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.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding that the Respondent Wanda Rahall did not owe a duty to warn or protect her elderly mother under the facts of this case?

A. Did the trial court err in finding that the Respondent Wanda Rahall did not owe a duty to warn or protect her elderly mother under a premises liability theory?

B. Did the trial court err in finding that the Respondent Wanda Rahall did not owe a duty to warn or protect her elderly mother under a "special relationship" theory?

STATEMENT OF THE CASE

This is an action for contribution. The Appellant Charleston Electrical Services, Inc. ("CES") was sued by Elsie Mae Rabon for injuries that she sustained upon being attacked, knocked to the ground, and injured by a German Shepherd dog on the premises located at 60 Romney Street, Charleston, South Carolina on August 20, 2010. In settlement of that civil action, the Appellant CES agreed to pay the sum of $200,000.00 to Elsie Mae Rabon in exchange for a full and final release of all liability executed by Elsie Mae Rabon on July 11, 2012. The Release executed by Elsie Mae Rabon extinguished the liability of the Respondent Wanda G. Rahall as well. (R. 128). The action captioned *Rabon v. Charleston Electrical Services, Inc.*, Civil Action Number 2010-CP-10-10666, was dismissed by Stipulation of Dismissal filed July 31, 2012. (R. 133). The Appellant Selective Insurance Company of South Carolina is subrogated to the rights of CES.

A bench trial was held in Charleston County on June 17, 2016, before Judge Mikell R. Scarborough, the Master-in-Equity. The Appellants initially pled claims for contribution and equitable indemnity. At the call of the case, the Appellants voluntarily withdrew their equitable indemnity claim. The parties presented the facts of the case by way of stipulated facts as well as deposition testimony and exhibits. No live witnesses were called at trial. The trial proceeding consisted solely of arguments presented by counsel.

By Order filed August 2, 2016, Judge Scarborough ruled that no duty of care was owed by Wanda Rahall to Elsie Rabon pursuant to the facts as he found them. He found no liability under either a premises liability theory or a special relationship theory. (R. 3-19).

Subsequently, the Appellants filed a timely appeal.

STATEMENT OF FACTS

This action arises out of events occurring on August 20, 2010, when Elsie Rabon, the elderly mother of the Respondent Wanda Rahall, was visiting her daughter and her daughter's fiancée, George Kornahrens, and was injured when she was jumped upon and pushed down by Gunner, a German Shepherd on the premises.

CES is located at 60 Romney Street. Kornahrens was the owner of those premises. (R. 122). He leased a portion of the premises to CES, but he also resided in an apartment at the premises together with the Respondent Rahall. (R. 122-123). In her deposition, Rahall testified that she and Kornahrens had been "together" since May 2005, and that they had been engaged for the previous four years. (R. 281). Rahall testified that during 2010, she resided at 60 Romney Street "all the time" but then further explained that she had "really been staying here I would say 70 percent of the time since 2008." (R. 282). Rahall also described 60 Romney Street as "where we live, me and George." (R. 304). In addition, Rahall had her own key to the apartment and was able to come and go as she pleased. (R. 317, 340). She also permanently kept clothes and other personal effects at the apartment. (R. 319).

On August 20, 2010, Elsie Rabon was a social guest at 60 Romney Street. Rahall testified as follows:

Q. So on August 20th, 2010, [Rabon] would have been a social guest?

A. Yes.

Q. She was staying as a guest with you and George at –

A. Yeah, she always stays with us at 60 Romney Street. That's where we live, me and George.

Q. So when she came to visit, she'd stay with you?

A. Yes. Always.

(R. 304).

On August 20, 2010, Elsie Rabon was visiting her daughter and Kornahrens. Rabon had arrived the day before (August 19), but had no interaction with the dog Gunner on that date. (R. 288). According to Rahall, Rabon knew that Kornahrens had a new dog, but she had not been around that particular dog. (R. 287-288). Rabon has never seen the dog before. (R. 321). Rahall, on the other hand, was very familiar with Gunner. She was aware that 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. (R. 285-286).. In fact, the dog had jumped up on her "a couple times the week before." (R. 326).

