THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5273 (S.C. Ct. App. filed October 1, 2014)

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

v.

Daniel Bibby, Sr., and Michelle Bibby

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the petitioners certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on October 23, 2014. (App. 406).

QUESTIONS PRESENTED

I. **Did the Court of Appeals err in finding that Respondent owed no duty to Petitioners, and therefore err in Affirming the Trial Court's grant of Summary Judgment?**

STATEMENT OF THE CASE

Petitioners, minor children under the age of eighteen (18), were sexually molested at the hands of their neighbor, Daniel Bibby, Sr. The various instances of molestation all occurred in a house owned jointly by Mr. Bibby and his wife, the Respondent, Michelle Bibby ("Respondent"). On October 15, 2010, Petitioners filed suit in the Court of Common Pleas, Berkeley County, alleging as against Daniel Bibby causes of action for Assault, Battery, False Imprisonment, and Intentional Infliction of Emotional Distress, and alleging as against Respondent causes of action for Negligence and Wrongful Infliction of Emotional Distress on a Bystander.

Daniel Bibby failed to file a responsive pleading and, on May 16, 2011, Petitioners obtained a default judgment against him. Respondent Michelle Bibby did Answer and, ultimately, filed a Motion for Summary Judgment, alleging that she owed no duty to these Petitioners.

Respondent's Motion for Summary Judgment was argued before the Honorable R. Markley Dennis, Jr. on July 10, 2012. Subsequently, by Order filed October 12, 2012, the Circuit Court Granted Respondent's Motion for Summary Judgment and dismissed Petitioners' claims with prejudice.

Petitioners served a Notice of Appeal on November 2, 2012. After entertaining oral arguments, a three member panel of the South Carolina Court of Appeals issued a 2-

1 opinion on October 1, 2014, affirming the Trial Court's Order. Petitioners filed a Petition for re-hearing on October 7, 2014, which was denied October 23, 2014. Petitioners now seek review by the Supreme Court.

STATEMENT OF FACTS

Michelle and Daniel Bibby were married September 13, 1969. (R. p. 77, lines 5-7). The Bibby's had three children, Donald, Daniel Jr., and Michelle Bernadette[1] ("Bernadette"). (R. p. 70, lines 6-23). In or around 1995, when Bernadette was 16, Bernadette disclosed to a family friend that her father, Danial Bibby Sr., had sexually molested her when she was younger. (R. p. 85, line 6-p. 86, line 4). Respondent confronted her husband about these allegations and Mr. Bibby admitted to Respondent that he had touched their daughter inappropriately. (R. p. 92, lines 2-6). The molestation was reported to DSS and Daniel Bibby, Sr. was removed from the house and placed in counseling. (R. p. 86, lines 11-21). Sometime thereafter, Respondent permitted Mr. Bibby to return to the household. (R. p. 86, lines 23-25-p. 22, lines 1-3).

Upon Mr. Bibby's return to the household, Respondent had a lock installed on Bernadette's bedroom door, and took precautions to hide the key from her husband. (R. p. 128, lines 9-15).

In 2008, Petitioners moved into the neighborhood. Petitioners' house was diagonally located across the street from Respondent's house. (R. p. 199, lines 22-25-p. 200, lines 1-9). Petitioner Jane Roe and Respondent became friendly. Shortly after Petitioners moved in, Respondent came over to introduce herself to Petitioner Roe. (R. p. 198, lines 8-12). Respondent's grandchildren were approximately the same age as the

[1] Michelle Bernadette Bibby's married name is Quattlebaum.

minor Petitioners[2] and the children became friends. (R. p. 278, lines 20-22). At the time, one of Respondent's adult children was living at Respondent's house along with two of Respondent's grandchildren. (See generally R. pp. 66-178).

