

ORIGINAL

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

RECEIVED

MAY 15 2014

SC Court of Appeals

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.

RECORD ON APPEAL (VOLUME 1)

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4004068

Denise Wright

PRG Real Estate Management Inc

Franklin Pineridge Associates

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award. Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 27 September 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Edward Wayne Ridgeway Jr.
S. Randall Hood

Jordan Christopher Calloway

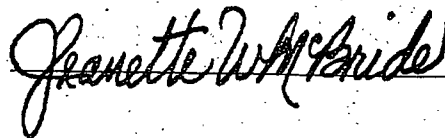
Brian Arnold Comer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Denise Wright,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2011-CP-40-4068

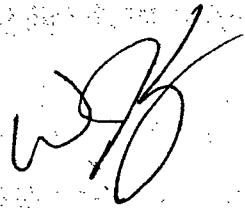
**ORDER GRANTING
SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS**

RICHLAND COUNTY
FILED
2013 SEP 23 PM 3:38
JEANETTE W. MCBRIDE
C.C.P. & C.S.

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

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

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

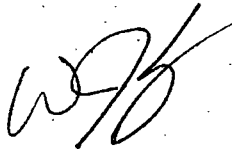


SCANNED

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

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

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



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

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

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

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



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

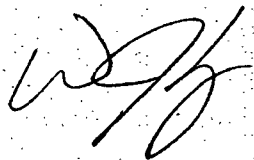
B. Negligence

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

(1) Defendants' Legal Duty to Plaintiff

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

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



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

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

[P]laces to which the general public are invited might indeed anticipate, either from common experience or known fact, that places of general public resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against that common expectation. . . .

Tenants in a huge apartment complex, or a tenant on the second floor of a house converted to an apartment, do not live where the world is invited to come. *Absent agreement, the landlord cannot be expected to protect them against the wiles of felony any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself.*

An apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public may create. *It is of its nature private and only for those specifically invited.* The criminal can be expected anywhere, any time, and has been a risk of life for a long time.

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

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

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



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

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

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

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



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

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

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

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

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



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

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

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



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

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

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

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

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



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

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

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



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

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

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

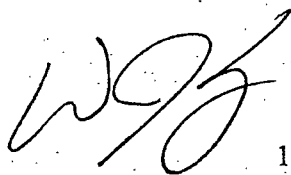


was never so dim that she could not reach her apartment without difficulty. (Wright Dep. 56:15-18). Plaintiff's expert agreed that work orders requested by Plaintiff concerning breezeway lights appeared to have been completed by Defendants. (Booth Dep. 152:11-18). Plaintiff never had a personal injury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

(2) Proximate Causation

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

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



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

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

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

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



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

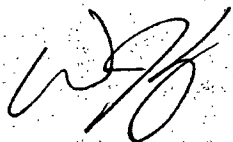
Plaintiff's expert has never spoken with the perpetrators. (Booth Dep. 162:19-22). Therefore, he has no way of knowing whether they had been watching Plaintiff's arrival and departure habits, whether they were aware of the presence or absence of a courtesy officer, or whether they chose their position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

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



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

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



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

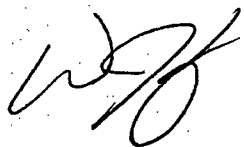
There is no evidence to support Defendants had a reason to foresee that breach of any of the duties Plaintiff attempts to impose upon them would have the natural and probable consequence of resulting in an intentional act by third parties against Plaintiff at Wellspring. Accordingly, Plaintiff cannot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

B. Breach of Implied Warranty

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

C. Violation of South Carolina Unfair Trade Practices Act

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



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

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

a. Unfair or Deceptive Conduct.

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

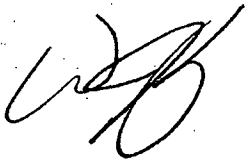


With regard to Plaintiff's allegation that Defendants represented Wellspring was "safe and secure," this alleged misrepresentation is not actionable because it is a representation of opinion rather than fact. *Cooke*, 741 F. Supp. at 1216. In *Cooke*, the plaintiff who was assaulted in her apartment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

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

Cooke, 741 F. Supp. at 1216.

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



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

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

(2) The Public Interest Requirement.

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



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

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

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

(3) Proximate Causation.

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



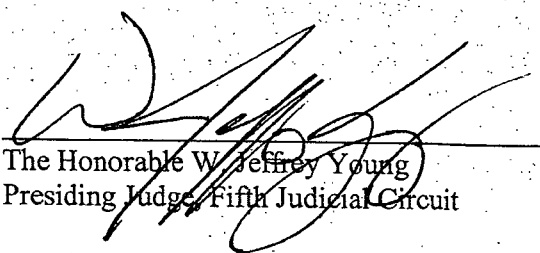
recommended it and because it was in close proximity to her work. (Wright Dep. 38:21 – 39:2, 40:3-7) (“Q. Okay, so we talked about proximity and the fact that some of your friends at church recommended it. Anything else that made you choose it?” A. No.”). The deceptive conduct alleged by Plaintiff cannot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

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

III. CONCLUSION

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

IT IS SO ORDERED


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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

DENISE WRIGHT

Plaintiff,

vs.

PRG REAL ESTATE MANAGEMENT,
INC., FRANKLIN PINERIDGE
ASSOCIATES, JANE DOE
INDIVIDUALLY AND IN HER
REPRESENTATIVE CAPACITY

Defendants.

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: _____

SUMMONS
(JURY TRIAL DEMANDED)

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DEANETTE W. McBRIDE
C.C.P. & G.S.

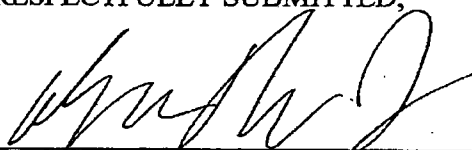
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RICHLAND COUNTY

TO: THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscriber at Burriss & Ridgeway, located at 907 Elmwood Avenue, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Complaint within such time aforementioned, the Plaintiffs will apply to the Court for the relief demanded in the Complaint and Judgment by default will be rendered against you for the relief demanded in the Complaint and an Order of Default will render against you for the relief so demanded in the Complaint.

Signature Page to Follow

RESPECTFULLY SUBMITTED,



E. Wayne Ridgeway, Jr., Esquire
907 Elmwood Avenue
Columbia, South Carolina 29201
(803) 779-5842
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
June 24, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

DENISE WRIGHT

CASE NO.: _____

Plaintiff,

vs.

COMPLAINT
(JURY TRIAL DEMANDED)

PRG REAL ESTATE MANAGEMENT,
INC., FRANKLIN PINERIDGE
ASSOCIATES, JANE DOE
INDIVIDUALLY AND IN HER
REPRESENTATIVE CAPACITY

Defendants.

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JANE W. McBRIDE
C.P. & G.S.

The Plaintiff, complaining of the Defendants, would respectfully show unto this honorable Court as follows:

1. The Plaintiff Denise Wright ("Plaintiff") is a citizen and resident of Richland County, South Carolina.
2. The Defendant PRG Real Estate Management, Inc. ("PRG") is a corporation organized and existing pursuant to the laws of the Pennsylvania, licensed to do business in the State of South Carolina, which manages, operates, and controls an apartment complex, known as Wellspring Apartments located at 500 Harbison Boulevard, in Richland County, State of South Carolina (hereinafter the real property and associated fixtures at this location will be referred to as "Wellspring").
3. The Defendant Franklin Pineridge Associates ("FPA") is a limited partnership

organized and existing pursuant to the laws of the State of Pennsylvania, licensed to do business in the State of South Carolina, and is the titled owner of Wellspring.

4. Upon information and belief, Defendant Jane Doe ("Doe") is a South Carolina resident who was at all times relevant to this action was employed by, and acting within the course and scope of her employment with PRG as the Property Manager of Wellspring Apartments and was vested with the power and authority to manage, direct, superintend, restrict, regulate, govern, administer and oversee the management of the premises in question.

5. Venue is proper in this Court as Defendants, individually or through their employees or agents did commit tortuous acts within the territorial limits of Richland County, State of South Carolina.

6. On or about September 18, 2008 the Plaintiff was a resident of Wellspring located at 500 Harbison Blvd.

7. The Plaintiff chose to live at Wellspring in part based upon Defendants' representations that Wellspring was safe, habitable, clean and professionally managed.

8. During the Plaintiff's tenancy, she and other tenants became concerned about the lack of exterior lighting, overgrown foliage, high frequency of crimes and other related personal safety concerns and notified Defendants of said concerns.

9. Defendants became aware through a high frequency of criminal activity and incidents on the property as well as complaints from tenants and others that this property was a safety hazard, that violent crimes were likely and that the personal safety of the Plaintiff and other tenants was at risk.

10. Subsequent to requests and notification of Defendants by the Richland County

Sheriff's Department, Plaintiff and others Defendants took no effective action to correct and repair these hazardous conditions and protect the Plaintiff and other tenants from criminal activity that the Defendants knew was likely.

11. On or about September 18, 2008 the Plaintiff was kidnapped at gunpoint, assaulted and held hostage as part of a pattern of criminal conduct that occurred on the subject property and which the Defendants knew or should have known was likely to occur.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

12. Paragraphs 1 through 11 above are re-alleged as fully as if restated herein.

13. The Defendants knew or should have known that Wellspring was not fit, habitable or safe for occupancy due to high frequency of criminal activity, lack of adequate lighting and presence of overgrown foliage as well as numerous other safety standard violations which are discovered or come to light during the course of this litigation.

14. The Defendants were negligent, grossly negligent, willful, wanton and reckless in the following particulars, to wit:

- a. In failing to inspect the property appropriately;
- b. In failing to take reasonable and appropriate measures to protect and warn the tenants of criminal activity;
- c. In failing to properly train and supervise their agents, servants, employees and contractors in the proper means of detecting safety violations and taking corrective action with regards to the same;
- d. In failing to have in place proper and reasonable policies and procedures for the detection and correction of safety related issues; or, if such policies and procedures were in place, in failing to observe and enforce compliance with the same;
- e. In failing to maintain the premises at Wellspring in safe, fit and habitable condition;
- f. In failing to take reasonable and appropriate measures to protect the safety of the Plaintiff and others by providing adequate lighting;
- g. In failing to properly and reasonably repair or maintain the

premises at Wellspring so that tenant's personal safety was not at risk;

- h. In failing to appropriately and with due care maintain bushes, shrubbery, foliage, grounds, etc. in a way that met applicable safety standards;
- i. In advising the tenants that this property was safe, fit and habitable when the Defendants knew or should have known it was not safe, fit and habitable;
- j. In failing to warn the Plaintiff and other tenants of personal safety related issues that the Defendants knew existed;
- k. In unnecessarily endangering the safety of tenants;
- l. In unnecessarily fostering an atmosphere for criminal activity to thrive;
- m. In such other particulars as the evidence at trial may tend to prove or suggest.

15. As a direct and proximate result of the aforesaid acts and omissions of the Defendants, the Plaintiff was placed at risk unnecessarily and was the victim of a brutal kidnapping and assault causing her to require medical treatment and care and resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, and other injuries, losses and damages.

16. The Plaintiff is entitled to an award of actual and punitive damages from the Defendants in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS

17. Paragraphs 1 through 16 above are re-alleged as fully as if restated herein.

18. Defendants gave the Plaintiff an implied warranty that Wellspring would be fit, safe and habitable during the Plaintiff's tenancy.

19. Throughout the Plaintiff's tenancy there existed hazardous conditions on the premises which rendered the same unfit, unsafe, and uninhabitable.

20. As a direct and proximate result of the aforesaid acts of the Defendants, the Plaintiff was exposed to violent criminal activity resulting in significant medical treatment and care

and resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, loss of personal property and other injuries, losses and damages.

21. The Plaintiff is entitled to an award of actual and punitive damages from the Defendants in an amount to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT PRG

22. Paragraphs 1 through 21 above are re-alleged as fully as if restated herein.

23. The leasing, renting and letting of apartments is conduct involving and effecting trade and commerce.

24. Defendant PRG was engaged in the business of leasing and renting apartments at Wellspring.

25. PRG engaged in deceptive and unfair trade practices by misrepresenting to the Plaintiff and other members of the general public the fitness, safety and habitability of the apartments at Wellspring as a safe and hospitable living environment.

26. PRG gained an advantage in the marketplace by virtue of their deceptive and unfair trade practices.

27. PRG's deceptive and unfair trade practices are capable of being duplicated.

28. PRG's conduct and misrepresentations about the habitability of the Wellspring Apartments, affects the public interest.

29. PRG's conduct and misrepresentations were intentional, willful and made with the knowledge that they were deceptive and unfair.

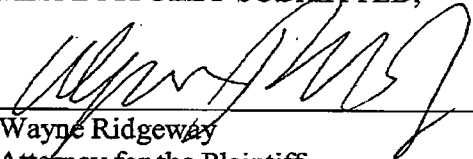
30. As a direct and proximate result of the aforesaid acts of the PRG, the Plaintiff was exposed to violent criminal activity requiring significant medical treatment and care and

resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, loss of personal property and other injuries, losses and damages.

31. The Plaintiff is entitled to an award of actual and punitive damages, treble damages, and attorney's fees from PRG in an amount to be determined by the trier of fact.

WHEREFORE, the Plaintiff prays that the Court inquire into the matters herein and grant her a judgment in a reasonable sum of actual damages, punitive damages, treble damages, costs, and such other and further relief as the Court may deem just and proper, all in an amount to be determined by a jury.

RESPECTFULLY SUBMITTED,



Wayne Ridgeway
Attorney for the Plaintiff
907 Elmwood Avenue
Columbia, SC 29201
803-779-5842
wayne@burrisslaw.com

Columbia, South Carolina

June 24, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Denise Wright,

Plaintiff,

vs.

PRG Real Estate Management, Inc.,
Franklin Pineridge Associates, Jane Doe
Individually and in her Representative
Capacity,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2011-CP-40-4068

ANSWER TO COMPLAINT

The Defendants answer the Complaint of the Plaintiff as follows:

Except as expressly admitted herein, each and every allegation of the Plaintiff's

Complaint is denied.

FOR A FIRST DEFENSE

1. Paragraph 1 of the Complaint is admitted upon information and belief.
2. Paragraph 2 of the Complaint is admitted.
3. Paragraph 3 of the Complaint is admitted.
4. With respect to the allegations contained in Paragraph 4 of the Complaint,

Defendants aver that Karen Campbell, a citizen and resident of Richland County, State of South Carolina, was the property manager at Wellspring Apartments and was acting within the scope and course of her employment at all times relevant to this action. Any remaining allegations of Paragraph 4 of the Complaint are denied.

JEANETTE W. McBRIDE
C.C.P. & G.S.

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5. With regard to the allegations of Paragraph 5 of the Complaint, Defendants admit that venue is proper in Richland County, State of South Carolina. The remaining allegations of Paragraph 5 of the Complaint are denied.

6. Defendants are without information sufficient to form a belief as to the truth or falsity of Paragraphs 6, 7, 8 and 9 of the Complaint and therefore deny the same.

7. Paragraph 10 of the Complaint is denied and Defendants demand strict proof thereof.

8. Defendants are without information sufficient to form a belief as to the truth or falsity of Paragraph 11 of the Complaint and therefore deny the same.

9. In response to Paragraph 12 of the Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 10 of the Complaint and deny any allegations inconsistent therewith.

10. Paragraphs 13, 14 (including subparts a. through m.), 15 and 16 of the Complaint are denied and Defendants demand strict proof thereof.

11. In response to Paragraph 17 of the Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 16 of the Complaint and deny any allegations inconsistent therewith.

12. Paragraph 18 of the Complaint calls for a legal conclusion and accordingly requires no response from Defendants. To the extent that Plaintiff contemplates that Paragraph 18 requires a response, the allegations of Paragraph 18 are denied and strict proof thereof is demanded.

13. Paragraphs 19, 20 and 21 of the Complaint are denied and Defendants demand strict proof thereof.

14. In response to Paragraph 22 of the Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 21 and deny any allegations inconsistent therewith.

15. Paragraph 23 of the Complaint calls for a legal conclusion and accordingly requires no response from Defendants. To the extent that Plaintiff contemplates that Paragraph 23 requires a response, the allegations of Paragraph 23 are denied and strict proof thereof is demanded.

16. Paragraph 24 of the Complaint is admitted.

17. Paragraphs 25, 26, 27, 28, 29, 30 and 31 of the Complaint are denied and Defendants deny strict proof thereof.

18. Defendants deny that Plaintiff is entitled to the relief sought in her prayer for relief.

FOR A SECOND DEFENSE

19. The foregoing allegations are incorporated herein and made a part hereof by reference.

20. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

21. The foregoing allegations are incorporated herein and made a part hereof by reference.

22. Plaintiff has failed to join a party necessary to this litigation as required by Rule 19, S.C.R.C.P., and Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(7) S.C.R.C.P.

FOR A FOURTH DEFENSE

23. The foregoing allegations are incorporated herein and made a part hereof by reference.

24. The Plaintiff's claims are barred or reduced by the doctrine of comparative negligence.

FOR A FIFTH DEFENSE

25. The foregoing allegations are incorporated herein and made a part hereof by reference.

26. The Plaintiff's claims are barred or reduced by the doctrine of assumption of the risk.

FOR A SIXTH DEFENSE

27. The foregoing allegations are incorporated herein and made a part hereof by reference.

28. Any injuries sustained by the Plaintiff were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons as a proximate cause of injuries as alleged, if any, and therefore, Defendants should not be liable to the Plaintiff in any sum whatsoever.

FOR A SEVENTH DEFENSE

29. The foregoing allegations are incorporated herein and made a part hereof by reference.

30. Defendants allege that the injuries and damages of the Plaintiff were the proximate result of the negligence and recklessness of persons or entities for whose conduct and actions Defendants bear no responsibility or liability.

FOR AN EIGHTH DEFENSE

31. The foregoing allegations are incorporated herein and made a part hereof by reference.

32. Any damages sustained by the Plaintiff were caused by the criminal acts of a third party. Therefore, Defendant pleads the intervening criminal acts of a third-party as a bar of this action.

FOR A NINTH DEFENSE

33. The foregoing allegations are incorporated herein and made a part hereof by reference.

34. Defendant had no reason to anticipate the alleged intentional and criminal conduct of the kidnapper as alleged in the Complaint.

FOR A TENTH DEFENSE

35. The foregoing allegations are incorporated herein and made a part hereof by reference.

36. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR AN ELEVENTH DEFENSE

37. The foregoing allegations are incorporated herein and made a part hereof by reference.

38. The U.S. Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom

they directly [do not] represent," *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (U.S. 2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A TWELTH DEFENSE

39. The foregoing allegations are incorporated herein and made a part hereof by reference.

40. Notwithstanding Defendant's prior defenses incorporating *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008).

WHEREFORE, Defendants pray that Plaintiff's Complaint be dismissed and for such other and further relief as this Court deems just and proper.

[Signature Page to Follow]

Respectfully submitted,
COLLINS & LACY, P.C.

By: Brian A. Comer
Brian A. Comer
Brooke C. Hammond
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Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
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Attorneys for Defendants PRG Real Estate
Management, Inc. and Franklin Pineridge
Associates

Columbia, South Carolina
August 1, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

DENISE WRIGHT

CASE NO.: 2011-CP-40-4068

Plaintiff,

vs.

**SECOND
AMENDED COMPLAINT
(JURY TRIAL DEMANDED)**

PRG REAL ESTATE MANAGEMENT,
INC., FRANKLIN PINERIDGE
ASSOCIATES, KAREN CAMPBELL
INDIVIDUALLY AND IN HER
REPRESENTATIVE CAPACITY AS AN
AGENT OF PRG REAL ESTATE
MANAGEMENT

Defendants.

The Plaintiff, complaining of the Defendants, would respectfully show unto this honorable Court as follows:

1. The Plaintiff Denise Wright ("Plaintiff") is a citizen and resident of Richland County, South Carolina.
2. The Defendant PRG Real Estate Management, Inc. ("PRG") is a corporation organized and existing pursuant to the laws of the Pennsylvania, licensed to do business in the State of South Carolina, which manages, operates, and controls an apartment complex, known as Wellspring Apartments located at 500 Harbison Boulevard, in Richland County, State of South Carolina (hereinafter the real property and associated fixtures at this location will be referred to as "Wellspring").

