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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

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APR 04 2019
SC Court of Appeals

Kenji Kilgore,

Appellant,

v.

Estate of Samuel Joe Dixon, Samuel E. Dixon,
and Fredda Dixon

Respondents.

PETITION FOR REHEARING

Anderson, South Carolina
April 1, 2019



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MEMORANDUM OF AUTHORITIES

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PETITION FOR REHEARING OF THE ORDER DISMISSING APPEAL

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Respondents.

Pursuant to SCACR Rule 221(a) and SCACR Rule 240(i) Appellant Kenji Kilgore respectfully petitions this Court for a rehearing of Opinion No. 2019-UP-110, filed March 20, 2019. Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

Summary of Arguments

The Honorable Court of Appeals affirmed the dismissal of Appellant's case for failure to state facts sufficient to constitute a cause of action for negligence. Without discussing what facts were absent or missing from the Complaint, the Court simply stated general principles of the law.

Appellant believed that the Honorable Court misappreciated the duty to warn doctrine and overlooked its exceptions as it relates to the facts of this case. Appellant also believed that

the Honorable Court limited its ruling on negligence based on duty warn and failed to consider his allegations of common law negligence.

In his Final Brief, Appellant averred that the Respondents had a duty to exercise that degree of care that a reasonable and prudent person would have exercised under the same and similar circumstances. He also advanced that Respondents had a duty to warn him of their son's mental health and volatile behavior. Appellant further asserted that Respondents had a duty to reasonably maintain safe conditions on their property. This Honorable Court however focused only on negligence based on failure to warn. Citing Doe v. Marion, 361 S.C. at 471 (Ct. App. 2004, this Honorable Court ruled that "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Simply, the Honorable Court believed based on the Complaint, that there was no duty owed to the Appellant, and as such there is no cause of action for negligence.

Appellant reiterates that he has sufficiently alleged the elements of negligence. He avers that this Court misappreciated the above-mentioned principle laid down in Doe v. Marion, and insists that the same is not absolute. It recognizes exceptions as discussed in the case of Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002).

Appellant maintains that the special circumstances of this case warrants a duty to warn on the part of the Respondents. Appellant claims that due to the special relationships of the Respondents to the Appellant (special relationship of defendant to the victim) and of the Respondents to Samuel Joe Dixon (special relationship of the defendant to the injurer). *Id.*

Appellant holds that the Court overlooked that the present case falls under the exception based on Respondents' negligent or intentional act of creating the risk. *Id.*

Appellant also insists that the Court failed to rule on Appellant's assertion that as landlord, Respondents' has a common law responsibility to act with due care. This Court has recognized in previous cases that "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990), citing Crowley v Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985).

ARGUMENTS

I.

THE RESPONDENTS HAVE A DUTY TO WARN APPELLANT BASED ON THE SPECIAL RELATIONSHIPS EXCEPTION.

Appellant admits that 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. Appellant asserts that there are a number of cases that provide exception to this. The court in Faile, recognized five (5) exceptions to this rule as follows:

- (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. See generally, Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990).

Faile, supra.

Appellant reiterates the special relationship between the parties give rise to a duty of care to prevent Samuel Joe from harming Appellant. Not only are the Respondents the parents of injurer, but they are also the landlord of herein Appellant.

Special Relationship of defendant with the injurer

Appellant maintains that Respondents are liable for their son's criminal acts because they had the ability to monitor, supervise or control him. Respondents contend that their son was an

adult at the time of the incident and as such, the rules on parental liability do not apply. But the case of Rowe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) laid down the following:

““The defendant may have a common law duty to warn potential victims under the ‘special relationship’ exception when the defendant ‘has the ability to monitor, supervise and control an individual’s conduct’ and when ‘the individual has made a specific threat of harm directed at a specific individual.’” Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting Bishop, 331 S.C. at 86, 502 S.E.2d at 81). It is not necessary for the injuring party to have made a threat while under the defendant’s control or custody. Bishop, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. “

Id.

Appellant asserts that the circumstances of this case fall under the said exception. Respondents have known of their son’s mental health issues and violent behavior. They had coaxed him into returning home from his marital house following the dissolution of his marriage. They had their son living in the trailer right behind their house. Respondents had easy access to their son, and with due diligence they could have easily walked over to the trailer to check and/or visit him.

Appellant avers that the son’s mental health condition and violent behavior were known to the Respondents prior to leasing their property to herein Appellant. In the years that son lived with them immediately preceding the tragedy, it is inferable that they were well acquainted than anyone with his mental disposition. Their knowledge of his condition is reflected in their previous conversation with the Appellant. Respondents expressed their gratitude to Appellant because they believed that their son was “doing better” since Appellant moved in the trailer. Undeniably, Respondents had notice of their son’s mental issues and volatile behavior

Special Relationship between Defendant and Plaintiff

Respondents leased their property to herein Appellant establishing a landlord-tenant relationship. It is well-established that a landlord generally owes no affirmative duty to a tenant to provide security from criminal activities of third persons. Wright v. PRG Real Estate Management, Inc., et al., Op. No. 27868 (SCT., March 20, 2019). *Wright*, identified four (4) exceptions to the this general rule: (a) affirmative acts exception; (b) concealed danger exceptions; (c) common area exception; and (d) the undertaking exception. Appellant believes that his case falls under the affirmative acts exception. Wright, citing the case of Cooke, supra.,

