Little v. Bell,*** 719 So.2d 757, 760 (¶ 15) (Miss. 1998) (citing ***Hoffman v. Planters Gin Co.,*** 358 So.2d 1008, 1011 (Miss. 1978))); ***Minor Child v. Miss. Federation of Colored Women's Housing,*** 941 So.2d 821, 826-27 (¶¶ 22-24) (Miss. App. 2006) (citations therein omitted); ***Lumbley v. Ten Point,*** 556 So.2d 1026, 1030 (Miss. 1989) (citations therein omitted). An apartment owner owes an invitee the duty to keep the premises reasonably safe and, when not reasonably safe, to warn where there is a hidden danger that is not in plain and open view. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 6) (citations therein omitted); ***Kendrick,*** 49 So.3d at 649 (¶ 10) (citation therein omitted); ***Stanley v. Boyd Tunica,*** 29 So.3d 95, 97 (¶ 8) (Miss. App. 2010) (citations therein omitted).

Foreseeability of the injury is a component of the duty owed to an invitee. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 8) (citation therein omitted).

Specifically, as to swimming pools, an apartment owner owes invitees the duty to use ordinary due care for the safety of invitees to guard against their injury and to provide a reasonably safe place, reasonably safe accommodations, or to maintain the premises in a reasonably safe condition. ***Kopera v. Moschella,*** 400 F.Supp. 131, 134 (S.D. Miss. 1975), *aff'd,* 526 F.2d 1405 (5th Cir. 1976) (citation therein omitted). The basis for premises liability is the owner's superior knowledge of any danger, therefore the owner is not generally liable for injury resulting from a danger known to the invitee or one as obvious to the invitee as to the owner, or from a danger which the invitee should reasonably have appreciated before exposing himself to it. There is no duty to warn an invitee of a danger known to the invitee or as well known to the invitee as to the owner or occupant or which is obvious or which should be observed by the invitee in the exercise of ordinary care. ***Nofsinger v. Irby,*** 961 So.2d 778, 782 (¶ 12) (Miss. App. 2007) (citations therein omitted). Moreover, "[t]he risk of drowning in a pool is obvious" and not a hidden danger. ***Howze v. Garner,*** 928 So.2d 900, 904 (¶ 17) (Miss. App. 2005). The Mississippi Supreme Court has previously found that a ten-year-old rising fifth-grader who drowned in a motel pool was "not too young to appreciate the danger of water." ***Gordon v. C.H.C. Corp.,*** 236 So.2d 733, 736 (Miss. 1970).

One who enters another's premises as a guest of the occupant, not for mutual benefit, but conditioned on hospitality or to receive a gratuitous favor, is usually considered a licensee. ***Kendrick,*** 49 So.3d at 649 (¶ 11) (citations therein omitted). A licensee is also one who enters the property of another for his own convenience or pleasure pursuant

to the implied permission of the owner. ***Albert,*** 978 So.2d at 1266-67 (¶ 7) (citation therein omitted). And while one may enter the premises as an invitee, he may lose that status and become a licensee if he exceeds the scope or purpose of the invitation. ***Hill v. March of Dimes,*** 641 F.Supp. 110, 113 (S.D.Miss. 1986) (citation therein omitted); ***Leffler v. Sharp,*** 891 So.2d 152, 157 (¶ 15) (Miss. 2004). An owner or occupant owes a licensee (and a trespasser) the duty to refrain from willfully or wantonly injuring them. ***Kendrick,*** 49 So.3d at 649 (¶ 10) (citation therein omitted). "Accordingly, a premises owner is not liable to a licensee or trespasser for injuries incurred because of the owner's failure to act." ***Davis v. Christian Brotherhood Homes of Jackson,*** 957 So.2d 390, 405 (¶ 35) (Miss. App. 2007).

C. Legal Argument

1. Status and Duty, but no Breach

The duty Nejam owed to Ricco is a question of law for the court to determine and this duty depends on Ricco's status at the time he was injured, which is also a question for the court when the relevant facts are undisputed. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 11); ***Albert,*** 978 So.2d at 1266-67 (¶¶ 6-7). There is no dispute about the facts concerning Ricco's presence at Bellevue Place Apartments: he was there at the invitation of his uncle, Craig Handy. As a matter of law, Ricco first entered the premises of the Bellevue Place Apartments as an invitee. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 6) (citations therein omitted); ***Minor Child,*** 941 So.2d at 826-27 (¶¶ 22-24); ***Lumbley,*** 556 So.2d at 1030.

