THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2011-CP-40-4068

Denise Wright ..... Appellant,

v.

PRG Real Estate Management, Inc.; Franklin Pineridge Associates; Karen Campbell Individually, and in her Representative Capacity as an Agent of PRG Real Estate Management ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Does a residential landlord owe its tenant a duty to reasonably secure the common areas a tenant must pass through to access her residence?

2. Does a residential landlord who provides "courtesy officers," common area lighting, and landscaping services owe a duty to perform these tasks with reasonable care?

3. Whether Appellant presented the Circuit Court with any evidence that her abduction in her apartment complex's common area was proximately caused by alleged lack of due care by her landlord in operating a courtesy officer program, maintaining common area lighting, and providing landscaping services?

4. Whether Appellant presented the Circuit Court with any evidence to support the required elements of her South Carolina Unfair Trade Practices Act ("SCUTPA") claim?

STATEMENT OF THE FACTS

Respondent Franklin Pineridge Associates ("FPA") is the owner of Wellspring Apartment Complex ("Wellspring") located at 500 Harbison Boulevard in Richland County. (Sec. Amend. Comp. ¶¶ 2-3). Respondent PRG Real Estate Management, Inc. ("PRG") manages Wellspring. Respondent Karen Campbell ("Campbell") was Wellspring's property manager and an employee of PRG at the time of the events giving rise to the instant case. (Id. at ¶¶ 2, 4).

Appellant Denise Wright leased an apartment at Wellspring beginning in approximately May of 2003. (Wright Dep. 39:18-22). On September 18, 2008, Appellant 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.). Nothing in the report indicates the perpetrators were concealed by shrubbery or lack of lighting, and Appellant did not indicate they were concealed to the officer who did the report. (Gabr Dep. 29:25 – 30:7, 31:7-9). The two men asked for Appellant'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). After approximately 35 minutes the men released her and she drove to her daughter's house, where police responded. (Id.). The perpetrators have never been caught.

Appellant was not physically injured during her incident. (Wright Dep. 131:7-11). She admitted in her deposition she was not undergoing treatment for any mental injuries, including mental distress and anxiety. (Id. at 134:2-6). She was not taking medications for anxiety. (Id. at 134:7-9). The money she withdrew from her account was returned to her. (Id. at 140:19-21). She went back to work for ten months after the incident before retiring. (Id. at 137:15-23).

STATEMENT OF THE CASE

Appellant filed a Complaint against Respondents on June 24, 2011 in the Richland County Court of Common Pleas. In her Complaint, Appellant asserted a claim for negligence on grounds that Respondents allegedly breached various duties relating to her security from criminal activity. In addition to her negligence claim, Appellant asserted claims for breach of implied warranty of safety, fitness and habitability, as well as violation of SCUTPA by Respondents. In short, she alleged that better maintenance of shrubbery, better lighting, and better security measures would have prevented the crime.

Respondents answered Appellant's Complaint on August 1, 2011. Appellant subsequently amended her Complaint on June 22, 2011 (Amended Complaint) and again on February 8, 2012 (Second Amended Complaint).[1] Respondents filed Answers to these amended pleadings on September 8, 2011, and March 8, 2012, respectively. Respondents moved for summary judgment in this matter on August 2, 2012, and filed a supporting memorandum ("Def. Memo.") on September 27, 2012.

As grounds for their motion, Respondents argued that South Carolina's courts have affirmed summary judgment in virtually every prior case involving negligent security claims by a tenant against a landlord. (Def. Memo. at 1). Respondents cited to clear, unequivocal law setting forth that an apartment complex has no duty to provide security for its tenants. (Id. at 5-14). Respondents also argued Appellant could not prove proximate causation because two criminals caused her injury, not Respondents' actions or omissions. (Id. at 15-18). Respondents argued that South Carolina's courts have rejected Appellant's claim that a landlord warrants the safety, fitness and habitability of an apartment complex from third-party criminal activity. (Id. at

[1] For ease of reference, Respondents cite to the Second Amended Complaint in this brief when referencing Appellant's operative pleading.

19-21). Finally, Respondents argued Appellant could not prove the elements of her SCUTPA claim on grounds there was no actionable unfair or deceptive conduct, it did not affect the public interest, and it was not the proximate cause of her injury. (Id. at 21-26).

The Circuit Court heard oral argument on October 1, 2012. At oral argument, Appellant served her Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. In the brief, Appellant did not address Respondents' summary judgment motion with regard to the claim for breach of implied warranty of safety, fitness and habitability. Appellant's counsel stipulated Appellant did not oppose Respondent's motion with regard to this claim during oral argument. (Oct. 1, 2012 Transcript of Hearing ("Hearing Tr.") at 4:14 – 5:2). The Circuit Court heard argument relating to the remaining claims. At the conclusion of the hearing, the Court took the motion under advisement and granted Respondents ten days to review Appellant's opposition memorandum and file a reply brief. (Id. at 45:24 – 46:4).

On October 17, 2012, Respondents requested leave and additional time from the Court to file a reply brief so as to address certain evidentiary issues raised by photographs of shrubbery relied on by Appellant. The Court granted Respondents' request on October 19, 2012, and Respondents filed their reply brief the same day. Appellant served a sur-reply brief on or about October 25, 2012.

On September 23, 2013, the Circuit Court issued its Order granting Respondent's Motion for Summary Judgment ("Order"). Appellant filed her Notice of Appeal on October 2, 2013, and served her initial brief ("App. Init. Br.") on November 21, 2013. Respondents requested and received an extension to file their initial brief, which (with extension) became due January 21, 2014. This appeal follows.