II. THE RESPONDENTS HAVE A DUTY TO PROVIDE SECURITY UNDER THE AFFIRMATIVE ACTS EXCEPTION.

In *Wright*, the South Carolina Supreme Court had an occasion to expound on the affirmative acts exception. The Court held:

The affirmative acts exception is limited to situations where the landlord's direct action increases a tenant's risk of harm from criminal activities. Examples of such direct action may include a landlord giving out a master key to someone who should not have one, a landlord leaving an apartment door or window unlocked, or a landlord failing to secure a ladder that is used by a criminal to commit a crime. Such affirmative acts by the landlord may impose liability for criminal acts of third parties. On the other hand, the voluntary undertaking exception invokes section 323 and may be applicable when a landlord's actions are more attenuated. See Restatement (Second) of Torts § 323 (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."). Section 323 is the standard in South Carolina when analyzing voluntarily

assumed duties. The concept of the undertaking exception is not limited to a landlord's undertaking to make repairs.

Id.

In this case, landlord attempted to repair their son by keeping him in the trailer on their property, victim was like a service dog. Respondents benefitted from Appellant's stay in their property. Instead of Respondents taking care of their son, Appellant kept him company.

In applying the affirmative acts exception in this case, Appellant submits that Respondents' act of placing Appellant in the company of their son as a roommate, increased Appellant's risk of harm from criminal acts.

What makes the situation worse is the reckless and/or negligent disregard of Appellant's welfare. First, in withholding information regarding their son's mental health conditions and violent behavior, they deprived Appellant of the ability to weigh the pros and cons of leasing from them.

Integral to this duty to warn is the existence of a specific threat of harm directed at a specific person.¹ Respondent argues that their son had not made specific threats against the Appellant and therefore does not fall under this exception. The rationale behind this line of cases is that an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care, the injury is no longer speculative in nature.

Appellant maintains that the specific threat in this case was the volatile behavior and mental condition of their son, who was capable of violence as evidence by his shooting of the

¹ This duty to warn arises when the individual has made a specific threat of harm directed at a specific individual. Bishop v. S.C Department of Mental health, 331 S.C. 86.

Appellant and his subsequent suicide. This threat of harm can only be directed to herein Appellant, whom Respondents themselves placed in the same trailer with son.

Secondly, Respondents failed to exercise reasonable degree of care which a reasonably prudent man would have exercised under the same and similar circumstances. Despite being aware of their son's mental illness and violent behavior, Respondents did not exert effort to discover if their son had access to or was in possession of a gun. They failed to take measures to prevent their son from having access to a gun while he had a roommate.

For these two reasons, Appellant believes that Respondents intentionally or recklessly created the risk of harm to the Appellant. Appellant submits that a duty of care arose from Respondents' acts that increased the risk of harm to Appellant.

**III.
THE RESPONDENTS HAVE A DUTY TO USE REASONABLE
CARE BASED ON THEIR UNDERTAKING.**

In Cramer, the Court explained that even though South Carolina law does not impose a duty on a landlord to protect a tenant from the criminal acts of third parties, a plaintiff is not precluded from asserting a general negligence principle. Cramer v. Balcor Property Management, Inc., 441 S.E.2d 317 (1994). A duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties. Id. at 319.

The basis for this duty is enshrined in the Restatement (Second) of Torts Section 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Appellant believed that when Respondents persuaded their son to stay and lived in their property, they undertook to care and look out for him considering his mental health condition and violent behavior. In effect, they voluntarily assumed the duties of a guardian of a mentally ill person. Appellant asserts that while Respondents had charge of him, they had a duty to exercise reasonable care to prevent him from harming others. Respondents breached this duty of care by (1) failing to take measures that their son had no access to a gun or any potentially dangerous weapon and (2) leasing their trailer to herein Appellant and joining them as roommates. In performing the undertaking, Respondents increased the risk of harm to herein Appellant.

Accordingly, when Appellant was shot by Respondents' son while under their custody and within their property, Respondents were liable for the harm inflicted by their son.

The instant case has similarities with the case of Crowley v. Spivey, 285 S.C. 397 (1985), 329 S.E.2d 774.

In Crowley, Timothy and Lynette Crowley had two minor children. They later divorced and custody was initially granted to Lynette. Lynette suffered from paranoid schizophrenia and was committed to Hall Institute. Upon receiving treatment for her paranoid schizophrenia, Lynette was released to the Spiveys (Lynette's parents). Custody of the children was later transferred to Timothy with Lynette granted visitation rights. Upon learning that Lynette bought a gun, Timothy informed the Spiveys that he would no longer permit any visitation outside his

home. The Spiveys assured father that they would supervise the children during Lynette's visitation with them in the Spiveys' house. During one visit, Lynette shot the two minors to death. Timothy filed two (2) wrongful death actions against the Spiveys based on negligence. The jury awarded damages to Timothy. The Court found that a duty of care existed in that based on Spivey's undertaking. The Court ruled that the duty of care was "grounded in the legal proposition that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." *Id. at 406.*

In both Crowley and the instant case, the parents undertook to take their children in their custody and care, although not obligated to do so. Once their performance began, a common law duty to exercise reasonable care arose. *Id. at 406*, citing Roundtree Villas Association, Inc. v. 4701 Kings Corporation, 282 S.C. 415, 321 S.E. (2d) 46, 51 (1984).

