STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Denise Wright,	)	CIVIL ACTION NO.: 2011-CP-40-4068
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS**
	)	
PRG Real Estate Management, Inc., Franklin Pineridge Associates, Karen Campbell Individually and in her Representative Capacity as an Agent of PRG Real Estate Management,	)	
	)	
Defendants.	)	

This case arises out of an abduction, kidnapping, and robbery by two unknown criminals originating in the common area of Plaintiff Denise Wright's ("Plaintiff's) residence at Wellspring Apartment Complex ("Wellspring"). This matter is before the Court on the motion of the Defendants for summary judgment. After considering the briefs of the parties, the arguments by counsel for the parties, the record, and the applicable law, this Court has determined that summary judgment is appropriate on all claims asserted by Plaintiff.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Defendant Franklin Pineridge Associates ("FPA") is the titled owner of Wellspring, which is located at 500 Harbison Boulevard in Richland County, South Carolina. (Sec. Amend. Comp. ¶¶ 2-3). Defendant PRG Real Estate Management, Inc. ("PRG") manages Wellspring, and Defendant Karen Campbell ("Campbell") was Wellspring's property manager and an employee of PRG at the time of Plaintiff's incident. (*Id.* at ¶¶ 2, 4).

Plaintiff leased an apartment at Wellspring beginning in approximately May of 2003. (Wright Dep. 39:18-22). On September 18, 2008, Plaintiff parked her car in Wellspring's parking lot and was walking to her apartment at approximately 10:30 p.m. (Sept. 18, 2008 Police Report at 1). According to the police report, "[t]he [Complainant/Victim] saw two black males sitting in front of the 2200 building." (*Id.*). The two men asked for Plaintiff's money, and when she did not have any, they made her drive them to various automatic teller machines to make withdrawals from her account. (Sept. 18, 2008 Police Report at 1). The withdrawals totaled $780. (*Id.*). After approximately 35 minutes, the men released Plaintiff and she drove to her daughter's house, where police responded. (*Id.*). The perpetrators have never been caught.

On June 24, 2011, Plaintiff filed her Complaint in which she alleged Defendants were negligent because they breached various duties relating to her security from criminal activity. Plaintiff also asserted claims for breach of implied warranty of safety, fitness and habitability, as well as violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") by Defendants. Defendants answered Plaintiff's Complaint on August 1, 2011. Plaintiff subsequently amended her Complaint on June 22, 2011 (Amended Complaint) and again on February 8, 2012 (Second Amended Complaint). Defendants filed Answers to these amended pleadings on September 8, 2011, and March 8, 2012, respectively.

Defendants moved for summary judgment in this matter on August 2, 2012, and filed a supporting memorandum on September 27, 2012. The court heard oral argument from counsel for all parties on October 1, 2012. At oral argument, Plaintiff served her Memorandum of Law in Opposition to Defendants Motion for Summary Judgment. The court granted Defendants ten days to review Plaintiff's opposition memorandum and file a reply brief. On October 17, 2012, Defendants requested leave and additional time from the court to file a reply so as to address

certain evidentiary issues, and the court granted Defendants' request the same day. Defendants filed a reply brief on October 19, 2012, and Plaintiffs served a sur-reply on October 25, 2012.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c); *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 252, 531 S.E.2d 305, 306 (Ct. App. 2000). Rule 56(e) of the South Carolina Rules of Civil Procedure sets forth that for purposes of summary judgment, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such acts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." South Carolina's appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

While the party seeking summary judgment has the burden of proof to show no issue of material fact exists, that party may discharge this responsibility by showing an absence of evidence to support the non-moving party's case. *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 452, 499 S.E.2d 238, 241 (Ct. App. 1998), *rev'd on other grounds*, 341 S.C. 307, 534 S.E.2d 275 (2000). Once the moving party has met its initial burden, the non-moving party may not rely upon denials or allegations in the pleadings, but must come forward with specific facts showing a genuine issue for trial. *Id.* at 453, 499 S.E.2d at 241. Absent any triable issue,

summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. *Pye v. Aycock*, 325 S.C. 426, 431, 480 S.E.2d 455, 457 (Ct. App. 1997).

B. Negligence

Plaintiff's first action is for negligence. (Sec. Amend. Comp. ¶¶ 23-28). Defendants argue Plaintiff's claim fails because she cannot prove the existence of a legal duty or that breach of a duty proximately caused her to be the victim of a crime. The court addresses each of these issues separately.