STANDARD OF REVIEW

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).

LAW/ANALYSIS

There are three indisputable facts in this case: (1) Appellant and Respondents had a landlord/tenant relationship; (2) Wellspring is private property where Appellant kept a private residence; and (3) Appellant was the victim of a crime committed by third parties. It is within this factual context that South Carolina's law applies, and it is clear from applicable law that the Circuit Court did not err in granting Respondents' Motion for Summary Judgment. Respondents address each of Appellant's arguments in the order they are raised in her initial brief.

I. The Circuit Court Did Not Err in Finding Respondents Had No Duty to Reasonably Secure Wellspring's Common Areas.

On appeal, Appellant argues Respondents had a duty to her because they "invited" non-tenant pedestrians to the apartment complex and because of the "particular circumstances" of this case. (App. Init. Br. at 4-20). The Circuit Court considered these arguments and properly rejected them in granting Respondents' motion.

A. A Landlord Does Not Owe a Duty to a Tenant to Provide Security In and Around a Leased Premises to Protect the Tenant From Third-Party Criminal Activity.

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 Circuit Court properly recognized that the issue of whether the law recognizes a particular duty is an issue of law to be decided by the Court. (Order at 4 (citing Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996)). The crux of Appellant's negligence claim is she believes Respondents should have made her "safe and

secure." (Wright Dep. 115:17-21). She believes Respondents should have dug up shrubs and should have done "whatever it takes to make you feel safe to be able to walk into your apartment." (Id. at 116:1-7).

South Carolina law has expressly rejected Appellant's belief in the context of a landlord/tenant relationship. Specifically, our courts have held unequivocally in multiple cases that an apartment complex has no duty to protect tenants from criminal activity.

In Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) ("Cramer I"), which involved the murder of a tenant by an unknown assailant who pried open her patio sliding glass door, the 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. The plaintiff in that case – just as Appellant does in this case – urged the Court to adopt the same standard used for innkeepers and guests, which requires them to protect guests or invitees from foreseeable criminal activity of third parties. Id. at 442, 441 S.E.2d at 318. In disposing of the District Court's question, the Cramer I Court cited to Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990) as directly on point for addressing the certified question. Id. at 442, 441 S.E.2d at 318. Specifically, in relying on Cooke, the Court found a fundamental distinction between the relationships of storeowner/invitee and innkeeper/guest as compared to landlord/tenant. Id. at 443, 441 S.E. 2d at 318-19. As stated by Cramer I:

> [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) (emphasis added).

The Court also agreed that nothing in the South Carolina Residential Landlord Tenant Act ("SCRLTA") imposes a duty upon landlords to protect tenants from third-party criminal activity. Id. at 444, 441 S.E.2d at 319. Having reached these conclusions, the 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 [SCLRTA], 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"). Relying on Cramer I's clear law, this Court later affirmed summary judgment in Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1998) (involving attack on social guest of tenant at apartment complex by third parties), and the Supreme Court again relied on it to affirm summary judgment in Jackson v. Swordfish Investments, L.L.C., 365 S.C. 608, 620 S.E.2d 54 (2005) (involving action against commercial landlord for injuries to nightclub patron when patron was shot multiple times by assailant inside night club).

In the case at bar, the Circuit Court relied on the above-stated law in its Order. (Order at 4-6). Appellant also acknowledged this law in her memorandum opposing summary judgment, and she expands upon it in her initial brief in an effort to distinguish her claim. (App. Init. Br. at 6-8). Specifically, Appellant 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. (App. Init. Br. at 9-10). Appellant believes that because the public uses these walking trails and can access Wellspring, Wellspring either invites members of the public to its complex or expects the public to be on the premises. (Id. at 9-10). Appellant argues Respondents knew members of the public and "criminal elements" from adjacent complexes could easily "spill over to Wellspring via the walking trails." (Id. at 11-12). For these reasons, she believes her claim is analogous to the storeowner-invitee and innkeeper-guest relationships. (Id. at 14).

The Circuit Court considered all of these arguments and properly rejected them based on clear South Carolina law governing landlord-tenant relationships. (Order at 6-7). First, the Circuit Court found that "[a]lthough 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." (Order at 6. See also Hearing Tr. at 25:2-5 ("But other apartment complexes have roads that are for walking. . . People walk on roads.")). The Court also noted that although Wellspring may be publicly-accessible, Appellant provided no evidence that Wellspring "invited" members of the general public to use the premises, as stated in heading I.A. in Appellant's initial brief. (Order at 6). Corporate representatives for PRG and FPA confirmed Wellspring is private property. (Order at 6 (citing Roten Dep. at 39:10-12)). Appellant's reference to brochures by the Richland County Conservation Commission or

SCTrails.net advertising the trails does not equate to an "invit[ation]" by Respondents for the public to gather and remain in Wellspring's common areas. (App. Init. Br. at 10). As found by the Circuit Court, Wellspring is reserved for people who are tenants or are specifically invited. (Order at 7 (citing Goode, 329 S.C. at 441, 494 S.E.2d at 831)).

Appellant attempts to argue Cooke and Cramer I adopted their rule because of reliance on a 1984 Pennsylvania Supreme Court decision, Feld v. Merriam, 485 A.2d 742, 745-46 (Pa. 1984), and that "Wellspring bears no resemblance to the high rise apartment building the Feld Court considered when discussing the typical apartment complex." (App. Init. Br. 8-9, 12). In reality, Feld involved three high rise apartments situated on 150 acres of land. Feld, 485 A.2d at 388. These buildings were also served by adjacent parking garages. Id. at 389. Therefore, the apartment complex in Feld is not unlike the typical "modern" apartment complex or Wellspring, as argued by Appellant.

