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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2026-000769

Komonick Sinclair, Appellant,

v.

Allen's Food Basket Inc.; Gabriel's Breakfast and Grill at Allen's Food Basket, LLC d/b/a Gabriel's Grill; Allen's Food Basket a/k/a Allen's Food Basket Grill; Wesley Allen a/k/a J. Wesley Allen; Patricia A. Blanton; J. Wesley Allen Revocable Living Trust; J. Wesley Allen in his capacity as Trustee of the J. Wesley Allen Revocable Living Trust; Patricia A. Blanton in her capacity as Trustee of the J. Wesley Allen Revocable Trust; Gabe Jackson a/k/a Gabriel Jackson; James D. Lewis; & Shirley A. Lewis, Defendants,

of which Wesley Allen a/k/a J. Wesley Allen; Patricia A. Blanton; J. Wesley Allen Revocable Living Trust; J. Wesley Allen in his capacity as Trustee of the J. Wesley Allen Revocable Living Trust; & Patricia A. Blanton in her capacity as Trustee of the J. Wesley Allen Revocable Trust, Respondents,

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INTRODUCTION

The circuit court erroneously held Wesley Allen and Patricia A. Blanton, individually and in their capacities as Trustees of the J. Wesley Allen Revocable Living Trust, and the J. Wesley Allen Revocable Living Trust (hereinafter, collectively, "the Allen Defendants" or "Respondents"), "did not act or fail to act in any way which could be a breach of any duty, regardless of the Plaintiff's status," and held their acts and omissions "were not the proximate cause of the Plaintiff's injuries." (Order p. 8). The circuit court did not hold that the Allen Defendants owed Komonick Sinclair no duty, and it did not decide his status. Respondents defend a ruling that does not exist. They ask the Court to affirm on a no-duty theory the circuit court never reached, and to reach it by deciding control, status, and causation against the party entitled to every reasonable inference. The question this appeal presents is narrower. Respondents agree a landlord "may owe such a duty as to a common area it actually controls." (Resp. Br. p. 9). What follows from that agreement is a question about this lease and this landlord, and the record answers that in Sinclair's favor.

The lease is a gross lease. The tenant "is not obligated to pay any additional expenses which includes utilities." (Lease p. 2). The Lessor "shall be obligated to maintain the general exterior structure of the Premises" and "shall maintain all major systems such as the heating, plumbing, and electrical," and the "parking area shall be maintained by the Lessor including the removal of any snow or environmental hazards as well as the grounds and lands surrounding the Premises." (*Id.*). Wesley Allen agreed that the lot was "a shared parking lot for the customers of the barbershop, The Hair Boutique and Allen's Food Basket." (W. Allen Dep. p. 88).

Wesley Allen kept the premises lit at night for the twenty-plus years he ran the store himself, then cut the lighting because it carried "a separate bill." (W. Allen Dep. pp. 86-87). He

installed an alarm system after an intruder broke out the glass in his doors, and he stopped keeping it up when he leased the store out. (W. Allen Dep. pp. 46-47, 49-51). He told the lessee, Gabriel Jackson, about none of it—not the lighting, not the alarm, not the break-in. (W. Allen Dep. pp. 51-52, 87). Between March 2017 and September 2020, sixteen armed robberies and fourteen shootings, four of them homicides, occurred within two and one-half miles of the store, most less than a mile away. (Levenberg Aff. p. 2). The property carried a CAPRisk score of 917, making a serious crime against a person more than nine times as likely there as in Horry County generally. (Levenberg Aff. p. 3). Prior to the incident, Allen had heard of shootings around the restaurant. (W. Allen Dep. pp. 59-60). The lot was dark. When asked whether the premises was "lit up that you could see just fine," Sinclair answered "No, sir." (Sinclair Dep. pp. 39-40).

On the morning of the shooting, a vehicle idled at the corner, turned toward the rear of the building "shining its lights on [the] back side," then moved to the west side and out of camera view. (Police Report p. 49). Two of the three assailants came in "from the side of the building." (Police Report pp. 32-33). Officers recovered spent casings in the parking lot. (Police Report pp. 8, 10). David Levenberg concluded that the lighting fell below published industry standards, that no security presence or patrol existed, and that the lot "was not secured in any way after daylight hours to keep unwanted people off the property." (Levenberg Aff. pp. 3-4).

