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S.C. Supreme Court

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.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY FIND THAT RESPONDENT OWED NO DUTY TO PETITIONERS UNDER EITHER A "SPECIAL RELATIONSHIP" THEORY OR A PREMISES LIABILITY THEORY, THEREFORE PROPERLY AFIFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This case centers on whether a wife has an affirmative duty to warn a third-party that her husband might commit a criminal act.

Petitioner Jane Roe ("Roe"), on behalf of her three minor children (the "minor Petitioners"[1]) (together with Roe, "Petitioners") brought this action in the Berkeley County Court of Common Pleas in October 2010. The Complaint asserted various causes of action against Defendants Daniel Bibby Sr. ("Mr. Bibby") and his wife, Michelle Bibby ("Mrs. Bibby" or "Respondent"), arising out of the allegation that Mr. Bibby sexually molested one of Roe's children, "Judy Roe." Mrs. Bibby answered the Complaint in January 2011, denying the allegations. Separately, Mr. Bibby submitted several documents to the Circuit Court, denying the allegations, but Roe ultimately obtained a default judgment against him.

Mr. Bibby is not a party to this appeal. By way of background, the claims asserted against him included assault, battery, false imprisonment, intentional infliction of emotional distress, and wrongful infliction of emotional distress on a bystander. As against Mrs. Bibby, Roe asserted causes of action for negligence and wrongful infliction of emotional distress on a bystander. The former claim was asserted on behalf of Judy Roe and the latter on behalf of Roe's other two children, "James Roe" and "Joyce Roe."

[1] For purposes of anonymity, the minor Petitioners are referred to as James, Joyce and Judy.

Following discovery, on April 17, 2012, Mrs. Bibby moved for summary judgment. The Honorable R. Markley Dennis Jr., held a hearing on July 10, 2012, after which he granted the motion. Judge Dennis issued a formal Order on October 21, 2012, dismissing the case against Mrs. Bibby with prejudice.

Petitioners appealed to the South Carolina Court of Appeals in November 2012. On appeal, Roe argued that the Circuit Court erred in dismissing her negligence claim against Mrs. Bibby. On October 1, 2014, the Court of Appeals affirmed the Order of the Circuit Court, finding that Mrs. Bibby owed no affirmative duty to warn as matter of law. The Court of Appeals denied the petition for rehearing on October 23, 2014. This Court granted Petitioners' petition for a writ of certiorari on January 16, 2015.

Petitioners' theory of liability is that Mrs. Bibby owed an affirmative duty to warn Roe that Mr. Bibby might engage in the conduct alleged.[2] Petitioners argue that this Court should, for the first time, recognize such a duty under either a "special relationship" analysis or a premises liability analysis.

STATEMENT OF FACTS

Mrs. Bibby, 65, is a mother of three and grandmother of five. She is currently retired, following thirteen years of service to the Charleston County Public Library. (App. p. 109, lines 4-11). During the time at issue, Mrs. Bibby was still working and had legal custody of a minor grandson. This grandson had lived with Mrs. Bibby since he was four months old. (App. p. 72, lines 10-14). Mr. Bibby had a career in the Navy and married Mrs. Bibby in 1969. (App. p. 78, lines 5-7 and 20-21). They were still together

[2] Respondent does not concede that Mr. Bibby engaged in the conduct alleged by Petitioners. Though he admitted other wrongdoing, Mr. Bibby denied Petitioners' allegations and was not prosecuted for any actions involving the minor Petitioners. (App. p. 218, lines 3-7).

during the time in dispute, but had separated by the time Petitioners commenced this lawsuit. (App. p. 76, lines 5-8).

Sometime in 2002 or 2003, Mrs. Bibby's youngest son, Daniel Bibby, Jr. ("Daniel Jr."), moved back into the family home in Goose Creek, along with his minor son and daughter. (App. p. 110, lines 4-6). Daniel Jr. was the custodial parent of these two children and was the father of the other child of whom Mrs. Bibby already had custody. Thus, during the time at issue, the Bibby household consisted of three adults (Mr. and Mrs. Bibby and Daniel Jr.) and three children (one girl and two boys). The Bibby residence was owned jointly by Mr. and Mrs. Bibby. (App. p. 154, line 20 - p. 155, line 2).

In or around February 2008, Roe, her husband, and three children (again, the "minor Petitioners") moved into a home diagonally across from the Bibby family. (App. p. 200, lines 22-24; App. p. 201, lines 6-9). The Roe and Bibby children became friends and often played over at the Roe house. (App. p. 199, lines 22-25). One day, Daniel Jr. told Roe that it would be okay for her children to come over and play with his children. (App. p. 200, lines 7-21). Other neighborhood children also played with the Roe and Bibby children, and as in many neighborhoods, the children ran back and forth between houses. (App. p. 168, lines 9-10; App. p. 229, lines 15-17).

During this period, Mrs. Bibby worked forty hours a week at the library. (App. p. 109, lines 4-11). Roe, on the other hand, had stopped working and was home with her children at all times. (App. p. 235, lines 12-17). Daniel Jr. also was not working. (App. p. 110, lines 2-3). Roe and Daniel Jr. often sat in lawn chairs and watched the children play outside. (App. p. 235, lines 18-20). According to Roe, there was an understanding

with Mrs. Bibby that Roe's children were welcome at the Bibby home, primarily when the children were outside playing. (App. p. 244, line 24-p. 245, line 12). Mrs. Bibby was generally aware that the children played together at each other's homes, but was not aware of the children ever being alone with Mr. Bibby. (App. p. 168, lines 2-13).