Nonetheless . . .

a. As a Matter of Law, Ricco was a Licensee or Trespasser when he Drowned and, also as a Matter of Law, Nejam satisfied the Duty Owed

Nejam concedes that Ricco initially entered the premises as an invitee; however, as a matter of law, Ricco lost his invitee status and became a licensee when he exceeded the

scope of his invitation. ***Hill,*** 641 F.Supp. at 113. Hill attended a March of Dimes fundraising event at the Trade Mart building, where he was required to produce a ticket to enter. Following the event, Hill voluntarily stayed to help clean up - not to help the March of Dimes, but to impress his employer. ***Hill,*** 641 F.Supp. at 113. During the clean up process, Hill climbed onto a scaffold so that he could reach some decorations that needed to be removed. A wheel of the scaffold got stuck in a crack, causing Hill to fall off the scaffold, about twenty feet to the concrete floor. ***Hill,*** 641 F.Supp. at 112. The ***Hill*** Court assumed Hill was an invitee when he entered the event, but found that he acquired the status of a licensee when he stayed on the premises after the event to clean up, because he had exceeded the scope or purpose of the invitation extended through the entry ticket. ***Hill,*** 641 F.Supp. at 113.

A similar situation occurred in ***Leffler,*** 891 So.2d 152 (Miss. 2004). Leffler visited the Quarter Inn, a restaurant and lounge in Vicksburg, for the first time with some co-workers. While there, he noticed a small, open window (24 inches long by 32 inches wide) leading to the rooftop, where some individuals had gathered. He presumed the rooftop area was open to Quarter Inn patrons and, although a locked glass door marked "NOT AN EXIT" was only four feet away, Leffler climbed through the window and onto the roof. While walking on the rooftop, he fell through the roof to the ground, about twenty feet below. ***Leffler,*** 891 So.2d at 154 (¶¶ 2-3). Though Leffler had no way of knowing it, the lease agreement between the Quarter Inn's owner (Free) and the property owner (Sharp) stated that the lessee would not have access to the roof terrace. ***Leffler,*** 891 So.2d at 155 (¶ 5). However, before this lease was entered into, Sharp considered leasing the rooftop area and, toward that end, consulted with an architect and structural engineer, who

advised that the roof was not safe for such use. Sharp so advised Free and they discussed what measures they should take to secure the roof area. The parties decided they would have bars welded over the window to keep people off the roof, but neither the bars nor any other preventive measures ever materialized. ***Leffler,*** 891 So.2d at 155 (¶ 6). On appeal of the trial court's grant of summary judgment in favor of Free and Sharp, the Court found that although Leffler was an invitee when he entered the Quarter Inn, Free and Sharp had only invited patrons to come inside the Quarter Inn. Leffler exceeded the bounds of his invitation when he crawled through the window and onto the roof, thereby shedding his invitee status. ***Leffler,*** 891 So.2d at 157 (¶ 15). Free and Sharp had locked and marked the exit door to keep the Quarter Inn safe for patrons, but Leffler was not an invitee at the rooftop when his accident occurred, therefore he was not owed the duty afforded an invitee. ***Leffler,*** 891 So.2d at 158 (¶¶ 16-17). Instead, because Leffler had neither an invitation nor permission to enter the rooftop, his status was that of a mere trespasser. ***Leffler,*** 891 So.2d at 158-59 (¶¶ 18-21).

Craig Handy invited Ricco to visit at his apartment. While there, Ricco decided to use the pool, which one may presume was open to guests of tenants, subject to the posted regulations, including that children must be accompanied by an adult, guests must be accompanied by the tenant, no lifeguard is on duty, and swimmers do so at their own risk. (C.P. 164, 173, 376) Even though these regulations were clearly posted on a permanent sign facing the pool, and knowing he could not swim, Ricco nonetheless entered the pool unaccompanied by any adult and unaccompanied by Craig Handy, the tenant. Although Ruby Heard had considered the possibility of a life-line rope before the date of Ricco's accident, no life-line was ever installed. ***Leffler,*** 891 So.2d at 155 (¶ 6). As was the case

