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.

APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Wanda G. Rahall, Respondent.

Appellate Case No. 2016-001842

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5614
Heard December 5, 2018 – Filed January 16, 2019

AFFIRMED

Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, for Appellants.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton, both of Pritchard Law Group LLC, of Charleston, for Respondent.

LOCKEMY, C.J.: In this action for contribution, Charleston Electrical Services, Inc. (CES) and its insurance carrier, Selective Insurance Company of South Carolina (Selective), appeal the master-in-equity's order granting judgment in favor of Wanda Rahall. We affirm.

FACTS/PROCEDURAL BACKGROUND

On August 20, 2010, Elsie Rabon and her daughter, Wanda Rahall, visited Rahall's fiancé, George Kornahrens, at 60 Romney Street (the Property) in Charleston, South Carolina. The Property was owned by Kornahrens and leased to CES. During her visit, Rabon went into the yard looking for Kornahrens and was knocked to the ground by CES's "overly friendly" German shepherd guard dog, Gunner. Rabon was transported to the hospital and diagnosed with a broken hip.

Kornahrens was CES's business manager. Although Kornahrens owned the Property, he had no ownership interest in CES[1]. The Property, which is fenced in its entirety, consists of two buildings and a large yard used for storing CES's trucks and equipment. Kornahrens lived in an apartment (the Apartment) in one of the buildings on the Property. Gunner was owned by CES and kept in the yard. Rahall and Kornahrens were both aware that Gunner had previously jumped on visitors.

At the time of Rabon's injury, Rahall and Kornahrens had been involved in a romantic relationship for five years and had been engaged for four years. Rahall owned a home in Myrtle Beach and Rabon lived in a senior living apartment complex in Myrtle Beach. Rahall stayed in the Apartment when she was in Charleston, and Kornahrens stayed at Rahall's home when he was in Myrtle Beach. According to Rahall, she lived with Kornahrens "all the time" during 2010 and "70 percent of the time since 2008." Rahall had a key to the Apartment and kept personal items in the Apartment, but she did not pay rent or utilities. Rahall was not an agent or employee of CES and never had any ownership interest in CES or the Property. Kornahrens periodically invited Rabon to stay at the Apartment.

On December 31, 2010, Rabon filed suit against CES alleging negligence and strict liability. In turn, CES filed a third-party indemnification action against Rahall and Kornahrens. Rabon and CES settled the underlying action for $200,000 in exchange for which Rabon released CES, Rahall, and Kornahrens from liability. Thereafter, the action was dismissed with prejudice as to Rabon's claim and without prejudice as to CES's claims against Rahall and Kornahrens.

On July 3, 2013, CES and its insurance carrier, Selective, filed suit against Rahall seeking to recover half of the settlement proceeds paid to Rabon. The suit was referred to the master-in-equity for trial. On August 2, 2016, the master ruled

[1] CES was originally owned by Kornahrens until his stepson, John Oakley, purchased the company in 1994.

Rahall did not owe a duty of care to Rabon; thus, Rahall was not liable under either a premises liability theory or the special relationship exception. CES and Selective (collectively, Appellants) appeal.

STANDARD OF REVIEW

An action for contribution lies in equity. *RIM Assocs. v. Blackwell*, 359 S.C. 170, 178-79 n. 3, 597 S.E.2d 152, 157 n. 3 (Ct. App. 2004). In an action in equity, tried by a master without a jury, an appellate court may view the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). This broad scope of review does not require the appellate court to disregard the findings of the master, who saw and heard the witnesses and was in a better position to evaluate their credibility. *Id.*

LAW/ANALYSIS

Appellants argue the master erred in finding in favor of Rahall in their action for contribution.

Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *United States v. Atl. Research Corp.*, 551 U.S. 128, 138, 127 S.Ct. 2331, 2337-38 (2007) (citing *Black's Law Dictionary* 353 (8th ed. 2004)); S.C. Jur. Contribution § 5 (2015). To maintain an action for contribution, Appellants must show Rahall shares a "common liability" for the damages suffered by Rabon. *See* S.C. Code Ann. 15-38-40(D) (2005).

Appellants assert Rahall's liability is grounded in negligence. To establish negligence, a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Steinke v. SC Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "An essential element in a cause of action for negligence is the existence of a legal duty owed by the defendant to the plaintiff." *Huggins v. Citibank, NA.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). In the absence of a duty, there can be no negligence. *Id.* at 332, 585 S.E.2d at 277.

I. Premises Liability

Appellants contend the master erred in finding Rahall did not owe a duty to Rabon under a premises liability theory. We disagree.

"To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). "One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

Here, the parties agree Rabon was a social guest, or licensee, on the Property. "Under South Carolina jurisprudence, 'a landowner 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*, 377 S.C. at 201, 659 S.E.2d at 204 (quoting *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994)).

The master determined Appellants' position that Rahall was liable for Rabon's injuries under a premises liability theory was "patently meritless." The master found Rabon's injury occurred in the yard of the Property, which was in the exclusive possession and control of CES; thus, CES, as owner and possessor of the yard, was the only party who owed a duty to Rabon. The master held Rahall was a social guest with no legal right to possess or control the Property; therefore, she did not owe a duty to other guests on the Property.

On appeal, Appellants argue Rahall was a possessor of the Property and owed a duty to Rabon to warn her of any dangerous conditions. Appellants contend Rahall knew or should have known Gunner presented a risk of harm to Rabon and should have warned or protected Rabon.