On August 20, 2010, Rahall had a 10:00 a.m. medical appointment with her chiropractor in Charleston. Her mother accompanied her to that appointment. Afterward, they returned to 60 Romney Street to get Kornahrens to go to lunch. Rabon and Rahall entered the premises. Rahall went to look for George and found him outside in the backyard where the dog was kept. After a few minutes, Rabon came outside looking for Rahall and Kornahrens. The dog had been released from his chain before they arrived. After Rabon came into the backyard, Gunner jumped up on Rabon and knocked her to the ground. As a result of that fall, Rabon sustained serious injuries including a broken hip and injured ankle. (R. 289-290, 295).

Rahall testified that she did not direct her mother not to come into the backyard behind the premises, nor did she take any action to prevent her from doing so. That is true even after she realized that Gunner was not chained. She had likewise not warned Rabon about the dog's tendencies or that it was "over friendly" or in general to be careful around the dog. (R. 325-330). Rahall took no action at any point to warn or protect her mother from what she should have recognized as a dangerous condition on the premises.

ARGUMENTS

I. Standard of Review – Factual Findings

This is an action for contribution. It is well settled 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").

In an action in equity, 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). Typically, in equity actions, an appellate court will not disregard the findings of the trial judge because he/she "saw and heard the witnesses and was in a better judge position to judge their credibility." *Id.* However, that is not the case here. Judge Scarborough heard this case non-jury, but no live witnesses were presented by the parties. Hence, Judge Scarborough did not see or hear any witnesses, nor did he have the ability to judge the credibility of the witnesses in any manner or position better than this appellate court can. This Court should therefore disregard the findings by the trial judge under the prevailing

standard of review and should find facts based upon its own view of the preponderance of the evidence.

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

In entering judgment for the Respondent Rahall, Judge Scarborough found that Rahall did not owe a duty of care to her mother, Elsie Rabon, under the facts as determined by the trial court. 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.

A. Premises Liability Theory

The liability of Rahall for the injuries sustained by her mother, Elsie Rabon, is governed by premises liability law. Rabon was a social guest or licensee present on the 60 Romney Street premises in order to visit Rahall and her fiancée, George

Kornahrens, both of whom resided there. Under South Carolina premises liability law, the possessor of property "owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196, 204 (Ct. App. 2008). The South Carolina Supreme Court has explained:

> The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except:
>
> (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.
>
> (b) 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.

Neil v. Byrum, 288 S.C. 472, 343 S.E.2d 615, 616 (1986), *citing Frankel v. Kurtz*, 239 F.Supp. 713, 717 (W.D.S.C. 1965). (Emphasis in original).

Judge Scarborough concluded that Rahall did not owe any duty of care to Elsie Rabon because Rahall had no ownership interest in CES or in the 60 Romney Street premises. He ruled that "Rahall had no right to possess or control any portion of the Property." (R. 16-17). Furthermore, in error, Judge Scarborough described Rahall herself as "an invited guest in the Apartment" because she "paid no rent, utilities or taxes on the Apartment." (R. 17). Thus, he concluded that

Rahall, like her mother, was a social guest at the premises.

Importantly, Judge Scarborough's fact-finding is directly contrary to the evidence from Rahall's own sworn testimony. It is undisputed that Rahall's fiancée, George Kornahrens, was the owner of the premises located at 60 Romney Street. He leased a portion of the premises to CES, but he also resided in an apartment at the premises together with Wanda Rahall. In her deposition, Rahall testified that she and Kornahrens had been "together" since May 2005, and that they had been engaged to marry for the previous four years. (R. 281). Rahall testified that during 2010, she resided at 60 Romney Street "all the time" but then further explained that she had "really been staying here I would say 70 percent of the time since 2008." (R. 282). Rahall also described 60 Romney Street as "where we live, me and George." (R. 304).. In addition, Rahall had her own key to the apartment and was able to come and go as she pleased. (R. 317, 340). She also permanently kept clothes and other personal effects at the apartment. (R. 319).

