

# YLA YOUTH IN GOVERNMENT

## Judicial



*Preparing the Next  
Generation of Civic Leaders*



### In This Chapter

- Quick Facts/  
Overview
- Writing Your Appeal
- Experience a Local  
Jury Trial
- Student Supreme  
Court Procedures
- Justice's Written  
Opinions
- Officers & Elections
- Definitions

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## Quick Facts/Overview – Student Judiciary

The Supreme Court considers an appeal of a lower court decision. The presiding officer of the Supreme Court is the Chief Justice.

	Ohio	West Virginia
Official Name	Supreme Court of Ohio	West Virginia Supreme Court of Appeals
Number of Justices	7	5
Length of elected term	6 years	12 years

- ◆ Decisions of the Supreme Court are a majority vote of the Justices. These decisions are the final word.
- ◆ A case appealed to the Supreme Court is an appeal only on errors claimed to have occurred in the local trial. It is NOT a retrial of the local trial.
- ◆ The authority of the Supreme Court comes from the individual state’s Constitution.
- ◆ The appellant is appealing the decision of a lower court.
- ◆ The appellee is supporting the decision of the lower court.
- ◆ The Brief summarizes the validity or lack of validity of the lower court’s decision.
- ◆ An Assignment of Errors lists the mistake(s) that either the Judge or Jury made in lower court decision.
- ◆ Arguments made in an appeal describe laws or precedent cases that support the argument.
- ◆ The concluding presentation to the Supreme Court summarizes arguments in the appeal and a conclusion the Supreme Court should reach.

# Judicial Program Overview

## The Judicial Process for the Student Supreme Court

DELEGATIONS select 4 Judicial delegates for each case. Return Participation Agreement and Fee to receive Judicial Manual and Case.



Delegates work to represent opposing sides of the appeal. It is suggested that students work with a local attorney to develop their appeal to the Student Supreme Court. The attorney's role is to provide advice, but not to develop arguments for the students.



With the help of these local attorneys, the Appellants work to cite the Errors in the local trial that need to be addressed by the Supreme Court. The winning side (called the Appellees) work to show the Supreme Court that there were no Errors or that the Errors would not have influenced the outcome of the case. Each of these written appeals is called a BRIEF.



Delegates SUBMIT 18 BOOKLETS (each containing a Cover Page, the Statement of Facts, Appellant's Brief, and the Appellee's Brief) to the Youth in Government Office by the Final Deadline. (Ohio January 28, WV Feb 10)



Judicial Officers and Officer Candidates attend CASE RATING to evaluate each case and place it on the docket. Consult the Manual for rating criteria.



AT YOUTH IN GOVERNMENT, each Judicial Delegate will present their case as an Attorney. Justices also sit on the bench as a Justice for 1 - 2 other cases. Justices hear oral arguments, consider the briefs, and render their OPINION. Each opinion is written and Justices explain their position on the closing day. The Justices may choose to UPHOLD or OVERTURN the Lower Court's decision or may REMAND the case for another trial. The decision of the State Supreme Court is final, unless grounds can be established to appeal to the US Supreme Court.

# Writing Your Appeal

When you register as a Judicial Delegate through the Participation Agreement, your advisor will receive the sample case for each judicial team. Our program picks up at the conclusion of the local trial. Students will choose a side to represent. The losing side (Appellant) will appeal the decision of the lower court and the winning side (Appellee) will be asking the Supreme Court to uphold the existing decision of the lower court.

The appeal IS NOT A RETRIAL, but rather is an opportunity to insure that justice is served in regard to the process of the local trial. At the appeal hearing, you will argue points of law. It is the Appellant's responsibility to research precedent cases and other laws that would show error in the local trial verdict.

The Assignment of Errors lists the Appellant's reasons the case is being appealed to the Supreme Court. The appellants will argue that these errors in the lower court trial, if corrected, could have changed the outcome of the lower court's verdict. Therefore, they appeal. Students may research previous cases at college or local law libraries or through the LEXUS/NEXUS computer system. Local attorneys are also excellent resources.

On the other side, the Appellees seek to support the lower court's verdict.

Your written brief should be between 2-6 pages in length. This is your first impression on the justices and should concisely and logically progress through your arguments to convince the Justices of your Conclusion.

When you appear before the Supreme Court in April, you will have additional time for Oral Arguments. Each side will have 10 minutes (approximately 5 minutes per attorney) to argue your side of the case. Your opponents will also have ten minutes. It is your responsibility to decide how you will split the time with your partner – but, both attorneys must share in the presentation. The appellants may reserve a portion of their time for rebuttal, if desired.

## Purpose and Contents of a Brief

The purpose of the Brief is to summarize the validity or lack of validity of the Lower Court's decision. Unless otherwise noted, the format for the brief is as follows: Paper size – 8.5" x 11" (one side only, DO NOT staple and remember to sign your name), Margins – 1", single spaced (except between sections – see sample brief), Type size – 10 or 12 point. There must be one (1) booklet and it must contain the following:

1 COVER PAGE: The Cover Page has the following information: Name of the Case  
Names and Positions of both pairs of Youth Attorneys

1 STATEMENT OF FACTS Must be agreed upon by both sets of Youth Attorneys

1 APPELLANT'S BRIEF Written by the Youth Attorneys that LOST the local trial. Must be between 2 – 6 pages. Each brief contains:

Assignment of Errors – the problem that either the Judge or Jury made in their Lower Court decision.

Arguments – Laws and/or precedent cases that support your Assignment of Errors.

Conclusion – A closing summary of the case and a conclusion that the Model Supreme Court should overturn the Lower Court's decision.

1 APPELLEE'S BRIEF Written by the Youth Attorneys that WON the local trial. Must be between 2 – 6 pages. Each brief contains:

Arguments – Laws or precedent cases that support the Lower Court's decision.

Conclusion – Summary of arguments in the case and a conclusion that the Model Supreme Court should therefore uphold the Lower Court's decision.