3. The Defendant Franklin Pineridge Associates ("FPA") is a limited partnership organized and existing pursuant to the laws of the State of Pennsylvania, licensed to do business in the State of South Carolina, and is the titled owner of Wellspring.
4. Upon information and belief, Defendant Karen Campbell ("Campbell") is a South Carolina resident who at all times relevant to this action was employed by and acting within the course and scope of her employment with PRG as the Property Manager of Wellspring Apartments and was vested with the power and authority to manage, direct, superintend, restrict, regulate, govern, administer and oversee the management of the premises in question.
5. Venue is proper in this Court as Defendants, individually or through their employees or agents did commit tortuous acts within the territorial limits of Richland County, State of South Carolina.
6. On or about September 18, 2008 the Plaintiff was a resident of Wellspring located at 500 Harbison Blvd.
7. The Plaintiff chose to live at Wellspring in part based upon Defendants' representations that Wellspring was safe, habitable, clean and professionally managed.
8. During the Plaintiff's tenancy, she and other tenants became concerned about the lack of exterior lighting, overgrown foliage, high frequency of crimes and other related personal safety concerns and notified Defendants of said concerns.
9. Defendants became aware through a high frequency of criminal activity and incidents on the property as well as complaints from tenants and others that this property was a safety hazard, that violent crimes were likely and that the personal safety of the Plaintiff and other tenants was at risk.

10. Subsequent to requests and notification of Defendants by the Richland County Sheriff's Department, Plaintiff and others Defendants took no effective action to correct and repair these hazardous conditions and protect the Plaintiff and other tenants from criminal activity that the Defendants knew was likely.
11. On or about September 18, 2008 the Plaintiff was kidnapped at gunpoint, assaulted and held hostage as part of a pattern of criminal conduct that occurred on the subject property and which the Defendants knew or should have known was likely to occur.
12. Apartment complexes must properly train their employees to make the tenants safe.
13. Apartment complexes must properly train their employees to keep the tenants safe.
14. Apartment complexes must train their employees to warn the tenants of dangers which make them unsafe.
15. Apartment complexes must warn the tenants of foreseeable harm.
16. Apartment complexes must warn the tenants of danger.
17. Apartment complexes must warn the tenants of dangers which make them unsafe.
18. Apartment complexes are not allowed to endanger the tenants.
19. Apartment complexes must maintain the premises in a way that makes the tenants safe.
20. Apartment complexes must not compromise the personal safety of the tenants.
21. Apartment complexes must maintain the property so that the personal safety of the tenants is the most important consideration.
22. Apartment complexes must make sure that unsafe conditions on the property do not exist which place the tenants in danger.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

23. Paragraphs 1 through 22 above are re-alleged as fully as if restated herein.

24. The Defendants knew or should have known that Wellspring was not fit, habitable or safe for occupancy due to high frequency of criminal activity, lack of adequate lighting and presence of overgrown foliage as well as numerous other safety standard violations which are discovered or come to light during the course of this litigation.

25. The Defendants knew or should have known that the landscaping maintenance at Wellspring was not being performed in a manner that met industry standards regarding the safety and security of the property and that said violations, acts and omissions were unnecessarily placing the Plaintiff and others at risk and compromising their personal security and safety.

26. The Defendants were negligent, grossly negligent, willful, wanton and reckless in the following particulars, to wit:

- a. In failing to inspect the property appropriately;
- b. In failing to take reasonable and appropriate measures to protect and warn the tenants of criminal activity;
- c. In failing to properly train and supervise their agents, servants, employees and contractors in the proper means of detecting safety violations and taking corrective action with regards to the same;
- d. In failing to have in place proper and reasonable policies and procedures for the detection and correction of safety related issues; or, if such policies and procedures were in place, in failing to observe and enforce compliance with the same;
- e. In failing to maintain the premises at Wellspring in safe, fit and habitable condition;
- f. In failing to take reasonable and appropriate measures to protect the safety of the Plaintiff and others by providing adequate lighting;
- g. In failing to properly and reasonably repair or maintain the premises at Wellspring so that tenant's personal safety was not at risk;
- h. In failing to appropriately and with due care maintain bushes, shrubbery, foliage, grounds, etc. in a way that met applicable safety standards;
- i. In advising the tenants that this property was safe, fit and habitable when the Defendants knew or should have known it was not safe, fit and habitable;
- j. In failing to warn the Plaintiff and other tenants of personal

- k. safety related issues that the Defendants knew existed;
- l. In unnecessarily endangering the safety of tenants;
- m. In unnecessarily fostering an atmosphere for criminal activity to thrive;
- n. In such other particulars as the evidence at trial may tend to prove or suggest.

27. As a direct and proximate result of the aforesaid acts and omissions of the Defendants, the Plaintiff was placed at risk unnecessarily and was the victim of a brutal kidnapping and assault causing her to require medical treatment and care and resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, and other injuries, losses and damages.

28. The Plaintiff is entitled to an award of actual and punitive damages from the Defendants in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

29. Paragraphs 1 through 28 above are re-alleged as fully as if restated herein.

30. Defendants gave the Plaintiff an implied warranty that Wellspring would be fit, safe and habitable during the Plaintiff's tenancy.

31. During the Plaintiff's tenancy there existed hazardous conditions on the premises which rendered the same unfit, unsafe, and uninhabitable.

32. As a direct and proximate result of the aforesaid acts of the Defendants, the Plaintiff was exposed to violent criminal activity resulting in significant medical treatment and care and resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, loss of personal property and other injuries, losses and damages.

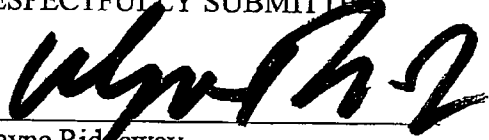
33. The Plaintiff is entitled to an award of actual and punitive damages from the Defendants in an amount to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

34. Paragraphs 1 through 33 above are re-alleged as fully as if restated herein.
35. The leasing, renting and letting of apartments is conduct involving and effecting trade and commerce.
36. Defendants were engaged in the business of leasing and renting apartments at Wellspring.
37. Defendants engaged in deceptive and unfair trade practices by misrepresenting to the Plaintiff and other members of the general public the fitness, safety and habitability of the apartments at Wellspring as a safe and hospitable living environment.
38. Defendants gained an advantage in the marketplace by virtue of their deceptive and unfair trade practices.
39. Defendants deceptive and unfair trade practices are capable of being duplicated.
40. Defendants conduct and misrepresentations about the habitability of the Wellspring Apartments, affects the public interest.
41. Defendants conduct and misrepresentations were intentional, willful and made with the knowledge that they were deceptive and unfair.
42. As a direct and proximate result of the aforesaid acts of the Defendants, the Plaintiff was exposed to violent criminal activity requiring significant medical treatment and care and resulting in disabilities, loss of income, loss of earning capacity, loss of enjoyment of life, pain, suffering, alteration of lifestyle, mental anguish, psychological trauma, loss of personal property and other injuries, losses and damages.
43. The Plaintiff is entitled to an award of actual and punitive damages, treble damages, and attorney's fees from PRG in an amount to be determined by the trier of fact.

WHEREFORE, the Plaintiff prays that the Court inquire into the matters herein and grant her a judgment in a reasonable sum of actual damages, punitive damages, treble damages, costs, and such other and further relief as the Court may deem just and proper, all in an amount to be determined by a jury.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read "Wayne Ridgeway", is written over a horizontal line.

Wayne Ridgeway
Attorney for the Plaintiff
907 Elmwood Avenue
Columbia, SC 29201
803-779-5842
wayne@burrisslaw.com

Columbia, South Carolina

February 2, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Denise Wright,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2011-CP-40-4068

**DEFENDANTS' ANSWER
TO PLAINTIFF'S SECOND
AMENDED COMPLAINT**

The Defendants answer the Second Amended Complaint of the Plaintiff as follows:

Except as expressly admitted herein, each and every allegation of the Plaintiff's Second Amended Complaint is denied.

FOR A FIRST DEFENSE

1. Paragraph 1 of the Second Amended Complaint is admitted upon information and belief.

2. Paragraph 2 of the Second Amended Complaint is admitted.

3. Paragraph 3 of the Second Amended Complaint is admitted.

4. With respect to the allegations contained in Paragraph 4 of the Second Amended Complaint, Defendants admit that Karen Campbell, a citizen and resident of Richland County, State of South Carolina, was the property manager at Wellspring Apartments and was acting within the scope and course of her employment at all times relevant to this action. Any remaining allegations of Paragraph 4 of the Second Amended Complaint are denied.

5. With regard to the allegations of Paragraph 5 of the Second Amended Complaint, Defendants admit that venue is proper in Richland County, State of South Carolina. The remaining allegations of Paragraph 5 of the Second Amended Complaint are denied.

6. Defendants admit the allegations of Paragraph 6 of the Second Amended Complaint.

7. Defendants are without information sufficient to form a belief as to the truth or falsity of Paragraphs 7 and 8 of the Second Amended Complaint and therefore deny the same.

8. Paragraph 9 of the Second Amended Complaint is denied and Defendants demand strict proof thereof.

9. Paragraph 10 of the Second Amended Complaint is denied and Defendants demand strict proof thereof.

10. Defendants are without information sufficient to form a belief as to the truth or falsity of Paragraph 11 of the Second Amended Complaint and therefore deny the same.

11. Paragraphs 12 through 22 of the Second Amended Complaint call for legal conclusions and accordingly require no response from Defendants. To the extent that Plaintiff contemplates a response to these allegations, they are denied and strict proof thereof is demanded.

12. In response to Paragraph 23 of the Second Amended Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 22 of the Second Amended Complaint and deny any allegations inconsistent therewith.

13. Paragraphs 24, 25, 26 (including subparts a. through m.), 27 and 28 of the Second Amended Complaint are denied and Defendants demand strict proof thereof.

14. In response to Paragraph 29 of the Second Amended Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 28 of the Second Amended Complaint and deny any allegations inconsistent therewith.

15. Paragraph 30 of the Second Amended Complaint calls for a legal conclusion and accordingly requires no response from Defendants. To the extent that Plaintiff contemplates that Paragraph 30 requires a response, the allegations of Paragraph 30 are denied and strict proof thereof is demanded.

16. Paragraphs 31, 32 and 33 of the Second Amended Complaint are denied and Defendants demand strict proof thereof.

17. In response to Paragraph 34 of the Second Amended Complaint, Defendants incorporate by reference their responses to Paragraphs 1 through 33 and deny any allegations inconsistent therewith.

18. Paragraph 35 of the Second Amended Complaint calls for a legal conclusion and accordingly requires no response from Defendants. To the extent that Plaintiff contemplates that Paragraph 35 requires a response, the allegations of Paragraph 35 are denied and strict proof thereof is demanded.

19. Paragraph 36 of the Second Amended Complaint is admitted.

20. Paragraphs 37, 38, 49, 40, 41, 42 and 43 of the Second Amended Complaint are denied and Defendants demand strict proof thereof.

21. Defendants deny that Plaintiff is entitled to the relief sought in her prayer for relief.

FOR A SECOND DEFENSE

22. The foregoing allegations are incorporated herein and made a part hereof by reference.

23. The Second Amended Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A THIRD DEFENSE

24. The foregoing allegations are incorporated herein and made a part hereof by reference.

25. Plaintiff has failed to join a party necessary to this litigation as required by Rule 19, S.C.R.C.P., and Plaintiff's Second Amended Complaint should be dismissed pursuant to Rule 12(b)(7) S.C.R.C.P.

FOR A FOURTH DEFENSE

26. The foregoing allegations are incorporated herein and made a part hereof by reference.

27. The Plaintiff's claims are barred or reduced by the doctrine of comparative negligence.

FOR A FIFTH DEFENSE

28. The foregoing allegations are incorporated herein and made a part hereof by reference.

29. The Plaintiff's claims are barred or reduced by the doctrine of assumption of the risk.

37. Defendants had no reason to anticipate the alleged intentional and criminal conduct of the kidnapper as alleged in the Second Amended Complaint.

FOR A TENTH DEFENSE

38. The foregoing allegations are incorporated herein and made a part hereof by reference.

39. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR AN ELEVENTH DEFENSE

40. The foregoing allegations are incorporated herein and made a part hereof by reference.

41. The U.S. Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (U.S. 2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A TWELTH DEFENSE

42. The foregoing allegations are incorporated herein and made a part hereof by reference.

43. Notwithstanding Defendants' prior defenses incorporating *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001) and *State Farm Mutual Automobile*

State of South Carolina

Court of Common Pleas

County of Richland

2011-CP-40-4068

Denise Wright

-VS-

TRANSCRIPT OF RECORD

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

October 1, 2012
Columbia, South Carolina

B E F O R E:

The Honorable W. Jeffrey Young, Judge.

A P P E A R A N C E S:

S. Randall Hood, Esquire
Edward Wayne Ridgeway, Jr., Esquire
Attorneys for the Plaintiff

Brian A. Comer, Esquire
Attorney for the Defendants

Daphne D. Helms
Circuit Court Reporter

1 **Mr. Comer:** Your Honor---

2 **The Court:** I've got a note here that this has been
3 assigned to Roger Young. Do we have the wrong Judge Young?

4 **Mr. Comer:** My understanding, it's always been -- it was
5 you, Your Honor.

6 **Mr. Hood:** It was just Judge Young as far as I was
7 concerned.

8 **The Court:** I've got a note that says assigned to Roger
9 Young. It doesn't matter, but I'm in Richland County and
10 he's over in---

11 **Law Clerk:** Lexington this week.

12 **The Court:** They've got him mixed up.

13 **Mr. Hood:** Okay.

14 **The Court:** I'm the right one.

15 **Mr. Comer:** Your Honor, we have a---

16 **The Court:** I'm the one who's here, so that makes that
17 the right one.

18 **Mr. Comer:** If it pleases the Court, Your Honor, we have
19 kind of a lengthy argument. I tried to kind of make a
20 roadmap of my argument.

21 **The Court:** I understand. My clerk is telling me that
22 you're arguing against precedence?

23 **Mr. Comer:** Yes, Your Honor. Well, I believe that the
24 plaintiff is arguing against---

25 **The Court:** Okay.

1 **Mr. Comer:** ---precedence.

2 **The Court:** Okay. I mean, if we've got the briefs, I
3 mean, you don't need to put everything in it because...

4 **Mr. Comer:** Sure. Okay.

5 **Mr. Hood:** Thank you, Your Honor. Just for
6 clarification, I don't think I'm actually arguing against
7 precedent specifically. It's an -- it's an alternative type
8 thing. If -- I'm arguing within the case precedent, but then
9 there are some extenuating circumstances differentiated that
10 would be against precedent.

11 **The Court:** You're Mr.?

12 **Mr. Hood:** Randy Hood.

13 **The Court:** Randy Hood.

14 **Mr. Comer:** And, Your Honor, my name is Brian Comer for
15 the defendants.

16 **The Court:** Okay. Mr. Comer?

17 **Mr. Comer:** If it pleases the Court, I've got a hard
18 copy tab set. I think I had sent you an electronic---

19 **The Court:** Is that what this...

20 **Mr. Comer:** Yes, sir.

21 **The Court:** Okay.

22 **Mr. Comer:** This has some tabs. It may make it a little
23 bit easier to navigate.

24 **The Court:** Okay. Very well.

25 **Mr. Hood:** I think that one was mine, Your Honor. I

1 think---

2 **The Court:** Oh.

3 **Mr. Hood:** Mine is the plaintiff's.

4 **The Court:** Okay.

5 **Mr. Hood:** And then his is---

6 **Mr. Comer:** Here is a copy for you.

7 **Law Clerk:** Thank you.

8 **The Court:** Okay.

9 **Mr. Comer:** Bear with me, Your Honor. One second and
10 I'll---

11 **The Court:** Yes, sir. I'll give you a moment to set up.

12 **Mr. Comer:** Your Honor, may it please the Court?

13 **The Court:** Yes, sir. Yes, sir.

14 **Mr. Comer:** As a housekeeping matter to see if I can cut
15 back this argument as much as I can, let me just see if I can
16 see if there's anything we can agree to. In looking at the
17 plaintiff's brief when they served it prior to appearing for
18 this hearing this morning, from what I could tell it doesn't
19 appear there's been any opposition, at least in the brief, to
20 my motion for summary judgment on the second claim which is
21 breach of implied warranty of fitness, safety and
22 habitability. I can cut out that portion of my argument if
23 that is not---

24 **Mr. Hood:** I will concede that, Your Honor.

25 **The Court:** All right. Very well.

1 **Mr. Comer:** Then I won't need to talk about breach of
2 implied warranty of fitness.

3 **The Court:** Okay.

4 **Mr. Comer:** Your Honor, as a further matter before I get
5 started, I anticipate that a big part of what we're going to
6 be talking about today is negligence.

7 **The Court:** Okay.

8 **Mr. Comer:** And the law is that there is no duty. I
9 anticipate a large part of his argument is going to be the
10 exception. If it's okay with Your Honor, it may make more
11 sense for me to cover the exceptions to that after he speaks
12 as opposed to doing it on the front end, if that works for
13 you.

14 **The Court:** All right.

15 **Mr. Comer:** Okay. Well, Your Honor, may it please the
16 Court? My name is Brian Comer. I'm with Collins & Lacy here
17 in Columbia, South Carolina. I represent, Your Honor, the
18 defendants in this matter, and it's my motion that is being
19 heard here today.

20 Your Honor, this is a claim by a tenant that her
21 apartment complex and its management failed to provide
22 adequate security to prevent her from being the victim of a
23 crime. Now, the apartment complex at issue is Wellspring
24 Apartments. It's at 500 Harbison Boulevard over in the Irmo
25 area. Wellspring is owned by Franklin Pineridge Associates.

1 Franklin Pineridge is one of the defendants I represent.

2 It is managed by PRG Real Estate Management Company who
3 I also represent, and finally the property manager at issue
4 at the time of the incident is a young lady named Karen
5 Campbell who is the third defendant. She is a former
6 employee of PRG.

7 What happened, Your Honor, as background is that on
8 September 18, 2008, the plaintiff parked her car in
9 Wellspring's parking lot, and she was walking to her
10 apartment at approximately 10:30 p.m. Now, according to the
11 police report which we provided to Your Honor at Exhibit B in
12 our notebook, it says, quote, the complainant/victim saw two
13 black males sitting in front of the 2200 building. That's
14 the building she lived in.

15 There's nothing in the police report, Your Honor, about
16 these two individuals being concealed by vegetation,
17 inadequate lighting, anything like that. Basically what
18 happened was they abducted the plaintiff, asked for money.
19 She didn't have any, so they said, "Well, we want you to
20 drive us around for awhile and withdraw some money from
21 A.T.M. machines." So she did that. After about 35 minutes,
22 they released her and they have never been caught, so
23 obviously they're not defendants here.

24 Now, one thing that is not in dispute here today, Your
25 Honor, is the plaintiff underwent a terrible experience. We

1 don't dispute that whatsoever, but she wasn't physically
2 injured. She's not undergoing treatment currently for any
3 mental anguish. She's not taking any medications for any
4 anxiety or mental anguish. The money she withdraw was
5 returned to her, and she went back to work for about ten
6 months after the incident until she opted to take an early
7 retirement.

8 So it's clear, Your Honor, this is a case involving
9 third-party criminal activity. But be that as it may, she
10 has brought three claims against my clients and now two since
11 we've reached an agreement today. What's left is a
12 negligence claim and a violation of the South Carolina Unfair
13 Trade Practices Act.

14 And here is the crux of her claim and this is basically
15 the four opinions of their security expert: First, that this
16 incident was foreseeable and it occurred because the
17 defendants allegedly failed to provide adequate security.
18 Second, that they failed to maintain the vegetation and that
19 it provided a hiding place for these criminals to hide in.

20 **The Court:** You can see that they weren't hidden when
21 she drove up?

22 **Mr. Hood:** No, Your Honor. In fact, we took the
23 deposition of Mohammed Gabber (phonetic) who was the officer
24 who came on the scene immediately after it occurred, and a
25 couple of things that were left out is they shoved a gun in

1 her face and said, "You're going to die. I'm going to kill
2 you."

3 **The Court:** I'm talking about---

4 **Mr. Hood:** I understand that, but what happens -- right
5 after this happened, Mohammed Gabber goes and takes her thing
6 and she's -- she gives him a very brief summary of what
7 happened. He then said: She was in a terrible state, and I
8 didn't go into everything because it was obvious that she was
9 in a terrible state. And when she talked to the
10 investigating officer the next day, she did indicate that
11 these gentlemen jumped out from behind bushes to him and she
12 has maintained that and has testified to that under oath at
13 the deposition.

14 **The Court:** Okay. All right. You may proceed.

15 **Mr. Comer:** The third point, Your Honor, was that the
16 lighting was inadequate and that better lighting would have
17 prevented the crime. A fourth is that the defendants were
18 supposed to have a courtesy officer on duty and didn't.

19 Now, Your Honor, virtually every South Carolina case
20 that has heard this kind of issue which is an inadequate
21 security claim against a landlord has affirmed summary
22 judgment in favor of the landlord, virtually every one.
23 There is one exception, and I'll talk briefly about it in a
24 minute.

25 So with that, let me go and talk about the negligence

1 claim. I have two points to make on the negligence claim,
2 Your Honor. First of all, the plaintiff can't prove a duty
3 in this case, and duty is an issue of law for this Court to
4 decide here today. The plaintiff has testified that she
5 believes that the defendants should have made her safe and
6 secure. Those are her words. They should have done whatever
7 it takes to make her feel safe and secure.

