STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	**CIVIL ACTION NO.: 2013-CP-10-3901**
Charleston Electrical Services, Inc., and Selective Insurance Company of South Carolina, as subrogee of Charleston Electrical Services, Inc.,	)	**ORDER ENTERING JUDGMENT IN FAVOR OF DEFENDANT, WANDA G. RAHALL**
Plaintiffs,	)	
v.	)	
Wanda G. Rahall	)	
Defendant.	)	

BACKGROUND

This is an action for contribution pursuant to Sections 15-38-10 through 70, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (hereinafter referred to as the "SCCATA")[1]. This matter arises out of an August 20, 2010, incident in which a dog jumped up on Elsie Mae Rabon (hereinafter referred to as "Rabon") knocking her to the ground and severely injuring her.

Rabon brought suit against Plaintiffs, Charleston Electrical Services, Inc., (hereinafter referred to as "CES") on December 31, 2010, in the Charleston County Court of Common Pleas alleging negligence and strict liability, which action was captioned *Elsie Mae Rabon v. Charleston Electrical Services, Inc.*, and assigned Civil Action No. 2010-CP-10-10666 (hereinafter referred to as the "Underlying Action"). In turn, CES brought a third-party indemnification action against

[1] At the commencement of the trial Plaintiffs, Charleston Electrical Services, Inc., and Selective Insurance Company of South Carolina, withdrew their claim for equitable indemnity. Accordingly, equitable indemnity is no longer a part of this case and will not be discussed herein.

Rabon's daughter, Defendant, Wanda Rahall (hereinafter referred to as "Rahall") and George Kornahrens (hereinafter referred to as "Kornahrens"). Rabon and CES settled the Underlying Action for $200,000.00 dollars (hereinafter referred to as the "Settlement"), and executed a release which released all parties involved in the Underlying Action. The Underlying Action was dismissed with prejudice as to Rabon's claim and without prejudice as to CES's claim against Rahall and Kornahrens. On July 3, 2013, CES, and its liability insurance carrier, Selective Insurance Company of South Carolina (hereinafter referred to as "Selective") initiated the present action against Rahall[2] seeking to recover half of the settlement proceeds paid Rabon.

This matter came before me for a trial on the merits on Friday, June 17, 2016. Present at the hearing were Andrew F. Lindemann, Esq., of Davidson & Lindemann, P.A., Columbia, South Carolina, on behalf of Plaintiffs, CES and Selective, and Elizabeth F. Fulton, Esq., and Edward K, Pritchard, III, Esq., of Pritchard Law Group, LLC., Charleston, South Carolina, on behalf of Rahall. No testimony or evidence was introduced as, by agreement of the parties, this matter is to be decided based on the joint stipulation of facts together with the three exhibits thereto submitted by the parties, the transcript of the deposition of John M. Oakley given November 16, 2011, in the Underlying Action and exhibits thereto, the transcript of the deposition of Kornahrens given November 16, 2011, in the Underlying Action and exhibits thereto, the transcript of the deposition of Rahall given November 16, 2011, in the Underlying Action and the transcript of the deposition of Rahall given May 26, 2016, in this Action. As explained hereinbelow, based on the joint stipulation of facts, the three exhibits, the deposition transcripts and the applicable law, judgment must be entered in favor of Rahall and this matter dismissed as to her with prejudice.

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[2] CES declined to seek contribution against Kornahrens supposedly on the basis that he was an employee of CES.

FACTS

On August 20, 2010, Rahall and Rabon went to visit Rahall's boyfriend, Kornahrens while he was working at CES, whose business is located at 60 Romney Street, Charleston, South Carolina (the "Property"). While on the Property, Gunner, a German shepherd that served as guard dog for CES, jumped on Rabon, knocking her to the ground, causing her to fracture her left hip (hereinafter referred to as the "Incident").

Kornahrens is and has been for many years the owner of the Property. The Property consists of a large yard which is used by CES in its business and two buildings. Kornahrens lives on the second floor of the main building (hereinafter referred to as the "Apartment") and leases the remainder of the Premises to CES. CES uses the yard to store a lot of its equipment, including, among other things, trucks, ladders, and supplies. Essentially, the yard is CES's parking lot for its trucks and storage area for its materials. No vehicles other than CES' vehicles were permitted to be parked in the yard[3] The parking spaces for the office and Apartment are located adjacent to Romney Street separate from the yard.