The minor Petitioners and Respondent's grandchildren often played with each other and visited each others' houses. (See R. p. 199, lines 5-12, R. p. 132, lines 20-25). Respondent was aware that the Petitioner minors were coming into her house to play with her grandchildren (R. p. 132, lines 17-19) and informed Petitioner Roe that the children were welcome anytime. (R. p. 243, lines 24-25-p. 244 lines 1-2). Respondent admits that she was not always present at her house when the minor Petitioners were over. (R. p. 133, lines 4-7). Respondent also admits that she remembered and was aware of her husband's prior sexual abuse of their daughter (R. p. 110, lines 3-7). However, Respondent never informed Petitioners of these prior acts of sexual abuse. (R. p. 134, lines 24-25-p. 135, lines 1-16).

In April of 2009, Daniel Bibby, Sr. admitted to a counselor that he had been molesting his granddaughter. (R. p. 103, lines 22-24). Upon learning of this admitted molestation, Petitioner Roe became fearful that Mr. Bibby might have been molesting her minor children as well. (R. p. 205, lines 23-25-p. 206, lines 1-7). Petitioner first discussed the matter with her oldest daughter, "Joyce," who confirmed that Mr. Bibby had touched her chest and threatened to kill her if she told anybody. (R. p. 207, lines 6-9). Petitioner's youngest daughter, "Judy," revealed similar accusations. (R. p. 208, lines 11-14). Petitioner immediately called the police. (R. p. 208, lines 14-15). Petitioners

[2] Appellant Roe had three minor children. The oldest were twins: one boy referred to herein as "James" and one girl refereed to herein as "Joyce." Appellants youngest child was a girl, who is referred to herein as "Judy." Pursuant to this Court's Order Regarding Personal Identifiers, Appellants' actual names have been redacted because this matter involves allegations of sexual abuse.

were referred to the Dorchester Children's Center and Petitioner Judy was forensically interviewed. (R. p. 212, lines 19-24).

During her interview, Judy revealed that Mr. Bibby touched her. (R. p. 143, lines 1-19). Judy stated that Mr. Biby held her in a room with Mr. Bibby's granddaughter and that Mr. Bibby took his clothes off and forced the children to take their clothes off. Id. Judy further stated that Mr. Bibby touched her "boobs" and her "tee tee" with his hands and that Mr. Bibby made Judy touch the granddaughter's boobs and tee tee as well. Id. Judy also disclosed exposure to pornography in the Bibby household. Id.

Petitioner Roe testified that she had no knowledge of Mr. Bibby's prior sexual abuse of his daughter and that she had no reason to suspect that it was unsafe for her children to play at the Bibby household. (R. p. 233, lines 8-25-p. 234, lines 1-3). Petitioner further testified that she never would have allowed her kids to visit the Bibby household had she been warned of Mr. Bibby's sexual propensities. (R. p. 236, lines 13-15).

ARGUMENT

In affirming the Trial Court's grant of summary judgment, the Court of Appeals held that Respondent owed Petitioners no duty, and, therefore, could not be negligent. (App. 382).

I. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because Respondent owed a duty to warn Petitioners 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 the present action, the Court of Appeals erred in finding that Respondent owed Petitioners no duty. The Court of Appeals erred in finding that no special relationship

existed between Respondent and Petitioners. Even in the absence of such a relationship, the Court of Appeals should have considered Respondent's liability under basic premises liability law and erred in ruling upon the weight of the evidence. Under either theory, or both, the order of the trial court should be reversed and the matter remanded for a trial on the merits.

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

Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. Restatement (Second) of Torts, § 315 (1965). However, 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." Id. (**emphasis added**). Multiple South Carolina cases have addressed and adopted the first prong in various instances. See, e.g., Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)(holding defendant was aware that mother had made specific threats of harm toward child in the past, and that defendant breached its duty to warn of mother's release); Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002)(holding department had independent duty to control and supervise a known dangerous juvenile in its custody). However, the question of whether there is a duty to warn minor children, and their parents, of potential sexual abuse in order to avoid the potential for child molestation is an issue of first impression.

Other states have considered the question, and held that a duty to warn of potential sexual abuse might arise in the context of a special relationship. For instance,

the Wisconsin Court of Appeals stated, "We think it self evident that an adult who voluntarily takes on supervision, custody or control, even on a temporary basis, of a visiting child...stands in a special relationship to such child for purposes of the child's 'protection' under [The Restatement]." Gritzner v. Michael R., 598 N.W.2d 282 (Wis. Ct.App. 1999) aff'd in part, rev'd in part on other grounds, 611 N.W.2d 906 (Wis. 2000).