(1) Defendants' Legal Duty to Plaintiff

The existence of a duty on the part of the defendant is essential to a negligence claim: "[w]ithout a duty, there is no actionable negligence." *Bishop v. South Carolina Dept. of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996). Therefore, it is appropriate for this court to decide as a matter of law whether a duty exists in this case.

South Carolina's courts have held that an apartment complex has no duty to protect tenants from criminal activity. The governing South Carolina law is set forth in *Cramer v. Balcor Property Management, Inc.*, 312 S.C. 440, 441 S.E.2d 317 (1994) ("*Cramer I*"). In *Cramer I*, the South Carolina Supreme Court considered the following question certified to the court by the United States District Court for the District of South Carolina: "Does a landlord owe a duty to a tenant to provide security in and around a leased premises so as to protect the tenant from criminal activity of third parties?" *Id.* at 441, 441 S.E.2d at 317. Similar to Plaintiff's arguments in this case, the plaintiff in *Cramer I* urged the court to adopt the same standard used

for innkeepers and guests, which requires innkeepers to protect guests or invitees from foreseeable criminal activity of third parties. *Id.* at 442, 441 S.E.2d at 318.

The court cited to *Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205 (D.S.C. 1990) for addressing the certified question. *Cramer I*, 312 S.C. at 442, 441 S.E.2d at 318. Citing to *Cooke*, the court found a fundamental distinction between the relationships of store owner/invitee and innkeeper/guest as compared to landlord/tenant. *Id.* at 443, 441 S.E. 2d at 318-19. As stated by the court:

> [P]laces to which the general public are invited might indeed anticipate, either from common experience or known fact, that places of general public resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against that common expectation. . . .
>
> Tenants in a huge apartment complex, or a tenant on the second floor of a house converted to an apartment, do not live where the world is invited to come. *Absent agreement, the landlord cannot be expected to protect them against the wiles of felonry any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself.*
>
> An apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public may create. *It is of its nature private and only for those specifically invited.* The criminal can be expected anywhere, any time, and has been a risk of life for a long time.

Id. at 442-43, 441 S.E.2d at 318 (quoting *Cooke*, 741 F. Supp. at 1213). The court also agreed that nothing in the South Carolina Residential Landlord Tenant Act ("SCRLTA") imposes a duty on landlords to protect tenants from third-party criminal activity. *Id.* at 444, 441 S.E.2d at 319.

Having reached these conclusions, the South Carolina Supreme Court answered the certified question as follows:

> We answer the question as presented to us in the negative. *Under South Carolina law a landlord does not owe a duty to a tenant to provide security in and around a leased premises to protect the tenant from criminal activity of third parties.* Neither common law nor the South Carolina Residential Landlord Tenant Act,

> imposes a duty on a landlord to provide protection to tenants against criminal activity of third parties.

Id. at 444, 441 S.E.2d at 319 (emphasis added). Applying this law, the United States District Court later granted summary judgment in *Cramer v. Balcor Property Management, Inc.*, 848 F. Supp. 1222 (D.S.C. 1994) ("*Cramer II*"). *See also Jackson v. Swordfish Investments, L.L.C.*, 365 S.C. 608, 620 S.E.2d 54 (2005) (affirming summary judgment in case involving action against commercial landlord for injuries to nightclub patron when patron was shot multiple times by assailant inside night club); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1998) (affirming summary judgment in landlord's favor in case involving attack on social guest of tenant at apartment complex by third parties).

Plaintiff acknowledges this law in her opposition brief. (Pl.'s Opp. Brief at 4-5). However, she argues her claim is distinguishable because Wellspring is part of a planned unit development known as the "Harbison Community Association," and that properties within this community are accessible by a series of public walking trails. (*Id.* at 5-9). Because the public uses these walking trails and can access Wellspring, Plaintiff argues Wellspring either invites members of the public to its complex or expects members of the public to be on the premises. (*Id.*). For this reason (and similar to the arguments of the plaintiff in *Cramer I*), Plaintiff believes Defendants have a duty to protect her from foreseeable criminal conduct.