Kornahrens was the original owner of CES. In approximately 1992, Kornahrens' stepson, John Oakley (hereinafter referred to as "Oakley"), became CES' owner. Kornahrens retained no ownership interest in CES. After transferring ownership of CES to Oakley, Kornahrens became a full-time salaried employee of CES[4]. Rahall is not and never has been an agent or employee of CES, does not and did not have any ownership interest in CES or the Property and does not and did not have any relationship to or with CES or the Property.

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[3] CES's employees were not permitted to park their private passenger vehicles in the yard while they were at work. CES' customers were not permitted to park their cars in the yard either. At one point, however, Kornahrens temporarily stored a boat in the yard.

[4] Kornahrens leased the Property to CES as a part of the transaction in which ownership of CES was transferred to Oakley.

Rahall owns a home in Myrtle Beach and is a citizen and resident of Horry County. Rabon lives in a senior living apartment complex in Myrtle Beach separate from Rahall. Rabon was not and never has been in the custody or care of a guardian or conservator, and she is and was legally competent[5].

At the time of the Incident, Rahall and Kornahrens were and had been for five years involved in a romantic relationship. Though engaged at one time, Rahall and Kornahrens were not and never have been married. Rahall typically stayed with Kornahrens in the Apartment when she was in Charleston. Rabon also stayed in the Apartment when she was in Charleston. When in Myrtle Beach, Kornahrens stayed with Rahall at her home.

For the last twenty years, CES has kept a guard dog on the Property to deter theft of its equipment[6]. On January 30, 2010, Kornahrens purchased Gunner, a full-blooded German shepherd, for CES. CES was the owner of Gunner, and at the time of the Incident, Gunner was under the care and keeping of CES[7].

Rahall rarely interacted with Gunner. Shortly after CES purchased Gunner, Rahall told Rabon about him.

Gunner, like all of the other guard dogs before him, lived in the yard. Neither Gunner nor any of the previous guard dogs were allowed inside the main building. Every morning, Gunner was fed and on weekdays was chained up prior to the arrival of CES's employees to prevent him from escaping through the opened gates. Once the gates close, typically around 8:30 am, Gunner was released and allowed to roam free in the yard. On weekdays, Gunner was again chained between

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5 Rabon passed away in November 2015.

6 CES has not had the same guard dog for twenty years, but, rather, has had several in succession over the years, though never more than one at a given time.

7 Gunner was given away shortly after the Incident.

3:30 pm and 5:30 pm when CES's employees returned to the yard. Gunner was described as a playful and friendly dog. CES never had a problem with Gunner attacking or biting anyone.

Rahall and Rabon stayed with Kornahrens at the Apartment on the night of August 19, 2010. On August 20, 2010, Rabon accompanied Rahall to a doctor's appointment in Charleston. After Rahall's doctor's appointment, they went to CES to take Kornahrens to lunch. Upon arrival at CES, Rahall walked through the front office toward the back of the Property to speak with Kornahrens who was working in the back, while Rabon waited in the front office. A few minutes later, Rabon exited the office and walked out in to the yard, presumably to join Rahall and Kornahrens. Gunner, who had been unchained by Kornahrens, jumped up on Rabon knocking her to the ground. Kornahrens and Rahall observed the Incident, but neither were able to prevent it from where they were standing. Rabon was immediately transported from CES to Roper St. Francis Hospital by EMS where she was diagnosed with a broken hip.

DISCUSSION

To maintain an action for contribution, CES and Selective must show that Rahall shares "common liability" for the damages suffered by Rabon. *See* Section 15-38-40(D), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended; *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). CES and Selective claim Rahall's liability is grounded in negligence. Because Rahall owed Rabon no duty, this position lacks merit.

To establish negligence, a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Steinke v. S.C. Dep't of Labor, Licensing and Regulation,* 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999)("The court must determine, as a matter of law, whether the law

recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict."). An essential element in a cause of action for negligence is the existence of a legal duty owed by the defendant to the plaintiff; in the absence of a duty, there can be no negligence. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003). "A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence." *Byerly v. Conner*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992)(citation omitted).