ALL OF THIS CONSTITUTES ONE BOOKLET. THE BOOKLET IS TO BE ASSEMBLED IN THE ORDER LISTED AND STAPLED ONCE IN THE UPPER LEFT CORNER. EIGHTEEN (18) COPIES OF THE BOOKLET ARE TO BE ASSEMBLED AND SUBMITTED TO THE YOUTH IN GOVERNMENT OFFICE BY THE DEADLINE (OHIO-JAN 28 • WV – FEB 10).

## Case Rating

All cases submitted will be rated for position on the docket of the Student Supreme Court. Only those cases that are received in the Youth in Government office by the due date will be rated.

The cases will be rated by the Youth Chief Justice, Associate Justices, the Supreme Court Coordinator, and possibly Model Supreme Court Alumni.

They will be rated on a scale of 1 – 50 points based on the following:

Correct Form and Order of the Briefs	5 points
Clarity of the Assignment of Errors	10 points
Thoroughness of the Argument and Conclusions	30 points
Appellant's Brief	15 points
Appellee's Brief	15 points
Correct Grammar and Spelling	<u>5 points</u>
Total	50 points

## Experience a Local Jury Trial

During the April Youth in Government program, judicial delegates have the opportunity to experience a mock jury trial. Here's what happens:

Student Justices are assigned a role. If you have a preference for what you want to do, let the YG office know well in advance.

This trial is very basic and is designed to give Student Justices an understanding of what is involved in a trial situation. Therefore, the judge may stop the trial periodically to explain what might occur in a real court scene.

There is a set of Defense attorneys and a set of Prosecuting attorneys. The attorneys receive the Statement of Facts and additional information about presentation of evidence, possible witnesses, etc...prior to the program. Changes in these statements can ONLY be made, if both parties (the Defense attorneys AND the Prosecuting attorneys) agree. The case you are using is meant to be a framework for your work. Both sides must be flexible and creative in adding to or deleting from the case any detail needed to give each side an equal chance of winning.

Attorneys will communicate with the witnesses and build a case for the side they represent. Attorneys can and should seek advice from an adult attorney or law student. The adult attorney also helps the students gain an understanding of the legal profession. At the trial, although attorneys work in pairs, only one attorney is allowed to question a witness on each side. They may take turns, but both cannot question the same witness. Both attorneys may share in the closing arguments. The adult attorneys are welcome to come to the trial, but they are only in the courtroom "on call" if needed to ASSIST the attorneys or judge in clarifying court procedures.

There will be a defendant chosen.

Witnesses are also selected in advance. If the attorneys choose, they may contact the witnesses prior to YG. However, they will have time to be briefed at the program. Witnesses will need to understand the basic issues of the case and be extremely familiar with the facts provided. The witnesses must be prepared to "ad lib" answers to questions from the attorneys, using the information provided as a guide.

The jury is randomly selected prior to the trial. All participants not involved will draw an envelope. Inside the envelope is a piece of paper with the word "audience" or "jury" on it. Those with the papers marked "jury" will serve as jurors. For civil cases, 6 serve. For criminal cases there are 12 jurors. The jury will hear the case and present a verdict.

A bailiff is also assigned.

## **HERE'S A TENTATIVE Outline OF THE TRIAL**

- I. Opening
- II. Presentation of Prosecution's Case
  1. Prosecution's Witnesses & Presentation of Evidence
  2. Cross Examination by Defense
- III. Presentation of Defense's Case
  1. Opening Statement
  2. Defense Witnesses & Presentation of Evidence
  3. Cross Examination by Prosecution
- IV. Court Instructs the Jury
- V. Prosecution's Closing Argument
- VI. Defense's Closing Argument
- VII. Prosecution's Final Argument
- VIII. Jury Retires, Elects a Foreman, and Reaches a Verdict
- IX. Court Reconvened and Verdict Announced

# Student Supreme Court Procedures

When the Justices enter, everyone rises. The Marshal (Ohio) or Clerk (WV) calls the Court to order.

Ohio	All Rise. . .The Honorable Chief Justice and Justices of the Supreme Court of Ohio (Once they have reached their seats, continue with...) Hear Ye! Hear Ye! Hear Ye! The Supreme Court of Ohio is Now in Open Session Pursuant to Adjournment. . .
West Virginia	All Rise. . .OYEZ! OYEZ! The Honorable Justices of the Supreme Court of West Virginia, the Honorable Chief Justice _____, presiding. Silence is now commanded under penalty of fine or imprisonment, while the Honorable Justices of the Supreme Court of Appeals of West Virginia are now sitting. All those having motions to make or appeals to prosecute, come forward and you shall be heard. GOD SAVE THIS STATE AND THIS HONORABLE COURT.

The Chief Justice will direct the audience to be seated.

The Chief Justice then calls on the Appellant attorneys. The first attorney for the Appellant informs the Marshal/Clerk whether or not there will be a rebuttal and if so, how much time is to be reserved. The Appellant attorneys then present their argument. The reasoning in their argument is that the verdict of the lower court was incorrect because \_\_\_\_\_. (Each side has 10 minutes – approximately 5 minutes per attorney in which to present their case.)

The Appellee’s attorneys then present their argument. The reasoning in their argument is that the verdict of the lower court was correct and the Appellant is incorrect because \_\_\_\_\_.

The Appellant’s attorneys then have an opportunity for rebuttal after the Appellee’s attorney’s presentation. Following this, the Chief Justice adjourns the Court to decide the Appeal. The reversal of the lower court’s decision requires at least a majority vote for reversal. When directed by the Chief Justice, the Marshal will call the Court to adjournment.

Ohio	All Rise. . .Hear Ye! Hear Ye! Hear Ye! This Open Session of the Honorable Supreme Court of Ohio Now Stands Adjourned. (After the last Justice is off the Bench, strike the gavel once.)
West Virginia	All Rise. . .Hear Ye! Hear Ye! Hear Ye! This Open Session of the Honorable Supreme Court of West Virginia Now Stands Adjourned.  (After the last Justice is off the Bench, strike the gavel once.)

Time organization is a very important part of your appeal. The job of the Supreme Court Marshal/Clerk is to time the oral presentation of each attorney – informing the attorney when one minute is left in the allotted time and when the time is up. Both sets of attorneys need to decide how much time each attorney on their side will take. Also, attorneys for the Appellant must decide how much time to reserve for rebuttal.

