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 REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. MS. WRIGHT'S DUTY CLAIM WAS NOT REJECTED BY CRAMER V. BALCOR PROPERTY MANAGEMENT, INC.

Ms. Wright's duty assertion presents an issue that has not been ruled on by any South Carolina court. Specifically, "whether the landlord-tenant relationship is analogous to the storeowner-invitee and innkeeper-guest relationships when the landlord knows the [apartment] complex's common areas are open to the public and knows the public accesses the common areas for non-visiting purposes." Initial Br. of Appellant at 14. Respondents argue this is not an issue of first impression because Ms. Wright's duty claim was considered and rejected in Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) ("Cramer I"). Initial Br. of Resp'ts at 10.

Cramer I answered a certified question from South Carolina's federal district court and established a general rule stating that a landlord does not owe a duty to provide security to protect tenants from third party criminal attacks. Cramer I, 312 S.C. at 444, 441 S.E.2d at 319. The rubber stamp of Cramer I that Respondents would have the Court apply to Ms. Wright's negligence claim would not be a fair reading of the opinion or the legal principles on which the Supreme Court relied in fashioning its ruling. The Cramer I court distinguished the innkeeper-guest and store owner-invitee relationships from the landlord-tenant relationship by stating the ways in which an innkeeper and store owner's property are different than a residential landlord's property. 312 S.C. at 443, 441 S.E.2d at 318 (citing Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990) (quoting Feld v. Merriam, 485 A.2d 742 (Pa. 1984)).[1] The distinction is based on (1)

[1] It is not clear from their brief but Respondents seem to suggest that the holdings of Cooke and Cramer I were not based on the description of a typical apartment complex in

whether the premises invite/permit the public; and (2) whether the property owner expects or anticipates that the public will be permitted on the premises. The apartment complexes considered in Cooke, Cramer I, and Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997), all fell within the description of an apartment complex and the traditional landlord-tenant relationship that South Carolina courts borrowed from Feld. None of these cases compel a certain result when the apartment complex in question is more like the store or inn described in Feld than the apartment complex to which the Pennsylvania Supreme Court referred.

Thus, while Respondents argue that this case does not present an issue of first impression for South Carolina courts, Respondents cannot point to a case where South Carolina courts have considered a landlord's duty in relation to a property like Wellspring, where the public is invited and expected to gather for non-visiting purposes. Respondents also offer the Court no reason why Cramer I's general rule must apply here in the absence of its fundamental building block, i.e. the description of a typical apartment complex from Cooke via Feld. Cramer I does not compel the result Respondents seek in this case. Instead, the entire course of South Carolina jurisprudence on this subject from Cooke to Cramer supports Ms. Wright's position: Cramer I's rule applies where an apartment complex has the characteristics of an apartment complex and the store owner/innkeeper rule should apply where an apartment complex has the operative characteristics of a store or inn.

Feld. See Initial Br. of Respondents at 10 ("Appellant attempts to argue Cooke and Cramer I adopted their rule because of reliance on ... Feld"). However, both Cooke and Cramer I extensively quote Feld and use Feld's description as the basis for what Cramer I calls a "fundamental distinction" between these relationships. Id. at 443, 441 S.E.2d at 318.

Respondents' Cramer I argument also express concern over the effect that finding a duty in this case would have on South Carolina premises liability law. Respondents argue that recognizing a duty here would generally subject residential landlords to exorbitant and infeasible duties to protect tenants. This is the concern underlying the "slippery slope" argument Respondents make twice in their brief. Initial Br. of Resp'ts at 10, 21. Respondents' concerns are unfounded because Respondents misstate conditions at Wellspring and exaggerates the duty Ms. Wright asks the Court to recognize.

Respondents argue Wellspring is like any other apartment complex in that it is "private property" and goes so far as to claim that this is one of three "indisputable facts" in this case. Initial Br. of Resp'ts. at 6. This statement is not an indisputable fact. For example, Ms. Wright's expert Bill Booth testified that based on his experience and multiple sight visits to the complex, he would characterize Wellspring as "public property which is privately owned." B. Booth Dep. 65:19-20. While denying that Wellsping was public property, Wellspring property manager Karen Campbell acknowledged that the Harbison trails bisecting the complex meant that anyone could come on to Wellspring's premises. K. Campbell Dep. 9:12-14. She agreed non-Wellspring tenants could enter the premises for non-visiting purposes. K. Campbell Dep. 143:3-16. PRG Chief Operating Officer Samuel Foster testified that entering Wellspring's premises is what the trails were "obviously designed to do." S. Foster Dep. 40:14-21.

