

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

RECEIVED
APR 29 2013
SC Court of Appeals

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.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO STRIKE

Appellants filed and served their Initial Brief and Designation of Matter on
February 25, 2013. On April 17, 2013, Respondent filed a Motion to Strike two of
Appellants' designations to be included in the Record on Appeal. Respondent seeks to
strike designation number 7: Dorchester Children's Center Interview Report; and
designation number 8: the deposition transcript of Michelle Bernadette Quattlebaum.

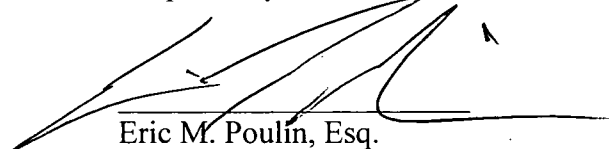
Appellants concede that Ms. Quattlebaum's deposition does not appear to have
been directly before the lower court and, accordingly, have agreed to strike this
designation. Appellants have filed a Motion to Amend and Amended Designation of
Matter to reflect the same.

As to designation number 7, the Dorchester Children's Center Interview Report, Respondent argues that Appellants' description is not set forth with specificity and that the document was not before the lower court. This argument is made in error, however, as the lower court actually refers to this interview in the written Order that is on appeal. See, 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.") [Exhibit A].

To the extent the initial designation was ambiguous, Appellants have re-labeled the document in the Amended Designation of Matter to read "7. Dorchester Children's Center Interview Report ("Summary of Abuse/Event Disclosure: Exhibit 2 to Michelle Bibby Dep.)." To further avoid confusion, a copy of this report is attached hereto as Exhibit B.

Wherefore, having fully replied to Respondent's Motion to Strike, Appellants pray for an order dismissing the Motion as Moot as to designation number 8; and denying the Motion as to designation number 7 based upon the arguments and evidence presented herein.

Respectfully Submitted,



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April 26, 2013

Attorney for Appellants

EXHIBIT A
(Lower Court Order on Appeal)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 [REDACTED] as Parent and)
 Natural Guardian of [REDACTED],)
 [REDACTED], and [REDACTED])
 [REDACTED],)
)
 Plaintiff,)
)
 v.)
)
 DANIEL BIBBY, SR. and MICHELE)
 BIBBY,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO. 2010-CP-08-3732

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

FILED
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 CLERK OF COURT
 BERKELEY COUNTY, S.C.

This matter comes before the Court pursuant to Defendant Michele Bibby's Motion for Summary Judgment. On July 10, 2012, the parties appeared before this court and arguments were heard from attorneys for all parties. Based on the deposition testimony of Michele Bibby and [REDACTED] the arguments set forth at the motion hearing, and the laws of South Carolina, the Defendant's Motion for Summary Judgment is hereby granted.

STATEMENT OF THE CASE

This case was brought against Michelle Bibby alleging liability for the alleged actions of her husband Daniel Bibby, Sr. by the Plaintiff, [REDACTED] on behalf of her minor children. In an attempt to recover, the Plaintiff filed suit against Daniel Bibby's wife, alleging negligence arising from a special relationship between Michele and the [REDACTED] children, and under a theory of premises liability. Following discovery, which included depositions of both [REDACTED] and Michele Bibby, the Defendant filed a Motion for Summary Judgment, which was heard on July 10, 2012. The Motion was granted as there was no genuine issue of material fact as determined under Rule 56 of the South Carolina

rmc 9/11

Rules of Civil Procedure based upon the pleadings, depositions, and current South Carolina law.

A. DEFENDANT MICHELE BIBBY HAD NO DUTY TO WARN PLAINTIFFS ARISING FROM A SPECIAL RELATIONSHIP OR CIRCUMSTANCE.

The Plaintiffs cannot recover against Michele because they cannot establish that she owed a duty to the [REDACTED] children. Generally, there is no duty to control the conduct of another or to warn a third person or potential victim of danger. *Faile v. SC Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E. 2d 536, 546 (2002). There are exceptions to this rule, including a duty to warn a third party when the defendant has a special relationship to the victim. *Id.* The defendant may have a common law duty to warn potential victims under this "special relationship" when the defendant "has the duty to monitor, supervise and control an individual's conduct" and when "the individual has made a specific threat of harm directed at a specific individual." *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (citing *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)). However, "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim." *Doe v. Marion*, 373 S.C. 390, 402, 645 S.E.2d 245, 251 (2007) (quoting *Gilmer v. Martin*, 323 S.C. 154, 157, 473 S.E. 2d 812, 814 (Ct. App. 1996)).