Although Wellspring may be accessible to the public by walking trails, the court is not persuaded this manner of access is any different from a public sidewalk or street that allows public access to other property. Although Wellspring may be publicly-accessible, Plaintiff has provided no evidence that Wellspring invited members of the general public to use the premises. Conversely, the corporate representative for PRG and FPA confirmed Wellspring is private property. (Roten Dep. 39:10-12). As such, it is reserved for people who are tenants or are

specifically invited. *Goode*, 329 S.C. at 441, 494 S.E.2d at 831. Therefore (and as stated in *Cramer I*), Wellspring is not a place of public resort. For this reason, South Carolina law distinguishes between the duty owed by a landlord to a tenant and the duty owed by an innkeeper to a guest. *Cramer I*, 312 S.C. at 442-43, 441 S.E.2d at 318. Plaintiff was a tenant pursuant to the terms of her lease. (Wright Dep. 39:18-22, 42:11-12). Therefore, Defendants owed her no duty to provide for her security.

Notwithstanding the law concerning lack of a duty by Defendants, South Carolina law recognizes that under particular circumstances an exception may apply so as to give rise to a duty based on a showing of negligence constituting the proximate cause of the loss. *Cramer I*, 312 S.C. at 443, n.1, 441 S.E.2d at 319, n.1. Citing this law, Plaintiff also argues certain circumstances permit her negligence claim. (Pl.'s Opp. Brief at 9-13). For example, Plaintiff argues the "common areas" exception, which refers to the duty of a landlord to maintain common areas that remain under the landlord's control. *(Id.* at 10-12); *Cooke*, 741 F. Supp. at 1211. Plaintiff argues courts outside of South Carolina have interpreted this exception to include that a landlord must make common areas reasonably secure. (Pl.'s Opp. Brief at 10-12).

However, South Carolina's courts have rejected this application of the common areas exception in the context of a negligent security claim. *Cooke* clarified the common areas exception by stating the following:

> This rule clearly has never been applied in South Carolina to anything except physical injuries resulting directly from the condition of the premises themselves. . . . [T]his court rejects the application of the 'common areas' exception to criminal activity under South Carolina law.

Id. Cramer I addressed this exception after *Cooke* by stating that under South Carolina law a landlord does not owe a duty to a tenant to provide security "in *and around* a leased premises" to protect a tenant from third-party criminal activity. *Cramer I*, 312 S.C. at 444, 441 S.E.2d at 319

(emphasis added). In *Cramer II*, the court also rejected plaintiff's claims that lack of security guards, insufficient lighting, and lack of fencing were relevant to the "common areas" exception in the context of third-party criminal activity. *Cramer II*, 848 F. Supp. 1225. The court agreed with *Cooke* that the exception relates to physical injuries resulting directly from the condition of the property. *Id.* "To attempt to apply the common areas exception to this situation would stretch the exception to the point of swallowing the rule." *Id.* The same is true in this case. Plaintiff's attempt to create a separate duty that distinguishes between providing "safe" physical premises (i.e., structurally) and "secure" premises that protects against third-party criminal activity is not accepted under South Carolina law.

Plaintiff also argues courts outside South Carolina have found a duty when a landlord has superior knowledge of the crime risk in the area. (Pl.'s Opp. Brief at 12-13). This circumstance argued by Plaintiff is just another way of arguing that a landlord has a duty to protect tenants from the foreseeable risk of criminal activity. For reasons already stated, South Carolina's courts have rejected that landlords have a duty to provide security for tenants; no degree of knowledge about the risk of crime changes this law.

Plaintiff's final argument with regard to the question of whether Defendants owed her a duty relates to the "affirmative acts" exception. (Pl.'s Opp. Brief at 13-21). As recognized in *Cooke*, "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." *Cooke*, 741 F. Supp. at 1209-10. Plaintiff cites to numerous cases outside of South Carolina that apply this exception in the context of a negligent security claim (Pl.'s Opp. Brief at 13-14), and Plaintiff argues Defendants assumed a responsibility to create, maintain, and perform a security program at Wellspring for the benefit of its tenants. (*Id.* at 16). Plaintiff argues Defendants failed to act with due care with regard to its courtesy officer

program and with regard to providing adequate lighting and properly-maintained shrubbery to deter crime. (*Id.* at 16-21).

The court first addresses Plaintiff's argument with regard to Defendants' courtesy officer program. *Cramer II* expressly rejected Plaintiff's argument that Defendants failed to act with due care with regard to having a courtesy officer on duty. *Cramer II*, 848 F. Supp. at 1224. In *Cramer II*, the plaintiff argued that by initially hiring a courtesy officer to patrol the grounds and then terminating that officer without replacing him, the defendants breached their duty. *Id.* The court found the plaintiff "misapprehend[ed] the scope of the affirmative acts exception." *Id.* Specifically, the court stated:

> The exception envisions a situation where the act of the landlord leads directly to the injury complained of. The cases which fit this exception are those where there is a stronger connection between the act and the injury, such as where a landlord leaves an apartment door unlocked and a third party enters.