Respondents' argument and the circuit court's finding that Wellspring's common areas are "reserved for people who are tenants or are specifically invited" does not hold up when compared to the other evidence in the record. See Order at 7; Initial Br. of Resp'ts at 10. Respondents attempt to minimize the trails' effect by referring to them as

"nearby trails" (Initial Br. of Resp'ts at 12) and the circuit court similarly compared the trails to sidewalks. Order at 6. If the Harbison trails were the equivalent of a public sidewalk and a security duty was imposed, then Respondents' slippery slope fears would perhaps be valid. However, the trails are not "nearby" Wellspring as maps show that the trails run right through the heart of Wellspring's common areas.

Respondents' argument not only misstates the true character of Wellspring, it also overstates the duty Ms. Wright seeks to apply. Respondents' slippery slope argument goes too far in asserting that landlords will be forced into "drastic economic measures that may be cost-prohibitive." Initial Br. of Resp'ts at 11. First, Respondents offer no testimony or data to support their forecast of potential future economic hardship and a resulting lack of affordable rental units for consumers. Second, this argument is premised on the circuit court's suggestion that Appellant's position would require construction of citadel-esque security perimeters around all residential rental properties. The duty Ms. Wright asserts imposes no such obligation. B. Booth Dep. 97:2-6 (recommending increased signage and vigilance among courtesy officers).

Additionally, the circuit court's hypothetical was overbroad because it failed to acknowledge that the duty Ms. Wright asserts does not apply to all residential landlords but only to landlords whose property invites the public and where the public is expected to gather for purposes other than visiting tenants. (Initial Br. of Resp'ts at 11 (citing Hearing Tr. at 27:4-24)). The circuit court's question specifically suggested Ms. Wright's duty assertion would require turning "any apartment complex" into a gated community. Accordingly, the question overstates both the duty's content and the scope of its application.

Finally, Respondents point to Feld and make the undisputed point that perfect safety is not possible and that zeroing out the risk of third party criminal attacks is not feasible. Initial Br. of Respondents at 11-12 (quoting Feld, 485 A.2d at 392). Again, this statement in no way affects the duty Ms. Wright asserts in this case. Ms. Wright's claims were based on Respondents' failure to make Wellspring reasonably safe. The inherent inability to completely eliminate a risk of injury is no bar to a duty of reasonable care to avoid the risk. For example, in the medical negligence context, a doctor is not an insurer of a successful surgical result and may not be held liable simply because a negative result occurs. See e.g., Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 464, 702 S.E.2d 372, 375 (Ct. App. 2010). The risk of a surgical complication cannot be completely eliminated. However, the same doctor has a duty of reasonable care in performing every surgical procedure, and the failure to exercise such care can result in liability where the failure proximately causes a negative result.

Thus, while it is true that even the most robust security program could not insure against criminal attacks on tenants and that Respondents cannot be liable simply because Ms. Wright was a crime victim, Respondents' duty required them to take reasonable steps, including the steps they promised to take and actually undertook, to protect Ms. Wright against the risk of criminal attack.

II. RESPONDENTS VOLUNTARILY UNDERTOOK A DUTY TO REASONABLY SECURE WELLSPRING'S COMMON AREAS THROUGH SECURITY OFFICERS, SECURITY LIGHTING, AND LANDSCAPING SERVICES.

Respondents undertook a duty to reasonably secure Wellspring's common areas through a security program that included security officers, common area lighting, and landscaping services. Respondents argue the courts have rejected issues with an

apartment complex's courtesy officers as a basis for a duty. Initial Br. of Resp'ts at 14 (citing Cramer v. Balcor Prop. Mgmt., Inc., 848 F. Supp. 1222 (D.S.C. 1994) ("Cramer II"). Respondents also argue that landscaping and lighting cannot be a basis for a security duty because the South Carolina Residential Landlord and Tenant Act ("SCRLTA") limits landlord responsibilities for the common areas of an apartment complex. Initial Br. of Resp'ts at 20-21.

Cramer II does not bar a duty based on the failure of Respondents' security program. Cramer II is distinguishable for two reasons. First, the Cramer II court only considered the courtesy officer claim within the context of the "affirmative acts" exception discussed in Cooke. Nothing in Cooke indicates that a claim based on the negligent operation of a courtesy officer program cannot form the basis for a duty if the elements of Restatement § 323, a provision South Carolina courts have repeatedly recognized and applied, are satisfied. Additionally, Cramer II's conclusion was based specifically on the finding that in the facts plaintiff Cramer presented the court, a "stronger connection" between the courtesy officer program failings and the injury suffered would be required to sustain a legal duty. The specifics of Wellspring's courtesy officer program and the ways in which it failed Ms. Wright make a much stronger case than Cramer II.

