IN THE COURT OF APPEALS 01/28/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00810 COA

CONSOLIDATED WITH

NO. 94-CA-01191 COA

DEL ROSIE TAYLOR, ADMINISTRATRIX OF THE ESTATE OF MARLO DONTRELL SARGENT, DECEASED

APPELLANT

v.

JOE JOHNSON AND RENEE JOHNSON

APPELLEES

TRIAL JUDGE: HON. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF WAYNE COUNTY

ATTORNEY FOR APPELLANT:

WILLIAM S. GUY

ATTORNEYS FOR APPELLEES:

DAVID M. OTT, MARK A. NELSON,

THOMAS C. ANDERSON

NATURE OF THE CASE: WRONGFUL DEATH

TRIAL COURT DISPOSITION: DISMISSED ON SUMMARY JUDGMENT

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is an appeal from the Circuit Court of Wayne County wherein Del Rosie Taylor filed suit against Joe Johnson and Renee Johnson seeking monetary damages for the death of Taylor's son who drowned while on the Johnsons' property. The trial court granted the Johnsons' motion for summary judgment. Feeling aggrieved, Taylor appeals challenging: (1) the trial court's finding that the child was a licensee; (2) the trial court's failure to find that the child was more than a bare licensee creating a duty of reasonable and ordinary care by the landowner to protect the child; (3) the trial court's finding that the Johnsons' knowledge of the child's presence created a duty of reasonable and ordinary care to protect him; (4) the trial court's failure to find that the child's status was of no consequence once the child's presence was known to the Johnsons; (5) the trial court's failure to find that the swimming pool slide was an attractive nuisance; (6) the trial court's finding that the Johnsons' knowledge of the child's presence was not material to the trial court's decision; (7) the trial court's finding that the Johnsons were entitled to a judgment as a matter of law based upon the undisputed facts; (8) the trial court's finding that there was no evidence of any affirmative act by the Johnsons which constituted a beach of their duty to the child; (9) the trial court's failure to rule on whether the distinctions of licensee and invitee should be abolished; and (10) the trial court granting the Johnsons' motion to correct of modify the record. We find that the trial court correctly granted the summary judgment motion and affirm.

STATEMENT OF THE FACTS

Joe and Renee Johnson are homeowners in a rural area outside of Waynesboro. The Johnsons' property included a weight room and a swimming pool. The Johnsons allowed Donald Wayne Sargent to use their weight room. On the morning of February 27, 1989, Sargent brought two children with him on his visit to the Johnson home: his four-year-old son, Marlo Dontrell Sargent, and Marlo's two-year-old friend, Alvin Rankins. The Johnsons were not at home when Sargent and the children arrived. After working out in the weight room, Sargent and the children played ball. The Johnsons arrived about 11:45 A.M., but Sargent did not talk with either Joe or Renee Johnson as they returned home. Sargent rode the children around the property on a three wheeler. Sargent and Brooks Johnson then went riding on the three wheelers, leaving the two children unattended with Sargent's instructions to "stay here and play football, don't go play any place. Stay right here in front of the building and play ball, I'll be right back."

When Sargent returned from riding, the children were no longer where he had left them. Sargent began looking for the children. Sargent then saw Joe Johnson for the first time that day and asked him if he had seen the children. Sargent soon discovered the children in the swimming pool. Joe and Brooks, with Renee's assistance with a pool implement, retrieved the children from the swimming pool. CPR was performed on both children. Alvin Rankins was successfully revived before emergency personnel arrived, but Marlo was not.

Sargent testified that he had been to the Johnsons' home many times to use the weights. He never paid to use the weights, nor did he perform services in exchange for use of the weights. Sargent

stated that he often brought the child with him while visiting the weight room. Sargent stated that Brooks Johnson was home at the time he arrived, but Joe and Renee Johnson were not. According to Sargent, he did not speak to either Joe or Renee when they returned home.

Joe Johnson testified that he had not seen the children that day prior to retrieving them from the swimming pool. Joe had seen Marlo with Sargent once or twice prior to the date of the incident. Joe stated that he had an understanding with Sargent as to his use of the weight room. Joe also stated that the swimming pool area was enclosed by a fence. Renee Johnson testified that she saw the children playing with Sargent while she was in her kitchen at approximately 12:15. Renee stated that she had never seen the children before or since the date of the incident.

STANDARD OF REVIEW

In summary judgment appeals, this Court employs a *de novo* review. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992). A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson*, 583 So. 2d 946, 949 (Miss. 1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So. 2d 431, 433 (Miss. 1988)). The evidence must be viewed in the light most favorable to the nonmoving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in that party's favor. *Id.*

ARGUMENT AND DISCUSSION OF THE LAW

The crux of Taylor's first nine assignments of error is whether the trial court erred in granting summary judgment in favor of the Johnsons. We find the questions of the child's status, any duty the Johnsons had based upon that status, whether there was a breach of any duty, and the attractive nuisance doctrine require discussion.

What was the child's status?

Mississippi defines an invitee as "a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage" while a licensee is "one who enters upon the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner." *Skelton v. Twin County Rural Electric Ass'n*, 611 So. 2d 931, 936 (Miss, 1992). The trial court determined that the child and his father were licensees while on the Johnsons' property. We find that this determination is correct and clearly supported by the record. Sargent testified that he performed no services nor paid any fee for use of the Johnsons' weight room. We reject Taylor's attempt to establish Sargent as an invitee because of the fact that Sargent and Joe Johnson worked out together, rather we find such conduct incidental to his status as a guest of the Johnsons. The child shared the same status of licensee as that of his father because he, too, was a guest in the Johnsons' home. *See Hoffman v. Planters Gin Co.*, 358 So. 2d 1008, 1011 (Miss. 1978).