Attorneys will prepare the majority of their oral arguments before reaching Youth in Government. Time at Youth in Government will be used to sharpen those arguments. A simple method to use to organize a brief or an oral argument is the FIRAC method.

- F Facts (Briefly tell the court what happened)
- I Issue (Tell the court what error was committed)
- R Rule (Who/What says that is an error?)
- A Application (Combine facts and rule to demonstrate error)
- C Conclusion (Therefore...)

Attorneys should be prepared to be interrupted by questions from the Justices. In organizing an oral presentation, an attorney should be prepared to speak persuasively for the full amount of time, but the attorney should be flexible enough to rearrange their presentation at the podium in order to cover all of the important points, in addition to answering questions from the Justices.

The attorneys start their presentation with the statement "May it please the court. My name is (state your name) and I am the attorney for or representing (state your client's name)"

Always keep your perspective. Act zealously for your client, but remember you are an officer of the court.

You are to attend all judicial program events. They are designed to give you the opportunity to learn more about our judicial system. You will also watch the appeals of other students. Much can be learned by watching others.

Your case will be put on a calendar and assigned a time to be heard by the Model Supreme Court. Attorneys for the local trial must be the same ones to present the case at the Model Supreme Court.

# Justice's Written Opinions

The Opinion is the written decision of the Supreme Court. It is the official document that records for history the decision and all of the relevant circumstances that influenced that decision. The opinions are reviewed by each Justice sitting on the case and are not disclosed to other participants until they are officially "released" during the closing session.

During deliberation, immediately following the case, you will have an opportunity to discuss and argue the points of law addressed in the case. One or more Justices will volunteer to write the opinion for the majority. The opinion is given to each Justice to study and accept. If it is accepted, the Justice will sign the opinion and it is passed on as the opinion of the court. If not, a concurring opinion may be written (same result, but with a different line of reasoning).

Those who do not agree with the Majority Opinion summarize their views in the Dissenting Opinion. All of the opinions are presented to the public, but only the majority opinion affects the parties involved in the case.

Opinions will be written on standard legal paper (or forms provided by the Court Coordinator). The opinion will then be submitted to the Chief Justice or Associate Justices assigned to the case. Each opinion must contain a statement defining the reasons for the verdict and a narrative of why those reasons were chosen.

## Youth in Government Student Supreme Court Majority Opinion

\_\_\_\_\_ Case # \_\_\_\_\_  
\_\_\_\_\_ All Justices who agree with this  
\_\_\_\_\_ Majority Opinion are to sign their  
\_\_\_\_\_ names to the left.  
\_\_\_\_\_ Opinions will be announced on  
\_\_\_\_\_ Saturday morning. Until then,  
\_\_\_\_\_ the decisions of the Court are not  
\_\_\_\_\_ to be discussed with anyone.

We the justices of the Supreme Court of Ohio in the case of Bennett v. Sims unanimously find that the lower court erred in permitting summary judgment. We found that a number of facts remained contested even though the lower court granted summary judgment. Following the precedence found in McKinney V. Hartz and Restle Realtor, Inc. we find that a five (5) year old could be held in violation of Ohio trespassing laws. However, following the guidelines set down in Pennsylvania Co. v. Legendary we find the mother not to be held in violation when the role of a rescuer is applied. The care of the pool was also in gross violation of not only local ordinances but state laws. Its negligence didn't fulfill the duty of care owed to the neighbors and community. For the aforementioned particulars we affirm the lower court's decision.

## Youth in Government Student Supreme Court Minority Opinion

\_\_\_\_\_ Case # \_\_\_\_\_  
\_\_\_\_\_ All Justices who agree with this  
\_\_\_\_\_ Minority Opinion are to sign their  
\_\_\_\_\_ names to the left.  
\_\_\_\_\_ Opinions will be announced on  
\_\_\_\_\_ Saturday morning. Until then,  
\_\_\_\_\_ the decisions of the Court are not  
\_\_\_\_\_ to be discussed with anyone.

(If there is a dissenting opinion among the Justices, this is the form that would be used. In the case of Bennett v. Sims a minority opinion was not necessary).

## Officer Responsibilities

Officers are elected at Youth in Government to serve through the next year's program. Their service throughout the year provides student leadership to the program, helps strengthen the program for everyone, and better prepares officers for their duties during the Student Legislature/Court.

Officers put Youth in Government first. They must have and take the time required to effectively serve the program.

In addition to Youth in Government at the Statehouse/Capitol, the officers "do their jobs" at the annual Sr. Leadership-Service Conference in June at Horseshoe, the Fall Program Conference in November and the February Officer/Committee Chair Training – Bill & Case Rating Session.

Additional responsibilities/qualifications include:

### **Chief Justice**

Appoint qualified Associate Justices as needed,

Serve on the Youth in Government Committee,

Study all cases before the Student Supreme Court,

At Youth in Government

- Present an opening address,
- Give a closing summary of the Supreme Court,
- Announce the new youth Chief Justice,
- Assist Judicial Coordinator as necessary.

## **Associate Justices**

Study all cases before the Student Supreme Court,

Preside over cases assigned to you by the Chief Justice and summarize the opinions of the panel

## **Elections and Appointments for State Office**

### **Nominations**

Each delegation may nominate one (1) candidate for Chief Justice. Nominations are due and to be submitted on the Officer Candidate Form by 7 pm at Youth in Government Office on Saturday.

Nominees must meet the qualifications listed for their office.

### **Officer Qualifications**

Qualifications common to the office of Chief Justice include:

1. One year's experience in Youth in Government as a judicial delegate. Unlike other elected offices in Youth in Government, Chief Justice Candidates may count their current year toward this requirement.
2. Will attend the Leadership-Summit Camp at Horseshoe in June, the Officer Training/Bill Rating session in February, Fall Conference in November and the Youth in Government program at the Statehouse/Capitol.
3. Positive group work skills and attitudes that help all others succeed.
4. Effective public speaking and presentation skills.
5. Understands the Youth in Government procedure and is able to implement it.
6. Has leadership skills appropriate to the purpose of Youth in Government.
7. Understands, supports, and practices the values of leadership through service promoted by YLA.

