THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-08-3732

Jane Roe, as parent and natural guardian of
Judy Roe, James Roe, and Joyce Roe, minor
children under the age of eighteen (18).....Appellants,

v.

Daniel Bibby, Sr., and Michelle Bibby

Of whom, Michelle Bibby is.....Respondent.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

In this Appeal, Appellants challenge the Order of the trial court granting Summary Judgment with respect to their claims against Respondent. Specifically, Appellants allege that Appellant Judy Roe was molested at the hands of Respondent's husband, while a guest in Respondent's house. (See Compl.). Notably, Respondent's husband had a history of molesting minor children and Respondent was aware of this history. (M. Bibby Dep. 46:3-7). Accordingly, Appellants brought suit against Respondent on a negligence theory, both arising out of Respondent's special relationship with Appellants, and under basic premises liability law. Appellants have already obtained a Judgment against Mr. Bibby for his part in the molestation.

ARGUMENT

A "cause of action for negligence requires: 1) the existence of a duty on the part of the defendant to protect the plaintiff; 2) the failure of the defendant to discharge the duty; 3) injury to the plaintiff resulting from the defendant's failure to perform." South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324, 325 (1986). Because there is at least a scintilla of evidence that could allow a reasonable jury to find in Appellants' favor as to each element, the trial court erred in granting summary judgment for Respondent and the order should be reversed and the matter remanded for a trial on the merits.

I. The Trial Court erred in granting Respondent's Motion for Summary Judgment because Respondent owed a duty to warn Appellants by way of their special relationship and, more fundamentally, because there is evidence on the record to show that Respondent was negligent under basic principles of premises liability law.

In her Initial Brief, Respondent addresses Appellants' theories of liability and, in turn, makes a number of sweeping generalizations that must be more fully fleshed out.

A. Respondent had a duty to warn Appellants arising out of their special relationship and the circumstances alleged in Appellants' Complaint.

Respondent argues that there is insufficient evidence to establish Respondent's ability to monitor, supervise, and control the minor Appellants' conduct. (Resp't Brief, p. 10-13). However, Respondent admits that she was aware that the Appellant minors were coming into her house to play with her grandchildren. (M. Bibby Dep. 67:17-19). Moreover, Respondent told Appellant Jane Roe that Roe's children were welcome at Respondent's house any time. (Roe Dep. 65:24-66:2).

In support of this position, Appellants proffered expert testimony, by way of affidavit, from Marguerite Paul, a child care specialist with over 32 years of experience in the field of child safety. [Mem. Opp'n Summ. J., Exhibit G]. Ms. Paul was the former Child Care Specialist and director of Child Care Licensing for the South Carolina Department of Social Services. Id. Ms. Paul opined that Respondent "invited the [minor] children into her home, making them social guests and giving her, the property owner, special responsibility to warn their parents of any danger present in her home." Id. Ms. Paul went on to state that Respondent "having knowledge of Daniel Bibby's propensity to sexually engage young children holds her to a higher standard of reporting and informing [Appellants] and to protect their children from harm." Id. Finally, Ms. Paul stated that "[Respondent] failed to act as a reasonable and prudent person would act under the circumstances..." Id.

Given this testimony, together with Respondent's own admissions, it seems apparent that there is evidence on the record to support the conclusion that Respondent stood in a special relationship with the minor Appellants.

Respondent goes on to argue that, even if she stood in a special relationship, she is not liable because she did not have knowledge of a specific threat of harm to the minor Appellants. Again, this argument ignores the ample evidence that exists, at least a scintilla of which tends to establish the opposite.

Some states require actual knowledge of the offender's propensities. See, e.g., Romero v. Superior Court, 89 Cal.App.4th 1068, 1083, 107 Cal.Rptr.2d 801, 812 (Ct.App. 2001)("We...hold as a matter of law that an adult defendant who assumed a special relationship with a minor by inviting the minor into his or her home will be deemed to have owed a duty of care to take reasonable measures to protect the minor against an assault by another minor invitee while in the defendant's home when the evidence and surrounding circumstances establish that the defendant had actual knowledge of, and thus must have known, the offending minor's assaultive propensities.").