Furthermore, Cramer I considered the very distinction Appellant tries to argue and rejected it. The Cramer I Court contemplated a landlord/tenant relationship may arise within an apartment complex or within a home. In either circumstance, the Court stated that tenant "in a huge apartment complex, or . . . on the second floor of a house converted to an apartment" do not live in a place where the public is invited to resort. Id. at 442-43, 441 S.E.2d at 318 (quoting Cooke, 741 F. Supp. at 1213 (emphasis added) (see pages 7-8, supra, for entirety of quote)). Cramer I did not distinguish between a house, high-rise apartment, or "apartment complex" in its citation to Feld. The rule is the same for all types of dwellings leased by a landlord to a tenant.

Contrary to Appellant's representation, this is not an issue of "first impression" for South Carolina courts. (App. Init. Br. at 14). It has been considered and rejected, as set forth in Cramer I. The Circuit Court also noted the "slippery slope" advocated by Appellant with regard

to finding a duty for landlords to provide for the security of tenants. The Circuit Court judge recognized that if South Carolina adopted Appellant's argument, the only way a landlord may ever be able to ensure the security of a tenant is by taking drastic economic measures that may be cost-prohibitive to providing a dwelling place for tenants.

> **The Court:** How will an apartment ever not be responsible for a criminal act if you don't [require walls with limited entrance]? If I rule your way and the Supreme Court agrees with me on that, how can any apartment complex ever not be able to exist without building a wall around it with limited access?
>
> **Mr. Hood:** Well, I think they do limit their access, and that's what they are building. They are building them with fences and they are building them with—
>
> **The Court:** Is that the standard we have for our state?
>
> **Mr. Hood:** Well, the standard was enunciated in 1990, 22 years ago, and the standard at that time says what it says, but it also says that where the public is invited like a mall, an innkeeper, or a mall like Wal-Mart—
>
> **The Court:** This is different from a mall or an innkeeper because they're invited for a short period of time. This is where these people live. So this would also include anyone who rents a house, wouldn't it? I mean, if you rent your house to somebody and it's in a bad neighborhood, wouldn't you have an obligation to protect your tenant?

(Hearing Tr. at 27:4-24).

The Court in Feld also recognized this dilemma. In its reversal of judgment rendered in favor of the plaintiff, the Feld Court stated that the trial court failed to recognize the distinction between risk of injury from a physical defect in the property and risk of injury from the criminal act of a third person:

> In the former situation the landlord has effectively perpetuated the risk of injury by refusing to correct a known and verifiable defect. On the other hand, the risk of injury from the criminal acts of third persons arises not from the conduct of the landlord but from the conduct of an unpredictable independent agent. To impose a general duty in the latter case would effectively require landlords to be insurers of their tenants safety: a burden which could never be completely met given the unfortunate realities of modern society.

485 A.2d at 392 (emphasis added).

The law treats apartment complexes differently than hotels with regard to security. Appellant's expert has even admitted this legal distinction. (Booth Dep. 79:6-22). He agreed hotels are for shorter term stays, do not generally require a lease, do not perform background or security checks, and are open to the public. (Id. at 80:5-9, 81:18 – 82:3). This is not true of Wellspring. Wellspring is not open to the public, is private property, and is reserved for people who are tenants or are specifically invited. Public roads and nearby trails do not change this indisputable fact. Accordingly, and as stated by the Circuit Court:

> 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.

(Order at 7). The Circuit Court's ruling was correct and should be affirmed by this tribunal.

B. Respondents Did Not Owe Appellant a Duty on a "General Negligence Principle" Based on the "Particular Circumstances of This Case.

Notwithstanding the law concerning lack of a duty by Respondents, 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. South Carolina's courts have considered four exceptions that may apply to create a duty to exercise reasonable care to protect tenants against foreseeable risk of harm arising out of the landlord's actions. These exceptions relate to "affirmative acts," "concealed danger," "common areas," and "undertakings." See, e.g., Cooke, 741 F. Supp. at 1209-13; Cramer II, 848 F. Supp. at 1224-25; Goode, 329 S.C. at 445, 494 S.E.2d at 832-33; and Jackson, 365 S.C. at 613-14, 620 S.E.2d at 56-57 (involving commercial landlord).

In her second argument, Appellant argues "the 'particular circumstances' that may support a negligence cause of action are not specified in Cramer or its progeny, and Cramer I does not reference the Cooke exceptions in its introduction of 'particular circumstances' cases." (App. Init. Br. at 15). Therefore, Appellant asserts this Court should look to other jurisdictions to define these circumstances. (Id.).

However, a close review of Appellant's argument reveals she is merely arguing the "common areas" and "concealed dangers" exceptions in an attempt to foist a duty upon Respondents. First, Appellant cites to secondary authority and argues a modern landlord has exclusive control over common areas (and therefore exclusive ability to care for them). (App. Init. Br. at 16-17). As a result, Appellant argues a landlord has a duty to keep those areas reasonably secure from a "dangerous condition." (Id. at 17 (citing to Restatement (Second) of Torts § 360)). Then, Appellant equates a "dangerous condition" to the "unreasonable risk of harm from criminal intrusion." (Id. (citing to McPherson v. Dept. of Corr., 152 P.3d 918, 922 (Or. App. 2007)). Appellant completes this "bootstrap" argument by asserting that because Respondents knew of previous crimes, they had a reasonable duty to secure the premises to safeguard residents. (Id. at 17-19).

