THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2016-001842
Case No. 2013-CP-10-3901

Charleston Electrical Services, Inc. and Selective Insurance Company of South Carolina as Subrogee of Charleston Electrical Services, Inc., ... Appellants,

v.

Wanda G. Rahall..... Respondent.

INITIAL REPLY BRIEF OF APPELLANTS

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I. Standard of Review – Factual Findings

In addressing the appropriate standard of review in her response brief, the Respondent Wanda G. Rahall ignores the fact that "an action for contribution lies in equity." *RIM Associates v. Blackwell*, 359 S.C. 170, 597 S.E.2d 152, 157, n.3 (Ct. App. 2004). *See also*, *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829, 835 (1961) (noting that "the right to contribution is ordinarily enforced in equity"). Instead, without any supporting authority, Rahall baldly asserts that this contribution action is an "action at law." Accordingly, Rahall insists that standard of review requires that "the trial court's findings of fact will not be disturbed unless there is no evidence to reasonably them." *See*, Respondent's Brief, p. 7. That is clearly incorrect. Under the proper standard of review, in an action in equity, which a contribution action clearly is, the appellate court "may find facts in accordance with [its] own view of the preponderance of the evidence." *South Carolina Dept. of Transportation v. M&T Enterprises of Mt. Pleasant*, 379 S.C. 645, 667 S.E.2d 7, 12 (Ct. App. 2008). The Court should, therefore, reject the standard of review urged by Rahall.

II. The trial court erred in ruling that the Respondent Wanda Rahall did not owe any duty to warn or protect her elderly mother under the facts of this case.

On appeal, the Appellants contend that Judge Mikell R. Scarborough erred in ruling that Wanda Rahall did not owe any duty to warn or protect her elderly mother, Elsie Rabon, under the facts of this case. The Appellants contend that Rahall owed a duty of care to her elderly mother under either of two distinct theories, both of which were erroneously rejected by Judge Scarborough. First, the Appellants argue that Rahall owed a duty as the possessor of the property where the dog lived and where her mother was a social guest invited there by Rahall. Second, and in the alternative, the Appellants argue that a duty of care was owed to Elsie Rabon based upon a special relationship. Rahall's analyses of both of these theories, like the court below, are in error.

A. Premises Liability Theory

In her attempt to refute the applicability of premises liability law to the Appellants' contribution claim, Rahall first argues that "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." See, Respondent's Brief, p. 9. The trial court made this same erroneous ruling. (Order, p. 14). Rahall's position and the trial

court's ruling overlooks that premises liability law applies to *both* dangerous conditions and dangerous activities present on the land. *See, Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615, 616 (1986); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196, 204 (Ct. App. 2008). A dangerous condition or activity would certainly include the presence of a dangerous animal. Premises liability is not limited to physical attributes of the real property or fixtures on the land. Indeed, that very point was highlighted in *Burns v. South Carolina Commission for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994), where this Court found that a case involving a sexual assault, contrary to the trial court's ruling, "is a premises liability case." 448 S.E.2d at 591. Harmful conduct occurring on the premises, including criminal conduct or in this case the presence of an animal that posed a risk of harm to Elsie Rabon, are properly subject to the application of a premises liability analysis.

Rahall also miscomprehends this Court's decision in *Roe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014). Rahall appears to argue that the *Roe* Court *entirely* rejected under any circumstances the application of premises liability law to a sexual assault occurring on the premises, which would put that decision at odds with *Burns*, where this Court clearly held a sexual assault case "is a premises liability case and, therefore, the trial judge should have charged the jury on premises liability." *Burns*, 448 S.E.2d at 591. Instead, a proper reading of *Roe* shows that this Court reaffirmed *Burns* but distinguished it solely on the facts of

the case. The *Roe* Court indeed found as a "correct statement" that "a victim of sexual assault may bring suit under a premises liability theory." *Roe*, 763 S.E.2d at 650. The *Roe* Court then proceeded with its analysis and concluded that there was no duty to warn "under a premises liability theory" based on the specific facts of that case. 763 S.E.2d at 651. In particular, the Court focused on the absence of evidence that "Respondent knew Mr. Bibby was a dangerous condition in their home or that he was abusing minor Appellants." *Id.* In contrast, in the present case, Rahall was very aware that the dog Gunner was "overly friendly" and that he would routinely jump on people – with that occurring even daily. Rahall testified that the dog had done the same to her several times and that she had frequently seen the dog jump up on other people before the August 20, 2010 incident. *See*, Rahall Depo. I, pp. 11-12. In fact, the dog had jumped up on her "a couple times the week before." *See*, Rahall Depo. II, p. 19.