in ***Leffler,*** Ricco was an invitee when he entered the Bellevue Place premises, but Nejam had only invited guests of tenants to swim in the complex pool subject to certain regulations. Ricco exceeded the bounds of his invitation when he entered the pool unaccompanied by any adult or by Craig Handy, the tenant, thereby losing his invitee status. ***Hill,*** 641 F.Supp. at 113; ***Leffler,*** 891 So.2d at 157 (¶ 15). Nejam had provided depth markings, clear notice that no lifeguard was on duty, and other regulations to keep the pool safe for tenants and guests, but Ricco was not an invitee in the pool unaccompanied by any adult or by Craig Handy when his accident occurred, therefore he was not owed the duty afforded an invitee. ***Leffler,*** 891 So.2d at 158 (¶¶ 16-17). As a matter of law, because Ricco had neither an invitation nor permission to enter the pool unaccompanied by an adult or by a tenant, his status was that of a trespasser. ***Leffler,*** 891 So.2d at 158-59 (¶¶ 18-21). Also as a matter of law, Nejam owed Ricco as "licensee" or "trespasser" the duty to refrain from willfully or wantonly injuring him. ***Kendrick,*** 49 So.3d at 649 (¶ 10).

Handy claims that Nejam breached his duty by failing to provide a life-line rope[5], bottom stripes, and by failing to provide an emergency telephone at the pool[6]. To constitute a breach of the duty owed a licensee or trespasser, there must be some knowing and intentional thing or wrongful act. ***Kendrick,*** 49 So.3d at 649 (¶ 13) (citation therein

---

5 Handy claims that the need for a life-line rope is greater than usual in the present case because the subject pool has a steep stair case like drop off from the shallow to deep water, but Ruby Heard's testimony is definitely that the bottom of the pool slants or tapers from one depth to another. (C.P. 310) This is in accord with Courtney's Affidavit that says Ricco could not climb back *up the slope* of the pool from the deep to the shallow end. (C.P. 304)

6 Handy also alleges the lack of depth markersis a breach, but the undisputed sworn evidence is that depth markers were in place and clearly visible on the date of the accident. Simply because certain witnesses did not recall seeing the depth markers does not overcome the sworn evidence affirmatively establishing that they were in place on the date of the drowning. (C.P. 308, 376)

omitted). When the duty owed is to refrain from willfully or wantonly injuring a person, "'something more is required to impose liability than mere inadvertence or lack of attention; there must be a more or less extreme departure from ordinary standards of care, and conduct must differ in quality, as well as in degree, from ordinary negligence involving a conscious disregard of a known serious danger.'" ***Leffler***, 891 So. 2d at 159 (¶ 22) (quoting ***Hoffman,*** 358 So. 2d at 1012 -13 (citing ***Coleman v. Associated Pipeline Contractors,*** 444 F.2d 737 (5th Cir. 1971))).

Nejam did not disregard the condition of the pool. It was regularly and well-maintained, clearly visible depth markers were in place, and rules and regulations for safe pool use were posted on a permanent sign facing the pool. Despite Nejam having taken reasonable steps to make sure the pool was in a safe condition, Ricco nonetheless entered the pool without invitation or permission. ***Leffler***, 891 So. 2d at 159 (¶ 23). Viewing all evidence in the record in the light most favorable to Handy, the record lacks even a scintilla of evidence, much less significant, probative evidence of an intentional wrong by Nejam or of Nejam willfully or wantonly injuring Ricco. At best, Nejam failed to provide a life-line, bottom striping, and an emergency phone; that is all Handy has alleged. Even Handy's proposed expert, Thomas Ebro, is of the opinion that Nejam passively breached his duty by failing to provide certain pool equipment. (C.P. 134)

Yet Nejam cannot be liable to Ricco for injuries suffered because of Nejam's failure to act. ***Davis,*** 957 So.2d at 405 (¶ 35). There is no evidence from which reasonable minds could rationally conclude that Nejam willfully and wantonly injured Ricco. ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10); ***Kendrick,*** 49 So.3d at 648 (¶ 7), 649 (¶ 14). As a matter of law, Nejam satisfied the duty owed to Ricco. ***Kendrick,*** 49 So.3d at 649 (¶ 10). With no

evidence establishing the essential element of breach, summary judgment in favor of Nejam is warranted. ***Patterson,*** 60 So.3d at 753 (¶ 41); ***Albert,*** 978 So.2d at 1266 (¶ 6). Alternatively . . .

