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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-08-3732

Jane Roe, as parent and natural guardian of
Judy Roe, James Roe, and Joyce Roe, minor
children under the age of eighteen (18).....Appellants,

v.

Daniel Bibby, Sr., and Michelle Bibby

Of whom, Michelle Bibby is.....Respondent.

AMENDED INITIAL BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This appeal arises out of an Order of the Circuit Court granting Respondent's Motion for Summary Judgment and dismissing Appellants' causes of action with prejudice.

The trial court's final judgment was entered on October 12, 2012 and disposed of all claims of all parties. Appellants filed a Notice of Appeal on November 2, 2012. This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in finding that Respondent owed no duty to Appellants, and therefore granting Respondent's Motion for Summary Judgment and dismissing Appellants' claims with prejudice?

STATEMENT OF THE CASE

Appellants, minor children under the age of eighteen (18), allege that they were sexually molested at the hands of their neighbor, Daniel Bibby, Sr. The various instances of molestation all allegedly occurred in a house owned jointly by Mr. Bibby and his wife, the Respondent, Michelle Bibby ("Respondent"). On October 15, 2010, Appellants filed suit in the Court of Common Pleas, Berkeley County, alleging as against Daniel Bibby causes of action for Assault, Battery, False Imprisonment, and Intentional Infliction of Emotional Distress, and alleging as against Respondent causes of action for Negligence and Wrongful Infliction of Emotional Distress on a Bystander.

Daniel Bibby failed to file a responsive pleading and, on May 16, 2011, Appellants' obtained a default judgment against him. Respondent Michelle Bibby did

Answer and, ultimately, filed a Motion for Summary Judgment, alleging that she owed no duty to these Appellants.

Respondent's Motion for Summary Judgment was argued before the Honorable R. Markley Dennis, Jr. on July 10, 2012, and the Court took the matter under advisement. During the period of advisement, the Court permitted the parties to submit supplemental memoranda in support of their respective positions. The supplemental memoranda were submitted July 12, 2012. Subsequently, by Order filed October 12, 2012, the Circuit Court Granted Respondent's Motion for Summary Judgment and dismissed Appellants' claims with prejudice.

It is from that Order that Appellants appeal. Appellants' Notice of Appeal was served on the Respondent on November 2, 2012.

STATEMENT OF FACTS

Michelle and Daniel Bibby were married September 13, 1969. (M. Bibby Dep. 12:5-7). The Bibby's had three children, Donald, Daniel Jr., and Michelle Bernadette[1] ("Bernadette"). (M. Bibby Dep. 5:6-23). In or around 1995, when Bernadette was 16, Bernadette disclosed to a family friend that her father, Danial Bibby Sr., had sexually molested her when she was younger. (M. Bibby Dep. 20:6-21-4). Respondent confronted her husband about these allegations and Mr. Bibby admitted to Respondent that he had touched their daughter inappropriately. (M. Bibby Dep. 27:2-6). The molestation was reported to DSS and Daniel Bibby, Sr. was removed from the house and placed in counseling. (M. Bibby Dep. 21:11-21). Sometime thereafter, Mr. Bibby was permitted to return to the household. (M. Bibby Dep. 21:23-22:3).

[1] Michelle Bernadette Bibby's married name is Quattlebaum.

Upon Mr. Bibby's return to the household, Respondent had a lock installed on Bernadette's bedroom door, and took precautions to hide the key from her husband. (M. Bibby Dep. 63:9-15).

In 2008, Appellants moved into the neighborhood. Appellants' house was diagonally located across the street from Respondent's house. (Roe Dep. 21:22-22:9). Appellant Jane Roe and Respondent became friendly. Shortly after Appellants moved in, Respondent came over to introduce herself to Appellant Roe. (Roe Dep. 20:8-12). Respondent's grandchildren were approximately the same age as the minor Appellants[2] and the children became friends. (Roe Dep. 100:20-22). At the time, one of Respondent's adult children was living at Respondent's house along with two of Respondent's grandchildren. (See generally M. Bibby Dep.).

