

FORM 18
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

RECEIVED

JUL 01 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

*On Petition for Writ of Certiorari
To the Supreme Court of South Carolina*

Appellate Case No. 2017-001330
Unpublished Opinion No. 2019-UP-110
(Rehearing denied June 5, 2019)

Kenji Kilgore,

Petitioner,


v.

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

Respondents.

PETITION FOR CERTIORARI

Anderson, South Carolina
June 27, 2019



Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

Other Counsel of Record:

Robert E. Davis, Esquire
WARD Law firm
223 East Pine Street
PO Box 5663
Spartanburg, SC 29302
(864) 591-2369
(864)-585-3090
Attorney for Respondents

TABLE OF CONTENTS

Table of Authorities	ii
Certification of Counsel	2
Questions Presented	3
Statement of the Case	4
Arguments	
I. THE SOUTH CAROLINA COURTS HAVE NOT RULED ON WHETHER A LANDLORD HAS A DUTY TO WARN OR PROTECT HIS TENANT/S FROM A POTENTIAL DANGER/THREAT CAUSED BY THEIR OWN SON ON THEIR PREMISES.....	5
II. THE ALLEGATIONS IN THE COMPLAINT WERE SUFFICIENT TO ESTABLISH RESPONDENTS' NEGLIGENCE.....	10
III. PETITIONER WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS AND TRY HIS CASE.....	13
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).....	7
Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991).....	5
Cooke v. All State Management Corp., 741 F. Supp. 1205, 1213 (D.S.C. 1990)	5
Cramer v. Balcor Prop. Mgmt., Inc. 312 S.C. 440, 443, 441 S.E.2d at 317, 318-339 (1994).....	5
Doe v. Batson, 338 S.C. 291, 296 525 S.E. 3d 909, 911 (Ct. App 1999)	6
Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (Ct. App 2001)	6
Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)	7
Jablonski v. United States, 712 F.2d 391 (9 th Cir, 1983) as cited in Bishop v. South Carolina, supra.....	12
Larimore vs. Carolina Power and Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App., 2000).....	5
Miller v. City of Candem, 317 SC 28, 451 S.e.2d 201 (1994).....	12
Rickborn v. Liberty Life Insurance, Co., 321 S.C. 291, 468 S.E.3d 292 (1996).....	10
Rogers v. South Carolina Dept. of Mental Health, 377 S.E.2d 125, 297 S.C. 363 (S.C. App., 1988).....	6
Sharpe v. South Carolina Dept. of Mental Health, 354 S.E.2d 778, 292 S.C. 11 (S.C. App., 1987).....	6
Sims v. Giles, 541 S.E.2d 857 (Ct. App, 2001).....	10
Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976).....	6
Wright v. PRG Real Estate Management, Inc. et al., Op. No. 27868 (S.Ct. , March 20, 2019).....	8

Statutes:

Restatement (Second) of Torts § 323 (1965).....	9
---	---

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this Petition for a Writ of Certiorari to review the judgment of South Carolina Court of Appeals.

The Order of South Carolina Court of Appeals was filed on March 20, 2019 and was reproduced herein as Appendix E to this Petition.

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's counsel certifies that a Petition for Rehearing was made on April 4, 2019 and denied on June 5, 2019.

QUESTIONS PRESENTED

- I. Whether Respondents as landlords had a duty to warn or provide security for their tenant from the criminal acts of their mentally ill child?
- II. If such a duty exists under the facts of this case, whether the allegations in the Complaint were sufficient to establish Respondents' negligence?
- III. Whether Petitioner was deprived of his right to pursue discovery proceedings and try his case?

STATEMENT OF THE CASE

Petitioner filed this action for the tortious injuries he suffered when deceased Samuel Joe Dixon shot him five times.

