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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Martha M. Rivers, Circuit Court Judge

Lower Court Case No. 2018-CP-02-01903

Gloria Allen, Personal Representative of the Estate of Helen Williams, Appellant,

v.

Estate of Calvin Warren, Estate of Diane Warren, Estate of Travis Robinson, and Marcus Williams, Defendants,

of which Estate of Calvin Warren, Estate of Diane Warren and Estate of Travis Robinson are the Respondents.

Appellate Case No. 2025-000208

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in failing to instruct the jury that, if they determined there was a special relationship between the Defendants and Mrs. Williams, then the Defendants had a legal duty to rescue her?

STATEMENT OF THE CASE

This is an appeal from a jury trial which resulted in a verdict in favor of the Defendants.

Gloria Allen, as Personal Representative of the Estate of her deceased mother Helen Williams, filed a summons and complaint against Marcus Williams and the Estates of Calvin Warren, Diane Warren, and Travis Robinson.[1] R. 1. Mrs. Allen brought wrongful death and survival causes of action against the Defendants for their alleged roles in Mrs. Williams' death as a result of a house fire. R. 1.

Gloria Allen and Marcus Williams reached a settlement and Mr. Williams was removed as a defendant in the case. The remaining Defendants—the Estates of Calvin Warren, Diane Warren, and Travis Robinson—timely answered the complaint. R. 35. The case proceeded to trial before the Honorable Martha M. Rivers and a jury from January 6 – 9, 2025. R. 46. Mrs. Allen was represented by John Harte and the Defendants were represented by Damon Wlodarczyk. R. 46. The jury returned a verdict finding that none of the Defendants were negligent. R. 396.

[1] The lawsuit was initially filed with the case numbers 2016-CP-02-02194 and 02195. Those cases were dismissed and later restored by consent of the parties under case numbers 2018-CP-02-01903 and 1904. These two lawsuits were consolidated under the single case number 2018-CP-02-1903.

STANDARD OF REVIEW

"In reviewing an alleged error in jury instructions, . . . an appellate court will not reverse the circuit court's decision absent an abuse of discretion." *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000).

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." *Cantrell*, 339 S.C. at 390, 529 S.E.2d at 539 (citing *Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971)).

"To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice." *Fairchild v. S.C. DOT*, 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009) (citing *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008)). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) (citing *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)).

STATEMENT OF FACTS

Background

This case involves a tragic house fire in Aiken that resulted in the deaths of three family members: Calvin Warren, Diane Warren, and Helen Williams (Mrs. Williams). Calvin and Diane were married. Mrs. Williams was Diane's mother. Diane's adult son, Travis Robinson, also lived at the house but survived the fire because he was not inside. However, Travis died later from causes unrelated to the fire.

Diane Warren's sister, Gloria Allen (Mrs. Allen), brought this lawsuit as Personal Representative of Mrs. Williams—Gloria and Diane's deceased mother. The lawsuit named four defendants: Marcus Williams, who owned the house and was one of Mrs. Williams' nephews; and Calvin, Diane, and Travis, who all lived at the house.

Rental Agreement and Agreement to Care for Mrs. Williams

Marcus inherited the house from his father, remodeled it, and rented it to Calvin and Diane. R. 95, l. 22 – 96, l. 14. The house was a two-story brick house with a three-car carport attached to the back of the house. R. 389 – 390. In remodeling the house, Marcus installed new batteries in the smoke detectors prior to Calvin and Diane moving in. Marcus also made sure the carport was cleared of all debris. R. 96, l. 15 – 97, l. 11.

Mrs. Williams was born and raised in Saluda, South Carolina. She was married and had eight children, including Gloria Allen and Diane Warren. R. 129, ll. 3 – 13. Mrs. Williams and her husband worked hard raising their children on a farm. All eight of the children ultimately received degrees in higher education. R. 131, ll. 1 – 9. Mrs. Allen recalled that her dad worked at the Savannah River Site and for Graniteville Company but would come home and work on their family farm. R. 131, ll. 10 – 17. While Mrs. Allen's parents instilled in her and her siblings the value of

education, they all had to do farm chores when they got home from school, including planting, chopping, and picking cotton. R. 131, l. 18 – 132, l. 25. They all ate breakfast, lunch, and dinner together as a family. R. 133, ll. 1 – 13. Mrs. Allen testified that she and her siblings were all very close and that her sister Diane was her "bestie." R. 133, ll. 14 – 23.

Mrs. Williams lived in a home in North Augusta and Diane would take care of her during the week and Mrs. Allen would take care of her on the weekends. R. 134, l. 22 – 135, l. 4. Mrs. Allen was at Mrs. Williams' home one Sunday afternoon preparing dinner when Diane and Mrs. Williams returned home from church. Diane left the house. Mrs. Allen recalled that she asked her mother a question and her mother didn't respond. Mrs. Allen called 911 and an ambulance came to the house to pick up Mrs. Williams and take her to the hospital. Medical professionals later confirmed that Mrs. Williams had suffered a stroke. R. 135, ll. 9 – 22.