Ms. Wright presented evidence that Wellspring made a specific representation of security officers to Ms. Wright, advertised the officers' presence by encouraging Wellspring tenants to call a security pager when problems arose, and required its officers to patrol Wellspring's grounds for hours each day. Ms. Wright has also presented apartment security expert Bill Booth who testified to a substantial and direct connection

between Respondents' courtesy officer program failings and the attack underlying Ms. Wright's claims. See B. Booth Dep. 92:1-10; 155:19 – 156:21. In short, Ms. Wright's claim based on a courtesy officer failing is much stronger than the one considered in Cramer II under either Cooke's "affirmative act" exception or Restatement (Second) of Torts § 323.

Respondents' also err in their assertion that Ms. Wright's claim related to the landscaping and lighting would require an extension of SCRLTA. See Initial Br. of Resp'ts at 21. The duty Ms. Wright asserts does not arise from the SCRLTA or a claimed extension of the SCRLTA, but rather Respondents' voluntary decision to undertake landscaping and lighting obligations for the purposes of securing Wellspring's common areas. Respondents' citation to Cramer I's conclusion that the SCRLTA does not impose on a landlord a security duty does not address the duty Ms. Wright claims here. See Initial Br. of Resp'ts at 21 (citing Cramer I, 312 S.C. at 444, 441 S.E.2d at 319). A voluntarily assumed act can create a legal duty regardless of whether the act is required by statute. Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985) (finding duty for voluntary act under common law and Restatement § 323 even though defendants "were not obligated to so act" by statute or other law). Even if Respondents are correct in their assertion that SCRLTA duties for landscaping and lighting are limited to the physical state of a leased premises, this limitation does not apply to a duty created by voluntary undertaking, i.e. a duty arising independently of the SCRLTA and its limitations.

Additionally, it is proper to apply Respondents' lighting/landscaping duties to Ms. Wright's security and not just to Ms. Wright's safety. Respondents argue that any

lighting or landscaping duties they owed by law or by voluntary assumption were performed only for "safety" purposes. Respondents specifically contend that they only provided lighting and landscaping to remove slip-and-fall hazards by providing a reasonably bright access path to Ms. Wright's rental unit unobstructed by shrubs or tree roots. Initial Br. of Resp'ts at 23. The circuit court's order rejected Ms. Wright's argument on lighting and landscaping by noting that neither darkness nor overgrown shrubbery[2] interfered with Ms. Wright's ability to access her front door. Order at 11. Respondents' argument and the circuit court's ruling overlook the full reason why Respondents provided common area lighting and landscaping services. According to Respondents' corporate representatives, these services were undertaken both for safety **and** to make the area secure for tenants.

Wellspring property manager Karen Campbell, Respondents' agent who directly interacted with landscaping contractors, agreed that landscaping maintenance was performed to keep trees/shrubs from being dangerous and also for the protection of tenants and guests. K. Campbell Dep. 230:5-14. Common area lighting was put in place and maintained at a certain level to, among other things, protect Wellspring tenants from potential crime. K. Campbell Dep. 27:1-5 (testifying that bright lighting discouraged unwanted visitors); 228:9-11 (agreeing common areas were to be well-lit for tenant

[2] Respondents also point out that Ms. Wright never submitted a work order to Respondents asking for additional shrubbery maintenance. Initial Brief of Resp'ts at 22-23. If Respondents' purpose for this argument was to show that they were unaware of a need for additional shrubbery maintenance, then their argument is directly rebutted by the affidavit of Shawn Howland, owner and operator of Wellspring's landscaping contractor H&S Landscaping. Mr. Howland stated under oath that he spoke with Karen Campbell several times about the shrubbery near Ms. Wright's unit including his professional opinion that the shrubbery "posed safety and security hazards for the residents." S. Howland Aff. ¶¶ 6, 8. Each time, he was rebuffed with Ms. Campbell noting that additional shrubbery maintenance was outside of Wellspring's budget. Id. at ¶ 9.

protection purposes). The maintenance section of Respondents' policy and procedure manual clearly demonstrates that Respondents believed their "security" duty to residents included making sure the property was "well lit." (PRG Defs 000108).