Sinclair does not ask this Court to make landlords insurers or to decide any disputed fact in his favor. He asks that the questions Respondents would resolve as a matter of law—control, status, breach, and causation—be tried. Sinclair respectfully requests that this Court reverse.

ARGUMENT

I. The Allen Defendants owed Sinclair a duty of reasonable care because they retained possession and control of the common areas where the dangerous conditions existed.

Control creates duties. The Allen Defendants controlled the parking lot, the exterior, and the electrical systems that served them. The conditions Sinclair complains of arose there. The lease, Wesley Allen's own testimony, and the authorities Respondents rely upon establish the existence of a duty.

a. The lease agreement establishes the Allen Defendants retained control of the areas where the harms arose.

A lessor who keeps part of the premises for the shared use of several tenants keeps the duty that goes with it. Where the lessor "reserves possession and control" of parts of a building "for the common use of several tenants," the law "creates a legal duty to keep the same in repair and to operate properly" those parts, a duty "peculiarly applicable to halls, entrances, porches or stairways of which no particular tenant has exclusive possession or control." *Daniels v. Timmons*, 216 S.C. 539, 549, 59 S.E.2d 149, 154 (1950). Respondents do not dispute the principle. They agree a landlord "may owe such a duty as to a common area it actually controls." (Resp. Br. p. 9).

This lease expressly reserved control of the pertinent areas for the landlord. The tenant "is not obligated to pay any additional expenses which includes utilities." (Lease p. 2). The Lessor bears the obligation "to maintain the general exterior structure of the Premises" and to "maintain all major systems such as the heating, plumbing, and electrical." (*Id.*). The "parking area shall be maintained by the Lessor including the removal of any snow or environmental hazards as well as the grounds and lands surrounding the Premises." (*Id.*). The Lessor also kept "the complete and unencumbered right of entry to the Premises at any time or times" to inspect, maintain, and repair. (Lease p. 9). Exterior lighting is an electrical system on the grounds surrounding the premises.

Under this lease the landlord paid for it, maintained it, and alone controlled it, and Wesley Allen confirmed that he was the one who changed the bulbs inside and out. (W. Allen Dep. pp. 32-33). He is also the one who shut the lighting off, because the bill was his. (W. Allen Dep. pp. 86-87).

That allocation matters because *Byerly* states a default rather than an absolute. A lease is equivalent to a sale of the premises only "[i]n the absence of an agreement to the contrary," and even then, the lessor escapes responsibility only for conditions "which thereafter develop or are created by the lessee." *Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992) (emphasis added). Neither condition is met. The lease is the agreement to the contrary, and the darkened lot was not the lessee's creation. It was the landlord's, in an area the lease retained for the landlord, through a power the lease gave the landlord alone. Sinclair does not sue on the lease. He does not claim its benefit as a third party, and he seeks to enforce none of its promises. The lease matters here only as *Byerly* and *Daniels* make it relevant to the question of control, as the instrument that shows what control the landlord held and what it relinquished.

Creighton confirms the point by drawing the same line in the opposite direction. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). The lease there charged the lessor with maintaining the shopping center's "common areas," which it defined as portions "designated and improved for common use by or for the benefit of more than one occupant," while "excluding all portions . . . which are used or intended for use by one occupant." *Id.* at 115 n.3, 512 S.E.2d at 520 n.3. Because the tenant admitted the entrance steps served only its own store, the steps fell outside that definition, and this Court held that "unless the terms of the lease provide otherwise," the landlord had no duty to maintain them. *Id.* at 114, 512 S.E.2d at 520. The parking lot here is different. It served three tenants, and Wesley Allen agreed it was "a shared parking lot for the customers of the barbershop, The Hair Boutique and Allen's Food Basket." (W. Allen Dep.

p. 88; Lease p. 2). Here the terms of the lease do provide otherwise, and the duty stayed with the landlord.

b. *Jackson v. Swordfish* reserved the principle Sinclair invokes, and this record supplies what that record lacked.

Respondents read *Swordfish* for more than it decided. The supreme court affirmed there on a narrow evidentiary ground. "Assuming, without deciding," that the landlord "had a duty under the lease to provide security in the common areas," the Court held the plaintiff "failed to present any evidence demonstrating a breach of this duty," because the record showed "no evidence of any alleged criminal or suspicious activity occurring outside the club" that would have alerted common-area security. *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 613-14, 620 S.E.2d 54, 57 (2005).