Cramer II, 848 F. Supp. at 1224. On this basis, the court rejected plaintiff's argument that having a courtesy officer on duty had a strong connection between the act and the injury. *Id.*

The same is true in this case. There is no evidence that Defendants' actions/omissions led directly to the incident complained of by Plaintiff. Defendants' Policies and Procedures Manual state that Wellspring "generally do[es] not provide security for [its] residents and employees should never indicate that we do so." (Section 9 of Policies and Procedures Manual entitled "Maintenance" at p. 7) (emphasis added). Notwithstanding this policy, Wellspring had a courtesy officer program whereby a resident who was affiliated with law enforcement received a reduced rental rate to serve as a courtesy officer for the complex. (Campbell Dep. 165:11-14, 223:20 – 224:9; Roten Dep. 147:15-20). There is nothing in the record to suggest Wellspring ever terminated a courtesy officer, but there were periods of time where Wellspring had no courtesy officer for various different reasons (e.g., a resident no longer wished to serve in this

capacity, was no longer affiliated with law enforcement, or other reasons). (Campbell Dep. 222:12-224:7). There was no courtesy officer in place at the time of Plaintiff's incident. (Roten Dep. 31:3-12). However, in these circumstances, Wellspring would seek to fill the position with a new courtesy officer by advertising the need for the position. (Roten Dep. 146:7-22; Mar. 25, 2009 email advertising courtesy officer opening (Ex. 11 to Roten Dep., PRG Def 002427)). As found in *Cramer II*, there is nothing to suggest a failure to use due care where Defendants were without a courtesy officer but sought to fill the position, and there is no evidence to suggest that absence of a courtesy officer led directly to Plaintiff's incident. Accordingly, the affirmative acts exception does not apply to this aspect of Plaintiff's liability theory.

The court next addresses Plaintiff's arguments concerning the "affirmative acts" exception with regard to lighting and maintenance of shrubbery. (*See* Pl.'s Opp. Brief at 19-21). Traditionally, under the law of South Carolina, a landlord owed no duty to maintain leased premises in a safe condition. *Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009). In 1986, South Carolina abrogated the common law by enacting SCRLTA, which requires landlords to comply with applicable housing codes materially affecting health and safety, and to "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." S.C. Code § 27-40-440(a)(1) and (2); *Robinson*, 384 S.C. at 585, 682 S.E.2d at 496. S.C. Code § 27-40-440(3) also requires a landlord to "(3) keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units, keep in a reasonably clean condition."

However, these provisions have never been interpreted to apply to anything other than the inherent physical state of the premises. In *Fair v. U.S.*, 334 S.C. 321, 513 S.E.2d 616 (1999), the South Carolina Supreme Court analyzed SCRLTA in the context of a dog bite case to determine

whether a landlord was liable under SCRLTA's fitness and habitability provision. The court reviewed § 27-40-440(a)(2) and determined the "fit and habitable" provision imposes a duty on the landlord relating only to the physical state of the premises. *Id.* at 323-24, 513 S.E.2d at 617. The court cited to cases in other jurisdictions that hold an implied warranty that premises are habitable and fit for living includes only structural defects, and not personal injury. *Id.* at 323, 513 S.E.2d at 617. Therefore, the court held that SCRLTA did not alter the common law rule that a landlord is not liable to a tenant's invitee for injury caused by a tenant's dog. *Id.* at 323-24, 513 S.E.2d at 617.

Plaintiff seeks to extend SCLRTA to require reasonable care in property repair and maintenance so as to protect tenants against third-party criminal activity. The South Carolina Supreme Court rejected this interpretation in *Cramer I* by stating "[w]hile section 27-40-440 imposes a duty on a landlord to keep the premises in a fit and habitable condition, the statute does not impose a duty on a landlord to provide protection to tenants against criminal activity by third parties." *Cramer I*, 312 S.C. at 444, 441 S.E.2d at 319 (emphasis added). Plaintiff's expert agrees there is nothing in the SCLRTA relating to the provision of security. (Booth Dep. 196:19 – 197:1).