There is no testimony in the depositions or any other evidence to support that Michele had a special relationship with the Plaintiffs because she had no duty to monitor, supervise and control Mr. Bibby's conduct. The Plaintiffs argue that Michele had a duty to warn the neighborhood following her husband's sexual misconduct with their daughter that

occurred more than fifteen years ago. That matter was handled by the Department of Social Services, including a direction to reincorporate Mr. Bibby into the family.

The Plaintiffs had not lived in the neighborhood for a year but Michele Bibby lived in the same house for decades. Under the Plaintiff's theory, Michele Bibby would have to hunt out any new residents living anywhere in an undefined area to tell them of an incident that occurred decades earlier. There were no other incidents between then and the time the Plaintiffs moved into the neighborhood. She 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. Based on Michele's testimony, she asked her husband if he had molested any other children, in which he responded, "No." *Michele Bibby Deposition*, p. 27, l. 21-25. *Michele Bibby Deposition*, p.28, l.1-10. Michele was then informed by DSS that after Mr. Bibby had completed his counseling with "flying colors" they felt he was no longer a threat. *Michele Bibby Deposition*, p.65, l. 10-12. Therefore, regarding when a duty arising from a special relationship exists, Michelle lacked the knowledge that Mr. Bibby was a potential threat to other young children, but more importantly she had no knowledge of a specific threat to the [REDACTED] There is no evidence of such in the record, nor can there be.

Furthermore, the Plaintiffs incorrectly rely on *Doe v. Batson* in support of their argument that Michele had a duty to warn arising from a special relationship. As noted in the Supreme Court's opinion, while they affirmed the Court of Appeals' reversal of summary judgment, the Court "vacate[s] those portions of the Court of Appeals' opinion discussing liability, and remand to the trial court for discovery and development of Doe's

theories of recovery.” *Doe ex rel Doe v. Batson*, 345 S.C. 316, 323, 548 S.E. 2d 854, 858 (2001) (emphasis added).

The case law from other jurisdictions also supports a finding that Michelle owed no duty to the Plaintiffs arising out of a special relationship. In *Hackett v. Smith*, the Louisiana Court of Appeals granted summary judgment for the defendant, holding that a relative had no duty to warn parents or a child about her husband’s alleged dangerous propensities when the sexual misconduct occurred more than fifteen years ago and the defendant had no reason to believe the problem had not been resolved. 630 So.2d 1324, 1328 (La.Ct.App. 1993) (finding also that the counselor testified the defendant had made “great progress” in therapy and no further allegation of sexual misconduct with minors surfaced during that period.) The court in *Hackett* also refused to find a special relationship existed between the defendant and the victim because there was no assertion the defendant was ever actually entrusted with the victim’s care. *Id.* at 1328. Similarly, in *Wood v. Astleford*, the Minnesota Court of Appeals found the existence of a special relationship immaterial between a pedophile’s wife and his victims as there was not enough evidence to prove that she could have foreseen the abuse and thus, there was no duty to warn. 412 N.W.2d 753, 757 (Min.Ct.App. 1987) Further, when the wife did become aware of the abuse, she was not alerted that the plaintiffs were the “particular targets of the specific aberrant behavior” and thus had no duty to warn. *Id.* Based on the facts established in the case at issue, Michele was not negligent because no special relationship existed. There are no other exceptions to the general rule that apply or that were argued by the Plaintiffs.

B. NO DUTY TO WARN EXISTS FOR ONE SPOUSE UNDER A PREMISES LIABILITY THEORY

The Plaintiffs also argued that Michele Bibby was liable for the alleged acts of her husband under a theory of premises liability. Premises liability is an area of law involving a property owner's duties that arise from others (most commonly classified as trespassers, invitees or licensees) coming on to their land. The most common example of a licensee is a social guest. *Singleton v. Sherer*, 377 S.C. 185, 199, 659 S.E.2d. 196, 203 (Ct. App. 2008) A landowner is under no obligation to exercise care to make the premises safe for a licensee, but has a duty 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.. *Id.* (quoting *Neil v. Byrum*, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (emphasis in original)). Based on the Plaintiff's argument, the Court would have to classify Michele's husband as a "dangerous condition or activity" that she would have to warn licensees about once they entered her property. There are no cases in South Carolina that discuss whether one spouse may be considered a "dangerous condition" or property of the other spouse. Mr. Bibby was charged with crimes against the Bibby children but they were dropped. 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 Mrs. 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.