Respondents have a SCRLTA duty to "keep all common areas of the premises in a reasonably safe condition" (S.C. Code Ann. § 27-40-440(3)) and this duty relates specifically to the physical state of the premises. In addition to this duty, Respondents undertook lighting and landscaping tasks for the purpose of providing a reasonable amount of security for its tenants. This is the duty on which Ms. Wright relied. Her claim does not seek an unprecedented extension of the SCRLTA because her claim is based on a common law or voluntarily assumed duty rather than a statutorily-imposed duty.

III. THE CIRCUIT COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD APPLICABLE TO THE PROXIMATE CAUSE ELEMENT OF MS.WRIGHT'S NEGLIGENCE CLAIM.

The parties agree with the circuit court's statement that proximate cause is usually a question for the jury and that summary judgment on this issue may be granted only where there is "absolutely no evidence in the record" indicating the required causal connection. Order at 12 (quoting Parks v. Characters Night Club, 345 S.C. 484, 500, 614 S.E.2d 605, 614 (Ct. App. 2001)). However, by overlooking Ms. Wright's proximate cause evidence, the circuit court incorrectly applied the standard to this case.

Respondents' negligence can be a proximate cause of Ms. Wright's injuries even though the negligence was separated from Ms. Wright's injuries by her attackers' criminal acts. Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 385 S.E.2d 37, 38 (Ct. App. 1989). There is no need to show Respondents "contemplated the particular chain of events" leading to the attack. Cody P. v. Bank of Am., N.A., 395 S.C. 611, 621, 720

S.E.2d 473, 478 (Ct. App. 2011). Ms. Wright could prevail at trial by showing the attack was "within the general range of consequences which any reasonable person might foresee" as a result of Respondents' negligent acts. Id. To defeat summary judgment, Ms. Wright was only required to provide any evidence on these points.

The circuit court found "there is no evidence that proximate cause exists to support Plaintiff's negligence claim." Order at 13. Respondents now defend the summary judgment order first by arguing that Ms. Wright failed to present any evidence that the injuries were a foreseeable result of Respondents' alleged negligence. Initial Br. of Resp'ts at 25-26. The circuit court supported its conclusion with its own analysis of crime reports for the Wellspring area in the years preceding Ms. Wright's attack. Id. Noting that the majority of such reports involved automobile-related crimes, the court did not consider the reports to be any evidence to support proximate cause. Id. at 14-15. This conclusion necessarily required the court to wholly reject the methodology and conclusions of Ms. Wright's apartment security expert Bill Booth, the only expert to provide testimony in this case.

Mr. Booth thoroughly explained his methodology for determining whether a crime was foreseeable to a landlord based on previous crimes in the area. Mr. Booth focused on past crimes but narrowed his focus to crimes in the specific area in which the crime at issue occurred. B. Booth Dep. 175:16-17. In fact, while Mr. Booth would typically look at crimes on the apartment complex's grounds and in the immediate vicinity, he limited his analysis to on-premises crimes in this case because "there were a significant number of incidents located in the common area of the apartment complex itself." B. Booth Dep. 175:19-21. Mr. Booth further narrowed the crimes in his analysis

by excluding domestic altercations and instead focusing on stranger-on-stranger offenses. B. Booth Dep. 176:20-21. Mr. Booth went one step further by focusing only on crimes in the Wellspring parking lot that would have been impacted by proper lighting, diligent landscaping, and the courtesy officer patrols Respondents promised Ms. Wright. B. Booth Dep. 178:24-179:6. His analysis also considered the specific facts of the crimes including indications that one attack initiated in Wellspring's common areas was particularly brazen. B. Booth Dep. 176:2-9.

The circuit court also relied on a distinction between "violent" and non-violent crime. Order at 14. It appears the court deemed any non-violent crime incapable of making a future violent crime foreseeable to Respondents. Id. (noting the number of crime reports related to violent and non-violent crimes). No definition of "violent crime" is provided in the Order and it is difficult to ascertain how the circuit court would define the term. It is even more difficult to ascertain the basis for the circuit court's implicit conclusion that non-violent crimes are wholly incapable of supporting foreseeability. This conclusion required the circuit court to disregard Mr. Booth's methodology in full. Based on his expertise in apartment security, Mr. Booth rejected the violent/non-violent dichotomy Respondents' counsel suggested during a deposition and that the circuit court discussed in its order. While many of the pre-attack crimes in Wellspring's common areas were auto-related, the only thing separating these offenses from "violent" crime status was that no one approached the perpetrator during each crime's commission. For example, if someone approached the scene while a car was being vandalized, then the offense would have had "a high probability of becoming a violent crime." B. Booth Dep. 180:18-23. The violent/non-violent crime distinction relied on this happenstance variable

and, therefore, Mr. Booth deemed the auto-related offenses relevant to his foreseeability analysis despite their non-violent status.