Mrs. Bibby and Roe enjoyed a neighborly relationship. Roe regularly talked to Mrs. Bibby and visited the Bibby home herself, whether to borrow a cup of sugar or to pick up hand-me-downs. (App. p. 252, lines 15-22). They discussed religion, their husbands' military backgrounds, and notably, the fact that Mr. Bibby had physically abused Mrs. Bibby in the past. (App. p. 254, lines 3-9). Roe knew that Daniel Jr. occasionally left all the children with Mr. Bibby while Mrs. Bibby was at work. (App. p. 229, lines 3-4; R. p. 230, line 2-p. 231, line 12; App. p. 233, lines 12-16). Roe did not advise Mrs. Bibby of that when it occurred. (App. p. 244, lines 21-24).

Sometime in April or May 2009, Mr. Bibby checked himself into a behavioral center for depression. (App. p. 113, lines 11-13). While there, he admitted to a doctor that he had molested his resident granddaughter, Daniel Jr.'s daughter. (App. p. 96, lines 10-12). Thereafter, Mr. Bibby confessed the same to Mrs. Bibby. (App. p. 116, lines 2-6). Mrs. Bibby immediately asked Mr. Bibby to move out, and she called the Department of Social Services ("DSS"). (App. p. 76, lines 14-18; App. p. 116, lines 17-22). Mrs. Bibby then informed her son, Daniel Jr., who, in turn, sent a text message to Roe. (App. p. 207, lines 5-8). Roe questioned her children and alleges that the two girls claimed that Mr. Bibby had touched them inappropriately. (App. p. 208, lines 6-9; App. p. 209, lines 12-14). Roe testified that she followed the advice of DSS in handling the situation and understood that Mrs. Bibby had done the same. (App. p. 243, line 21-p. 244, line 3).

Mr. Bibby has consistently denied touching the Roe children. (App. p. 146, lines 3-13). In his Court filings in this case, he stated: "Never have I caused any harm to the mentioned children [in this] case, whether it be sexual abuse or physical abuse...Again, I never, ever harmed those children." (App. p. 289). And in a subsequent filing, he reiterated: "I deny every and all accusation[s] made by [Jane Roe] against me." (App. p. 291; *see also* App. p. 290, 291, 292). Ultimately, Mr. Bibby was convicted of molesting his granddaughter; the charges involving the Roe children, however, were dismissed. (App. p. 217, lines 19-20; App. p. 218, lines 3-7).

Roe contends that Mrs. Bibby should have warned her in light of an episode that had come to light some fourteen years prior. (App. p. 237, lines 1-15). In 1995, when Mrs. Bibby's daughter was sixteen years old, she reported that her father had – a few years prior to that – touched her and made her feel uncomfortable. (App. p. 87, lines 4-8). Upon learning this, Mrs. Bibby immediately called DSS. (App. p. 86, lines 8-9). Mrs. Bibby also confronted Mr. Bibby, who admitted the allegations, and Mrs. Bibby asked him to leave the house. (App. p. 86, lines 24-25; App. p. 91, lines 16-19). Subsequently, Mr. Bibby spent a month in a behavioral hospital in Florida. (App. p. 85, lines 4-25).

During that time, the Bibby family worked with DSS, and Mrs. Bibby understood that Mr. Bibby completed his counseling with "flying colors." (App. p. 131, lines 7-12). DSS advised Mrs. Bibby to take Mr. Bibby back into the family in order to rebuild the family unit. (App. p. 87, line 23-p. 88, line 3). DSS instructed the Bibby family not to discuss the episode with anyone, and Mrs. Bibby understood that Mr. Bibby was "cured." (App. p. 103, lines 9-14). Mr. Bibby was not prosecuted criminally. As part of the

follow-up counseling provided to Mrs. Bibby's daughter, they talked about ways to make her feel more secure. (App. p. 130, lines 12-17). They decided to purchase a new doorknob for the daughter's room, with a key. (App. p. 130, lines 17-23). The lock gave her a sense of privacy until she moved out after high school, around 1997. (App. p. 95, lines 22-23; App. p. 130, line 8-p. 131, line 5).

Until 2009, when Mr. Bibby informed Mrs. Bibby of what had happened with their granddaughter, Mrs. Bibby had no knowledge of any such abuse by Mr. Bibby since the earlier episode was disclosed and addressed in 1995. (App. p. 129, lines 3-8; App. p. 132, lines 7-24; App. p. 149, lines 4-6). Indeed, Roe admitted she has no information to the contrary. (App. p. 245, line 20-p. 246, line 1). For well over a decade, Mrs. Bibby believed, as did DSS, that Mr. Bibby was "cured." (App. p. 130, lines 12-13; App. p. 131, lines 6-7).

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "A genuine issue of fact, however, can be created only by evidence which would be admissible at trial." *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (1994).

ARGUMENT

THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE RESPONDENT OWED NO DUTY TO PETITIONERS UNDER EITHER A "SPECIAL RELATIONSHIP" THEORY OR A PREMISES LIABILITY THEORY.