The minor Appellants and Respondent's grandchildren often played with each other and visited each others' houses. (See Roe Dep. 21:5-12; M. Bibby Dep. 67:20-25). Respondent was aware that the Appellant minors were coming into her house to play with her grandchildren (M. Bibby Dep. 67:17-19) and informed Appellant Roe that the children were welcome anytime. (Roe Dep. 65:24-66:2). Respondent admits that she was not always present at her house when the minor Appellants were over. (M. Bibby Dep. 68:4-7). Respondent also admits that she remembered and was aware of her husband's prior sexual abuse of their daughter (M. Bibby Dep. 46:3-7). However, Respondent never informed Appellants of these prior acts of sexual abuse. (M. Bibby Dep. 69:24-70:16).

[2] Appellant Roe had three minor children. The oldest were twins: one boy referred to herein as "James" and one girl refereed to herein as "Joyce." Appellants youngest child was a girl, who is referred to herein as "Judy." Pursuant to this Court's Order Regarding Personal Identifiers, Appellants' actual names have been redacted because this matter involves allegations of sexual abuse.

In April of 2009, Daniel Bibby, Sr. admitted to a counselor that he had been molesting his granddaughter. (M. Bibby Dep. 38:22-24). Upon learning of this admitted molestation, Appellant Roe became fearful that Mr. Bibby might have been molesting her minor children as well. (Roe Dep. 27:23-28:7). Appellant first discussed the matter with her oldest daughter, "Joyce," who confirmed that Mr. Bibby had touched her chest and threatened to kill her if she told anybody. (Roe Dep. 29:6-9). Appellant's youngest daughter, "Judy," revealed similar accusations. (Roe Dep. 30:11-14). Appellant immediately called the police. (Roe Dep. 30:14-15). Appellants were referred to the Dorchester Children's Center and Appellant Judy was forensically interviewed. (Roe Dep. 34:19-24).

During her interview, Judy revealed that Mr. Bibby touched her. (See, DCC Interview Report). Judy stated that Mr. Biby held her in a room with Mr. Bibby's granddaughter and that Mr. Bibby took his clothes off and forced the children to take their clothes off. Id. Judy further stated that Mr. Bibby touched her "boobs" and her "tee tee" with his hands and that Mr. Bibby made Judy touch the granddaughter's boobs and tee tee as well. Id. Judy also disclosed exposure to pornography in the Bibby household. Id.

Appellant Roe testified that she had no knowledge of Mr. Bibby's prior sexual abuse of his daughter and that she had no reason to suspect that it was unsafe for her children to play at the Bibby household. (Roe Dep. 55:8-56-3). Appellant further testified that she never would have allowed her kids to visit the Bibby household had she been warned of Mr. Bibby's sexual propensities. (Roe Dep. 58:13-15).

STANDARD OF REVIEW

Summary judgment is "an extreme remedy to be cautiously invoked." Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore has the authority to review this question presented *De Novo*.

ARGUMENT

A "cause of action for negligence requires: 1) the existence of a duty on the part of the defendant to protect the plaintiff; 2) the failure of the defendant to discharge the duty; 3) injury to the plaintiff resulting from the defendant's failure to perform." South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324, 325 (1986). Because there is at least a scintilla of evidence that could allow a reasonable jury to find in Appellants' favor as to each element, the trial court erred in

granting summary judgment for Respondent and the order should be reversed and the matter remanded for a trial on the merits.

I. The Trial Court erred in granting Respondent's Motion for Summary Judgment because Respondent owed a duty to warn Appellants by way of their special relationship and, more fundamentally, because there is evidence on the record to show that Respondent was negligent under basic principles of premises liability law.

A cause of action for negligence requires one to breach her duty owed to another. See Byerly v. Connor, 307 S.C. 441, 443, 415 S.E.2d 796, 798 ("Without a violation of . . .a legal duty, there is no negligence."). A legal duty can be established in many ways. The duty might be heightened or different depending upon the nature of the relationship between the parties. Moreover, an owner or possessor of land may owe certain duties to those who are invited or allowed entry upon the land.