Other states require only constructive knowledge. See, e.g., Doe v. Franklin, 930 S.W.2d 921, 928 (Tx.App. 1996)("If [defendant] knew or should have known of her husband's proclivities, she should have taken steps to ensure that Doe would not be placed in harm's way or to otherwise ensure that her husband would not be in a position to act on his temptations); Funkhouser v. Wilson, 89 Wash.App. 644, 661, 950 P.2d 501, 509 (1998)("we must determine whether there is sufficient evidence that a rational trier of fact should be allowed to determine whether the risk of harm was reasonably foreseeable at the time [plaintiffs] were molested.").

South Carolina has already adopted the "constructive knowledge" test in other circumstances. See, Bishop, 331 S.C. (holding it is not necessary for the injuring party to have made a threat while under the defendant's control or custody. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person).

However, whether this Court applies an actual knowledge or constructive knowledge test is almost immaterial in this instance because the Respondent admits to having actual knowledge of her husband's prior propensities toward pedophilia. (M. Bibby Dep. 46:3-7)(Admitting she was aware that her husband had molested their daughter in the past). To overcome this, Respondent relies solely upon the passage of time between the first molestation and the molestation of Appellants.

The passage of time between the alleged molestations does not however, as a matter of law, negate the fact that Respondent had actual knowledge of her husband's proclivities to commit such acts. Nor does it preclude a reasonable jury from finding that Mr. Bibby was likely to re-offend as, in fact, he did.

This is particularly true where Daniel Bibby, Jr., in a statement to police, admitted that, for at least two years leading up to the alleged molestation of Appellants, he had caught his father looking at child pornography on the internet. (D. Bibby Statement) Further, he had brought his father's pornography watching to the attention of his mother, the Respondent on several occasions. (Roe Dep. 79:21-80:3).

Indeed, Respondent admits to having been with Mr. Bibby in Myrtle Beach when he disposed of the computer in a dumpster behind a building. (M. Bibby Dep. 54:16-55-

7). This presents a scintilla of evidence from which a rational juror could surmise Respondent's knowledge of her husband's continuing propensities.

Respondent argues that this statement from Daniel Bibby, Jr. is inadmissible hearsay. However, this is not necessarily true. As in initial matter, Daniel Bibby Jr.'s testimony is not, in itself, hearsay, because his statement is one of personal knowledge (what he observed). Therefore, Bibby Jr. could easily take the stand and proffer the testimony, distinguishing this from the type of evidence excluded by Hall v. Fedor, 349 S.C. 169,561 S.E.2d 654 (Ct. App. 2002)(refusing to consider a statement that was hearsay when made) and similar cases. More importantly, the written statement, itself is likely admissible at trial under one or more of the hearsay exceptions, specifically, the business records exception under SCRE 803(8) and, if unavailable, the statement against interest exception of SCRE 804(b)(3) as Bibby Jr. was seemingly exposing himself to criminal and civil liability in making this statement.

Respondent also argues that this theory of liability cannot apply because there is no evidence that she had knowledge of a specific threat of harm. In supporting this argument, Respondent relies upon a handful of cases from *other* jurisdictions, and only two from South Carolina.

In Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004), aff'd, 373 S.C. 390, 645 S.E.2d 245 (2007), a doctor molested one of his minor patients. For some time prior to the molestation, the doctor had been treating with a psychiatrist for his "predilection for child molestation." The patient thereafter sued the psychiatrist for failing to warn the doctor's patients of this sexual proclivity. Id. In Marion, the Plaintiffs attempted to argue that a specific threat existed because the minor was a "member of a

readily identifiable group of future patients..." id. In rejecting this argument, the Court ruled that Plaintiff failed to allege a specific threat to an "identifiable party." Id.