In the instant matter, CES and Selective seek to have this Court impose upon Rahall, an affirmative duty to act. Specifically, CES and Selective contend that Rahall owed Rabon a duty to protect Rabon from Gunner or to warn Rabon of the danger associated with Gunner.

One generally has no duty at common law to act affirmatively to protect the interests of another. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003). In order for an affirmative duty to act to arise, one must have a relationship to the injured party recognized by law sufficient to support such a duty. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 644 S.E.2d 43, 46 (2007). As explained in *Hendricks v. Clemson Univ.*, *supra*:

> 'The determination of the existence of a duty is solely the responsibility of the court.' Whether the law recognizes a particular duty is an issue of law to be decided by the Court. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care.

Id. at 456- 457, 578 S.E.2d at 714 (*quoting Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997)(*citing* Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996)). South Carolina law recognizes five exceptions to the general rule that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger: (1) where the defendant has a

special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant. *Faile v. South Carolina Dep't of Juvenile Justice,* 350 S.C. 315, 566 S.E.2d 536 (2002). It is the relationship between the parties, not the potential "foreseeability of injury," that determines whether the law will recognize a duty in a given context. *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.,* 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). "This ensures that the concept of duty in tort liability is not extended beyond reasonable limits." *Williams v. Preiss-Wal Pat III,* 17 F.Supp.3d 528 (D.S.C. 2014); *accord Huggins v. Citibank*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003); *see South Carolina State Ports Auth. v. Booz–Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324, 326 (1986). If there is no duty, the defendant is entitled to a judgment as a matter of law. *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007).

CES and Selective contend that Rahall owed Rabon a duty to act affirmatively for two reasons: (1) Rahall had a special relationship to Rabon which gave rise to a duty; and, (2) Rahall's duty to Rabon arises out of her interest in the Property. Neither position is supported by either the facts or the law.

A. Rahall Owed No Duty to Rabon Arising Out of a Special Relationship.

It is not entirely clear what CES and Selective believes is the relationship between Rahall and Rabon which gives rise to an affirmative duty ~~to~~ on the part of Rahall to protect Rabon from Gunner or to warn Rabon of the danger associated with Gunner. To some extent, CES and Selective ~~seem to~~ contend that a parent-child relationship gives rise to the duty, with the child, Rahall, owing the duty to the parent, Rabon. At other points, CES and Selective ~~seem to~~ advance the theory that the duty arises due to the fact that Rabon is elderly. At other points, CES and

Selective ~~seem to~~ argue that it is a combination of the foregoing. Finally, CES and Selective also ~~seem to~~ take the position that Rahall's duty arises out of her relationship with Gunner. However, it matters not which of these theories CES and Selective is operating under, as the Court's research leads to the ineluctable conclusion that none of these theories is legally or factually sufficient to give rise to an affirmative legal duty on the part of Rahall to protect Rabon from Gunner or to warn her of Gunner's tendencies to jump up on people.

The Court of Appeals decision in *Roe v. Bibby*, 410 S.C. 287, 294, 763 S.E.2d 645, 649 (Ct. App. 2014), *reh'g denied* (Oct. 23, 2014), *cert. granted* (Jan. 16, 2015), contains the most recent appellate court pronouncement on special relationships under South Carolina law. In *Roe v. Bibby*, *supra*, the Court declined the invitation to impose upon a wife a duty to warn minor children living in the neighborhood that her husband had a predilection for sexual molestation holding that there is no general special relationship between a husband and wife or between the wife of a sexual predator and neighboring children which is sufficient to give rise to such a duty. The Court of Appeals based its ruling, in part, on the fact that the wife had no ability to monitor and control her husband. As to the children, the Court of Appeals rested its holding on the fact that the children were not entrusted to the wife's care. This court is quite familiar with the inability of a child to monitor and control the actions of an independent parent.

