Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00432-CV

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DARRELL VAULX, SR. as next friend and guardian of DARRELL VAULX, Jr., and OPAL MAY POE, Appellants

V.

DIANA COLBERT, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 96-33780

O P I N I O N

This is an appeal of an order granting summary judgment in favor of Diana Colbert. Darrell Vaulx, Sr., as next friend and guardian of Darrell Vaulx, Jr.(Vaulx, Jr.) and Opal Mae Poe (Poe), referred to collectively as plaintiffs, sued Colbert for the drowning death of Johnnie Mae Vaulx (Johnnie Mae). The trial court granted summary judgment for Colbert, and Vaulx brings eight points of error on appeal. In the first two points of error, plaintiffs assert that there are conflicts in the summary judgment evidence which preclude summary judgment. In points of error three, four and five, plaintiffs assert summary

judgment was improper because the owner of the premises breached the duty owed to Johnnie Mae as a licensee. In point of error six, Vaulx, Jr. contends that he had a right to recover because he witnessed his mother's death, and in points seven and eight he contends Colbert breached her duty to him. No points of error are presented regarding Poe individually. We affirm.

Background

On July 9, 1994, Johnnie Mae, her son Darrell, and her friend Charline Mills (Mills) went to the house of Diana Colbert (Colbert) to swim. The three arrived at Colbert's house mid-afternoon. After arriving, Colbert asked Darrell if he knew how to swim, and he said that he did. Darrell, Colbert, Colbert's daughter, and Colbert's niece swam. At that time, neither Johnnie Mae nor Mills entered the pool. After swimming, everyone went into the house. Later, Johnnie Mae, Mills, Colbert, and Sheridan Johnson went out onto the back porch. Johnnie Mae and Mills eventually left the patio and went out into the backyard to walk around the pool. Both Johnnie Mae and Mills were wearing shorts, T-shirts and shoes. Neither Johnnie Mae nor Mills could swim. The two sat on the edge of the pool and put their feet into the water. After awhile, Johnnie Mae and Mills got into the pool at the shallow end by walking down the steps. Mills warned Johnnie Mae not to walk out past the slide because that was where it became significantly deeper. Mills and Johnnie Mae were holding hands when suddenly Mills was under the water. She fought to get to the side of the pool. When Colbert heard splashing coming from the pool, she looked out and saw Mills struggling to reach the side of the pool. She also saw Johnnie Mae face-down underwater in the deep-end of the pool. She jumped in to retrieve Johnnie Mae and instructed her niece to call paramedics. Johnnie Mae died from drowning in Colbert's pool.

Plaintiffs brought suit against Colbert under the Wrongful Death Act, common law negligence and premises liability. Colbert filed a motion for summary judgment, asserting that Johnnie Mae was a trespasser as to the swimming pool, or alternatively a licensee, and

that Colbert did not breach any duty owed to her. The trial court granted summary judgment.

Claims arising under the Wrongful Death Act are derivative actions, and condition the plaintiff's ability to recover upon the decedent's theoretical ability to have brought an action had the decedent lived. *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 348-49 (Tex. 1992). We therefore address first the issue of whether Johnnie Mae could have recovered in an action against Colbert immediately prior to her death.

I.
Standard of Review

Plaintiffs bring this appeal asserting that Colbert was not entitled to summary judgment. When reviewing a summary judgment, we follow these well-established rules: (1) the movant has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in his favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The movant must establish his entitlement to summary judgment on the grounds expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The nonmovant must expressly present to the trial court any issues that would defeat the movant's entitlement to summary judgment by filing a written answer or response to the motion. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). If the trial court does not specify the basis for granting summary judgment, the appealing party must show it is error to base summary judgment on any ground asserted in the motion. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). Additionally, the reviewing court must affirm the summary

judgment if any one of the movant's theories has merit. *See Star-Telegram, Inc.*, 915 S.W.2d at 473.

II.
Decedent's Status

The threshold inquiry in a negligence case is duty.[1] *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). In Texas, the duty owed by a premises owner or occupier is determined by the status of the complaining party. *See Graham v. Atlantic Richfield Co.*, 848 S.W.2d 747, 751 (Tex. App.—Corpus Christi 1993, writ denied). Plaintiffs admit in the response to Colbert's motion for summary judgment that Johnnie Mae was a social guest at Colbert's home.

A licensee is one who enters the land of another with the permission of the land owner, but does so for his own convenience or on business for someone other than the owner; consent to enter may be express or implied. *See Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936); *Weaver v. KFC Management, Inc.*, 750 S.W.2d 24, 26 (Tex. App.–Dallas 1988, writ denied). Colbert allowed Johnnie Mae to come to her home to use her pool and to socialize. All social guests are treated as licensees for purposes of determining the duty owed to them by a homeowner. *See Dominguez v. Garcia*, 746 S.W.2d 865, 867 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.). Thus, Johnnie Mae's status during the time she was at the Colbert home was that of a licensee.[2]

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[1] Plaintiffs pleaded negligence and premises defect claims. On appeal, plaintiffs' points of error three, four and five contend summary judgment was improperly granted because Colbert breached her duty to Johnnie Mae.