What duty was owed to the child and was there a breach of duty?

Ordinarily the owner or occupant of land or premises owes no duty to a licensee or trespasser entering the premises, except to refrain from willful or wanton injury, unless the owner/occupant "engages in active conduct *and* knows of the licensee's presence." *Skelton*, 611 So. 2d at 936 (emphasis added); *see also Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737, 739 (5th Cir. 1971) (citations omitted). "To be willful or wanton, 'something more is required than mere inadvertence or lack of attention. There must be a more or less extreme departure from ordinary standards of care. The conduct must differ in quality, as well as in degree, from ordinary negligence, and must involve a conscious disregard of a known, serious danger.'" *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737, 739 (5th Cir. 1971) (quoting *Dry v. Ford*, 238 Miss. 98, 117 So. 2d 456, 458 (1960)); *see also Skelton*, 611 So. 2d at 937.

Taylor attempts to distinguish the present case by arguing that the Johnsons' knowledge of the presence of Marlo changed his status from that of "bare licensee." The Mississippi Supreme Court has recognized an exception to the willful or wanton injury standard of care due a licensee in that "ordinary reasonable care is required where the landowner engages in *active* conduct and the plaintiff's presence is known to him." *Lucas v Buddy Jones Ford Lincoln Mercury*, 518 So. 2d 646, 648 (Miss. 1988). However, "[t]his exception is not applicable where the licensee is injured as a result of the condition of the premises, or passive negligence." *Lucas*, 518 So. 2d at 648.

There is nothing in the record to suggest that the Johnsons failed to refrain from wanton or willful injury to the child. There is no evidence that either Joe or Renee Johnson knew that Sargent left the children unsupervised. In the record before this Court, the only evidence of the Johnsons' knowledge of Marlo's presence comes from Renee Johnson who testified that at approximately 12:15 she saw the children outside with Sargent playing ball. There is no evidence of any affirmative act by either Joe Johnson or Renee Johnson to suggest a breach of their duty to Marlo. Accordingly, we affirm the trial court's determination that there was no breach of duty.

Taylor urges this Court on appeal to abolish the status distinctions of licensee and invitee. We are bound by the precedent set by the Mississippi Supreme Court and are without authority to abandon Mississippi's adherence to the common law distinctions of licensee and invitee. *See* 20 Am. Jur. 2d *Courts* § 201 (1965).

Was the swimming pool slide an attractive nuisance?

Taylor suggests that the swimming pool slide was an attractive nuisance. However, the Mississippi Supreme Court has repeatedly held that swimming pools do not fall under the attractive nuisance doctrine. *See Goodwin v. Jackson*, 484 So. 2d 1041, 1045 (Miss. 1986); *Ausmer v. Sliman*, 336 So. 2d 730, 731 (Miss. 1976); *Gordon v. C.H.C. Corp.*, 236 So. 2d 733, 736 (Miss. 1970). Furthermore, the Mississippi Supreme Court has said:

> [I]n order for a condition of premises to constitute an attractive nuisance there must be maintained on the premises dangerous instrumentalities or appliances easily accessible to children. We have held that water hazards are not attractive nuisances, and have adopted this rule with reference to impounded water even though children are attracted to water and even though it is dangerous and they are not able to swim.

Hughes v. Star Homes, Inc., 379 So. 2d 301, 305 (Miss. 1980). We do not feel warranted under the evidence in this case to expand the doctrine of attractive nuisance to include the swimming pool slide here involved, or to impose liability upon the Johnsons for the unfortunate death of this child.

> DID THE TRIAL COURT ERR IN GRANTING THE JOHNSONS' MOTION TO CORRECT OR MODIFY THE RECORD TO EXCLUDE THE DEPOSITION TESTIMONY OF RENEE JOHNSON AND SUBSTITUTING ONLY CERTAIN LINES FROM HER DEPOSITION?

In her tenth assignment of error, Taylor argues that the trial court erred in granting the Johnsons' motion to modify the record. Taylor maintains that Renee Johnson's deposition was before the trial court and should have been considered by the trial court in its decision. Specifically, Taylor asserts that the trial court improperly excluded pages 14, 21 and 23 of Renee Johnson's deposition from the record on appeal. Taylor cites no authority in support of her argument.

The Johnsons respond by pointing out that the depositions of Renee Johnson and Joe Johnson were not part of the record prior to the entry of the trial court's final judgment. The Johnsons assert that they sought to strike the transcript of the depositions because of Taylor's attempt to augment the record after entry of an adverse judgment. The Johnsons point out Taylor's failure to cite authority. Finally, the Johnsons argue that Taylor included the pages of Renee's deposition in her brief, and that the information excluded from the appeal record would provide for the same result.

The Mississippi Supreme Court has consistently held that failure to cite authority in support of an assignment of error precludes this Court from considering the issue on appeal. *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994) (citing *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993); *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1023 (Miss. 1990); *Kelly v. State*, 553 So. 2d 517, 521 (Miss. 1989)).

CONCLUSION

Regrettably, Taylor has suffered the loss of her child. However, because the child was a licensee, and the swimming pool was not an attractive nuisance, the Johnsons' duty to the child could only be to refrain from willful or wanton injury. In the facts presented in the present case, it is clear that the Johnsons fulfilled their duty to refrain from willfully and wantonly injuring the child. Accordingly, the trial court correctly granted the Johnsons' motion for summary judgment.

THE JUDGMENT OF THE CIRCUIT COURT OF WAYNE COUNTY GRANTING SUMMARY JUDGMENT IN FAVOR OF JOE JOHNSON AND RENEE JOHNSON IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.