b. If Ricco was an Invitee when he Drowned, as a Matter of Law Nejam Satisfied the Duty Owed

Should this Court determine that Ricco maintained his "invitee" status at the time of his injury, then as a matter of law Nejam owed him a duty to keep the premises reasonably safe and, when not reasonably safe, to warn of any hidden danger not in plain and open view. ***Hynes,*** 2011 WL 2536189, at *2 (¶¶ 6, 8); ***Kendrick,*** 49 So.3d at 649 (¶ 10); ***Stanley,*** 29 So.3d at 97 (¶ 8). More specifically, again contingent upon Ricco having maintained his "invitee" status at the time of his injury, Nejam owed the duty to use ordinary due care for Ricco's safety to guard against his injury and to use due care to provide a reasonably safe place, reasonably safe accommodations, or maintain the premises in a reasonably safe condition. ***Kopera,*** 400 F.Supp. at 134. As a matter of law, Nejam owed Ricco no duty to warn of any danger known to Ricco or as well known to Ricco as to Nejam and no duty to warn Ricco of any danger that was obvious or which Ricco should have observed in the exercise of ordinary care. ***Nofsinger,*** 961 So.2d at 782 (¶ 12).

Although foreseeability is a component of this duty, Handy has provided no evidence to the effect that Nejam had reason to foresee Ricco's drowning. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 8) (citation therein omitted). There is no evidence of any previous drowning or even a near drowning at the Bellevue Place Apartments or at any of the properties that Nejam owns. There is no evidence in the record tending to show the known, constant presence of many minor children at the Bellevue Place pool. Consequently, and contrary to the situations presented in ***Kopera*** and ***Gault,*** there is no

evidence of the foreseeability of danger to children of tender years, which might otherwise inform the duty owed. ***Kopera,*** 400 F.Supp. at 134; ***Gault v. Tablada,*** 400 F.Supp. 136, 139-40 (S.D.Miss. 1975), *aff'd,* 526 F.2d 1405 (5th Cir. 1976).

Handy claims Nejam breached the duty owed by failing to provide a life-line rope, bottom stripes, and an emergency phone[7]. Viewing all evidence in the light most favorable to Handy, the record reflects that there was no life-line rope, bottom stripe, or emergency phone, but the water was clean and clear and Nejam had provided open and obvious depth markers. (C.P. 166, 275, 308) The resident manager routinely inspected the pool to ensure that the pool safety appliances were in place and that the pool area was generally as it should be and not in need of maintenance. (C.P. 309-10, 378) Nejam had also provided plain notice that no lifeguard was on duty and had provided other regulations to keep the pool safe for tenants and guests, including the requirement that children be accompanied by an adult and that guests be accompanied by a tenant. As a matter of law, Nejam satisfied his duty to use ordinary care for Ricco's safety and to provide a reasonably safe place and to maintain the pool area in a reasonably safe condition. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 6); ***Kendrick,*** 49 So.3d at 649 (¶ 10); ***Stanley,*** 29 So.3d at 97 (¶ 8); ***Kopera,*** 400 F.Supp. at 134.

Handy claims that a duty to equip the apartment pool with a lifeline, a bottom stripe, and an emergency phone[8] is included within Nejam's duty to keep the premises reasonably safe. However, despite the proffered "learned treatise" and case law from other jurisdictions, Handy has provided no evidence that Nejam had an affirmative duty imposed either by statute or common law to so equip the swimming pool. *See* ***Hynes,*** 2011 WL

---

7 See footnote 6 as to depth markers.

2536189, at *2 (¶ 7). Handy did provide an affidavit from Thomas Ebro, an aquatic safety consultant and specialist, who offered his "expert" opinion via affidavit that Nejam breached the standard of care by failing to provide a lifeline, a bottom stripe, and an emergency phone[9]. As a matter of law, Ebro's affidavit is insufficient to avoid summary judgment.