[2] "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." *See* RESTATEMENT (SECOND) OF TORTS § 330 (1965). The Reporter's notes to the restatement list social guests among the persons included under the term licensees. Even though social guests are normally invited, they are nevertheless not invitees. The notes address the possible confusion:

> Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an 'invitee,' within the legal meaning of that term, as stated in § 332. He does not come as a member of the public upon premises held open to the public

(continued...)

III.

Landowner's Liability to A Licensee

In order to establish liability on the part of the premises owner for injury sustained by a licensee while on the premises, the licensee must prove that:

> (1) a condition of the premises created an unreasonable risk of harm to the licensee;
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> (2) the owner actually knew of the condition;
>
> (3) the licensee did not actually know of the condition;
>
> (4) the owner failed to exercise *ordinary care* to protect the licensee from danger; and
>
> (5) the owner's failure was a proximate cause of injury to the licensee.

See State Dep't of Highways v. Payne, 838 S.W.2d 235, 237 (Tex. 1992) (emphasis added). The duty to use ordinary care to protect a licensee requires that the landowner not injure a licensee by willful, wanton, or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not. *See id.* To provide the ordinary care level of protection, the landowner can either warn the plaintiff or make the premises

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[2] (...continued)
for that purpose, and he does not enter for a purpose directly or indirectly connected with business dealings with the possessor. The use of the premises is extended to him merely as a personal favor to him. The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

RESTATEMENT (SECOND) OF TORTS, § 330 cmt. h.3 (1965).

reasonably safe. *See State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996).[3] Stated in a slightly different manner, the landowner is not negligent unless there was both a failure to adequately warn the licensee of the condition, and a failure to make the condition reasonably safe. *See id.*

IV.
Colbert's Motion For Summary Judgment

In her motion for summary judgment, Colbert challenges two elements of the plaintiffs' premises liability and negligence claims: the knowledge possessed by Johnnie Mae regarding the pool, and the adequacy of the warning given to Johnnie Mae.

A. Decedent's Knowledge

Colbert's motion for summary judgment asserts that Johnnie Mae, an adult, is imputed with knowledge of conditions perceptible to her. A licensee is imputed with the knowledge of those conditions perceptible to him, or the existence of which can be inferred from facts within his present or past knowledge. *See Smith v. Andrews*, 832 S.W.2d 395, 397 (Tex. App.—Fort Worth 1992, writ denied). Here, Johnnie Mae arrived in the afternoon at Colbert's home and various individuals began to use the pool. There can be no dispute that the pool, a dangerous condition to Johnnie Mae who admitted during discovery that she could not swim, was able to perceive the presence of the pool and the danger it posed to a non-swimmer. Indeed, comments a. and b. to Section 342 of The Restatement of Torts state the following regarding the knowledge element of a landowner's liability to licensees:[4] (a.) "[K]nowledge of the risk involved in a particular condition implies not only that the condition is recognized as dangerous, but also that the chance of harm and the gravity of the threatened harm are appreciated. (b.) If the licensees are adults,

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[3] Plaintiffs, in the response to Colbert's summary judgment motion, acknowledge the validity of the level of proof required by a licensee to impose liability on a landowner.

[4] Section 342 of the Restatement addresses the liability of possessors of land to licensees.

the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it." *See* RESTATEMENT (SECOND) OF TORTS § 342 (1965). We hold Colbert as movant established as a matter of law that Johnnie Mae had knowledge of the condition that posed an unreasonable risk of harm to her as a licensee.

B. Warning to Decedent

Colbert's summary judgment motion also correctly states the protection a landowner must provide a licensee: the landowner must either warn the licensee of the dangerous condition, or make the premises reasonably safe. *See Williams*, 940 S.W.2d at 584. Colbert contends that Johnnie Mae was adequately warned of the dangerous condition by Charline Mills. The summary judgment motion contains the affidavit of Mills in which she states "Twice I verbally warned Johnnie Mae Vaulx that she should not go past the slide on the side of the pool, because the depth increased suddenly past the end of the slide. Johnnie Mae Vaulx kept going anyway. She ignored the warnings and slipped off into the deep end after wading past the end of the slide where I had warned her not to go."

In response, plaintiffs contend that Mill's warning to Johnnie Mae was inadequate because the warning concerning the drop off in the pool did not serve to warn of the slippery bottom or the lack of safety equipment. We disagree. The pool with a deep end was the dangerous condition to a non-swimmer and Colbert offered summary judgment proof that Johnnie Mae was warned of that danger. Johnnie Mae's challenge goes to the second element of a landowner's duty to a licensee, the requirement that the premises owner make it reasonably safe. The correct statement of this duty is in the disjunctive. The owner can provide the required protection by either warning the plaintiff *or* making the premises

reasonably safe. *See id.* (emphasis added). Here, Johnnie Mae was given a proper warning. That Colbert failed to make the condition reasonably safe is of no moment.