This argument is nothing more than an attempt to convince the Court there are "particular circumstances" separate and apart from the recognized exceptions. South Carolina has considered these arguments within the "concealed dangers" and "common areas" exceptions and has rejected them in the context of criminal activity. As a threshold matter, the "concealed danger" exception refers to recovery permitted in some jurisdictions "'where injury results from a defective condition known to the landlord and concealed by him from the tenant.'" Cooke, 741 F. Supp. at 1211 (quoting dictum from Timmons v. Williams Wood Prods. Corp., 164 S.C. 361,

162 S.E. 329 (1932)). However, the Cooke Court refused to apply this exception to impose a duty on landlords to warn about lurking criminals. Id. at 1211. The Court invoked strong language that the plaintiff was attempting to "rip[] the law on concealed dangers from its context (the physical soundness of the premises)." Id. (emphasis added). As stated in Cooke, criminal activity is a completely different type of danger than rotting stairways, and none of the concealed dangers alleged by the plaintiff in Cooke could be said to fall anywhere near the existing parameters of the exception. Id.

Similar to the "concealed danger" exception, the "common areas" exception refers to the duty of a landlord to maintain common areas that remain under the landlord's control. Cooke, 741 F. Supp. at 1211. However, Cooke also clarified this 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. For the same reasons discussed in response to the "concealed dangers" argument, this court rejects the application of the "common areas" exception to criminal activity under South Carolina law.

Id. (emphasis added). 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. Since Cooke, no state appellate court has applied the "concealed dangers" exception to shift responsibility to landlords for protecting tenants from "one of the dangers of modern urban life." Id. Therefore, this exception does not apply. The same is also true with regard to Appellant's arguments that equate to the "common areas" exception. Appellant's attempt to create a separate duty that distinguishes between providing "safe" physical premises (i.e., structurally) and "secure" premises that protect against third-party criminal activity is not accepted under South Carolina law. The Circuit Court relied on this law in its Order to reach the same conclusion. (Order at 7-8). The Court also noted Appellant's attempts to create a duty when a landlord has superior knowledge of the crime risk in the area "is just another way of arguing that a landlord has a duty to protect tenants from the foreseeable risk of criminal activity." (Id. at 8). The Court pointed out South Carolina's courts have rejected that landlords have a duty to provide security for tenants based on the same rationale set forth in pages four through seven of its Order. (Id.).

Although Appellant argues public policy favors a duty under "particular circumstances," (App. Init. Br. at 19-20), South Carolina's courts (and the Circuit Court in the instant case) have considered these public policy arguments and have rejected them. Appellant claims she is not trying to make Respondents "insurers of security" to promote her public policy rationale. (App. Init. Br. at 19). However, the fact that she is trying to link shrubbery height and lighting adequacy to the cause of her incident contradicts this claim. The Circuit Court judge recognized this "slippery slope," and the Feld Court stated it was a burden that "could never be completely met." (Hearing Tr. at 27:4-24); 485 A.2d at 392. The "particular circumstances" argued by Appellant do not create a duty in this case, and the Circuit Court's ruling should be affirmed.

II. Respondents Reasonably Performed Any Duties They Voluntarily Undertook Pursuant to the "Affirmative Acts" and "Undertakings" Exceptions Recognized by South Carolina Law.

Appellant argues if Respondents had no duty to reasonably secure Wellspring's common areas, then Respondents undertook certain duties and failed to act on them with reasonable care. (App. Init. Br. at 20). Appellant's argument is in error inasmuch as it has been addressed by South Carolina's courts in the form of the "affirmative acts" and "undertaking" exceptions to the "no duty" rule for landlords.

In Cooke, the United States District Court for the District of South Carolina recognized the "affirmative acts" exception as "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. Cooke is the only case that did not grant full summary judgment in the context of an inadequate security claim by a tenant. The Court applied the "affirmative acts" exception to deny full summary judgment because there was a factual question as to whether a ladder that may not have been secured by the complex was used to access the victim's apartment. Id. at 1210.

The "undertaking" exception is similar to the "affirmative acts" exception, but refers to the principle that a landlord's repairs are required to be performed with due care. Cooke, 741 F. Supp. at 1212; Cramer II, 848 F. Supp. at 1224. For example, the Court in Cooke noted that if a tenant asked for repair of a lock and the repair was done negligently, then the tenant may have an actionable negligence claim if a crime is later committed by someone gaining access through the door. Cooke, 741 F. Supp. at 1212. However, the exception does not countenance an argument that a landlord did not use the best locks available or that the locks were somehow inadequate. Id. The undertaking exception also requires that a landlord "undertake" to do something.

Cramer II, 848 F. Supp. at 1225. The mere fact that a tenant requests something (i.e., an additional safety measure) is of no consequence if the landlord does not undertake performance.[2]

In this legal context, Appellant first argues Respondents affirmatively acted or undertook to assume responsibility for a "sophisticated security program" at Wellspring and that Appellant relied on Respondents' "security program" when she chose to move to Wellspring. (App. Init. Br. at 25-26).

This argument misstates the record. The primary reasons cited by Appellant for her decision to lease an apartment at Wellspring were: (1) that members of her church recommended it; and (2) it was in close proximity to her work. (Wright Dep. 38:21 – 39:2; 40:3-7 ("Q. Okay. So we've talked about proximity and the fact that some of your friends at church had recommended it. Anything else? A. No.") (emphasis added)). After additional prompting about any "amenities," Appellant testified there was a pool, she could use a nearby recreation center, and she was told "there were security officers on duty. So I felt like it would be a safe place." (Wright Dep. 40:16-21).

Appellant's assertion that she only moved to Wellspring after receiving a satisfactory answer to a direct question about the "security program" is not reflected by her testimony. (App. Init. Br. at 27). Instead, the crux of any reliance by Appellant related to "security officers" and her belief that Wellspring would be a "safe" place. Neither Appellant's belief that Wellspring

[2] Appellant argues the South Carolina Court of Appeals has adopted Restatement (Second) of Torts § 323 (1965) as a source of the "undertaking" exception. (App. Init. Br. at 24-25 (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 442, 494 S.E.2d 827, 832 (Ct. App. 1997)). Appellant is incorrect. The appellant in Goode cited to 323 as a source of the undertaking duty, but there is nothing in Goode's decision to indicate the Court adopted it as a rule for the undertaking exception in the context of a landlord-tenant security case. Instead, the Court applied the appellant's own authority to show him how his circumstances still did not warrant the finding of a duty. Nevertheless, Respondents address 323 by providing analysis of what Respondents provided to Appellant and what exactly she relied on, i.e., "security officers."

was "safe" nor any representation by Respondents to this effect is actionable. Cooke rejected a plaintiff's argument that that the defendant provided negligent advice about an apartment complex when it described the complex as "safe." "Such a casual and general comment certainly does not fall within the current boundaries of the law on this point." Cooke, 741 F. Supp. at 1212. Although Appellant cites Wellspring's newsletters as stating that security is a "top priority," she provides no evidence that she ever read or relied on these representations. (App. Init. Br. at 27-28). The extent of any reliance by Appellant related to an alleged representation concerning "security officers."

With regard to this alleged representation, Wellspring had a courtesy officer program whereby a resident who was affiliated with law enforcement received a reduced rental rate to serve as an 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 when 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 Appellant'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)).

With this context, Cramer II has expressly rejected Appellant's argument that Respondents 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 disagreed and found the plaintiff "misapprehend[ed] the scope of the affirmative acts exception." Id.

> 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 the 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. The record reflects Appellant was told there were security officers on duty at the time she signed her lease. This is the extent of any "reliance" on a "security program" provided by Respondents (as represented in Appellant's initial brief). Wellspring had a courtesy officer program and was seeking to fill the position at the time of Appellant's abduction by third-party criminals. Recognizing these circumstances, the Circuit Court held as follows:

> 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.

(Order at 10). Although the Circuit Court's Order referenced the "affirmative acts" exception, its analysis also applies to the extent Appellant tries to argue the "undertaking" exception and application of Restatement (Second) of Torts § 323 (1965).

Appellant next argues Respondents undertook various duties relating to shrubbery and lighting at Wellspring and Respondents failed to act with reasonable care for "security" (not "safety") purposes. (App. Init. Br. at 29-32). Appellant also misapprehends the scope of the exceptions with regard to these arguments.

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 Ann. § 27-40-440(a)(1) and (2); Robinson, 384 S.C. at 585, 682 S.E.2d at 496. S.C. Code Ann. § 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."

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 SCLRTA's fitness and habitability provision. The Court reviewed section 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.

Fair did not assess section 27-40-440(a)(3) and its language concerning common areas and safety. However, it reviewed section 27-40-510(2), which imposes upon a tenant a duty to "keep the dwelling unit and that part of the premises that he uses reasonably safe and reasonably clean." Id. This provision – which places a duty upon the tenant – is virtually identical to the corresponding duty placed on a landlord at section 27-40-440(a)(3). In reviewing both sections,

the Court also held SCLRTA relates only to the inherent physical state of the premises. Id. Therefore, the Court held 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.

Here, Appellant 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 also 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). Appellant's expert agreed there is nothing in the SCLRTA relating to the provision of security. (Booth Dep. 196:19 – 197:1).

Similar to its review of the "no duty" rule for landlords, the Circuit Court also recognized a "slippery slope" with regard to Appellant's arguments about shrubbery. During oral argument, the judge engaged in the following exchange with Appellant's counsel when counsel presented pictures depicting what he believed to be overgrown shrubbery at the time of Appellant's incident.[3]

[3] It is important to note that Appellant failed to authenticate the pictures utilized at the hearing that allegedly depicted the "overgrown" shrubbery in question. In Respondents' Reply Brief to Appellant's Memorandum of Law opposing the motion for summary judgment ("Resp. Reply Br."), Respondents presented evidence that called into question the authenticity of the photographs relied on by Appellant. Specifically, the "properties" within the electronic files for the photographs indicated they were taken between 9:18 and 9:19 a.m. on February 24, 2006, more than two-and-a-half years prior to Appellant's September 18, 2008 incident. (Resp. Reply Br. at 5). Appellant's counsel had never taken the deposition of Amber Stockton, the alleged photographer of the pictures in question, prior to the motion so as to authenticate the photographs. Appellant attempted to cure this deficiency by submitting an affidavit from Ms. Stockton in Appellant's sur-reply at the close of briefing. It is Respondents' position that failure to authenticate the photographs makes them inadmissible for purposes of this appeal, and that Ms. Stockton's affidavit was untimely. See, e.g., Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir.

Mr. Hood: [Presenting picture] [w]hich shows a big shrub. And if you look at this first picture up on the right, that's where they cut them back. Now, in the first one, interestingly anybody could hide behind there and you'll never seem them. When you look at the second one—

The Court: Somebody could hide behind those trees, too, couldn't they?

Mr. Hood: Yeah.

The Court: You're not proposing they cut all the trees down are you?

Mr. Hood: No, but they've got to limb them up to seven feet.

The Court: Those are pine trees.

Mr. Hood: Those are pine trees, yes, Your Honor.

The Court: Somebody could stand behind one of the pine trees, too.

(Hearing Tr. at 32:17 – 33:7). By this exchange, the judge recognized the slippery slope of trying to infer a duty to safeguard the security of the premises, as opposed to its physical structure.

Ultimately, the Circuit Court relied on Fair and Cramer I to reject Appellant's argument that Respondents' "affirmative acts" gave rise to a duty. (Order at 10-11). In reviewing the evidence, the Court noted the shrubs around Appellant's door were never so high or thick that they impeded her ability to get to her apartment, and Appellant's expert admitted that pictures purported to be of the shrubs at the time of the incident do not appear to show any interference with the right of way to Appellant's apartment. (Order at 11 (citing Wright Dep. 56:10-14; Booth Dep. 129:22 – 130:2)). Appellant's expert also reviewed work orders requested by

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1993) (holding unsworn, unauthenticated documents submitted in response to motion for summary judgment were properly disregarded: "To be admissible at the summary judgment stage, 'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e).' 10A Charles A. Wright et al., Federal Practice and Procedure § 2722, at 58-60 (1983 & 1993 Supp.).").

Appellant and admitted she never contacted Respondents about trimming the shrubs. (Id. (citing Booth Dep. 130:13-16)).

Appellant cited to testimony by Campbell that Wellspring's policy was to replace burned out lights within a day for "security" purposes. (App. Init. Br. at 29 (citing Campbell Dep. 84:25-85:8)). However, Appellant's expert agreed that work orders requested by Appellant concerning breezeway lights appeared to have been completed by Respondents. (Order at 12 (citing Booth Dep. 152:11-18)). Appellant also admitted the lighting around her apartment was never so dim that she could not reach her apartment without difficulty. (Id. at 12 (citing Wright Dep. 56:15-18)). Appellant 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. (Id. (citing Wright Dep. 56:19-25)).

There is no evidence to support the "affirmative acts" or "undertaking" exceptions with regard to Respondents' actions relating to courtesy officers, shrubbery, or lighting. Therefore, this Court should affirm the Circuit Court's ruling with regard to this argument.

III. Appellant Cannot Prove Proximate Causation for Her Negligence Claim.

Although the question of proximate cause is usually a question for the jury, when there is "absolutely no evidence in 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 v. St. Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827,834 (Ct. App. 1998) (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 injury the plaintiff suffers. 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. (citing McCappin v. Park Capitol Corp., 126 A.2d 51 (N.J. Super. Ct. 1956)).

Even if Appellant could prove Respondents owed her a duty, the Circuit Court held Appellant's negligence claim failed because she could not prove a breach that proximately caused her injury. (Order at 12-16). First, a willful and malicious crime (e.g., an abduction, kidnapping, and robbery) breaks the causal link between any negligence of Respondents and Appellant's alleged 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 under Sheppard is whether the author of the primary negligence should have reasonably anticipated the intervening act and resulting injury based on the circumstances. Id. at 375, 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 the law enunciated within Sheppard, the Circuit Court agreed Appellant could not prove proximate causation in this case. Appellant and her expert admitted this case involves criminal activity. (Wright Dep. 118:5-7; Booth Dep. 74:1-12). Appellant also admitted that although crime may be deterred, it cannot all be prevented. (Wright Dep. 117:24 – 118:4). Appellant's expert admitted 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). Appellant's expert also admitted every crime cannot be prevented. (Id. at 74:25 – 75:1). As stated by the 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 actually walked up with her dogs as the incident was occurring and engaged the criminals in conversation. (Wright Dep. 74:17 – 75:6).

In addition, it is also clear Respondents could not foresee Appellant's incident. Appellant argues she "adamantly disagrees with Respondents' characterization of Wellspring's extensive crime record" and "only [her] position was supported by evidence." (App. Init. Br. at 36). This assertion again misstates the record. This is apparent from a review of police reports produced by Appellant and testimony about them by Appellant's expert. Appellant's expert admitted 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, which pre-dated Appellant's incident and that Appellant'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 vast majority related 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 Appellant'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 Appellant's incident. (Id. at 185:21-22). Appellant'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).

Respondents also supported the lack of foreseeability by citing to testimony of local law enforcement officials. Respondents' counsel deposed the reporting and investigating officers for Appellant's case, Officer Mohammed Gabr and Detective Kevin Isenhoward. Both of these law enforcement officers were 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 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). Notably, even Appellant's expert characterized crime in the area where Wellspring lies as "average." (Booth Dep. 108:12-17). Appellant's testimony also corroborated 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). Members of her church recommended Wellspring. (Id. at 38:21 – 39:2).

In addition, there is nothing in the police report to support that shrubbery or a lack of lighting contributed to conceal the perpetrators. Officer Gabr, the author of the police report, testified that recording accurate information in police reports is important because others may rely on the reports 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). Appellant also testified that when she saw the perpetrators, she said "I need to get through, please." (Wright Dep. 65:1-5). To the extent Appellant 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.

Appellant also cites to testimony by her expert and by a man hired to trim the shrubs to support that "witnesses" have provided evidence she would have seen the criminals but for the dim lighting and shrubbery. (App. Init. Br. at 37). As a preliminary matter, neither of these men witnessed the crime so as to know where the criminals were in relation to Appellant. The only witnesses were Appellant, the criminals, and a third-party who was walking her dog and engaged Appellant and the criminals as the crime occurred. Appellant also cites to her affidavit in which she testifies she would not have gotten out of her car if she could have seen the perpetrators, or she would have retreated if she could have seen them as she approached the ramp. (App. Init. Br. at 37-38 (citing Wright Aff. ¶ 10)). It is noteworthy that Appellant provided the referenced affidavit five months after her deposition, and after Respondent's filed their motion for summary judgment, in an attempt to cure her deposition testimony. In her deposition, she testified she eventually saw the perpetrators as she walked to her apartment. Instead of retreating, she said "I need to get through, please." (Wright Dep. 64:22 – 65:1). See also Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (setting forth six considerations a court may use to determine if a post-deposition affidavit is a "sham affidavit").

Finally, Appellant cites to the lack of a courtesy officer, and that "but for Respondents' sloppily executed courtesy officer program, the perpetrators likely would not have been in the area to abduct Ms. Wright." (App. Init. Br. at 38). This argument is pure speculation. First, it assumes the two hours patrolled by a courtesy officer would have been around the time of the incident on any given day. Second, it assumes that the courtesy officer would have been nearby, in what is an expansive property. (See Booth Dep., Ex. 5, p. 1, for property map). Third, and as explained in greater detail above, Appellant's expert had no idea as to what motivated the perpetrators in this case. He has never spoken with them. (Booth Dep. 162:19-22). Therefore, he has no way of knowing whether they had been watching Appellant's 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 admitted that answers to all of these questions would be relevant to his opinion that Respondents were the proximate cause of Appellant's injury, and not the criminal perpetrators. (Id. at 162:15 – 163:13). To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture. McKnight v. S.C. Dept. of Corrs., 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App.2009). This is another reason Appellant cannot prove proximate cause for her negligence claim.

As found by the Circuit Court, Respondents did not know two criminals would abduct, kidnap, and rob Appellant. (Order at 16). Respondents had no reason to foresee that breach of any of the duties Appellant attempts to impose upon them would have the natural and probable consequence of resulting in an intentional act by third parties against Appellant at the complex. (Id.). Accordingly, Appellant cannot prove proximate causation, and Respondents were not

negligent. (Id.) (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 826 (Ct. App. 1988)).

IV. Appellant Failed to State Facts Sufficient to Constitute a Cause of Action for Violation of the South Carolina Unfair Trade Practices Act.

Appellant's final claim was 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 Ann. § 39-5-20(a). For Appellant to recover under SCUTPA, she must show: (1) Respondents 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) Appellant 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 preliminary matter, Appellant is attempting to assert a personal injury claim within a statutory regime devoted to unfair or deceptive conduct in "trade or commerce." S.C. Code Ann. § 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. The Circuit Court judge acknowledged that "Car dealers seem to get those [SCUTPA claims]" during oral argument. (Hearing Tr. 15:21). Respondents disputed SCUTPA has any application to Appellant's personal injury claim five years removed from the initial signing of her lease. (Hearing Tr. at 15:13-16:6). Nevertheless, Respondents addressed each element of Appellant's SCUTPA claim to show that there is no genuine issue of material fact.

A. There is No Evidence of Any Actionable Unfair or Deceptive Conduct by Respondents.

First, Appellant failed to provide any factual allegations to support her SCUTPA claim in her Complaint. Instead, she vaguely alleged "Defendants engaged in deceptive and unfair trade practices by misrepresenting to Appellant 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). During her deposition, Appellant clarified this allegation by citing to only two ways Respondents 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). Appellant testified there was no other allegedly deceptive conduct by Respondents. (Id. at 121:1-5).

With regard to Appellant's allegation that Respondents 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 Cooke Court 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 Appellant that Wellspring was a "safe and secure place" is not deceptive in this case 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, Respondents' conduct was not deceptive, and this alleged misrepresentation is not actionable.

Appellant attempts to distinguish Cooke by pointing out representations in tenant newsletters concerning safety. However, there is no evidence Appellant reviewed the newsletters in question, and she did not cite to them as a basis for her claim. Instead, she testified she was told Wellspring was a "safe and secure place" at the time she filled out her application in 2003. (Wright Dep. 118:12-25). Second, Appellant attempts to distance her case from Cooke by arguing the instant dispute involves a different cause of action – SCUTPA – and Appellant is not required to prove fraud. (App. Init. Br. at 40-41). This argument is a "red

herring." The analysis in Cooke was based on whether a statement is one of fact or one of opinion. Cooke, 741 F. Supp. 1215-16. The Court ruled a statement that an apartment complex was "safe" was one of opinion. Id. at 1216. Even though Appellant alleges a SCUTPA claim, it defies logic that someone expressing their opinion can be liable for unfair trade practices if their opinion proves to be untrue, or unsupported. The fact that Cooke involved a fraud claim is inconsequential to its holding.

Appellant also asserts Respondents made representations that Wellspring was "safe" in an attempt to induce tenants to sign a lease and increase profitability. (App. Init. Br. at 41). "A potential tenant's peace of mind regarding security increased the likelihood that the potential tenant would sign a lease a Wellspring." (Id.). Notably, these assertions are devoid of any citation to the record or any evidence whatsoever. No witness for Respondents has ever stated that such representations were made to induce potential tenants, or that they were part of a calculated strategy to deceive customers. See, e.g., Hancock v. Wal-mart Stores, Inc., 355 S.C. 168, 172, 584 S.E.2d 398, 400 (Ct. App. 2003) (affirming summary judgment where there were "no exhibits, testimony, affidavits, or evidence" to support the plaintiff's contention that an agreement existed with the defendant).

Similarly, Appellant points to the lack of a courtesy officer at the time of Appellant's incident to support unfair or deceptive conduct by Respondents. Again, this argument misstates the record as to how Appellant claims Respondents deceived her or treated her unfairly. Appellant claims she was deceived when she was told Wellspring was a "safe and secure place" in 2003, at the time she completed her application. (Wright Dep. 118:12-25). Notwithstanding that this representation is not actionable, Appellant said nothing about courtesy officers or any deceptive conduct around the time of her incident five years later.

Appellant'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 Respondents misrepresented or concealed information concerning criminal incidents at Wellspring. By Appellant's own admission, this information was not provided to her until after her incident. (Id. at 119:17 – 120:5). The question is whether alleged failure to affirmatively provide this information during the tenure of her occupancy constitutes deceptive conduct. It does not. There is no case, statutory, or regulatory authority requiring Respondents to have proactively notified or informed Appellant about the incidence of crime at Wellspring. Accordingly, this alleged deceptive conduct is also not actionable.

B. There is No Evidence Any Alleged Conduct Affects the Public Interest.

Appellant's claim also fails because she cannot prove the alleged unfair or deceptive conduct affected the public interest. Appellant must prove this element with specific facts. Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994). Without proof of specific facts disclosing that members of the public were adversely affected, Appellant'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).

Burbach involved a SCUTPA claim by tenants of a home when the management company failed to return their security deposit after the tenants vacated the property. Id. at 494, 484 S.E.2d at 119-20. The management company claimed there was damage to the home during the tenant's occupancy and the security deposit went toward its repair. Id. at 494, 484 S.E.2d at

120. At trial, the plaintiff presented evidence that other tenants also had their security deposits withheld for the same reason. Id. at 494-95, 484 S.E.2d at 120. The Court found the evidence admissible and relevant to the public impact requirement because it showed the conduct was capable of repetition. Id. at 497-98, 484 S.E.2d at 121.

In this case, there is no evidence the unfair and deceptive conduct alleged by Appellant affects the public interest. When asked specifically during her deposition how she was deceived and to provide specific examples, Appellant only cited to two actions/omissions by Respondents: (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). As stated during this line of questioning:

> Q. Did you ever feel like someone treated you unfairly?
> A. No. . . . .
> Q. We talked about the verbal expression [concerning Wellspring being a 'safe and secure place'], any other way that they – and we talked about the incident reports. Anything else that made you feel like you were deceived?
> A. No.

(Id. at 120:8 – 121:5) (emphasis added).

There is no evidence Respondents engaged in a course of conduct whereby a standard business practice was to represent Wellspring to be a "safe and secure place" to prospective tenants or to conceal from prospective tenants the level of crime at Wellspring to secure tenant leases. Appellant cites to no evidence in the record in this regard. Instead, Appellant cites to the fact there was no courtesy officer at the time of her incident and a 2008 newsletter continued to provide a security pager number (notwithstanding the fact that there was no courtesy officer at the time). These are not the representations complained of by Appellant, which occurred at the time she was considering her lease. Furthermore, there is no evidence that Appellant even knew about a newsletter at Wellspring, or read any such information relating to a security pager.

(Wright Dep. 127:6-9 (Q. Okay. Did Wellspring ever do anything like that in terms of be it through a newsletter or voice mail or anything? [referencing publication of telephone numbers and other incidents] A. No.")).

Appellant 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. Appellant also fails to prove this element of her claim, and the Circuit Court agreed. (Order at 19-20).

C. Appellant Cannot Prove Monetary or Property Loss as a Result of the Allegedly Unfair or Deceptive acts.

Finally, as with her alleged negligence claim, Appellant cannot prove the third element of a SCUTPA claim: that the unfair or deceptive acts caused her monetary or property loss. First, Appellant admitted 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.") (emphasis added). Although she cited to security guards as amenities – along with use of a recreation center and pool – proximity and recommendation by friends were the primary factors. (Id. at 40:13-21). The deceptive conduct alleged by Appellant cannot be the proximate cause of her injury if it was not the basis for her decision to lease an apartment at Wellspring.

Second, Respondents incorporate by reference the arguments concerning proximate causation in section III., supra, relating to Appellant's negligence claim. Even if Respondents deceived Appellant (which Respondents deny), the alleged deceptive conduct did not cause Appellant's injury. Two criminals who intentionally and deliberately abducted and robbed

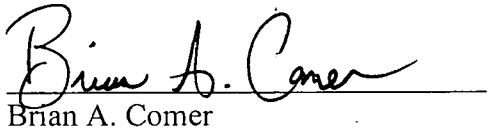
Appellant caused her injury, and Respondents could not reasonably anticipate this conduct at the time of the incident. For this reason, Appellant also cannot prove proximate causation for her SCUTPA claim. The Circuit Court also agreed with this law and analysis. (Order at 20-21).

CONCLUSION

Based on the arguments stated above, the Court should affirm the Circuit Court's Order granting summary judgment to favor Respondents. There is no genuine issue of material fact with regard to any of Appellant's claims based on the law that governs the landlord/tenant relationship and interpretation of SCRLTA. It is unfortunate that Appellant was the victim of a crime committed by two unknown perpetrators. However, with regard to suits arising from third-party criminal activity within an apartment complex, South Carolina's courts have been clear: 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, this Court should affirm the grant of summary judgment to Respondents.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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Columbia, South Carolina
January 21, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No.: 2011-CP-40-4068

Denise Wright ..... Appellant,

v.

PRG Real Estate Management, Inc.; Franklin Pineridge Associates; Karen Campbell Individually, and in her Representative Capacity as an Agent of PRG Real Estate Management ..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the 21st day of January, 2014, counsel for the Appellant was served with a copy of the Initial Brief of Respondents in this matter by mailing a copy of the same by United States Mail, with first class postage prepaid to the following addresses:

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