Relying in part on this methodology, Mr. Booth reached the conclusion that Ms. Wright's abduction was foreseeable to Respondents and that Respondents' courtesy officer, lighting, and landscaping failures were a proximate cause of the attack.[3] B. Booth Dep. 65:20-66:2; 66:8-15; 162:15-18. Despite this testimony supported by the aforementioned methodology, the circuit court found "no evidence that proximate cause exists." Order at 13. This finding required a complete rejection of Mr. Booth's expert opinion with no explanation as to why Mr. Booth's opinion is deficient or how his conclusions fall short of the minimal standard needed to defeat a summary judgment motion. Respondents did not present an expert to state a contrary conclusion or to attack the reliability of Mr. Booth's methodology. The circuit court's order does not point to any testimony or literature that even suggests Mr. Booth is unqualified or that his opinions are unreliable. Notably, Respondents offer no such suggestion in their brief.[4]

Mr. Booth's foreseeability analysis is bolstered by other evidence showing that Respondents could have foreseen the harm Ms. Wright suffered. Respondents' conduct

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[3] Expert testimony can provide proximate cause evidence. See e.g., Schmidt v. Courtney, 357 S.C. 310, 326-27, 592 S.E.2d 326, 335 (Ct. App. 2003).

[4] Ms. Wright argued in Appellant's Brief that only her position on this issue was supported by evidence. Initial Br. of Appellant at 36. Respondents deem this assertion a misstatement of the record. Initial Br. of Respondents at 25. Respondents' position is incorrect because it misconstrues the extent of Ms. Wright's argument. Ms. Wright argued only that nonviolent crimes may not be summarily dismissed for purposes of determining whether a violent crime was foreseeable. Ms. Wright supported this argument with Mr. Booth's testimony. Respondents' opposing position, i.e. nonviolent crimes have no role in determining foreseeability of violent crime, was not supported at the circuit court level by expert testimony, industry standards, literature, or any other form of evidence. The evidentiary deficiency is apparent in the circuit court's order and is not cured by anything in Respondents' brief.

shows that crime was foreseeable in Wellspring's common areas. Respondents' anticipation of this problem is evident from their Courtesy Officer Independent Contractor Agreement in which officers were instructed to respond to "Criminal acts" on Wellspring premises. PRG 00746. Wellspring property manager also agreed that there would be a certain amount of crime at Wellspring. K. Campbell Dep. 114:1.

The remainder of Respondents' proximate cause argument relates to causation in fact, the second component to the proximate cause analysis. Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005). Causation in fact is proven by showing a plaintiff's injury would not have occurred "but for" the defendant's negligent act or omission. Id. (citing Oliver v. S.C. Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992)). Respondents argue that even if Wellspring provided security services, common area security lighting, and landscaping services to Ms. Wright's satisfaction, Ms. Wright still would have been attacked. Summary judgment on causation in fact was only proper if Ms. Wright presented no evidence to support the required causal link.

Ms. Wright presented cause in fact evidence in opposition to Respondents' summary judgment motion, and she should have been permitted to present this evidence to a jury. Ms. Wright's testimony, the strongest available evidence of what happened on the night of her attack, shows a causal link between Respondents' negligence and her injuries. Ms. Wright testified that her attackers were concealed "behind the bush" and "came out ... when I got up to them." D. Wright Dep. 63:19-22. The shrubbery was sufficiently unkempt and overgrown to hide the attackers as Ms. Wright testified that the men emerged from behind "tall bushes." D. Wright Dep. 64:6. Ms. Wright also swore in

her affidavit that her attackers "were not visible" as she parked her car due to "overgrown shrubbery and the lack of lighting in the area." D. Wright Aff. ¶ 8. Had her attackers not been concealed by vegetation and shrouded in darkness, Ms. Wright would never have exited her vehicle and the attack would have been averted. D. Wright Aff. ¶ 10.

Since summary judgment on the proximate cause issue is only appropriate if there is "absolutely no evidence," Respondents are forced to argue that Ms. Wright's testimony is of no value or should not have been considered by the circuit court. Respondents' argument is premised on the notion that Ms. Wright's sworn testimony is not credible. This argument presents two problems. First, South Carolina law does not permit summary judgment based on an attack of an opposing witness's credibility. See Hoard v. Roper Hosp., Inc., 387 S.C. 539, 548-49, 634 S.E.2d 1, 6 (2010); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000)). Respondents' cause-in-fact argument amounts to little more than an assertion that Ms. Wright's deposition testimony and affidavit are inaccurate. They can offer the Court no testimony from another witness present at the scene when Ms. Wright was attacked to contradict her claims. Even if Respondents could do so, the best they could offer the circuit court was a factual dispute that juries are in place to resolve.