The Court then reserved the principle Sinclair invokes here, noting "[i]n a case presenting different facts, we might well agree with the dissent that a commercial landlord has a duty to reasonably protect invitees from foreseeable criminal acts in areas under the commercial landlord's control." *Id.* at 614, 620 S.E.2d at 57. This is that case. First, prior crime here is documented rather than absent: sixteen armed robberies and fourteen shootings within two and one-half miles, a CAPRisk score more than nine times the county figure, and a landlord who had heard of shootings around the restaurant. (Levenberg Aff. pp. 2-3; W. Allen Dep. pp. 59-60). Second, suspicious activity outside the leased space is on video. The assailants' vehicle idled at the corner, turned to sweep its headlights across the back of the building, and moved to the west side and out of view, all in the landlord's unlit exterior and roughly forty minutes before the shooting. (Police Report p. 49). Two of the three assailants then came in "from the side of the building." (Police Report pp. 32-33). Third, breach here rests on expert opinion rather than on inference. (Levenberg Aff. pp. 3-4). The evidentiary gap that decided *Swordfish* is filled here.

c. Control over a landlord's retained common areas is not the operational control the franchisor cases address.

The rule Respondents invoke is the rule Sinclair relies upon. "One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citations omitted); *accord Charleston Elec. Servs., Inc. v. Rahall*, 427 S.C. 317, 323, 831 S.E.2d 122, 125 (Ct. App. 2019) (quoting *Miller*). *Miller* found no duty because that defendant's "contractual right of control was limited to maintaining a certain normal water level for production purposes," while the contract "specifically reserved to City complete control of the dam and water level in the event of a weather emergency." *Miller*, 329 S.C. at 314, 494 S.E.2d at 815. The Allen Defendants held far more than a single collateral right. The lease obligated them to maintain the exterior structure, the electrical systems, the parking area, and the surrounding grounds; it placed responsibility for the utilities on the Allen Defendants; and it reserved to them an unencumbered right of entry and a veto over any alteration. (Lease pp. 2, 8, 9). A contractual duty to maintain and to pay for the very areas where the harm arose is control.

Correspondingly, the franchisor cases relied upon by the Allen Defendants are inapposite. Each asked whether a brand licensor controlled the "daily operations" of a business it did not own. *Bass v. Gopal, Inc.*, 384 S.C. 238, 247-50, 680 S.E.2d 917, 922-23 (Ct. App. 2009); *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 679 (D.S.C. 2006). The Allen Defendants are the property owner, and the question is not who ran the restaurant. Sinclair has never contended the Allen Defendants did. The question is whether the owner had to keep reasonably safe the lot, grounds, and exterior systems it kept for itself under the lease, and the franchisor cases do not answer that question.

d. A commercial premises held open to the public is governed by section 323, not by the residential no-duty rule.

The no-duty rule Respondents press was built for private apartment complexes, and its rationale is the reason it does not apply here. *Cramer* declined to extend to landlords the duty owed by store owners and innkeepers, and it did so by adopting the reasoning of *Cooke*: "[P]laces to which the general public are invited" may "anticipate . . . that places of general public resort are also places where what men can do, they might." An apartment building, by contrast, "is not a place of public resort," and "is of its nature private and only for those specifically invited." *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C. 440, 443, 441 S.E.2d 317, 318-19 (1994) (quoting *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1213 (D.S.C. 1990)). On that reasoning the Court found "a fundamental distinction between the relationships of landlord/tenant and store owner/invitee and innkeeper/guest." *Id.* Allen's Food Basket was a commercial restaurant that the landlord knew was kept open to the public for business. (W. Allen Dep. p. 88). The Allen Defendants' premises sits on the store-owner side of that distinction, so the rationale Respondents press supports a duty here rather than defeating one.

On that side of the line, a landlord who takes on a protective measure is governed by section 323 of the Restatement (Second) of Torts, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Our supreme court applied that section to a landlord's security undertaking in *Wright*, reversed a grant of summary judgment, held "[s]ection 323 is the standard in South Carolina when analyzing voluntarily assumed duties," and clarified that the

undertaking exception "is not limited to a landlord's undertaking to make repairs." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 216-17, 826 S.E.2d 285, 292-93 (2019); *see also Sherer v. James*, 290 S.C. 404, 407-08, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984). Whether the landlord in fact undertook the service is not always a question the court answers alone. *Vaughan v. Town of Lyman*, 370 S.C. 436, 446-47, 635 S.E.2d 631, 637 (2006). "Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." *Id.* (quoting *Miller*, 329 S.C. at 314, 494 S.E.2d at 815).