After the stroke, Mrs. Williams remained very cognizant of her surroundings and fully able to understand what people were saying to her. However, the stroke left Mrs. Williams unable to speak or walk and she also had limited use of her arms. R. 135, l. 23 – 136, l. 5. Mrs. Williams was unable to feed herself, so other members of their family had to feed her pureed and soft foods. R. 136, ll. 5 – 8. Amazingly, even though Mrs. Williams could not speak, she could still sing. Mrs. Williams would sing Amazing Grace for her children and grandchildren even after her stroke. R. 136, ll. 9 – 19.

Marcus recalled seeing how much his grandmother, Mrs. Williams, enjoyed living in the home that their family had built and that when she spent time with her grandchildren and great-grandchildren she was always smiling and full of joy. R. 98, ll. 10 – 24. Mrs. Allen recalled that her mother continued to laugh after the stroke and that she and her siblings and all the grandchildren loved to hear her laugh. R. 140, ll. 18 – 22.

Mrs. Allen and Diane decided that they would take full-time care of their mother to avoid putting her in a nursing home. R. 136, l. 20 – 137, l. 3. They also had durable power of attorney for Mrs. Williams. R. 391. Because Diane was retired, she would check on Mrs. Williams every day during the week, making sure Mrs. Williams was out of bed, changed, and dressed for the day. Diane also made sure Mrs. Williams got her medicine and would take her to her doctor's appointments. R. 137, l. 15 – 138, l. 3. Mrs. Allen would take over during the weekends but would also help during the week after she got off work. R. 138, ll. 4 – 6. Occasionally, Mrs. Williams would stay at Diane's house where she lived with her husband Calvin, and her son Travis. R. 138, ll. 12 – 19. Mrs. Allen recalled that Travis also assisted in caring for Mrs. Williams. Specifically, he helped get her in and out of bed, in and out of the car, and helped give Mrs. Williams her daily medicine. R. 139, ll. 3 – 24.

House Fire

At the time of the fire, Mrs. Allen, Diane, Calvin, and Travis had all been helping take care of Mrs. Williams for two years. R. 141, ll. 16 – 23. The morning before the fire, Mrs. Allen took her mother to her house and they had dinner together. Mrs. Allen's children were also there and they wanted to see Mrs. Williams. R. 144, l. 20 – 145, l. 2. Diane called and asked Mrs. Allen if she could bring Mrs. Williams to Diane's house instead of taking Mrs. Williams back to her house in North Augusta. R. 145, ll. 2 – 9. Mrs. Allen's son helped get Mrs. Williams into the car, and Mrs. Allen drove Mrs. Williams to Diane's house. Once they arrived, Diane, Calvin, and Travis all helped get Mrs. Williams out of the car and into their house. R. 145, ll. 10 – 22. After Mrs. Allen dropped her mother off at Diane's house, she left for work at USC Aiken. R. 145, l. 23 – 146, l. 3.

The following morning, Mrs. Allen received a phone call from one of her cousins that there had been a story on the local news about a house fire and it looked like it was Diane's house. R.

146, ll. 4 – 10. Mrs. Allen immediately called Diane and Calvin. Neither of them answered, so Mrs. Allen got in the car and drove to their house. When she arrived, the fire trucks were still there. R. 146, ll. 11 – 22. The Coroner later told Mrs. Allen that there were deceased family members inside the house and they were going to bring them out. R. 148, ll. 16 – 25. Mrs. Allen was in shock and disbelief at the news that her mother, sister, and brother-in-law all died in the fire. It was difficult for her to sleep and eat, and she kept having visions of their bodies being brought out of the house and their three caskets lying at the front of the church for their funerals. R. 149, ll. 5 – 20.

Interview of Travis Robinson

Law enforcement interviewed Travis after the fire took place. Travis told the investigators that he had "a couple of beers" on the night of the fire. Pl.'s Ex. 3, 3:30. In recounting the events preceding the fire, Travis recalled that his aunt, Mrs. Allen, had brought his grandmother, Mrs. Williams, to his house that morning and that he assisted Mrs. Williams out of the car and into the house. *Id*. at 6:30-7:00. Travis said that he and his mother, Diane, and stepfather, Calvin, always helped watch Mrs. Williams because she had a stroke. *Id*. at 9:00-9:20.

Travis said that his girlfriend was on the way over to their house but that her car broke down. *Id*. at 7:20-7:40. Travis went to go pick his girlfriend up in his mother's Jaguar. *Id*. at 9:30-9:50. Travis picked his girlfriend up at approximately 4:00 p.m. and they went to her house. *Id*. at 10:20-10:40. While at his girlfriend's house, Travis hung out with "the kids," including his own one-year-old son. *Id*. at 11:20-12:00. Travis told the investigators that he left his girlfriend's house around 9:00 p.m. and went home. *Id*. at 13:50-14:20. However, investigators spoke with other witnesses who were with Travis until midnight before he went home. R. 82, l. 18 – 83, l. 5.

Travis' girlfriend lived approximately 45 minutes to an hour drive from Diane and Calvin's house, so law enforcement estimated the earliest Travis would have gotten there was 1:00 a.m., but possibly as late as 1:30 or 2:00 a.m. R. 83, ll. 6 – 19. Travis continued to maintain that he only had one or two beers over the course of the entire day. Pl.'s Ex. 3, 15:00-15:30. However, one of the witnesses who was with Travis that night informed law enforcement that Travis was drinking vodka mixed with Gatorade. R. 84, ll. 11 – 20.