The Court of Appeals correctly determined that Mrs. Bibby did not owe Petitioners a duty to warn in this case. A plaintiff must prove three elements to recover for negligence: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *See Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). As a threshold matter, "the court must determine, as a matter of law, whether the law recognizes a particular duty." *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011). If there is no duty, the defendant is entitled to a judgment as a matter of law. *Id.*

Here, Petitioners contend that an affirmative duty should be imposed upon Respondent under either (a) a "special relationship exception" or (b) the law of premises liability. While South Carolina courts have recognized an affirmative duty to warn in certain, unrelated circumstances, the law has not been, and should not be, expanded to recognize the duty advocated by Petitioners, particularly on these facts.

A. Petitioners Failed to Establish a Duty to Warn Under the Special Relationship Exception.

It is well-established that "South Carolina law does not recognize a general duty to warn of the dangerous propensities of others." *See Doe v. Marion*, 361 S.C. 463, 471, 605 S.E.2d 556, 560 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007) (emphasis added); *see also Wal-Mart Stores*, 393 S.C. at 247, 711 S.E.2d at 912 ("Under

South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger"). Petitioners argue that this Court should apply an exception to the rule providing that a duty may arise where the defendant had a special relationship with the alleged victim(s).[3] Under this "special relationship exception," a defendant "may have a common law duty to warn potential victims . . . when [1] the defendant 'has the ability to monitor, supervise, and control an individual's conduct' and when [2] 'the individual has made a specific threat of harm directed at a specific individual.'" *Wal-Mart Stores*, 393 S.C. at 247, 711 S.E.2d at 912 (quoting *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)).

The Court of Appeals correctly concluded that Petitioners failed to establish either prong of the special relationship test. Specifically, Petitioners did not demonstrate (1) that Respondent had the ability to monitor, supervise and control the minor Petitioners; and (2) that Respondent had knowledge of a specific threat to a specific individual.

1. Petitioners Failed to Establish a Special Relationship Between Respondent and the Minor Petitioners.

Petitioners have not shown, and cannot show, that Respondent had the ability to "monitor, supervise, and control [the minor Petitioners'] conduct," as required to establish a special relationship. *See Wal-Mart Stores, Inc.*, 393 S.C. at 247, 711 S.E.2d at

[3] In *Faile v. S.C. Dep't of Juvenile Justice*, this Court set forth five (5) exceptions to the general rule that one does not have an affirmative duty to act. 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Two (2) of these exceptions arise from "special relationships," which, as noted by Petitioners, may involve the defendant's relationship with either (1) the alleged injurer (*i.e.* Mr. Bibby) *or* (2) the alleged victims (*i.e.* the minor Petitioners). *See, e.g., Wal-Mart Stores, Inc.*, 393 S.C. at 247, 711 S.E.2d at 912 (noting that the defendant-store had no special relationship with either the injurer (the father) or the victim (the son) because the store did not have the ability to monitor, supervise, and control either of them). Petitioners have conceded the absence of the former type of special relationship and focus exclusively on the latter, *i.e.* an alleged special relationship between Respondent/Mrs. Bibby and the minor Petitioners.

912 (finding that retailer/film developer had no special relationship with abuse victim depicted in photographs); *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 109-10, 374 S.E.2d 910, 918 (Ct. App. 1998) (focusing on custody and whether defendant "had charge" of individual with whom special relationship was alleged).

This is not a case where Mrs. Bibby was the minors' counselor, teacher, day-care provider, or even babysitter. Instead, Mrs. Bibby was the joint owner of a home in or around which the children occasionally played, as they did at other homes in the neighborhood. (App. p. 200, lines 18-21). Unlike Roe, Mrs. Bibby was working full-time, outside of the house. (App. p. 109, lines 10-11; App. p. 235, lines 12-17). She did not know, and does not admit, that the children were ever alone with Mr. Bibby. (App. p. 134, lines 11-16; App. p. 168, lines 2-5; App. p. 169, lines 14-15). According to Roe's own allegations, the minor Petitioners went into the Bibby home while Mrs. Bibby was at work. (App. p. 228, line 24-p. 229, line 7; App. p. 235, lines 4-10). It was not Mrs. Bibby, but her adult son, who – with Roe's knowledge – allegedly and briefly left the house while Mr. Bibby was home. (App. p. 230, line 2-p. 231, line 12; App. p. 244, lines 16-23). Roe concedes she did not advise Mrs. Bibby about this. (App. p. 244, lines 21-24). In sum, by no stretch of the facts could Mrs. Bibby be said to have had *custody, charge, or control* over the minor Petitioners – much less in the fashion necessary to alter the common law and impose an exceptional duty.

In their brief, Petitioners cite to the vacated opinion of the Court of Appeals in *Doe v. Batson*, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 1999) as potentially instructive. In *Batson*, the Court of Appeals surmised that the mother of an adult son, living at home, may have had a duty to warn identifiable victims of her son's criminal sexual conduct, if

certain prerequisites were satisfied. *Id.* at 301, 525 S.E.2d at 914. As noted by Petitioners, however, *Batson* is not precedential because this Court vacated "those portions of the Court of Appeals' opinion suggesting potential sources of liability." *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 858 (2001). Additionally, though no discovery had been conducted in *Batson*, the plaintiff alleged that the offender's mother was *physically present in the home* and *knew that her adult son had young boys in his bedroom*. 338 S.C. at 295, 525 S.E.2d at 911. Thus, if *Batson* is instructive in any way, it is as a contrast to the facts of the instant case, where Mrs. Bibby was outside of the home and had no knowledge that Mr. Bibby was ever alone with the minor Petitioners.