In the present action, the trial court erred in finding that Respondent owed Appellants no duty. The trial court erred in finding that no special relationship existed between Respondent and Appellants. Even in the absence of such a relationship, the trial court should have considered Respondent's liability under basic premises liability law and erred in ruling upon the weight of the evidence. Under either theory, or both, the order of the trial court should be reversed and the matter remanded for a trial on the merits.

A. Respondent had a duty to warn Appellants arising out of their special relationship and the circumstances alleged in Appellants' Complaint.

Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. Restatement (Second) of Torts, § 315 (1965). However, such a duty may arise where, "a special relation exists between the actor and

the third person which imposes a duty upon the actor to control the third person's conduct; **or**, a special relationship exists between the actor and the other which gives the other a right to protection." Id. (**emphasis added**). Multiple South Carolina cases have addressed and adopted the first prong in various instances. See, e.g., Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)(holding defendant was aware that mother had made specific threats of harm toward child in the past, and that defendant breached its duty to warn of mother's release); Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002)(holding department had independent duty to control and supervise a known dangerous juvenile in its custody). However, the question of whether there is a duty to warn minor children of potential sexual abuse in order to avoid the potential for child molestation is an issue of first impression.

Although the legal issue is novel, this is not the first time our Court of Appeals has considered the question. In Doe v. Batson, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 2000), partially vacated, 345 S.C. 316, 548 S.E.2d 854 (2001), the Court considered a similar scenario. In Batson I, a number of minors were sexually assaulted by a 27 year old man who still lived at home with his mother. The minors brought suit against the perpetrator's mother, alleging that the molestations occurred in her house, that she knew her son had young boys in his bedroom, and that she was negligent for failing to warn or act. Id. In reviewing the trial court's grant of summary judgment in favor of the mother, the Court of Appeals considered the special relationship test and noted, "case law from other jurisdictions lends credence to Doe's assertion that Batson had a duty to warn in this case." Id. at S.C. 301, S.E.2d 914.

The issue ultimately made it to the South Carolina Supreme Court. The Supreme Court agreed with the Court of Appeals that summary judgment was improper because discovery had not yet been completed, but explicitly vacated the portions of the Court of Appeals' opinion discussing liability. Batson II, 354 S.C. 316, 323, 548 S.E.2d 854. However, in vacating those portions of the opinion, the Supreme Court did not express disapproval of the reasoning. Instead, the Supreme Court noted, "The paucity of the record makes it impossible for us to determine the merits of Doe's argument. Whether Batson had a cognizable duty will be determined after the record has been more fully developed." Id. Therefore, although Batson I is not strictly precedential, the opinion of the Court of Appeals nonetheless sheds valuable and well reasoned light on the issue.

Indeed, case law from other jurisdictions does tend to lead credence to Doe's assertion, and the assertion of Appellants in the present matter, that a duty to warn of potential sexual abuse might arise in the context of a special relationship. For instance, the Wisconsin Court of Appeals stated, "We think it self evident that an adult who voluntarily takes on supervision, custody or control, even on a temporary basis, of a visiting child...stands in a special relationship to such child for purposes of the child's 'protection' under [The Restatement]." Gritzner v. Michael R., 598 N.W.2d 282 (Wis. Ct.App. 1999) aff'd in part, rev'd in part on other grounds, 611 N.W.2d 906 (Wis. 2000).

Some states require actual knowledge of the offender's propensities. See, e.g., Romero v. Superior Court, 89 Cal.App.4th 1068, 1083, 107 Cal.Rptr.2d 801, 812 (Ct.App. 2001)("We...hold as a matter of law that an adult defendant who assumed a special relationship with a minor by inviting the minor into his or her home will be deemed to have owed a duty of care to take reasonable measures to protect the minor against an

assault by another minor invitee while in the defendant's home when the evidence and surrounding circumstances establish that the defendant had actual knowledge of, and thus must have known, the offending minor's assaultive propensities.").