When Travis got back to his house and pulled into the driveway, he looked down and saw that the car that he had been driving—his mother's Jaguar—was on fire. Pl.'s Ex. 3, 15:30-16:00. Travis said that he had left his keys to the house in his truck, so he ran to his truck to retrieve them. *Id*. at 16:40-16:55. By the time Travis got to his truck he said the fire had grown to where he could not enter the house. *Id*. at 16:50-17:00. Travis said the first place he saw the fire was underneath the hood of the Jaguar. *Id*. at 17:50-18:15. He then got into his truck and backed it to safety and hid behind his truck while he called 911. *Id*. at 19:30-20:15; Pl.'s Ex. 8 (911 calls). Travis said he stayed on the phone with 911 until first responders arrived and he ran to the road to try to direct them towards the house. Pl.'s Ex. 3, 25:00-25:30.

The investigator told Travis he didn't believe that Travis had only drank two beers because he could smell alcohol on him during the interview. *Id*. at 26:40-27:00. The investigator asked Travis why he initially told 911 that his child was in the house but did not tell them about his mother, stepfather, and grandmother being inside the house. Travis said he wasn't sure what was going through his head at the time but that he was just scared. Travis also said he heard someone screaming inside the house and that he thought about his grandmother being inside and thought about the fact that she had a stroke and could not help herself. *Id*. at 27:00-28:00.

First Responders and Forensic Investigation

The original 911 call from Travis came in at 2:10 a.m. and the fist firefighter to arrive on scene was Eureka Assistant Fire Chief Chad Auvenshine who arrived at 2:20 a.m. R. 89, ll. 13 – 21. When Auvenshine arrived at the house, he was met by Travis. Auvenshine testified that typically when he responds to a fire where there is someone outside, he is met with family who immediately tells him where the person is inside the residence so the fire fighters know how to approach their rescue operations. R. 216, ll. 1 – 5. However, Travis did not tell Auvenshine where—or even if—there was anyone inside the house. He also testified that something was "a little bit off" with Travis. Auvenshine recalled that he "had to get pretty firm with trying to get [Travis'] attention to try to communicate with [him] on what [they] had." R. 216, ll. 11 – 15.

After Auvenshine got Travis' attention, Travis informed him that everyone was safely out of the house. R. 216, ll. 20 – 25. In response, Auvenshine radioed the other first responders who were en route and informed them that there were no victims inside the residence. However, Travis came back up to Auvenshine after that and told Auvenshine that his child was inside. R. 216, l. 24 – 217, l. 7. Auvenshine testified about how important it is to act quickly in a house fire and that if first responders know where occupants are located within the home they will "push in as hard as [they] can" to save them. R. 217, ll. 12 – 20. Auvenshine never received accurate information from Travis and did not know there were occupants inside until he found their bodies. R. 218, ll. 2 – 7.

According to Auvenshine, if Travis told him about the location of Mrs. Williams, he and his fellow firefighters would have entered through Mrs. Williams' bedroom window first instead of going through the door of the house. R. 221, ll. 11 – 21. Auvenshine explained that when looking at the front of the house, the windows on the far right were the windows to Mrs. Williams' bedroom and that if he had known that, he would have entered the house first through those windows. He

noted that Mrs. Williams' body was found not far from that window. R. 230, l. 23 – 231, l. 6. The bedroom that Mrs. Williams was in had not been consumed by fire. R. 119, ll. 16 – 22.

The source of the fire was never determined. R. 109, ll. 19 – 24. However, the location of the start of the fire was determined to be near the Jaguar that Travis drove into the carport. R. 112, ll. 8 – 23; R. 394. The fire was determined to be accidental and not arson. R. 127, ll. 9 – 12. Lieutenant Daren Vaughn, a special agent in the arson unit at SLED who investigated the fire, concluded that the fire initially started in the carport area, consumed the roof of the carport, and then spread into the attic of the house. R. 122, ll. 15 – 21.

Brian Wright who was a K-9 handler for the arson unit at SLED assisted with investigating the fire. Wright had a lab named Gunter who was trained to smell accelerants in fire investigations. R. 172, l. 7 – 173, l. 7. Wright and Gunter responded to the fire in this case after the fire was put out. R. 177, ll. 1 – 4. The first place Gunter sniffed was around the locations of the bodies but Gunter did not alert to any accelerants near them. R. 178, l. 18 – 179, l. 3. However, Gunter alerted to accelerants in the carport around the Jaguar and Cadillac. R. 180, ll. 2 – 7. More specifically, "alert one" was near the left rear driver's side door of the Cadillac, and "alert two" was near the back bumper of the Cadillac. R. 180, l. 18 – 181, l. 7; R. 183, l. 22 – 184, l. 2.

The evidence alerted to by Gunter and collected by Wright was analyzed by SLED for the presence of accelerants. The chemicals discovered were "a light isoparaffinic product, a light aromatic product and a light petroleum distal" which could have been from "racing fuel, aviation fuels, specialty solvents, xylenes, toluene-based products, cigarette lighter fluids, and some camping fuels." The chemicals are highly flammable accelerants and are not consistent with standard gasoline. R. 205, l. 5 – 206, l. 5. They could be ignited by something as simple as a match, or a spark, or even a cigarette. R. 206, ll. 6 – 14.

ARGUMENT

The circuit court erred in failing to instruct the jury that, if they determined that there was a special relationship between the Defendants and Mrs. Williams, then the Defendants had a legal duty to rescue her.

