

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

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Case No. 2010-CP-08-3732

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**RECEIVED**

OCT 17 2014

**SC Court of Appeals**

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.

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**RESPONDENT'S RETURN TO  
APPELLANTS' PETITION FOR REHEARING**

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Respondent, by and through her undersigned counsel, and pursuant to Rule 240, SCACR, respectfully submits this Return to Appellants' Petition for Rehearing (the "Petition").

This Court correctly affirmed the Circuit Court's order granting summary judgment in favor of Respondent, Mrs. Bibby. (Opinion No. 5273, filed October 1, 2014, the "Opinion"). As noted in the Opinion, Appellants failed to establish liability under either (1) a special relationship exception or (2) a premises liability theory of recovery. Appellants' Petition, arguing the contrary, restates prior arguments and points to nothing that would change the result of this appeal.

**I. The Court Correctly Found That Appellants Failed to Establish the Applicability of the Special Relationship Exception.**

South Carolina law does not recognize a general duty to warn of the dangerous propensities of others. *See Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011). Appellants argue that this Court should apply the exception to the rule providing that a duty may arise where the defendant had a “special relationship” with the alleged victim and knowledge of a specific threat. In the Petition, Appellants argue that the Court (a) misapprehended the special relationship issue and (b) overlooked the record in determining the absence of a specific threat. (Petition, pp. 2-4). Appellants’ arguments are misplaced.

a. Appellants Have Not Shown a Special Relationship Between Respondent and the Minor Appellants.

As noted by Appellants, the law recognizes that a special relationship may exist *either* between the defendant and the alleged injurer (*i.e.* Mr. Bibby) *or* between the defendant and the alleged victims (*i.e.* the minor Appellants). Appellants have conceded the absence of the former relationship and focus exclusively on arguing the latter relationship, *i.e.* between Respondent and the minor Appellants. Appellants maintain that the Court misapprehended this issue based on its statement that “Appellants presented no evidence Respondent had the duty to monitor, supervise, or control the conduct of Mr. Bibby.” (Petition, p. 2).

The Court, however, plainly understood and noted Appellants’ contention that “Respondent had a special relationship with the minor Appellants.” (Opinion, p. 4). The Court correctly cited the caselaw setting forth the general rule and the five exceptions thereto, one of which is expressly delineated as a special relationship between the

defendant and the victim. *Wal-Mart Stores, Inc.*, 393 S.C. at 246, 711 S.E.2d at 911 (citing *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)). The Court went on to demonstrate the stark contrast between the type of relationship in this case and the types of special relationships actually recognized in our precedent. (Opinion, p. 5). Specifically, the Court observed that this case did not involve any type of commercial or child care situation. Rather, Mrs. Bibby worked a full-time job, outside of the home, at the time the alleged events occurred in the home. *Id.*

In determining whether a special relationship exists (with either the injurer or the victim), our courts have looked to whether the defendant had “the ability to monitor, supervise and control *an individual's* conduct.” *Wal-Mart Stores, Inc.*, 393 S.C. at 247, 711 S.E.2d at 912 (emphasis added). When the defendant-injurer relationship is at issue, the term “individual” presumably refers to the injurer, and when the defendant-victim relationship is at issue, the term “individual” presumably refers to the victim.<sup>1</sup> Here, the Court clearly found that Appellants had not met the requisite standard with respect to establishing a special relationship with the alleged victims. The fact that the Opinion also states that Mrs. Bibby did not have the ability to monitor, supervise or control *Mr. Bibby* – which is absolutely true and conceded by Appellants – does not somehow mean that the Court misapprehended the issue.

b. Appellants Have Not Shown that Mrs. Bibby Had Knowledge of a Specific Threat of Harm to a Specific Individual.

With regard to the “specific threat” requirement (which Appellants must also establish to advance their case under the special relationship exception), Appellants

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<sup>1</sup> In *Wal-Mart Stores, Inc.*, for example, the Court noted that the store had no special relationship with either the injurer (the father) or the victim (the son in the photographs developed by the store) because the store did not have the ability to monitor, supervise, and control either of them. 393 S.C. at 247, 711 S.E.2d at 912.

contend that the Court overlooked certain evidence demonstrating the existence of such a threat. Specifically, Appellants argue that Mrs. Bibby had actual knowledge of Mr. Bibby's "prior propensities toward pedophilia" and knew that the minor Appellants were coming over to her house. (Petition, p. 4). Again, Appellants' arguments are unavailing.

To begin with, the facts related to these arguments have been extensively addressed and, therefore, have not been overlooked. Regardless, the allegations – on their face – fall short of what is required to establish knowledge of a specific threat. As reiterated in *Doe v. Marion*, it is not simply "foreseeability," but a "person's *awareness of a distinct, specific, overt threat of harm* [towards] a particular victim" that gives rise to liability. 373 S.C. 390, 401, 645 S.E.2d 245, 251 (2007) (emphasis added). The Court has not overlooked any "distinct, specific, overt" threat of harm in this case, Appellants' arguments notwithstanding.