Sometime prior to July 2012, Petitioner began living in a house/trailer located at 240 Thomson Road, Starr, Anderson County. Said property is owned by Respondents Samuel and Fredda Dixon (hereinafter, referred to as Respondents). Petitioner was invited to rent a room in the trailer by Samuel Joe Dixon, (hereinafter, referred to as "son"), the son of Respondents. They had a harmonious relationship which can be considered as friendly, during Petitioner's stay at the aforementioned property. Respondents expressed happiness/gratitude in having him as a tenant on their property as they had noticed their son's behavior had gotten better. Petitioner had no idea that they were talking about their son's violent/volatile behavior.

On or about July 2, 2012, Respondents' son shot Petitioner five times, without provocation, inside the rented house/trailer. Several days after shooting Petitioner, Respondents' son committed suicide.

On July 1, 2015, Petitioner filed a Complaint against the Estate of Samuel Joe Dixon and Respondents for negligence. On November 9, 2015, Respondents filed their Answer, and moved to dismiss the case for lack of cause of action on March 3, 2016. A hearing was schedule for the motion, but Petitioner's former counsel failed to appear due to lack of notice.

Respondents offered to settle the case, which Petitioner's counsel had arranged for the settlement of the matter. However, Petitioner was not willing to resolve the claims. Thereafter, Respondents moved to enforce the settlement. Petitioner had a change of counsel. Without giving new counsel the opportunity to conduct discovery proceedings, the Court ordered the dismissal of the case on January 24, 2017.

Petitioner moved to reconsider the aforementioned Order on February 2, 2017, which the Respondents opposed on February 8, 2017. On May 8, 2017, the Court denied the Petitioner's motion for reconsideration.

Petitioner timely served his Notice of Appeal on June 12, 2017. The Court of Appeals affirmed the judgment of the circuit court on March 20, 2019. (App., p. 99).

Petitioner filed his Petition for Rehearing on April 4, 2019, (App., p. 101), which the Court of Appeals denied in its June 5, 2019 Order. (App., p. 132). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

I.

THE SOUTH CAROLINA COURTS HAVE NOT RULED ON WHETHER A LANDLORD HAS A DUTY TO WARN OR PROTECT HIS TENANT/S FROM A POTENTIAL DANGER/THREAT CAUSED BY THEIR OWN SON ON THEIR PREMISES.

Petitioner is aware that South Carolina courts have addressed, in a number of cases, the duty of property owners to provide security to the public invited to their premises. The cases of Larimore vs. Carolina Power and Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App., 2000) and Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991), dealt with an invitee or business visitor. The Court in *Larimer* and *Callander* ruled that a property owner owes an invitee the duty of exercising ordinary care for his safety and is liable for the injuries, a breach of such duty may cause. *Larimer, supra*. *Callander* limited such duty to warn of latent or hidden dangers which the property owner has knowledge or should have knowledge.

In Cooke v. All State Management Corp., 741 F. Supp, 1205, 1213 (D.S.C. 1990) and Cramer v. Balcor Prop. Mgmt., Inc. 312 S.C. 440, 443, 441 S.E.2d at 317, 318-339 (1994), the Court addressed the liability of a residential landlord vis-à-vis his tenant. In both cases, the

Court ruled that a residential landlord generally does not owe his tenant a duty to secure the landlord's premises.

Petitioner insists however that Supreme Court has not addressed the issue raised by the unique circumstances in this case. The case at bar differs from Larimer and Callander as the two cases involve commercial landlord-tenant relationship. While this case is similar to Cooke and Cramer in that they involved residential landlord-tenant relationship, it differs with regards to the parties. Respondents are the landlord of Petitioner, the injured party, and at the same time, are the parents of son, Samuel Joe, the injurer.

It is widely believed that a parent has no liability over the criminal and/or tortious actions of their adult child. The Doe v. Batson¹ case attempted to address this matter, but due to lack of sufficient evidence, to determine parent's knowledge of her child's dangerous conduct, the Supreme Court did not lay down a clear and unambiguous standard. Nonetheless, Petitioner posits that the Court has yet to address the issue of parental liability over the actions of their mentally ill adult child, which is the subject matter of the instant case.