Sinclair proceeds under subsection (a) of section 323, as Wesley Allen did not simply decline to add security. He previously provided it, and he took it away. He lit the premises at night for two decades and then shut the lighting off to save a bill that was his alone. (W. Allen Dep. pp. 86-87). He installed an alarm system in response to an intruder who broke out the glass in his doors, and by his own account he stopped keeping it up "when I leased the store out." (W. Allen Dep. pp. 46-47, 49-51). He told Jackson about none of it, not the lighting, not the alarm, not the break-in, because he "didn't think that was none of his business." (W. Allen Dep. pp. 51-52, 87). A landlord who withdraws the protections he installed, at the moment he stops watching the property himself, and who leaves the incoming tenant ignorant of both the protections and the reason for them, has increased the risk of exactly the harm section 323 addresses.

Goode v. St. Stephens United Methodist Church is not instructive as to the application of section 323 to these facts. 329 S.C. 433, 444-45, 494 S.E.2d 827, 833 (Ct. App. 1997). The section 323 claim failed there for three reasons. The security measures "were for the protection of the residents of the complex, not the general public." *Id.* Nothing suggested they had been performed without due care. The plaintiff also conceded he knew no security existed, so he could not have

relied on it. *Id.* None of the three is present in the case sub judice. The lighting and the alarm protected a building the landlord knew was open to the public, not a private residential complex closed to it. The record permits a finding that withdrawing them was unreasonable. Reliance is irrelevant, because subsection (a) turns on increased risk.

Wright itself marks the limit of the contrary reading. The Court approved summary judgment as to that landlord's lighting and shrubbery on the ground that it is "inconceivable that any apartment developer would not install lighting," so that treating installation as an undertaking would swallow the residential no-duty rule from *Cramer*. *Wright*, 426 S.C. at 216 n.3, 826 S.E.2d at 293 n.3. That reasoning governs the *provision* of lighting at a private complex. It has nothing to say about a commercial landlord who lit his building for twenty years, removed the lighting to save a utility bill he alone paid, and let a contracted alarm service lapse. Those acts sit alongside the courtesy-officer program *Wright* held did raise a jury question.

e. Sinclair's status is a question of fact, and the invitee standard controls this motion.

The duty Sinclair relies on does not turn on status. A landlord's obligation to keep reasonably safe the common areas it controls runs to everyone lawfully on them. Respondents' lead argument, that the Allen Defendants owed no duty at all, is likewise independent of status, and it is answered by the control analysis above rather than by reclassifying the plaintiff.

Where status does matter, it is disputed. An invitee is one who enters by express or implied invitation, whose entry "is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land," and whose presence carries "a mutuality of benefit or a benefit to the owner." *Singleton v. Sherer*, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008) (quoting *Sims v. Giles*, 343 S.C. 708, 716-17, 541 S.E.2d 857, 862 (Ct. App. 2001)). Keshawn Staggers attested that Gabe Jackson cooked chicken wings, shrimp, and rice inside the

restaurant that night, that he watched Sinclair eat them, and that Sinclair purchased a bottle of water from the restaurant. (Staggers Aff.). Food prepared and sold on the premises is a benefit to the possessor and an activity the occupant conducted there. Respondents read the same evidence as "entirely consistent with a social gathering." (Resp. Br. p. 13). Where one set of facts supports two readings, the question is for the jury.

Parker v. Stevenson Oil Company makes the point on close facts. 245 S.C. 275, 280-82, 140 S.E.2d 177, 179-80 (1965). There a boy entered a filling station at night after the outside lights were turned off. *Id.* Because the vending machines were still operating and the restroom was unlocked and marked, invitee status was left for the jury. *Id.*; *see also Hoover v. Broome*, 324 S.C. 531, 536, 479 S.E.2d 62, 65 (Ct. App. 1996). The circuit court, moreover, supplied the answer this Court should adopt. It acknowledged that "there may be a dispute as to whether the Plaintiff was a licensee or invitee," and it then decided the motion "regardless of the Plaintiff's status." (Order p. 8). Because the invitee duty is the more demanding of the two, a ruling that no duty was breached under either status necessarily assumes the invitee standard. This Court should review the case on that same assumption, which is also the assumption most favorable to the nonmoving party.

Roe v. Bibby does not change the analysis. 410 S.C. 287, 297-98, 763 S.E.2d 645, 650-51 (Ct. App. 2014). *Roe* holds that no South Carolina case recognizes a duty to warn a licensee of prior criminal acts by a third party "residing on the premises." *Id.* These assailants did not reside there. Sinclair's arguments do not turn on a warning claim. His claim is that the Allen Defendants withdrew protections they had installed in common areas they controlled, and a rule about warnings does not absolve a landlord who creates the hazard.

II. Genuine issues of material fact preclude summary judgment on proximate cause.

The intervening-criminal-act rule reaches only crimes that "could not have been foreseen." *Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173-74 (1968). *Stone* shows the limit. The car at issue in *Stone* was parked beside the owner's place of business "within the view of the police station of the City of Dillon," on a site "illuminated by a street light," at a place that "was not a place where people loitered or lingered," and where "[n]o motor vehicle of the respondent had ever been stolen or tampered with." *Stone*, 251 S.C. at 164, 161 S.E.2d at 174. The property here was unlit, unwatched, and surrounded by a documented history of armed robbery and gunfire. Where that history exists, proximate cause belongs to the jury. *Jeffords v. Lesesne*, 343 S.C. 656, 664-65, 541 S.E.2d 847, 851 (Ct. App. 2000); *Lord v. D & J Enters.*, 407 S.C. 544, 558-60, 757 S.E.2d 695, 702-03 (2014).

A third-party criminal act cannot be deemed unforeseeable as a matter of law where the alleged breach was the defendant's failure to guard against that very harm. *Wright*, 426 S.C. at 222, 826 S.E.2d at 296. Proximate cause is ordinarily a question of fact, and it becomes a question of law only where the evidence supports a single inference. *Wright*, 426 S.C. at 222, 826 S.E.2d at 295; *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). Withdrawing the lighting and the alarm created the foreseeable risk that an armed criminal would exploit those conditions, which is precisely what occurred.

More than one inference is available here. Asked what economically feasible measures "would have more likely than not prevented the attack," Levenberg identified four. (Levenberg Aff. p. 4). Improved lighting is "a proven deterrent to criminal behavior," and replacing the burned-out bulbs and lighting the entrance "would have been sufficient to provide reasonable light levels that complied with the IES published standards." (*Id.*). A chain or gate arm across the entry drives

"would keep unwanted vehicles out of the parking lot and could have deterred the assailants in this case from committing the crime in question." (*Id.*). Most concretely, a camera system with motion detection "would have alerted the owner / manager of movement outside via their cell phones before the assailants gained entry" and "allowed him to contact the police to investigate prior to the shooting." (*Id.*). A vehicle swept its headlights across the back of this building roughly forty minutes before anyone approached the door. (Police Report p. 49). The criminal conduct was not confined to the interior of the premises. Two of the assailants entered from the side of the building. (Police Report pp. 32-33). Officers recovered spent casings in the parking lot. (Police Report pp. 8, 10). The assailants fired on a man sitting in a car in that lot as they left. (Police Report p. 17).

The governing standards ask no more than that. Legal cause turns on foreseeability, and "[i]t is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable, or foreseen"; it is enough "that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range." *Hughes v. Children's Clinic*, P.A., 269 S.C. 389, 397-98, 237 S.E.2d 753, 756-57 (1977) (quoting *Orr v. First Nat'l Stores, Inc.*, 280 A.2d 785 (Me. 1971)). This Court reversed summary judgment for a hotel on materially similar reasoning, finding jury questions on both the adequacy of security and whether the failure proximately caused a guest's assault. *Daniel v. Days Inn of Am., Inc.*, 292 S.C. 291, 300-02, 356 S.E.2d 129, 134-35 (Ct. App. 1987). *Kitchen Planners* asks only for a reasonable inference and a genuine issue of material fact. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463-64, 892 S.E.2d 297, 301-02 (2023). An expert opinion built on the layout of the property, the history of crime around it, and video of the assailants approaching through the unlit exterior clears that bar. The contrary inference, that this attack was targeted and undeterrable, is the one Respondents ask this Court to draw against the nonmoving party.

III. The circuit court's "no breach" ruling resolved jury questions and cannot be recast as a pure question of law.

The circuit court found that the Allen Defendants "did not act or fail to act in any way which could be a breach of any duty." (Order p. 8). That is a finding that no act or omission of these defendants could constitute a breach, and it cannot stand alongside an expert opinion that they breached their duties by failing to provide reasonable security against a foreseeable risk. Respondents relabel the ruling as a legal conclusion about the "scope" of duty, but the label does not change what the court decided.

Under the balancing approach South Carolina applies, whether security was reasonable in light of the risk is a classic question of fact. Reversing summary judgment in a negligent-security case, our supreme court observed that "whether a business proprietor's security measures were reasonable in light of a risk will, at many times, be identified by an expert," and it held the plaintiff's expert testimony made it "premature to deprive [her] of the opportunity to present her case to a jury." *Lord v. D & J Enters.*, 407 S.C. 544, 560 n.4, 757 S.E.2d 695, 703 n.4 (2014). To hold that no act or omission "could be" a breach, the circuit court had to set Levenberg's opinion aside, which is the weighing of evidence Rule 56(c), SCRCP, reserves for the jury.

The order resolved other disputed facts as well. It found that "the business was closed when the Plaintiff arrived, and that it remained closed," even though the Staggers affidavit describes food cooked and served inside the restaurant and a bottle of water sold to Sinclair. (Order p. 8; Staggers Aff.). It concluded in the same passage that there are "no genuine material disputed facts" while acknowledging that "there may be a dispute as to whether the Plaintiff was a licensee or invitee." (Order p. 8). It treated as immaterial "whether there were shots made outside the restaurant or not," but where the criminal activity occurred is what ties it to the areas the landlord controlled. (*Id.*) Each of those determinations belonged to a jury.

Respondents answer that the measures Levenberg identified were the restaurant operator's to make. That answer conflates two sets of measures. Some of what Levenberg addresses concerns the restaurant's operations. However, the core of his opinion concerns the common areas the landlord controlled: the exterior lighting, an access-control gate across the entry drives, cameras, and patrols. (Levenberg Aff. p. 4). Those were the landlord's to provide and, under this lease, the landlord's to pay for.

The same point limits Rule 220(c), SCACR. The rule permits affirmance on any ground appearing in the record, but the ground must actually appear there. On an appeal from a grant of summary judgment this Court applies the same standard the circuit court applied, so a sustaining ground cannot be supplied by resolving a disputed question of fact against the nonmoving party. Control is such a question. The circuit court never decided whether the Allen Defendants controlled the common areas, and it never decided Sinclair's status. To affirm on the ground Respondents now press, this Court would have to decide control in the first instance, against the nonmoving party, on a record closed while Sinclair's motion to compel remained pending.

IV. The circuit court erred in granting summary judgment before Sinclair completed discovery directed at the control issue Respondents make dispositive.

Summary judgment should not be granted until the party opposing it has had a full and fair opportunity to complete discovery. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). The rule asks the nonmovant to advance a good reason the time was insufficient and to identify what further discovery would produce. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009); *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Sinclair did both. (Mot. to Compel; Mot. to Quash).

The records he sought, invoices and payment records for utilities, lighting, and security, go to control, because they show who paid for and maintained the common areas. The lease already

places those costs on the landlord, since the tenant was "not obligated to pay any additional expenses which includes utilities." (Lease p. 2). The invoices would show how that obligation was carried out in practice, which is the factual predicate of the duty Respondents deny rather than the "legal conclusion" they describe. When Respondents represented that they lacked the records, Sinclair subpoenaed the banks that held them, and Respondents moved to quash. Both motions were pending and unheard when the court ruled. Unlike the plaintiffs in *Dawkins* and *Guinan*, Sinclair identified specific records aimed at the precise issue Respondents call dispositive. *See Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. This Court should reverse and allow that discovery to be completed before the question of control is decided.

CONCLUSION

The disputed questions of control, status, breach, and causation belong to a jury. For these reasons, and those stated in his initial brief, Sinclair respectfully requests that this Court reverse the judgment and the denial of reconsideration and remand for trial.

Respectfully submitted,

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