Mississippi follows the federal ***Daubert/Kumho*** standard in analyzing the admissibility of expert testimony: the expert opinion must be relevant (that is, it must assist the trier of fact) and it must be reliable. ***Denham v. Holmes,*** 60 So.3d 773, 784 (¶ 35) (Miss. 2011) (citing M.R.E. 702, Comment); ***Sanders v. Wiseman,*** 29 So.3d 138, 141 (¶ 10) (Miss. App. 2010) (citations therein omitted). Though somewhat better than the expert affidavit proffered in ***Sanders,*** Ebro's affidavit is still insufficient pursuant to M.R.E. 702(1) because: it fails to establish that Ebro knows whether Ricco was an invitee or licensee, therefore fails to establish that he knows the duty owed to either; although the affidavit states that Ebro is familiar with the standard of care owed by apartment complex operators and owners in Mississippi, it does not articulate any applicable standard of care, as to either an invitee or a licensee, yet broadly concludes that Nejam breached the standard of care. (C.P. 131-35) ***Sanders,*** 29 So.3d at 143 (¶¶ 21-22). Without any specifically articulated standard of care, Ebro's affidavit testimony concerning breach is not helpful to the trier of fact, therefore irrelevant and inadmissible as a matter of law. *See, e.g.,* ***Denham,*** 60 So.3d at 784 (¶¶ 35-36); M.R.E. 702; ***Sanders,*** 29 So.3d at 141 (¶ 10); M.R.E. 402.

Ignoring momentarily the insufficiency of Ebro's affidavit and presuming his affidavit

---

8 See footnote 6 as to depth markers.

9 Ebro also states the lack of depth markers is a problem, but the undisputed sworn evidence is that depth markers were in place and clearly visible on the date of the accident. Simply because certain witnesses did not recall seeing them does not overcome the sworn evidence establishing that they

testimony on the issue of breach is sufficient and properly considered, Nejam cannot be liable for injury resulting from a danger known to Rico or one as obvious to Ricco as to Nejam, or from a danger which Ricco should reasonably have appreciated before exposing himself to it. ***Nofsinger,*** 961 So.2d at 782 (¶ 12). Consider ***Howze***, wherein the plaintiff similarly contended, via the affidavit of an aquatics director, that the defendant breached the duty of care[10] concerning his swimming pool by failing to install a life-line, by not hiring a certified lifeguard, by allowing children to swim in a cloudy pool, and by failing to provide personal flotation devices. ***Howze,*** 928 So.2d at 904 (¶ 16). Despite this affidavit testimony, the trial court granted defendant's motion for summary judgment; the Mississippi Court of Appeals affirmed. The Court of Appeals noted that although there are dangers associated with allowing children to swim in pools, the dangers are not hidden perils and the risk of drowning in a pool is obvious. ***Howze,*** 928 So.2d at 904 (¶ 17). "Therefore, [defendant's] failure to provide flotation devices, hire certified lifeguards, install a life-line, or read brochures pertaining to pool safety does not constitute a breach of [defendant's] duty [to a licensee] to warn of hidden perils." ***Howze,*** 928 So.2d at 904 (¶ 17).

There was no hidden peril presented by the swimming pool at the Bellevue Apartment complex. The depth of the water was clearly marked on the side of the pool, the pool's water was clean and not cloudy, and the pool rules were plainly posted next to the pool. Assuming, *arguendo,* that the lack of a life-line rope, bottom stripes, and an emergency phone effected a dangerous condition, Nejam had no duty to warn Ricco of such danger because the risk of drowning in a pool is obvious, not hidden, therefore Ricco should have observed this danger in the exercise of ordinary care. ***Nofsinger,*** 961 So.2d

---

were in place. (C.P. 308, 376)

at 782 (¶ 12); ***Howze,*** 928 So.2d at 904 (¶ 17). In fact, Ricco's mother testified that she had warned Ricco not to get into swimming pools and, further, that Ricco knew that was a very dangerous situation for him. (R.E. 2, depo pp. 22-23) As a matter of law, 17-year-old Ricco Handy was "not too young to appreciate the danger of water" and Nejam had no duty to warn of any alleged danger presented by the pool. ***Gordon,*** 236 So.2d at 736; ***Nofsinger,*** 961 So.2d at 782 (¶ 12); ***Howze,*** 928 So.2d at 904 (¶ 17). There is no genuine issue of material fact: even if Ricco was an invitee, as a matter of law Nejam satisfied the duty owed. ***Kendrick,*** 49 So.3d at 649 (¶ 10). There is no evidence from which reasonable minds could rationally conclude that Nejam failed to use ordinary care to maintain the premises in a reasonably safe condition. ***Kopera,*** 400 F.Supp. at 134; ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10); ***Kendrick,*** 49 So.3d at 648 (¶ 7). As a matter of law, Nejam satisfied the duty owed to Ricco. ***Kendrick,*** 49 So.3d at 649 (¶ 10). With no evidence establishing the essential element of breach, summary judgment in favor of Nejam is warranted. ***Patterson,*** 60 So.3d at 753 (¶ 41); ***Albert,*** 978 So.2d at 1266 (¶ 6).