Cases such as Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976), Sharpe v. South Carolina Dept. of Mental Health, 354 S.E.2d 778, 292 S.C. 11 (S.C. App., 1987) and Rogers v. South Carolina Dept. of Mental Health, 377 S.E.2d 125, 297 S.C. 363 (S.C. App.,

¹ In Doe v. Batson, 338 S.C. 291, 296 525 S.E. 3d 909, 911 (Ct. App 1999) (hereinafter referred as Batson I, John Doe brought a case on behalf of his two minor children who were sexually abused by Donald. He filed a case against Donald and Batson, Donald's mother, with whom he lives with. The sexual abuse was allegedly committed at Batson's residence. Batson raised as her defense the fact that Donald was already an adult when the criminal acts were committed. The Court discussed two possible sources of liability for the parent of an adult child residing in the home: (1) a duty to warn arising from a special relationship or circumstance, and (2) a duty to warn based on premises liability. On appeal, The Court of Appeals vacated those portions suggesting potential sources of liability in this case because there is not enough evidence on record to determine the merits of Doe's argument. (Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001) (hereinafter referred as Batson II). The Court in Batson II remanded the case to the trial court for discovery and development of Doe's theories of recovery. It should be noted that Court has not categorically denied liability of parents over the acts of their adult child, who lived with them, and which they have knowledge or notice of their child's dangerous nature.

1988), which tackled the issue of liability for a mentally ill person's dangerous conduct involved a physician-patient relationship. As such, they are not on all fours with the present case.

A general rule was laid down in the case of Sharpe and Rogers, where the Supreme Court held that while there is no general duty to control the conduct of another or to warn a third person or potential victim of danger, there are circumstances wherein a duty to warn may arise.

Although one generally has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct, "when a defendant has the ability to monitor, supervise control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct." Rogers, 320 S.C. at 255-56, 464 S.E.2d at 332. (citing Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), cert. denied, 298 S.C. 204, 379 S.E.2d 133 (1989); and Restatement (Second) of Torts §§ 315, 319 (1965)). It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. 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.

Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).

The exception to this general rule has been expanded in the case of Faile v. South Carolina Department of Juvenile Justice to include the following: (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 Department of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)

Petitioner believes that the special relationship between the parties give rise to Respondents' duty to use care to prevent their son, from harming their tenant, Petitioner, on their

premises. To address the unique circumstances in this case, this Court must develop a standard that combines the different aspects of the law of negligence, such as the landlord-tenant relationship, parent and child relationship, and premises liability law.

DUTY TO WARN BASED ON SPECIAL RELATIONSHIP

A. BETWEEN RESPONDENTS AND SAMUEL JOE (Defendants-Injurer Relationship)

The parental relationship between Respondents and Samuel Joe is relevant in this matter because Respondents knew of their son's mental illness and aggressive behavior. It shall be noted that son has another marital residence, from which the parents directed him to relocate; and son acquiesced. Their knowledge of his condition is reflected in their previous conversation with Petitioner. Respondents expressed their gratitude to Petitioner because they believed their son was "doing better" since Petitioner moved to the trailer.

It is also relevant because Respondents had the ability to monitor, supervise or control their son who lived in the trailer behind their house. With exercise of due diligence, Respondents could have easily walked over to their son's trailer to check on, monitor or supervise, which they did not do. Respondents could made condition of staying there mental health counselling Despite their knowledge of his mental illness and aggressive behavior, they did nothing to ensure the safety of others, including Petitioner; in particular they did nothing to deny access of the weapons such as the gun used in the shooting.

B. BETWEEN RESPONDENTS AND PETITIONER (Defendants-Victim Relationship)

Respondents leased their property to herein Petitioner establishing a landlord-tenant relationship. While there is no general rule that mandates landlord to provide security or warn their tenant of criminal activities of a third person, the case of Wright v. PRG Real Estate Management, Inc. et al., Op. No. 27868 (S.Ct. , March 20, 2019) enumerated instances where the

general rule does not apply: (1) affirmative acts exception; (2) concealed danger exceptions; (3) common area exceptions; and, (4) the undertaking exception. Petitioner believes that this case falls under the affirmative acts and undertaking exception.