8 But, Your Honor, South Carolina has expressly rejected
9 this belief in multiple cases. They've basically said that
10 in the conduct of a -- in the context of a landlord-tenant
11 relationship, there is no duty to protect from third-party
12 criminal activity. And the fundamental case, Your Honor, is
13 Kramer versus Balcor Property Management which is at 312 S.C.
14 440, 441 S.E.2d. It's at Exhibit E-2 in the notebook that we
15 have provided.

16 Your Honor, in that case the South Carolina Supreme
17 Court addressed a certified question from the United States
18 District Court for South Carolina, and here was the question:
19 Does a landlord owe a duty to a tenant to provide security in
20 and around a leased premises so as to protect the tenant from
21 criminal activity of third parties? Here was their answer:
22 "We answer the question as presented to us in the negative.
23 Under South Carolina law, a landlord does not owe a duty to a
24 tenant to provide security in and around a leased premises to
25 protect the tenant from criminal activity of third parties.

1 Neither common law nor the South Carolina Residential
2 Landlord Tenant Act imposes a duty on a landlord to provide
3 protection to tenants against criminal activity of third
4 parties."

5 That was their answer, Your Honor, and that's directly
6 on point in this case, and the reason they arrived at that
7 answer was they said there was a fundamental distinction
8 between hotel law and apartment complex law and here's the
9 distinction: Hotels invite the public to come and get a
10 room, and basically the Court said -- and it cited to a
11 previous case in the district of South Carolina, Cook v.
12 Allstate Management. The Court said that because a hotel
13 invites the public, that hotel has to take the precautions
14 that go with what may happen in the public. So if you're
15 inviting the public to come and get a room, you have to
16 provide security against foreseeable incidents.

17 The distinction, Your Honor, is that an apartment
18 complex is not considered to be public property or to invite
19 the public. It is private property---

20 **The Court:** They advertise to bring people in. They do
21 promotions, first month free, and things like that.

22 **Mr. Comer:** Well, I understand that, Your Honor, but I
23 think the distinction that the Court was making was that
24 unless you've got a room, you lease a room, unless you're
25 inviting someone, you know, to come and visit you or you work

1 there, that just the public is not invited to come and show
2 up. So on that basis, Your Honor, Kramer, later affirmed on
3 summary judgment in the district court after that question
4 was answered, and then the South Carolina appellate courts
5 have relied on Kramer two more times. Good versus Saint
6 Stephen's United Methodist Church affirmed summary judgment,
7 and that involved an attack on a social guest of a tenant,
8 and then Jackson v. Swordfish Investments also affirmed
9 summary judgment where someone brought an inadequate security
10 claim against a landlord, and those are also at Exhibit E-5
11 and Exhibit E-6 in our notebook. So, Your Honor, on this
12 point I would just say that the defendants did not owe a
13 duty, and the law is very clear on this point.

14 I'm going to save talking about any of the exceptions
15 for after Mr. Hood speaks, and let me address proximate
16 causation now. Even if a duty exists, Your Honor, the
17 plaintiff can't prove proximate causation in this case, and
18 the courts have said: Where there is absolutely no evidence
19 in the record indicating that proximate cause exists, it's
20 appropriate for the Court to decide proximate causation as a
21 matter of law.

22 In this case, in a landlord-tenant relationship, here's
23 what the plaintiff has to prove for proximate causation.
24 First, that the negligence must -- of the landlord has to
25 lead directly to the injury that the plaintiff suffers.

1 There has to be a strong causal connection, and here is the
2 example that has been provided, I believe, in the Kramer
3 case. The example was that, for example, if a -- if a
4 landlord walks into a---

5 **The Court:** And in Kramer that person was murdered,
6 weren't they?

7 **Mr. Comer:** Yes. Yes, Your Honor. Basically the Court
8 provided an example of where a landlord goes into a tenant's
9 apartment and leaves the door unlocked - maybe they're doing
10 maintenance or something - and then later an assailant enters
11 that door that they left unlocked. That's the kind of strong
12 causal connection.

13 So based on that, I want to make three points on
14 proximate cause. First, this is a crime. The plaintiff
15 can't prove proximate causation because the crime was an
16 intervening cause, and there is case law in South Carolina
17 that says a willful and malicious crime like this one breaks
18 the causal link. There is no question this is third-party
19 criminal activity, and here is some testimony in this case.

20 The plaintiff said that although crime may be deterred,
21 it can't all be prevented. Her expert said there is no
22 crystal ball or magic pill that allows us to know with any
23 certainty what men may do. He also said that every crime
24 can't be prevented, and he said importantly, Your Honor,
25 security is a people problem, and although it may be

1 exacerbated by the surroundings in which a security incident
2 occurs, ultimately it's people who intend to do harm.

3 Now, Your Honor, what's important to understand about
4 this case is that this crime occurred even though the
5 plaintiff has testified that she heard people on the
6 balconies around her. She heard people in the parking lot.
7 It also occurred even though a witness came walking up as it
8 was happening and engaged these perpetrators in conversation.

9 So we don't know as we sit here today - and the
10 plaintiff's expert conceded this - why the perpetrators chose
11 where they were sitting. The expert conceded that if they
12 said, "Well, we didn't care anything about shrubbery," that
13 would be important or if they said, "We didn't care what the
14 lighting was like; we had been following her habits for the
15 previous week," that would be important, but we don't know
16 that.

17 Second, Your Honor, the defendants couldn't foresee the
18 plaintiff's incident. I took the deposition of plaintiff's
19 expert, and basically he agreed that he's reviewed a lot of
20 police reports in this case. He has zeroed in on 20, 20,
21 that he believes relevant to his analysis. He admitted these
22 20 are from 2005 to 2008 up to the time of her incident. Of
23 the 20 incidents, the vast majority dealt with motor vehicle
24 theft or car theft, stealing hubcaps, something like that.

25 Only two of them, Your Honor, involve what I would call

1 violent crime. One was a stranger-on-stranger assault. The
2 other one was an attempted home invasion. So there were two
3 prior incidents of violent crime that the plaintiff's expert
4 considers to be relevant to this case. I would argue, Your
5 Honor, that does not make an abduction foreseeable. That had
6 never happened at this apartment complex.

7 I think the lack of foreseeability is also apparent from
8 the testimony of local law enforcement. We've taken two
9 investigating officers' depositions in this case, and both of
10 them have testified that the crime in this area was average.
11 That was the term they used. The plaintiff's expert said, "I
12 agree that the crime was average." So for that reason we
13 don't believe it to be foreseeable.

14 The third point I want to make on proximate causation,
15 Your Honor, is that, as I've already stated, there's nothing
16 in the police report to indicate that these individuals were
17 concealed. Now, plaintiff's counsel said that the next day
18 she spoke with other officers and said they were concealed,
19 but when I took the deposition of Officer Gabber - he's the
20 one who actually did the police report - I kind of questioned
21 him like I do a doctor sometimes. I said, you know, "Do you
22 agree that it's important to make a police report as accurate
23 as possible? Do you try and get as much information as you
24 can?" And he agreed. And I said, "And that's because people
25 may rely on this document to solve a crime or to see a

1 pattern of crime." He said, "Yeah, I agree." And he said
2 that at the time that he was taking down all this
3 information, the plaintiff never said anything about these
4 individuals being concealed, and so he put in his record that
5 she saw the two individuals.

6 She also said, Your Honor, in her deposition that when
7 she saw them, she said, "I need to get through, please."
8 Now, that doesn't sound to me like anyone jumped out and
9 surprised her which is what she said later in an affidavit is
10 what happened. So for these reasons, Your Honor, I don't
11 think that the plaintiff can prove proximate causation in
12 this case.

13 We've already talked about implied warranty, Your Honor,
14 so I will skip that. Let me go to the last claim which is
15 the South Carolina Unfair Trade Practices Act. Now, Your
16 Honor, as a threshold matter, the South Carolina cases that
17 have applied the South Carolina Unfair Trade Practices Act,
18 typically you see this in a non-personal injury case
19 involving some kind of trade or commerce, some kind of
20 transaction---

21 **The Court:** Car dealers seem to get those.

22 **Mr. Comer:** Exactly. Examples, Your Honor -- you've
23 just hit on one. Forcing another competitor out of business,
24 mislabeling a product's package, misrepresenting a machine's
25 operating requirements. In this case, Your Honor, the trade

1 or commerce that happened would have happened around 2003
2 which is when the plaintiff signed her lease to choose
3 Wellspring, and I just dispute, Your Honor, that from a
4 proximate causation standpoint something five years removed
5 from that was caused by some sort of deceptive or unfair
6 conduct in 2003.

7 But be that as it may, I'm going to address the
8 elements. First, Your Honor, there's no evidence of any
9 actionable, unfair, or deceptive conduct. I asked the
10 plaintiff very specifically in her deposition who, what,
11 when, where and how. How were you deceived or treated
12 unfairly? There are two things that she points at, Your
13 Honor. First, she said that an employee represented that
14 Wellspring was a safe and secure place.

15 The second thing she said, Your Honor, was, "I didn't
16 find out about all this other crime going on at the apartment
17 complex until after my incident." And so the implication is
18 they misrepresented or didn't disclose what was going on. So
19 let me address those two alleged deceptions.

20 First, Your Honor, any claim that someone represented
21 this was a safe and secure place, that's not actionable, and
22 the case that I would direct the Court to is the Cook case.
23 That's 741 F. Supp., specifically page 1216. In that case,
24 Your Honor, that was another case of someone bringing an
25 inadequate security case, and they brought a fraud claim and

1 said, "Well, you know, the employees said that this was a
2 safe place." And in addressing that claim, Your Honor, the
3 Court looked at the difference between a representation of
4 fact and a representation of opinion. A representation of
5 fact is something that can be determined with certainty. For
6 example, if I say, "That is a profitable business," we can do
7 some analysis and we can determine whether or not I've
8 misrepresented that. But if I tell you that someone is a
9 competent mechanic, then the difference is what I may believe
10 to be a competent mechanic may be very different from you.

11 **The Court:** True.

12 **Mr. Comer:** And on that basis, Your Honor, the Court
13 stated there can be no doubt but that the comment that an
14 apartment complex is safe is one of opinion rather than fact.
15 It's certainly not the kind of statement South Carolina would
16 support as fraudulent. For the same reason, I don't believe
17 it's deceptive, Your Honor.

18 The second specific thing that she said was the lack of
19 disclosure about crime. Your Honor, I think the thing to
20 understand here is: Was there any kind of duty, be it
21 through a case, statutory or regulatory, that required the
22 apartment complex to tell her about incidents of crime in
23 that area? I don't believe that there are; certainly nothing
24 that I concluded from my research indicates so. And so, Your
25 Honor, I don't think that this is any sort of deceptive

1 conduct either that is actionable.

2 On the second point, Your Honor, the plaintiff has to
3 prove that any deceptive conduct affects the public interest,
4 and there's no evidence in this case, Your Honor. She has to
5 show specific facts disclosing that members of the public
6 were adversely affected; otherwise, this is speculative. And
7 in this case, Your Honor, there is no evidence of unfair and
8 deceptive conduct where there is a pattern of conduct by the
9 apartment complex of telling people when they come in to sign
10 a lease that this is a safe place or that this is a secure
11 place. There hasn't been any sort of evidence to show that
12 pattern of conduct.

13 Now, I anticipate we're going to hear plaintiff's
14 counsel talk about a lot of affidavits about shrubbery and
15 lighting, but that's not what she said was the deceptive
16 conduct. She said safe and secure place, nondisclosure of
17 crime.

18 The other thing I would point to, Your Honor, is that
19 the law considers whether there is a capability of
20 repetition, and the defendants have a policy and procedure
21 manual which I have included as Exhibit K., and here is its
22 policy. It says, "Wellspring generally does not provide
23 security for its residents, and employees should never
24 indicate that we do so." So by their own policies, Your
25 Honor, they are discouraging any repetition which is another

1 factor to consider with regard to public impact.

2 Finally, Your Honor, the plaintiff can't prove any
3 monetary or property loss as a result of the unfair or
4 deceptive acts. I asked the plaintiff in her deposition,
5 Your Honor, "Why did you choose Wellspring?" And she said,
6 "I chose it because it was in close proximity to my work, and
7 I chose it because members of my church recommended it." And
8 I asked her specifically now why it was, and those were the
9 two things she said.

10 If the alleged deceptive conduct wasn't the basis for
11 her decision, then I don't see how it can proximately cause
12 her loss. And I would just incorporate here by reference,
13 Your Honor, everything else I've said up to this point about
14 proximate causation. I think it also applies to the Unfair
15 Trade Practices Claim Act and/or Act claim, and I would
16 incorporate by reference the entirety of our brief that we
17 have submitted. I'm going to reserve a little bit of time to
18 talk about---

19 **The Court:** Sure.

20 **Mr. Comer:** ---affirmative acts, but that's the crux of
21 my argument. Thank you, Your Honor.

22 **The Court:** All right. Mr. Hood.

23 **Mr. Hood:** Yes, Your Honor. May it please the Court,
24 sir?

25 **The Court:** Yes, sir.

1 **Mr. Hood:** As Paul Harvey says, there's two sides to
2 every story. First, Your Honor, I think it's really
3 imperative to understand exactly what happened. This lady
4 goes at 10:30 at night, drives up to her apartment complex,
5 and I believe it's Exhibit 15 for Your Honor. I've got
6 pictures of before and after, the shrubs before and after.

7 And she drives up and she -- this is a woman whose
8 son-in-law is a -- her son-in-law is a lieutenant with the
9 Richland County Sheriff's Department. She worked for a bank
10 for four years and had worked for banks before that. This is
11 not some fly-by-night lady. This is not somebody that's ever
12 been in trouble. This is a 60-year-old woman who was
13 extraordinarily responsible. And she drives up after choir
14 practice at her church, and she says, not when she gave the
15 initial report but every other time after that, two men
16 jumped out from behind bushes. And they rode her around for
17 45 minutes saying, "I'm going to kill you. This is the last
18 time you're going to live. This is the last time you're
19 going to breathe."

20 They stuck their hands down her pants. They sexually
21 assaulted her. And when he says that she hasn't had any kind
22 of medical, yes, she has. She has seen doctors. She has
23 seen counselors. She left her job after ten months because
24 she's so stoic - she tried to do her job - and after ten
25 months she basically couldn't do it anymore. That's what

1 really happened, Your Honor.

2 And in this particular situation, I think what we've got
3 to do is we've got to look at, one, how this apartment
4 complex is different and, two, even if you say, "Okay, it's
5 not different," we're going to use the Cook/Kramer analysis
6 from the South Carolina Supreme Court and from the South
7 Carolina United States District Court why this still falls
8 within those types of exceptions to deny a motion for summary
9 judgment, and I think that the most important thing here,
10 Your Honor, is looking at the standard.

11 What's the legal standard in this specific case? Well,
12 it appears that, one, he's talking proximate cause, and I'm
13 going to kind of -- I'm going to deal with one thing about
14 the difference and then I'm going to talk about proximate
15 cause and then I'm going to talk about affirmative duty.

16 Okay. As far as proximate cause is concerned, I think
17 everybody agrees: That's a jury question. And if there's a
18 scintilla of evidence, a scintilla of evidence, that this
19 Court must deny the motion for summary judgment. What I
20 heard was basically a closing argument at a trial, not
21 something about whether there are questions of material fact.
22 And I'm going to go through those questions of material fact,
23 Your Honor.

24 Two, the Cook case -- let's say that we're not talking
25 about the alternative but we're talking about the Cook case.

1 In the Cook case, they talked about -- it was a case where a
2 lady said a ladder existed that shouldn't have been there and
3 that ladder allowed a gentleman to have egress to her
4 apartment on the second floor and that that's how he got in.
5 But they took the deposition of the perpetrator. He said, "I
6 didn't use a ladder. I climbed up on an iron railing."

7 Took the maintenance guy and he said, "There was no
8 ladder around there," and the lady said, "Well, I saw a short
9 ladder around my apartment." That's what the Court used to
10 deny the motion for summary judgment. And so whether there
11 was a duty or not, this assumed duty, it does rely on facts.
12 It is a mixed -- it's a mixed analysis of facts and law.

13 Obviously it is Your Honor's discretion how to apply those,
14 but it still has factual elements, and I would argue that
15 there's a scintilla of evidence that would show that there is
16 some type of an assumption of duty that the motion for
17 summary judgment must be denied.

18 Now, the first thing that I believe that we want to
19 discuss is how this is different, how this is different, and
20 I want to---

21 **The Court:** You're going back to Kramer now.

22 **Mr. Hood:** Actually, he said that Kramer was the seminal
23 case. I'm going to disagree. I'm going to say Cook was the
24 seminal case because what happened -- Cook was the first
25 case, and then the Supreme Court when they certified -- were

1 certifying the question in Kramer I, cited to Cook, and they
2 basically all agree. I think Cook and Kramer -- they're
3 basically interchangeable. Cook had more analysis, and so
4 I'm going to use Cook because it used the analysis and it
5 went into everything.

6 **The Court:** Okay.

7 **Mr. Hood:** And in Cook I think it's particularly
8 instructive, Your Honor, that when you talk about the place,
9 it says -- and this is -- this is their quote and it's on
10 page nine of that opinion, Your Honor. It says, "Places to
11 which the general public are invited might indeed anticipate
12 either from common experience or known fact that places of
13 general public resort are also places where what men can do
14 they might. One who invites all may reasonably expect that
15 all might not behave and bears responsibility for injury that
16 follows the absence of reasonable precaution against that
17 common exception."

18 **The Court:** Wouldn't that be a better argument if it was
19 a visitor to her rather than your lady?

20 **Mr. Hood:** You know what, Your Honor? If this was a
21 normal complex, I would agree with Your Honor, and I'll go
22 over why it's -- why it's different, and I think this is also
23 instructive. It says, "An apartment complex is not a place
24 of public resort, for one who profits from the very public it
25 invites must bear what losses that public may create. It is

1 of its nature private and only for those specifically
2 invited. The criminal can be expected anywhere, any time,
3 and has been a risk of life for a long time." And that's
4 when I think it's really instructive, Your Honor.

5 When we go to -- I went up and I took the 30(b)(6)
6 deposition and they -- they gave different people. They had
7 a guy by the name of Sam Foster who was the chief operating
8 officer and a lady by the name of Michelle Roten. But Sam
9 Foster in his deposition, Your Honor, on page 44 said but the
10 pool -- I mean, excuse me, "The pond and the trails around
11 it" - and we're talking about the Harbison community trails -
12 "Even though they're on your private property, there's either
13 a right-of-way or an easement that allows people to utilize
14 those." He said, "There's a right-of-way of easement. A
15 right-of-way is for people to use and easements for them to
16 exist on our property." "There's easements for them to exist
17 and then the right-of-way so that they can use them."

18 "Right." "And that goes either beside or through the
19 Wellspring property." "Correct." "And as you said, that's
20 something that's able to be used by any member of the
21 public." Answer, "Presumably yes." "Okay. The purpose of
22 walking trails is to, you know, walk on them for recreation."

23 So their own chief operating officer acknowledges that
24 this apartment complex, it's -- it's different than any
25 apartment complex you've ever seen. They have public walking

1 trails that go throughout---

2 **The Court:** But other apartment complexes have roads
3 that are for walking.

4 **Mr. Hood:** But these---

5 **The Court:** People walk on roads.

6 **Mr. Hood:** These have walking trails and they advertise
7 -- in their periodical and in their literature they advertise
8 one of the perks that they have is a recreation center, that
9 you can use the walking trails. They put a lake in their
10 literature that has the walking trails. Their walking trails
11 go up beside the pool. They go throughout. And one of the
12 things Bill Booth said is when you -- this is a unique
13 property, unique, in that you have public easements and you
14 have right-of-ways for the public to be able to go.

15 And, in fact, Karen Campbell who was the apartment
16 manager for Wellspring Apartments -- she, before this, was
17 the apartment manager of something called The Woods at
18 Harbison. The Woods at Harbison is another apartment complex
19 that is connected by the trails. At The Woods at Harbison,
20 she testified under oath that The Woods at Harbison was a
21 troubled complex, and by that she meant that there was a
22 large criminal element there and that that criminal intent
23 can walk from The Woods at Harbison down to the Wellspring
24 community or Wellspring Apartments and there's nothing to
25 stop them. And she said -- she herself said -- testified

1 under oath that any member of the public is allowed in there,
2 any member. She also testified that they derive an economic
3 benefit from the community trails. And when you advertise it
4 in your literature, you acknowledge it. You know that it
5 exists. You know that there are trails where criminals are
6 coming down and coming to your apartment complex.