Rahall also attempts to distinguish *Roe* because it involved a sexual assault. However, *Roe* may not be read as limiting the application of premises liability law only to sexual assaults as opposed to other types of assault or harmful conduct occurring on the premises. Harmful conduct including any type of physical assault or injurious behavior – such as the harmful actions of an animal on the premises – may certainly give rise to premises liability for the owner or possessor of the property.

As to the issue of possession, Rahall argues without any supporting evidence

that Charleston Electrical Services (CES) had "exclusive possession and control" of the area of the premises where Elsie Rabon was injured. That is not accurate. Under the facts of this case, the premises consisting of 60 Romney Street cannot be dissected into separate parts to suggest that CES had *exclusive* control of the yard. While a portion of the property was leased to CES by the owner – Rahall's fiancé George Kornahrens – the premises also included the apartment where Kornahrens and Rahall lived. The apartment and the shop were all part of the same integrated building and shared the yard. Thus, for premises liability purposes, the yard should not be distinguished or dissected from the remainder of the premises. The possessors of the premises as a whole included Rahall who lived and came and went freely there.

Rahall's arguments seem to suggest that only one party may have control of the premises and thus have a duty to warn a visitor of a dangerous condition or activity occurring on the premises. However, that is not the case. Rahall repeatedly argues that CES owed a duty of care, but that has not been disputed. That explains precisely why this is a contribution action. More than one party can concurrently owe a duty of care, and that is precisely the scenario in this case. CES owed a duty of care, but Wanda Rahall did as well. Rahall, as a "possessor" of the premises where she was living on a regular basis owed a duty to her elderly mother – the social guest on the premises – to warn or otherwise prevent her from coming outside where the dog was located. As the Appellants have shown, Rahall

should have made certain that Gunner was chained or otherwise restrained before allowing her mother to walk outside. Even after noting that Gunner was not chained, Rahall took no action to warn or protect her mother although she had the opportunity to do so. Rahall did not make certain her mother stayed away from the yard, nor did Rahall warn her mother of the dog's presence and that he was unrestrained. For these reasons, Rahall breached a duty of care owed to her mother under a premises liability theory.

B. Special Relationship

South Carolina law recognizes that there is a duty to warn or otherwise protect "where the defendant has a special relationship *to the victim*." *Faile v. South Carolina Dept. of Juvenile Justice,* 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). (Emphasis added). In the case at bar, the Appellants have argued that the relationship between Wanda Rahall and her elderly mother, Elsie Rabon, who had come to the premises for a visit, is specifically the type of special relationship that gives rise to a duty to warn and/or protect under the factual circumstances of this case.

In response, Rahall makes several erroneous arguments of law and fact. First, Rahall, like the trial judge, errs in relying on this Court's decision in *Roe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014). In *Roe*, the plaintiff was

attempting to argue that the defendant wife owed a duty to her neighbors and their children to warn about her husband who was allegedly a sexual predator. This Court ultimately found no special relationship because there was no evidence that the wife had knowledge of a specific threat of harm posed by her husband and because there was no evidence that the wife had the ability to monitor, supervise or control *her husband.* Thus, a proper reading of *Roe* shows that this Court addressed the "special relationship" exception from the perspective of the defendant wife's ability to monitor, supervise or control the conduct of the *perpetrator* rather than the *victims*. There is no question in *Roe* that the defendant wife did not have a special relationship with the neighborhood children who were victimized. She clearly had no ability to monitor, supervise or control them.