Alternatively, Nejam satisfied any alleged duty to warn by virtue of the permanent rules and regulations sign, which faced the pool and clearly advised that no lifeguard was on duty and that all swimmers used the pool at their own risk. (C.P. 164, 173, 376) Again, Ricco's mother testified that Ricco was able to read and comprehend what he read and, specifically, that Ricco would have been able to understand the posted pool rules. (R.E. 2, depo pp.15-21, 56-57) Presuming Nejam owed Ricco a duty to warn[11], there is no genuine issue of material fact: the posted rules and regulations satisfied that duty, as a matter of

---

10 Owed to a licensee.

11 Which Nejam does not concede because, as a matter of law, there is no hidden peril involved. ***Gordon,*** 236 So.2d at 736; ***Nofsinger,*** 961 So.2d at 782 (¶ 12); ***Howze,*** 928 So.2d at 904 (¶

law. ***Kendrick,*** 49 So.3d at 649 (¶ 10). There is no evidence from which reasonable minds could rationally conclude that Nejam failed to warn Ricco. ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10); ***Kendrick,*** 49 So.3d at 648 (¶ 7). With no evidence establishing breach, summary judgment in favor of Nejam is appropriate. ***Patterson,*** 60 So.3d at 753 (¶ 41); ***Albert,*** 978 So.2d at 1266 (¶ 6).

2. Presuming Breach of Duty, as a Matter of Law there is no Proximate Cause

If Handy had succeeded in proving that Nejam breached a duty owed to Ricco, in order to prevent summary judgment she would still be required to show that this breach proximately caused Ricco's death. ***Hynes,*** 2011 WL 2536189, at *2 (¶ 9). The sufficiency of evidence offered to establish proximate cause can be determined as a matter of law, so is proper fodder for summary judgment. ***Double Quick v. Lymas,*** 50 So.3d 292, 299 (¶ 35) (Miss. 2010); ***Worthy v. McNair,*** 37 So.3d 609, 617-18 (¶ 31) (Miss. 2010). To survive summary judgment on the essential element of proximate cause, Handy must provide evidence that, had Nejam provided the pool equipment which Handy claims he had a duty to provide, Ricco would not have drowned. ***Davis,*** 957 So.2d at 406 (¶ 38). Handy has not and cannot meet this burden.

Although there is no basis in the record for such a finding, presuming that Nejam did breach the duty owed to Ricco by failing to provide a life-line rope, bottom striping, or an emergency phone[12], Handy has produced nothing more than pure speculation and conclusory statements via Ebro's affidavit that any of these alleged deficiencies proximately caused Ricco's drowning, to wit: the specified pool items would have

---

17).

12 Again, the sworn record evidence affirmatively establishes the existence of clearly visible depth

prevented Ricco's drowning because Ricco never intended to go into water over his head. This is insufficient to establish evidence of proximate cause.

First, Ebro's affidavit is properly disregarded. The federal ***Daubert/Kumho*** standard for analyzing the admissibility of expert testimony, which Mississippi employs, provides that the expert opinion must be relevant (that is, it must assist the trier of fact) and it must be reliable. ***Denham,*** 60 So.3d at 784 (¶ 35) (citing M.R.E. 702, Comment); ***Worthy,*** 37 So.3d at 614 (¶ 14), 615 (¶ 16); ***Sanders,*** 29 So.3d at 141 (¶ 10); M.R.E. 402. Additionally, an expert's opinion must be supported by good grounds and based on what is known. ***Sanders,*** 29 So.3d at 141 (¶ 13) (citations therein omitted). The facts underlying an expert's opinion or conclusion "'must permit reasonably accurate conclusions as distinguished from mere guess or conjecture.'" ***Sanders,*** 29 So.3d at 141 (¶ 13) (quoting ***Miss. Transp. Com'n v. McLemore,*** 863 So.2d 31, 35 (¶ 8) (Miss. 2003)). "Thus, an expert opinion based merely on 'subjective beliefs or unsupported speculation' is insufficient, and is properly excluded . . . Affidavits consisting of nothing more than conclusory statements should be disregarded by the trial court." ***Sanders,*** 29 So.3d at 141 (¶ 13) (quoting ***McLemore,*** 863 So.2d at 35 (¶ 8)) (other citations therein omitted). Speculative expert testimony is insufficient, as a matter of law, to establish proximate cause. ***Double Quick,*** 50 So.3d at 299 (¶ 35).