7 It's a different thing than what has been enunciated in
8 that Cook v. Kramer case. It's different, and because of
9 that, I would argue---

10 **The Court:** I mean, there's potentially criminals
11 everywhere. I mean, there's criminals maybe out in that
12 hall. I mean, so there's always a criminal element. As the
13 statement says that I think, you know, criminals can be
14 expected anywhere, any time, and, you know, all the time.
15 That's why I was a proponent of the Concealed Weapons Bill.

16 **Mr. Hood:** Right.

17 **The Court:** Because they're everywhere. The police
18 can't protect you. You have to protect yourself.

19 **Mr. Hood:** Well, when you -- but the analysis that I'm
20 going by is the Cook analysis saying that apartment complexes
21 are private and you keep them out. That didn't happen in
22 this particular case. In this case---

23 **The Court:** You're proposing that all apartment
24 complexes would now have to have walls with---

25 **Mr. Hood:** No.

1 **The Court:** ---limited entrance.

2 **Mr. Hood:** No, Your Honor, that is not what I'm
3 proposing. I'm saying that this is---

4 **The Court:** How will an apartment ever not be
5 responsible for a criminal act of its tenant if you don't do
6 that? If I rule your way and the Supreme Court agrees with
7 me on that, how can any apartment complex ever not be able to
8 exist without building a wall around it with limited access?

9 **Mr. Hood:** Well, I think they do limit their access, and
10 that's what they are building. They are building them with
11 fences and they are building them with gates and they are
12 building them with---

13 **The Court:** Is that the standard that we have for our
14 state?

15 **Mr. Hood:** Well, the standard was enunciated in 1990,
16 22 years ago, and the standard at that time says what it
17 says, but it also says that where the public is invited like
18 a mall, an innkeeper, or a mall like Wal-Mart---

19 **The Court:** This is different from a mall or an
20 innkeeper because they're invited for a short period of time.
21 This is where these people live. So this would also include
22 anyone who rents a house, wouldn't it? I mean, if you rent
23 your house to somebody and it's in a bad neighborhood,
24 wouldn't you have an obligation to protect your tenant?

25 **Mr. Hood:** Well, it depends on what you have in your

1 lease. If you have in your lease, "I will not provide this,
2 I will not provide this, I will not provide this, I will not
3 provide this," then you may be able to do it, but exculpatory
4 clauses are specifically not looked upon favorably in South
5 Carolina as is enunciated in the Cook case, and I think that
6 what you can do is then you get into the Cook analysis.

7 If you take a duty in the Cook case when they took the
8 ladder and they had a ladder that they left out in the open
9 even though it was a disputed fact whether they did or they
10 didn't or whether it was a disputed fact of whether he used
11 that ladder, they denied a motion for summary judgment on
12 that specific issue. So what I'm saying is: If you have an
13 apartment complex that is unique, that is different -- and
14 I'm not saying that they enunciate it for every apartment
15 complex. I'm saying that in this specific case and this
16 specific case only because of the unique character of this,
17 having walking trails and having right-of-ways and having
18 easements all through the apartment complex where people can
19 walk right beside the apartment complexes, that it's
20 different than the standard that was enunciated in the Cook
21 versus Kramer case.

22 Now, let's look at the Cook/Kramer case at the
23 difference -- I mean at the thing that they did deny the
24 motion for summary judgment. Now, I think what you've then
25 got to look at -- and I'm reading directly from the Cook

1 case, Your Honor. "Because under general South Carolina
2 negligence law all affirmative acts must be performed with
3 due care, plaintiff has shown that defendant had a duty to
4 use due care when maintaining the premises in storing
5 equipment," and they're talking about that ladder.

6 So even though the perpetrator said he didn't use the
7 ladder, even though their maintenance person said that they
8 didn't have one out in the open, they took the testimony of
9 the victim that said there was a ladder in close proximity to
10 her apartment to get to the second floor and that created a
11 question of material fact because if they had a ladder out
12 there, they shouldn't just leave it out there for anybody to
13 use. So what we did is we looked at a lot of different
14 things, and for your -- just for Your Honor's edification, we
15 took the deposition of Karen Campbell who was the apartment
16 manager. We took the deposition of a 30(b)(6) person up in
17 Philadelphia, and we took part of the 30(b)(6) -- they
18 designated three people. Basically it was two though that we
19 used for most of the things, and it was a lady by the name of
20 Michelle Roten and a gentleman who was the chief operating
21 officer by the name of Sam Foster.

22 Now, on the undertaking, Michelle Roten says that or,
23 excuse me, under the undertaking, Karen Campbell said she was
24 aware of crimes, and that's on page 43 and 44 of her
25 deposition. And on page 43 and 44 of her deposition it says,

1 "So you would agree with me that there were crimes that were
2 happening on the Wellspring property?" "Yes." "And you
3 would agree with me that when you have crimes occurring on a
4 property where the general public is allowed that Wellspring
5 should do whatever is necessary to help provide security to
6 its residents," and she said, "No." But then I said, "Okay.
7 So they should not help provide security for their
8 residents." "We were not required to provide security." And
9 I said, "Okay. Gotcha. Love it. Gotcha. But when you are
10 not required and then you took the extra step -- let's say
11 you -- you took a responsibility to do it. Even though not
12 required, you had to do it right." "Correct." So she agreed
13 with that standard.

14 "And, for instance, if you had courtesy officers, you
15 had no obligation to provide them, did you?" She said, "No."
16 "But if you then said, 'Okay, we're going to provide them,'
17 you should do that in a reasonable manner; correct?" And she
18 said, "Yes." And I said, "If you didn't have an obligation
19 to cut back shrubbery, you could let it grow as much as you
20 wanted to; right?" She said, "Yes." "And then -- but if you
21 took the obligation and duty of doing that, then you had to
22 do it within a reasonable manner; right?" "Yes." "And
23 though you did not have an obligation or duty to maintain
24 breezeway lights, if you took it upon yourself to repair
25 those, it had to be done in a reasonable manner; right?"

1 "Yes."

2 "Okay. You would agree then that where there's a risk
3 of safety or life involved, corporations who own apartment
4 complexes should follow the rules. It's better to be safe
5 than sorry." "Yes." And so she's agreeing.

6 She's also agreeing that they didn't have
7 responsibilities to take care of things in regard to the
8 shrubs. They didn't have a responsibility to take care of
9 things in regard to the lighting, and they didn't have a
10 responsibility to do things in regard to the courtesy
11 officers.

12 Now, in regard to each of those three, Bill Booth, who
13 is the expert for the plaintiff, has said they didn't have
14 the responsibility, but when they did, they didn't use due
15 care. And that's in his deposition, and that's the
16 deposition excerpts that I have provided to Your Honor, and
17 it is covered in our brief. And rather than go through the
18 whole expanse of that, I will simply tell you that he has
19 said that. There is evidence in his deposition that he said
20 that.

21 But I think that what you've also got to do is you've
22 got to look specifically at: Okay, what other evidence other
23 than our expert is there that -- that this duty was not done
24 appropriately if they agreed that they didn't have to do it
25 and then didn't? One, in regard to the shrubbery, we have

1 submitted an affidavit by a gentleman by the name of Shane
2 Howland. His affidavit is available to Your Honor. It is in
3 the packet of exhibits. And he says in his affidavit that,
4 yes, I was the landscape contractor for this particular
5 apartment complex. Yes, I was supposed to do regular
6 maintenance and, yes, I did that, but I went to Karen
7 Campbell and told her that this regular maintenance was not
8 sufficient and the shrubbery was -- the shrubbery was
9 overgrown and presented a safety concern to its residents.
10 And that's what I think is really appropriate for Your Honor,
11 and I want to point this out, and this is where the shrubs
12 go.

13 If you go to Exhibit 15, Your Honor -- I just want to
14 really... Your Honor, Exhibit 15, they have this picture
15 which is---

16 **The Court:** I've got that.

17 **Mr. Hood:** Which shows a big shrub. And then if you
18 look at this first picture up on the right, that's where they
19 cut them back. Now, in the first one, interestingly anybody
20 could hide behind there and you'll never see them. When you
21 look at the second one---

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

24 **Mr. Hood:** Yeah.

25 **The Court:** You're not proposing they cut all the trees

1 down, are you?

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

4 The Court: Those are pine trees.

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

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

8 Mr. Hood: I guess conceivably they could. I think you
9 could probably be able to see one side or the other, but the
10 bottom line is in this particular case -- and you can see the
11 difference between the shrubs. A person isn't going to be
12 able to hide behind those shrubs and jump out and accost
13 someone. And when you have a situation where you've
14 undertook the duty to do it and then you didn't do it and
15 then something like this occurs, that falls squarely within
16 the exception of the Cook analysis.

17 And, in fact, when I took the deposition of Michelle
18 Roten and Sam Foster in Philadelphia, they said this is
19 called severe pruning when they -- when they took the bush
20 from seven or eight feet down to two feet, it's called severe
21 pruning, and that is not something that falls within the
22 contract of Shane Howland and that's something that is a
23 budget line item that has to be approved by the home office,
24 and this was done shortly after this lady was abducted, and
25 interestingly, interestingly, they did it at her complex and

1 nowhere else. They cut them there but didn't cut them
2 anywhere else.

3 So: Had a duty. Did it with the landscaper and said,
4 okay, prune -- I mean, do some general maintenance. He told
5 them that isn't enough; it's dangerous. They didn't do it.
6 This lady is abducted. Then they cut them. But Bill Booth,
7 our expert, has said that that is a breach, that they did not
8 do it in a reasonable manner, and Shane Howland who was a
9 landscaper said it wasn't done.

10 We also have a situation in regard to the lighting.
11 With regard to the lighting, they have a situation where in
12 2003 they purchased this complex -- when I say they purchased
13 it, Franklin Pineridge may have been the ownership, but PRG
14 came into the management of the complex. They were both
15 owned by the same guys, but essentially they decided in 2003/
16 2004 to do \$1.4 million in capital improvements.

17 When they did that, they did not address any of the
18 lighting in this area, and Detective Kevin Isenhoward of the
19 Richland County Sheriff's Department said under oath in his
20 deposition: Yes, I went over there and I went over there at
21 night, and I didn't like the design of the lighting because
22 it was dark. In fact, there's a -- there's an underpass
23 that's on this rec trail or this trail that goes directly --
24 that's probably a hundred feet, and he said it's creepy
25 because vagrants hang out there and everybody knows vagrants

1 hang out there, and they walk along that trail up and down by
2 that apartment complex, and he said the lighting -- it was
3 just bad.

4 This lady says that at the time that this occurred that
5 the lighting was out. Bill Booth has said that it was
6 inadequate. In this specific case it was inadequate. Even
7 if it was on, which there's evidence it was not, it was
8 inadequate.

9 I am anticipating they're going to say: Well, this was
10 SCE&G's responsibility because that's who we contracted with
11 to put out these lights. Well, they didn't contract with
12 them to do the breezeway lights. They contracted with them
13 to put out these other lights, but it was still their
14 responsibility to ensure, even if they did contract, that
15 they had adequate lighting. If they only had one out there
16 and they needed three, they needed to put three out there
17 because they're the ones that are in control of those common
18 areas, and once they take and undertake the duty of doing it,
19 they've got to do it right and Bill Booth has said that did
20 not occur, and he gave very specific testimony about what the
21 standard in the industry was and what the standard is, and I
22 will defer to that in the stuff that we gave to Your Honor.

23 We then go to the courtesy officers, and the courtesy
24 officers -- it gets really egregious, Your Honor. This lady
25 was told when she came in that courtesy officers -- that

1 security would be provided. Security was not provided, at
2 least in the sense I think that she thought it was. There
3 was no security patrol. There may have been at one time.
4 There was---

5 **The Court:** How do we ever make laws based upon what the
6 person individually thinks on something like that, if they
7 have security officers there and it's what she thought versus
8 what they thought?

9 **Mr. Hood:** Well, I think that it's not a -- I think
10 that's for a jury to decide, Your Honor. I think that's up
11 to a jury to decide based on the law that we have in this
12 state, and I think that those 12 people in the box are going
13 to be able to determine: Well, is it reasonable upon what
14 she says or is it reasonable upon what they say? And I think
15 that's what it comes down to.

16 And in this particular case what we have is a situation
17 where they had something called the Courtesy Officer Program,
18 and in the Courtesy Officer Program what they would do is
19 they would take somebody that was local law enforcement,
20 whether it was Columbia, City or Richland County Sheriff's
21 Department or the highway patrol, and they would give them a
22 price break on their rent for them to leave their car, their
23 state official car, in front of the premises, and then they
24 would walk the premises two hours a day and they would also
25 fill out a report.

1 Now, in the Courtesy Officer Agreement it says: If you
2 see crimes occurring, if you see crimes occurring, which I
3 think goes to the foreseeability element because they're
4 basically acknowledging, okay, there's crimes that are
5 occurring, so that's one of your jobs is to make sure that
6 when it does, you've got the right to do whatever you want to
7 do. It goes to foreseeability, but it also goes to the
8 aspect of what they're supposed to do.

9 Karen Campbell, when I took her deposition - she's the
10 apartment manager - I said, "Tell me every time they've
11 walked two hours." "I don't know." "Give me any report or
12 every form they're supposed to fill out every day." Didn't
13 happen. That's a violation of policy. That's a violation of
14 policy. Didn't do it.

15 And then where it really gets egregious, Your Honor: In
16 July of 2008 they quit having the courtesy officers. They
17 quit having the courtesy officers. But they put out a news
18 letter to all of their residents, and they say, "Security is
19 our very top priority. Here is the security pager for the
20 security of our complex." They didn't have anybody there.

21 Bill Booth has testified that when you have a situation
22 like that, you cause residents their concerns to go down
23 because they think there's somebody there taking care of this
24 and they're not, and he's also said that when you do that,
25 that you aren't -- you aren't doing what is expected to be

1 done, that that's a breach in regard to that specific thing.

2 So you have a situation where they've undertaken the
3 responsibility to do lighting, undertook the responsibility
4 to do the shrubbery, undertook the responsibility to do the
5 courtesy officers, and Bill Booth has testified that each one
6 of them is improper and gave testimony about the standards
7 and why it was improper, and I've got his entire deposition
8 for Your Honor that I will hand up at the end that you can
9 look at. And so I think that what we have is a situation
10 where you've got all of those things.

11 **The Court:** Okay. Argue on unfair trade practices
12 breach of---

13 **Mr. Hood:** Did you want proximate cause or I can do---

14 **The Court:** I'm trying to get this done within the time
15 frame.

16 **Mr. Hood:** Sure. Sure. Okay. Unfair trade practices,
17 Your Honor. Unfair trade practices: I think that you've got
18 a situation where he said that she -- there were two things:
19 Safe and secure, the crimes happened on the premises, and she
20 should have been notified and that there's got to be
21 capability of repetition. Well, on July 2008 there was a
22 home invasion. Doesn't matter whether there's 20 parking lot
23 -- in the criminal law community it's called precursor
24 crimes. If you see somebody vandalizing, you're probably
25 going to become the victim of a personal crime. That's what

1 happens.

2 But you had a home invasion two months before this. It
3 happened then, happened to her and, in fact, a year later -
4 and we're also representing this lady - a lady was raped in
5 this complex which shows that it's capable of repetition. We
6 also have -- as he said, we have 12 affidavits saying that
7 the lighting and the security were bad. We've complained
8 about it. We've told them over and over and over. They
9 didn't do anything about it.

10 That goes not necessarily to the repetition of, okay,
11 this crime occurring, but their knowledge that it could occur
12 because it had occurred before. It occurred during and then
13 it occurred after. And so you have susceptibility of
14 repetition and, in fact, it's borne out in what has occurred.
15 And when he says that it -- it's typically used in, like Your
16 Honor said, like in car situations or other things. The law
17 is the law in South Carolina, and whether there's ever been a
18 case that says it can be used in something like this, it just
19 hasn't been argued.

20 I mean, we're in a situation where it would be a novel
21 issue in South Carolina, and I think that whether it's
22 monetary, you can argue that when she had to go to counseling
23 and when she has lost income because of this, that's monetary
24 injury. It doesn't have to be just property; it can be
25 monetary. And she has suffered monetary injury as a result

1 of that.

2 And so in sum, Your Honor, we feel like proximate cause
3 is a factual issue. There's scads of evidence -- I mean lots
4 of evidence saying what happened, what could have occurred,
5 and, in fact, the Denise Wright affidavit which Your Honor
6 has I think which is the very first one says: If I had come
7 in there and there had been proper lighting or the shrubbery
8 was cut back, I would have seen them and I would have never
9 gotten out of my car. If I---

10 **The Court:** How long had this lady lived here?

11 **Mr. Comer:** Five years.

12 **Mr. Hood:** From 2003 to 2008, five years. And if she'd
13 seen them, she would have gotten---

14 **The Court:** Those bushes didn't grow up over night, did
15 they?

16 **Mr. Hood:** No, no, they were there. And so -- you know,
17 which would go to an assumption of the risk thing I guess or
18 some comparative fault that, once again, is a jury issue or
19 normally a jury issue, Your Honor. But the bottom line is:
20 You have a situation where, from a proximate cause
21 standpoint, we have submitted evidence that certainly meets
22 the standard of scintilla of evidence that I would say goes
23 way beyond that.

24 And in regard to the assumption of duty, we have met
25 that as well, Your Honor. And is there something that they

1 can argue from a directed verdict or judgment notwithstanding
2 the verdict or 13th juror or argue stuff before a jury?
3 Absolutely. But at this specific time at the summary
4 judgment stage of this case, Your Honor, this is simply not
5 the time to decide this case based on the facts and the
6 evidence that is being presented in the case. Thank you.

7 **The Court:** Thank you.

8 **Mr. Comer:** Thank you, Your Honor.

9 **The Court:** Brief.

10 **Mr. Comer:** Five minutes. I will. Let me address what
11 is called the Affirmative Acts Exception, and this is a rare
12 occasion, Your Honor, where we have case law directly on
13 point for this case. The first issue that Mr. Hood stated
14 was: You assume the duty of providing courtesy officers.
15 When you didn't have one, that was a breach.

16 I would direct the Court to E-3 which is the Kramer II
17 case, and in that case, Your Honor, the Court expressly
18 rejected the plaintiff's argument that the defendants failed
19 to act with due care with regard to not having a courtesy
20 officer. They made the same argument in Kramer II, and the
21 Court said, "You misapprehend the scope of this exception.
22 We're talking about something that has a direct relationship
23 to the injury, and just because there wasn't a courtesy
24 officer on duty doesn't meet the scope of the exception."
25 That's courtesy officer.

1 With regard to shrubbery and lighting, Your Honor, again
2 this misapprehends the scope of the exception. The South
3 Carolina Residential Landlord Tenant Act requires landlords
4 to make a dwelling fit and habitable. That's why they need
5 to, for example, repair railings or cut back bushes so that
6 somebody won't trip on them. But, Your Honor, the courts
7 made it very, very clear that the South Carolina Residential
8 Landlord Tenant Act applies to the physical state of the
9 structure, in other words, where a shrub or a railing or
10 inadequate lighting is the cause of the injury.

11 In this case, the plaintiff has testified: My room was
12 clean, that the branches never impeded her ability to go to
13 her apartment, that the lighting was never so inadequate that
14 she tripped or couldn't get to her apartment. She has never
15 had a personal injury because of the shrubs and the lighting,
16 and that's how the law interprets the Landlord Tenant Act is
17 it goes to the physical state.

18 And in fact, Your Honor, the South Carolina Supreme
19 Court has expressly rejected that you can take South Carolina
20 Code 27-40-440 which is the fit and habitable provision and
21 impose a duty on a landlord to keep the premises or impose
22 some sort of duty to prevent a crime. It is expressly
23 rejected, that application. So when we're talking about the
24 Affirmative Acts Exception as it relates to shrubbery and as
25 it relates to lighting, that goes to whether or not a

1 dwelling was fit and habitable but not as to whether there
2 should have been better lighting to prevent crime. The
3 courts have expressly rejected that application.

4 A couple of points that Mr. Hood stated that I'll touch
5 on briefly and I know Your Honor is ready to move on, but
6 first of all, you are spot on, Your Honor. Really these
7 walking trails are no different than a sidewalk. Yes, the
8 public can access Wellspring Apartments by walking through
9 the walking trails, but you can make the same argument about
10 a sidewalk that goes in front of an apartment complex.

11 I think Your Honor is also correct that this wouldn't be
12 limited to just apartment complexes. If somebody rents a
13 house, they are a landlord, and they would have a tenant.
14 And if you're going to extend a duty to impose security in
15 the context of an apartment and that kind of landlord/tenant
16 relationship, I think it probably also would extend to rental
17 of a house.