In *D. W. v. Richard Bliss and Carol Bliss*, the Kansas Supreme Court directly addressed the topic. Here, the Court stated that to suggest a spouse be equated with and

considered "property" or a "dangerous condition" in order to give rise to premises liability, while creative, has no support. 279 Kan. 726, 739, 112 P. 3d 232, 241 (2005)

Other states have examined whether or not it is appropriate to find a breach of duty under a premises liability theory against a homeowner for the acts of her spouse and have refused to recognize it. In *Hackett*, the court refused to find the situation of child molestation could be "likened to a premises liability situation, where the owners of the property may be strictly liable for injuries caused by defects in their property... [the husband] is not [the wife's] property." 630 So.2d 1324 at 1329. Further, the Plaintiffs in *Hackett* conceded that the wife could not be held responsible for failing to warn or protect from his activities where she had no special relationship to the victim. *Id.* In *Eric J. v. Betty M.*, the court held that a convicted child molester's "mere presence" on the property could not be considered a dangerous condition, and thus not a basis for premises liability. 76 Cal.App.4th 715, 726 (Cal.Ct.App.1999)

Premises liability and sexual abuse was mentioned in South Carolina in *Burns v. South Carolina Comm'n for the Blind*, but there are several distinguishing features, which preclude its use in the analysis of the law regarding the case at issue. In *Burns*, the Court of Appeals did find that the jury could be charged with instructions on a premises liability theory for a sexual abuse case. However, the Defendant was a state agency, and the Court found "this relationship, analogous to that of a business invitee, imposes liability on the Commission, if at all, similar to that of an owner of a business." 323 S.C. 77, 80, 448 S.E.2d 589, 591 (1994). Therefore, *Burns* falls into a different line of cases than those at issue in this case. The Plaintiff was a patient in a state facility attacked by another patient. The case at issue here deals with a private residence and not real property open to the public. The

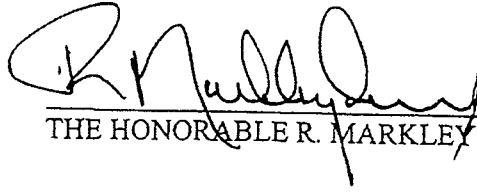
standards enforced under South Carolina premises liability law differ based on the status of the individual and the nature of the property.

When the Court of Appeals cites *Burns* sixteen years later in *Burnett v. Family Kingdom, Inc.*, there is no mention of premises liability; rather the case is cited for the consideration of liability arising from a statute. 387 S.C. 183, 189, 691 S.E.2d 170, 174 (Ct. App. 2010.) If there is a cause of action in South Carolina under premises liability, there would have to be some question of fact evidence knowledge or acquiescence by a wife in the criminal acts of the husband. Michele Bibby worked at the Charleston County Library during the day and took care of her grandchildren at night. There is nothing that presents even a scintilla of evidence that she had or could have had knowledge of a danger reoccurring at the home where her disabled grown son and children of various ages were living.

In addition, the case at issue should be removed from the discussion of premises liability because Michele would have to have some reason to expect or know that a danger existed in the first place. Under any analysis, a duty imposed upon Michele requires an element of knowledge of a latent defect on the premises. At the motion hearing, Plaintiff's counsel was unable to articulate evidence in the record that Michele had knowledge of any danger or had placed her grandchildren or anyone else's children in danger. Their only argument was the incident that occurred between Daniel Bibby, Sr., and their daughter more than fifteen years ago.

For the reasons set above, IT IS HEREBY ORDERED THAT Defendant's Motion for Summary Judgment is **GRANTED** and this case is hereby dismissed with prejudice against the Plaintiff.

AND IT IS SO ORDERED!



THE HONORABLE R. MARKLEY DENNIS, JR.

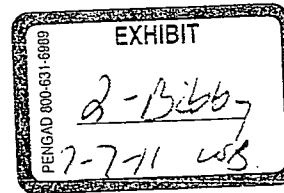
Moncks Corner, South Carolina

~~Sept~~
August 17, 2012

EXHIBIT B

(Appellants' Designation Number 7 to be Included in the Record on Appeal)

2009-0914



Summary of abuse/event disclosure (Note: This is a summary. See video for child's complete statement.)

Summary:

█ provided a disclosure of domestic violence between her parents

█ stated that her parents hit each other and they have pushed each other down. She stated that her parents say bad words and curse. █ reported a time when her dad hit her bedroom door and it broke. She stated that her mom was in the living room and her brother █ was in the bed sleep and she and her sister █ was in their bed. █ was unclear about why her dad was angry but stated that her mom said she was sorry. █ also recounted an incident when she accidentally hit her mom in the jaw with a gold club and her mom was unconscious.

█ provided a disclosure of sexual abuse against Mr. Daniel Bibbey, Sr.