Based on this law, Defendants complied with applicable law concerning maintenance of the physical state of Wellspring with regard to shrubbery and lighting. The shrubs around Plaintiff's door were never so high or thick that they impeded her ability to get to her apartment, and Plaintiff's testifying expert, William Booth, admitted the shrubs did not interfere with the right of way to Plaintiff's apartment. (Wright Dep. 56:10-14; Booth Dep. 129:22 – 130:2). He also reviewed work orders requested by Plaintiff and admits she never contacted Defendants about trimming the shrubs. (Booth Dep. 130:13-16). The lighting around Plaintiff's apartment

was never so dim that she could not reach her apartment without difficulty. (Wright Dep. 56:15-18). Plaintiff's expert agreed that work orders requested by Plaintiff concerning breezeway lights appeared to have been completed by Defendants. (Booth Dep. 152:11-18). Plaintiff never had a personal injury relating to the physical state of her apartment and its lighting or shrubbery. She never tripped over any branches from the shrubbery or was injured by losing her way from lack of lighting. (Wright Dep. 56:19-25). Accordingly, there is also no evidence to support Defendants' "affirmative acts" regarding lighting and shrubbery give rise to a duty that supports Plaintiff's claim.

(2) Proximate Causation

Although the question of proximate cause is usually a question for the jury, when there is "absolutely no evidence on the record" indicating that proximate cause exists, it is appropriate for the court to decide the issue as a matter of law. *Parks v. Characters Night Club*, 345 S.C. 484, 500, 614, 548 S.E.2d 605, 614 (Ct. App. 2001). If a plaintiff cannot prove proximate cause, then there is no claim for negligence. *Goode*, 329 S.C. at 447, 494 S.E.2d at 834 (granting summary judgment in apartment complex case involving claim of inadequate security).

Negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. *Id.* In order to hold a landlord liable for the breach of any duty, the negligence of the landlord must lead directly to the plaintiff's injury. *Cramer II*, 848 F. Supp. at 1224. In applying this rule, courts require a strong causal connection between the negligent act and the injury, such as where a landlord leaves an apartment door unlocked and a third party enters. *Id.*

First, a willful and malicious crime (e.g., an abduction, kidnapping, and robbery) breaks the causal link between any negligence of Defendants and Plaintiff's injuries. As stated by the South Carolina Court of Appeals:

> Generally, if between the time of the original negligent act or omission and the occurrence of the injury, there intervenes a willful, malicious, or criminal act of a third person producing the injury, and the intervening act was not intended by the negligent actor and could not have been foreseen by him as a probable result of his own negligence, the causal link between the original negligence and the injury is broken, and there is no proximate causation.

Sheppard v. South Carolina Dept. of Corrections, 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). The test is whether the author of the primary negligence should have reasonably anticipated the intervening act and resulting injury based on the circumstances. *Id.*, 385 S.E.2d at 37-38. However, "[o]ne is not charged with foreseeing that which is unpredictable or which could not have been expected to happen." *Id.* Foreseeability is judged from the perspective of the actor at the time of the negligent act, and not with the benefit of hindsight after an injury. *Id.*, 385 S.E.2d at 38.

Applying this law, there is no evidence that proximate cause exists to support Plaintiff's negligence claim. Plaintiff and her expert admit this case involves criminal activity. (Wright Dep. 118:5-7; Booth Dep. 74:1-12). Plaintiff admits that although crime may be deterred, it cannot all be prevented. (Wright Dep. 117:24 – 118:4). Plaintiff's expert admits there is no "crystal ball" or "magic pill" that allows us to predict what people may do with any certainty. (Booth Dep. 75:2-5). He also admits every crime cannot be prevented. (*Id.* at 74:25 – 75:1). As stated by Plaintiff's expert, security is a "people problem." (*Id.* at 73:13-14). Although it may be exacerbated by surroundings in which the security incident occurs, people are the ones who actually intend the harm. (*Id.* at 73:15-22). The perpetrators in this case committed their crime in spite of the fact that Wellspring residents were on their balconies and in the parking lot as the

incident happened. (Wright Dep. 67:1-7; Booth Dep. 164:24 – 165:18). They continued to commit the act in spite of the fact that another resident walked up with her dogs as the incident was occurring and engaged them in conversation. (Wright Dep. 74:17 – 75:6).