18 And finally, Your Honor, he mentioned Mr. Howland's
19 affidavit and said that, you know, this is called severe
20 pruning and it's not something that falls in the contract,
21 and Mr. Hood hasn't provided Mr. Howland's contract as part
22 of his exhibit. But if you look at his contract, it says:
23 Trim shrubs as needed. It doesn't qualify that statement.
24 So for him to say, "Well, that was outside the scope of my
25 contract; therefore, they, you know, wouldn't do it," the

1 contract says what it says. And, regardless, the law just
2 says you have to make it fit and habitable from the
3 standpoint of branches not impeding, rails not falling over
4 and lighting being well enough for you to get to your
5 apartment. She has admitted that she never had any personal
6 injury---

7 **The Court:** Well, I think that was what my point was
8 concerning the pine trees, that you can't cut everything
9 down. Otherwise, nobody would come live there because they'd
10 complain that it looks like crap.

11 **Mr. Comer:** Exactly, Your Honor. I mean, it goes both
12 ways. To them I think they're not getting any business
13 because there's not nice shrubs or flowers, but the courtesy
14 officer issue has been ruled on and the courts have rejected
15 that as an affirmative act, and that's all I have, Your
16 Honor. Thank you.

17 **The Court:** Thank you.

18 **Mr. Hood:** Your Honor, very briefly, two minutes.

19 **The Court:** One minute.

20 **Mr. Hood:** One minute. In regard to what he said about
21 the courtesy officers, in that case, Your Honor, it also says
22 in order to fall within the undertaking exception, the
23 defendant must undertake to do something and then they've got
24 to do it in a reasonable manner. If they undertook it,
25 they've got to do it within a reasonable manner. Undertaking

1 to provide a courtesy officer, then he doesn't work there,
2 and then leading the residents to believe that somebody is
3 still there, that's where it's different than the case that
4 he cited.

5 He also talked about the Residential Landlord Tenant
6 Act. We've already said that doesn't exist here, and the
7 Court has said and every case you've got, Your Honor, says
8 that this is not about the Residential Landlord Tenant Act.
9 This is about negligence and whether there are four
10 exceptions to the duty under the -- under a landlord/tenant
11 situation which is wholly independent from the Residential
12 Landlord Tenant Act, and that's what this case is about, Your
13 Honor, and we feel like there's questions of material fact.

14 **The Court:** All right. Thank you. I will review all
15 the affidavits and the arguments, and I will give you a
16 ruling soon.

17 **Mr. Hood:** Your Honor, at this time I would like to --
18 because I didn't at the -- I just gave portions. For the
19 purposes of a record, Your Honor, I would like to move the
20 full depositions of Denise Wright, Karen Campbell, Mohammed
21 Gabber, Michelle Roten, Sam Foster, and Kevin Isenhoward...

22 **The Court:** Okay. Do you have those available?

23 **Mr. Hood:** Yes, Your Honor.

24 **Mr. Comer:** Your Honor, I just received plaintiff's
25 supporting memorandum today. If I may, I'm going to review

1 it this afternoon. I won't overwhelm the Court---

2 **The Court:** Would you like---

3 **Mr. Comer:** I would like to possibly---

4 **The Court:** I'll give you ten days to respond.

5 **Mr. Comer:** Certainly. Thank you, Your Honor.

6 **The Court:** Thank you.

7 **Mr. Hood:** Your Honor, if he does, can I have a sur-
8 reply?

9 **The Court:** I'll give you five days.

10 **Mr. Hood:** Five days. Thank you, Your Honor.

11 **The Court:** And then we're done.

12 **Mr. Hood:** And then we're done. Thank you, Your Honor.

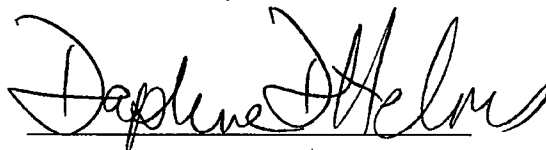
13 **The Court:** All right. Thank you.

14 (Whereupon, the proceedings were concluded. There were
15 no exhibits introduced.)
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25

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 1st of October, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 22, 2012

A handwritten signature in cursive script, reading "Daphne Helms". The signature is written in dark ink and is positioned above the printed name.

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Denise Wright

☐ Plaintiff,

vs.

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

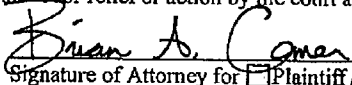
☒ Defendant.

check box above indicating submitting party

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER:
2011-cp-40-4068

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Name, S.C. Bar No. and address of plaintiff's attorney: Wayne Ridgeway, Esquire Burris and Ridgeway 907 Elmwood Ave., Columbia, SC 29201 telephone: 803-779-5842 fax: 803-227-0384 e-mail: other:		Name, S.C. Bar No. and address of defendant's attorney: Brian A. Comer, Esquire Collins & Lacy, P.C. Post Office Box 12487, Columbia, SC 29211 telephone: 803-256-2660 fax: 803-771-4484 e-mail: bcomer@collinsandlacy.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: 1 Hour Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion -			
I hereby move for relief or action by the court as set forth in the attached proposed motion.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		8-1-12 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other: ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRCP)			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: Date:	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		DATE FILED	
☐ MOTION FEE COLLECTED: \$ ☐ CONTESTED - AMOUNT DUE: \$			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Denise Wright,	)	CIVIL ACTION NO.: 2011-CP-40-4068
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
PRG Real Estate Management, Inc.,	)	
Franklin Pineridge Associates, Jane Doe	)	
Individually and in her Representative	)	
Capacity,	)	
	)	
Defendants.	)	
	)	

COMES NOW Defendants PRG Real Estate Management, Inc., Franklin Pineridge Associates, Karen Campbell, Individually and in her Representative Capacity as an Agent of PRG Real Estate Management (hereinafter, collectively, "Defendants"), and move the Court for an Order granting summary judgment in favor of Defendants with regard to all claims asserted by Plaintiff Denise Wright (hereinafter, "Plaintiff"). The grounds for this motion are as follows:

1. Plaintiff was a tenant of an apartment complex owned and/or managed by Defendants. As she was exiting her car and going to her apartment, she was abducted by third-party criminals who forced her to drive them to an ATM machine and withdraw money. She was later released by the criminals. Based on this incident, she filed a lawsuit against Defendants in which she alleged claims for negligence, breach of implied warranty, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

2. With regard to Plaintiff's negligence claim, neither common law nor the South Carolina Residential Landlord-Tenant Act impose a duty on a landlord to provide protection to tenants against criminal activity of third parties. Even if there was such a duty, which

Defendants dispute, Plaintiff cannot prove that any breach proximately caused her alleged injuries.

3. With regard to Plaintiff's breach of implied warranty claim, South Carolina does not recognize an implied warranty of fitness or habitability in leases. The South Carolina Residential Landlord Tenant Act also does not impose a duty on a landlord to provide protection to tenants against criminal activity by third parties. Any "fit and habitable" provisions in the Act impose a duty on the landlord only with regard to the physical state of the premises, i.e., with regard to structural defects. It does not impose a duty on a landlord to provide protection to tenants against criminal activity.

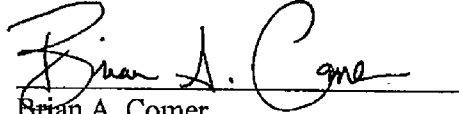
4. Finally, with regard to Plaintiff's SCUTPA claim, Plaintiff cannot satisfy any of the requirements for this action. She cannot prove (1) Defendants engaged in unfair or deceptive acts in the conduct of trade or commerce; (2) the unfair or deceptive acts affected public interest; and (3) Plaintiff suffered monetary or property loss as a result of the Defendants' unfair or deceptive act(s).

For all of these reasons, Defendants request an Order by this Court granting summary judgment in favor of Defendants with regard to all of Plaintiff's claims. This motion is supported by the South Carolina Rules of Civil Procedure, applicable case law, such supporting memoranda or affidavits that may be submitted prior to the hearing of this matter, and the arguments at a hearing on this matter.

Respectfully submitted,

COLLINS & LACY, P.C.

By:



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Attorneys for Defendants PRG Real Estate
Management, Inc., Franklin Pineridge
Associates and Karen Campbell

Columbia, South Carolina
August 1, 2012

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

I. INTRODUCTION

Denise Wright was the unfortunate victim of an abduction, kidnapping, and robbery by two unknown criminals originating in the common area of her residence at Wellspring Apartments. In spite of the fact that third-party criminals deliberately and intentionally harmed her, Ms. Wright has asserted claims against Defendants for negligence, breach of implied warranty, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). She believes better maintenance of shrubbery, better lighting, and better security measures would have prevented the crime.

South Carolina's courts have affirmed summary judgment in virtually every prior case involving inadequate security claims by a tenant against a landlord. These decisions are based on clear, unequivocal law: an apartment complex has *no duty* to provide security for its tenants. Even if there was a duty, Plaintiff cannot prove proximate causation because two criminals caused Plaintiff's injury, not Defendants' actions or omissions. South Carolina's courts have

also rejected Plaintiff's claim that a landlord warrants the safety, fitness and habitability of an apartment complex from third-party criminal activity. Finally, Plaintiff cannot prove the elements of her SCUTPA claim. There was no actionable unfair or deceptive conduct, it did not affect the public interest, and it certainly was not the proximate cause of Plaintiff's injury. For all of these reasons, Defendants should be granted summary judgment.

II. RELEVANT FACTUAL BACKGROUND

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

Plaintiff Denise Wright ("Plaintiff") leased an apartment at Wellspring beginning in approximately May of 2003. (Wright Dep. 39:18-22, selected portions of which are attached as **Ex. A**). On September 18, 2008, Plaintiff parked her car in Wellspring's parking lot and was walking to her apartment at approximately 10:30 p.m. (Sept. 18, 2008 Police Report at 1, attached as **Ex. B**). 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 Plaintiff did not indicate they were concealed to the officer who did the report. (Gabr Dep. 29:25 – 30:7, 31:7-9, selected portions of which are attached as **Ex. C**). The two men asked for Plaintiff's money, and when she did not have any, they made her drive them to various automatic teller machines to make withdrawals from her account. (Sept. 18, 2008 Police Report at 1, **Ex. B**). The withdrawals

totaled \$780. (*Id.*). 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.

Plaintiff was not physically injured during her incident. (Wright Dep. 131:7-11, **Ex. A**). She is not undergoing treatment for any mental injuries, including mental distress and anxiety. (*Id.* at 134:2-6). She is 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. (*Id.* at 137:15-23).

Nevertheless, on June 24, 2011, Plaintiff filed her Complaint in which she alleged Defendants were negligent because they breached various duties relating to her security from criminal activity. In addition to her negligence claim, Plaintiff asserted claims for breach of implied warranty of safety, fitness and habitability, as well as a SCUTPA violation by Defendants. Defendants answered Plaintiff's Complaint on August 1, 2011.¹ Defendants filed their Motion for Summary Judgment on August 2, 2012.

Since the pleadings, Plaintiff has designated William F. Booth as her liability expert. Mr. Booth has provided four opinions in support of Plaintiff's claim:

- (1) Plaintiff's incident was foreseeable and occurred because Defendants failed to provide adequate security in light of the unique layout of Wellspring;
- (2) Defendants failed to maintain vegetation on the property, and overgrown vegetation provided a hiding place for the criminals who abducted Plaintiff;
- (3) Lighting on the property was inadequate, and the crime would not have occurred if it had been adequate; and
- (4) Defendants represented they had courtesy officers to tenants, and if a courtesy officer had been patrolling the property at the time of the incident, the crime would not have occurred.

(Booth Dep. 65:20 – 67:25, **Ex. D**) (paraphrased).

¹ Plaintiff subsequently amended her Complaint on June 22, 2011 (Amended Complaint) and again on February 8, 2012 (Second Amended Complaint). Defendants filed Answers to these amended pleadings on September 8, 2011, and March 8, 2012, respectively. For ease of reference, Defendants cite to the Second Amended Complaint in this supporting memorandum when referencing Plaintiff's pleadings.

III. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” S.C. R. Civ. P. 56(c); *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 252, 531 S.E.2d 305, 306 (Ct. App. 2000). 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 this 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).

IV. ARGUMENT

There are three indisputable facts in this case: (1) Plaintiff and Defendants had a landlord/tenant relationship; (2) Wellspring is private property where Plaintiff kept a private residence; and (3) Plaintiff 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 Defendants should be granted summary judgment with regard to Plaintiff’s claims.

A. Defendants are entitled to summary judgment with regard to Plaintiff's negligence claim.

Plaintiff's first action is for negligence.² (Sec. Amend. Comp. ¶¶ 23-28). Her claim fails because she cannot prove the existence of a legal duty or that breach of a duty proximately caused her to be the victim of a crime.

(1) 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 issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996). Therefore, it is appropriate for the court to decide as a matter of law whether a duty exists in this case. Plaintiff believes Defendants should have made her "safe and secure." (Wright Dep. 115:17-21, Ex. A). She believes they 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 Plaintiff's belief in the context of a landlord/tenant relationship. Our courts have held unequivocally in multiple cases that an apartment complex has no duty to protect tenants from criminal activity. The governing South Carolina law is set forth in *Cramer v. Balcor Property Management, Inc.*, 312 S.C. 440, 441 S.E.2d 317 (1994) ("*Cramer I*"),³ which involved the murder of a tenant by an unknown

² In order to recover under a negligence theory, a plaintiff must prove the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach proximately caused damage to the plaintiff. *Murray v. Bank of America, N.A.*, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003).

³ Defendants rely substantially on the following case law that encompasses inadequate security claims by tenants: *Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205 (D.S.C. 1990); *Cramer v. Balcor*

assailant who pried open her patio sliding glass door. In *Cramer I*, the South Carolina Supreme Court considered the following question certified to the court by the United States District Court for the District of South Carolina: “Does a landlord owe a duty to a tenant to provide security in and around a leased premises so as to protect the tenant from criminal activity of third parties?” *Id.* at 441, 441 S.E.2d at 317. The plaintiff in the case urged the court to adopt the same standard used for innkeepers and guests, which requires innkeepers to protect guests or invitees from foreseeable criminal activity of third parties. *Id.* at 442, 441 S.E.2d at 318.

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

[P]laces to which the general public are invited might indeed anticipate, either from common experience or known fact, that places of general public resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against that common expectation. . . .

Tenants in a huge apartment complex, or a tenant on the second floor of a house converted to an apartment, do not live where the world is invited to come. *Absent agreement, the landlord cannot be expected to protect them against the wiles of felony 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*

Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) (“*Cramer I*”); *Cramer v. Balcor Property Management, Inc.*, 848 F. Supp. 1222 (D.S.C. 1994) (“*Cramer II*”); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1998); *Jackson v. Swordfish Investments, L.L.C.*, 365 S.C. 608, 620 S.E.2d 54 (2005); and *Fair v. U.S.*, 334 S.C. 321, 513 S.E.2d 616 (1999). Because of Defendants’ frequent citation to this authority throughout this supporting memorandum, Defendants have attached these cases for the convenience of the court at **Ex. E**.

nature private and only for those specifically invited. The criminal can be expected anywhere, any time, and has been a risk of life for a long time.

Id. at 442-43, 441 S.E.2d at 318 (quoting *Cooke*, 741 F. Supp. at 1213). The court also agreed that nothing in the South Carolina Residential Landlord Tenant Act ("SCRLTA") imposes a duty upon landlords to protect tenants from third-party criminal activity. *Id.* at 444, 441 S.E.2d at 319. Having reached these conclusions, the South Carolina Supreme Court answered the certified question as follows:

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

Id. at 444, 441 S.E.2d at 319 (emphasis added).

Applying this law, the United States District Court later granted summary judgment in *Cramer v. Balcor Property Management, Inc.*, 848 F. Supp. 1222 (D.S.C. 1994) ("*Cramer I*"). Relying on *Cramer I*'s clear law, the South Carolina Court of Appeals 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 South Carolina 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).

Defendants owed Plaintiff no duty to provide for her security from criminal activity. The law treats apartment complexes differently than hotels with regard to security, and Plaintiff's expert has admitted this legal distinction. (Booth Dep. 79:6-22, **Ex. D**). Plaintiff's expert agrees

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. As stated by the corporate representative for PRG and FPA, Wellspring is private property. (Roten Dep. 39:10-12, selected portions of which are attached at **Ex. F**). It is reserved for people who are tenants or are specifically invited. *Goode*, 329 S.C. at 441, 494 S.E.2d at 831. Plaintiff was a tenant pursuant to the terms of her lease. (Wright Dep. 39:18-22, 42:11-12, **Ex. A**). Accordingly, Defendants owed her no duty to provide for her security. Nothing in her lease and no other agreement between Plaintiff and Defendants changes this law.

(2) None of the exceptions recognized by South Carolina courts apply to give rise to a duty by Defendants.

Notwithstanding the law concerning lack of a duty by Defendants, South Carolina law recognizes that under particular circumstances an exception may apply so as to give rise to a duty based on a showing of negligence constituting the proximate cause of the loss. *Cramer I*, 312 S.C. at 443, n.1, 441 S.E.2d at 319, n.1. 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). Defendants anticipate Plaintiff will attempt to apply one or all of these exceptions, as she must, to sustain her negligence claim. However, none of these exceptions apply to Plaintiff's circumstances.

(a) The "Affirmative Act" Exception

In *Cooke*, the United States District Court for the District of South Carolina recognized that “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 against a landlord. 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.

Similarly, Defendants anticipate Plaintiff will argue Defendants affirmatively acted to maintain shrubbery, provide lighting, and provide courtesy officers for tenants. Because Plaintiff and her expert believe Defendants failed to act with reasonable care in this regard, Defendants anticipate she will argue application of the “affirmative acts” exception. Plaintiff’s argument misunderstands the scope of this exception.

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

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

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

The same is true in this case. As stated by Campbell, Wellspring had a courtesy officer program whereby a resident who was affiliated with law enforcement received a reduced rental rate to serve as a courtesy officer for the complex. (Campbell Dep. 165:11-14, 223:20 – 224:9, selected portions of which are attached as Ex. G; Roten Dep. 147:15-20, Ex. F). There is nothing in the record to suggest Wellspring ever terminated a courtesy officer, but there were periods of time where Wellspring had no courtesy officer for various different reasons (e.g., a resident no longer wished to serve in this capacity, was no longer affiliated with law enforcement, or other reasons). (Campbell Dep. 222:12-224:7, Ex. G). There was no courtesy officer in place at the time of Plaintiff's incident. (Roten Dep. 31:3-12, Ex. F). 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, Ex. F; Mar. 25, 2009 email advertising courtesy officer opening (Ex. 11 to Roten Dep., PRG Def 002427), attached as Ex. H). 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. Accordingly, the affirmative acts exception does not apply to this aspect of Plaintiff's liability theory.

Plaintiff also misapprehends the scope of the exception with regard to her arguments about shrubbery and lighting. 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 SCLRTA, which requires landlords to comply with applicable housing codes materially affecting health and safety, and to "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." S.C. Code § 27-40-440(a)(1) and (2); *Robinson*, 384 S.C. at 585, 682 S.E.2d at 496. S.C. Code § 27-40-440(3) also requires a landlord

to “(3) keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units, keep in a reasonably clean condition.”

However, these provisions have *never* been interpreted to apply to anything other than the inherent physical state of the premises; courts have rejected an interpretation that requires a landlord to maintain property so as to prevent third-party criminal activity. 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 § 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 § 27-40-440(a)(3) and its language concerning common areas and safety. However, it reviewed § 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 § 27-40-440(a)(3). In reviewing both sections, the court also held that SCLRTA relates only to the inherent *physical* state of the premises. *Id.* Therefore, the court held that SCRLTA did not alter the common law rule that a landlord is not liable to a tenant’s invitee for injury caused by a tenant’s dog. *Id.* at 323-24, 513 S.E.2d at 617.

Based on this law, it is indisputable that Defendants exercised reasonable care in maintaining the physical state of Wellspring with regard to shrubbery and lighting. The shrubs around Plaintiff’s door were never so high or thick that they impeded her ability to get to her

apartment, and Plaintiff's 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 Plaintiff's apartment. (Wright Dep. 56:10-14, **Ex. A**; Booth Dep. 129:22 – 130:2, **Ex. D**). Plaintiff's expert also reviewed work orders requested by Plaintiff and admits she never contacted Defendants about trimming the shrubs. (Booth Dep. 130:13-16, **Ex. D**). The lighting around Plaintiff's apartment was never so dim that she could not reach her apartment without difficulty. (Wright Dep. 56:15-18, **Ex. A**). Plaintiff's expert agreed that work orders requested by Plaintiff concerning breezeway lights appeared to have been completed by Defendants. (Booth Dep. 152:11-18, **Ex. D**). Plaintiff never had a personal injury relating to the physical state of her apartment and its lighting or shrubbery. She never tripped over any branches from the shrubbery or was injured by losing her way from lack of lighting. (Wright Dep. 56:19-25, **Ex. A**).