More instructive are those cases in which this Court has either explicitly or implicitly recognized a "special relationship." *See, e.g., Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007) (assuming special relationship between psychiatrist and patient/injurer); *Faile v. S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 566 S.E.2d 536 (2002) (finding special relationship between Department of Juvenile Justice and dangerous juvenile/injurer over whom it had custody per court order); *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (finding special relationship between Department of Mental Health and involuntarily-committed patient/injurer in its custody); *Rogers v. S.C. Dep't of Parole and Community Corrections, et al.*, 320 S.C. 253, 464 S.E.2d 330 (1995) (assuming special relationship between state agencies charged with prisoner parole and prisoner/injurer who was being released from custody (but finding no specific threat)); *see also Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) (finding that fraternal organization had duty to pledge who had become helplessly drunken from alcohol

furnished to him by fraternity) (cited in *Faile* as example of special relationship between defendant and victim). In the instant case, by comparison, there was no organization, institution, or professional charged with the care or supervision of the minor Petitioners in any of the ways exemplified in the case law. The Court of Appeals properly found this precedent to be controlling.[4] (App. p. 380).

From a broader perspective, the special relationship requirement is important because it sets a formal threshold over which a case must pass before the Court will consider imposing an exceptional duty. Further, because one is generally aware of entering into the types of relationships recognized as "special" under the law, a person in such a relationship effectively has notice of potential liability for failing to act after obtaining knowledge of certain specific threats. Mrs. Bibby simply had no such relationship with the minor Petitioners. Accordingly, the Court of Appeals correctly affirmed the grant of summary judgment in her favor. *See Wal-Mart Stores, Inc.*, 393 S.C. at 247, 711 S.E.2d at 912 (affirming summary judgment where defendant had no special relationship with the victim of sexual abuse); *Hackett v. Schmidt*, 630 So.2d 1324, 1328 (La. Ct. App. 1993) (finding no special relationship between defendant/wife and abuse victim merely because victim was present in defendant's home on occasion).

[4] Having reviewed these cases, the Court of Appeals further observed that Petitioners "presented no evidence Respondent had the duty to monitor, supervise, or control the conduct of *Mr. Bibby*." (App. p. 380) (emphasis added). Though Petitioners contend that this finding was immaterial because they are not advancing a theory based upon vicarious liability or arguing a special relationship between Respondent and Mr. Bibby, the finding is nonetheless correct and underscores the absence of any type of special relationship in this case.

2. Petitioners Failed to Establish That Respondent Had Knowledge of a Specific Threat of Harm.

While necessary, the existence of a special relationship is not itself sufficient to create a duty to warn. Rather, such a duty will only arise where "the [alleged injurer] has made a specific threat of harm directed at a specific individual." *Marion*, 373 S.C. at 400, 645 S.E.2d at 250 (emphasis added). Indeed, as reiterated by this Court, "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim." *Id.* at 401, 645 S.E.2d at 251 (quoting *Gilmer v. Martin*, 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct. App. 1996)) (emphasis added); *see also Oblanchinski v. Reynolds*, 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011) (emphasizing that "foreseeability of injury, in and of itself, does not give rise to a duty") (emphasis in original). The "specific threat" requirement provides reasonable parameters for an affirmative duty that would otherwise become amorphous and overly-burdensome.

This is not a case where Respondent had knowledge of the alleged abuse of the minor Petitioners. *Cf. Doe v. Franklin*, 930 S.W.2d 921 (Tex. Ct. App. 1996) (finding duty where evidence showed that minor complained directly to wife/custodian that her husband was molesting her). Again, according to Roe, the alleged molestation occurred while Mrs. Bibby was at work, out of the house. (App. p. 228, line 24-p. 229, line 7; App. p. 231, lines 6-14; App. p. 235, lines 4-10). Further, Mrs. Bibby had no knowledge (and, in fact, denies) that Mr. Bibby was ever alone with the minor Petitioners. (App. p. 134, lines 11-16; App. p. 168, lines 2-5; App. p. 169, lines 11-15; App. p. 170, lines 15-20). Indeed, Mrs. Bibby denies the allegations of abuse asserted by Petitioners and

believes that Judy Roe was coached and potentially influenced by problems in Roe's own home. (App. p. 145, lines 18-20; App. p. 146, line 3-p. 147, line 9; App. p. 171, lines 11-19).

In short, there is no evidence that Respondent had knowledge of any "distinct, specific, overt threat of harm" to the minor Petitioners. This itself should conclude the argument and validate the affirmation of summary judgment by the Court of Appeals. *See, e.g., Marion*, 373 S.C. at 400-01, 645 S.E.2d at 250-51 (affirming dismissal due to lack of specific and overt threat where psychiatrist failed to warn pediatrician's patients of known "predilection for child molestation"); *Gilmer*, 323 S.C. at 157, 473 S.E.2d at 814 (affirming summary judgment due to lack of overt threat where mentally-ill employee of nursing home killed nursing home patient).

In the absence of the requisite threat, Petitioners maintain that the law should recognize a lesser standard for imposing liability, based on what Respondent knew or should have known in light of Mr. Bibby's "prior propensities toward pedophilia." (Petitioner's Brief, p. 8). Even if this Court were to recognize a constructive knowledge standard – and it should not – the evidence is inadequate to establish that Mrs. Bibby should have known of a specific threat of harm. Indeed, Respondent's knowledge of Mr. Bibby's "prior propensities" was just that – knowledge of a single, prior act that had occurred many years in the past. 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.