Plaintiff's expert has never spoken with the perpetrators. (Booth Dep. 162:19-22). Therefore, he has no way of knowing whether they had been watching Plaintiffs arrival and departure habits, whether they were aware of the presence or absence of a courtesy officer, or whether they chose their position based on overgrown shrubbery or inadequate lighting. (*Id.* at 162:23 – 163:13). He admits that answers to all of these questions would be relevant to his opinion that Defendants were the proximate cause of Plaintiff's injury, and not the criminal perpetrators. (*Id.* at 162:15 – 163:13).

In addition, there is no evidence to suggest Defendants could foresee Plaintiff's incident. This is supported from a review of police reports produced by Plaintiff and testimony about them by Plaintiff's expert. Plaintiff's expert admits security is a response to conditions known at the time. (Booth Dep. 75:14-25). There were twenty police reports of incidents from 2005 to 2008 that pre-dated Plaintiff's incident and that Plaintiff's expert considered relevant to his opinions. (Booth Dep. 182:20-25 – 183:1; Ex. 5, p. 11 to Booth Dep.). Of these twenty reports, the majority relate to automotive/parts theft or vandalism. (*Id.* at 179:7-14; Ex. 5, p. 11 to Booth Dep.). Only two police reports from the four years preceding Plaintiff's incident involved violent crimes: an assault and an attempted home invasion. (*Id.* at 185:12-20; Ex. 5, p. 11 to Booth Dep.). There were no other instances of abduction or kidnapping like Plaintiff's incident. (*Id.* at 185:21-22). Plaintiff's expert also could not recall any police report he reviewed that referenced shrubbery or lighting as a contributing factor to the crime. (*Id.* at 186:2-9).

The lack of foreseeability is also supported by testimony of local law enforcement officials. The reporting and investigating officers for Plaintiff's case, Officer Mohammed Gabr and Detective Kevin Isenhoward are familiar with the area in which Wellspring lies and characterized the crime rate as "average." (Gabr Dep. 26:10-22; Isenhoward Dep. 51:24 - 52:9). Detective Isenhoward stated that it is not a particularly dangerous area; there were some incidents in 2008, but "since then it's fairly calm." (Isenhoward Dep. 52:2-9). Plaintiff's expert also characterized crime in the area where Wellspring lies as "average." (Booth Dep. 108:12-17). Plaintiff's testimony also corroborates this characterization. She was not aware of any other criminal incidents at Wellspring prior to her incident. (Wright Dep. 57:18-20). She was never the victim of a crime at Wellspring prior to her incident, and she was not aware of crime involving other residents. (*Id.* at 57:1-17).

There is also nothing in the police report to support that shrubbery or a lack of lighting contributed to conceal the perpetrators. The author of the police report testified that recording accurate information in police reports is important because others may rely on them as part of a criminal investigation. (Gabr Dep. 15:18 – 16:14). As stated in the report: "The Complainant stated to the [Responding Officer] that while she was coming back home she parked her vehicle and walked to her apartment building. The [Complainant/Victim] *saw* two black males sitting in front of the 2200 building." (September 18, 2008 Police Report) (emphasis added). Plaintiff also testified that when she saw the perpetrators, she said "I need to get through, please." (Wright Dep. 65:1-5). To the extent Plaintiff claims shrubbery and inadequate lighting "concealed" the perpetrators, neither her testimony nor the police report taken at the time of the incident support these factors as a proximate cause.

Finally, there is nothing to suggest Plaintiff's incident would not have happened but for the absence of a courtesy officer. Plaintiff argues a properly-executed courtesy officer program would have provided a consistent officer presence that would have deterred Plaintiff's incident. (Pl.'s Opp. Brief at 26). The problem is that Plaintiff admits the program required officers to patrol for a minimum of two hours per day (*id.* at 26), and Plaintiff has provided no evidence that the patrol would have occurred at the time of Plaintiff's incident.

There is no evidence to support Defendants had a reason to foresee that breach of any of the duties Plaintiff attempts to impose upon them would have the natural and probable consequence of resulting in an intentional act by third parties against Plaintiff at Wellspring. Accordingly, Plaintiff cannot prove proximate causation, and Defendants were not negligent. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 826 (Ct. App. 1988).

B. Breach of Implied Warranty

Plaintiff's second cause of action is for breach of implied warranty of fitness, safety, and habitability. (Sec. Amend. Comp. ¶¶ 29-33). Plaintiff did not address Defendant's arguments in favor of summary judgment for this claim in her Memorandum of Law in Opposition to Defendants Motion for Summary Judgment. At oral argument on October 1, 2012, Plaintiff's counsel stipulated that Plaintiff did not oppose Defendant's motion with regard to this claim. Therefore, because this claim is unopposed, the court does not need to address it.