The case at hand is quite distinguishable. Here, Judy Roe is specifically and easily identifiable. She is not a possible "member" of some abstract class. Instead, she is an actual person, placed in Mr. Bibby's direct path, not only with Respondent's actual knowledge but, indeed, by Respondent's invitation. Thus, she was as readily identifiable as a potential victim can be, and it would have been easy for Respondent to warn her of the threat.

Likewise, in Gilmer v. Martin, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), a nursing home patient was killed by a mentally ill employee of the nursing home. That employee had been treating with a psychiatrist for anxiety and depression. Id. The victim's family sued the psychiatrist for failure to warn. However, in rejecting this argument, the Court noted that the employee had no history of violence and had never harmed any person before, or even threatened harm. Id.

Again, the present case is distinguishable because Daniel Bibby had, in fact, committed identical acts of molestation on his daughter in the past, and Respondent was well aware of these acts. Thus, it can be said that the Martin case fails on the first prong (no specific threat of harm) while the Marion case fails on the second prong (no readily identifiable victim). Here however, we have evidence of both a specific threat (previous instances of molestation and more recent instances of viewing of child pornography) **and** a readily identifiable victim (a minor child roughly the same age as Bibby's prior victim who was invited into the house by the Respondent.)

For all these reasons, the trial court erred in finding that Respondent owed Appellants no duty arising out of their special relationship. The trial court erred in granting Respondent's Motion for Summary Judgment and the ruling should be reversed and remanded for a trial on the merits.

B. Respondent had a duty to warn Appellants as a matter of basic premises liability law.

Respondent also argues that she cannot be liable to Appellants on a premises liability theory and suggests that the Court would be required to "expand" existing case law to recognize such a duty. (Resp't Brief, p. 3). This hyperbole, however, is unpersuasive. South Carolina case law on premises liability is already well established and it is quite straightforward.

As Respondent suggests, the nature of the duty owed is dependent upon the Plaintiff's "status" upon the land. Here, it is undisputed that Appellants were licensees. (See M. Bibby Dep. 67:17-19(admitting that the Appellants were social guests at her house.)); (Resp't Brief, p. 18). A social guest is an example of a licensee. Singleton v. Sherer, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008). One who possesses, manages, or controls a property owes to a licensee the duty "to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land; and to use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which maybe dangerous to him, and which he may reasonably be expected to discovery." Neil v. Byrum, 288 S.C. 472, 473 (1986).

Our Courts have already held that a victim of a sexual assault on another person's property may bring suit under a premises liability theory. See Burns v. South Carolina

Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct.App. 1994). Therefore, the analysis turns on whether Mr. Bibby constituted a dangerous condition known to Respondent, and whether this danger was concealed.

There is no logical reason, nor is there any binding legal authority, to draw a distinction between a dangerous inanimate concealed condition on one's property and a dangerous resident pedophile. Here, there is evidence on the record to support a conclusion that Mr. Bibby did, in fact, molest Appellants, rendering him dangerous. Moreover, Appellant testified that she was unaware of Bibby's dangerous propensities. "They gave me no reason not to trust them." (Roe Dep. 50:2-3). "I had no reason not to trust [Respondent]. I saw that she had her grandkids. She looked like a good grandmother to me...I never saw anything wrong" (Roe Dep. 55:8-13). "[Mr. Bibby] looked like a normal – he looked like a grandfather. He was clean-cut, he was well-kept. I mean, he was never disrespectful to me. He seemed like he was nice to the kids, so I had no reason not to trust him." (Roe Dep. 55:23-56:3). Finally, as noted more fully above, there is ample evidence to suggest that Respondent was aware of this danger.

Thus, we have, quite simply, a *prima fascia* case of premises liability with respect to a licensee because we have a 1) dangerous condition (Mr. Bibby); that is 2) known to Respondent; but 3) concealed to Appellants.

In an attempt to muddy the waters, Respondent suggests that some finding of "special relationship" or duty is required, even under a premises liability analysis (Resp't Brief, p. 20). However, the existence of a special relationship has never been an element of premises liability law in South Carolina. Indeed, it would be absurd to suggest that a business patron or social guest would have to establish the existence of a special

relationship with a landowner in any other context,[1] and to so hold would require a significant departure from hundreds of years of premises liability and negligence jurisprudence.