Relevant Facts

After Mrs. Allen rested her case, the lawyers and circuit court had a discussion about whether special relationship duties applied to this case. R. 251, l. 21 – 252, l. 7. Several cases were referred to by the circuit court and Counsel for the Defendants, including *Roe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014), *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008), and *Charleston Elec. Servs. v. Rahall*, 427 S.C. 317, 831 S.E.2d 122 (Ct. App. 2019). R. 252, l. 2 – 253, l. 4.

Counsel for the Defendants argued that while some cases support the idea that a special relationship may create a duty, the cases do not explicitly state what that duty is. R. 253, ll. 17 – 22. Counsel argued that the Defendants had a licensee duty to Mrs. Williams, but it was unclear what additional duties would be owed if there was a special relationship between them. Counsel stated that there might be a duty to protect from foreseeable harm. R. 253, l. 25 – 254, l. 8. The circuit court asked the lawyers to conduct additional research to determine whether the existence of a special relationship is a question for the court or the jury to decide, and if there is a special relationship, what is the specific duty that is owed. R. 254, l. 9 – 255, l. 10.

Counsel for Mrs. Allen argued that there was a special relationship between the Defendants and Mrs. Williams based on several factors. Specifically, Mrs. Williams was fully dependent on the Defendants for her care and well-being. Furthermore, there was an understanding between the family that they each had an active role in monitoring and caring for Mrs. Williams. R. 255, l. 20

– 256, l. 5. Counsel pointed out that the agreement to provide care to Mrs. Williams included Travis who also assumed responsibility for her care. Furthermore, Travis was the only person who was in a position to warn Mrs. Williams of the fire because he was the first person to witness the fire start. R. 256, ll. 17 – 25.

Counsel for the Defendants argued that the agreement to care for Mrs. Williams was an agreement that only included Mrs. Allen and Diane. And while Calvin and Travis "seemed to help out when needed," the special relationship did not extend to them. R. 257, ll. 15 – 25. During his motion for a directed verdict, Counsel argued this in more detail. Counsel for the Defendants acknowledged that there was a special relationship between Mrs. Williams and Diane. However, Counsel argued that because Calvin only helped get Mrs. Williams in and out of the car and the bed that this was insufficient to serve as an acceptance of an affirmative duty to care for her. R. 266, ll. 8 – 21. Accordingly, Counsel maintained that the only duty owed by Calvin to Mrs. Williams was the general duty owed to a licensee. R. 266, l. 22 – 267, l. 6. Counsel made this same argument about Travis. R. 277, l. 20 – 278, l. 14.

As to Diane, Counsel for the Defendants argued that the court should charge the duty found in *Madison v. Babcock*, 371 S.C. 123, 638 S.E.2d 650 (2006). Specifically, Counsel suggested the court instruct the jury that the duty owed by Diane to Mrs. Williams was to "exercise reasonable care in supervising [Mrs. Williams] and providing appropriate care and treatment to [Mrs. Williams]." R. 270, l. 15 – 271, l. 7. Counsel maintained that, at most, the duty owed by Diane was to make sure Mrs. Williams was fed, cleaned, and properly medicated. R. 271, ll. 17 – 22. Counsel later acknowledged, and the circuit court agreed, that the duty owed by a defendant to a plaintiff in a case where there is a special relationship between the parties is generally undefined in scope and will depend on the facts and circumstances of each case. R. 274, ll. 7 – 17.

Counsel for the Defendants also argued that there is no duty to rescue in South Carolina, and that even if there was, Calvin and Diane both died in the fire with Mrs. Williams so rescue would have been impossible for them. R. 277, ll. 11 – 19. Counsel also argued that any rescue by Travis was impossible because he could not access the house due to the spread of the fire. R. 278, l. 15 – 279, l. 5. Counsel argued that there was no duty for Travis to even call 911 after he discovered the fire. R. 279, ll. 13 – 24.

The circuit court asked Counsel for the Defendants whether Travis would have any additional duty if it was determined that he had taken on the same obligation to care for Mrs. Williams that Diane had taken on. R. 280, ll. 2 – 5. Counsel responded that the scope of the duty would be limited to providing care and treatment such as feeding, clothing, medication, and grooming. Any duty imposed would not include a duty to rescue. R. 280, ll. 6 – 15.

Counsel for Mrs. Allen argued that each of the Defendants had a special relationship to Mrs. Williams because they all accepted responsibility for her care when she stayed at their house. R. 288, ll. 5 – 15. The circuit court asked Counsel to specifically respond to the Defendants' argument that even if they owed a duty of care on account of their special relationship to Mrs. Williams, that duty would not include a duty to rescue. R. 294, ll. 2 – 10. Counsel acknowledged that it was difficult to impose a duty to rescue on Diane and Calvin because they also perished in the fire. However, Travis did have a duty to rescue given the specific facts and circumstances of this case. R. 296, l. 8 – 297, l. 3. Specifically, Travis accepted responsibility to care for Mrs. Williams and the only way he could discharge that responsibility given her severe physical disabilities was to attempt a rescue. R. 297, ll. 4 – 13.

Furthermore, Travis was driving the car that appears to have been the source of the fire. While law enforcement never determined the source, Travis told the investigators that the fire

started under the hood of the Jaguar. Pl.'s Ex. 3, 17:50-18:15. Counsel maintained that Travis had a duty to act in response to the danger he was faced with. R. 298, ll. 1 – 22.

