IN THE SUPREME COURT OF MISSISSIPPI

2010-CA-01513

MELISSA HANDY, as Administratrix of the Estate of
Ricco Handy and on Behalf of the Wrongful Death
Beneficiaries of Ricco Handy
Appellant

vs.

NEJAM A. WADDELL d/b/a BELLEVUE PLACE APARTMENTS
Appellee

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of Hinds County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

MSC:

LAW AND ARGUMENT

The trial court erred in granting summary judgment.

Whether Ricco Handy exceeded the scope of the invitation was a question for the jury.

The Appellee argues that while the guest of an apartment resident is an invitee[1], in this case Handy exceeded the scope of the invitation and, thereby, was no longer an invitee but was a licensee. *Leffler v. Sharp*, 891 So.2d 152, 157 (Miss. 2004). At the very least, however, the scope of the invitation and whether the plaintiff exceeded that scope are questions of fact for the jury. *Pinnell v. Bates*, 838 So. 2d 198, 202 (Miss. 2002). *See also Jones v. E. S. Woodworth & Co.*, 249 N.W. 799, 801 (S.D. 1933) ("But whether or not respondent was a mere licensee, or acting within the scope of her implied invitation, and whether the appellants were negligent in the premises, were clearly questions of fact to be decided by the jury, and not by the judge as a matter of law"); *Monheit v. Rottenberg*, 295 N.J. Super. 320, 325, 685 A.2d 32 (App. 1996) ("questions pertaining to the scope of the invitation and whether the entrant has exceeded that which is authorized are within the jury's domain"); *Butler Mfg. Co. v. Standifer*, 268 Ala. 181, 184 (Ala. 1958) (holding it was a jury question as to whether plaintiff ceased to be an invitee when, while waiting for to have steel loaded on his trailer, he told an employee of

[1] Appellee cites, among others, the case of *Little by Little v. Bell*, 719 So.2d 757, 760 (Miss. 1998).

defendant he was going to take a nap under the trailer and was subsequently run over by the trailer).

"Since the status of the visitor as an invitee may depend upon whether the possessor should have known that the visitor would be led to believe that a particular part of the premises is held open to him, the question is often one of fact for the jury, subject to the normal control which the court exercises over the jury's function in such matters." Restatement (Second) Torts, § 332. As one court has stated, "[t]he question as to the extent of the invitation is normally one of fact rather than law, encompassing such considerations as the circumstances of the invitation, the relation between the parties, the character of the premises or other locus covered by the invitation, the nature of the use which the invitee may be expected to make in accomplishing the objectives of the invitation, and the conditions or circumstances under which such use is to be made." *Sockett v. Gottlieb*, 187 Cal. App. 2d 760, 767 (Cal. App. 2d Dist. 1960) (holding that it was question for jury whether guest of apartment tenant exceeded her invitation when she walked across defendants' lawn and fell off a low retaining wall next to a driveway). The trial court in this case found that Ricco handy was an invitee. However, to the extent there is any question whether Ricco Handy exceeded the scope of his invitation, that question is one for the jury.

Ricco Handy was in the subject swimming pool with the express permission of his uncle and Bellevue tenant Craig Handy. (Deposition of Craig Handy, pgs. 36 -

37 and pg. 51, lines 20-24). The swimming pool in which Ricco Handy drowned at the Bellevue Place Apartments was and is a common area of the apartment complex under the exclusive control of the defendants. By express language of the lease agreement of tenant Craig Handy, his guest were permitted to swim in the Bellevue Place Apartments swimming pool and children over the age of 12 were not required to be accompanied by an adult at the swimming pool. (See Lease of Craig Handy, paragraph 28). More specifically, the subject lease agreement of tenant Craig Handy states as follows, "[t]he Lessee also understands that children under 12 years of age must be accompanied by an adult at the pool in order to ensure their safety." There is no dispute that Ricco Handy was over the age of 12 when he entered the subject pool with his uncle's permission, and thus no tenant supervision was required by the terms of Craig Handy's lease agreement.

With respect to the status of the guest of a tenant at a multi-unit apartment complex, the Mississippi Supreme Court has repeatedly affirmed its special rule as follows:

> in multi-unit apartment buildings, where the owner expressly or impliedly reserves parts for common use, it is the landlord's duty to keep safe such parts over which he reserves control, and, if he is negligent in this respect, and personal injury results to a **tenant or to a person there in the right of the tenant**, he is liable in tort.