Other states require only constructive knowledge. See, e.g., Doe v. Franklin, 930 S.W.2d 921, 928 (Tx.App. 1996)("If [defendant] knew or should have known of her husband's proclivities, she should have taken steps to ensure that Doe would not be placed in harm's way or to otherwise ensure that her husband would not be in a position to act on his temptations); Funkhouser v. Wilson, 89 Wash.App. 644, 661, 950 P.2d 501, 509 (1998)("we must determine whether there is sufficient evidence that a rational trier of fact should be allowed to determine whether the risk of harm was reasonably foreseeable at the time [plaintiffs] were molested.").

South Carolina has already adopted the "constructive knowledge" test in other circumstances. See, Bishop, 331 S.C. (holding 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).

In the present case, there is more than a scintilla of evidence on the record from which a reasonable jury could find that Respondent had a special relationship with the Appellant victims. Respondent readily admits to knowing that the Appellants were coming over to her house to play. (M. Bibby Dep. 67:17-19). Furthermore, she admits that the Appellant children were there at her invitation. (M. Bibby Dep. 102:12-13)("I am the one when I was home who let the children in the house.). Based upon Respondent's own admissions, the other evidence on the record, and the reasonable

inferences to be drawn therefrom, the trial court erred in holding, as a matter of law, that no special relationship existed between the Respondent and the minor Appellants.

Moreover, there is evidence on the record of a specific threat. Whether this Court applies an actual knowledge or constructive knowledge test is almost immaterial in this instance because the Respondent admits to having actual knowledge of her husband's prior propensities toward pedophilia. (M. Bibby Dep. 46:3-7)(Admitting she was aware that her husband had molested their daughter in the past). The trial court improperly overlooks this evidence, noting that the prior molestation occurred approximately 15 years earlier and holding, "There were no other incidents between then and the time Plaintiffs moved into the neighborhood. [Respondent] had no knowledge that her husband was a danger, believing the incident between Mr. Bibby and their daughter was an isolated event and that furthermore, he was rehabilitated according to the Department of Social Services." (Order Grant'g Summ. J. at 3).

This analysis is made in error both because it goes to the weight of the evidence, and because it mischaracterizes the evidence on the record. The passage of time between the alleged molestations does not, as a matter of law, negate the fact that Respondent had actual knowledge of her husband's proclivities to commit such acts. Whether Respondent truly believed her husband was "rehabilitated" or not is a question of fact for the jury. Indeed, a reasonable jury could conclude, as science would seem to dictate, that a pedophile can never be truly cured. More importantly, there is evidence on the record to even suggest Respondent, herself, did not actually believe that her husband had been rehabilitated. When her husband returned to the house after the first instance of sexual abuse on their daughter, after the counseling which Respondent allegedly believes to

have rehabilitated Mr. Bibby, Respondent nevertheless proceeded to install a lock on her daughter's door and took steps to hide the key from her husband. (M. Bibby Dep. 63:9-15). This action could lead to the reasonable inference that, in fact, Respondent did not believe her husband had been rehabilitated, but rather was concerned that he would re-offend. Simply put, it is for the jury to decide whether to lend credibility to Respondent's rehabilitation theory or not.

Furthermore, the passage of time, alone, does not prove as a matter of law that Mr. Bibby was rehabilitated. Clearly he was not, as he admits to re-offending. Indeed, a long passage of time (coincidentally the time when no minor children were living in the house) might suggest a lack of opportunity, rather than a lack of desire. More importantly, the trial court's finding that "there were no other incidents" is not exactly supported by the evidence on the record. In a statement to police, Daniel Bibby, Jr. admitted that, for at least two years leading up to the alleged molestation of Appellants, he had caught his father looking at child pornography on the internet. (D. Bibby Statement). Moreover, Bibby Junior informed Appellant Roe that he had brought his father's pornography watching to the attention of his mother on several occasions. (Roe Dep. 79:21-80:3). Respondent admits to having been with Mr. Bibby in Myrtle Beach when he disposed of the computer in a dumpster behind a building. 54:16-55-7). This presents a scintilla of evidence from which a rational juror could surmise Respondent's knowledge of her husband's continuing propensities.