Appellants do not seek to overhaul premises liability jurisprudence in South Carolina. Instead, we must simply apply the facts of this case to the law as it already exists. Here, all of the elements for a premises liability action are supported by evidence on the record. Once again, Respondent cites to cases from other jurisdictions but cannot stand on any precedential authority that would preclude such a recovery. Accordingly, the trial court's ruling should be reversed and this matter remanded for a proper trial on the merits.

II. There is overwhelming evidence on the record to substantiate Appellants' Allegations of abuse against Mr. Bibby.

In submitting her Initial Brief, Respondent raises the issue of proximate cause and damages for the first time. As Respondent correctly notes, "the Circuit Court did not reach this issue..." (Resp't Brief, p. 25). In fact, Respondent has never raised this issue. Respondent's Motion for Summary Judgment was devoid of any supporting grounds whatsoever and Appellants continue to contend that it failed to comply with the notice requirements of SCRCP 7(b)(1). See, e.g., (Pls.' Mem. Opp. Summ. J. p. 2). Even when Respondent eventually filed her supporting Memorandum, it made no mention of this issue. Thus, the record was built to present such evidence to the Circuit Court as was necessary to defeat the arguments that Respondent actually put forth.[2]

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[1] For example, in a slip and fall case.

[2] Had Respondent raised this issue earlier, Appellants likely would have supplemented the record further, to include a sworn statement or deposition from Defendant Judy Roe. However, in the apparent absence of any dispute about damages, it seems ill advised to put the minor child through that situation.

Nonetheless, the record is hardly devoid of "any admissible evidence substantiating the allegations against Mr. Bibby as related to the minor appellants" as Respondent now alleges. (Resp't Brief, p. 26).

In fact, Appellants have already obtained a judgment against Mr. Bibby for his acts of molestation. By default, Mr. Bibby has admitted, among other things, that "on multiple occasions [he] did sexually assault [Judy Roe];" "on at least one occasion [he] attempted to sexually assault [Joyce Roe];" and "On multiple occasions [he] forced [James Roe] to watch said molestation and threatened [James Roe] to ensure his silence." (See, generally, Compl.). In entering judgment, The Honorable Roger M. Young noted that "The court heard testimony from Plaintiffs' in support of the allegations" and that "[Bibby] failed to establish the existence of any meritorious defense to the allegations complained of in [the] Complaint." (Order of J.)[3]

Additionally, during this hearing on May 16, 2011, Appellants offered Laura Schreyer, a licensed professional counselor and Assistant Clinical Coordinator, Therapist, and Forensic Interviewer at Dorchester Children's Center, who was qualified by the Court to offer expert testimony regarding the allegations of abuse.[4]

Accordingly, there is ample evidence on the record to support Appellants' allegations of abuse.

CONCLUSION

For the reasons stated, the Order of the trial court should be reversed. This action should be remanded to the Circuit Court for a trial and final determination on the merits.

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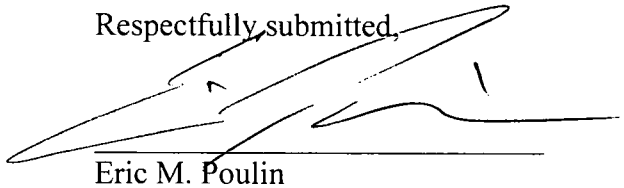
[3] Because this issue was not initially raised, neither the Judgment nor the transcript of expert testimony was designated in Appellants' matter to be included in the record. Accordingly, Appellant will work with Respondent and/or file a motion seeking leave to supplement the Record in accordance with rule 212.

[4] See above.

September 9, 2013

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served Appellants' Reply Brief on Michelle Bibby by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2013, addressed to her attorney of record, Eugene P. Corrigan, III, Post Office Box 547, Charleston, South Carolina, 29402.

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