#### **N O T E**

If you cannot attend Leadership-Summit at Horseshoe in June, for any reason, your office becomes vacant and another person at the camp will be appointed to your position. The new officer will complete the term of office through the Youth in Government conference.

## **Election Procedure at Youth in Government**

Candidates demonstrate their ability to carry out the responsibilities of the position they seek by "doing" what the office requires. There is no campaign, campaign speech, or campaign material.

Having demonstrated their effectiveness to their peers throughout the weekend, Chief Justice Candidates will have 3 minutes to summarize their vision of the Judicial Program to the Student Supreme Court participants. The candidate receiving the majority of votes is declared the winner. Only Judicial delegates vote for the Chief Justice.

## **Associate Justices**

Associate Justices are appointed by the Chief Justice from those qualified applicants who submit their application no later than one week after Youth in Government.

## Definition of Terms

**Appellant** [uh-pel-ent] – The party who loses the local trial and appeals to the Supreme Court.

**Appellee** [a-puh-lee] – The party who won the local trial and responds to the appeal of the appellant.

**Argument** - The persuasive reasoning by the attorney to the deciding body (judge or jury) stating why the case should be decided in favor of his client. Arguments, whether oral or written, should present clear thinking and logical statements that lead to only one conclusion.

**Bailiff** - The officer of a trial court who opens, recesses, reconvenes and closes each session of the court.

**Bill of Exception** -The verbatim transcript of everything that is said at the local trial relevant to the issues being appealed.

**Brief** - The formal written statement prepared by both parties of an appeal listing the errors (appellants only), their arguments and conclusions.

**Chief Justice** - The presiding Justice of the Supreme Court.

**Conclusion** - Making a definite statement within your facts. The logical end to a line of reasoning.

**Court Reporter** - The officer of the court who records everything said by everyone at each session of the court.

**Damages** - In most cases, the reward received by the plaintiffs, if they win.

**Defendant** - The party being charged with the alleged wrongdoing.

**Dissenting Opinion** - The written decision of the judge(s) in the minority on a case.

**Expert witness** - A witness who, because of their knowledge or experience, can offer technical expertise to the court within their area or profession.

**Evidence** - Information obtained by testimony of witnesses or introduction of objects or documents at a trial which the jury considers in reaching its verdict.

**Judge** - The one who presides at a trial and, if there is no jury, also decides the case.

**Jury (Panel)** - A group of citizens who hear the evidence at trial and decide disputed questions of fact (verdict). The group is known as a panel during the voir dire and after taking the oath as jurors, is known as the jury.

**Justice** - The formal name given to a Judge of the Supreme Court.

**Marshal** - The officer of a trial court who opens, recesses, reconvenes, and closes each session of the court.

**Narrative Bill of Exceptions** - A written statement of the facts according to testimony at the local trial agreed upon by opposing Attorneys. This is used in lieu of the Bill of Exceptions when a court reporter is not present.

**Notice of Appeal** - Statement asking for a reversal of the lower court's judgment.

**Objection** - Any oral statement to the judge voiced by an attorney during trial showing why a certain question or answer constitutes improper evidence.

**Opinion** - The written decision of the judge or judges, supported by their reasoning, of a case which has been argued on appeal.

**Peremptory Challenge** - Prerogative of counsel to object to a member of the panel during voir dire.

## **SAMPLE BRIEF**

*The following sample brief is representative of the form, contents, and flow for your written brief. Obviously, you will use case law from your particular state to uphold your arguments and conclusion.*

### **THE MODEL SUPREME COURT OF THE STATE OF OHIO**

Ricky Bennett, Administrator	vs.	Jeffrey Sims
Prosecution (Appellant)		Defendant (Appellee)
Kristen Ford		Reba Davis
Kelvin Ranford		Eric Blackmon
Attorneys for the Appellant		Attorneys for the Appellee

## STATEMENT OF FACTS

Ricky and Cher Bennett and their children Kyle, age 8; Madison age 6; and Chance, age 5 moved to Cincinnati, Ohio in the fall of 1996. Jeffrey and Stacey Sims were the Bennett's next-door neighbors.

The Sims had a pool on their property which had gone unused for three years. At the time the Bennett's moved next door, the Sims pool was covered by a tarp and surrounded with fencing. After the Bennett's moved in, the Sims removed the tarp and drained the pool. However, they permitted rainwater to collect in the pool. The rainwater accumulated to a depth of over six feet. The Sims removed the fencing on two sides of the pool. The pool became pond-like, containing tadpoles and frogs. The side of the pool became slimy with algae. The pool contained no ladders.

The Sims and the Bennett houses were one hundred feet apart. There was some fencing which ran parallel between the two properties. But there is an eight-foot section of yard between the houses which was not covered by fencing. The Sims were aware that the Bennett's had small children that often played in the Bennett's yard unattended. The Bennett's were aware of the condition of the Sims' pool. The Sims did not have any property signs posted which warned of the pool or stated, "No trespassing".

On the afternoon of March 20, 1997, Chance and Kyle Bennett were playing at the Sims' pool with the frogs. The Sims did not invite them onto their property or to the pool. Chance slipped into the pool. Kyle went to get Cher Bennett. It appears that Cher Bennett also slipped into the pool. When Ricky arrived at home later that afternoon, he found Kyle sobbing uncontrollably. When questioned by Ricky, Kyle told her father that Mommy and Chance were "drowning in the water". Ricky ran next door and found his wife and son unconscious in the pool. He pulled the two from the water and tried to revive them. He was unsuccessful. Cher Bennett and Chance Bennett were pronounced dead by University Hospital later that evening.

Ricky Bennett in his capacity as Administrator of the Estate of Cher Bennett and Administrator of the Estate of Chance Bennett filed a wrongful death suit against the Sims in the Hamilton County Common Pleas Court. The Complaint alleged that the Sims had negligently maintained their pool and the negligence was the proximate cause of the deaths of Cher and Chance Bennett. Mr. Bennett further alleged that the Sims should have known the pool posed an unreasonable risk of serious harm to others and that children, especially because of their youth, would not recognize the danger. Appellant sought compensatory and punitive damages.