CES and Selective have failed to present any case from any jurisdiction holding that a child has a general duty to protect his or her parent from harm presented by the conduct of a third party or an instrumentality not within the custody and control of the child. A review of South Carolina case law reveals that South Carolina courts have recognized a special relationship – except for the duty owed by a landowner - sufficient to give rise to an affirmative duty to protect or warn another from danger related to the conduct of a third party or an instrumentality not within the custody and control of the person upon whom the duty is imposed only in five limited and narrow

circumstances: (1) a group home has a duty to supervise a minor child in its care, *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485575 S.E.2d 549 (2003); (2) a psychiatrist has a duty to warn her patient of specific known threat of harm from another patient, *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); (3) the South Carolina Department of Juvenile Justice has a duty to supervise and control a dangerous juvenile in its custody, *Faile v. S.C. Dep't of Juvenile Justice, supra*; (4) the South Carolina Department of Mental Health has a duty to supervise and control an involuntarily-committed patient in its custody, *Bishop v. S.C. Dep't Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998); (5) the South Carolina Department of Parole and Community Corrections has a duty to warn one to whom a specific threat of harm has been directed by a person being released from custody, *Rogers v. S.C. Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995)(no finding of specific threat). Finding no South Carolina case addressing the precise issue at hand, the court embarked on an ~~unprecedented and neoteric~~ juridical journey in facing this novel issue by visiting other jurisdictions for edification and enlightenment. After an exhaustive search this Court has failed to unearth a case in which a court has imposed upon a child of any age a general duty to protect his or her parent, regardless of age, from harm presented by the conduct of a third party or an instrumentality not within the custody and control of the child.

In each case in which a court found that there was a special relationship sufficient to give rise to an affirmative duty to protect or warn another from danger related to the conduct of a third party or an instrumentality not within the custody and control of the person upon whom the duty is imposed, the case turned on a finding that the person upon whom such duty was imposed either had a responsibility to supervise or an ability to monitor and control either the victim or the perpetrator or instrumentality of the act which gave rise to the injury. *E.g., Cunningham ex rel. Grice v. Helping Hands, Inc., supra*; *Roe v. Bibby, supra.* The cases, both within and outside of South

Carolina, reflect a reluctance to impose a duty to protect, warn and supervise an adult unless there is a clear indication of some incapacitation of normal faculties, a well-established authority relationship and/or a substantial risk of serious harm. *Id*; *Robinson v. Vivirito,* 217 N.J. 199, 86 A.3d 119 (2014)(school principal owes no duty of care to a third party who decides to use school property after hours for personal purposes and is injured by a stray animal that is neither owned nor controlled by school personnel); *Knight v. Merhige,* 133 So.3d 1140 (Fla. Dist. Ct. App.), *reh'g denied* (Mar. 26, 2014), *review dismissed*, 143 So.3d 919 (Fla. 2014), *and review denied*, 157 So.3d 1045 (Fla. 2014), *and review denied sub nom. Sitton v. Merhige*, 157 So. 3d 1048 (Fla. 2014)(Parents owe no legal duty to protect extended family members from the conduct of adult son, who shot and killed several family members at a holiday dinner as no special relationship existed that required parents to protect other adult family members from adult son's conduct); *Millea v. Erickson*, 849 N.W.2d 272 (S.D. 2014)(Babysitter's mother's boyfriend's adult son, who stopped by mother's and boyfriend's apartment, did not have a special relationship with child who died from positional asphyxiation so as to give rise to a duty to provide care or aid, despite contention that babysitter deferred to mother's boyfriend's son because of his age and quasi-stepbrother-like role to her); *Toribio v. Pine Haven, LLC*, 2014 WL 3865845 (D.N.J. Aug. 5, 2014)(no special relationship between decedent and decedent's friend's parents when decedent drowned while vacationing at a public lake with decedent's friend's parents); *Bridges v. Parrish*, 366 N.C. 539, 742 S.E.2d 794 (2013)(Parents were not liable for the criminal actions of their 52–year–old son who took gun from their home and used the gun to shoot his girlfriend); *Estate of Cilley v. Lane*, 2009 ME 133, 985 A.2d 481 (2009)(no special relationship between girlfriend and boyfriend where boyfriend accidentally shot himself and girlfriend failed to get timely medical assistance); *Ventura v. Picicci*, 227 Ill.App.3d 865, 592 N.E.2d 368 (1992)(defendant

not liable for adult son who shot plaintiff in defendant's house because no duty to control adult son); *Kosrow v. Smith* 162 Ill.App.3d 120, 113 Ill.Dec. 104, 514 N.E.2d 1016 (1987)(no negligence in failing to control the actions of a houseguest who drove a car while intoxicated); *Villacana v. Campbell*, 929 S.W.2d 69 (Tex. App. 1996), *writ denied* (Feb. 21, 1997)(finding no liability as to parents whose adult child murdered two people on the basis that parents had no special relationship with adult son or duty to control adult son); *Theobald v. Dolcimascola*, 299 N.J.Super. 299 (App. Div. 1997)(As a matter of law, friendship—standing alone—is an insufficient basis for imposing a special relationship upon two parties).