Second, all of Ms. Wright's causation testimony is consistent with the other evidence she presented to the circuit court. Shrubbery large enough to conceal criminals is consistent with landscaper Shawn Howland's statement that the vegetation near Ms. Wright's unit "posed safety and security hazards for the residents." S. Howland Aff. ¶ 8. Ms. Wright's testimony is also consistent with the affidavit of a Wellspring neighbor who

observed the overgrown shrubbery. N. Davis Aff. ¶ 5 ("The shrubbery in front of Ms. Wright's building was very high").

Ms. Wright also presented to the circuit court photos of the overgrown shrubbery as it appeared at the time of Ms. Wright's attack. Pla. Mem. in Opp. to Defs.' Mot. for Summ. J. at 21 and Exhibit 15. Respondents contend that these photos were not properly authenticated and should not be considered by the Court. Initial Br. of Resp'ts at 21 n. 3. Respondents' argues that the photographer's deposition was never taken to establish the photos' date. Id. Respondents also submitted a brief to the circuit court raising concerns they believe call in to question the photos authenticity.

Respondents' argument must fail and this Court is permitted to consider the photos. The proponent of a piece of evidence bears the burden of proving its authenticity. This burden is met by showing "evidence sufficient to support a finding that the matter in question is what the proponent claims." Rule 901(a), SCRE. This showing can be made in a variety of ways including through "[t]estimony of [a] witness with knowledge." Rule 901(b)(1), SCRE. Ms. Wright's deposition testimony is sufficient to authenticate the photos.[5] Ms. Wright used the photos during her deposition to describe the scene where she was abducted and the bushes from which her attackers emerged. D. Wright Dep. 66-74. Under Rule 901, her testimony is sufficient to show that the representation of the bushes in the photo is an adequate representation of the shrubbery near her rental unit on the day of her attack. Respondents are wrong in their suggestion that Rule 901's

[5] As further evidence of the photos' authenticity, the photographer provided an affidavit in which she swore that the photos were taken within 2-3 days after Ms. Wright's abduction. A. Stockman Aff. ¶ 5. While Respondents challenge the timing of Ms. Stockman's affidavit, it is important to note that the affidavit was signed within days of when Respondents first challenged the authenticity of photos that Ms. Wright previously authenticated.

authenticity requirement required the photographer's testimony. See State v. Campbell, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) (rejecting an argument that photographer must be in court and subject to cross-examination if another witness with knowledge is able to identify image); Gilliam v. Foster, 75 F.3d 881, 897 (4th Cir. 1996) (holding under South Carolina law, "[n]ormally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved").

Lighting dim enough to mask the attackers is consistent with Mr. Booth's lighting study in which he noted a failure to meet apartment complex industry standards for exterior lighting. B. Booth Dep. 141:17 – 142:11 (stating standard as "enough lighting to allow one individual to see another individual with sufficient clarity to be able to identify them later"). Other Wellspring tenants also noted unreasonably dim lighting in common areas. See T. Patel Aff. ¶ 4; N. Davis Aff. ¶ 3.

Respondents argue that Detective Isenhoward's testimony supports Respondents' proximate cause position. Initial Br. of Resp'ts at 26. However, Detective Isenhoward's deposition statements are actually consistent with Ms. Wright's causation testimony. Detective Isenhoward testified that Ms. Wright told him during the investigation that her attackers had been concealed. K. Isenhoward Dep. 34:12-21. When Respondents' counsel asked the detective if anything stood out to him about Wellspring during the investigation, Detective Isenhoward noted the "overgrown hedges." K. Isenhoward Dep. 23:18 – 24:2; see also K. Isenhoward Dep. 58:11-15 ("some bushes and some shrubbery that were a little too high"). The bushes "did obstruct some view." K. Isenhoward Dep.

34:22 – 35:1. Detective Isenhoward also testified on the common area lighting noting it was "too dark for my comfort." K. Isenhoward Dep. 24:7-8.

In sum, Ms. Wright presented the circuit court with evidence to support both the foreseeability and cause-in-fact components of the proximate cause analysis. Respondents' bald assertion that Mr. Booth's analysis is wrong and Respondents' insinuation that Ms. Wright's sworn statements are untruthful cannot remove the proximate cause issue from the jury's province and the circuit court erred in granting summary judgment on this basis.