Because Handy's only evidence on proximate cause is Ebro's affidavit, the preliminary inquiry is whether this affidavit is insufficient because unsubstantiated and conclusory. ***Sanders,*** 29 So.3d at 142 (¶ 15). Ebro's affidavit testimony is insufficient pursuant to M.R.E. 702(1) because: it fails to establish that Ebro knows whether Ricco was

---

markers.

an invitee or licensee, therefore fails to establish that he knows the duty owed to either; it does not articulate the applicable standard of care, as to either an invitee or a licensee, yet concludes that Nejam breached the standard of care; further, and specifically as to proximate cause, it contains a conclusory statement that Nejam's alleged breaches proximately caused Ricco's death, but this opinion is based not on any facts but solely on Ebro's speculation that Ricco never intended to go into the water that was over his head. (C.P. 131-35) ***Sanders,*** 29 So.3d at 143 (¶¶ 21-22). When there is no factual basis for an expert's conclusion as to causation, the opinion lacks reliability and should be disregarded. ***Davis,*** 957 So.2d at 409 (¶ 45).

Ebro's affidavit testimony concerning causation is not supported by good grounds or based on what is known, which is that Ricco intentionally went into the deep end of the pool and intentionally went under water. ***Sanders,*** 29 So.3d at 141 (¶ 13). There are no facts underlying Ebro's conclusion that the missing pool equipment proximately caused Ricco's drowning. Rather than a reasonably accurate conclusion, this is a mere guess or conjecture. ***Sanders,*** 29 So.3d at 141 (¶ 13) (quoting ***McLemore,*** 863 So.2d at 35 (¶ 8). Ebro's opinion as to causation is based on unsupported speculation that Rico didn't intend to go in water over his head, therefore is properly excluded and disregarded. ***Sanders,*** 29 So.3d at 141 (¶ 13) (quoting ***McLemore,*** 863 So.2d at 35 (¶ 8). Ebro's speculative testimony is insufficient, as a matter of law, to establish proximate cause. ***Double Quick,*** 50 So.3d at 299 (¶ 35). With no evidence on this essential element of Handy's claim, summary judgment in favor of Nejam is mandated. ***Patterson,*** 60 So.3d at 753 (¶ 41); ***Albert,*** 978 So.2d at 1266 (¶ 6).

Even presuming Ebro's affidavit is accepted and considered, other than a broad

conclusion concerning proximate cause, it does not show that if Nejam had provided a life-line, bottom striping, or an emergency phone, that Ricco would not have drowned. *See, e.g.,* ***Alqasim v. Capitol City Hotel Investors,*** 989 So.2d 488, 493 (¶¶ 15-16) (Miss. App. 2008). There is no evidence in the record from which a trier of fact could conclude that, more likely than not, the specified pool equipment would have prevented Ricco's drowning. Handy has provided speculation, but no facts or evidence, that these measures would have kept Ricco from going into the deep end of the pool. Rather, there is sworn testimony in the record that the pool depth was clearly marked and that Ricco knowingly and intentionally went into the deep end of the pool, not once, but twice.

With regard to the contention that the pool was unsafe because it did not have a rope separating the shallow end from the deep end of the pool or a stripe on the bottom of the pool to mark changes in depth, Handy/Ebro asserts that Ricco never intended to swim or wade into water that was over his head, but the changes of depth were clearly identified by the depth markers. And while Courtney swore an affidavit which states that he and Ricco discussed and agreed, before they ever went to the pool, that they would not go into the deep end of the pool, Courtney also testified under oath that once they were actually at the pool, Ricco told Courtney he was going down to the six foot end of the pool. (C.P. 304, 199-201) Moreover, Courtney testified that Ricco intentionally and knowingly waded from the shallow end of the pool into the deep portion of the pool once, waded back to the three foot depth, and then returned to the six foot depth portion of the pool, intentionally and knowingly, and purposely went under water, before he got into trouble. (C.P. 199-202, 240-42, 265-66) Although Courtney also speculated, in his affidavit, that Ricco waded out farther than he intended to, there is no evidence that either a life-line rope or bottom

striping would have prevented this. As to a life-line rope, it would have been attached to the hooks in place in the pool, on the shallow side before the 6 foot depth. (C.P. 310) Pursuant to Courtney's sworn testimony, Ricco intended to go to the 6 foot depth. In order to get there he would have gone beyond any life-line rope. And in light of the fact that he ignored the plain and obvious depth markers, there is no evidence or reason to presume that Ricco would have heeded the warning of bottom stripes.

