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.

PETITION FOR REHEARING

Appellant hereby moves and petitions, pursuant to Rules 219 and 221(a), SCAR, as well as other applicable law, for an Order granting rehearing in this case and would respectfully show that the Court may have overlooked or misapprehended certain points, as set forth below:

I. Respondent had a duty to warn Appellants because there existed a special relationship.

Appellants allege that Respondent owed a duty because there exists a special relationship between Respondent and Appellants. Such a duty may arise where, "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third

person's conduct; **or**, a special relationship exists between the actor and the other which gives the other a right to protection." Restatement (Second) of Torts, § 315 (1965) (**emphasis added**).

In affirming the lower Court's grant of summary judgment, the majority holds that "Appellants presented no evidence Respondent had the ability to monitor, supervise, or control the conduct of Mr. Bibby." However, Appellants believe the Court has misapprehended this issue.

First, as correctly recognized in Batson I, Appellants' claim is not based on a theory of vicarious liability, that Respondent is vicariously liable for the actions of her husband, but rather is based upon Respondent's own negligence in breaching the duty owed under the special relationship. Indeed the special relationship test is *disjunctive*, such that Respondent owes a duty **either** where, "a special relation exists between the actor and the [molester] which imposes a duty upon the actor to control the [molester's] conduct; **or**, a special relationship exists between the actor and the [victim] which gives the [victim] a right to protection." Restatement (Second) of Torts, § 315 (1965). (**emphasis added**).

Here, Respondent's special relationship with Appellants is dependent upon the relationship between Appellants and Respondent, and Respondent's ability to control her husband becomes immaterial. Stated differently, the Defendant's ability to monitor, supervise, or control the actor is only relevant when respondent is alleged to have a special relationship with the actor. Such was the issue in the cases cited by this Court, e.g., Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) and Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002).

Those cases sought to impose liability on a defendant when the person in that defendant's custody caused harm to another. This case involves the inverse type of special relationship,

where a minor in Defendant's custody is harmed by another. Thus, the appropriate inquiry is not whether Respondent had the ability to monitor the actor causing harm (Mr. Bibby); but rather, whether Respondent's relationship with Appellants was such as to give Appellant's a right of protection.

Appellants further would show that this Court overlooked or misapprehended the record in determining that "Respondent [did not have] knowledge of a specific threat of harm to a specific individual.

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).

In the present case, there is more than a scintilla of evidence on the record from which a reasonable jury could find a specific threat. 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. (R. p. 110, lines 3-7)(Admitting she was aware that her husband had molested their daughter in the past). Therefore, the specific persons to be harmed were readily identifiable as the minor Appellants. If Respondent knew or should have known of their presence and the threat of harm her husband posed to them, but failed to warn them, the same would constitute a failure to warn of a specific threat to a specific victim.

Respondent readily admits to knowing that the Appellants were coming over to her house to play. (R. p. 132, lines 17-19). Furthermore, she admits that the Appellant children were there at her invitation. (R. p. 167, lines 12-13)("I am the one when I was home who let the children in the house.). Based upon Respondent's own admissions, the other evidence on the record, and the reasonable inferences to be drawn therefrom, there is sufficient evidence to support Appellants' contention that a special relationship existed between the Respondent and the minor Appellants.

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

Appellants would further show that this Court may have overlooked or misapprehended

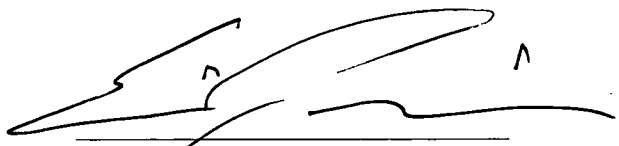
the duty arising under premises liability law. The majority found that "there is no evidence Respondent knew Mr. Bibby was a dangerous condition in their home..." because "[Respondent] testified she believed Mr. Bibby was 'cured' following his 1995 confession and release from treatment."

However, there is equally significant evidence on the record to support the opposite conclusion. When her husband returned to the house after the first instance of sexual abuse on their daughter, after the counseling which Respondent allegedly believes to have rehabilitated Mr. Bibby, Respondent nevertheless proceeded to install a lock on her daughter's door and took steps to hide the key from her husband. (R. p. 128, lines 9-15). This action could lead to the reasonable inference that, in fact, Respondent did not believe her husband had been rehabilitated, but rather was concerned that he would re-offend.

Moreover, in a statement to police, Daniel Bibby, Jr. 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. (R. pp. 287-288). Bibby Junior informed Appellant Roe that he had brought his father's pornography watching to the attention of his mother on several occasions. (R. p. 257, lines 21-25-p. 258, lines 1-3). Respondent admits to having been with Mr. Bibby in Myrtle Beach when he disposed of the computer in a dumpster behind a building. (R. p. 119, lines 16-25-p. 120, lines 1-7). This presents a scintilla of evidence from which a rational juror could surmise Respondent's knowledge of her husband's continuing propensities. The determination as to which evidence should carry more weight is one for the trier of fact, and should not have been adjudicated on summary judgment.

WHEREFORE, for the reasons stated above, and those set forth in the briefs and initial arguments, Appellants respectfully pray for a rehearing on this matter.

October 7, 2014



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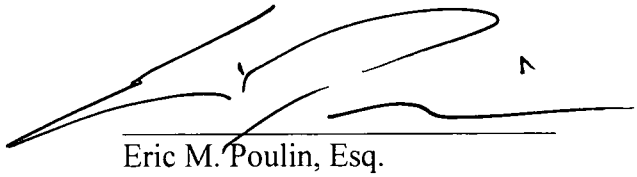
Of whom, Michelle Bibby is.....Respondent.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Petition for Rehearing on Michelle Bibby by depositing a copy of it in the United States Mail, postage prepaid, on October 7, 2014, addressed to her attorney of record, Eugene P. Corrigan, III, Post Office Box 547, Charleston, South Carolina, 29402.

October 7, 2014



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October 7, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Jane Roe v. Michelle Bibby*
Case No.: 2010-CP-08-3732
Tracking No.: 2012-213350

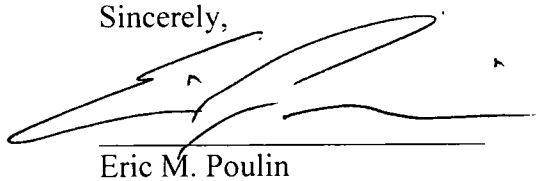
Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of Appellants' Petition for Rehearing in this matter along with the original and one (1) copy of Proof of Service of the same. We would appreciate it if you would file the originals and return one stamped copy of the Petition and a stamped copy of the Proof of Service in the enclosed envelope.

Also enclosed is our check in the amount of $25.00 for the filing fee.

Please do not hesitate to contact me should you have any questions.

Sincerely,



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