█ provided a disclosure of sexual abuse against Mr. Danny Bibbey, Jr.

█ provided a disclosure of sexual abuse against her brother, █

█ provided a disclosure of exposure to pornography against Mr. Daniel Bibbey, Sr

█ stated that when she was at her best friend's █ Bibbey house, █ grandfather, Mr. Bibbey touched her. She stated that Mr. Bibbey drives a red truck and that he is the father of Mr. Danny who is █ dad. █ reported that while in █'s room, she and █ had their clothes off. █ stated at Mr. Bibbey took her clothes off. She stated that Mr. Bibbey touched her boobs and her tee tee with his hands. She stated that she (█) touched █'s boobs and tee tee and put her mouth in those areas. █ also stated that Mr. Bibbey touched █ on her boobs and tee tee. █ stated that she touched █ on her nose with her hands. She stated that Mr. Bibbey's clothes were also off.

█ stated that Mr. Danny gave her cookies and that she put the cookies in Mr. Bibbey's mouth and he yum yum. She stated that crushed cookies were put in her butt by Mr. Bibbey and that cookies were put in █ butt. She was unable to state how the cookies were taken out of her butt. She stated that Mr. Bibbey put powder in her tee tee and he did the same thing to █

█ stated that when Mr. Bibbey told her to touch his wiener, she said no and he said yes. She stated that she started crying and he spanked her calling her "nigger, and motherfucker." She stated that she repeated these same words to █ and █ repeated these words to █ at Mr. Bibbey's request. She stated that she touched █'s mouth with her hand and she put her mouth on █'s boobs and tee tee.

█ stated that Mr. Danny put his mouth on her boobs, butt and on her tee tee. She stated that the only person on the room was █. She stated that Mr. Bibbey was gone to get pizza. █ stated that she put her mouth on Mr. Bibbey's wiener and Mr. Danny took a picture of her doing this. She stated that she started crying and they (█, █, and her brother, █) started laughing. She stated that █ said bad words, █, and her brother, █) started laughing. She stated that █ said bad words, "nigger, asshole and fucker."

█ stated that while at Mr. Bibbey's house she saw sex on a movie, she stated that she saw boobs and wiener. She stated that while at her house, her brother, █ pulled her pants off and kissed her tee tee. She stated that she told █ that her boobs were big and he said no they were little. She denied seeing pornography at her home.

2009-0914

CONTINUATION:

June 2, 2009 - A Follow up Forensic Interview was conducted to further distinguish between Mr. and Mr. Danny. In the initial interview [REDACTED] was very clear that Mr. Bibbey and Mr. Danny (how she referred to them) were two different people. After the follow up interview with Mrs. [REDACTED], she indicated that both Mr. Bibbey and Mr. Danny were both Daniel Bibbey. The Follow up interview was to again make sure there was a clear distinction between the two and it was clearly different.

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

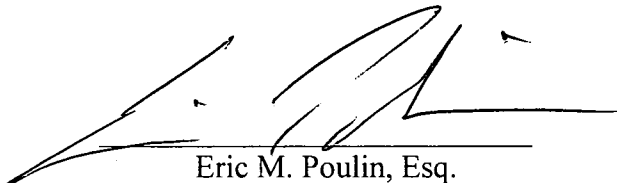
Of whom, Michelle Bibby is.....Respondent.

PROOF OF SERVICE

I certify that I have served Appellants' Return to Respondent's Motion to Strike 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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Daniel J. Crooks, III (DC) (SC)

Florence Office: 150 W. Evans Street, Florence, SC

Reply to the North Charleston Office

April 26, 2013

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

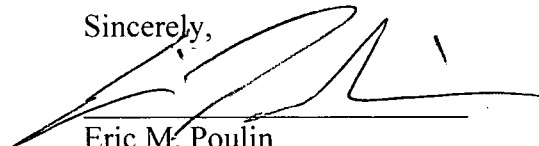
RE: *Jane Roe v. Michelle Bibby*
Case No.: 2010-CP-08-3732
Tracking No.: 2012-213350

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of Appellants' Return to Respondent's Motion to Strike; and original and one (1) copy of proof of service of the same upon the Respondent. We would greatly appreciate it if you would file the originals and return the clocked in copies to us through the enclosed envelope.

Please do not hesitate to contact me should you have any questions.

Sincerely,



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(843) 614-8888

Cc: Eugene P. Corrigan, III (w/ enclosures)
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APR 29 2013

SC COURT OF APPEALS

ADDITIONAL OFFICES

Florence, South Carolina * Greenville, South Carolina * Columbia, South Carolina
Myrtle Beach, South Carolina * Wilmington, North Carolina