Mrs. Bibby reasonably believed that her husband was "cured" following his 1995 confession and release from treatment. (App. p. 103, lines 9-14; App. p. 130, lines 10-13;

App. p. 131, lines 6-12). During that time, DSS counseled Mrs. Bibby and her family to rebuild the family unit and to refrain from discussing the situation with anyone else. (App. p. 87, line 24-p. 88, line 3; App. p. 103, lines 11-14; App. p. 135, lines 22-23). Mrs. Bibby was neither responsible for, nor aware of, the minor Petitioners ever being alone with Mr. Bibby. (App. p. 134, lines 11-16; App. p. 168, lines 2-5; App. p. 170, lines 15-20; App. p. 244, lines 21-24). At all times relevant hereto, there was another, stay-at-home adult in the Bibby home (Daniel Jr.), who was also the parent of the three resident minors. (App. p. 134, lines 11-16). In sum, Petitioners cannot establish that Respondent knew, or should have known, of any current and specific threat to the minor Petitioners.

Petitioners suggest that Mrs. Bibby might be disbelieved. This position is plainly inadequate. *See Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) ("A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness"). No doubt recognizing this, Petitioners contend that the following should be considered: (1) that Mrs. Bibby once installed a lock on her daughter's door; (2) that Daniel Jr. allegedly saw his father looking at child pornography on the internet; (3) that Roe testified that Daniel Jr. stated that he told Mrs. Bibby about the pornography (App. p. 258, line 21-p. 259, line 3); and (4) that Mrs. Bibby was with Mr. Bibby when he disposed of his computer. While plainly inadequate to establish actual notice of a specific threat, these allegations similarly fail to establish constructive notice of specific threat.

First, the fact Mrs. Bibby installed a lock for her daughter some fourteen years before the time at issue has no bearing on what Mrs. Bibby knew or should have known

at the time in question. The idea for the lock emerged from counseling as a means to provide an added sense of security and privacy at that time. (App. p. 130, line 6-p. 131, line 5). There is no evidence of a lock having been installed or used during the time at issue with the minor Petitioners. To the contrary, the granddaughter's door was unlocked because, again, Mrs. Bibby did not believe there was any kind of threat. (App. p. 149, lines 16-25). Second, whether and to what extent Daniel Jr. saw Mr. Bibby looking at inappropriate images on the internet is completely irrelevant to what *Mrs. Bibby* knew. In any event, Daniel Jr.'s statement, cited and relied upon by Petitioners, is inadmissible hearsay. (App. pp. 288-289). Third, Roe's contention regarding what *Daniel Jr.* told *her* that *he* told *Mrs. Bibby* is similarly hearsay, and therefore inadequate to create a factual question. *See Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (1994) ("A genuine issue of fact, however, can be created only by evidence which would be admissible at trial"); *see also Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (refusing to consider hearsay evidence to refute summary judgment). Fourth, the fact that Mrs. Bibby was with Mr. Bibby when he disposed of his computer behind a computer store is irrelevant. (App. p. 120, line 2-p. 121, line 7; App. p. 123, lines 19-25). This did not occur until *after* the alleged events at issue and *before* Mrs. Bibby learned of what had happened with their granddaughter. (App. p. 124, lines 1-16). Otherwise, Mrs. Bibby would not have been with him. *Id.*

In short, the allegations relied upon by Respondents are either irrelevant to the issue at hand, inadmissible as evidence, or both. They do not establish that Mrs. Bibby "should have known" of a specific threat to the minor Petitioners and, regardless, do not amount to evidence of a *distinct, specific, overt* threat of harm made toward a particular

victim. *See Marion*, 373 S.C. at 400, 645 S.E.2d at 250. In the absence of such evidence, the Court of Appeals properly affirmed the grant of summary judgment in favor of Respondent. *See Marion*, 373 S.C. at 400-01, 645 S.E.2d at 250-51; *see also Wood v. Astleford*, 412 N.W.2d 753, 757 (Minn. Ct. App. 1987) (affirming summary judgment for defendant/wife based on lack of specific threat to specific victims, though wife knew that husband had "boys" staying overnight when she was gone, had some concurrent knowledge of his involvement with "child pornographic photography," and the facts were such to have aroused suspicion of "aberrant behavior").

B. Petitioners Failed to Establish a Duty to Warn Under a Premises Liability Theory.

In the alternative, Petitioners maintain that a duty should be imposed under a theory of premises liability, likening Mr. Bibby to a concealed dangerous condition on the property, such as a "beehive." (Petitioners' Brief, p. 13). Under this line of reasoning, liability should be assigned to Respondent because she was the joint owner of the home where the alleged molestation occurred. As noted by Petitioners, a premises liability action requires proof of all the standard elements of negligence (duty, breach of duty, and proximately caused damages). The scope and nature of a duty in a premises liability action "is determined based upon the status or classification of the person injured at the time of his or her injury." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). As licensees, Petitioners are unable to establish a duty under a premises liability theory of recovery. Even if it were conceptually possible, Petitioners cannot otherwise satisfy the elements necessary to advance their claim.