In contrast, in the present case, the Appellants are asserting that there is a special relationship between Rahall and the *victim*, who was her elderly mother visiting from out of town. Moreover, contrary to Rahall's bald and unsupported assertions in her brief, there is substantial evidence presented that Rahall did have knowledge of a substantial risk of harm posed to her mother by Gunner. In addition, Rahall had the ability to monitor, supervise and control her mother's actions on the premises to keep her from coming into contact with the dog, but she did not do so. As a result, a duty of care was owed by Rahall to her mother.[1]

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[1] Like the trial judge, Rahall includes a string citation of a number of cases from other jurisdictions, but none of those cases are on point or are even closely analogous. Quite

In her brief, Rahall claims that "she had little to no interaction with Gunner." See, Respondent's Brief, p. 17. That is clearly false. Rahall was with her fiancé George Kornahrens when he bought the dog. *See*, Rahall Depo. I, pp. 9-11. Moreover, as discussed above, Rahall testified that she was well aware that Gunner was "overly friendly" and that he would routinely jump on people – with that occurring even daily. Rahall explained that the dog had done the same to her several times and that she had frequently seen the dog jump up on other people before the August 20, 2010 incident. *See*, Rahall Depo. I, pp. 11-12. In fact, the dog had jumped up on her "a couple times the week before." *See*, Rahall Depo. II, p. 19. Thus, the evidence shows that Rahall knew or should have known that an "overly friendly" dog posed a danger to her mother if he jumped on her as the dog was prone to do. Contrary to Rahall's reasoning, there was no need for the dog to have "malicious intent" to be recognized as posing a risk of harm. Clearly, knowledge by Rahall of the dog's repeated tendency to jump up on people even in an "overly friendly" manner is sufficient information to know that a dog of its size (i.e., a German Shepherd) posed a substantial risk of harm to her elderly mother should the dog come into contact with her. That is precisely what occurred, and

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frankly, it is a meaningless string citation that adds absolutely nothing to the analysis. None of those cases address whether the relationship of an adult child and elderly parent creates a special relationship under facts similar to those in this case. None of those cases even address whether a parent-child relationship creates a duty to protect. Likewise, none of those cases address whether a special relationship exists between the defendant and the victim based upon the ability to control the victim as opposed to the ability to control the perpetrator of the harm.

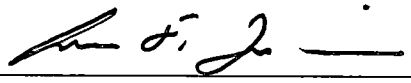
Rahall failed to take any action to warn her mother to stay out of the yard or to prevent her mother from entering the yard without first ensuring that Gunner was restrained. Consequently, a preponderance of the evidence supports a finding of some degree of fault on the part of Rahall, which is sufficient for the Appellants to recover on their contribution claim.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants respectfully renew their request that this Court reverse the Order issued by Master-in-Equity Mikell R. Scarborough and the judgment entered in the Respondent's favor. The Court is requested to find a duty of care was owed and breached by the Respondent under the facts of this case and to remand for entry of judgment in the Appellants' favor.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

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July 12, 2017

THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2016-001842
Case No. 2013-CP-10-3901

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SC Court of Appeals

Charleston Electrical Services, Inc. and Selective Insurance Company of South Carolina as Subrogee of Charleston Electrical Services, Inc., ... Appellants,

v.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellants, does hereby certify that service of the **Motion to Accept Filing Out of Time, Initial Reply Brief of Appellants** and **Appellants' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 12th day of July 2017:

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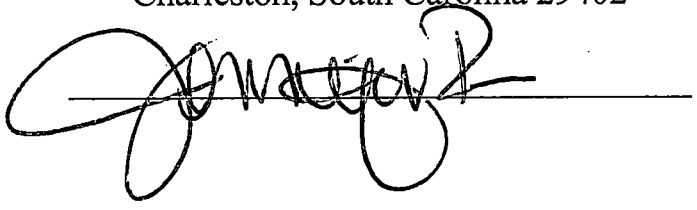

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July 12, 2017

Hand Delivered

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RE: Charleston Electrical Services, Inc. and Selective Insurance Company of South Carolina as Subrogee of Charleston Electrical Services, Inc. v. Wanda G. Rayhall
Appellate Case Number: 2016-001842
Civil Action Number: 2013-CP-10-3901
Claim Number: 21010307
Our File Number: 307.9065

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Motion to Accept Filing Out of Time**, as well as the originals and one copy each of the **Initial Reply Brief of Appellants** and **Appellants' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's $25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Edward K. Pritchard, III, Esquire *(w/ Enclosures)*
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