Moreover, as Appellants concede when they point to Mrs. Bibby's knowledge of Mr. Bibby's "*prior propensities*" (Petition, p. 4, emphasis added), there is no evidence that Mrs. Bibby knew of any ongoing abuse or threat by Mr. Bibby. Indeed, there was and remains no evidence of any recidivism by Mr. Bibby during the fifteen years after he confessed, received treatment, and was released back into the home by DSS. Because Mrs. Bibby's granddaughter was also a resident of the home at the time in question, Mrs. Bibby would not have allowed Mr. Bibby to be there if she knew he was a threat. (R. p. 147, line 25-p. 148, line 6). As to the allegation related to Mrs. Bibby's knowledge of the minor Appellants coming over to play, the record is clear that Mrs. Bibby had no knowledge (and, in fact, denies) that Mr. Bibby was ever alone with the minor Appellants. (R. p. 133, lines 11-16; R. p. 167, lines 2-5; R. p. 168, lines 11-15; R. p. 169,

lines 15-20). According to Roe, the alleged molestation occurred while Mrs. Bibby was at work, out of the house. (R. p. 227, line 24-p. 228, line 7; R. p. 230, lines 6-14; R. p. 234, lines 4-10). In sum, the Court correctly ruled that Appellants failed to establish any specific threat of harm against a specific individual.

## **II. The Court Correctly Found That Appellants Could Not Recover Under a Premises Liability Theory of Recovery.**

With respect to their alternative theory of recovery under the law of premises liability, Appellants maintain that this Court overlooked evidence that Mr. Bibby constituted a “dangerous condition” on the premises known to Mrs. Bibby. Specifically, Appellants assert (a) that Mrs. Bibby had used a lock on her daughter’s door, (b) that Mr. Bibby allegedly looked at child pornography on the internet, and (c) that Mrs. Bibby was with Mr. Bibby when he discarded his computer. (Petition, p. 5).

First, Appellants’ points on this issue are legally insufficient. As a threshold matter, Appellants concede that they were licensees. There is no precedent recognizing a duty to warn a licensee with regard to the potential criminal act of a third party. Appellants make no argument to the contrary. Additionally, though Appellants would use the law of premises liability to make an end run around the “special relationship” requirement, the case they rely upon found a special relationship between the plaintiff and the residential treatment facility in which she resided. *See Burns v. S.C. Comm’n for the Blind*, 323 S.C. 77, 80, 448 S.E.2d 589, 591 (Ct. App. 1994). Appellants have not, and cannot, establish a special relationship.

In any event, the issues raised by Appellants do not demonstrate that Mr. Bibby was a “dangerous condition” known to Mrs. Bibby. These issues have been briefed and argued and were not overlooked. The “lock” was temporally associated with the therapy

of Mrs. Bibby's daughter some fifteen years prior and, therefore, is irrelevant to what Mrs. Bibby knew at the time in question. More to the point, the granddaughter's door was unlocked during the time at issue because, again, Mrs. Bibby did not believe there was any threat. (R. p. 130, lines 2-12; R. p. 137, lines 12-20; R. p. 148, lines 16-25). As to the allegation involving the child pornography, *Roe's* self-serving testimony about what *Daniel Jr.* allegedly told *her* that *he* told Mrs. Bibby is inadmissible hearsay. (R. p. 257). Daniel Jr.'s actual statement to police is devoid of any allegation that Mrs. Bibby was aware of Mr. Bibby viewing child pornography. (R. p. 288). Finally, the fact that Mrs. Bibby was with Mr. Bibby when he discarded his computer similarly has no bearing on whether she believed him to be a "dangerous condition." She understood that his computer had crashed and that he was leaving it behind a computer store because he forgot to stop at Goodwill. (R. pp. 122-123). This did not occur until *after* the alleged events at issue (but before Mrs. Bibby learned of what had happened with their granddaughter). (R. p. 123, lines 1-16). Otherwise, she would not have been with him. *Id.* In sum, it bears repeating that this is not a case where the Respondent knew that the alleged abuse, or any abuse, was occurring.

WHEREFORE, for the reasons stated herein and in the prior briefing, Respondent respectfully submits that this Court should DENY Appellants' Petition for Rehearing.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. P. Corrigan III", is written over a horizontal line.

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ATTORNEYS FOR RESPONDENT  
MICHELLE BIBBY

October 15, 2014

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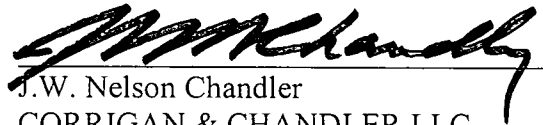
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I certify that I have served the foregoing **RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING** on all parties of record by depositing a copy of it in the United States Mail, postage prepaid, on October 15, 2014, addressed to their attorneys of record as follows:

Eric M. Poulin, Esq.  
Anastapoulo Law Firm, LLC  
2557 Ashley Phosphate Road  
North Charleston, SC 29418

*Attorney for Appellants*

***[SIGNATURE PAGE TO FOLLOW]***



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ATTORNEYS FOR RESPONDENT  
MICHELLE BIBBY

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REPLY TO:  
P.O. Box 547  
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October 15, 2014

**VIA U.S. MAIL**

The Honorable Jennie Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
1015 Sumter St.  
Columbia, SC 29211

Re: *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, Defendants, Of Whom Michelle Bibby is Respondent*  
Case No. 2010-CP-08-3732  
Appellate Case No. 2012-213350

Dear Ms. Kitchings:

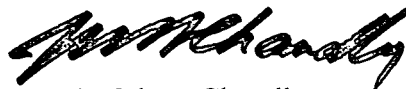
We represent Respondent Michelle Bibby in the above-referenced case. Enclosed, please find one (1) original and seven (7) copies of *Respondent's Return To Appellants' Petition for Rehearing*. Please file the original and required copies and return one of the file-stamped copies in the enclosed self-addressed stamped envelope.

By copy of this letter, we are serving opposing counsel with a copy of the same.

Should you have any questions, please do not hesitate to contact us.

With highest professional regards, I am

Sincerely yours,



J.W. Nelson Chandler

JWNC:lsb

cc: Eric M. Poulin, Esquire (w/enclosure)

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