C. Violation of South Carolina Unfair Trade Practices Act

Plaintiff's final claim is for alleged violation of SCUTPA. (Sec. Amend. Comp. ¶¶ 34-43). SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code § 39-5-20(a). For Plaintiff to recover under SCUTPA, she must show: (1) Defendants engaged in

an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) Plaintiff suffered monetary or property loss as a result of the unfair or deceptive act(s). *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

As a threshold matter, Plaintiff attempts to assert a personal injury claim within a statutory regime devoted to unfair or deceptive conduct in "trade or commerce." S.C. Code § 39-5-20(a). A review of South Carolina cases applying SCUTPA illustrates the claim is predominantly asserted in non-personal injury matters arising from a transaction (e.g., forcing another competitor out of business, mislabeling a product's package, misrepresenting a machine's operating requirements, misrepresenting a used car's history or condition, and padding repair bills). *See generally* 28 S.C. Jur. Unfair Trade Practices Act § 3. Defendants disputed that SCUTPA had any application to Plaintiff's personal injury claim five years removed from the initial signing of her lease. Nevertheless, the court addresses each element of this claim for purposes of arriving at its decision.

a. Unfair or Deceptive Conduct.

Plaintiff does not provide any factual allegations to support her SCUTPA claim in her Complaint. Instead, she alleges "Defendants engaged in deceptive and unfair trade practices by misrepresenting to the Plaintiff and other members of the general public the fitness, safety, and habitability of the apartments at Wellspring as a safe and hospitable living environment." (Sec. Amend. Comp. ¶ 37). Defendants argued Plaintiff clarified this allegation in her deposition by citing to two ways Defendants deceived her: (1) an employee told her Wellspring was a "safe and secure place" when she filled out her application, and (2) she was not aware of the crime in the area until after her incident. (Wright Dep. 118:12-25, 119:8-12, 119:17-24). Plaintiff testified there was no other deceptive conduct by Defendants. (*Id.* at 121:1-5).

With regard to Plaintiff's allegation that Defendants represented Wellspring was "safe and secure," this alleged misrepresentation is not actionable because it is a representation of opinion rather than fact. *Cooke*, 741 F. Supp. at 1216. In *Cooke*, the plaintiff who was assaulted in her apartment asserted a fraud claim against her landlord based on statements by its agents that the complex was "safe." *Id.* at 1215. In its review of the fraud claim, the court reviewed the difference between representations of "fact" versus "opinion." For example, a statement that a person is a "competent mechanic" has been held to be a statement of opinion. *Id.* (citing *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985)). Conversely, a statement that a business is "profitable" has been held to be a statement of fact. *Id.* at 1216 (citing *Gilbert v. Mid-South Mach. Co, Inc.*, 267 S.C. 211, 227 S.E.2d 189 (1976)). As further guidance, the court cited to Restatement (Second) of Torts § 538A to explain that "an opinion is a statement 'expressing (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment.'" *Id.* After reviewing these concepts, the court in *Cooke* stated as follows with regard to the fraud claim:

> There can be no doubt but that the comment that an apartment complex is "safe" is one of opinion rather than fact. It simply reflects the speaker's judgment about the quality of life at [the] apartments. Safety is a vague term that would not be "susceptible of exact knowledge" in the way that the profitability of a business would be. "Safe," like "good," is a word whose meaning, in the language of the Restatement, "depends entirely upon the standard set." No more specific questions were asked, no more specific statements made. The response, casual and general, was simply the agent's judgment and opinion about safety on the complex. It is certainly not the kind of statement that South Carolina law would support as fraudulent.

Cooke, 741 F. Supp. at 1216.

Similarly, a representation to Plaintiff that Wellspring was a "safe and secure place" is not deceptive because it only reflects an individual's belief – without certainty – as to the

existence of a fact. Whether an apartment complex is a "safe and secure place" is a relative matter, depending upon the standard set as to what is a safe and secure apartment complex. It is certainly a matter upon which individual judgments may be expected to differ. *Id.* (citing to the comments to Restatement (Second) of Torts § 538A). For this reason, Plaintiff's conduct was not deceptive, and this alleged misrepresentation is not actionable.