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

(b) The “Concealed Danger” Exception

Plaintiff may also try to argue application of the “concealed danger” exception. 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 court in *Cooke* refused to apply this exception to impose a duty on landlords to warn about lurking criminals. *Id.* at 1211. The court had strong language that the plaintiff was attempting to “rip[] the law on concealed dangers from its context (the physical soundness of the premises).” *Id.* 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.*

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 also does not apply.

(c) The “Common Areas” Exception

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. *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.*

Again, the same is true in this case. Plaintiff’s attempt to create a separate duty that distinguishes between providing “safe” physical premises (i.e., structurally) and “secure” premises that protect against third-party criminal activity is not accepted under South Carolina law. There is no evidence to suggest Defendants failed to comply with their obligations under SCLRTA and the case authority interpreting it. Therefore, the “common areas” exception also does not apply.

(d) The “Undertaking” Exception

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. In *Cooke*, the court 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.

This case does not involve a repair alleged to have caused Plaintiff's incident. To the extent Plaintiff argues maintenance of shrubbery or lack of lighting falls within the parameters of the "undertaking" exception, her argument fails for the same reasons set forth in the "affirmative acts" discussion at section IV.A(2)(a), *supra*. There is no evidence Defendants failed to comply with the applicable law set forth in the SCLRTA, and there is no evidence Plaintiff suffered a personal injury as a result of the physical/structural condition of the property.

To the extent Plaintiff intends to argue Defendants were negligent in describing Wellspring as a "safe" place, this argument also falls outside the scope of the undertaking exception. *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.

Therefore, the "undertaking" exception also does not apply to Plaintiff's case. Without an applicable exception, Plaintiff cannot prove Defendants owed her a duty, and her claim for negligence fails.

(3) Plaintiff 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*, 329 S.C. at 447, 494 S.E.2d at 834 (granting summary judgment in apartment complex case involving claim of inadequate security).

Negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. *Id.* In order to hold a landlord liable for the breach of any duty, the negligence of the landlord must lead directly to the 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 Plaintiff could prove Defendants owed her a duty (which Defendants dispute in section IV.A(1), *supra*), her negligence claim fails because she cannot prove a breach that proximately caused her injury. First, a willful and malicious crime (e.g., an abduction, kidnapping, and robbery) breaks the causal link between any negligence of Defendants and Plaintiff's injuries. As stated by the South Carolina Court of Appeals:

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

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

Applying this law, Plaintiff cannot prove proximate causation in this case. Plaintiff and her expert admit this case involves criminal activity. (Wright Dep. 118:5-7, **Ex. A**; Booth Dep. 74:1-12, **Ex. D**). She also admits that although crime may be deterred, it cannot all be prevented. (Wright Dep. 117:24 – 118:4, **Ex. A**). Plaintiff's expert admits there is no "crystal ball" or "magic pill" that allows us to predict what people may do with any certainty. (Booth Dep. 75:2-5, **Ex. D**). He also admits every crime cannot be prevented. (*Id.* at 74:25 – 75:1). As stated by Plaintiff's expert, security is a "people problem." (*Id.* at 73:13-14). Although it may be exacerbated by surroundings in which the security incident occurs, people are the ones who actually intend the harm. (*Id.* at 73:15-22). The perpetrators in this case committed their crime in spite of the fact that there Wellspring residents were on their balconies and in the parking lot as the incident happened. (Wright Dep. 67:1-7, **Ex. A**; Booth Dep. 164:24 – 165:18, **Ex. D**). They continued to commit the act in spite of the fact that another resident walked up with her dogs as the incident was occurring and engaged them in conversation. (Wright Dep. 74:17 – 75:6, **Ex. A**).

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

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

The lack of foreseeability is also apparent from testimony of local law enforcement officials. Defendant's counsel deposed the reporting and investigating officers for Plaintiff's case, Officer Mohammed Gabr and Detective Kevin Isenhoward. Both of these members of law enforcement who are familiar with the area in which Wellspring lies characterized the crime rate as "average." (Gabr Dep. 26:10-22, **Ex. C**; Isenhoward Dep. 51:24 - 52:9, selected portions of which are attached as **Ex. J**). Detective Isenhoward stated that it is not a particularly dangerous area; there were some incidents in 2008, but "since then it's fairly calm." (Isenhoward Dep. 52:2-9, **Ex. J**). Even Plaintiff's expert characterized crime in the area where Wellspring lies as "average." (Booth Dep. 108:12-17, **Ex. D**). Plaintiff's testimony also corroborates this characterization. Plaintiff was not aware of any other criminal incidents at Wellspring prior to

her incident. (Wright Dep. 57:18-20, Ex. A). 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).

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 them as part of a criminal investigation. (Gabr Dep. 15:18 – 16:14, Ex. C). 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, Ex. B). Plaintiff also testified that when she saw the perpetrators, she said “I need to get through, please.” (Wright Dep. 65:1-5, Ex. A). To the extent Plaintiff claims shrubbery and inadequate lighting “concealed” the perpetrators, neither her testimony nor the police report taken at the time of the incident support these factors as a proximate cause.

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

B. There is no legal or factual foundation for Plaintiff’s breach of implied warranty claim.

Plaintiff’s second cause of action is for breach of implied warranty of fitness, safety, and habitability. (Sec. Amend. Comp. ¶¶ 29-33). Plaintiff fails to provide any legal or factual basis for this claim in her Complaint; she merely alleges without elaboration that “Defendants gave the

Plaintiff an implied warranty. . . .” (Sec. Amend. Comp. ¶ 30). Regardless, Plaintiff’s claim is fatally deficient for numerous reasons.

First, assuming Plaintiff’s claim relates to some representation in her lease, South Carolina’s state and federal courts have held there is no implied warranty of fitness and habitability in leases. In *Holmes v. Rosner*, 289 S.C. 287, 346 S.E.2d 37 (Ct. App. 1986), a tenant asserted a breach of implied warranty of fitness and habitability claim for injuries from an apartment fire. The South Carolina Court of Appeals held that South Carolina does not recognize such a warranty in leases. *Id.* at 289, 346 S.E.2d at 38. The District of South Carolina more recently cited to *Holmes* in *Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp.2d 653, 656-57 (D.S.C. 2005), where the court granted summary judgment in a hotel fire case concerning the plaintiff’s theory of implied warranty of fitness or habitability for particular purpose.

If Plaintiff is relying on SCLRTA, her implied warranty claim fails for the same reasons set forth in section IV.A.(1)(a) (The “Affirmative Acts” Exception), *supra*, concerning interpretation of SCLRTA. South Carolina’s courts have interpreted SCLRTA’s “fit and habitable” provision at S.C. Code § 27-40-440 to relate only to the physical state of the premises and structural defects. *Fair v. U.S.*, 334 S.C. 321, 513 S.E.2d 616 (1999). Based on this interpretation, Defendants have not violated any provision of SCLRTA. Plaintiff’s apartment was clean. (Wright Dep. 45:13-15, Ex. A). The physical/structural state of the lighting and shrubbery never impeded her ability to enter or exit her apartment, and she suffered no personal injuries as a direct result of the physical condition of the property. (*Id.* at 56:10-25). Again, South Carolina does not interpret this provision to require protection from third-party criminal activity. *Cramer I*, 312 S.C. at 444, 441 S.E.2d at 319. Therefore, there is no evidence that Defendants violated SCLRTA or warranted Wellspring against third-party criminal activity.

Even if South Carolina's courts supported Plaintiff's interpretation, Plaintiff's claim still fails because she has not satisfied the prerequisites for a claim brought pursuant to SCLRTA. Although SCLRTA creates a cause of action by a tenant against a landlord for failure to make necessary repairs and do what is reasonably necessary to keep the premises in a habitable condition, the tenant is required to provide written notice of the breach to the landlord and afford the landlord reasonable time to cure it. *Watson v. Sellers*, 299 S.C. 426, 436, 385 S.E.2d 369, 374 (Ct. App. 1989); S.C. Code § 27-40-630. A tenant's rights under SCLRTA do not arise until the tenant provides such notice. S.C. Code § 27-40-630(d). Plaintiff has never produced any written notice provided by her to Defendants concerning any shrubbery, lighting, or other security concerns. Therefore, she has no private right of action under SCLRTA.

Plaintiff's ambiguous "implied warranty" claim is without basis in fact or in law. Therefore, Defendants are also entitled to summary judgment with regard to this claim.

C. Plaintiff has failed to state facts sufficient to constitute a cause of action for violation of the South Carolina Unfair Trade Practices Act.

Plaintiff's final claim is for alleged violation of SCUTPA. (Sec. Amend. Comp. ¶¶ 34-43). SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code § 39-5-20(a). For Plaintiff to recover under SCUTPA, she must show: (1) Defendants engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) Plaintiff suffered monetary or property loss as a result of the unfair or deceptive act(s). *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

As a threshold matter, Plaintiff 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 § 39-5-20(a). A review of South Carolina cases applying SCUTPA illustrates the claim is

predominantly asserted in non-personal injury matters arising from a transaction (e.g., forcing another competitor out of business, mislabeling a product's package, misrepresenting a machine's operating requirements, misrepresenting a used car's history or condition, and padding repair bills). *See generally* 28 S.C. Jur. Unfair Trade Practices Act § 3. Defendants dispute that SCUTPA has any application to Plaintiff's personal injury claim five years removed from the initial signing of her lease. Be that as it may, Defendants address each element of Plaintiff's SCUTPA claim to show that there is no genuine issue of material fact.

(1) There is no evidence of any actionable unfair or deceptive conduct by Defendants.

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

With regard to Plaintiff's allegation that Defendants represented Wellspring was "safe and secure," this alleged misrepresentation is not actionable because it is a representation of opinion rather than fact. *Cooke*, 741 F. Supp. at 1216. In *Cooke*, the plaintiff who was assaulted in her apartment asserted a fraud claim against her landlord based on statements by its agents that the complex was "safe." *Id.* at 1215. In its review of the fraud claim, the court reviewed the

difference between representations of “fact” versus “opinion.” For example, a statement that a person is a “competent mechanic” has been held to be a statement of opinion. *Id.* (citing *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985)). Conversely, a statement that a business is “profitable” has been held to be a statement of fact. *Id.* at 1216 (citing *Gilbert v. Mid-South Mach. Co, Inc.*, 267 S.C. 211, 227 S.E.2d 189 (1976)). As further guidance, the court cited to Restatement (Second) of Torts § 538A to explain that “an opinion is a statement ‘expressing (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment.’” *Id.* After reviewing these concepts, the court in *Cooke* stated as follows with regard to the fraud claim:

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

Cooke, 741 F. Supp. at 1216.

Similarly, a representation to Plaintiff that Wellspring was a “safe and secure place” is not deceptive 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, Plaintiff’s conduct was not deceptive, and this alleged misrepresentation is not actionable.

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

(2) There is no evidence that any alleged conduct affects the public interest.

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

For example, *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. *Burbach*, 326 S.C. 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 that the security deposit went toward its repair. *Id.*, 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 Plaintiff affects the public interest. Although Defendants expect Plaintiff to present a litany of sworn affidavits concerning failure to maintain lighting and shrubbery in an attempt to substantiate her claim(s), Plaintiff has not alleged she was deceived by Defendants with regard to maintenance of shrubbery or lighting. When asked specifically during her deposition how she was deceived and to provide specific examples, she only cited to two actions/omissions by Defendants: (1) the representation that Wellspring was a “safe and secure place;” and (2) the non-disclosure of other crime in Wellspring until after her incident. (Wright Dep. 118:12-19, 119:8-12, 119:17-24, 121:1-5, Ex. A). 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 expressing [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 120:6-10) (emphasis added).

There is no evidence Defendants engaged in a course of conduct whereby a standard business practice was to represent Wellspring to be a “safe and secure place” or to conceal from prospective tenants the level of crime at Wellspring to secure tenant leases. Indeed, Defendants’ Policies and Procedures Manual make clear that Wellspring “generally do[es] not provide security for [its] residents and *employees should never indicate that we do so.*” (Section 9 of Policies and Procedures Manual entitled “Maintenance” at p. 7, Ex. K) (emphasis added).

Defendants' policy concerning the non-provision of security discouraged any repetition of the alleged conduct.

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

(3) Plaintiff cannot prove monetary or property loss as a result of the allegedly unfair or deceptive acts.

Finally, as with her alleged claim, Plaintiff cannot prove the third element of a SCUTPA claim: that the unfair or deceptive acts caused Plaintiff monetary or property loss. First, Plaintiff admits 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, **Ex. A**) (“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). The deceptive conduct alleged by Plaintiff cannot be the proximate cause of her injury if it was not the basis for her decision to lease an apartment at Wellspring.

Second, Defendants incorporate by reference the arguments concerning proximate causation in section IV.A.(2) of this memorandum relating to Plaintiff's negligence claim. Even if Defendants deceived Plaintiff (which Defendants dispute), the alleged deceptive conduct did not cause Plaintiff's injury; two criminals who intentionally and deliberately abducted and robbed her caused her injury, and Defendants could not reasonably anticipate this conduct at the time of the incident. For this reason, Plaintiff also cannot prove proximate causation for her SCUTPA claim.

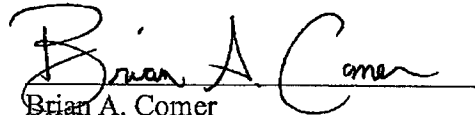
IV. CONCLUSION

There is no genuine issue of material fact with regard to any of Plaintiff's claims based on the law that governs the landlord/tenant relationship and interpretation of SCLRTA. It is unfortunate that Plaintiff was the victim of a crime committed by two unknown perpetrators. However, in virtually every decision addressing 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, Defendants are entitled to summary judgment on all of Plaintiff's claims.

Respectfully submitted,

COLLINS & LACY, P.C.

By:



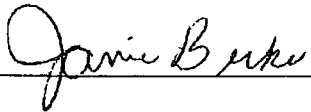
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Columbia, South Carolina
September 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2012, **Memorandum in Support of Defendants' Motion for Summary Judgment** was mailed to the below listed counsel of record via the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked.



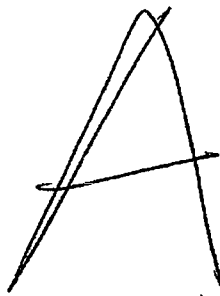
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Attorney for Plaintiff



00001

1 State of South Carolina) Court of Common Pleas

)

2 County of Richland) No.: 2011-CP-40-4068

3

4 Denise Wright,)

)

5 Plaintiff,)

) Deposition of

6 vs.) DENISE WRIGHT

)

7 PRG Real Estate)

Management, Inc.,)

8 Franklin Pineridge)

Associates, Karen)

9 Campbell, Individually)

and in her Representative)

10 Capacity as an Agent of)

PRG Real Estate)

11 Management,)

) April 16, 2012

12 Defendants.)

13

14 Deposition on oral examination of DENISE

15 WRIGHT, reported by Brad H. Thomas, Certified

16 Realtime Reporter and Notary Public in and for the

17 State of South Carolina; said deposition taken

18 pursuant to agreement and in accordance with the

19 South Carolina Rules of Civil Procedure, at the

20 Offices of Burriss & Ridgeway, 907 Elmwood Avenue,

21 Columbia, South Carolina, on April 16, 2012, at the

22 hour of 10:05 a.m.

23

GARBER REPORTING SERVICE, INC.

24 POST OFFICE BOX 12348it, Denise 2012-04-16.txt

Page 1

00039

1 Those were probably the two reasons I went there
2 first.

3 Q. Did you go to any other places before
4 going to Wellspring?

5 A. I went to a couple.

6 Q. What were some of the others?

7 A. Gosh, it's changed names now, but it was
8 Columbiana Place. It was on Columbiana Drive.
9 There's two apartment complexes on that road, but
10 they've both changed names now. So I don't know
11 what they are called. I went there. I looked at a
12 couple patio homes. That was basically about it.

13 Q. Okay. Do you recall the names of the
14 church members who had lived at Wellspring?

15 A. No, I don't. Neither one of them are
16 members there anymore either. So I don't remember
17 the names.

18 Q. And when approximately did you move into
19 Wellspring?

20 A. 2003.

21 Q. Do you remember what part of the year?

22 A. I think it was in May.

23 Q. How much time passed between when -- I
24 guess, when you began the process of looking for a
25 place of your own and actually moving into

00131

1 or a non-bottom floor apartment?

2 A. That was part of it. I didn't want the
3 bottom floor there either. I just felt safer up
4 high. And at Wellspring that was the only thing
5 they had available at the time too. So it worked
6 out for me.

7 Q. Okay. Let me change topics again and let
8 me just talk to you about your current condition.
9 Do you have any physical injuries that you are
10 claiming as a result of this incident?

11 A. No, I don't.

12 Q. Okay. Do you have any mental injuries
13 that you are claiming as a result of this incident?

14 A. Yeah. I feel like I do, yes.

15 Q. Tell me a little bit about that.

16 A. Nightmares. I still don't -- I don't
17 drive at night by myself at all. I have a terrible
18 fear of -- if a car has been on my bumper too long,
19 I will go out of the way to go a different way or
20 get somewhere safe. I don't travel. I don't go
21 into places that I don't know people.

22 Q. How do you get to choir practice?

23 A. It's right down -- my church is right down
24 the street from me. There for the first six months
25 or so I didn't go by myself. Someone came and

00134

1 do it by myself.

2 Q. Okay. And you're not undergoing any
3 treatment right now for any sort of distress --

4 A. No.

5 Q. -- or anxiety; is that right?

6 A. No.

7 Q. And you're not taking any medications
8 right now; is that right?

9 A. For anxiety, no.

10 Q. Did Ms. Zaepfel, I'm sure I'm pronouncing
11 that wrong, did her therapy help you?

12 A. Yes, it did.

13 Q. Is there anything that you can't -- well,
14 we've talked about driving at night and we talked a
15 little bit about, you know, when you do and when you
16 don't. Is there anything else that you either don't
17 or can't do now that you did before your incident?

18 A. I can't work. I gave up a job that I
19 loved. I planned on staying until 65.

20 Q. Okay.

21 A. I can't do that. And I --

22 Q. What kind of problems were you having at
23 work, if any?

24 A. Not trusting anybody. Anybody strange
25 that walked in the front door of the bank would

00140

1 your supervisor at work about your ability to work,
2 that kind of thing?

3 A. Yes.

4 Q. Who was that?

5 A. Karen Metts was one of them. Diane Brewer
6 was another. Michelle Pilcher, who was my manager
7 at the time, we talked.

8 Q. In terms of your compensation, was any of
9 it ever tied to any bonuses or anything like that,
10 any bonus compensation?

11 A. Yes.

12 Q. How did that work?

13 A. Every time I worked on a merger, which I
14 would go to a bank that we bought in another state,
15 there was a bonus for every time we went.

16 Q. Has there been any kind of merger since
17 your incident?

18 A. No. There was nothing.

19 Q. Did you get the money that you withdrew
20 from the ATM back from your bank?

21 A. Yes, I did.

22 Q. So you're not missing any money as a
23 result of the incident from your personal funds?

24 A. Right.

25 MR. COMER: I'll tell you what.

00137

1 doing that coming home because I had to drive so far
2 away." They did try to send me a couple other
3 places and I tried a job assignment in Chapin and I
4 got there and couldn't get out of the car.

5 Q. This was all through this Roper Temp
6 Agency?

7 A. Roper Temporary Service.

8 Q. Temporary Service?

9 A. I just finally had to call them and tell
10 them that I just couldn't do it.

11 Q. Did your bank -- did BB&T when you left
12 have any sort of early retirement system --

13 A. Yes.

14 Q. -- or something?

15 A. That's what they let me do. I wanted to
16 quit. I just wanted to walk away and quit. And
17 they said since I had 20 years in that I could
18 retire with partial benefits and, you know, they
19 would help me do that. So they helped me. I ended
20 up having to stay ten more -- or stay ten months
21 after the incident to get -- you know, make sure
22 everything was okay. And that's what I did instead
23 of quitting.

24 Q. And for someone who, you know, is not at
25 retirement age or anything any time soon, what did

00115

1 back to work?

2 A. She didn't release me. I released myself
3 and she said she would agree with it as long as I
4 continued counseling. And I tried it. I tried
5 after I went back to work going to counseling with
6 her, but it's awfully hard to do and work the kind
7 of hours and schedules we did. So I ended up
8 calling her and telling her I was going to try this
9 on my own.

10 Q. And I guess my question is have you ever
11 seen anyone correspondence from her to your employer
12 or anyone else saying, "She can go back to work"?

13 A. No, I never saw anything.

14 Q. Are you aware of whether she ever sent
15 anything like that?

16 A. No, I'm not aware of it.

17 Q. What is it -- you have brought a lawsuit
18 naming PRG and Wellspring and, I believe, Karen
19 Campbell as defendants. What is it that you believe
20 they should have done to prevent this?

21 A. Made me safe and secure.

22 Q. Okay. And --

23 A. Took care of the issues that caused the
24 problems. If it hadn't of been for those bushes, I
25 wouldn't have had to go through this.