1. Petitioners Cannot Establish a Duty to Warn Due to Their Admitted Status as Licensees.

In the instant case, Petitioners maintain that they were licensees on the subject property and that they were harmed by the alleged criminal acts of a third-party, Mr. Bibby. (Petitioners' Brief, p. 11). As noted by the Court of Appeals, the Petitioners have not cited, and cannot cite, a single South Carolina case recognizing a duty to warn a licensee with regard to an alleged criminal act committed by a third-party. (App. p. 382).

Under South Carolina law, a licensee is owed "something less than a duty of due care." F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts*, 126 (4th Ed. 2011). "The duty owed to a licensee differs from the duty owed to an invitee in that the landowner has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." *See Singleton v. Sherer*, 377 S.C. 185, 201, 659 S.E.2d 196, 204 (Ct. App. 2008) (internal quotations omitted). Rather, a licensee can be said "to accept the premises as they are and demand no greater safety than his host provides himself." *Id.* at 201, 59 S.E.2d at 205 (emphasis added). There is no South Carolina authority supporting Petitioners' position because licensees – who are, by definition, owed something less than a duty of care – cannot also be owed an exceptional duty of protection from independent, third-party actors. *See, e.g, T.A. v. Allen*, 669 A.2d 360, 364 (Penn. Super. Ct. 1995) ("There is no special relationship between the possessor of land and a licensee which creates a duty upon the possessor of land to protect or warn licensees, whether adult or minor, against criminal acts committed on the land by a third person"). The law of premises liability is simply inapplicable to such a claim by licensees.

In effort to overcome this hurdle, Petitioners point to the Court of Appeals' opinion in *Burns v. S.C. Comm'n for the Blind,* 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994) for the proposition that it may be possible for "a victim of a sexual assault on another's property [to] bring suit under a premises liability theory." (Petitioners' Brief, p. 11). While technically correct, Petitioners' generalized description of *Burns* omits the critical points of distinction. To begin with, *Burns* involved an alleged duty to protect a resident of a treatment facility and not a duty to warn a third-party visitor in a private residence. *Id.* at 79, 448 S.E.2d at 591. More importantly, the plaintiff-victim in *Burns* was not a licensee, but an invitee – thus implicating a higher duty of care. *Id.* at 80, 448 S.E.2d at 591. Thus, *Burns* provides yet another illustrative contrast to the relationship at issue in this case. The plaintiff-victim in *Burns* was allegedly assaulted while within the defendant's custody and under the defendant's institutional care. Despite this, the opinion actually reversed the jury verdict in favor of the victim, finding error in the trial court's failure to charge that the defendant was "not the insurer of the safety of [its clients]." *Id.* at 78, fn. 2, 448 S.E.2d at 590, fn. 2.

Most informatively, the *Burns* Court rested its premises liability analysis on the threshold finding of a special relationship between the defendant and the plaintiff-invitee. *Id.* at 79, 448 S.E.2d at 591. The injection of the special relationship prerequisite in *Burns* suggests that the Court of Appeals did not consider the traditional law of premises liability adequate to evaluate liability arising from the alleged criminal conduct of a third-party. Though Petitioners claim there is "little difference between a pedophile and, say, a beehive" (Petitioners' Brief, p. 13), the differences are significant. An active – and, therefore, potentially dangerous – beehive is readily identifiable by a homeowner. The

burden and risks of warning third-parties about the threat presented by an active beehive are slight. The likelihood that an independent adult will actually commit a morally-reprehensible criminal act, on the other hand, is not readily determinable. *See generally Feld v. Merriam*, 485 A.2d 742, 746 (Pa. 1984).[5] Moreover, the burden and risks of warning third-parties of the potential for such behavior are **great**, and in some instances, the warning itself could subject the homeowner to liability. The repercussions for giving such a warning are numerous, particularly where the warning impacts the spousal relationship and children of that relationship.[6] Such considerations no doubt informed the development of the "special relationship" and "specific threat" tests clarified by this Court in the years after *Burns*.

In sum, the *Burns* opinion is inapposite, and if anything, only underscores Petitioners' inability, as licensees, to establish a duty under the law of premises liability. Petitioners' arguments are better assessed (and dismissed) under the more recently-developed, special relationship framework, which takes into account the various policy

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[5] Though the facts of *Feld* are not directly analogous, the *Feld* Court had occasion to opine on the very distinction disputed by Petitioners. In chastising the lower court for failing to recognize the "crucial distinction" between the risk of injury from a physical defect, on the one hand, and a criminal act, on the other, the Pennsylvania Supreme Court stated: "In the former situation the [the property owner] has effectively perpetuated the risk of injury by refusing to correct a known and verifiable defect. On the other hand, the risk of injury from the criminal acts of third persons arises not from the conduct of the [the property owner] but from the conduct of an unpredictable independent agent." *Feld*, 485 A.2d at 746 (declining to impose duty in the latter case because it would make landlords the insurers of their tenants' safety).

[6] This case is not only about the duty to warn of "third-party" criminal conduct in the abstract, but of criminal conduct by one's own spouse. As such, Petitioners' proposed expansion of liability should be approached with additional sensitivity and caution. *See generally Theisen v. Theisen*, 394 S.C. 434, 446, 716 S.E.2d 271, 277 (2011) ("It is beyond question that the public policy of this State favors the institution of marriage . . ."). One reason for the rejection of such liability in *Eric J. v. Betty M.*, 76 Cal. App. 4th 715 (Cal. Ct. App. 1999) was that any other result "would create intolerable conflicts of interest within families." *Id.* at 730. The recognition of liability in this case would similarly create immediate conflicts, not only within families but within marital relationships.

considerations at issue. Accordingly, the Court of Appeals correctly found that Respondent had no duty to warn under a premises liability theory.