The Sims denied any negligence. The Sims filed a motion for summary judgment. The trial court found that Cher and Chance Bennett were trespassers on the Sims' property and the only duty owed by the Sims was to refrain from wanton and willful misconduct on behalf of the Sims. The trial court found the Sims owed no duty of care to Chance and Cher Bennett. The trial court entered judgment for the Sims as a matter of law. Ricky Bennett appealed the decision of the trial court to the First District Court of Appeals. The First District Court of Appeals affirmed the trial court. The matter is before the Ohio Supreme Court upon the allowance of a discretionary appeal.

## APPELLANT'S BRIEF

### ASSIGNMENT OF ERRORS

There was an error in the trial court in the following particulars:

- a) The trial court erred when it granted the defendant - appellee motion for summary judgment.
- b) The trial court erred in ruling that a five-year-old child could be guilty of trespass and there was no duty of care owed to the trespasser.
- c) The trial court erred in determining the defendant-landowner's duty of care in this case.

### ARGUMENTS

#### Argument #1 – The trial court was incorrect when it granted the motion for summary judgment.

When the trial court granted the motion for summary judgment it deprived Ricky Bennett the right of presenting facts and evidence to a jury of his peers. In order for a plaintiff to survive a properly supported motion for summary judgment in a wrongful death case, the plaintiff must demonstrate that genuine issue of material fact remains as to whether: (1) the defendant owed the decedent a duty; (2) the defendant breached that duty; and (3) as a proximate result of the defendant's breach of that duty, the decedent suffered an injury or death. *Mussivand v. David* (1989), 45 Ohio St. 3d 314,318.

Sims, as pool owners, owed the public a duty of care to maintain the pool in a safe condition. The question of whether the Sims breached the duty of care it owed to Chance and Cher Bennett is a question of fact that should be left to the jury to determine. Ohio Civ. R 56(c) states that only when there is no genuine issue as to any material fact is the moving party entitled to judgment as matter of law. In the present case there were several unanswered questions, such as, did the Sims negligently maintain the pool? Was the negligence the proximate cause of death for Chance and Cher Bennett? The answers to those questions could only have been provided through the presentation of testimony and evidence by both the Sims and the Bennetts. Since there were genuine issues of material fact, the Sims were not entitled to a motion for summary judgment as matter of law.

#### Argument #2 – The trial court erred in ruling that a five-year-old child could be guilty of trespass and no duty of care would be owed to a trespasser.

Chance Bennett is a five-year-old child, clearly a person of tender years. He would not be able to understand that the pool was dangerous. The matter in which the Sims maintained the pool made it attractive to Chance as a place to play. Reasonable minds could conclude that it was foreseeable that the Bennett children would like to explore around the pool.

The court has previously decided that the amount of care required to discharge a duty owed to a child of tender years is necessarily greater than that required to discharge a duty owed to a mature adult under the same circumstances. Children of tender years and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the danger they may encounter. Young children are not capable of recognizing defects and dangers in the same way an adult could. Thus a person has a duty to take greater precaution when children are exposed to dangers and defects. *DiGildo v. Caponi* (1969) 18 Ohio St. 2d 125.

The Sims' pool was a dangerous instrumentality. A dangerous instrumentality has been defined as an apparatus actively and negligently maintained by an owner and the dangerousness of the apparatus is not readily apparent to children. *McKinney v. Hartz & Restle Realtor, Inc.* (1987), 31 Ohio St. 3d 244. The Sims' pool contained over six feet of murky water, its sides were covered with algae, it was not properly barricaded and it contained no ladder. Clearly any adult venturing upon the pool would view it as dangerous and would proceed cautiously. A five-year-old child would not be able to see the dangerousness.

The trial court decided the Sims owed no ordinary duty of care to Cher and Chance Bennett because they were not invited upon the property. The trial court found Chance and Cher entered the Sims property for their own purposes, not the Sims. The trial court concluded the only duty owed to a trespasser was to refrain from wanton and willful misconduct. The court found the Sims had not acted in the heedless indifference to create a condition which would injure others.

The trial court decision was contrary to law. Applying the principles of the dangerous instrumentality doctrine, the Sims owed the Bennett's a duty of care. The Sims made a decision to maintain their pool in an unsafe condition. It should have been foreseeable to the Sims that children could have wandered onto their property and found their way to the pool. The Sims owed those children a higher duty of care to safeguard them from injury. While it is true that Chance, his sister and his mother were all trespassers on the Sims property, The Sims were duty bound to take precautions to keep the children from injuring themselves at the pool. In this case Chance, a child of tender years, was attracted to a virtual deathtrap. He could not comprehend the dangerousness of the pool. The Sims should have taken responsibility to keep the pool inaccessible to Chance and his siblings.

Argument #3 – The trial court was incorrect when it determined the defendant's duty of care in this case.

The Restatement of the Law 2d, Torts (1965) Section 339 states:

A possessor of land is subject to liability for physical harm to children trespassing on the owner's land, for injury caused by an artificial condition upon the land if...

- a) The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- b) The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- c) The children because of their youth do not discover the condition or realize the risk coming within the dangerous area, and
- d) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight, compared with the risk of harm to the children involved, and
- e) The possessor fails to exercise reasonable care to eliminate the danger or to otherwise to protect the children.

The doctrine established by the Restatement is known as the attractive nuisance doctrine. The attractive nuisance doctrine extends liability to an owner of a home swimming pool where the presence of a child who was injured at the pool or was drowned therein was foreseeable to the property owner. In the present case, the facts show that the Sims knew their neighbors had three young children. The Sims also knew the children often played outside unattended. Lastly, the Sims knew that the Bennett children could enter onto their property because it was not completely fenced off.

The Sims should have realized that the children would have been attracted to the pond-like pool area because of the animals there. The Sims also should have known the pool had algae-slimed sides, was filled with over six feet of water, was easily accessible to children, and contained no ladder for people to get out of the pool. It should have been foreseeable to the Sims that the Bennett children would enter their property to play at the pool and possibly injure themselves.