IV. THE CIRCUIT COURT OVERLOOKED EVIDENCE IN THE RECORD ESTABLISHING ALL REQUIRED ELEMENTS OF A SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT ("SCUTPA") CLAIM.

SCUTPA provides remedies to any person harmed by any "unfair methods of competition" or "unfair or deceptive practices." S.C. Code Ann. § 39-5-20(a). SCUTPA claims are not limited to any subset of business industries; the statute applies to "any trade or commerce." Id. One court has rejected a defendant's attempt to exclude certain industries from SCUTPA's reach. See Liberty Mut. Ins. Co. v. Employee Resource Mgmt., Inc., 176 F. Supp. 2d 510, 515 (D.S.C. 2001) (rejecting party's invitation to limit SCUTPA to the "usual" industries in which such claims arise). A SCUTPA plaintiff must prove (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's unlawful trade practice; and (3) the defendant's unlawful trade practice had an adverse impact on the public interest. City of Charleston, S.C. v. Hotels.com, L.P., 520 F. Supp.2d 757, 773 (D.S.C. 2007).

The current dispute centers on a summary judgment order. Summary judgment determines whether there is a "genuine issue as to any material fact." Rule 56(c), SCRCP.

Importantly, summary judgment rulings are not based on complaint allegations alone but rather require consideration of all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Id. The circuit court's order overlooked evidence Ms. Wright produced to support the required elements of her SCUTPA claim. The Order, and Respondents' brief asking this Court to affirm the Order, are far too narrowly focused and fail to consider viable evidence of unfair or deceptive conduct that affects the public interest and was a proximate cause of Ms. Wright's damages. For example, in the heading to their SCUTPA argument, Respondents argue that Ms. Wright "failed to state facts sufficient to constitute a cause of action." Initial Br. of Resp'ts at 29. Respondents then refer to the factual allegations in Ms. Wright's amended complaint. Initial Br. of Resp'ts at 30. Respondents cite and apply the standard for a motion to dismiss under Rule 12(b)(6), SCRCP rather than the summary judgment standard.

Despite the broad range of materials to be considered at the summary judgment stage, the circuit court largely confined its analysis to a two-page portion of Ms. Wright's deposition. Order at 17. The circuit court found that Ms. Wright's only evidence of unfair or deceptive conduct were her statements that (1) a Wellspring employee told her the complex was safe and secure; and (2) she was not aware of the area's crime rate until after she was attacked. Id. (citing D. Wright Dep. 118-19). Relevant statements from other portions of the deposition and other documents before the circuit court were overlooked. Respondents make the same error and even go so far as to charge Ms. Wright with misstating the record when she references other portions of her deposition that elaborate on the statements in the narrowly defined excerpts to which Respondents refer. Initial Br. of Resp'ts at 32.

It is true that Ms. Wright testified that she was deceived by a Wellspring employee who promised the complex was "a safe and secure place." D. Wright Dep. 119:1-9. However, to fully understand Ms. Wright's SCUTPA claim, the circuit court should have considered other portions of Ms. Wright's deposition where she elaborated on the specific promise and the specific ways in which the promise was unfair and deceptive. Respondents did not merely make a nebulous or unspecified promise of safety or security to Ms. Wright. Instead, Ms. Wright was specifically promised that security officers were on duty in Wellspring's common areas. D. Wright Dep. 40:25-41:6.

This separates Ms. Wright's claim from the fraud claim in Cooke where an unspecified promise of safety was deemed insufficient to state a cause of action for fraud. See Initial Br. of Resp'ts at 30-31 (citing Cooke, 741 F. Supp. at 1216). Cooke's promise that an apartment complex was "safe" was an opinion rather than a statement of fact because, as Respondents quote in their brief, "[n]o more specific questions were asked, no more specific statements were made." Initial Br. of Resp'ts at 31 (quoting Cooke, 741 F. Supp. at 1216). Ms. Wright was not just promised safety or security, she was specifically promised security officers. Unlike Cooke, Ms. Wright asked specific questions and Respondents' representative made specific statements in response. Ms. Wright specifically asked "did they have officers there?" D. Wright Dep. 41:4-5. The Wellspring representative, seeking to induce Ms. Wright to sign a lease and select Wellspring over other apartment complexes in the area, specifically said "Yes, we have security officers." D. Wright Dep. 41:5-6.