In this matter, just as in Batson I, there is ample evidence of specific harm. As the Court of Appeals reasoned in Batson I, "the specific persons to be harmed were readily identifiable as the minor males brought to Batson's home and taken to her son's room.

At each instance, if Batson knew or should have known of their presence and the threat of harm her son posed to them, but failed to warn them, such may constitute a failure to warn of a specific threat to a specific victim." Batson, 338 S.C. at 301. This case is even more egregious as there is no indication that Batson had a known history of molestation, where here the record supports actual knowledge of Bibby's propensities, and actual knowledge of Appellants' presence in Respondent's house.

To the extent the trial court relies upon cases such as Hackett v. Smith, 630 So.2d 1324 (La.Ct.App. 1993) and Wood v. Astleford, 412 N.W2d 753 (MinCt.App. 1987), such reliance is misplaced because these cases are quite distinguishable, factually, from the present matter. In Hackett, the court refuses to find a special relationship because, by the Plaintiff Guardian's own testimony and admission, the pedophile's wife was never actually entrusted with the victim's care. Instead, the Guardian admitted that the victim only visited the pedophile's house in the company of Guardian. Hackett, 630 So.2d at 1328. This is clearly inapplicable to the present case where Appellant Roe entrusted the minor Appellants' care to Respondent and was not actually present in Respondent's home when the alleged molestations occurred. Likewise, in Wood, the Court refused to find a special relationship because there was no evidence that the Defendant had prior knowledge of her husband's propensities. Wood, 412 N.W.2d at 757 ("There is scant evidence from the record, briefs, or oral arguments that Lola Astleford knew or should have known of her husband's pedophilia."). Such evidence clearly exists in the present case.

Finally, to the extent the trial court refused to consider the possibility of a special relationship because respondent "had no duty to monitor, supervise and control Mr.

Bibby's conduct (Order Grant'g Summ. J. at 2)," this analysis is misplaced. First, as correctly recognized in Batson I, Appellants' claim is not based on a theory of vicarious liability, that Respondent is vicariously liable for the actions of her husband, but rather is based upon Respondent's own negligence in breaching the duty owed under the special relationship. Indeed the special relationship test is *disjunctive*, such that Respondent owes a duty **either** where, "a special relation exists between the actor and the [molester] which imposes a duty upon the actor to control the [molester's] conduct; **or**, a special relationship exists between the actor and the [victim] which gives the [victim] a right to protection." Restatement (Second) of Torts, § 315 (1965). (**emphasis added**). Here, Respondent's special relationship with Appellants is clearly supported by the evidence, and her ability to control her husband becomes immaterial.

For all these reasons, the trial court erred in finding that Respondent owed Appellants no duty arising out of their special relationship. The trial court erred in granting Respondent's Motion for Summary Judgment and the ruling should be reversed and remanded for a trial on the merits.

B. Respondent had a duty to warn Appellants as a matter of basic premises liability law.

Even assuming Respondent owed no "special" duty to Appellants by way of their relationship, Respondent could nonetheless be liable under a premises liability theory. Because all of the alleged acts of molestation occurred on Respondent's property, Respondent owed, and may have breached, duties to Appellants just as any occupier of land would owe to one who came upon the land with consent or permission.

To establish negligence in a premises liability action, a plaintiff must prove (1) a duty of care owed by defendant to the plaintiff; (2) defendant's breach of that duty by a

negligent act or omission; and (3) damage proximately resulting from the breach of duty. See Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006); Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). Therefore, to survive a Motion for Summary Judgment, Plaintiffs must establish only a mere scintilla of evidence in support of each element.