Being only five-years-old, Chance Bennett probably didn't realize the pool had no ladder and the sides were slippery. He probably didn't realize that there was six feet of water accumulated in the pool. All Chance knew was the pool had frogs and he wanted to play with them. The Sims made the decision to tear down the fence surrounding the pool and took off the tarp. They were the ones that created the pool's unsafe condition. If the Sims had left the pool in its original condition, Chance would not have been able to access the pool area. The condition of the pool attracted Chance to it. It was the negligent condition of the pool that caused Chance's death. Under the attractive nuisance doctrine, the Sims are responsible for the death and are liable to Ricky Bennett for payment of damages.

As for Cher Bennett, her entrance upon the Sims property was in a role of a rescuer. The court has held that if a rescuer does not rashly or unnecessarily expose himself to danger, but is injured because of a negligent condition nevertheless, the injury may be attributed to the person who caused the negligence. *Pennsylvania Co. v. Legendary* (1891), 48 Ohio St. 316. Cher Bennett went onto the Sims property to rescue her son from the pool. Unfortunately she slipped into the pool and she died with her son. Ricky Bennett is entitled to recover damages because Cher's death occurred while attempting to rescue her child from a danger or attractive nuisance created by the defendant's negligence.

## CONCLUSION

The trial court should not have granted the motion for summary judgment because it deprived Ricky Bennett of the right to have the case heard by a jury of his peers. There are genuine issues of material facts which needed to be determined by the jury. The trial court also erred when it determined that Chance and Cher Bennett were trespassers on the Sims' property and not entitled to a duty of care from the Sims. The Sims maintained a pool on their property in an unsafe condition. Chance, a child of a young age, had no idea he was trespassing or what the consequences of trespassing would mean to him. He was unable to contemplate the dangerousness of the pool. Pursuant to the attractive nuisance doctrine, the Sims owed Chance and Cher Bennett the duty to eliminate the danger or to otherwise protect them from the risks the pool represented.

Based on the foregoing arguments, the decision of the trial court should be overturned.

Respectfully submitted,

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Kristen Ford

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Kelvin Ranford

Attorneys for the Appellant

## APPELLEE'S BRIEF

### **ARGUMENTS**

Argument #1 – The trial court was correct when it granted the motion for summary judgment.

Civ. R 56 (c) provided that a summary judgment motion shall be rendered if, the pleadings, depositions, answers to interrogatories, written admissions, affidavits, and written stipulation of fact show that there is no genuine issue as to any material fact and the moving party is entitled to have the motion granted as a matter of law. In the present case, there are no disputed facts. Chance Bennett and his sister Kyle trespassed on the Sims' property to play with the frogs at the pool. Chance slipped into the pool and was not able to get out. Kyle went to get help from Cher Bennett. Cher went into the pool to rescue Chance and was not able to get out. Both Chance and Cher drowned in the pool.

The Appellant argues that the Appellee owed a duty of care to Chance and Cher Bennett. The Appellant further argues that the Appellee breached the duty of care owed to Chance and Cher and thus are liable for Chance and Cher's death.

It is unfortunate that Cher and Chance Bennett died, but their death is not the fault of the Sims. The Bennetts were not invited onto the Sims' property. They were trespassers. The law has held that an owner of property is not responsible to a trespasser for any injuries sustained on the owner's property while trespassing. *Wills v. Frank Hoover Supply* (1986), 26 Ohio St. 3d 186. If the owner is not responsible for any injuries sustained by a trespasser, the Sims could not be liable to Ricky Bennett for Chance's and Cher's deaths.

Upon review of the pleadings submitted, reasonable minds could come to but one conclusion, the Defendant owed no duty of care to the Bennetts. The Defendant's motion for summary judgment should have been granted.

Argument #2 – The Defendant-landowner owed no duty of care to Cher and Chance Bennett because they were trespassers.

The duty of care a landowner owes to a person entering his or her property depends upon whether the person entering is an invitee, licensee, or trespasser. *Rinehart v. Federal Natl. Mtge. Assn.* (1993), 91 Ohio App. 3d 222.

An invitee is an individual who rightfully comes upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner. *Gladon v. Greater Cleveland Regional Transit Authority* (1996), 75 Ohio St. 3d 312. A licensee is one who stands in no contractual relationship to the owner of the land, but is permitted or tolerated thereon expressly or impliedly by the owner, merely for the owner's interest, convenience or pleasure and remains on the land by virtue of the owner's consent. *Keersecker v. McKelvy* (1943), 141 Ohio St. 162; *Restatement of the Law 2d, Torts* (1967), Section 330. A trespasser is one who, without or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience. *McKinney v. Harts and Restle Realtors, Inc.* (1987), 31 Ohio St. 23d 244.

Chance Bennett did not enter on the Sims' property at the expressed or implied invitation of the Sims. Chance did not remain on the Sims' property with their consent. Chance Bennett was a trespasser. He entered the Sims' property to play with the frogs. Clearly one can conclude Chance Bennett went onto the Sims' property for his purposes and convenience.

Cher Bennett entered the property only in an effort to rescue her son. She was not invited by the Sims, nor was her presence on the Defendant's property with the Defendant's consent. While it may be argued that Cher was a trespasser by necessity, i.e.: she entered the property to save her son's life, she was a trespasser none the less.

An owner of land owes an invitee and licensee the duty of care to warn them of any hidden perils, dangers or traps. An owner of land does not owe a trespasser the duty of care to warn said trespasser of any hidden perils or traps, unless the owner discovers the trespasser's presence on the owner's property.

The Appellant argues Chance is a child of tender years and is unable to understand that he has trespassed. Ohio law has argued to the contrary. A landowner owes no duty to make his premises safe to a mere trespasser whether young or old. *Wills, supra*. Ohio law also does not impose on a landowner a duty to anticipate the presence of a child on the owner's property or to prepare for the safety of the child. *Brown v. Rachel (1959)*, 108 Ohio App. 356. Finally, a landowner does not insure the safety of child trespassers upon his land. Such children have no greater right to go on the land of others than adults have. *Wills, supra*. Upon consideration of the above case, the court was correct when it determined by means of summary judgment that the Sims owed no duty of care to Chance Bennett.

