

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 5614
(S.C. Ct.App. filed January 16, 2019)

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

v.

Wanda G. Rahall..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 22, 2019.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in applying an erroneous test to rule that the Respondent was herself a “social guest” at the premises where she admittedly lived and thus did not owe a duty to warn or protect her elderly mother under the facts of this case?

- II. Did the Court of Appeals err in failing to consider whether the Respondent owed a duty to protect and warn her elderly parent of a dangerous condition under a “special relationship” theory because the issue was “novel” and lacked existing precedent?

STATEMENT OF THE CASE

This is an action for contribution. The Petitioner 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 Petitioner 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 Petitioners initially pled claims for contribution and equitable indemnity. At the call of the case, the Petitioners 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 Petitioners filed a timely appeal to the South Carolina Court of Appeals. After holding oral arguments, the Court of Appeals affirmed the Circuit Court's Order by published opinion issued on January 16, 2019. (App. 1-6).

The Petitioners thereafter petitioned for rehearing, and that petition was denied by order entered on August 22, 2019. (App. 7).¹ The Petitioners now seek review in the Supreme Court by way of a petition for writ of certiorari.

¹ By letter dated February 4, 2019, the Court of Appeals requested the Respondent to file a return to the Petitioners' Petition for Rehearing. Despite requesting and receiving an extension, no return was ever filed.

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. The Court of Appeals erred in applying an erroneous test to rule that the Respondent was herself a “social guest” at the premises where she admittedly lived and thus did not owe a duty to warn or protect her elderly mother under the facts of this case.**

In its published opinion, the Court of Appeals ruled that the Respondent Wanda Rahall was “a social guest in the Apartment” because she “did not possess or control any portion of the Property” and because she “did not pay rent, taxes, or utilities related to the Apartment and maintained a separate residence in Myrtle Beach.” (App. 4). As a result, the Court of Appeals concluded that she owed no duty to protect or warn her elderly mother of dangerous conditions known to her to be present on the premises *where Rahall admittedly lived*.

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). This 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).

In the case at bar, the Court of Appeals erred in concluding that Wanda Rahall was a “social guest” herself and owed no duty to protect and/or warn to Elsie Rabon. The Court of Appeals relied on a flawed analysis on this issue by looking at such factors as payment of rent, utilities, and taxes or the existence of more than one residence. That is not and should not be the test for determining whether a person qualifies as a “possessor” of property who owes a duty to protect and/or warn licensees upon that property. The Court of Appeals cited no authority, and there is none, for the test employed. There is no authority that holds that a person who is a permanent (or non-transitory) possessor of property must have an ownership interest or formal relationship as a lessee in order to owe a duty of care related to the very property where she admittedly lives.

Additionally, the test employed by the Court of Appeals fosters bad public policy. The Court of Appeals places a duty to protect or warn *only on the owner (or formal lessee) of property and upon no other resident or possessor*. There should be no correlation between ownership and the duty to warn or protect.² A person, such as Rahall, who resides on the property and has knowledge of dangerous conditions should not be given a pass only because she

² During oral argument and, as clear from the Court of Appeals’ opinion, it appears that the Court of Appeals did not distinguish between the various duties of care that may arise in a premises liability case. The Court of Appeals focused on the duty to correct or control a dangerous condition on the property, which arguably falls only on the owner or lessee of the property. Indeed, in this case, Charleston Electric Services owed such a duty and hence settled with Elsie Rabon, which triggered this action for contribution. During oral argument, the Court of Appeals asked about a hypothetical situation where there is a dead, hazardous tree that needs to be removed from the property. In that situation, the duty of care falls on the owner or lessee. But that situation is entirely inapposite to the case presented. Here, the Petitioners do not assert that Rahall owed a duty to correct or control any condition on the property. That duty would fall on the owner or lessee. Rather, the Petitioners contend that Rahall owed a duty to protect and warn her elderly mother -- her guest on the premises where she resided -- and that duty is not contingent on having a financial interest in the property.

has no financial nexus or responsibility for the property, or, even more so, because she has more than one residence. If this is the law, any person who lives in a residence but does not pay to live there, would owe no duty of care. That is not and should not be the law. Accordingly, this is an appropriate case for this Court to grant a writ of certiorari and address this issue.