Turnipseed v. McGee, 109 So.2d 551 (Miss. 1959); *Lucas v. Miss. House. Auth. No. 8*, 441, So.2d 101, 103 (Miss. 1983); and *Thomas v. Columbia Group, LLC*, 969 So.2d 849, 853 (Miss. 2007). Thus, under these authorities, Ricco Handy was an invitee

of the Defendant at the time he drowned in the common area swimming pool. Due to his invitee status, Ricco Handy was owed much more than just a duty to refrain from "willfully or wantonly" injuring him as asserted by the Defendant. Ricco Handy was owed a higher duty from the Defendant. That is, the Defendant herein had to affirmatively put in place reasonable measures for the safety of its invitees who entered into the common area swimming pool at Bellevue Place Apartments. As was shown in Appellant's brief, Defendant wholly failed to make the pool reasonably safe and consciously disregarded the safety of its invitee Ricco Handy.

Based on the conflicting evidence presented by the parties as to whether Ricco Handy had to be accompanied by Craig Handy to the swimming pool, a genuine issue of material fact exist which precludes summary judgment on the issue of whether Ricco Handy was an invitee of the Defendant when he entered and drowned in the subject swimming pool.

Handy presented sufficient evidence as to proximate cause as to make that an issue for the jury.

Appellee argues that Handy fails to establish proximate cause in that he has not proven that had the safety apparatus and equipment been provided, Handy would not have drowned. Appellee contends that the assertions in aquatic safety expert Thomas Ebro's affidavit were inadmissible because the statements were "nothing more than pure speculation and conclusory." *Appellee's Brief p. 21.* First of all, Appellee never objected to or moved to strike Ebro's affidavit as required. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and

Procedure § 2722, at 382-85 (1998). Secondly, there is nothing speculative about the list of standard pool safety devices described by Ebro – safety devices that Appellee's pool lacked. Ebro's affidavit identified several features the Bellevue Place pool lacked that would have prevented Ricco's drowning or, at the very least, allowed him to be rescued him in time to prevent him from dying. These features include a life-line rope dividing the shallow end of the pool from the deep end, a body hook at least 12 feet long and a rope as long as one and one-half times the width of the pool, a telephone available nearby to summon emergency aid, proper depth markers or a bottom stripe to indicate increasing depth to swimmers not familiar with the pool's design, and a written Emergency Action Plan ("EAP") to deal with drowning emergencies. CP. 133; RE. 4.

Appellee contends that "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." *Appellee's Brief p. 21.* But that is not what Handy had to prove. In *Spruill v. Downing*, 1995 Conn. Super. LEXIS 2542 (1995), the plaintiff sued when her five-year-old son Steven drowned while participating in a city camp. On the day, there were some 75 campers at the lake. It was not known how Steven drowned, only at some point that one of the other children stepped on the child's body. Steven's mother sued the city and won. The city moved to set aside the verdict on the grounds that plaintiff failed to prove beyond the realm of

surmise and speculation that the city's negligence caused her son's death. *Spruill,* 1995 Conn. Super. LEXIS 2542 *6. In refusing to grant the city's motion, the court held that the jury was allowed to rely on circumstantial evidence and to draw inferences from that evidence to conclude that defendants had been negligent when the decedent drowned. The court held further that the applicable standard of care was a question of fact based on the circumstances in the case and the verdict was not against the weight of the evidence. *Spruill,* 1995 Conn. Super. LEXIS 2542 * 17. "For example, the jury could have inferred that Steven would not have drowned if the defendants had allowed fewer children in the water at one time, or had confined his swimming to a shallow area of the lake. In addition, the jury could reasonably have concluded that Steven's drowning was of the same general nature as the foreseeable risk created by the defendants' negligence." *Spruill,* 1995 Conn. Super. LEXIS 2542, **19-20.

In this case, the court is not confronted with a motion for judgment notwithstanding the verdict[2] or a motion for new trial[3] but rather a motion for

[2] The standard of review for a motion for judgment notwithstanding the verdict requires that the court consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inference[s] that may be reasonably drawn from the evidence. *Steele v. Inn of Vicksburg, Inc.,* 697 So.2d 373, 376 (Miss.1997). "If the evidence is sufficient to support a verdict in favor of the non-moving party, the trial court should deny the motion. *Henson v. Roberts,* 679 So.2d 1041, 1044-1045 (Miss.1996). In other words, the Court is to consider "whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *White v. Stewman,* 932 So.2d 27, 32 (Miss.2006).