00116

1 Q. Okay. So, I guess, do you mean that they
2 should have cut the bushes back more?

3 A. Down.

4 Q. Cut the bushes down?

5 A. Dug them up. Whatever it takes to make
6 you feel safe to be able to walk into your
7 apartment.

8 Q. Had you felt unsafe prior to this
9 incident?

10 A. Yes.

11 Q. Okay. What, if anything, else? I mean,
12 we've talked about the bushes. What else should
13 they have done?

14 A. And the lights, the security lights. And
15 the first thing I questioned her the next day was,
16 "Where are these security officers that are supposed
17 to be walking the beat? I didn't see anybody.
18 There was nobody there when I needed them. I didn't
19 see one. I've never seen one the whole time I've
20 lived there."

21 Q. And what did she say?

22 A. Just shrugged her shoulders, "I'm sorry."

23 Q. And I apologize if I've already asked
24 this, but do you remember who this -- was this Kylie
25 or --

00039

1 Those were probably the two reasons I went there
2 first.

3 Q. Did you go to any other places before
4 going to Wellspring?

5 A. I went to a couple.

6 Q. What were some of the others?

7 A. Gosh, it's changed names now, but it was
8 Columbiana Place. It was on Columbiana Drive.
9 There's two apartment complexes on that road, but
10 they've both changed names now. So I don't know
11 what they are called. I went there. I looked at a
12 couple patio homes. That was basically about it.

13 Q. Okay. Do you recall the names of the
14 church members who had lived at Wellspring?

15 A. No, I don't. Neither one of them are
16 members there anymore either. So I don't remember
17 the names.

18 Q. And when approximately did you move into
19 Wellspring?

20 A. 2003.

21 Q. Do you remember what part of the year?

22 A. I think it was in May.

23 Q. How much time passed between when — I
24 guess, when you began the process of looking for a
25 place of your own and actually moving into

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1 for me.

2 Q. Did they say they couldn't do it, but you

3 could or that you weren't permitted to do it?

4 A. They just said they couldn't do that.

5 Q. Okay.

6 A. They didn't tell me yes or no whether I

7 could or couldn't.

8 Q. Okay. Did you ever read -- did you

9 receive any paperwork as --

10 A. Yes.

11 Q. Signed a lease, I assume?

12 A. Yes.

13 Q. What else?

14 A. That's it.

15 Q. Okay. Did you read your lease?

16 A. I did.

17 Q. Give you any sort of welcome pack or

18 anything like that?

19 A. Yeah, there was a welcome pack telling you

20 about schools and --

21 Q. Do you still have any of that material?

22 A. I probably do in a box somewhere.

23 Q. Okay. And your initial lease that you

24 entered into, how long was it for? A year?

25 A. A year.

00056

1 they ever tell you, you know, first you need to call
2 this number, then you need to call that, like call
3 911 and then call us or what?

4 A. No.

5 Q. Okay. Any other representations about
6 security?

7 A. Nothing except that they did have officers
8 that patrolled regularly.

9 Q. Okay. You mentioned earlier the shrubs
10 around the ramp to your home. Were these shrubs
11 ever so high that you couldn't get to your door?
12 Did they ever impede your ability to get to your
13 door?

14 A. No.

15 Q. Okay. How about the lighting, did any
16 lights being out in the parking lot ever impede your
17 ability to get to your apartment?

18 A. No.

19 Q. Did you ever have any personal injury --
20 and I'm not talking about your incident in the
21 complaint, but did you ever have any personal injury
22 relating to the shrubbery or the lighting, for
23 example, tripping because of the shrubs or anything
24 like that?

25 A. No.

00118

1 prevented?

2 A. It can certainly be deterred.

3 Q. Okay.

4 A. I know you can't prevent it all.

5 Q. Do you agree with me that this was
6 criminal activity?

7 A. Oh, yes.

8 Q. And my understanding then is you believe
9 that Wellspring should have done something to
10 prevent the criminal activity?

11 A. Yes, I do.

12 Q. Okay. One of the claims you've brought is
13 under something called the South Carolina Unfair
14 Trade Practices Act. Did you ever feel that someone
15 at Wellspring or at PRG deceived you?

16 A. Yes.

17 Q. Okay. Tell me how they deceived you.

18 A. They told me it was a safe and secure
19 place.

20 Q. Who told you it was a safe and secure
21 place?

22 A. It would be Kylie. She's the one that
23 I -- I think. Don't hold me to that because that's
24 been many years ago as to who was there when I
25 filled out the application.

00117

1 A. I don't remember.

2 Q. Okay.

3 A. I really don't know who it was. I was out
4 of it.

5 Q. Okay. So we've talked about the officer,
6 we've talked about the bushes, we've talked about
7 the lighting. Is there anything else you think they
8 should have done to take care of your safety?

9 A. Well, nothing except things that I had
10 brought to their attention before of fencing the
11 property in so that -- because they always would say
12 those kids that were jumping the fence to get in the
13 pool were just riffraff, normal Harbison riffraff
14 that we couldn't control. Well, put some fences up
15 then or do something, but I was always told that
16 wasn't feasible.

17 Q. Well, did you ever consider leaving when
18 they told you that wasn't feasible?

19 A. Yeah. Yeah, I did, but I could afford
20 that place and it was close to work, but, yes, I did
21 consider it.

22 Q. Okay. But you never acted on that?

23 A. No, I did not.

24 Q. Do you think all criminal activity -- I
25 mean, do you think criminal activity can be

00118

1 prevented?

2 A. It can certainly be deterred.

3 Q. Okay.

4 A. I know you can't prevent it all.

5 Q. Do you agree with me that this was
6 criminal activity?

7 A. Oh, yes.

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9 that Wellspring should have done something to
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19 place.

20 Q. Who told you it was a safe and secure
21 place?

22 A. It would be Kylie. She's the one that
23 I -- I think. Don't hold me to that because that's
24 been many years ago as to who was there when I
25 filled out the application.

00067

1 Q. Okay. Was anyone else there? Did anyone
2 else witness this?

3 A. Not at that moment. My mind started
4 racing and I could hear people. I could hear there
5 were people out on their balconies, people in the
6 parking lot, but I couldn't see anybody until we
7 started walking.

8 Q. Right. Did you give any consideration to
9 just screaming out loud?

10 A. Yes, I did. I did.

11 Q. And what made you decide -- did you do
12 that?

13 A. No, I did not.

14 Q. Okay. What made you decide not to?

15 A. I had two guns, one in my back and one in
16 my head. All I was thinking about was surviving the
17 minute.

18 Q. Okay. So -- and I apologize. If you need
19 to take a break at any time, you just let me know.

20 A. I'm fine. I'm fine.

21 Q. So at this point they've got a gun on you
22 and you're looking down. What happened next? Did
23 they walk you back to your car or what?

24 A. No. They just sort of turned -- they got
25 up. They were either crouched or sitting, I'm not

00074

1 pictures of them. So I really don't know.

2 Q. Okay. So at this point they tell you that
3 you're going to -- they want you to go to an ATM?

4 A. Right.

5 Q. And they take you back to your car. At
6 this point did you see anyone?

7 A. Yes.

8 Q. Who did you see?

9 A. I don't know her name. When we came down
10 the steps here and came back toward this, somewhere

11 right in here, between there and the trash can --

12 Q. For the record, you're looking on the
13 second picture in Exhibit No. 4 around the bottom
14 sidewalk; is that right?

15 A. Right.

16 Q. Okay.

17 A. A lady was walking her two dogs. She
18 walked her dogs every night about the same time,
19 somewhere between 10:30 and 11:00. She was coming

20 up and he -- the two guys were right on me. The one
21 that had the gun to the front dropped the gun down
22 and put it in his pants. The other one kept it in
23 my shirt and he said, "You better not say one word.
24 You better not scream. You better not try to run or
25 do anything because we'll kill both of you." And he

00075

1 said, "Don't speak to her."

2 She had already said, "Hi, how are you?"

3 And he spoke. He told her, said, "We're

4 fine."

5 And she said something about the weather.

6 He commented about her dogs. And he told the other

7 guy behind me under his breath, he said, "Go to the

8 car with her."

9 And so he kept the gun in my back and kept

10 close and told me that I better act like we were

11 long lost lovers and stick right with him. And I

12 didn't know whether they were going to shoot that

13 woman there. I didn't know what they were going to

14 do. So I started going with him, the one behind me,

15 to the car.

16 And I heard him ask her what kind of dog

17 she had and she -- he told her he had the same kind.

18 And they chitchatted for a few minutes and he

19 finally said, "Well, I've got to go. Have a good

20 night." And he caught up with us before we got to

21 the car.

22 Q. Okay. And did you ever talk with her

23 afterwards?

24 A. Afterwards. The day after, yeah.

25 Q. Okay. And do you as you sit here today

00057

1 Q. Over your time of living there did you
2 ever come to have any sort of understanding about
3 the neighborhood or about the incidents of crime or
4 anything like that?

5 A. No.

6 Q. Okay. In other words, sharing notes with
7 other residents, things like that?

8 A. No.

9 Q. Did you ever have any conversations with
10 other residents where they said that something had
11 happened to them?

12 A. No.

13 Q. Other than this incident, did you ever --
14 leading up to this incident when you were abducted
15 in the parking lot had you ever had any other
16 criminal incidents yourself?

17 A. No.

18 Q. Were you aware of any other criminal
19 incidents in that -- in the complex?

20 A. No.

21 Q. Okay. Let me shift gears again and let's
22 talk a little bit about the day of your incident.
23 What do you remember about that day as you sit here?
24 And what I mean is can you just kind of walk me
25 through how your day went in terms of getting up for

00065

1 Q. What did you say?

2 A. I said, "I need to get through, please."

3 And then I saw the guns and I said, "If those are
4 real, you need to put them away." And that's when
5 they grabbed me.

6 Q. Okay. Where did they grab you?

7 A. One grabbed me around my neck and one
8 around the waist.

9 Q. And did he do -- I'm using my hand like a
10 choking --

11 A. No. With the arm. One put the gun in my
12 back, under my shirt, and the other one put the gun
13 at my head.

14 Q. Okay. Can you describe -- was it two
15 gentlemen?

16 A. Two.

17 Q. Okay. And can you describe them for me?

18 A. Actually I didn't look. My head was down.
19 I was fumbling with my keys to get into my apartment
20 and I saw the guns is the first thing I saw. And
21 then when I looked up to see if it was kids playing
22 with play -- I mean, I realized they were not play
23 guns. They were young, two young boys. They did
24 not have masks on. They didn't have gloves. No way
25 to disguise themselves or the guns at all. It was

00045

1 Q. Do you know how many apartments are in
2 Building No. 22? Estimate?

3 A. I think it was eight.

4 Q. Okay. Do you know how many buildings are
5 at the entire complex?

6 A. No, I don't.

7 Q. Do you have any idea of the number of
8 units total? Were you ever told or anything?

9 A. No.

10 Q. Do you have any idea as to the number of
11 residents?

12 A. No.

13 Q. How was the apartment in terms of your
14 needs, cleanliness, that kind of thing?

15 A. It was fine.

16 Q. Did you ever have any problems with it?

17 A. Yes.

18 Q. Okay. Tell me a little bit about some of
19 the problems you had.

20 A. The lights. The one in the parking lot
21 coming up to the apartment complex and the one right
22 outside my door were constantly burnt out.

23 Q. Okay. Let's start with the one in the
24 breezeway. I assume that would be right outside
25 your apartment?

00056

1 they ever tell you, you know, first you need to call
2 this number, then you need to call that, like call
3 911 and then call us or what?

4 A. No.

5 Q. Okay. Any other representations about
6 security?

7 A. Nothing except that they did have officers
8 that patrolled regularly.

9 Q. Okay. You mentioned earlier the shrubs
10 around the ramp to your home. Were these shrubs
11 ever so high that you couldn't get to your door?
12 Did they ever impede your ability to get to your
13 door?

14 A. No.

15 Q. Okay. How about the lighting, did any
16 lights being out in the parking lot ever impede your
17 ability to get to your apartment?

18 A. No.

19 Q. Did you ever have any personal injury --
20 and I'm not talking about your incident in the
21 complaint, but did you ever have any personal injury
22 relating to the shrubbery or the lighting, for
23 example, tripping because of the shrubs or anything
24 like that?

25 A. No.

00118

1 prevented?

2 A. It can certainly be deterred.

3 Q. Okay.

4 A. I know you can't prevent it all.

5 Q. Do you agree with me that this was

6 criminal activity?

7 A. Oh, yes.

8 Q. And my understanding then is you believe

9 that Wellspring should have done something to

10 prevent the criminal activity?

11 A. Yes, I do.

12 Q. Okay. One of the claims you've brought is

13 under something called the South Carolina Unfair

14 Trade Practices Act. Did you ever feel that someone

15 at Wellspring or at PRG deceived you?

16 A. Yes.

17 Q. Okay. Tell me how they deceived you.

18 A. They told me it was a safe and secure

19 place.

20 Q. Who told you it was a safe and secure

21 place?

22 A. It would be Kylie. She's the one that

23 I-- I think. Don't hold me to that because that's

24 been many years ago as to who was there when I

25 filled out the application.

00119

1 Q. Well, and I understand, but this is my
2 opportunity to ask you questions.

3 A. Yes.

4 Q. So if you're saying that someone deceived
5 you, what I want to know is who and when and how?

6 A. Well, it's probably better to say the
7 manager at that time.

8 Q. Okay. And what did they say?

9 A. That it was a safe and secure place. I
10 told them my situation, that I was a single woman
11 alone and it was important to me that I felt safe
12 and secure.

13 Q. Okay. So this was verbal?

14 A. Verbal.

15 Q. Okay.

16 A. Yes.

17 Q. Any other way that you felt deceived
18 beyond them saying this is a safe and secure place?

19 A. Not until after this was all over and I
20 found out how many other incidents have gone on
21 there and we were never -- I never knew that. I
22 would have made a decision to leave before something
23 happened had I known there were so many other
24 incidents there.

25 Q. And so you believe they should have been

00121

1 Q. Other than the verbal expression, any
2 other way that they -- and we talked about the
3 incident reports. Anything else that made you feel
4 like you were deceived?

5 A. No.

6 Q. Okay. We've been talking about security
7 officer. Did anybody ever use the term courtesy
8 officer with you? Did you ever hear somebody
9 referred to in that manner?

10 A. No.

11 Q. Did you ever speak with a security officer
12 or courtesy officer at the complex?

13 A. No.

14 Q. Prior to this incident did you ever report
15 an incident that would have required you to speak
16 with a courtesy officer or security officer?

17 A. No. I called -- I directly called the
18 sheriff's department when those young men were
19 soliciting.

20 Q. Okay. Why did you call the sheriff's
21 department when the -- are you talking about the
22 magazine subscriptions?

23 A. Right. Yes.

24 Q. Why did you call the sheriff's department?

25 A. Because the number that I would have

00119

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2 opportunity to ask you questions.

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5 you, what I want to know is who and when and how?

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20 found out how many other incidents have gone on
21 there and we were never -- I never knew that. I
22 would have made a decision to leave before something
23 happened had I known there were so many other
24 incidents there.

25 Q. And so you believe they should have been

00120

1 telling you about anything going on on the premises?

2 A. I think we deserved a right to know.

3 Q. Did you ever make that request prior to
4 this incident?

5 A. I didn't know about it until after I left.

6 Q. We've been talking about deception. It's
7 called the South Carolina Unfair Trade Practices

8 Act. Let me ask you about unfairness. Did you ever
9 feel like someone treated you unfairly?

10 A. No.

11 Q. Okay. Other than this verbal
12 representation that you say was made by the
13 manager -- when was that made? Was it when you
14 moved in? Was it later or when?

15 A. When I went to fill out an application.

16 Q. All right. Was it a man or a woman?

17 A. Woman.

18 Q. How old?

19 A. Young.

20 Q. Okay. Young 20's, young 30's?

21 A. Late 20's probably.

22 Q. What color hair did she have?

23 A. It seemed like it was brown.

24 Q. Okay. Long, short hair?

25 A. I really don't remember.

00118

1 prevented?

2 A. It can certainly be deterred.

3 Q. Okay.

4 A. I know you can't prevent it all.

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6 criminal activity?

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11 alone and it was important to me that I felt safe
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21 there and we were never -- I never knew that. I
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24 incidents there.

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00121

1 Q. Other than the verbal expression, any
2 other way that they -- and we talked about the
3 incident reports. Anything else that made you feel
4 like you were deceived?

5 A. No.

6 Q. Okay. We've been talking about security
7 officer. Did anybody ever use the term courtesy
8 officer with you? Did you ever hear somebody
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18 sheriff's department when those young men were
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21 department when the -- are you talking about the
22 magazine subscriptions?

23 A. Right. Yes.

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00120

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20 Q. Okay. Young 20's, young 30's?

21 A. Late 20's probably.

22 Q. What color hair did she have?

23 A. It seemed like it was brown.

24 Q. Okay. Long, short hair?

25 A. I really don't remember.

00038

1 old to lung cancer, watching her go through that.

2 That was probably -- rates right up there about the
3 same feelings.

4 Q. Approximately when was that?

5 A. She passed away in 2009.

6 Q. Did you have to seek any counseling for
7 that?

8 A. No.

9 Q. Ever receive any medical treatment of any
10 kind?

11 A. No.

12 Q. Let's shift gears again and start talking
13 a little bit about your move into Wellspring. I
14 think you told me that you lived at -- was it the
15 Wychwood address?

16 A. Wychwood.

17 Q. And did you decide to move to Wellspring
18 as a result of separating and getting your own
19 space?

20 A. Right.

21 Q. Tell me a little bit about why you chose
22 Wellspring.

23 A. Several people from my church had lived
24 there at one time or another and had recommended it.
25 It was right down the street from where I worked.

00039

1 Those were probably the two reasons I went there
2 first.

3 Q. Did you go to any other places before
4 going to Wellspring?

5 A. I went to a couple.

6 Q. What were some of the others?

7 A. Gosh, it's changed names now, but it was
8 Columbiana Place. It was on Columbiana Drive.

9 There's two apartment complexes on that road, but
10 they've both changed names now. So I don't know
11 what they are called. I went there. I looked at a
12 couple patio homes. That was basically about it.

13 Q. Okay. Do you recall the names of the
14 church members who had lived at Wellspring?

15 A. No, I don't. Neither one of them are
16 members there anymore either. So I don't remember
17 the names.

18 Q. And when approximately did you move into
19 Wellspring?

20 A. 2003.

21 Q. Do you remember what part of the year?

22 A. I think it was in May.

23 Q. How much time passed between when -- I
24 guess, when you began the process of looking for a
25 place of your own and actually moving into

00040

1 Wellspring?

2 A. Probably a month. About a month.

3 Q. Okay. So we've talked about proximity and

4 the fact that some of your friends at church had

5 recommended it. Anything else that made you choose

6 it?

7 A. No.

8 Q. Did you go and -- I presume you walked

9 around the grounds and looked at an apartment?

10 A. I did.

11 Q. Okay. And were they to your liking?

12 A. Yes.

13 Q. Did you make your decision based on any of

14 the amenities that were there?

15 A. Yes.

16 Q. What were some of the amenities?

17 A. Had a pool. We were close to the Harbison

18 Recreation Center, which we were allowed to use and

19 I wanted to be able to use that facility. I was

20 told that there were security officers on duty. So

21 I felt like it would be a safe place.

22 Q. Who told you that?

23 A. The manager at that time. I think her

24 name was Kylie. I don't know her last name.

25 Q. Okay. And did she say -- well, what did

B

RICHLAND COUNTY SHERIFFS
DEPT
SC0400000

INCIDENT REPORT

INFORMATION
ONLY

CASE NUMBER
0809186819

NCIC
INQ. ENTD.