Respondents argue their security officer promise cannot form the basis for a SCUTPA claim because Ms. Wright "said nothing about courtesy officers or any

deceptive conduct around the time of her incident." Initial Br. of Resp'ts at 32. This argument again overlooks Ms. Wright's deposition testimony. In her first interaction with Respondents within days of her attack, Ms. Wright asked about the security officers she had been promised. Ms. Wright asked the Wellspring property manager, "Where are these security officers that are supposed to be walking the beat?" D. Wright Dep. 116:11-20. Wellspring offered Ms. Wright an apology rather than an answer. D. Wright Dep. 116:21-22. This interaction provides evidence that (1) Respondents made a specific representation of security officers; and (2) Ms. Wright was deceived by this representation since she believed the representation and specifically inquired as to why the promise was not kept.

SCUTPA's "public interest" requirement is satisfied with proof that a defendant's unfair or deceptive trade practice has even the potential for repetition. Wright v. Craft, 372 S.C. 1, 29, 640 S.E.2d 486, 501 (Ct. App. 2006). Nothing beyond the potential for repetition need be plead or proved to meet the public interest element of a SCUTPA claim. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). The potential for repetition can be demonstrated by (1) showing the same kinds of actions occurred in the past; or (2) showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Wright, 372 S.C. at 29, 640 S.E.2d at 501. Potential for repetition may be proven in other ways, as the Wright court made clear that these two examples are not the only ways in which this showing can be made. Id.

Ms. Wright testified that Respondents represented that security officers would be stationed in Wellspring's common areas at the beginning of her tenancy in 2003. D. Wright Dep. 40:25-41:6. Wellspring property manager Karen Campbell testified that this

promise was made to all new Wellspring tenants, not just Ms. Wright. Ms. Campbell testified that "when they move in" all residents are told about Wellspring's courtesy officers and that this representation of the courtesy officers' presence was made anew each month in the tenant newsletter. K. Campbell Dep. 265:15-21. Clearly, the untrue promise of security officers to Ms. Wright was not an isolated occurrence. The same unfair and deceptive act was repeated for numerous Wellspring tenants during Ms. Campbell's employment with Respondents.

Finally, Respondents argue that Ms. Wright has produced no evidence to support SCUTPA's causation requirement. Since Respondents' argument on this point largely mirrors their causation argument in opposition to Ms. Wright's negligence claim, Ms. Wright incorporates by reference her argument in support of causation for the negligence claim and directs the Court to Section III above. As noted in Section III, Respondents are incorrect in their assertion that their security officer representations did not form the basis for Ms. Wright's decision to enter a rental agreement at Wellspring. Initial Br. of Resp'ts at 35. In fact, Respondents acknowledge that Wellspring's amenities, including the presence of security officers, were part of the reason Ms. Wright chose to lease from Respondents. Initial Br. of Resp'ts at 35.

Respondents justify this fact by setting up an unsubstantiated distinction between what they perceive to be the "primary" and non-primary factors underlying Ms. Wright's decision. Respondents offer no citation to authority showing why this purported distinction should lead to summary judgment on the causation requirement. Respondents' security officer representations were a reason Ms. Wright signed a lease at Wellspring, and Ms. Wright has presented evidence that the failure of Respondents security program

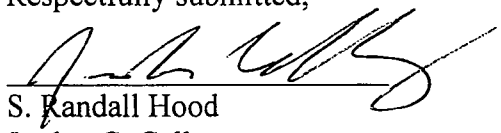
was a proximate cause of her injuries. This principle applies equally to the causation requirement for both the negligence and SCUTPA claims.

Ms. Wright presented evidence to support all three elements of a SCUTPA claim and the circuit court erred in granting Respondents summary judgment on this claim.

CONCLUSION

Based on the arguments stated above and those presented in her earlier brief, Ms. Wright respectfully requests this Court reverse the circuit court's Order granting Respondents summary judgment.

Respectfully submitted,



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Rock Hill, South Carolina

February 21, 2013

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 this 21st day of February, 2014, she served counsel for the Defendants with a copy of the Initial Reply Brief of Appellant and Appellant's Designation of Matter 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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February 21, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
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Re: Denise Wright 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
Case No.: 2011-CP-40-4068

Dear Ms. Kitchings:

Please find enclosed an original and three copies of the Initial Reply Brief of Appellant and Appellant's Designation of Matter to Include in the Record on Appeal along with a Proof of Service in this matter. Please file the original and return the filed copies to me in the enclosed self-addressed stamped envelope. By copy of this letter, I am serving counsel for the Defendants. Please contact me should you have any questions.

Thank you for your time and consideration in this matter.

Sincerely,

Jordan C. Calloway

JCC:jlc
Enclosures
cc: Brian A. Comer, Esquire
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