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 that Respondent had a special relationship with the Petitioner victims. Respondent readily admits to knowing that the Petitioners were coming over to her house to play. (R. p. 132, lines 17-19). Furthermore, she admits that the Petitioner 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, the Court of Appeals erred in holding, as a matter of law, that no special relationship existed between the Respondent and the minor Petitioners.

Moreover, there is evidence on the record of 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).

The passage of time between the alleged molestations does not, as a matter of law, negate the fact that Respondent had actual knowledge of her husband's proclivities to commit such acts. Whether Respondent truly believed her husband was "rehabilitated" or not is a question of fact for the jury. Indeed, a reasonable jury could conclude, as science would seem to dictate, that a pedophile can never be truly cured. More importantly, there is evidence on the record to suggest that even Respondent, herself, did

not actually believe that her husband had been rehabilitated. 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. Simply put, it is for the jury to decide whether to lend credibility to Respondent's rehabilitation theory or not.

Furthermore, the passage of time, alone, does not prove as a matter of law that Mr. Bibby was rehabilitated. Clearly he was not, as he admits to re-offending. Indeed, a long passage of time (coincidentally the time when no minor children were living in the house) might suggest a lack of opportunity, rather than a lack of desire. More importantly, there were other instances of misconduct during that time, of which Respondent had knowledge. 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). Moreover, Bibby Junior informed Petitioner 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.

Finally, to the extent the Court of Appeals failed to consider the possibility of a special relationship because "Appellants presented no evidence Respondent had the ability to monitor, supervise, or control the conduct of Mr. Bibby (App. 4)," this analysis is misplaced. First, Petitioner's 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 Petitioners is dependent upon the relationship between Petitioners 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 defendant is alleged to have a special relationship with the actor. Such was the issue in the cases cited by Court of Appeals, 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 Petitioners was such as to give Petitioners a right of protection.

For all these reasons, the Court of Appeals erred in finding that Respondent owed Petitioners 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 Petitioners as a matter of basic premises liability law.

Even assuming Respondent owed no "special" duty to Petitioners by way of their relationship, Respondent should nonetheless be liable under a premises liability theory. Because all of the alleged acts of molestation occurred on Respondent's property, Respondent owed, and breached, duties to Petitioners just as any occupier of land would owe to one who came upon the land with consent or permission.

To establish negligence in a premises liability action, a plaintiff must prove (1) a duty of care owed by defendant to the plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. See Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006); Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). Therefore, to survive a Motion for Summary Judgment, a plaintiff must establish only a mere scintilla of evidence in support of each element.

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 R. p. 132, lines 17-19)(admitting that the Appellants were social guests at her house.)). 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.

The general state of premises liability law, as it relates to people as "dangerous conditions or activities" can be summarized as follows. "Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal conduct of third parties, because the foreseeability of the risk is slight, and because of the social and economic consequences of placing such a duty on a person. However, an exception exists if the owner, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party or *if it is shown that the landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor.*" 62 Am.Jur.2d Premises Liability § 409 (*emphasis added).*

Again, in this specific context, the question is somewhat novel to South Carolina. Therefore, we must address the question as a matter of first impression for South Carolina.

Numerous other states seemingly do allow a premises liability action under these circumstances. See, e.g., Thibeault v. Seifert, 388 So.2d 244 (Fla.Dist.Ct.App. 1980); Barmore v. Elmore, 83 Ill.App.3d 1056, 403 N.E.2d 1355(1980); Youngblood v. Schireman, 53 WashApp. 95, 765 P.2d 1312 (1988). Indeed, to the extent this Court chooses to look to other jurisdictions, the facts and law presented by J.S. and M.S. v. R.T.H., 155 N.J.330, 714 A.2d 924 (1998) seem most instructive to the case at bar. In R.T.H., parents brought an action on behalf of their children against a husband and wife, Plaintiff's neighbors, alleging that the husband had assaulted the minor children and that the wife was negligent in failing to warn of or prevent the assault. In a lengthy opinion, the New Jersey Supreme Court reasoned that, where a spouse has actual knowledge or special reason to know of the likelihood of her spouse engaging in sexually abusive behavior, the spouse must warn of the harm. Id. The Court stated, "we conclude that there is sound, indeed compelling basis for the imposition of a duty on a wife whose husband poses the threat of sexually victimizing young children. Id. at 935.