DUTY BASED ON AFFIRMATIVE ACTS EXCEPTION

In Wright, the South Carolina Supreme Court held that affirmative acts exception works as follows:

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).

Id.

Petitioner would show that Respondents committed affirmative acts which would mandate them to provide security or trigger a duty to warn Petitioner of the threat of danger posed by their son. One such act is Respondents housing Petitioner with their son in the same trailer. By placing Petitioner in the same residence as their son they increased Petitioner's risk of harm from the potential danger found therein. They did not allow Petitioner to make the choice of whether to take residence there. In essence, Respondents took a calculated risk that Petitioner would be a positive influence on their highly unstable son.

DUTY TO WARN BASED ON PREMISE LIABILITY LAW

Petitioner posits that the law on premise liability is applicable in this case. Petitioner was injured on Respondents' property. Based on the case of Sims v. Giles, Petitioner can be

considered as an invitee, having entered and permitted to stay on Respondents' property with their express invitation, and his entry and stay was 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). The degree of care required is commensurate with the particular circumstances involved, including the age and capacity of the invitee. *Henderson v. St. Francis Cmty. Hosp.*, 303 S.C. 177, 399 S.E.2d 767 (1990).

cited in *Sims v. Giles*, 541 S.E.2d 857 (Ct. App, 2001).

Applying this doctrine in this case, Respondents had a duty to warn Petitioner of their son's mental health condition and his associated violent behavior, which can be considered a hidden danger of which the landowners had prior knowledge.

II.

THE ALLEGATIONS IN THE COMPLAINT WERE SUFFICIENT TO ESTABLISH RESPONDENTS' NEGLIGENCE.

In order to establish a cause of action in negligence, three essential elements must be alleged and proven: (1) duty of care owed by defendant to plaintiff; (2) breach of duty by a negligent act; and, (3) damage proximately resulting from the breach of duty. *Rickborn v. Liberty Life Insurance, Co.*, 321 S.C. 291, 468 S.E.3d 292 (1996).

This case has been dismissed at the lower court upon motion of Respondents, allegedly for failure to state a cause of action. Petitioner avers that the Complaint stated facts sufficient to establish Respondents' negligence.

Petitioner was able to establish the relationship between the parties. The Complaint stated that Samuel Joe was Respondents' son, and that at the time of the incident, he was living and staying in a trailer owned by Respondents. (App., p. 5). That said trailer was located at the back of Respondents' property.

Petitioner also alleged that he started to live in the trailer owned by Respondents. (App., p. 4). He was to be housed with Respondents' son as his roommate. (App., p. 5).

Petitioner mentioned in his Complaint that Respondents' son had a propensity for violence and erratic behavior. (App., p. 7). Petitioner insists that Respondents were aware or had knowledge of their son's mental condition and dangerous nature.

Petitioner would show that Respondents coaxed their son into returning to their property from his marital house following the dissolution of his marriage. They had him live in a residence on their property. In the years that he had lived with them, it is inferable that Respondents were well acquainted with his mental disposition. Their knowledge of their son's condition was reflected in their previous conversation with Petitioner. (App., p. 52). Respondents told Petitioner that their son "is getting better" since they became roommates. (App., p. 52).

Petitioner concedes that the Complaint did not state that respondents "have the ability to control, monitor, and supervise their son." Petitioner argues that he was able to allege facts that would show Respondents had an opportunity and/or ability to do such, namely, that their son lived in a trailer behind their house. (App., p. 5). Had Respondents applied a modicum of due diligence, they could or should have easily walked over to their son's trailer to check on him. It is particularly important considering that Respondents knew or should have known that their son was a danger to himself and to others.

Furthermore, as expressly ruled by the Court, there is no case limiting the liability by requiring the threat to be made while under the control of or in custody of the defendant. Rogers, as cited in Bishop. What the Court requires is that defendant be aware or should have been aware of the specific threat made by the patient to harm a specific person. Jablonski v. United States, 712 F.2d 391 (9th Cir, 1983) as cited in *Bishop*.