The nature of the duty owed is dependent upon the Plaintiff's "status" upon the land. Here, it is undisputed that Appellants were licensees. (See M. Bibby Dep. 67:17-19(admitting that the Appellants were social guests at her house.)). A social guest is an example of a licensee. Singleton v. Sherer, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008). One who possesses, manages, or controls a property owes to a licensee the duty "to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land; and 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 maybe dangerous to him, and which he may reasonably be expected to discovery." Neil v. Byrum, 288 S.C. 472, 473 (1986).

Our Courts have already held that a victim of a sexual assault on another person's property may bring suit under a premises liability theory. See Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct.App. 1994). Therefore, the analysis turns on whether Mr. Bibby constituted a dangerous condition known to Respondent, and whether this danger was concealed.

The general state of premises liability law, as it relates to people as "dangerous conditions or activities" can be summarized as follows. "Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal

conduct of third parties, because the foreseeability of the risk is slight, and because of the social and economic consequences of placing such a duty on a person. However, an exception exists if the owner, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party or *if it is shown that the landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor.*" 62 Am.Jur.2d Premises Liability § 409.

Again, in this specific context, the question is somewhat novel to South Carolina. The Batson I court seemed to suggest, at a minimum, that such a cause of action could exist in South Carolina, though this portion of the decision was also vacated by the Supreme Court. Therefore, we must address the question as a matter of first impression.

In refusing to classify Mr. Bibby as a dangerous condition or activity, the trial court first seems to call into question the credibility of Appellants' testimony, questioning whether Mr. Bibby could be dangerous if the alleged molestation never actually occurred. (Order Grant'g Summ. J. at 5 ("The only evidence of any such crime was the video interview of the oldest child. She does not give a coherent story and she places several other adults in the room of Ms. Bibby's granddaughter. Even taking into account the nature of a tale told by a child of her age, it did not make any sense.")). Once again, this analysis by the court goes to the weight of the evidence and is wholly inappropriate in a summary judgment setting. Whether the Appellants' allegations make sense or not is a question for the jury. Moreover, it almost belies common sense to suggest that, as a matter of law, a rational jury could never find Mr. Bibby culpable of molesting

Appellants in light of his admission to molesting both his granddaughter, who is roughly the same age as Appellants, and his own daughter years ago when she was that age.

The trial court goes on to dismiss this theory by relying upon a case out of Kansas, D.W. v. Richard Bliss and Carol Bliss, 279 Kan. 726, 112 P.3d 232 (2005), and a case out of California, Eric J. v. Betty M., 76 CalApp.4th 715 (CalCt.App.1999). Again, however, this reliance is misplaced. The cases upon which the trial court rests its analysis are factually dissimilar to the case at hand. Moreover, these cases appear to represent the minority view among the states. Kansas has done away with traditional distinctions between duties owed in a premises liability setting. Bliss, 112 P.3d at 241. Thus, the Bliss Court is addressing the question from an entirely different legal angle. Likewise, Betty addresses the liability of a landowner for criminal acts committed against a guest by **another guest**. Betty, 76 CalApp.4th at 723.

The court fails to take notice of the numerous other states who seemingly do allow a premises liability action under these circumstances. See, e.g., Thibeault v. Seifert, 388 So.2d 244 (Fla.Dist.Ct.App. 1980); Barmore v. Elmore, 83 Ill.App.3d 1056, 403 N.E.2d 1355(1980); Youngblood v. Schireman, 53 WashApp. 95, 765 P.2d 1312 (1988). Indeed, to the extent this Court must look to other jurisdictions, the facts and law presented by J.S. and M.S. v. R.T.H., 155 N.J.330, 714 A.2d 924 (1998) seem most instructive to the case at bar. In R.T.H., parents brought an action on behalf of their children against a husband and wife, Plaintiff's neighbors, alleging that the husband had assaulted the minor children and that the wife was negligent in failing to warn of or prevent the assault. In a lengthy opinion, the New Jersey Supreme Court reasoned that, where a spouse has actual knowledge or special reason to know of the likelihood of her

spouse engaging in sexually abusive behavior, the spouse must warn of the harm. Id. The Court stated, "we conclude that there is sound, indeed compelling basis for the imposition of a duty on a wife whose husband poses the threat of sexually victimizing young children. Id. at 935.