Plaintiffs in their summary judgment response and on appeal assert that because there is a conflict between statements made by Mills in her deposition and her statements in her affidavit supporting Colbert's summary judgment motion, a genuine issue of material fact exists which defeats summary judgment. The discrepency in the Mill's statements relates to the precise manner in which Johnnie Mae reached the deep end of the pool. This issue does not relate to either of the elements of a premises liability suit addressed by Colbert in her summary judgment motion, and indeed it does not relate to any of the elements of a premises liability suit. *See Payne*, 838 S.W.2d at 237. A motion for summary judgment cannot be defeated by the existence of an immaterial fact issue. *See Harris County v. Ochoa*, 881 S.W.2d 884, 889 (Tex. App.—Houston [14th Dist.] 1994, writ denied).[5]

Accordingly, we hold Colbert established as a matter of law that Johnnie Mae was warned of the dangerous condition. Therefore, Colbert in her motion defeated two of the elements of the plaintiffs' claim that Colbert breached her duty to Johnnie Mae, and the non-movant did not raise a genuine issue of material fact as to either one of those elements. Summary judgment is proper if the defendant disproves at least one element of each of the plaintiff's claims. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Accordingly, Colbert was entitled to summary judgment as to the premises defect and negligence claims brought on behalf of Johnnie Mae. Therefore, points of error three, four and five are overruled.

V.
Claims By Vaulx, Jr.

[5] The issue of the existence of a genuine issue of material fact was raised by plaintiffs in points of error one and two. We overrule those two appellate points.

In point of error six, Vaulx, Jr. claims that he should have been able to recover as a bystander and as a derivative claimant.[6] In Texas, only two situations arise when someone other than the direct victim of a tort may recover damages. *See Cavanaugh v. Jones*, 863 S.W.2d 551, 555 (Tex. App.–Austin 1993, writ denied). One situation is a suit brought under the Texas Wrongful Death Statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 et seq. (Vernon 1997). A death action cannot be maintained successfully where the decedent could not have recovered had he survived the injuries. *See Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279, 281 (Tex. 1973); *Maderazo v. Archem Co.*, 788 S.W2d 395, 398–99 (Tex. App.–Houston [14th Dist.] 1990, no writ). As discussed in points of error three, four, and five, Colbert was not liable to Johnnie Mae for her death. A defendant who is exonerated of liability to the injured person is not required to defend against the same claims by the person's family following his death. *See Russell*, 841 S.W.2d at 349. A death action is derivative in that the beneficiaries stand in the decedent's shoes. *See Washam v. Hughes*, 638 S.W.2d 646, 648 (Tex. App.—Austin 1982, writ ref'd n.r.e.). Thus, because Johnnie Mae could not have recovered against Colbert had she survived, Vaulx, Jr. cannot recover for his derivative claims.

The other situation where someone other than the direct victim of a tort may recover damages is a bystander suit brought by a plaintiff who has witnessed a close relative's death or injury caused by the defendant's wrongful acts. *See Reagon v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990). However, before a bystander may recover, he must establish that the defendant has *negligently* inflicted serious or fatal injuries on the primary victim. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 79 (Tex. 1997) (emphasis added). Because we hold summary judgment for Colbert as to plaintiffs' premises defect and

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[6] Plaintiffs' petition in this case asserted, on behalf of Vaulx, Jr., loss of consortium, love, affection, protection, emotional support, services, companionship, earnings, and mental pain and suffering as a result of the death of Johnnie Mae. These claims are derivative and may be brought under the Wrongful Death Act only if the individual injured would have been entitled to bring an action if he had lived. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a) (Vernon 1997).

negligence claims was correct, Colbert did not negligently inflict serious or fatal injuries on Johnnie Mae, thus precluding a bystander claim by Vaulx, Jr. Point of error six is overruled.

In points of error seven and eight, appellant asserts that Colbert owed a duty to him to make the premises reasonably safe. We have just held that Vaulx, Jr. cannot maintain an action against Colbert as either a bystander or as a derivative claimant because Colbert did not breach the duty she owed Johnnie Mae as a licensee. In these last two points of error, appellants appear to be arguing that Vaulx, Jr. has a personal claim against Colbert for breaching her duty to a social guest to make the premises safe. Appellant's brief asserts that Colbert knew or should have known the pool condition posed a severe risk of bodily harm and that Vaulx, Jr. would not realize it. The question of duty turns on the forseeability of harmful consequences, which is the underlying basis for negligence. *See Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983). However, Vaulx, Jr. has not asserted that he sustained any injury as a result of the condition of the pool. Even were we to hold, which we do not, that the pool posed an unreasonable risk of harm to Vaulx, Jr. and Colbert breached her duty to Vaulx, Jr. by failing to exercise ordinary care to protect him from danger, he still may not recover. This result obtains because even though, in the assumption, there was a breach of duty, the breach was not a proximate cause of any injury. *See Payne*, 838 S.W.2d at 237. Because Vaulx, Jr. was not injured, he cannot recover under the theory of premises liability. Points of error seven and eight are overruled.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Anderson, Edelman and Draughn.

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