The Appellants argue the negligently maintained pool created a dangerous instrumentality and thus imposes a higher duty of care on the owner to safeguard any persons entering the owner's property. It is the Appellee's position that the pool is not an inherently dangerous instrumentality. A pool is not a dangerous instrumentality unless there is a hidden defect or a dangerous condition. There were no hidden defects in the Sims' pool. While the pool may have been filled with six feet of murky water, not surrounded by fencing and missing a ladder, these conditions were apparent to anyone who visited the pool.

Chance and Cher Bennett should have recognized the obvious danger of drowning in a swimming pool, whether it was filled with clean water or filled with slime and algae and kept in a pond-like manner. The Sims owed no duty of care to Chance and Cher Bennett because they were undiscovered trespassers and the condition of the pool was obvious to anyone viewing it.

### Argument #3 – The Defendant's conduct in maintaining the pool was neither wanton nor willful.

Generally, a landowner owes an undiscovered trespasser the duty to refrain from willful and wanton misconduct. *Gladon, supra*. To constitute willful or wanton misconduct an act must demonstrate heedless indifference to or disregard for other circumstances where the probability of harm is great and is known to the actor. *Brooks v. Norfolk and Western Rv. Co. (1976)*, 45 Ohio St. 2d. 45. Willful misconduct involves the intent, purpose or design to injure. Wanton misconduct occurs when one fails to exercise any care whatsoever toward those to whom he owes a duty and his failure occurs under circumstances in which there is a great probability that harm will result. *McKinney, supra*.

While it is true the Sims removed the fencing from around the unused pool, pulled the tarp off the pool and let it become filled with over six feet of water, there is no evidence before the court which would indicate the Sims' actions were done with the intent to harm Chance or Cher Bennett. There is also no evidence before the court that would indicate that the Sims acted in heedless indifference or disregard for Chance and Cher. In fact, it was not foreseeable that the Sims' actions could have harmed anyone.

There being no evidence of wanton or willful misconduct, the trial court was correct to grant the motion for summary judgment.

## **CONCLUSION**

In summary, the Sims owed no duty of care to trespassers. The facts are clear that Chance and Cher Bennett were trespassers on the Sims property. The pool as maintained by the Sims was not a dangerous instrumentality. The condition of the pool was obvious to anyone viewing. The fact that Chance is a young child of tender years does not lead to a conclusion that the Defendants owed him a higher duty of care. The maintenance of the pool was not negligent. The actions of the Sims in connection with the maintenance of the pool were neither wanton nor willful. Lastly, the Sims' actions were not the proximate cause of Cher's and Chance's death. The decision of the Lower Court should be affirmed.

Respectfully submitted,

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Reba Davis

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Eric Blackmon

Attorneys for the Appellee

**SAMPLE BRIEF**

**THE MODEL SUPREME COURT OF THE STATE OF WEST VIRGINIA**

State of West Virginia      vs.      Mark Carter  
Prosecution ( Appellant)              Defendant (Appellee)

Samantha Godbey                      Erica Brannon  
Mairin Odle                              Stephanie Bostic  
*Attorneys for the Appellant*              *Attorneys for the Appellee*

## STATEMENT OF FACTS

Mr. Mark Carter (hereinafter "Carter") was placed on parole in May 1998 after having been found guilty of one count of possession of a controlled substance and one count of drug trafficking. Carter's parole was subject to terms and conditions established by the Kanawha County Adult Parole Authority. At the time he was placed on parole, Carter signed a document entitled "Conditions of Supervision." Paragraph 9 of that document stated, "I agree to a search of my person, my motor vehicle, or my place of residence by a probation/parole officer at any time." After agreeing to the conditions of his parole, Carter was placed under the supervision of Ken Moynahan (hereinafter "Moynahan"), a parole officer with the Adult Parole Authority.

After being placed on parole, Carter went to live in a home owned by his mother, Nora Carter. Some evidence was presented at the suppression hearing that when a parolee is placed in a home, the owner of the home, in this case Carter's mother is informed that the home can be subject to a search at any time. Furthermore, there was some evidence that Nora Carter was informed of this. Several other individuals also resided in the home, however, and no evidence was presented as to whether they were informed of the search possibility.

On October 4, 1998, Carter's parole officer received an anonymous phone call from a female who advised him that Carter was selling illegal drugs from that residence. The anonymous informant also told Moynahan that Carter placed the drugs in his mother's bedroom to avoid detection in the event of a search by his parole officer. Finally, the informant told Moynahan that Carter kept a firearm in the home, which is also a violation of his parole conditions.

Moynahan corroborated the information he received from the anonymous informant by speaking with another parolee. The parolee confirmed that Carter was selling drugs out of his residence and hiding the drugs in his mother's bedroom to avoid detection by his parole officer. After corroborating this information, Moynahan spoke to the anonymous informant a second time, and the informant relayed the same information as in the earlier call. Moynahan claims that in addition to this evidence, he had other evidence that Carter was engaged in illegal activity, but he did not specify what evidence. Moynahan stated that he could not divulge what that evidence was because it could jeopardize the safety of other persons.

After receiving this information, Moynahan called the local drug task force to ascertain whether the task force wanted the Adult Parole Authority to proceed with a search or whether the task force would search on its own. Moynahan did not receive a response from the task force. As a consequence, on October 16 1998, Moynahan again contacted that task force to determine whether he should proceed with a search. The task force advised Moynahan that it had not reached a decision on that matter.

On October 17, 1998, Moynahan asked a fellow parole officer, Jason Timmons (hereinafter "Timmons"), to accompany him in searching Carter's residence. When Moynahan and Timmons arrived at the home, neither of them observed any suspicious activity. Moynahan knocked on the door, Carter answered and Carter let them into the home. According to Moynahan and Timmons, they asked Carter whether they could search the premises, and Carter consented to the search. Timmons proceeded directly upstairs to Carter's bedroom, while Moynahan stayed with Carter downstairs. Timmons searched Carter's bedroom as well as all of the bedrooms upstairs. Timmons did not find any drugs or money in the upstairs bedrooms.