This reasoning is compelling indeed. Common sense, alone, dictates that a pedophile creates an unreasonably dangerous condition in the presence of young children. There seems little difference between a pedophile and, say, a beehive. Each is dangerous. In either scenario, where a landowner knows or has reason to know of its existence, that landowner should, in South Carolina, have a duty to warn licensees on her premises if the danger is concealed. This is particularly true where the pedophile or otherwise dangerous person, as here, is a permanent presence at the residence, rather than a mere guest as contemplated in the Betty case. This does not, as the trial court suggests, impose a duty on Respondent to "hunt out any new residents living anywhere in an undefined area to tell them of an incident that happened decades earlier." (Order Grant'g Summ. J. at 3). Instead, it imposes only a duty to warn those unsuspecting guests who Respondent chooses to allow on her property or those with whom Respondent chooses to undertake a special relationship as set forth more fully above. Thus, the breadth and scope of the duty, in cases like these, are always determined by the homeowner herself. If she does not wish to subject herself to the duty, she simply should not allow children access to her property.

There is no logical reason, nor is there any binding legal authority, to draw a distinction between a dangerous inanimate concealed condition on one's property and a dangerous resident pedophile. South Carolina should not draw such a distinction and

should treat both dangers as one in the same, requiring a homeowner with knowledge to warn those unsuspecting guests who are proper licensees on the premises.

There is evidence on the record to support a conclusion that Mr. Bibby did, in fact, molest Appellants, rendering him dangerous. Moreover, Appellant testified that she was unaware of Bibby's dangerous propensities. "They gave me no reason not to trust them." (Roe Dep. 50:2-3). "I had no reason not to trust [Respondent]. I saw that she had her grandkids. She looked like a good grandmother to me…I never saw anything wrong" (Roe Dep. 55:8-13). "[Mr. Bibby] looked like a normal – he looked like a grandfather. He was clean-cut, he was well-kept. I mean, he was never disrespectful to me. He seemed like he was nice to the kids, so I had no reason not to trust him." (Roe Dep. 55:23-56:3). Furthermore, proximate cause seems clear. Appellant testified, "if I would have known what would have happened in that house, my little girls would have never been over there, never." (Roe Dep. 58:13-15). Respondent admits that she never warned Appellants of her husband's propensities or past acts of molestation. (M. Bibby Dep. 69:24-70:16).

Accordingly, all of the elements for a premises liability action are supported by evidence on the record. The trial court's ruling should be reversed and this matter remanded for a proper trial on the merits.

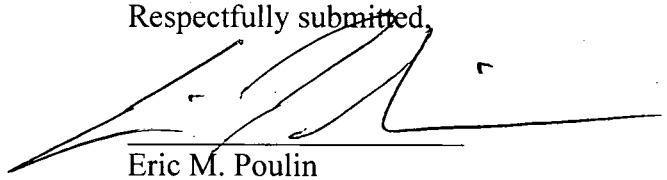
CONCLUSION

For the reasons stated, the Order of the trial court should be reversed. This action should be remanded to the Circuit Court for a trial and final determination on the merits.

[Signature on Following Page]

February 26, 2013

Respectfully submitted,



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Of whom, Michelle Bibby is.....Respondent.

PROOF OF SERVICE

I certify that I have served Appellants' Motion to Amend; Amended Initial Brief; and Amended Designation of Matter on Michelle Bibby by depositing a copy of it in the United States Mail, postage prepaid, on April 26, 2013, addressed to her attorney of record, Eugene P. Corrigan, III, Post Office Box 547, Charleston, South Carolina, 29402.

April 26, 2013

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