CES and Selective urge this Court to go where no court before it has gone and recognize a child-parent relationship is a special relationship sufficient to support a duty on the part of the child to protect his or her elderly parent from harm presented by the conduct of a third party or an instrumentality not within the custody and control of the child. They, likewise, urge this court to impose a duty on one to protect another from a dog owned by a third-party if it is foreseeable that the dog might injure the other person. This court declines both invitations as in neither situation is there a responsibility to supervise or an ability to monitor and control either the parent or the dog and there is no indication of some incapacitation of normal faculties, or a well-established authority relationship and/or a substantial risk of serious harm. To find either duty exists under the facts or circumstances of this case would expand the concept of duty in tort liability well beyond all reasonable limits[8].

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[8] The imposition of such duties could potentially lead to limitless absurd results. Though the Court could catalogue examples of such absurd results for hundreds of pages, the Court will limit itself to but a handful of examples. For instance, Charles, Prince of Wales, age 67, would have a duty to protect and warn Queen Elizabeth II, Queen of the United Kingdom, Canada, Australia, and New Zealand, and Head of the Commonwealth as well as Queen Jamaica, Barbados, the Bahamas, Grenada, Papua New Guinea, Solomon Islands, Tuvalu, Saint Lucia, Saint Vincent and the Grenadines, Belize, Antigua and Barbuda, and Saint Kitts and Nevis, of and from all foreseeable harm; three of the eight United States Supreme Court Justices are age seventy-seven of older - Stephen G. Breyer, Associate Justice, is age 77 and will be age 78 on

Rabon and Rahall were mother and adult daughter, respectively. By all indications both were mentally and physically competent at the time of the Incident; there is no evidence that either was anything to the contrary. Rabon lived independently in a senior living apartment complex in Myrtle Beach separate from Rahall. Rabon was not and never has been in the custody or care of a guardian or conservator, and she is and was legally competent. There is no evidence to suggest that Rabon was unaware of Gunner's presence or that she was unable to understand and appreciate the injuries a full grown German Shepard is capable of. There is no evidence to suggest that Rabon was any more susceptible of being knocked down by a full grown German Shepard than any other person her size, which by all indications is well within normal limits, regardless of age. Simply stated, Rabon was perfectly capable of taking care of herself and there is nothing which indicates that Rahall was in a better position to take care of Rabon than was Rabon herself.

The relationship between Rahall and Rabon does not fall under any of the five exceptions listed above. Gunner was owned by CES. Rahall did not own, possess or control Gunner, and, in fact, had little to no interaction with Gunner. Gunner posed no specific threat to Rabon. Under Section 47-3-110(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, the party liable for

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August 15th, Anthony M. Kennedy, Associate Justice is age 79 and will be age 80 on July 23, and Ruth Bader Ginsburg, Associate Justice is age 83 – and if CES' and Selective's position is adopted, their respective children would have a duty to protect and warn them from and of all foreseeable harm; Karis Jagger, age 45, Jade Jagger, age 44, Elizabeth Jagger, age 32, James Jagger, age 30, and Georgia May Jagger, age 24, each would have a duty to protect and warn Sir Michael Philip "Mick" Jagger, age 72, of and from all foreseeable harm; Susan Alice Buffett, age 62, Howard Graham Buffett, age 61, Peter Buffett, age 58, each would have a duty to protect and warn Warren Edward Buffett, age 85, of and from all foreseeable harm; and, assuming the winner of this year's presidential election wins a second term, at the end of the second term Hillary Rodham Clinton and Donald John Trump will be age 77 and 78, respectively, and Chelsea Victoria Clinton, then age 44, and Ivanka Marie Trump, then age 42, will each owe a duty to their respective presidential parents to protect and warn her or him of and from all foreseeable harm, even though her presidential parent has a secret service detail. As noted, the Court could continue on for hundreds of pages with equally absurd examples, listing, among others, members of Congress, leaders of other countries, captains of industry, military leaders, governors, legislators and judges. The notion that the children of many of the world's most powerful and influential people have a duty to protect and warn the very people charged with the safety and protection of the people of the world would expand the concept of duty in tort liability well beyond all reasonable limits. Further, the absurdity that one who owns a dog would seek to impose liability on the daughter of the victim for an injury caused by the dog on its owner's property while in its owner's control ~~should~~ not ~~be~~ lost on the court.

a dog attack must be either the dog's owner or a person having the dog in his care or keeping.