Counsel for Mrs. Allen argued in closing that if the jury found that there was a special relationship between the Defendants and Mrs. Williams, that the Defendants had a duty to rescue her. R. 313, l. 19 – 314, l. 21. The circuit court however did not instruct the jury that if it found there was a special relationship between the Defendants and Mrs. Williams that they had a duty to rescue her. Instead, the circuit court instructed the jury that if it found a special relationship existed, the jury "may determine that one or more of the Defendants owed a duty to warn [Mrs. Williams] of a known danger." R. 364, ll. 3 – 5.

Argument Summary and Legal Framework

Under the specific facts and circumstances of this case, the circuit court should have instructed the jury that if it found that there was a special relationship between the Defendants and Mrs. Williams, they had a duty to rescue. While South Carolina has implicitly recognized a duty to rescue for common carriers, it has never explicitly held there is a duty to rescue. *See Brice v. S. Ry.*, 85 S.C. 216, 218, 67 S.E. 243, 244 (1910) ("When a passenger falls from a train . . . every officer of the train, as soon as he knows of the fall, must be conscious of the impelling duty to stop the train or to take some other prompt and efficient measure to rescue the passenger"). This Court has also noted that "[a]lthough there is no general duty to aid or protect others, such a duty does exist where the defendant has a special relationship to the victim." *McCord v. Laurens Cty. Health Care Sys.*, 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020) (quoting Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* at 106 (4th ed. 2011)). Accordingly, whether a special relationship between the defendant and the victim may give rise to a duty to rescue in the context presented in this case is a novel question for this Court.

A. The Defendants—including Travis—had a special relationship with Mrs. Williams because she was severely physically disabled and they were her caretakers.

Our Supreme Court has noted that "[a]n affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). And while this Court noted in *Johnson v. Jackson*, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012) that there is "no general duty to control the conduct of another or to warn a third person or potential victim of danger," South Carolina does recognize several exceptions to this rule, including where the defendant has a "special relationship" to the victim, where the defendant voluntarily undertakes a duty, or where the defendant negligently or intentionally creates the risk. *Madison*, 371 S.C. at 136, 638 S.E.2d at 656.

What constitutes a "special relationship" has not been exhaustively defined by our courts, but the Supreme Court in *Bishop v. S.C. Dep't of Mental Health*, stated that "when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual." 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). In *Madison*, our Supreme Court also found that there was a special relationship between a corporation that provides housing services to intellectually disabled persons and its residents. 371 S.C. at 134-35, 638 S.E.2d at 656.

Section 314A of the Second Restatement of Torts also identifies several specific special relationships. These include common carriers and their passengers, innkeepers and their guests, possessors of land held open to the public and those who enter, and "one who is required by law or who voluntarily takes the custody of a another under circumstances such as to deprive the other of his normal opportunities for protection." Restatement (Second) of Torts § 314A.

Comment (a) to this section adds employers and their employees to this list. Restatement (Second) of Torts § 314A cmt. a. And comment (b) makes clear that "[t]he relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found." Restatement (Second) of Torts § 314A cmt. b. Comment (b) further notes that the duty to render aid arises out of this special relationship between the parties which creates a special responsibility, thus removing it from the general rule that there is no duty to rescue. *Id*. Finally, comment (b) notes that "[t]he law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." *Id*.

Furthermore, Section 2.A.5.b(1) of The South Carolina Law of Torts lists the following types of special relationships that may give rise to an affirmative duty to aid or protect:

> (1) parent—child
> (2) physician—patient
> (3) hospital—patient
> (4) attorney—client
> (5) accountant—client
> (6) common carrier—passenger
> (7) innkeeper—guest
> (8) custodian—person in custody
> (9) shipmate—shipmate
> (10) host—guest
> (11) business operator—invitee
> (12) master—servant
> (13) real estate broker—real estate purchaser
> (14) insurer/insurance agent—insured
> (15) fraternal organization—member
> (16) teacher/school—student
> (17) bailor—bailee

Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* § 2.A.5.b(1) (internal footnotes omitted).

Here, the special relationship is between a grandson and his grandmother, but more importantly between a caregiver and a severely physically disabled person living in his home. The relationship is further clarified by their respective relation to the case—defendant and victim. *See Madison*, 371 S.C. at 134-35, 638 S.E.2d at 656 (special relationship between caregiver and intellectually disabled resident). As will be discussed in more detail below, the legal significance the existence of a special relationship between parties is that there is a heightened duty of care.

B. Because of Travis' special relationship with Mrs. Williams, and because of the circumstances under which the house fire occurred, he had a legal duty to rescue her.

The specific duty imposed in special relationship cases is not always the same. Our Supreme Court has distinguished between the "duty to warn" and the "duty to control." And in the context of special relationship cases that have arisen in South Carolina, typically the special relationship involved is between *the defendant and the injurer*, not, as is the case here, the special relationship between *the defendant and the victim*. Accordingly, these cases finding a duty to warn and a duty to control are distinguishable from the situation presented here.