Despite the boys' pre-pool conversation, the sworn evidence in the record is to the effect that Ricco intentionally entered the deep end of the pool not once, but twice, with plainly obvious markers advising of the pool's depth at 3, 6, and 9 feet. It is reasonable to conclude that Ricco would have gone into the deep end of the pool notwithstanding additional measures advising him of the water's depth change. So, as in ***Davis,*** not only has Handy failed to provide evidence establishing that, with additional pool equipment, Ricco would not have gone into the deep water and drowned, but the only record evidence concerning this issue demonstrates the opposite. ***Davis,*** 957 So.2d at 407 (¶ 41). Ebro's and Courtney's speculative affidavit testimony that Ricco never intended to go into water over his head is insufficient to refute the sworn record evidence to the contrary.

Regarding an emergency telephone, Handy has produced no evidence that the lack of one played any role in Ricco's death. There is sworn testimony in the record that someone called 911 from a cell phone immediately after Ricco was pulled from the water. (C.P. 178-79) Courtney also called 911 from Craig's cell phone. (C.P. 251) it is reasonable to conclude that Ricco would not have received medical attention any sooner had an additional phone been available. "Accordingly, there is no evidence from which a trier of fact could conclude that the [additional] measures proposed by [Handy] would have

prevented" Ricco's death by drowning. ***Davis,*** 957 So.2d at 407 (¶ 41). There is no evidence from which reasonable minds could rationally conclude that the specified pool equipment would have prevented Ricco's death. ***Kopera,*** 400 F.Supp. at 134; ***Hynes,*** 2011 WL 2536189, at *3 (¶ 10); ***Kendrick,*** 49 So.3d at 648 (¶ 7). With no evidence establishing the essential element of breach, summary judgment in favor of Nejam is warranted. ***Patterson,*** 60 So.3d at 753 (¶ 41); ***Albert,*** 978 So.2d at 1266 (¶ 6).

VI. CONCLUSION

Despite any duties he may have owed to invitees, licensees, and trespassers, Waddell Nejam is not an insurer against all injuries; Mississippi law does not impose strict liability in premises liability cases. ***Stanley,*** 29 So.3d at 97 (¶ 8) (citations therein omitted). Nejam cannot be found liable because there is no breach and no proximate cause. Regardless of the horrific nature of Ricco's "injury" and natural sympathy for his family, Melissa Handy must still prove the existence of duty, breach and causation in order to avoid summary judgment. *See* ***Hill,*** 641 F.Supp. at 114. This, she has failed to do.

For these and all of the above and foregoing reasons, this Court should affirm the trial court's Order granting summary judgment in favor of Nejam.

Respectfully submitted, this the 30th day of August, 2011.

WADDELL A. NEJAM, APPELLEE

BY: Jan F. Gadow

THOMAS Y. PAGE
H. GRAY LAIRD
JAN F. GADOW

OF COUNSEL:
THOMAS Y. PAGE - MSB [redacted]
H. GRAY LAIRD – MSB [redacted]
JAN F. GADOW - MSB [redacted]
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Suite 200 [39232-2215]
Post Office Box 1163
Jackson, Mississippi 39215-1163
Telephone: (601) 420-0333
Facsimile: (601) 420-0033

CERTIFICATE OF SERVICE

I, Thomas Y. Page/H. Gray Laird/Jan F. Gadow, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

Joe N. Tatum, Esq.
TATUM & WADE, PLLC
Post Office Box 22688
Jackson, MS 39225-2688

Latrice Westbrooks
The Law Office of Latrice Westbrooks, PLLC
P.O. Box 14203
Jackson, MS 39236

Hon. Jeff Weill, Sr.
Hinds County Circuit Court
P.O. Box 22711
Jackson, MS 39225

THIS, the 30th day of August, 2011.

Jan F. Gadow

THOMAS Y. PAGE
H. GRAY LAIRD
JAN F. GADOW