[3]The denial of a motion for new trial is reviewed for abuse of discretion. *Poole v. Avara,* 908 So. 2d 716, 726 (Miss. 2005). A verdict will not be set aside unless the court is

summary judgment. Moreover, this is not a case where Ricco Handy's body was discovered in the pool and it is not known how long it had been there. This is a case where Ricco's friend and an adult who happened to be at the pool tried to save him as soon as it appeared he was in trouble. When their efforts were unavailing, they obtained the assistance of yet another adult. Whether basic life-saving equipment that the Appellee did not have but should have had, would have made the difference between Ricco drowning or not is a question for the jury. Whatever a jury might eventually have found, though, the evidence offered by Plaintiff in opposition to the motion for summary judgment was sufficient that the case should have been allowed to go to trial.

In ruling on a motion for summary judgment, the trial court must believe the nonmoving party's evidence, and must draw all reasonable inferences in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In drawing inferences in the light most favorable to the nonmoving party, the court may draw inferences from underlying facts not in dispute, such as background or contextual facts. The court may also draw inferences from underlying facts on which there is conflicting direct evidence, but on which the judge must assume may be resolved at trial in favor of the nonmoving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

"convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted." *Id.* at 727.

No expert could opine categorically that had the Appellee provided the requisite safety equipment or incorporated the necessary safety designs Ricco Handy would not have drowned. Mississippi law requires the plaintiff to show only that the negligence of the premises owner **contributed** to the plaintiff's injury. *Lyle v. Mladinach,* 584 So.2d 397, 400 (Miss. 1991) (On remand, the jury must determine whether the Mladiniches' discontinuance of its previous policy of hiring security personnel to patrol the parking lot constituted a breach of duty and, if so, whether this breach proximately caused or contributed to Lyle's injuries). And, given the evidence presented by Handy this is a question for the jury. *Id.*

In *First Overseas Investment Corp. v. Cotton*, 491 So.2d 293 (Fla. App. 1986), the plaintiff's husband died in a hotel pool. It was not known when exactly the husband drowned only that at some point he could not be found and a subsequent search resulted in finding his body in the pool. *First Overseas Investment Corp.*, 491 So.2d at 294. His wife sued alleging that the hotel was negligent in that the filtration system did not work properly and, thus, the water was cloudy, that the lifeguard chair was not elevated and the lifeguard did not have an unobstructed view of the pool, and that there was no lifesaving apparatus and first aid equipment. *First Overseas Investment Corp.*, 491 So.2d at 295. The wife claimed that had the hotel not been negligent in these areas, her husband would have been rescued within four or five minutes and would have survived. She offered expert testimony that there was a high probability that the husband would have survived if rescued

within the first four or five minutes. *First Overseas Investment Corp.*, 491 So.2d at 294. The jury returned a verdict for the wife and, on appeal, the court affirmed.

Just as in *Overseas Investment Corp.*, the question of proximate cause in this case is for the jury which need only conclude that the Appellee's negligence contributed to Ricco Handy's death. And, as in *Kopera v. Moschella*,400 F.Supp. 131 (S.D.Miss. 1975)[4], it was for the jury to decide whether a life-line rope dividing the shallow end of the pool from the deep end would have prevented Ricco Handy from slipping into the deep end of the pool as well as whether the provision of a shepherd's hook or a phone could have prevented Ricco from dying once he did begin to drown.

Conclusion

This Court should reverse the ruling of the trial court which, in effect, holds that an apartment complex pool lacking many of the safety features one might find in and around modern pools, was, nonetheless, reasonably safe as a matter of law. The trial court erred in ruling as a matter of law that Nejam Waddell breached no duty to Ricco Handy. Instead, a jury should have been allowed to decide whether Nejam Waddell's failure to take basic safety precautions vis-à-vis the Bellevue Place pool was negligence and whether such negligence contributed to Ricco Handy's death. This Court, then, must reverse the trial court's order granting summary judgment and remand this case for a trial.

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[4] In *Kopera*, the district court found, as a matter of law and applying Mississippi law, that the apartment owner was negligent because even though the complex was full of minor children, the owner failed to have a lifeguard, failed to fence, cover or drain the pool, and failed to maintain rescue or resuscitation equipment by the pool. *Kopera*, 400 F. Supp. at 135

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe N. Tatum, Attorney for Appellant, certify that I have this day served a copy of Appellant's Reply Brief by United States mail, first class postage prepaid, to:

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THIS, the 24th day of August, 2011.

Joe N. Tatum