We hold the master did not err in finding Rahall owed no duty to Rabon under a premises liability theory. Rahall, as a social guest in the Apartment, did not possess or control any portion of the Property. Rahall did not pay rent, taxes, or utilities related to the Apartment and maintained a separate residence in Myrtle Beach. Furthermore, although Rahall occupied the Apartment, the remainder of

the Property, including the yard where Rabon's injury occurred, were leased to CES and were in its exclusive possession and control.

II. Special Relationship Exception

Appellants argue the master erred in finding Rahall did not owe a duty to Rabon arising out of a special relationship. We disagree.

"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." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). South Carolina law recognizes five exceptions to this rule: "(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." *Id.*

The master found the relationship between Rahall and Rabon did not fall under any of the five exceptions listed above. The master noted no South Carolina court had ever imposed upon a child of any age a general duty to protect his or her parent, regardless of age, from harm presented by the conduct of a third party or instrumentality not within the custody and control of the child. The master further found Rahall did not undertake a duty to protect her mother nor did she negligently or intentionally create the risk of Gunner jumping on Rabon. The master held Rahall could not warn Rabon of a danger that she did not know existed.

On appeal, Appellants argue that based upon their special relationship, Rahall owed a duty to warn and protect her elderly mother from the risk of harm posed by going into the yard where Gunner was located. Appellants assert Rahall knew Gunner was an overly friendly dog with a propensity to jump on visitors and could potentially injure her mother. Appellants contend Rahall had the ability to monitor, supervise, and control Rabon's actions on the Property and could have prevented her mother from entering the yard where Gunner was located.

We hold the master did not err in finding Rahall did not owe a duty to Rabon arising out of a special relationship. Our jurisprudence has not extended a legal duty to children to protect, warn, or supervise a parent. We further note the record contains no evidence Rabon was physically or mentally incompetent or unable to care for herself.

CONCLUSION

The decision of the master is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

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

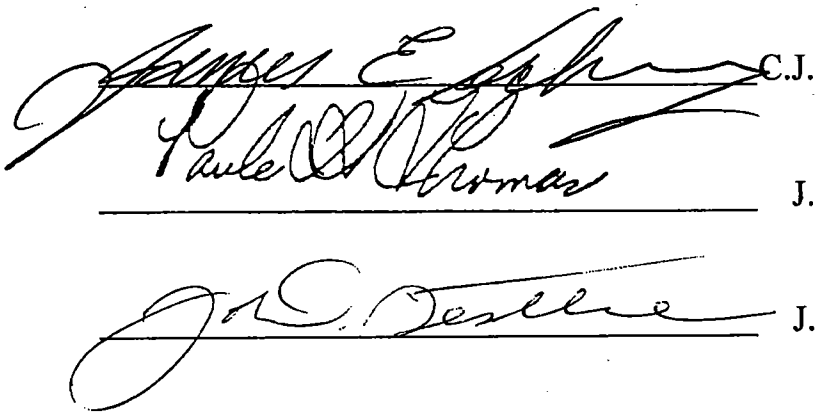
v.

Wanda G. Rahall, Respondent.

Appellate Case No. 2016-001842

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

Columbia, South Carolina

cc:
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Edward K. Pritchard, III, Esquire

FILED

August 22, 2019

Elizabeth Fraysure Fulton, Esquire
Julie J. Armstrong

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.

APPELLANTS' PETITION FOR REHEARING

The Appellants petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Charleston Electrical Services, Inc. v. Rahall*, Op. No. 5614 (S.C. Ct. App. filed January 16, 2019).

The grounds for the Appellants' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants' petition for rehearing is based on the Court's decision in *Charleston Electrical Services, Inc. v. Rahall*, Op. No. 5614 (S.C. Ct. App. filed January 16, 2019); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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January 31, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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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,

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Wanda G. Rahall..... Respondent.

MEMORANDUM IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

The Appellants have petitioned this Court for a rehearing of its recent published decision in *Charleston Electrical Services, Inc. v. Rahall*, Op. No. 5614 (S.C. Ct. App. filed January 16, 2019). The Appellants respectfully submit that the following points were overlooked or misapprehended by the Court:

I.

In its opinion, this Court 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." (Slip Op. at 4). As a result, the Court 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.

The Court respectfully erred in concluding that Rahall was a "social guest" herself and owed no duty to protect and/or warn to Elsie Rabon. The Court relies 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 cites 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 this Court fosters bad public policy. The Court 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.[1] 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 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.

The Appellants 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

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[1] During oral argument and, as clear from the Court's opinion, it appears that the Court has not distinguished between the various duties of care that may arise in a premises liability case. The Court focuses 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 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 Appellants 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 Appellants 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.

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 Appellants 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.

This Court 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 Appellants 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 Appellants 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.

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. On rehearing, the Court is respectfully requested to find that a duty of care was owed by Rahall to her mother under these facts.

II.

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 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, this Court 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." (Slip Op. at 5). The Court, 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.

This Court needs 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, this Court did "note the record contains no evidence Rabon was physically or mentally incompetent or unable to care for herself." (Slip Op. at 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

competence. Moreover, as addressed above, it is important for this Court to focus on the duty alleged. The Appellants 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 Appellants submit that that issue, even if novel and for which there is no existing jurisprudence in this State, is nonetheless deserving of full consideration and analysis, and on that basis, a rehearing should be granted.

CONCLUSION

Based on the foregoing discussion, the Appellants respectfully request that the Court rehear its published decision and 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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