Rahall undertook no duty to protect her mother nor did she negligently or intentionally create the risk of Gunner jumping on Rabon. Rahall left Rabon in the office, a place Gunner never entered, to speak to Kornahrens in the yard. Rabon of her own volition exited the office into the yard, where she encountered Gunner who jumped and knocked her down. Rabon was aware of Gunner's presence on the Property, and had visited the Property numerous times in the five years Rahall and Kornahrens had been together. Rahall had no notice that Gunner was a dangerous animal. There is no evidence Gunner was a dangerous animal or had any malicious intent when he jumped on Rabon. Neither Kornahrens nor any other CES employee warned Rahall to be cautious of Gunner or that non-employees were prohibited in the yard. Rahall could not warn her mother of a danger that she (or anyone else for that matter) did not know existed.

B. Rahall is Not Liable for Premises Liability Theory

CES seeks to impose liability on Rahall under a theory of premises liability. This position is patently meritless.

A premises liability action is one sounding in tort. *See Shipes v. Piggly-Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977). As in any other tort action, in order to prevail, a plaintiff in a premises liability case must establish by a preponderance of the evidence that: (1) the defendant owed the plaintiff a duty, (2) the defendant breached such duty and (3) the defendant's breach of such duty proximately caused the plaintiff damages. *Id.*

Generally speaking, "one who controls the use of property has a duty of care not to harm others by its use." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). "An owner of land possesses a general duty to warn others of latent hazardous conditions on his land. This duty arises from the owner's superior knowledge of conditions on the premises within

his control." *Byerly v. Conner*, *supra* at 443, 415 S.E.2d at 798. Conversely, "one who has no control [over the property] owes no duty." *Miller v. City of Camden*, *supra* at 314, 494 S.E.2d at 815.

> [W]hen land is occupied by a lessee . . . the law of property regards the lease as equivalent to a sale of the premises for the term of the lease. In the absence of an agreement to the contrary, the lessor surrenders possession and control of the land to the lessee. After the premises are surrendered in good condition, the lessor typically is not responsible for hazardous conditions which thereafter develop or are created by the lessee.

Byerly v. Conner, *supra* at 443, 415 S.E.2d at 798.

On the other hand,

> '[a] possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.'

Binnicker v. Adden, 204 S.C. 487, 492, 30 S.E.2d 142, 145 (1944)(quoting RESTATEMENT OF THE LAW OF TORTS § 360).

In the first place, an injury caused by a dog is not actionable under premises liability at common law as the dog is not a defective condition upon the land. Further, under Section 47-3-110(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, the party liable for a dog attack must be either the dog's owner or a person having the dog in his care or keeping, regardless of where the attack occurs.

Second, CES and Kornahrens maintained possession and control of their respective portions of the Property at the time of the Incident[9]; Rahall had no right to possess or control any

[9] Q. As I understand it, you own the building that the business is in?

portion of the Property. As an invited guest in the Apartment, Rahall had no legal right to possess or control the Property, especially the portion leased to CES. Rahall paid no rent, utilities or taxes on the Apartment. At all times, Rahall maintained a separate residence in Myrtle Beach. Though Rahall was allowed to visit the Apartment at the pleasure of Kornahrens, she had no legally recognized right in and to the Property. She had no legal right to remain there if asked to leave by Kornahrens. She had no right to quiet possession to the Property. She had no right to have another removed from the Property. As an invited guest in the Apartment,

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A. I do.