A complaint need not be drafted in order to adequately allege that Respondents had a duty to warn Petitioner. Here, the Complaint stated that the Respondents were the parents of the individual who injured Petitioner. Petitioner is Respondents' tenant. Respondents knew their son's medical faculties had diminished with the failure of his marriage that is why they convinced him to stay with them. Respondents knew or should have known of their son's violent disposition, and yet allowed Petitioner to room with him. They did not advise Petitioner of their son's condition and/or the potential threat to his life. Respondents' son shot Petitioner several times. Petitioner sustained injuries, suffered both emotionally and mentally. He incurred numerous medical expenses, which could have been avoided had it not been for Respondents' failure to use care by informing or warning him of their son's condition and aggressive behavior.

DUTY TO USE DUE CARE

Even when there is no duty to act, Respondents who act voluntarily assume a duty to use due care. Miller v. City of Candem, 317 SC 28, 451 S.e.2d 201 (1994). Petitioner believes that when Respondents persuaded their son to live with them on their property, they undertook a duty to care and look after his welfare. In effect, they assumed the responsibilities and/or duties of a guardian of a mentally ill person. Petitioner posits that for as long as their son was living with Respondents, they had a duty to exercise reasonable care to secure his safety and prevent him

from harming others. Due to their voluntary undertaking, a duty to exercise reasonable care arose.²

This duty was breached when they (1) leased their property to Petitioner and housed him with their mentally ill son; (2) failed to inform or warn Petitioner of their son's condition and volatile behavior; (3) failed to discover that their son possessed or had access to a gun or dangerous weapon; and, (4) failed to take measures to prevent their son from having access to a gun or dangerous weapon. In performing their undertaking, Respondents failed to exercise the reasonable care required under the circumstances. Seemingly, these are all jury questions.

III.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS AND TRY HIS CASE.

Petitioner's previous counsel filed a Complaint for recovery and negligence against the Estate of Samuel Joe Dixon and herein Respondents. An Answer was filed on November 9, 2015. A Motion to Dismiss was filed on February 29, 2016, and a hearing was set for April 29, 2016, and re-scheduled to June 13, and again on August 2016. In the meantime, an Order of Mediation was filed prior to the hearing. Respondents filed a Motion to Compel Settlement on November 7, 2016. A hearing on the motions were set for January 24, 2017, where the Court ordered the dismissal of the case.

On February 2, 2017, Petitioner, with his new counsel, moved for reconsideration of the Order, and requested the Court to grant Petitioner a chance to pursue discovery proceedings.

² 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."

The combination of Petitioner's trauma brought about by the shooting, outstanding motions that have been filed and the minimal time given to the substituting counsel, all prevented him from conducting discovery. Besides, based on the pending motions, it did not seem to be wise to begin the discovery process when the matter could ultimately be dismissed.

Petitioner believes that discovery would provide the trial court with the necessary evidence to allow him to have his day in Court. In *Batson (I)*, the Court declined to impose summary judgment before sufficient discovery could be completed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition for Certiorari and review the Court of Appeal's decision to affirm the circuit court's. Petitioner believes that the unique circumstances of this case merit the re-examination of the rules on residential landlord-tenant relationship, recognizing the need to formulate a new standard of duty of care that will address the distinct features of this case.

June 27, 2019

Respectfully submitted,



Donald L. Smith, Esquire

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Counsel for Petitioner Kenji Kilgore

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

RECEIVED

JUL 01 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

*On Petition for Writ of Certiorari
To the Supreme Court of South Carolina*

Appellate Case No. 2017-001330
Unpublished Opinion No. 2019-UP-110
(Rehearing denied June 5, 2019)

Kenji Kilgore,

Petitioner,

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 Petitioner's Petition for Certiorari, Appendix and Proof of Service for same upon The Honorable Daniel Shearouse, Clerk of Court South Carolina Supreme Court, at Post Office Box 11330, 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 copies of same in the United States Mail, postage prepaid, on June 27, 2019.

Anderson, South Carolina
June 27, 2019



Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner