STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON)
) FOR THE FOURTH JUDICIAL CIRCUIT

Ebony Bethea, [redacted])
) C. A. No. 2012-CP-17-295
)
Plaintiff,)
) ORDER GRANTING DEFENDANT CITI
vs.) TRENDS, INC'S AND DEFENDANT
) PALMETTO PROPERTIES, INC.'S
Derrick Jones, John Doe,) MOTIONS FOR SUMMARY JUDGMENT
Individually and as employee/agent)
Of CITI TRENDS, INC., CITI)
TRENDS, INC., and Palmetto)
Properties, Inc.,)
)
Defendants.)

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This matter came before the undersigned on January 7, 2014 on Defendants Citi Trends, Inc. and Palmetto Properties, Inc.'s motions seeking orders granting summary judgment pursuant to Rule 56, SCRCP. Catharine Garbee Griffin of Baker, Ravenel & Bender, L.L.P., appeared on behalf of Defendant Citi Trends, Inc. ("Citi Trends"), Robert W. Buffington, Esquire of Haynsworth, Sinkler Boyd, PA, appeared on behalf of Defendant Palmetto Properties, Inc. ("Palmetto Properties) and Eric M. Poulin and Akim Anastopoulo of Anastopoulo Law Firm, LLC appeared on behalf of the plaintiff, Ebony Bethea.

Based upon the arguments of counsel, the depositions of the witnesses, the evidence in the file, as well as the applicable law, I find that there is no genuine issue of material fact and that summary judgment should be granted to Defendants as a matter of law.

FACTS

This case arises out of a shooting on December 27, 2010 by Derrick Jones of his former girlfriend, Ebony Bethea, which took place in the Citi Trend's retail clothing store located in the

Dillon Plaza Shopping Center which is owned by Palmetto Properties. Citi Trends opened their retail location in the Dillon Plaza Shopping Center in March of 2010.

Prior to opening the store, Citi Trends surveyed the site and determined that there were seven other stores in the shopping center. The survey found that three stores had tenants; that none of the stores had bars in their windows; that none of the stores were using security guards; and that one other store had EAS (sensor) systems and cameras in their stores. The survey also determined that there had been no break-ins and no armed robberies in the Dillon Plaza Shopping Center in the past few years. The survey also indicated that the shopping center had a good response time from the police and that the police department for the City and County were 1.1 miles away. In light of the assessment made by Citi Trends, they rated the store as a low security risk.

Defendant Jones and Plaintiff had been together in a relationship for approximately ten years before the Fall of 2010. Defendant Jones and Plaintiff have a son together. Defendant Jones and Plaintiff were involved in a dysfunctional relationship which deteriorated in approximately 2005, but continued through August of 2010. Plaintiff understood that Defendant Jones had an anger problem and could not control his anger. On November 15, 2009, Defendant Jones assaulted Plaintiff when he believed she was "talking" to another man. Plaintiff chose to resume the relationship with Defendant Jones soon after he had beaten her. She continued a sexual relationship with Defendant Jones until August of 2010. When Plaintiff started dating someone else in the Fall of 2010, Defendant Jones would sit outside the new boyfriend's apartment, hoping to catch them together. Jones followed the Plaintiff to the "country," stalking her with her new boyfriend. When Plaintiff learned that Jones was banging on the door to her new boyfriend's mother's house, she called the police. Plaintiff reported to the police that

"there's no telling what he could have done" because he was threatening to kill Plaintiff and her boyfriend. The police recommended that she take a restraining order out against Defendant Jones. Thereafter, Defendant Jones continued to stalk Plaintiff by hiding in Plaintiff's barn, waiting for her. Plaintiff did not believe that a restraining order would deter Jones, stating, "He was just at that moment to where he just didn't really care about what he would do now. It was just how I felt, like this thing is – this restraining order is not going to scare Derrick." Plaintiff testified that she knew in December of 2010 that Jones was "too far gone" with his anger that he would disrespect a restraining order and the police. When questioned whether anything could have prevented Defendant Jones from shooting her, Plaintiff responded that if the police locked up Jones after the incident in the "country" maybe it would have helped, but concluded that she "didn't know if this would have helped or not because I'm thinking maybe if he would have got out, he probably still would have done what he's done."

Two days before the shooting, Plaintiff went to Defendant Jones' home to allow their child to open Christmas presents with his family. While at his house, Defendant Jones was angered and started "talking crazy mess about [Bethea]" and threatened to hit Bethea. Plaintiff was so conscious of how agitated Defendant Jones was that she would not go to his house after dark. Although Plaintiff understood she needed to exercise caution with Jones, she testified that Jones was so angry at her that it did not matter if she saw him at day or night or in front of the Sheriff's Department because he was determined to hurt her.

Plaintiff had specific knowledge of threats made against her by Defendant Jones. Within days before the shooting, Defendant Jones left voice messages for Plaintiff, narrating how she would be "paralyzed by Christmas." He also threatened to kill Plaintiff and her new boyfriend. Jones left at least seventeen (17) messages for Bethea. The gist of the voicemail messages was

that Defendant Jones would find Plaintiff and hurt her, stating that if he were going to go to prison, it would be for "something big." Defendant Jones left a message which stated that he could "get them [Ebony and boyfriend] any time he wanted":

> You know Ebony, you think I'mma f*** up and go to prison and leave y'all out here. I kill y'all anytime I want to, I can kill you anytime I want.... Take me to the police man, b****.

(Message 4 of First Voicemails, Transcript). He also stated:

> I'mma make you suffer, but I'mma do life in prison, though. I ain't go kill you, but I betcha.... Hey dis for the b**** a** polices. I betcha I'mma make you suffer for da rest of your life.... I bet your ass be paralyze by Christmas.

(Message 4, Second Voicemails, Transcript).

Plaintiff also received a Facebook message from Defendant Jones's cousin which warned Plaintiff that she needed to be careful because Defendant Jones was telling others that he was going to shoot Plaintiff after Christmas. Plaintiff also had knowledge of Defendant Jones's violent past, including an incident in 2000 in which Defendant Jones shot a former girlfriend and another woman at a club. When Plaintiff entered Citi Trends on the evening of December 27th, she did not ask the employees in the store to be on the lookout for Defendant Jones. It is undisputed that neither Citi Trends nor Palmetto Properties had specific knowledge of the relationship between Jones and the Plaintiff.

On December 27, 2010, at approximately 6:00 p.m., the Plaintiff entered Citi Trends. Plaintiff testified that minutes prior to entering the store, she engaged in a telephone conversation with Defendant Jones and informed him that she was going inside Citi Trends so she could not talk. She continued to talk with Defendant Jones as she entered the store. After being inside the store for at least fifteen minutes, Plaintiff testified that Defendant Jones also entered the store. The surveillance tape showed that when Defendant Jones entered the store, both of his hands were visible. The gun was not in Defendant Jones's hands, but in the pocket of his pants, and

was not visible. Jones did not appear to be in a hurry, nor did he have a hood over his head. As Defendant Jones entered the store, he did not appear to be someone who was about to commit a crime. There was nothing about Defendant Jones walking in the store that would have suggested the store employees needed to check him out. Plaintiff testified that she was in the back of the store and Defendant Jones walked towards her. Plaintiff described that as he approached her, Defendant Jones, in a calm voice, stated that he was "tired of [Plaintiff] disrespecting" him and put his fingers in Plaintiff's face. In response, Plaintiff stated that she told Defendant Jones that he was "not going to be putting [his] fingers in [her] face." Defendant Jones then lifted his shirt and said "Oh, I ain't going to put my fingers in your face." Plaintiff detailed that she did not take the time to look to see if anything was beneath Defendant Jones's shirt. Instead, she immediately began running towards the front of the store, though she did not know who or how anyone was going to protect her. Based on the time stamp on the surveillance video, approximately one minute passed from when Defendant Jones entered Citi Trends until the moment he exited through the front door after shooting the Plaintiff. Three to four seconds passed from the moment Plaintiff began screaming and running from Defendant Jones until he shot her. The incident occurred so quickly that there was not enough time for the store employees to call 911 to get a police officer to protect Plaintiff from Defendant Jones. Plaintiff testified that the incident happened so fast that the two women working at Citi Trends did not have time to do anything. As she ran, Defendant Jones shot Plaintiff in the back, causing her to be paralyzed from the chest down. The shooting occurred in the leased premises of Citi Trends and did not occur in the common areas controlled by Palmetto Properties. Jones pled guilty to attempted murder and felon in possession of a firearm. He is currently incarcerated.

In the City of Dillon, a shooting occurs approximately once a month. Most of the shootings are at clubs and residences, but sometimes they occur on the street. The plaza in which Citi Trends is located is considered to be an area with a low incidence of crime. There have been no other shootings in the Citi Trends' Dillon location. There were no violent crimes occurring inside Citi Trends. There were no violent crimes occurring in the entire Dillon Plaza Shopping Center. Prior to Plaintiff being shot, the only other crimes in the stores located at the Dillon Plaza Shopping Center were shoplifting, copper theft from a vacant store, and financial crimes, such as embezzlement. Prior to Plaintiff being shot, neither Citi Trends nor Palmetto Properties had problems with violent crimes in their Dillon store or in the shopping center. In the light most favorable to the Plaintiff, using the crime statistics relied on by the Plaintiff's expert, and using the ½ mile radius for the known crimes (which is not consonant with the dictates of *Bass v. Gopal*, 395 S.C. 129, 716 S.E.2d 910 (2011)), the only evidence of specific crimes were identified by the Defendant's expert: an aggravated assault (1/2 mile away), one carjacking without weapon, (1/3 of a mile away), two simple assaults (1/2 mile away), and one simple assault (cursing only), that occurred in the theatre parking lot across the street from Dillon Plaza.

In December 2010, the Citi Trends' store had a monitor near the front door, in view of the customers coming in, which alerted anyone passing the threshold that the store had a video of the customers walking in. Additionally, Citi Trends stores utilize stickers on each side of the cash register to notify the customers and remind the employees they are under video surveillance because Citi Trends has security video cameras above the cash registers. Generally, the security video cameras in every Citi Trends stores are the type that can be seen under a dome. On

December 27, 2010, the Dillon Citi Trends' store had four security cameras which were recording activity in the store.

The Plaintiff filed a complaint alleging, inter alia, that Defendants Citi Trends and Palmetto Properties were negligent for various failures related to providing security for Plaintiff in the store.

STANDARD FOR SUMMARY JUDGMENT

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). A trial court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, when triable issues exist, those issues must go to the jury. *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn there from in the light most favorable to the non-moving party. *Worley Cos., Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000). The burden is on the moving party to clearly establish an absence of a genuine issue of material fact. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Once the moving party meets the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid S.*

Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In meeting its burden, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). It is not sufficient that a party create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). A trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993).

CONCLUSIONS OF LAW

I. **Neither Citi Trends nor Palmetto Properties owed a duty to protect Plaintiff from the criminal acts of a third party.**

As a matter of law, I find that the Plaintiff failed to present any evidence creating a genuine issue of material fact that Citi Trends or Palmetto Properties owed a duty to Plaintiff to protect her from the criminal acts of a third party. "In any negligence action, the threshold issue is whether the defendant owed a duty of care to the plaintiff." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011). The issue of whether a duty is owed to Plaintiff is a question of law to be decided by this court. *Burnette v. Family Kingdom, Inc.*, 387 S.C. 183, 691 S.E.2d 170 (2010).

The South Carolina Supreme Court recently reviewed the duty that an innkeeper owes to an invitee to protect against the criminal acts of third parties in *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011). The case arose out of an attempted robbery at a Super 8 motel in Orangeburg County. *See id.* The court indicated "the extent of the duty may be determined with an analysis of whether the innkeeper knew or had reason to know of a probability of harm to its guests." *Id.* The court described a business owner's duty as "a duty to take reasonable action to

protect its invitees against the *foreseeable* risk of physical harm." *Bass*, at 135, 716 S.E.3d at 913. The court listed the approaches used by jurisdictions nationwide to determine the foreseeability required to establish a duty: the imminent harm rule (South Carolina law before *Bass*); the prior or similar incidents test; the totality of the circumstances test; and, the balancing test. *Id.* at 135-39, 716 S.E.2d at 913-15. The court adopted the balancing test approach to be used in evaluating the foreseeability of a risk. *Id.* at 138-39, 716 S.E.2d at 915. Significantly, the court stated that in adopting the balancing approach, it was not altering the duty that is owed to an invitee by a business owner. *See id.* at 139, 716 S.E.2d at 915. Furthermore, the court specifically rejected the totality of the circumstances test of foreseeability, the broadest of all approaches, because "the totality approach's effect is to impose an unqualified duty on businesses in high crime areas to provide elaborate security." *Id.* at 138, 716 S.E.2d at 915.

Furthermore, the court explained that "the balancing approach acknowledges that duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed." *Id.* at 138, 716 S.E.2d at 915 (citation omitted). The approach elucidates (1) how to determine if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm. *Bass*, at 139, 716 S.E.2d at 915. In detailing how to determine whether a crime is foreseeable, the court explained that "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Id.* The *Bass* court relies on the Tennessee Supreme Court analysis in *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891 (1996). There, the Tennessee court emphasized that the "requisite degree of foreseeability essential to establish a duty to protect against criminal acts will always require that

prior instances of crime have occurred on or in the immediate vicinity of defendant's premises. *Id.* The *McClung* court considered the location, nature, and extent of previous criminal activities and their similarity, proximity or other relationship to the crime giving rise to the cause of action." *Id.*

The *Bass* court first noted that the plaintiff was unable to supply a report of criminal incidents at the Super 8 prior to the attack on the plaintiff because of the lack of historical data. However, in determining whether the plaintiff produced at least some evidence that aggravated assault was foreseeable by the motel, the court looked at evidence presented in a CRIMECAST report, showing the risk of crimes against persons (i.e. homicide, rape, robbery, and aggravated assault) at the Super 8 motel. *Id.* at 140, 716 S.E.2d at 916. "The CRIMECAST model produces probability measures that place any location in the United States in context with national, state and county levels of criminality." *Id.* at 141 n.3, 716 S.E.2d at 916 n.3. The court found the CRIMECAST report showed an "especial high probability of crime at Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against [the plaintiff] was foreseeable." *Id.* at 141, 716 S.E.2d at 916.

Because of its finding of evidence supporting foreseeability of crime, the court proceeded to determine whether the evidence presented showed that the business owner's preventative actions were unreasonable given the heightened risk. *Id.* The court noted that this determination involved consideration of the expert's opinion and reviewed the expert's findings made after the expert's multiple visits to the motel. *Id.* at 141-42, 716 S.E.2d at 917. The court held that the evidence failed to prove that the owner "should have expended more resources," especially in light of the expert's opinion that there was not enough data for the owner to say that he needed to

hire a security guard or install a roving camera system, or to train his employees to do a guard tour. *Id.* at 141-42, 716 S.E.2d at 917.

The South Carolina Supreme Court noted a criticism expressed by at least one court in regard to the balancing test, which is "bleeding the line between the duty and breach." *Id.* at 139, 716 S.E.2d at 915. Through its analysis, the court indicated that the determination of the duty of the business owner to an invitee remains an issue of law for the court, although the court has to evaluate the facts that would indicate foreseeability, and, if any foreseeability found, to determine, based on the evidence introduced by the invitee, whether the business owner's security measures were unreasonable. *See id.*, at 139-42, 716 S.E.2d at 916-17.

a. Plaintiff Has No Evidence that the Criminal Act of the Third-Party, Ex-Boyfriend, Defendant Jones, was Foreseeable

Assuming the *Bass* standard applies to this domestic attack on Citi Trends' premises, then under *Bass*, I find that the Plaintiff has presented no competent evidence that the attack on Plaintiff by her ex-boyfriend Derrick Jones was foreseeable. The Plaintiff did not introduce a CRIMECAST report, as in *Bass*, to show the probability of similar crimes against persons, specifically assaults with a gun, at the Citi Trends' location in Dillon. The undisputed evidence in this case demonstrates that there were no prior criminal incidents involving shooting or other types of violent crimes at Citi Trends. It is also undisputed that there were no prior criminal incidents involving shooting or other types of violent crimes in the Dillon Plaza Shopping Center. Sergeant Turner of the City of Dillon Police Department testified that Citi Trends is located in a low-crime area, where the most common crimes were shoplifting and not violent crimes against persons. Sergeant Hayes indicated that the part of Dillon where Citi Trends was located was not a high-crime area. Mr. Holliday, the representative who testified on behalf of Palmetto Properties, stated that from 2001 until December 27, 2010, that there had been no

shootings in the parking lot of the shopping center. Mr. Holliday also testified that there were no shootings in any of the leased spaces. Mr. Holliday was also not aware of any assaults at the shopping center. He testified that Palmetto Properties was familiar with the area when it purchased the shopping center and he described it as a "pretty calm place." He stated that there had not been any trouble in or around the shopping center. Mr. Holliday characterized the crime rate as a "very low crime area." He stated that comparing Dillon Plaza Shopping Center to South of the Border that " it's a cakewalk in a church."

Plaintiff argued that her expert opines, based on the incident reports, that Citi Trends was in a high-crime area and, consequently, should have foreseen that violent crimes would take place in its store. Plaintiff additionally argues that locating the store in "areas of urban distress" increased the foreseeability of violent crime happening in the store. Plaintiff argues that Mr. Jones's crime against her was foreseeable to Citi Trends based on 911 calls (also referred to as "calls for service") from Dillon Plaza Shopping Center and on incident reports from Dillon Police Department for the year 2009.[1] Mr. Hodge explained in his deposition that he ascribed a 95% weight to the City of Dillon incident reports in determining foreseeability. Additionally, Plaintiff argued that Mr. Hodge also relied on an analysis of the FBI's Uniform Crime Reporting statistics for the year of 2009, comparing Dillon City's violent crime rate with the South Carolina or national averages of violent crime in his analysis of foreseeability.

[1] Mr. Hodge refers to 291 files or 291 incident reports. However, the Dillon Police Department Incident Reports produced by the Plaintiff span over 291 pages but do not include 291 incident reports. Although most of them are one different incident per page, some of incidents have additional pages of supplemental reports. In counting the actual incident reports, which include a wide range of incidents not relevant to the considerations set forth in *Bass*, there are actually only 248 incidents for 2009. In fact, there are only five incident reports which are crimes against people in the half mile radius proposed as the standard by the plaintiff's expert.

However, Mr. Hodge admits that no violent crimes took place inside Citi Trends prior to Plaintiff's injury. Furthermore, it is undisputed that Mr. Hodge has no evidence of any shooting or violent crime in any of the other businesses in the shopping center or in the parking lot.

In the light most favorable to the Plaintiff, Mr. Hodge maintained generally that his "review of the Dillon City's incident reports indicated that violent crime is very prevalent within a half-mile radius of the [Citi Trends] immediate location." However, Mr. Hodge acknowledged during his deposition that he did not prepare a summary of the types, number, and location of crimes within a half-mile radius of Citi Trends' location. Mr. Hodge could not point to the violent crimes which supported his statement. Mr. Hodge admitted that he did not independently evaluate the distances between the store and the location of the crimes in the incident reports. He also stated that he would consider ten to fifteen "assaults, batteries, various violent crimes" to be a "high amount." He agreed that there had been no shootings in Dillon in retail stores before this incident. Additionally, Mr. Hodge specified that in the retail industry it is a reasonable probability that someone could come in the store and shoot someone else because "[t]he evidence is that in the security field, crime can occur and does occur anywhere." Mr. Hodge indicated there was a rash of mass shootings at malls and movie theaters recently, and gave as an example the shooting at the Annapolis mall in Maryland in 2010.

The only evidence of crimes within a half mile of the location which are similar to a shooting are as follow: one aggravated assault half of a mile away; one carjacking a third of a mile away; two simple assaults half of a mile away; and one simple assault (cursing only) in the theater parking lot across the street from Dillon Plaza. Mr. Hodge did not identify any calls made from Citi Trends to the Police Department.

Under the *Bass* standard, this Court will only consider violent crimes in or around the premises.[2] The incident reports of an unknown distance from the store and of a dissimilar nature relied upon by Plaintiff's expert do not provide competent evidence that an attempted murder or an assault with a firearm by a third party against an invitee in the store was foreseeable to Citi Trends or Palmetto Properties. In *Bass*, the South Carolina Supreme Court did not refer to incident reports of crimes within an area of half of a mile from a certain location as factors supporting a heightened risk. It is very significant that the CRIMECAST report considered by the *Bass* court was showing the risk of crimes at the Super 8 motel, the specific location where the attempted robbery against Bass took place. The Plaintiff has failed to present competent evidence that violent crimes occurred on the premises of Citi Trends or the Dillon Plaza Shopping Center. Even if this court were to consider the Plaintiff's argument to look at crimes

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[2] In *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 903 (Tenn. 1996) and *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99), 752 So. 2d 762, 765, the plaintiffs presented evidence consisting of police incident reports. In *McClung*, the plaintiff's wife, a customer of the defendant shopping center, was abducted from the parking lot and later raped and murdered. *McClung*, at 893. The *McClung* court adopted the balancing approach to determine the shopping center's duty to protect a customer in its parking lot. *Id.* at 902-03. The plaintiff introduced into evidence police reports from a period of seventeen months prior to the plaintiff's wife's abduction indicating that 164 criminal incidents occurred on or near defendant's parking lot. *Id.* at 903. In its finding of foreseeability, the *McClung* court considered these criminal incidents, along with other evidence in the record. The court stated "[a]ll these crimes occurred on or in the immediate vicinity of defendants' parking lot." *Id.* at 904 (emphasis added). While the court did not specifically define immediate vicinity, the *McClung* court considered the "criminal activity in the immediate vicinity of the business, such as an adjacent parking lot." *See id.* at 899 (emphasis added).

In *Posecai*, the plaintiff was robbed at gun point in Sam's parking lot. *Posecai*, 752 So.2d at 764. The plaintiff's expert introduced evidence of three incident reports of predatory offenses (robberies) on Sam's parking lot during the six and a half years prior to the plaintiff being robbed. *Id.* at 765. "In order to broaden the geographic scope of his crime data analysis, [the plaintiff's expert] looked at the crime statistics at thirteen businesses on the same block as Sam's, all of which were either fast food restaurants, convenience stores or gas stations" and found eighty-three predatory offenses in the six and a half years before the plaintiff was robbed. *Id.* at 765. Based on these incidents, the expert concluded the area around Sam's was "heavily crime impacted." *Id.* The *Posecai* court analyzed the foreseeability of an armed robbery against a Sam's customer only in light of the three incidents on Sam's premises, and did not consider the incidents on the same block. *Id.* at 768. Concluding that only one of the three bore any similarity to the crime at issue, the court held that Sam's did not possess the required degree of foreseeability to provide security patrols in its parking lot or to support a duty to implement greater security measures. *Id.* at 768-69. The court also observed that "[a]lthough the neighborhood bordering Sam's is considered a high crime area by local law enforcement, the foreseeability and gravity of harm in Sam's parking lot remained slight." *Id.* at 769.

one half a mile from the premises, there is not sufficient evidence in those reports to show that the crime against the Plaintiff was foreseeable to Citi Trends and Palmetto Properties. Furthermore, Plaintiff's expert's statement of what number of crimes he would consider a "high amount" supports the contrary conclusion because the number would not qualify as a "high rate."

Furthermore, the *Bass* court rejected a report submitted by Bass which indicated the robbery rate in the county for the year of his attempted robbery exceeded the state benchmark by approximately 190 percent:

> We do not believe evidence of an elevated crime rate covering the expanse of an entire county, on its own, is sufficient to prove foreseeability by a preponderance of the evidence. Such a finding would diminish a business's economic incentive to expand into higher crime counties, which arguably are in the greatest need of commercial stimulus.

Bass, at 140, 716 S.E.2d at 916.

Therefore, this court rejects the Plaintiff's argument that the determination of the duty owed by the Defendants includes an assessment of the Uniform Crime Statistics for the County of Dillon and the State of South Carolina. Plaintiff's argument that it should automatically be more foreseeable to a business locating its stores in low-income areas because violent crime is more likely to happen in these areas goes against public policy. The *Bass* court implicitly indicated it would not consider criminal acts foreseeable to a business owner when the evidence only indicated that a business was located in a high crime area. Specifically, the *Bass* court rejected the totality of the circumstances test because this test "effectively requires businesses to anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society." *Bass*, 395 S.C. at 138, 716 S.E.2d at 915.

In light of the analysis above, as a matter of law, incidents of assaults, with or without a weapon, at locations a half of a mile away from the store and beyond cannot be said to have been

in the immediate vicinity of Citi Trends. Additionally, as explained above, under *Bass*, the FBI's Uniform Crime Reporting statistics for the year of 2009 relied upon by Plaintiff are not sufficient to prove foreseeability. Similarly, Plaintiff's expert's opinion that Citi Trends is in a high crime area is not supported by the evidence and does not provide any evidence of foreseeability. Furthermore, the standard in South Carolina under *Bass* does not support finding a duty of a business owner to protect its customers from shootings when the evidence of foreseeability is that mall shootings have happened around the country in recent years.

Moreover, the foreseeability approach established in *Bass* to determine duty has not been endorsed by the South Carolina Supreme Court as applicable when the criminal act is not random. In *Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 678, 863 P.2d 207, 215 (1993) *disapproved on different grounds by Reid v. Google, Inc.*, 50 Cal. 4th 512, 235 P.3d 988 (2010), the first case recognized by the *Bass* court as originally formulating the balancing approach, the court states: "Unfortunately, **random**, violent crime is endemic in today's society." (emphasis added). *Bass*, *McClung*, *Posecai*, and *Ann M.*, are all cases in which a third party committed a violent act against a random victim, one that the assailant happened to find at that particular time in those particular places. Here, the violent crime was not committed against a random victim. Mr. Jones did not go to Citi Trends to find a random person to shoot. Mr. Jones went to Citi Trends to find Plaintiff, knowing from Plaintiff that she was there. Even if, under *Bass*, the foreseeability may be established in the absence of prior criminal incidents on the store's premises but in the presence of other factors supporting a heightened risk, in this case Plaintiff did not present any evidence that Citi Trends or Palmetto Properties could foresee that Mr. Jones would attempt to murder his ex-girlfriend or, at a minimum, that women in abusive relationships

are likely to be hunted down by their spouses, boyfriends, or exes, inside Citi Trends' store. As stated in the Affidavit of the security expert, Bill Booth:

> This crime had nothing to do with location and everything to do with a terribly deteriorating relationship between two people. Domestic violence is famously difficult for a landowner or business to prevent because it has nothing to do with the location and everything to do with an interpersonal relationship. Citi Trends was not aware of the relationship, the nature of the relationship, or the impending violence that was going to result from the relationship.

In *Posecai*, the court reviewed three prior incidents in Sam's parking lot in analyzing the foreseeability of that plaintiff being robbed in Sam's parking lot. *Posecai*, 752 So.2d at 762. One of the three involved an attack of an employee of the store in the parking lot where the employee's purse was taken, apparently by her husband. *Id.* The *Posecai* court implicitly found this incident dissimilar with the robbery of the plaintiff by an unknown assailant when it did not consider it in its determination of foreseeability. *Id.*

Therefore, as a matter of law, Plaintiff does not have any evidence that the attempted murder against Plaintiff was foreseeable to Citi Trends or Palmetto Properties and, therefore, neither Citi Trends nor Palmetto Properties had duty to protect the Plaintiff.

b. Assuming arguendo that there is a duty, Plaintiff has no Evidence that Citi Trends' Security Measures or those of Palmetto Properties were Unreasonable in these Circumstances.

Plaintiff has presented no evidence that the security measures taken by Citi Trends were unreasonable given the risk. Plaintiff also presented no evidence that it was reasonable for Palmetto Properties to take certain security measures in the parking lot given the risk.

The only evidence presented by Plaintiff in regard to the reasonableness of Citi Trends' security measures is through its expert witness, Mr. Hodge. In his affidavit and his deposition, Mr. Hodge opines as to what security measures would have been reasonable for Citi Trends to take "[i]n review of the facts and circumstance of this case." However, Hodge fails to raise a

"genuine" issue of material fact regarding the foreseeability of the crime as well as the security measures in response to the crime. A fact is genuine "if the evidence is such that a reasonable person could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, conclusory or speculative allegations are not facts. *Blakely v. Moore*, No. 5:12-cv-1214-RMG, 2013 WL 980412 at *2 (D.S.C. Mar. 12, 2013). "The opinion of the expert 'must be based upon facts . . . sufficient to form a basis for an opinion. . . . Expert opinion is inadmissible if its factual foundation is nebulous.'" *Young v. Tide Craft, Inc.*, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978). "[The expert] must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried which was necessary to the formation of an intelligent opinion." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 469, 242 S.E.2d 671, 678 (1978).

The *Bass* standard requires a determination of the economically feasible security measures required to prevent foreseeable risk of harm to an invitee of the store through a balancing of the foreseeability with the reasonable security measures. Given that the attack on Plaintiff was not foreseeable, the security measures in place in Citi Trends in December 2010 -- four security cameras, an EAS monitoring system, and the monitor by the front door indicating that the store was under security surveillance -- were reasonable. This situation is not exemplary of "an instance where a business would be required to employ costly security guards" due to the lack of evidence of prior crimes. *See Bass v. Gopal*, 395 S.C. at 141, 716 S.E.2d at 916-17. Even Plaintiff's expert stated that he did not believe security guards or metal detectors were reasonable security measures that should have been taken. Reasonable measures in light of the foreseeability of the crime which could have occurred on the premises were already in place in Citi Trends.

This court rejects the Plaintiff's argument which relies on the shooter Jones' opinion as to what subjectively would have deterred him. The *Bass* standard requires that the reasonable security measures to be taken by a business owner are to be balanced with the foreseeability by the business owner of future criminal acts of third parties. What would have deterred Jones or a third party that committed a criminal act does not have any relevance for this standard.

Consequently, I find that the Plaintiff has presented no evidence that the security measures taken by Citi Trends and Palmetto Properties, Inc. were unreasonable given the foreseeable risk of harm to its customers or that Palmetto Properties should have had cameras recording in the parking lot or security guards patrolling.

II. Plaintiff has No Evidence that either Citi Trends or Palmetto Properties was the Proximate Cause of her Injuries.

Additionally, I conclude that the Plaintiff has failed to present evidence showing that any action or inaction of Defendants Citi Trends or Palmetto Properties was the proximate cause of Plaintiff's injuries.

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). "To prove causation, a plaintiff must demonstrate both causation in fact and legal cause." *Id.* "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id.* "Legal cause turns on the issue of foreseeability." *Id.* "An injury is foreseeable if it is the natural and probable consequence of a breach of duty." *Id.* "Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach." *Id.* "It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to

someone." *Id.* "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 721 (Ct. App. 1996). "Only when the evidence is susceptible to only one inference does [the question of proximate cause] become a matter of law for the court." *Id.*

There is no evidence that there is anything that could have been done to prevent Plaintiff from being shot by Defendant Jones. Although Defendant Jones stated he would not have entered Citi Trends and shot Plaintiff if he had known there were surveillance cameras in the store, the foreseeability in the context of proximate cause is judged from the store's perspective, not that of the perpetrator, at the time of the incident and not in hindsight. Further, the shooting did not even occur in the common area of the shopping center or on the premises under the control of the property owner, Palmetto Properties.

Sergeant Turner, a nineteen-year employee of the City of Dillon Police Department, described the shooting as "outside the ordinary." He testified that he did not think "there's anything that anyone in that store could have done to have stopped what happened that night without getting hurt or possibly hurt." Sergeant Hayes, a member of the City of Dillon Police Department, who personally investigated the Plaintiff's case, opined that there was nothing that the store employees could have done to have prevented the shooting from happening in the store. He believed that Defendant Jones chose Citi Trends to shoot the Plaintiff because that was the location where he knew Plaintiff was going to be at that time. Plaintiff's encounter with Defendant Jones lasted less than one minute, with only a few seconds of the exchange indicating that the Plaintiff was in danger as she began to run away from him. Plaintiff herself testified that she "really wouldn't know if [the employees] would have time to do anything, it happened so

fast." Therefore, I find that there is no evidence in the record that the store or property owner proximately caused Plaintiff's injury. *See Parks*, 345 S.C. at 500, 548 S.E.2d at 613 (noting that the attack on plaintiff "was unexpected and occurred abruptly" as one reason for a finding that a nightclub's alleged breach of a duty to protect a guest from the criminal acts of third parties did not proximately caused guest's injury).

III. As a Matter of Law, Defendants Citi Trends and Palmetto Properties are Entitled to Summary Judgment Because the Comparative Negligence of Plaintiff is Greater than Any Negligence of Citi Trends and Palmetto Properties

Assuming that there is negligence of the Defendants Citi Trends and Palmetto Properties, which this court does not find, Plaintiff's negligence is so great that Plaintiff is barred as a matter of law from claiming that Defendants Citi Trends and Palmetto Properties caused her injuries. In South Carolina, "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). On a motion for summary judgment, though the facts are viewed in the light most favorable to the non-moving party, a court "cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citation omitted). "Where evidence of the plaintiff's *greater* negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." *Id.* at 424, 529 S.E.2d at 714.

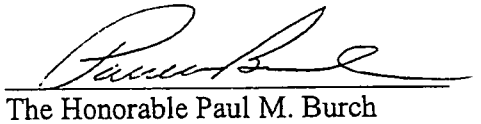
The Plaintiff had actual knowledge of her ex-boyfriend Defendant Jones' propensity to act criminally since he had shot and injured a former girlfriend and her friend. She also was fully aware of his goal physically to harm her because Defendant Jones left at least seventeen (17) voicemails for the Plaintiff, threatening in some of them to kill her or paralyze her. Despite

the threats made by Defendant Jones, Plaintiff did not take any additional actions to protect herself by involving the police. She proceeded to enter Citi Trends on the night of the incident while informing Defendant Jones that she would be in the store. Though she was fearful that Defendant Jones could enter the store, Plaintiff failed to inform the employees of her concerns. Plaintiff also failed to call the police upon seeing Defendant Jones in the store. The Plaintiff did not scream for help when she first saw Jones; instead, the Plaintiff calmly talked to Defendant Jones until he made it known to Plaintiff that he had a gun. Plaintiff was knowledgeable regarding Defendant Jones' violent history, knowledgeable that he was threatening to hurt her, but still revealed her whereabouts to Jones when she walked into Citi Trends. Thus, Plaintiff was in the better position to protect herself against the criminal act of Defendant Jones and, thus, I find that her negligence was greater than that of any alleged negligence of Citi Trends or Palmetto Properties.

CONCLUSION

For the reasons stated hereinabove, the Defendants' Citi Trends, Inc. and Palmetto Properties, Inc.'s Motions for Summary Judgment are granted and the case against these Defendants is dismissed.

AND IT IS SO ORDERED.



The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

January 22, 2014