2. Mr. Bibby Was Not a Concealed Dangerous Condition Known to Respondent.

Though unnecessary, a further evaluation of Petitioners' claim under the law of premises liability does nothing to change the result. As noted by Petitioners, a property owner owes a licensee a duty "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 may be dangerous to him, and which he may reasonably be expected to discover." *See Neil v. Byrum*, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (emphasis added). Even if this standard were to be applied, Petitioners have not demonstrated that (1) Mr. Bibby was a "dangerous condition" on the property (2) about which Respondent had the requisite knowledge.

First, unlike a dangerous staircase or a "beehive," Mr. Bibby was an independent human actor over whom Mrs. Bibby possessed no ownership. *Cf. Neil*, 288 S.C. at 474, 343 S.E.2d at 616 (determining existence of duty to warn licensee of dangerous staircase). Therefore, as a matter of law, Mr. Bibby cannot properly be categorized as a dangerous "condition" on the property giving rise to a duty to warn. On this point, the opinions of other jurisdictions are instructive. In *Hackett v. Schmidt*, 630 So.2d 1342 (La. 1993), for example, the Louisiana Court of Appeals rejected a similar attempt to use premises liability law as a separate basis for asserting liability against the wife of a child molester for failure to warn. Dismissing the plaintiff's attempt to draw an analogy between the offender and a "hole in the floor" or "the presence of a dog," the *Hackett* Court declared: "[T]his situation cannot be likened to a premises liability situation. . . .

[The husband] is not [the wife's] property." *Id.* at 1329; *see also Allen*, 669 A.2d at 364 (noting that the requirement for notifying licensees of certain "conditions on the land" has no application "to the risk of injury from criminal acts of third persons").

The California Court of Appeals engaged in a scholarly analysis of the same issue in *Eric J. v. Betty M.*, 76 Cal. App. 4th 715 (Cal. Ct. App. 1999). *Eric J.* involved a claim on behalf of a child who was molested by his mother's boyfriend at the home of the boyfriend's relatives. The plaintiff argued that the relatives should have warned her in light of their knowledge that the boyfriend had been convicted of felony child molestation four years earlier and released on parole. *Id.* at 717. Like the Petitioners' "beehive," the plaintiff in *Eric J.* likened the offender to a "vicious pit bull." After providing a thorough discourse on the law, the California Court of Appeals disagreed. While acknowledging, "in retrospect," that the boyfriend-offender was the "moral equivalent of a vicious pit bull," the Court rejected any contention that he could be equated – for purposes of premises liability – to either an "inanimate, dangerous condition, or that of a dangerous animal." *Id.* at 725-26. The Court could not square treating the offender as a "brute beast without the capacity to repent" with the fact that he was an individual released on parole with at least the possibility of having been rehabilitated. *Id.* at 726.

By the same token, in this case, Mrs. Bibby believed that a dark chapter had been closed after Mr. Bibby underwent treatment "with flying colors" (App. p. 131, line 11), and they lived together for well over a decade without any report of recidivism. To treat him as a "brute beast," or condition of the property, would be inconsistent with his status as a free and independent human actor – at least theoretically capable of rehabilitation.

As suggested by the Court of Appeals in its analysis, to do otherwise would be equally difficult to square with the State's decision to release Mr. Bibby back into the home following his treatment in 1995. Because Mr. Bibby was neither a "condition," nor the property, of Mrs. Bibby, she had no duty to warn arising from the law of premises liability. *See id.*; *see also D.W. v. Bliss*, 112 P.3d 232, 243 (Kan. 2005) (affirming summary judgment for wife of offender on duty to warn claim and rejecting premises liability theory of recovery).[7]

Regardless of Mr. Bibby's status as a "condition" of the property, Petitioners have not established, and cannot establish, the requisite knowledge on the part of Mrs. Bibby. *See Neil*, 288 S.C. at 473, 343 S.E.2d at 616 (noting that dangerous condition must be "known" to the possessor); *see also Singleton*, 377 S.C. at 201, 659 S.E.2d at 204 ("the [defendant] has no duty to search out and discover dangers or defects in the land"). As previously stated, there is no evidence that Mrs. Bibby had actual knowledge of the minor Petitioners' alleged abuse (which abuse is denied). Further, to the extent relevant, and for all of the reasons argued hereinabove, Petitioners have not established, and cannot establish, that Mrs. Bibby knew that Mr. Bibby presented an active, specific threat to the minor Petitioners.