For instance, in *Faile v. S.C. Dep't of Juvenile Justice*, our Supreme Court found that DJJ had a special relationship to a child in its custody and that DJJ had a *duty to control* the child to prevent him from violently attacking other children. 350 S.C. 315, 339, 566 S.E.2d 536, 548 (2002). The *Faile* Court pointed to section 319 of the Second Restatement of Torts which specifically provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319. The *Faile* Court noted that section 319 had been applied to impose a duty to control in other cases where the defendant had custody of the injurer, such as the Department of Corrections and its inmates, and a psychiatric hospital and its patients. *Faile*, 350 S.C. at 336, 566

S.E.2d at 547 (citing *Jackson v. S.C. Dep't of Corr.*, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989); *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988); *Semler v. Psychiatric Inst. of Wash., D.C.*, 538 F.2d 121 (4th Cir. 1976)).

In *Bishop v. S.C. Dep't of Mental Health*, the Supreme Court found that DMH had a special relationship to its patient and therefore had *a duty to warn* the threatened third party of the patient's release from DMH's custody. 331 S.C. 79, 87, 502 S.E.2d 78, 82 (1998). *See also Doe v. Marion*, 373 S.C. 390, 400-01, 645 S.E.2d 245, 250-51 (2007) (Supreme Court assumed without deciding that a psychiatrist had a special relationship with his patient but that there was no duty to warn potential future victims of the patient where no specific threat had been made by the patient towards a specific person); *Rogers v. S.C. Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 256, 464 S.E.2d 330, 332 (1995) (holding that the Department had no duty to warn when it released an inmate early pursuant to a supervised furlough program where the inmate had not made any specific threats against specific persons).

One important South Carolina case which did deal with the special relationship between a defendant and victim was *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). In *Madison*, our Supreme Court considered the nature of the duty owed by a corporation that provides housing to people with intellectual disabilities and its residents. The plaintiff in that case was a severely intellectually disabled person who lived at one of the defendant's residential homes. One night, the plaintiff left the facility with two men who had sex with her. *Id*. at 131-32, 638 S.E.2d at 654. The plaintiffs guardian sued under a several different causes of action but the circuit court granted summary judgment to the defendants. The circuit court determined the defendants "had no legal duty to maintain a constant watch over the plaintiff" to prevent her from leaving without permission. *Id*. at 133, 638 S.E.2d at 655.

The Supreme Court reversed, finding that the defendant had "a duty to exercise reasonable care in supervising and providing care and treatment to clients in its custody." *Id*. at 135, 638 S.E.2d at 656. The *Madison* Court pointed out that at trial, the defendants and the circuit court had couched the duty as being "twenty-four-hour, eyes-on" duty or "no duty at all." *Id*. The Court further pointed out that the defendant's all-or-nothing approach "confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case, standards by which a fact finder may judge whether a duty was breached." *Id*. The Court ultimately concluded that the defendants had a special relationship with the plaintiff by virtue of her being a severely disabled person who was in their care and held that "a private person or business entity which accepts the responsibility of providing care, treatment, or services to a[n intellectually disabled] client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client." *Id*. at 138, 638 S.E.2d at 658.

Additionally, where the defendant has done something to create or increase the danger to a plaintiff, there may also be an affirmative duty to act imposed on the defendant. For instance, in *Edwards v. Lexington Cty. Sheriff's Dep't*, a victim of domestic violence sued the Sheriff's Department after she was attacked in court at her ex-boyfriend's bond revocation hearing where the Sheriff's Department failed to provide security. 386 S.C. 285, 287, 688 S.E.2d 125, 127 (2010). The circuit court held that there was no duty owed by the Sheriff's Department to the victim and granted summary judgment, but our Supreme Court reversed. *Id*. After the ex-boyfriend's initial arrest and release from jail, he continued to threaten the victim and her children. He was rearrested and released again. Even after his second release from jail, the ex-boyfriend continued harassing and threatening the victim. Accordingly, the state moved to revoke the ex-boyfriend's bond. *Id*. at 288-89, 688 S.E.2d at 127. At the bond revocation hearing, no one from the Sheriff's Department

appeared and "no other precautionary or security measures were employed." *Id*. at 289, 688 S.E.2d at 128.

The Supreme Court in *Edwards* determined that the Sheriff's Department had a common law duty to protect the victim under the special circumstances presented in that case. Those special circumstances included the fact that the Sheriff's Department was aware of the ex-boyfriend's violent propensities towards the victim, arranged for a bond revocation hearing which they strongly encouraged victim to appear for, and took zero steps towards ensuring the victim's safety at that hearing. *Id*. at 293, 688 S.E.2d at 130. The *Edwards* Court noted that the Sheriff's Department was not required to "guarantee [the victim's] safety with absolute certainty," but because they created a situation that posed a significant risk to the victim, they owed her a duty of care. *Id*. *See also* Restatement (Second) of Torts § 322 (imposing a duty to render aid on an actor who has tortiously or innocently caused another harm).

What these cases demonstrate is that the duty that arises out of a given special relationship is not always the same. The duty will depend on the nature of the relationship and how the relationship relates to the particulars of the case, i.e., defendant/victim vs. defendant/injurer, gratuitous act vs. required act. Furthermore, the South Carolina cases cited above relied heavily on Sections 315 (no general duty to control others), 319 (duty to control others with dangerous propensities in defendant's custody), 323 (duty to exercise reasonable care when gratuitously rendering services to another), and 324 (duty to exercise reasonable care when one gratuitously takes charge of a helpless person), of the Second Restatement of Torts. Restatement (Second) of Torts §§ 315, 319, 323, and 324. But, the *duty to rescue* is separate and distinct from these.