Q. How long have you owned that building?

A. I guess about 30 some years.

Q. And you rent the first floor to Charleston Electric?

A. Yes, sir, first floor and everything in the yard. We got a building in our back also, a building in the back, supplies in and things like that

Q. And that's rented to the company as well?

A. Yeah, that's rented to the company. Everything on the ground is rented to the company.

Q. What does the company pay you for rent?

A. 3,000 -- I think it's 3,000, 3500 a month. I really don't know.

Q. Is there any type of lease agreement or written agreement?

A. No lease agreement.

Q. And then you live in the second floor apartment?

A. Yes, sir.

Kornahrens Dep. 9:6 – 10:4, Nov. 16, 2011. (emphasis added).

Kornahrens and CES clearly had a tenancy at will, as defined by Section 27-33-10(3), CODE OF LAWS OF SOUTH CAROLINA, 1976, and thus an enforceable lease agreement existed. *See generally, Bruce v. Durney*, 341 S.C. 563, 569-70, 534 S.E.2d 720, 724 (Ct. App. 2000) (An express agreement is not necessary to create the relation of landlord and tenant, but such relation may arise from the implied agreement of the parties, and may be established by proof of circumstances authorizing the inference that the parties intended to assume such relation toward each other).

Rahall owed no duty to another coming upon the Property. As Rahall neither owned the Property nor possessed a leasehold interest, she was at most a guest of Kornahrens. *See, Vogt v. Murraywood Swim & Racquet Club,* 357 S.C. 506, 511, 593 S.E.2d 617, 620 (Ct. App. 2004)(holding plaintiff was a licensee on grounds that he was a guest of a dues-paying member, who entered the swim club not by right, but by the permission of the member...that it is undisputed that he visited the pool only because members invited him and his presence at the pool was entirely permissive). Something more than physical presence on the land – even if frequent and for prolonged periods - is required to give rise to a duty in tort; one must have a legally recognized interest in the property sufficient to give rise to the right and ability to possess and control the property to the exclusion of members of the general public. *See Dunbar v. Charleston & W.C. Ry. Co.*, 211 S.C. 209, 44 S.E.2d 314 (1947). As a mere guest herself, Rahall owed Rabon, another guest, no duty as a matter of law.

While Kornahrens occupied the Apartment, the remaining portions – the two buildings and the yard – were leased to CES, and, thus in its exclusive possession and control. Where injury is caused by a dangerous or defective condition on the premises of real estate, the decision of whether a person has an affirmative duty to keep the premises in a safe condition or warn of dangers on the premises "depends in general upon his having control of the property." *Dunbar v. Charleston & W.C. Ry. Co., supra* at 216, 44 S.E.2d at 317 (1947). Consequently, "[o]ne who controls the use of property has a duty of care not to harm others by its use." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (*citing Dunbar*, 211 S.C. at 216, 44 S.E.2d at 317; *Peden v. Furman Univ.*, 155 S.C. 1, 19, 151 S.E. 907, 913 (1930)). "Conversely, one who has no control owes no duty." *Id.* (*citing Clark v. Greenville County*, 313 S.C. 205, 210, 437 S.E.2d 117, 119 (1993)). Neither Rahall nor Kornahrens owned or controlled the portion of

the Property leased to CES so with regard to the portion of the Property leased to CES, no duty attached to either. *See Bruce v. Durney*, 341 S.C. 563, 571, 534 S.E.2d 720, 725 (Ct. App. 2000) (holding a landlord is not liable for injuries caused by an animal kept by a tenant on leased property). As the Incident occurred in the yard, which irrefutably was in the exclusive possession and control of CES, assuming a premises liability claim was actionable, CES as owner and possessor of the yard was the only one who owed the duty to Rabon.

Conclusion

As discussed at length above, Rahall owed Rabon no duty to protect her from or warn her of any danger presented by Gunner. Accordingly, there can be no liability on the part of Rahall arising in negligence, and, thus, no common liability.

NOW, THEREFORE, based on the foregoing, ordered adjudged and decreed that judgment is hereby entered in favor of Defendant, Wanda G. Rahall, dismissing this matter.

AND IT IS SO ORDERED!

The Honorable Mikell Ross Scarborough

July 16, 2016
Charleston, South Carolina

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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Master Order-entering judg in favor of defnt Wanda Rahall

CASE NO: 2013CP1003901
Charleston Electrical Services Inc VS Wanda G Rayhall

This judgment was entered on the 02th day of August, 2016, and notice mailed first class on Wednesday, August 03, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at http://clerkofcourt.charlestoncounty.org or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

DLSCN 08/08/16

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