Finally, in his Complaint, Appellant alleged that Respondents was negligent in failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same and similar circumstances. Appellant has also averred that he was a tenant in a trailer owned by Respondents. Appellant advances that Respondents had a duty to warn him under the premises liability law.

South Carolina recognizes that, to a certain degree and under certain circumstances, a property owner is liable to a person injured while on his or her property, if the injury sustained was caused by the property owner's negligence. In the case of Sims v. Giles, the Court provides that the level of care owed to a person present and injured in another person's property depends on the status or classification of the injured individual. Sims v. Giles, 541 S.E.2d 857 (S.C. Ct. App. 2001).

Sims recognized the following classes of individuals: invitees, licensees, adult trespassers and children.

Sims defined invitee as:

"An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct.App. 1997). "Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." Restatement (Second) of Torts § 332 cmt. a (1965). The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner. Parker v. Stevenson Oil Co., 245 S.C. 275, 140 S.E.2d 177 (1965); Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct.App. 1994).

"Phrased somewhat differently, it may be said that a person is an invitee on the land of another if he enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." 62 Am.Jur.2d Premises Liability § 87 (1990). See also Larimore, 340 S.C. at 444, 531 S.E.2d at 538 ("Because Larimore, [who was hired by the property owner to add vinyl siding to his home,] was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with [the property owner], Larimore was an invitee.").

Ibid.

Appellant avers that he can be considered an invitee, as he entered and stayed in Respondents' property with their express invitation, and his entry and stay is connected with their conduct of leasing property. The degree of care for an invitee is outlined as follows:

The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the

breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991).

Sims, Supra.

Applying this doctrine in this case, Respondents has a duty to warn Appellant of their son's mental health illness and violent behavior, which can be considered a hidden danger that the landowner had prior knowledge of.

Since the Honorable Court only addressed the issue of existence of duty of care owed by Respondents, the Appellant shall limit his arguments to this element of negligence. With these in mind, Appellant believes that his Complaint has stated facts regarding Respondents duty owed to the Appellant by reason of the landlord-tenant relationship and the undertaking of affirmative acts of the Respondents. The Complaint should not have been dismissed.

IV.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS.

Having established in the previous discussion that Appellant has set forth sufficient facts to establish a cause of action of negligence, Appellant respectfully requests this Honorable Court to address the failure of the Appellant to obtain discovery in this matter. Appellant maintains that the undersigned counsel was retained by the Appellant a month before the lower court issued its Order, dated January 24, 2017. There was very little discovery conducted in this matter. Counsel for Appellant should have been allowed to pursue discovery, especially given the traumatic events which took place, and the subsequent mental scarring that followed this tragedy. Outstanding motions prevented him from conducting discovery. Appellant believes that

discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the Batson case², where the Court declined to impose summary judgment before the sufficient discovery could be completed.

CONCLUSION

WHEREFORE, for the reason set forth above, Appellant respectfully requests that this Honorable Court grant rehearing in this case.

April 1, 2019

Respectfully submitted,



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Attorney for Appellant

² Doe v. Batson, 525 S.E.2d 909, 338 S.C. 291 (S.C. App., 1999).

**FORM 7
PROOF OF SERVICE
FILING PETITION FOR REHEARING**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2017-001330

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Kenji Kilgore,

Appellant,

v.

Estate of Samuel Joe Dixon, Samuel E. Dixon,
and Fredda Dixon

Respondents

PROOF OF SERVICE

I certify that I have served an original and six (6) copies of Appellant's Petition for Rehearing to the Appellate Clerk of Court and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and a copy of the same upon Respondents, by and through their counsel of record, Robert E. Davis, Esquire at Ward Law Firm, PA, 233 S. Pine St., Spartanburg, SC 29301, by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2019.

Anderson, South Carolina
April 1, 2019



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FORM 8
LETTER TO APPELLATE CLERK OF COURT
FILING PETITION FOR REHEARING

April 1, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

**RE: Kenji Kilgore v. Estate of Samuel Joe Dixon, Samuel E. Dixon and
Fredda Dixon**
Appellate Case No. 2017-001330
Case No.: 2015-CP-04-1605

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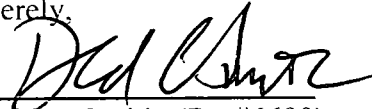
SC Court of Appeals

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

- 1) Appellant's Petition for Rehearing;
- 2) A check amounting to Fifty Dollars (\$50.00) as motion/petition fees; and,
- 4) Proof of Service for the same.

Sincerely,



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Anderson, SC 29621

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
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Columbia SC 29211