Section 314 of the Second Restatement of Torts provides that the "fact that [an] actor realizes or should realize that action on his part is necessary for another's aid or protection does

not of itself impose upon him a duty to take such action." However, Section 314A has recognized a duty to aid and protect in "special relationship" situations. Specifically, the Restatement has recognized a duty to "protect [the victim] against unreasonable risk of physical harm, and . . . to give [the victim] first aid after [the defendant] knows or has reason to know that [the victim is] ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A.

Professors Hubbard and Felix have likewise noted in *The South Carolina Law of Torts* that a special relationship between the defendant and victim may give rise to an affirmative legal duty to render aid. Hubbard, *supra*, § 2.A.5.b(1). The Professors further noted that the existence of a special relationship is a factual issue for the jury, but whether the nature of that relationship gives rise to a specific duty to act is a matter of law for the judge. *Id*.

An affirmative duty to rescue has been recognized in several different situations. For example, in *Abbott v. U.S. Lines, Inc.*, the Fourth Circuit held that a "ship is under a duty to search and attempt a rescue when its officers know or in the exercise of reasonable care should have known a crewman is missing." 512 F.2d 118, 121 (4th Cir. 1975). In *S&C Co. v. Horne*, the Supreme Court of Virginia held that a lifeguard at a public pool had a duty to both observe swimmers for signs of distress and to attempt to rescue swimmers who are in distress. 218 Va. 124, 129 (1977). The Massachusetts Supreme Court expanded the duty to rescue to include a duty to prevent suicide in the higher education context:

> [A] university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances[:] Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm.

Dzung Duy Nguyen v. Mass. Inst. of Tech., 479 Mass. 436, 453, (2018). In *Morris v. De La Torre*, the California Supreme Court found that a business owner had a special relationship to its customers and accordingly had a duty to call 911 to aid a customer who was violently attacked in the parking lot of the business. 36 Cal. 4th 260, 264 (2005).

The affirmative duty to rescue is also legally distinct from the duty to exercise due care when gratuitously undertaking a rescue. "[I]t has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Madison*, 371 S.C. at 136, 638 S.E.2d at 657. Section 323 of the Second Restatement of Torts provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (quoted with approval in *Madison*, 371 S.C. at 136, 638 S.E.2d at 657). The Second Restatement of Torts further provides that:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Restatement (Second) of Torts, § 324. *See also* Hubbard, *supra*, § 2.A.5.b(3) ("Even where a person has no duty to act, if he or she voluntarily acts for the benefit of the plaintiff, then he or she must act with due care and is liable for harm resulting from the lack of due care if it increases the risk of harm or the harm results because of reliance on the undertaking" (footnotes omitted)).

Under section 314A of the Second Restatement of Torts, and section 2.A.5.b(1) of the South Carolina Law of Torts, certain relationships—such as carrier-passenger, innkeeper-guest, or custodian-dependent—create affirmative duties of care. Likewise, section 324 establishes that one who voluntarily undertakes to render services to another assumes a duty to perform those services with reasonable care. Our appellate courts have approved of these concepts. *See Madison*, 371 S.C. at 135, 638 S.E.2d at 656 (recognizing an institution's duty to protect disabled residents from foreseeable harm); *Faile*, 350 S.C. at 339, 566 S.E.2d at 548 (finding that custodial control creates an obligation to control the person in custody and safeguard others from potential harm); *Bishop*, 331 S.C. at 87, 502 S.E.2d at 82 (finding a duty to warn when a violent person within your custody is released where a specific threat has been made against a specific person).

In this case, Travis did initiate a rescue and failed to use due care in doing so. But more importantly, Travis' attempt at a rescue was not legally gratuitous; it was legally required. This is because Travis had a special relationship with Mrs. Williams. *See* Restatement (Second) of Torts § 314A cmt. b ("[t]he law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence"). Mrs. Williams was completely dependent on her family for her care, including Travis.

Like the defendants in *Madison*, the Defendants here suggested that any duty to rescue was "all or nothing." Counsel for the Defendants suggested that a duty to rescue would mean that Travis had to charge into the burning house and attempt to wheel Mrs. Williams out. R. 280, ll. 6 – 15. However, as our Supreme Court noted in *Madison*, this argument confuses the existence of a duty with the standards by which a jury could determine the breach of that duty. 371 S.C. at 135, 638 S.E.2d at 656. Of course, the existence of a duty is separate from whether the duty was breached. Whether Travis *breached his duty to rescue* by failing enter the house, failing to remove the

burning vehicle which he parked in the carport, or by failing to give first responders accurate information about who was in the house and where they were located, was a question for the jury to answer. But the *existence of the duty to rescue* was a question of law which the circuit court should have instructed the jury on. *See* Hubbard, *supra*, § 2.A.5.b(1).