Importantly, Rahall never described herself as a social guest on the premises or someone who only occasionally was on the premises. Thus, consistent with premises liability law, Rahall qualified as a "possessor" or "occupier" of the property, and thus, owed a duty of care to her mother, as a social guest, as the law requires. A duty of care is not owed only by the person or entity that actually owns or has a legal interest in the premises, as the trial court erroneously concluded, but also is owed by a person that regularly lives at the premises, which explains why

South Carolina case law addresses the duty owed by a "possessor" rather than an "owner." Judge Scarborough, in fact, entirely disregarded the existing South Carolina case law, such as the seminal case of *Neil v. Byrum* as cited above, where a duty was held to be owed by the "possessor" of property. Ownership interest or other legal interest in the property is not determinative of who owes a duty of care as to real property.

Judge Scarborough further erred in treating the premises consisting of 60 Romney Street as distinct parts so as to conclude that Rahall, even if a possessor of the apartment where she lived with Kornahrens, was not a possessor of the remainder of the premises such as the yard where the dog Gunner lived. The apartment and the shop were part of the same building and shared the yard, all of which was owned by Kornahrens, to whom Rahall was engaged and with whom she was living. 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 include Rahall given that she was not some transitory guest, as the trial court makes her appear.

Moreover, the Appellants demonstrated by a preponderance of the evidence that the dog Gunner constituted a dangerous condition on the premises and that Elsie Rabon had not previously been around the dog and was unaware that the dog

posed a danger to her.[1] On August 20, 2010, Rabon was visiting her daughter and Kornahrens. Rabon had arrived the day before (August 19), but had no interaction with the dog on that date. (R. 288). According to Rahall, Rabon knew that Kornahrens had a new dog, but she had not been around that particular dog. (R. 287-288). Rabon has never seen the dog before. (R. 321).. Rahall, on the other hand, was very familiar with Gunner. She was aware that 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. (R. 285-286).. In fact, the dog had jumped up on her "a couple times the week before." (R. 326).

Rahall therefore knew or should have known that the dog presented a risk of harm to Elsie Rabon and should have taken steps to warn Rabon and/or prevent her

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[1] The trial court erroneously ruled that the dog "is not a defective condition upon the land" and thus "an injury caused by a dog is not actionable under premises liability at common law." (R. 16). The trial court's ruling in this regard is erroneous for several reasons. First, the Supreme Court case law addresses "concealed dangerous conditions *or activities,*" which would include the presence of a dangerous animal. *See, Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615, 616 (1986). (Emphasis added) Second, prior to the enactment of Section 47-3-110 as a strict liability statute, there were cases involving dog-related injuries that were tried and won under a premises liability or negligence theory. *See*, *Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985). Third, in *Roe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014), this Court suggested that criminal acts on the premises may also give rise to premises liability claims. That is also true with respect to *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. Thus, contrary to Judge Scarborough's ruling, dangerous activities on the premises, such as those caused by a dog, are actionable under a premises liability theory.

from coming outside where the dog was located. Rahali also 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.

In sum, under South Carolina premises liability law, Wanda 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 her of a dangerous condition or activity on the premises. Judge Scarborough erred in his fact-finding and in failing to find that a duty of care was owed by Rahall to her mother under these facts.

B. Special Relationship

In addition to owing a duty of care as a "possessor" or "occupier" of the premises, the Appellants presented an alternative theory as the legal basis for a duty of care to be owed by Wanda Rahall. "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." *Doe v. Wal-Mart, Inc.*, 393 S.C. 240, 711 S.E.2d 908, 911 (2011). The Supreme Court, however, has recognized five exceptions to this

general rule, and one of those exceptions is "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).

The preponderance of the evidence reflects a "special relationship" between Rahall and Rabon. Rabon was Rahall's elderly mother who was invited to the premises for a visit. Rabon had been living in an assisted living facility for a number of years. Rabon would not have been at the premises but for that mother-daughter relationship. Most importantly, Rahall had the ability to monitor, supervise and control her mother's actions on the premises and could have prevented her from entering the backyard of the premises where the dog was located. Based upon the "special relationship" between them, Rahall owed a duty to protect Rabon from the risk of harm posed by going into the backyard where Gunner was located. At the very least, she owed her mother a duty to warn her that the dog would routinely jump on people and could potentially injure her mother when not restrained.

In entering judgment for the Respondents on this alternative theory of liability, Judge Scarborough based undue reliance on this Court's decision in *Roe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014). In that case, this Court addressed whether a wife owed a duty of care to her neighbors and their children to warn about her husband who was allegedly a sexual predator. This Court in *Roe* addressed only whether there was a special relationship between Mrs. Bibby and

perpetrator and *not* between Mrs. Bibby and victims. Ultimately, this Court in *Roe* found no special relationship because there was no evidence that Mrs. Bibby had knowledge of a specific threat of harm posed by her husband and because there was no evidence that Mrs. Bibby had the ability to monitor, supervise or control her husband.

Judge Scarborough's reliance on *Bibby* is misplaced because this case involves a special relationship between Wanda Rahall and the victim (her elderly mother). That is a critical distinction that was disregarded by Judge Scarborough. To reiterate, in *Roe*, this Court addressed the "special relationship" exception from the perspective of Mrs. Bibby's ability to monitor, supervise or control the conduct of the *perpetrator* rather than the *victims*. There is no question in *Roe* that Mrs. Bibby did not have a special relationship with the neighborhood children who were victimized. She clearly had no ability to monitor, supervise or control the victims. This case is different. Wanda Rahall had the special relationship with her mother; she 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.

In addition to *Roe*, Judge Scarborough cited many cases from other jurisdictions, but none of those cases is on point. None of those cases addresses 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. Yet, clearly a

parent-child relationship is such a special relationship that may give rise to liability where the parent acts in such a manner to subject a child to a dangerous condition and/or otherwise fails to protect the child from danger. *See*, *State v. Claypoole*, 371 S.C. 473, 639 S.E.2d 466, 468 (Ct. App. 2006) (court "acknowledged the nature of the parent-child relationship places a legal duty upon the parent to take all reasonable steps to protect the child from harm"). *See also*, *Brewer v. Murray*, 292 P.3d 41, 50 (Okl. Ct. App. 2012) ("[a] uniformly recognized special relationship is that which exists between parent and child"). Similarly, the relationship between an adult child and an elderly parent under the facts as presented in this case gives rise to a special relationship that creates a duty to warn or otherwise protect the elderly parent from a danger that was known or should have been known to the adult child.

Finally, in addressing the "special relationship" theory of liability, Judge Scarborough made several errors in fact-finding as he also made under the premises liability theory. For instance, Judge Scarborough erroneously concluded that no duty was owed by Rahall because Elsie Rabon was aware of Gunner's presence on the premises and that Rahall had no notice that Gunner was a dangerous animal. However, as addressed above, the preponderance of the evidence demonstrates that the dog Gunner constituted a dangerous condition on the premises and that Elsie Rabon had not previously been around the dog and was unaware that the dog posed a danger to her. As previously discussed, according to

Rahall herself, Elsie Rabon knew that George Kornahrens had gotten a new dog, but she had not been around that particular dog. (R. 287-288). Rabon has never seen the dog before. (R. 321). Rahall, on the other hand, was very familiar with Gunner. She was aware that 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. (R. 285-286).. In fact, the dog had jumped up on her "a couple times the week before." (R. 326). Thus, the evidence demonstrates that Elsie Rabon was not familiar with Gunner or his propensity to jump on people. Moreover, 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.

In sum, based upon the "special relationship" between them, Wanda Rahall owed a duty to protect her elderly mother from the risk of harm posed by going into the backyard where Gunner was located. At the very least, she owed her mother a duty to warn her that the dog would routinely jump on people and could potentially injure her mother when not restrained. However, Rahall breached that duty by taking absolutely no action to warn or protect her mother from the risk of harm posed by Gunner. In short, a preponderance of the evidence demonstrates that Rahall was at fault for the accident that resulted in injury to Elsie Rabon. 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 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,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Final Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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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 **Brief of Appellants** was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 31st day of August 2017:

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