Finally, in reference to certain extra-jurisdictional case law, Petitioners ask this Court to consult *J.S. and M.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998) as instructive. (Petitioners' Brief, p. 12). *R.T.H.*, however, is inapposite for several reasons. First,

[7] One final distinction between a beehive and a third-party criminal is that a beehive, by virtue of its nature as property, cannot be held directly accountable in a civil or criminal action. A third-party criminal, on the other hand, may be held accountable by both society and the victim. In *Bliss*, the Supreme Court of Kansas rejected the duty-to-warn action against the wife as an unwarranted attempt to convert her ownership interest "into responsibility for [her husband's] criminal actions." 112 P.3d at 243. Petitioners in this case effectively seek to do the same.

though cited in the context of Petitioners' premises liability argument, the plaintiffs in *R.T.H.* do not appear to have based their case on a premises liability theory, and the New Jersey Supreme Court did not evaluate it as such. Accordingly, the *R.T.H.* opinion has no apparent relevance to Petitioners' premises liability argument. Second, the *R.T.H.* Court followed New Jersey law in recognizing a potential duty to warn on the part of a wife without any analysis of whether a "special relationship" was present. Indeed, the term "special relationship" is conspicuously absent from the opinion and, in fact, it does not appear that one existed on the facts alleged. In this respect, the *R.T.H.* opinion is an outlier and in direct conflict with long-established law in South Carolina. Third, the defendant-wife in *R.T.H.* admitted that "at all relevant times . . . she knew or should have known of her husband's proclivities/propensities." *Id.* at 928. She also knew that her husband spent substantial time alone with the minor plaintiffs and, on at least one occasion, she referred to them as his "whores." *Id.* at 927. In sum, *R.T.H.* fails to support Petitioners' arguments under any theory of recovery, and if anything, offers yet another illustrative contrast to the instant case.

For all of the foregoing reasons, Petitioners cannot establish a duty to warn under a premises liability theory of recovery, and this Court should affirm the opinion of the Court of Appeals.

[CONCLUSION BEGINS ON FOLLOWING PAGE.]

CONCLUSION

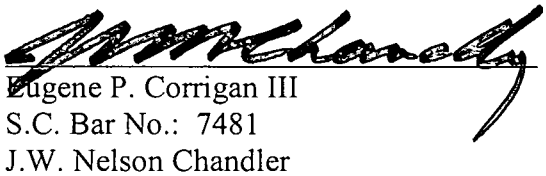
Whatever the circumstances, the molestation of a child is an abhorrent and reprehensible crime. Respondent's defense of this case should in no way be seen as a defense of any such conduct. This appeal is not about whether Mr. Bibby should be held accountable in any respect. The question before this Court is whether Mrs. Bibby should be held potentially liable for an alleged tort of omission.

The Court of Appeals correctly understood and applied the law of this State. As noted by Petitioners, Judge Williams dissented and argued for the imposition of a duty to warn. In so doing, he cited three extra-jurisdictional cases, which, tellingly, have a common denominator that is not present in this case. *See Pamela L. v. Farmer*, 112 Cal. App. 3d 206 (Cal. Ct. App. 1980); *J.S. and M.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998); *Doe v. Franklin*, 930 S.W.2d 921 (Tex. Ct. App. 1996). In each of the cases relied upon in the dissent – in addition to other, more egregious facts – the wife acted as a virtual accomplice, and was actively involved in the husband-molester's successful efforts to be alone with the minors. *See Pamela L.*, 112 Cal. App. 3d at 209 (assuring parents of minors that it would be perfectly safe for minors to swim alone with husband and preparing food to entice minors to pool when wife was not home); *R.T.H.*, 714 A.2d at 336 (finding husband alone with minor girls on several occasions and calling them his "whores" and "bitches"); *Franklin*, 930 S.W.2d at 929 (assuming task of caring for minor and then leaving minor alone with husband-molester, despite having been told directly by the minor of the husband's offenses). In this case, by contrast, Respondent never left the minor Petitioners alone with Mr. Bibby and, in fact, had no knowledge that they were ever alone with him.

This appeal requires the Court to determine whether the circumstances justify a departure from the common law that there is no general duty to warn of the dangerous propensities of others. The facts of this case do not present the occasion for this Court to so expand the scope of tort liability in this State. The imposition of a duty on these facts would place friends and spouses of prior offenders in precarious positions indeed. Such individuals would have to continually evaluate whether to disclose a prior incident to third parties – even when the offender was rehabilitated and there is no knowledge of the offender being alone with any minors. Recognition of the proposed duty would no doubt have ramifications beyond the specific facts of this case, potentially creating exposure in a variety of scenarios.

For all of these reasons, and any others the Court may deem appropriate, the opinion of the Court of Appeals should be AFFIRMED.

Respectfully submitted,



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March 17, 2015

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,

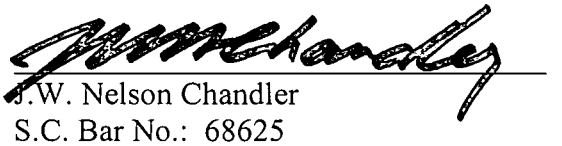
v.

Daniel Bibby, Sr., and Michelle Bibby

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

PROOF OF SERVICE

I certify that I have served the foregoing **BRIEF OF RESPONDENT** on Petitioners by depositing a copy of it in the United States Mail, postage prepaid, on March 17, 2015, addressed to their attorneys of record, Eric M. Poulin and Roy T. Willey IV, Anastapoulo Law Firm, LLC, 2557 Ashley Phosphate Road, North Charleston, SC 29418.



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REPLY TO:
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March 17, 2015

VIA U.S. MAIL
The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211

Re: *Jane Roe, et al. v. Daniel Bibby Sr., et al.*
Case No. 2010-CP-08-3732
Appellate Case No. 2014-002500

Dear Mr. Shearouse:

We represent the Respondent in the above-referenced appeal. Enclosed, please find one (1) unbound original and sixteen (16) bound copies of the *Brief of Respondent* and *Proof of Service*. 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

Enclosures (as noted)

cc: Eric M. Poulin, Esquire/Roy T. Willey IV, Esquire (w/enclosure)