Plaintiff's second alleged deceptive conduct relates to her belief that she had a "right to know" about any crime occurring on the premises. (Wright Dep. 119:17 – 120:2). There is no evidence Defendants misrepresented or concealed information concerning criminal incidents at Wellspring. By Plaintiff's own admission, this information was not provided to her until after her incident. The question is whether failure to provide this information constitutes deceptive conduct. It does not. There is no case, statutory, or regulatory authority requiring Defendants to notify or inform Plaintiff about the incidence of crime at Wellspring. Accordingly, this alleged deceptive conduct is also not actionable.

(2) The Public Interest Requirement.

Plaintiff's claim also fails because she cannot prove the alleged unfair or deceptive conduct affected the public interest. Plaintiff must prove this element with specific facts. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994), *reh'g denied*, (Nov. 29, 1994). Without proof of specific facts disclosing that members of the public were adversely affected, Plaintiff's adverse public impact claim is speculative and insufficient for recovery under SCUTPA. *Id.* at 527-28, 451 S.E.2d at 23. A SCUTPA claim requires specific proof of similar acts, transactions, or happenings where there is some special relation between them which would tend to prove or disprove some fact in dispute. *Burbach v. Investment Mgmt. Corp. Int'l*, 326 S.C. 492, 498, 484 S.E.2d 119, 121 (Ct. App. 1997).

In this case, there is no evidence the unfair and deceptive conduct alleged by Plaintiff affected the public interest. Although Plaintiff presents sworn affidavits concerning failure to maintain lighting and shrubbery in an attempt to substantiate her claim(s), Plaintiff has not alleged she was deceived by Defendants with regard to maintenance of shrubbery or lighting. When asked during her deposition how she was deceived and to provide specific examples, she cited to two actions/omissions by Defendants: (1) the representation that Wellspring was a "safe and secure place;" and (2) the non-disclosure of other crime in Wellspring until after her incident. (Wright Dep. 118:12-19, 119:8-12, 119:17-24, 121:1-5).

There is no evidence Defendants engaged in a course of conduct whereby a standard business practice was to represent Wellspring to be a "safe and secure place" or to conceal from prospective tenants the level of crime at Wellspring to secure tenant leases. Defendants' Policies and Procedures Manual state that Wellspring "generally do[es] not provide security for [its] residents and employees should never indicate that we do so." (Section 9 of Policies and Procedures Manual entitled "Maintenance" at p. 7). Defendants' policy concerning the non-provision of security discouraged any repetition of the alleged conduct.

Plaintiff cannot prove a pattern of conduct concerning any allegedly deceptive conduct, widespread advertising of it, or that others were similarly deceived in an effort to secure or maintain tenant leases. Therefore, Plaintiff fails to prove this element of her claim.

(3) Proximate Causation.

Finally, as with her negligence claim, Plaintiff cannot prove the third element of a SCUTPA claim: that the unfair or deceptive acts caused Plaintiff monetary or property loss. First, Plaintiff testified the alleged deceptive conduct was not the basis for her decision to lease an apartment at Wellspring. She chose Wellspring because several of her friends from church

recommended it and because it was in close proximity to her work. (Wright Dep. 38:21 – 39:2, 40:3-7) ("Q. Okay, so we talked about proximity and the fact that some of your friends at church recommended it. Anything else that made you choose it?" A. No."). The deceptive conduct alleged by Plaintiff cannot be the proximate cause of her injury if it was not the basis for her decision to lease an apartment at Wellspring.

Second, the court has already addressed other aspects of proximate causation in addressing Plaintiff's negligence claim, *supra*. Even if Defendants deceived Plaintiff, the alleged deceptive conduct did not cause Plaintiff's injury; two criminals who intentionally and deliberately abducted and robbed her caused her injury. Defendants could not anticipate this conduct at the time of the incident. For this reason, Plaintiff also cannot prove proximate causation for her SCUTPA claim.

III. CONCLUSION

There is no genuine issue of material fact with regard to any of Plaintiff's claims based on the law that governs the landlord/tenant relationship and interpretation of SCLRTA. In virtually every decision addressing third-party criminal activity within an apartment complex, South Carolina's courts have held there is no duty to provide security for tenants so as to protect them from crime. Courts have also rejected any notion that maintenance of property encompasses measures to prevent third-party criminal activity. For these reasons and the others set forth in this supporting memorandum, Defendants are entitled to summary judgment on all of Plaintiff's claims.

IT IS SO ORDERED

The Honorable W. Jeffrey Young
Presiding Judge, Fifth Judicial Circuit