The Petitioners do not suggest that a transitory person who is at the premises only briefly and on occasion owes a duty of care as a “possessor,” but Rahall’s presence was not occasional, and she was not transitory. She lived there. By 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 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. As the Petitioners have argued, the duty of care is not owed only by the person or entity that actually owns or has a legal interest in the premises, 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.” *See, Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615, 616 (1986). In sum, ownership interest or other legal interest in the property is not determinative of who owes a duty to protect and/or warn. The “possessor” need not have a financial nexus to the property in order to owe a duty to protect or a duty to warn of a dangerous condition on the property.

The Court of Appeals also erred in treating the premises consisting of 60 Romney Street as distinct parts so as to conclude that Rahall, even if a “possessor” or “occupier” 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.

Furthermore, the Petitioners have alleged that Rahall owed Rabon, who was an invited guest at 60 Romney Street by Rahall, a duty to protect and a duty to warn of the dog’s propensity to jump up on persons. Importantly, the Petitioners are not arguing that Rahall had a duty to control the dog in any respect or to control the yard. Thus, the fact that the yard may have been in the “exclusive possession” of Charleston Electric Services in a legal sense has absolutely no bearing whatsoever on the duties to protect and/or warn owed by Rahall to her elderly mother.

The Petitioners have 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.³ On August

³ The trial court erroneously ruled that the dog "is not a defective condition upon

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 from coming outside where the dog was located. Rahall 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

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), the Court of Appeals 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 the Court of Appeals 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.

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 protect and warn her of a dangerous condition or activity on the premises. This Court is respectfully requested to issue a writ of certiorari to address whether duty of care was owed by Rahall to her mother under these facts.

II. The Court of Appeals erred in failing to consider whether the Respondent owed a duty to protect and warn her elderly parent of a dangerous condition under a “special relationship” theory because the issue was “novel” and lacked existing precedent.

In addition to owing a duty of care as a “possessor” or “occupier” of the premises, the Petitioners presented an alternative theory as the legal basis for a duty to care to be owed by Wanda Rahall. 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). Here, the relationship between Rahall and her elderly mother 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 its opinion, the Court of Appeals disposed of this issue simply by recognizing that “[o]ur jurisprudence has not extended a legal duty to children to protect, warn, or supervise a parent.” (App. 5). The Court of Appeals, however, failed to engage in any meaningful analysis of the issue. The lack of existing precedent on a particular issue does not mean that the issue cannot be raised and is not deserving of careful consideration and analysis as a novel issue. In other words, the lack of existing “jurisprudence” does not dispose of a novel issue. That is

particularly true where South Carolina law does already recognize a duty to protect and/or warn “where the defendant has a special relationship to the victim.” *Faile*, 566 S.E.2d at 546.

Given the Court of Appeals’ failure to do so, this Court is urged to examine whether the “special relationship” recognized in *Faile* includes a parent-child relationship. Clearly, the law recognizes a special relationship that may give rise to liability where a parent fails to protect a minor 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”). The same should be true where an adult child fails to protect an elderly parent from danger.

In its opinion, the Court of Appeals did “note the record contains no evidence Rabon was physically or mentally incompetent or unable to care for herself.” (App. 5). However, whether a duty to protect and/or warn exists under particular facts should not be contingent on whether the victim is incompetent or not. By analogy, a parent still owes a duty of care to a minor child regardless of the child’s age or level of competence. Moreover, as addressed above, it is important for the Court to focus on the duty alleged. The Petitioners are not suggesting that the law requires an adult child to *control* his/her elderly parent. This case involves only a duty to protect and warn an elderly parent of a dangerous condition. Any other legal duty is not at issue.

In short, 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. The Petitioners submit that that issue, even if novel and for which there may be no

existing jurisprudence in this State, is nonetheless deserving of full consideration and analysis. The Court of Appeals erred in rejecting an issue only because it is “novel.” But even novel issues are deserving of full consideration and adjudication. That is the only way that the common law is amplified or even expanded to address societal norms and mores and the legal duties related thereto. This Court is respectfully urged to grant a writ of certiorari to address this important issue of law.

CONCLUSION

Based on the foregoing discussion, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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September 23, 2019

CERTIFICATE OF SERVICE

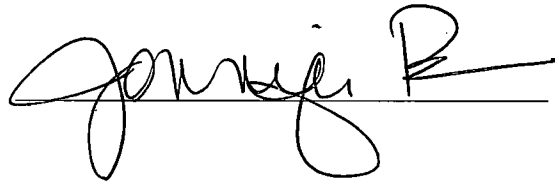
The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioners, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record (minus the briefs and Record on Appeal filed with the Court of Appeals) by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 23rd day of September 2019:

Hand Delivered

The Honorable Jenny Abbott Kitchings
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