Travis voluntarily undertook the duty to assist Mrs. Williams. His familial role and his active caregiving of her created a special relationship which gave rise to an affirmative duty to act. Additionally, it was Travis who drove his mother's car home while intoxicated and parked in the carport where it appears to have been the source of the fire that ultimately claimed the lives of his mother, stepfather, and grandmother. R. 83, l. 6 – 84, l. 20; Pl.'s Ex. 3, 15:30-16:00; R. 394. Under the specific facts and circumstances of this case, Travis had an affirmative duty to initiate a rescue—not necessarily by charging into the burning house, but to at least give accurate information to first responders so that they could charge into the house in a way that maximized Mrs. Williams' survival. This is especially important since Mrs. Williams' stroke left her unable to speak or walk and she had limited use of her arms. R. 135, l. 23 – 136, l. 5.

The circuit court erred by not instructing the jury that the Defendants—including Travis—had a duty to rescue Mrs. Williams. Here, the special relationship between Travis and Mrs. Williams gave rise to a duty to rescue. *See* Restatement (Second) of Torts § 314A; Hubbard, *supra*, § 2.A.5.b(1). And while it was the exclusive province of the jury to determine whether the evidence presented at trial warranted a finding that Travis breached that duty, they could not determine whether Travis breached that duty when they were not even instructed that such a duty existed.

C. The circuit court's error in failing to instruct the jury that if it found there was a special relationship between the Defendants and Mrs. Williams that they had a duty to rescue resulted in significant prejudice to Mrs. Allen.

Mrs. Allen was significantly prejudiced by the circuit court's failure to instruct the jury that the Defendants had a duty to rescue. It is important to note how confusing the circuit court's instructions were regarding the relevant duties in this case. First, the circuit court instructed the jury that Mrs. Williams was a licensee in the home, and then, with regard to the duties owed by the possessor of property and a licensee, the circuit court told the jury:

> The possessor of property owes the following obligation to a licensee: One, to use reasonable care and avoid injury to a licensee in carrying on activities upon the land; and two, to use reasonable care to warn the licensee of any concealed dangerous conditions or activities that are known to the possessor or which should have been known to the possessor and were unknown to the licensee.

R. 363, ll. 4 – 14. The court next instructed the jury what may constitute a special relationship and that "[i]f you find [a special] relationship existed, then you may determine that one or more of the Defendants owed a duty to warn Plaintiff of a known danger." R. 363, l. 19 – 364, l. 5.

Respectfully, the circuit court's instruction regarding the relevant duties was incorrect and hopelessly confusing. *See Berberich v. Jack,* 392 S.C. 278, 294, 709 S.E.2d 607, 615 (2011) (holding that it was reversible error to instruct the jury on assumption of risk but refusing to define ordinary negligence versus recklessness because "this had the potential to confuse the jury and skew apportionment of fault in a manner that favored the defendant"); *see also Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial").

The circuit court's instruction erroneously implied that there was a higher duty owed between a property possessor and licensee than there was between parties with a special

relationship. This cannot be correct. The only legal significance that the existence of a special relationship has is to impose a greater duty of care on the defendant. *See Faile*, 350 S.C. at 339, 566 S.E.2d at 548. That duty of care, under the facts and circumstances of this case, must have included the duty to rescue. *See* Hubbard, *supra*, § 2.A.5.b(1).

"Under South Carolina jurisprudence, a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." *Singleton v. Sherer*, 377 S.C. 185, 201, 659 S.E.2d 196, 204 (Ct. App. 2008) (internal quotations omitted). But the existence of a special relationship gives rise to a greater duty of care.

Counsel for the Defendants acknowledged at trial that if there was a special relationship between the Defendants and Mrs. Williams then the jury should have at least been given the heightened duty instruction found in *Madison*, 371 S.C. 123, 638 S.E.2d 650. R. 270, l. 15 – 271, l. 7. That instruction may have looked something like this: "a private person or business entity which accepts the responsibility of providing care, treatment, or services to a[n intellectually disabled] client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client." *Madison*, at 138, 638 S.E.2d at 658. And although Counsel for the Defendants maintained that the scope of this heightened duty would be limited to providing care and treatment such as feeding, clothing, medication, and grooming, the circuit court did not even instruct the jury on that. R. 280, ll. 6 – 15.

The jury's confusion was further evidenced by the fact that it requested to be reinstructed on the definition of negligence. R. 379, ll. 17 – 21. In response to this question, the circuit court gave the following instruction to the jury:

> Negligence is defined in the law as the absence of due care, the want or lack of due care or ordinary care. The word carelessness conveys

> the same idea as negligence. Those two terms are synonymous. Negligence is the breach of a duty of care owed to the Plaintiff by the Defendant. Negligence is the failure by omission or commission to exercise due care of a person of ordinary—that a person of ordinary reason and prudence would exercise in the same or similar circumstances. It is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

R. 380, ll. 1 – 13. The circuit court did not further explain the duty of care and did not correct its earlier erroneous instruction on the difference between the duty owed by a possessor of land and a licensee as opposed to the duty owed by a defendant who has a special relationship with the victim.

Instead of instructing the jury that there was a higher duty of care owed in special relationship cases, the import of its instructions was that there was a lower duty of care. The court's instructions were therefore not only incorrect, but prejudicial. Accordingly, this Court should reverse and remand so that Mrs. Allen can receive a fair trial in which the jury is properly instructed on the Defendant's legal duties.

CONCLUSION

By reason of the foregoing arguments, Mrs. Allen respectfully requests this Court to reverse the judgment below and remand for a new trial with proper jury instructions defining the heightened duty of care owed by caregivers to disabled and dependent persons.

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