This reasoning is compelling indeed. Common sense, alone, dictates that a pedophile creates an unreasonably dangerous condition in the presence of young children. There seems little difference between a pedophile and, say, a beehive. Each is dangerous. In either scenario, where a landowner knows or has reason to know of its existence, that landowner should, in South Carolina, have a duty to warn licensees on her premises if the

danger is concealed. This is particularly true where the pedophile or otherwise dangerous person, as here, is a permanent presence at the residence, rather than a mere guest.

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. South Carolina should not draw such a distinction and should treat both dangers as one in the same, requiring a homeowner with knowledge to warn those unsuspecting guests who are proper licensees on the premises.

There is evidence on the record to support a conclusion that Mr. Bibby did, in fact, molest Petitioners, rendering him dangerous. Moreover, Petitioners' Mother testified that she was unaware of Bibby's dangerous propensities. "They gave me no reason not to trust them." (R. p. 228, lines 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" (R. p. 233, lines 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." (R. p. 233, 23-25-p. 234, lines 1-3). As to proximate cause, Petitioner testified, "if I would have known what would have happened in that house, my little girls would have never been over there, never." (R. p. 236, lines 13-15). Respondent admits that she never warned Petitioners of her husband's propensities or past acts of molestation. (R. p. 134, lines 24-25-p. 135, lines 1-16).

Accordingly, all of the elements for a premises liability action are supported by evidence on the record. The trial court's ruling should be reversed and this matter remanded for a proper trial on the merits.

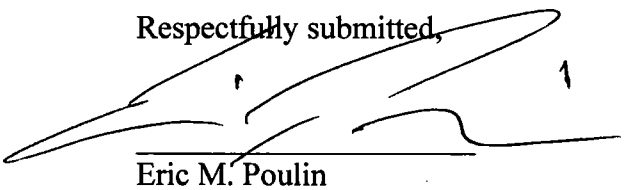
CONCLUSION

Petitioners respectfully submit that this case is appropriate for review by the Supreme Court. In its opinion, the Court of Appeals noted multiple times that the issues presented were novel to South Carolina jurisprudence. Accordingly, the Court of Appeals' decision was split, with a vigorous dissent from Judge Williams. Furthermore, while the legal issues may be novel, the underlying factual scenario is not uncommon. These issues are nearly certain to appear again and again before our lower courts and, with no direction from the Supreme Court, are subject to inconsistent rulings.

Many other states have also been forced to address these legal issues. As noted above, and as recognized in Judge Williams' dissent, many of these states have ruled in a manner consistent with the arguments set forth by your Petitioner. The Court of Appeals erred by not recognizing the special relationship between Respondent and the minor Petitioners, and erred by failing to apply basic tenants of premises liability law. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment, and the matter should be reversed and remanded to the Trial Court for a full trial by jury.

November 21, 2014

Respectfully submitted,



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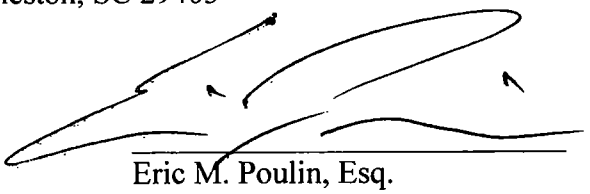
PROOF OF SERVICE

I certify that I have served a copy of Petition for Certiorari and the Appendix on Michelle Bibby by causing the same to be hand delivered to her attorneys, Eugene P. Corrigan, III and J.W. Nelson Chandler, this 21st day of November, 2014, at their office located 16 Charlotte Street, Suite B., Charleston, SC 29403

November 21, 2014



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