Timmons then went downstairs and thoroughly searched all areas downstairs, including Carter's mother's bedroom. Timmons discovered a locked Sentry safe under Carter's Mother's bed. Timmons then obtained Carter's key ring from his bedroom and used the smallest key on the ring to open the box. Timmons alleged that it later was determined that any small key would open the box because the lock was broken. When Timmons opened the safe, he discovered that it was filled with heroin and cocaine. While in Carter's mother's room, Timmons also noticed that one corner of Carter's mother's mattress was higher than the other corner, as if there was something beneath it. Timmons looked under the mattress and discovered \$4,600. A gun was also discovered on the premises. Carter was then arrested for aggravated drug trafficking.

When Nora Carter returned home, after Timmons had already opened the safe, the police asked her to sign a consent to search form, and she agreed. After signing the consent form, the parole officer more completely searched Nora Carter's bedroom. Nonetheless, they did not find any other incriminating evidence in her bedroom. When the officers questioned Nora Carter about the narcotics discovered in her bedroom as a result of the earlier search, she denied that the drugs belonged to her.

On November 13, 1998, the grand jury indicted Carter on two counts of aggravated drug trafficking in cocaine and heroin. On December 3, 1998, a hearing was held on the issue of whether Carter had standing to contest the search and whether the scope of the search exceeded Carter's consent to search. As a result, the court suppressed the evidence gained through the search of the mother's bedroom. The state now brings this timely appeal of that decision.

## APPELLANT'S BRIEF

### ASSIGNMENT OF ERRORS

There was an error in the trial court in the following particulars:

The Judge erred in granting Carter standing to contest the search of his mother's bedroom.

The Judge erred in determining that the search of said bedroom exceeded Mr. Carter's consent.

The trial court wrongfully suppressed the evidence found in the search of Mr. Carter's mother's bedroom.

### ARGUMENTS

Argument #1 – The Judge erred in granting Carter standing to contest the search of his mother's bedroom.

Mr. Mark Carter had no standing to contest the search of his residence. He signed, as a condition of parole from a previous conviction, a document entitled "Conditions of Supervision." Paragraph 9 of that document states "I agree to a search of ...my place of residence by a parole officer at any time." A parole officer, Jason Timmons, conducted the search.

Argument #2 – The Judge erred in determining that the search of said bedroom exceeded Mr. Carter's consent.

Mark Carter's mother, Nora Carter, is the owner of the home in which her son made his residence and as such had been informed that the home could be searched at any time as a condition of her son's parole. No evidence was presented at trial that she ever disagreed with or denied this stipulation of her son's parole. The consent made by Nora Carter as the owner of the residence was never limited to selected rooms but encompassed the entire residence. The case, *State v. Plantz*, 155 W. Va. 24, 180 S.E. 2d 614 (1971) holds that "The voluntary consent of a person who owns or controls premises to search of such premises...does not violate the constitutional prohibition against unreasonable searches and seizures." Likewise, the consent to search agreement that was a condition of Mr. Carter's parole never limited the scope of how much of his residence could be searched. Therefore, the search did not exceed Mr. Carter's consent.

Argument #3 – The Court wrongfully suppressed the evidence found from the search of Mr. Carter's mother's bedroom.

The evidence found in Carter's place of residence is valid. It was the product of a lawfully conducted search. Moynahan and Timmons, parole officers as specified in the terms of probation, had reasonable cause to conduct the search based on information an informant gave them and which another person corroborated. The terms of probation did not require a search warrant. The search was not unconstitutional as "the State and Federal Constitutions prohibits only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as...searches and seizures made that have been consented to." *State v. Angel*, 154 W. Va. 615 177 S.E. 2d 562 (1970).

**CONCLUSION**

Mr. Carter had no basis to contest any of the search. He had agreed to the conditions of his parole which included a search of his residence by a probation officer at any time. He also consented verbally to a search of his residence when asked by Moynahan and Timmons on October 17, 1998. The trial court improperly granted the motion to suppress the evidence in this case. The lower court's decision should be overturned.

Respectfully submitted,

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Samantha Godbey

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Mairin Odle

Attorneys for the Appellant

## APPELEE'S BRIEF

### **ARGUMENTS**

Argument #1 – The Judge was correct in suppressing the evidence found through an unconstitutional search.

There was no warrant to search Nora Carter's bedroom. Ken Moynahan and Jason Timmons illegally searched her bedroom by doing so without consent, a warrant, or probable cause. This warrantless search is prohibited by the Fourth Amendment. According to WV State Code 62-1A-6, this evidence should have been and was suppressed. *White v. Melton*, 166 WV 249, 273 SE 2<sup>nd</sup> 81 (1980) is one example of the use of this.

Argument #2 – Mark Carter's consent to search does not extend to Nora Carter's or any other's bedroom.

Nora Carter's bedroom is not Mark Carter's "place of residence." Since Nora Carter's bedroom is "exclusively used by a non-consenting third party," Mark Carter cannot consent to the search of her bedroom as said in 415 U.S. 164:1974. Therefore, Mark Carter's probation officer has no grounds to search Nora Carter's bedroom without a warrant.

Argument #3 – Ken Moynahan further lacked a reliable informant, credible information, and corroborative evidence which would be necessary to conduct a search based on probable cause.

Although information from informants may be used to establish probable cause, hearsay such as Ken Moynahan used is not permissible unless the informant is "reliable" and "some corroborative evidence exists." There was no corroborating evidence, much less the additional evidence required when the informant is anonymous." *Aguilui v. Texas* 378 U.S. 108: 1964. *Payton v. New York* 445 U.S. 573: 1980 further supports this by stating that an officer must have both probable cause and exigent circumstances in order to conduct a warrantless search, neither of which Ken Moynahan had.

**CONCLUSION**

We feel that this judgment should be upheld since Ken Moynahan clearly conducted an illegal search which violated Nora Carter's and the other residents' right to privacy. This violation should result in the dismissal of all evidence found through this unconstitutional search.

For these reasons, we feel that the judgment of the lower court should be upheld in the case State of West Virginia v. Mark Carter.

Respectfully submitted,

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Erica Brannon

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Stephanie Bostic

Attorneys for the Appellee