INCIDENT TYPE ARMED ROBBERY - 120				COMPLETED ☒ YES ☐ NO	FORCED ENTRY ☐ YES ☒ NO	PREMISE TYPE PARKING LOT/GARAGE	UNITS ENTERED	TYPE VICTIM ☒ Individual ☐ Business ☐ Financial Inst ☐ Government ☐ Relig. Orgn. ☐ Soc/Public ☐ Other ☐ Unknown ☐ Police Off.						
2. 100 KIDNAPPING/ABDUCTION - 100				☒ YES ☐ NO	☐ YES ☒ NO	PARKING LOT/GARAGE								
3.				☐ YES ☒ NO	☐ YES ☒ NO									
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER) 500 HARBISON BLVD, BLDG 22, COLA, SC						ZIP CODE 29212	WEAPON TYPE HANDGUN							
INCIDENT DATE 09/18/2008	24 HR. CLOCK 22:30	TO	DATE 09/18/2008	24 HR. CLOCK 23:05	DISP. DATE 09/19/2008	DISPATCH DATE/TIME 24 HR. CLOCK DISP. TIME 23:13	TIME ARRIVED 23:25	DEPART. TIME 00:55						
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE) WRIGHT, TONI, D			RELATIONSHIP TO SUBJECT #1 ST #2 #3		RESIDENT J	RACE W	SEX F	AGE 59 /	ETH N	DAYTIME PHONE 803-407-0989	EVENING PHONE F B			
ADDRESS 500 HARBISON BLVD, 2210				CITY COLUMBIA		STATE SC	ZIP CODE 29212	LOCATION NO.						
VICTIM'S NAME (LAST, FIRST, MIDDLE) WRIGHT, TONI, D			RELATIONSHIP TO SUBJECT #1 ST #2 ST #3		RESIDENT J	RACE W	SEX F	AGE 59 /	ETH N	DAYTIME PHONE 803-407-0989	EVENING PHONE F B			
HEIGHT 506	WEIGHT 170	HAIR BLN	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.										
ADDRESS 500 HARBISON BLVD, 2210				CITY COLUMBIA		STATE SC	ZIP CODE 29212	LOCATION NO.						
VIOLENCE (MCT) ☐ YES ☒ NO ☐ EXPLAIN-														
COMPLAINANT OF ANY NON-VIOLENCE ☐ YES ☒ NO ☐														
VICTIM(S) USING: ALCOHOL ☐ YES ☒ NO ☐ UNK. ☐ DRUGS: ☐ YES ☒ NO ☐ UNK. ☐ TYPE:														
TWO MAN VEH. ☐ ONE MAN VEH. ☐ DETECTIVE/PLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐														
*J-This Jurisdiction. S-State. O-Out of State. U-Unknown.														
☒ SUSPECT	NAME (LAST, FIRST, MIDDLE) UNKNOWN					RACE B	SEX M	AGE 20 / 29	ETH N	DATE OF BIRTH	HEIGHT 600	WEIGHT 170	HAIR	EYES
☐ RUNAWAY														
☐ WANTED	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC. , DARK SHIRTS									DAYTIME PHONE F B	EVENING PHONE F B			
☐ WARRANT														
☐ ARREST	ADDRESS UNKNOWN					CITY		STATE SC	ZIP CODE	LOCATION NO.				
☐ JAIL														
☐ SUMMONS	SUBJECT(S) USING: ALCOHOL ☐ YES ☒ NO ☐ UNK. ☐ DRUGS: ☐ YES ☒ NO ☐ UNK. ☐ TYPE					ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO ☐		DATE/TIME OF OFFENSE 9/18/2008 10:30:00 PM		DATE/TIME OF ARREST				
DAY OF THE WEEK S M T W T F S UNK														
HOW REPORTED														
A= OFFICER DISPATCHED ON CALL D= COMPLAINT WRITTEN IN B= REPORT TAKEN BY PHONE E= OFFICER INITIATED C= COMPLAINANT WALKED IN F= OTHER														
DIFF. FACTOR														
A= RESISTANCE/HOSTILITY B= WEAPONS C= UNFOUNDED CALLS D= MENTAL SUBJECT E= COMPLAINANT FRE-QUENTLY INTOXICATED F= DOMESTIC N= NORMAL														
ARMED ROBBERY/KIDNAPPING/ABDUCTION														
ON THE ABOVE LISTED AND TIME THE R/O WAS DISPATCHED TO 1143 CHADFORD RD. IN REFERENCE TO AN ARMED ROBBERY THAT OCCURRED AT THE ABOVE LISTED I/L. THE COMPLAINANT STATED TO THE R/O THAT WHILE SHE WAS COMING BACK HOME SHE PARKED HER VEHICLE AND WALKED TO HER APARTMENT BUILDING. THE C/V SAW TWO BLACK MALES SITTING ON THE WALKING RAMP IN FRONT OF THE 2200 BUILDING. ONE SUBJECT POINTED A HANDGUN AT HER AND SAID "I'LL BLOW YOUR HEAD OFF IF YOU DON'T GIVE ME YOUR MONEY". THE C/V TOLD THE SUBJECT THAT SHE DID NOT HAVE ANY CASH AND HANDED														
JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY SC0400000						JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY SC0400000								
TYPE (GROUP)	77	20												
STOLEN	1	780												
DAMAGED	0	0												
BURNED	0	0												
RECOVERED	1	0												
SEIZED	0	0												
TOTAL VALUE 781														
0														
0														
1														
0														
SUBJECT IDENTIFIED ☐ YES ☒ NO ☐														
SUBJECT LOCATED ☐ YES ☒ NO ☐														
S. F. ☐														
☒ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED														
ARRESTED UNDER 18 ☐ EX-CLEAR UNDER 18 ☐														
ARRESTED 18 AND OVER ☐ EX-CLEAR 18 AND OVER ☐														
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ EXTRADITION DENIED. 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE NOQ. STUDY.														
REPORTING OFFICER(S) Gabr, Mohammed			DATE 9/19/2008	UNIT NUMBER 1422	APPROVING OFFICER Turner, Jody			DATE 9/19/2008	UNIT NUMBER					
					FOLLOW UP INVESTIGATION ☒ YES ☐ NO ☐			OFFICER MCRAE, DON	DATE 9/20/2008	UNIT NUMBER 1202				

ADDITIONAL NARRATIVE

Agency Name: RICHLAND COUNTY SHERIFFS DEPT	ORI #: SC0400000	Report Date/Time: 9/18/2008 10:30:00 PM	OCA #: 0809186819

HIM HER WALLET. THE SUBJECT TOOK HER WALLET AND LOOKED IN IT AND DID NOT FIND ANY CASH BUT FOUND A BB&T BANK CARD. THE SUBJECTS TOLD THE C/V TO TAKE THEM TO THE BANK AND WHILE THE C/V AND THE SUBJECTS WERE GOING TO HER VEHICLE THEY SAW A LADY WALKING HER DOG IN THE PARKING LOT. THE SUBJECTS TALKED TO THE LADY ABOUT HER DOG THEN GOT IN THE C/V'S VEHICLE IN WHICH ONE SUBJECT SAT ON THE PASSENGER SEAT AND THE OTHER SUBJECT SAT IN THE BACK SEAT. THE C/V STATED THAT THE SUBJECT ON THE PASSENGER SEAT PUT SOME KIND OF A GREEN SCARF ON HIS FACE AFTER HE ENTERED THE VEHICLE AND HAD A HANDGUN IN HIS LAP POINTING AT HER. THE SUBJECT IN THE BACKSEAT HAD A HANDGUN POINTING AT THE BACK OF HER NECK. THE C/V TOOK THE SUBJECTS TO THE BB&T BANK ON HARBISON BLVD. AND THEY WENT TO THE DRIVE THROUGH ATM MACHINE AND MADE TWO WITHDRAWALS OF \$500 AND \$200. AFTER THE TRANSACTIONS WERE MADE. THE SUBJECTS TOLD THE C/V TO TAKE THEM TO PINEY GROVE RD. AND THEN DROVE THROUGH BONNIE FOREST RD. TO BROAD RIVER ROAD. THE SUBJECT IN THE BACK SEAT TOLD THE C/V TO GIVE HIM HER WALLET AGAIN IN WHICH THE SUBJECT TOOK THE WALLET AND GAVE IT BACK TO HER THEN TOLD HER THAT HE NEEDED ANOTHER \$700. THE C/V TOOK THE SUBJECTS TO BB&T ON DUTCH SQUARE IN WHICH SHE WITHDREW \$80 FROM THE ATM MACHINE.

AGENCY: RICHLAND COUNTY SHERIFFS
ORI #: SC0400000
Report Date / Time: 09/18/2008 22:30
Incident #: 0809186819

ADDITIONAL NARRATIVE

Agency Name: RICHLAND COUNTY SHERIFFS DEPT	ORI #: SC0400000	Report Date/Time: 9/18/2008 10:30:00 PM	OCA #: 0809186819

SUPPLEMENTAL REPORT

THE SUBJECTS TOLD THE C/V TO GO TO THE HARDEES PARKING LOT ON DUTCH SQUARE BLVD. AND WHILE IN THE HARDEES PARKING LOT THE SUBJECTS TOLD HER THAT THEY WERE GOING TO RAPE HER. HOWEVER, THE C/V WAS NOT SEXUALLY MOLESTED AT ALL. AFTER THIS, THE C/V STARTED CRYING AND THE SUBJECTS TOLD HER TO DRIVE THEM TO CROSSROADS APARTMENTS VIA BURNING TREE RD. WHEN THEY ARRIVED AT CROSSROADS APARTMENTS THE SUBJECTS TOLD THE C/V TO UNLOCK THE DOORS OF HER VEHICLE. THE SUBJECTS THEN TOLD THE C/V TO SLOW DOWN AND NOT TO LOOK IN THE REAR VIEW MIRROR BECAUSE THEY HAD ANOTHER VEHICLE FOLLOWING THEM THE ENTIRE TIME AND DID NOT WANT THE C/V TO SEE IT. AFTER THE C/V SLOWED DOWN THE SUBJECTS EXITED THE VEHICLE AND ORDERED HER TO KEEP GOING AND NOT TO TRY TO DO ANYTHING BECAUSE THEY KNEW WHERE SHE LIVED. ONCE THE SUBJECTS LEFT THE VEHICLE THE C/V DROVE QUICKLY TO BROAD RIVER AND HEADED TO HER SON IN LAW'S HOUSE. THE R/O COMPLETED AN ARMED ROBBERY QUESTIONNAIRE. INV. POULIN WAS NOTIFIED OF THE INCIDENT. ALSO INV. MANN WAS NOTIFIED AND PROCESS THE SCENE.

NOTE: THE C/V STATED THAT THE SUBJECTS WERE WEARING DARK IN COLOR SHIRTS PULLED OVER THE TOP OF THEIR HEADS. IT IS UNKNOWN IF THEY WERE BUTTONED DOWN OR PULLOVER SHIRTS.

THE C/V'S VEHICLE INFORMATION:

MAKE:SATURN MODEL:VUE STYLE:SUV COLOR:GREY SC TAG: ASX164 VIN: 3GSCL33P48S504509

C

00001

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND) CASE NO.: 2011-CP-40-4068

3

4 DENISE WRIGHT,)

5 Plaintiff,) DEPOSITION OF

6 vs.) MOHAMMED GABR

7 PRG REAL ESTATE MANAGEMENT,) AUGUST 14, 2012

8 INC., FRANKLIN PINERIDGE)

9 ASSOCIATES, KAREN CAMPBELL,)

10 INDIVIDUALLY AND IN HER)

11 REPRESENTATIVE CAPACITY AS AN)

12 AGENT OF PRG REAL ESTATE)

13 MANAGEMENT,)

14 Defendants.)

15)

16 Deposition on oral examination of Mohammed Gabr,

17 reported by Frances C. Moyd, Court Reporter and Notary

18 Public in and for the State of South Carolina; pursuant to

19 Rule 30 of the South Carolina Rules of Civil Procedure;

20 said deposition was taken at the Law Offices of Collins &

21 Lacy, P.C., 1330 Lady Street, Columbia, South Carolina, on

22 Tuesday, the 14th day of August, 2012, scheduled for

23 o'clock a.m. and commencing at the hour of 10:07 o'clock

24 a.m.

25

00029

1 Q. Yeah, down the side there's a series of --
2 well, wait a minute. I apologize, I'm looking at a
3 different version. Yeah, we'll get to that in a
4 minute, I'm sorry.

5 A. Sure -- sure.

6 Q. Let's go into your narrative, it says that
7 on the above listed and time the R/O -- does that
8 mean responding officer?

9 A. Yes.

10 Q. Was dispatched to 1143 Chadford Road, is
11 that right?

12 A. Right.

13 Q. And that's, based on your recollection, her
14 daughter's residence; is that right?

15 A. Right.

16 Q. It says in reference to an armed robbery
17 that occurred at the above listed I/L -- what does
18 the I/L mean?

19 A. Incident location.

20 Q. The complainant stated to the responding
21 officer that while she was coming home, she parked
22 her vehicle and walked to her apartment building, the
23 -- what is the C/V?

24 A. Complainant / victim.

25 Q. Saw two black males sitting on the walling

00030

1 ramp in front of the 2200 building. I want to ask
2 you about that. Did she indicate at any time that
3 these individuals were concealed or that she couldn't
4 see them or anything like that?

5 A. At that point -- at that point, I believe
6 they were unconcealed. At that point they were just
7 sitting on the ramp.

8 Q. Okay.

9 A. And they put a scarf after that -- I mean,
10 after they took her in the car and stuff, but at that
11 point, I believe that they were -- they were
12 unconcealed, they were just sitting on the ramp.

13 Q. And this ramp that you're describing from
14 having been at Wellspring Apartments, is your
15 understanding of where she was describing that they
16 would have been in plain view?

17 MR. HOOD: Object to the form.

18 A. Would they been in plain view?

19 Q. Yes. You can answer. He may object --

20 MR. HOOD: Object to the form.

21 Q. Yeah, he may object at times, but you can
22 still answer.

23 A. Well, it depends on how you look at it. I
24 mean, the ramp, like, the apartment -- the parking
25 lot itself if somebody's in the parking lot, they're

00031

1 -- you know, you can totally see 'em, but if
2 somebody's sitting on the ramp, it's kind of dark --
3 a little darker area, and --

4 Q. Okay.

5 A. -- I mean, I can't say -- I can't say it's
6 plain view.

7 Q. Did she ever say anything about them being
8 concealed by any bushes or anything like that?

9 A. No.

10 Q. And it says one subject pointed a handgun
11 at her and said I'll blow your head off if you don't
12 give me your money. The C/V told the subject she did
13 not have any cash and handed him her wallet -- bear
14 with me, I'm gonna try and move this along. The
15 subject took her wallet and looked in it and did not
16 find any cash, but found a BB&T bank card, and that's
17 what you were testifying to earlier; is that right?

18 A. Yes.

19 Q. The subjects told the C/V to take them to
20 the bank and while the C/V and the subjects were
21 going to her vehicle, they saw a lady walking her dog
22 in the parking lot. Did she ever tell you the name
23 of that person?

24 A. She did not.

25 Q. Have you ever spoken with the woman who was

00026

1 A. Parking lots, yes. -

2 Q. How often would you say you do that?

3 A. How often -- probably, maybe once a week

4 and whenever we get calls. Whenever, I mean, like

5 regular patrol, like if I'm just patrolling, I

6 probably do it once a week. And if we get -- you

7 know, sometimes we get calls, you know, motor vehicle

8 theft or assault or something, we still -- we

9 respond.

10 Q. Would you consider yourself to be fairly

11 familiar with that general area where Wellspring is?

12 A. I'm pretty much familiar, yes.

13 Q. And I guess I just wanted to ask you what

14 you consider that area of town to be like, if you can

15 categorize it, would you consider it to be average in

16 terms of crime, above average, below average?

17 A. I'll say average. We get -- I mean,

18 besides this, we usually get some car theft, just

19 regular domestic stuff, you know, assaults and stuff.

20 like that -- I mean, I can't say it's above average.

21 Q. You cannot say it's above average?

22 A. No. It's average.

23 Q. Let me ask you a little bit more about the

24 report. Further down, it says visible injury, no.

25 Does that mean that just when you looked at her, she

00015

1 Q. And if we were to break that information
2 down into categories, one category would be an
3 alleged victim's account of everything that happened,
4 is that a fair statement?

5 A. Yes.

6 Q. And that would include, for example, an
7 interview of the victim, what happened, who was
8 involved, where it happened, that kind of thing, --

9 A. Yes -- yes.

10 Q. -- is that a fair statement? And does much
11 of the incident report come from an interview of the
12 alleged victim?

13 A. Right.

14 Q. Does it come from any other sources?

15 A. If there were any witnesses or -- I usually
16 just interview the victim, anybody else that was
17 involved, any witnesses or anything.

18 Q. Would you agree with me that it's important
19 to get as accurate of information as possible when
20 you're putting it into an incident report?

21 A. Yes.

22 Q. And is one of the reasons for that that
23 somebody else may be relying on this incident report,
24 for example, an investigation?

25 A. Right.

00016

1 Q. And is there ever a time where, for
2 example, maybe a similar crime happens in an area,
3 somebody would pull another incident report to see
4 maybe if there's some sort of pattern or if the same
5 person could be involved or anything like that?

6 A. Yes, that's the -- during the investigation
7 process they pull the reports, you know, like for
8 similar incidents in the area and just compare 'em
9 and see if, you know, same suspect or something like
10 that.

11 Q. And so that's another reason that it would
12 be important to keep as accurate of an incident
13 report as possible, is that right?

14 A. Yes.

15 Q. Let me ask you before we go any further a
16 little bit more about what you brought with you
17 today. We asked you to bring your full investigative
18 file concerning this matter. Is there anything else?
19 Are there any notes or are there any interviews or
20 anything like that that are not a part of what you
21 brought with you?

22 A. There is nothing else; that's it.

23 Q. We've already marked the incident report
24 that you brought with you as, I believe, Deposition
25 Exhibit No. 3.

D

00001

1 State of South Carolina) Court of Common Pleas

) Fifth Judicial Circuit

2 County of Richland) No.: 2011-CP-40-4068

3

4 Denise Wright,)

)

5 Plaintiff,)

) Deposition of

6 vs.) WILLIAM F. BOOTH, CPP

)

7 PRG Real Estate)

Management, Inc.,)

8 Franklin Pineridge)

Associates, Karen)

9 Campbell, Individually)

and in her)

10 Representative Capacity)

as an Agent of PRG Real)

11 Estate Management,)

) September 20, 2012

12 Defendants.)

13

14 Deposition on oral examination of William F.

15 Booth, CPP, reported by Jeffrey M. Thomas,

16 Registered Professional Reporter and Notary Public

17 in and for the State of South Carolina; said

18 deposition taken pursuant to agreement and in

19 accordance with the South Carolina Rules of Civil

20 Procedure, at the Offices of McGowan, Hood & Felder,

21 LLC, 1517 Hampton Street, Columbia, South Carolina,

22 on September 20, 2012, at the hour of 9:30 a.m.

23

GARBER REPORTING SERVICE, INC.

24 POST OFFICE BOX 12348, William 2012-09-20.txt

Page 1

00065

1 MR. HOOD: This is eight, right?

2 MR. COMER: Yes.

3 BY MR. COMER:

4 Q. Okay. Now we'll finally get to the good

5 stuff. What specifically are the opinions you

6 intend to offer in this case, Mr. Booth?

7 A. Do you want the opinions and the basis for

8 the opinions or do you want the opinions first and

9 then the basis second?

10 Q. Let's do the opinions first and the basis

11 second.

12 A. Okay. I have four basic opinions in this

13 case. The first of those is that this is a unique

14 property, unique to the Columbia area and unique as

15 apartment complexes go. And it essentially, as

16 representatives of the owners have said, it's an

17 apartment complex that is wrapped around a public

18 park.

19 And as such I would characterize it as

20 public property which is privately owned. And it is

21 my opinion that this placed an additional

22 responsibility on the managers and owners for

23 security that they did not meet. And that the

24 incident that occurred, which I believe was

25 foreseeable, occurred because of the lack of

00066

1 security and the inadequacy of the security that

2 they provided.

3 Q. Hold one second. Okay. Let me make sure

4 I captured that. My understanding is you have four

5 basic opinions, and this is the first one; is that

6 right?

7 A. Yes.

8 Q. And the first one is this is a unique

9 property that you believe to be public property that

10 is privately owned which basically put additional

11 responsibilities on management and security that

12 were not met. And the incident occurred because of

13 a lack of security and inadequacy. Is that a fair

14 characterization?

15 A. The foreseeable incident.

16 Q. Foreseeable incident. Okay. What is your

17 second opinion?

18 A. The second opinion is that the vegetation

19 on the property was allowed to become overgrown and

20 provided a hiding place for the individuals who

21 committed this crime. If -- it is my opinion if the

22 vegetation had been properly maintained that this

23 crime would not have occurred.

24 Q. Okay. That is your second opinion. What

25 is your third opinion?

00067

1 A. The third one is the lighting on the
2 property was totally inadequate and was a definite
3 causative factor in this crime, and I'm referring to
4 the September 18th, 2008, kidnapping and robbery of
5 Ms. Wright. And that if the lighting had been
6 adequate and had met the standards then existing
7 that this crime would not have occurred.

8 Q. Okay. That was your third opinion. What
9 is your fourth opinion?

10 A. The fourth opinion is that the complex
11 represented to residents that they had security
12 either in the form of security officers or what they
13 called courtesy officers. And that those officers
14 were expected to patrol the property. And that it
15 was reasonable for the residents to rely on those
16 patrols of the officers.

17 It is my opinion that had the courtesy
18 officers been there and been patrolling the property
19 as required that the perpetrators in this crime more
20 likely than not would not have been in the position
21 to rob and kidnap Ms. Wright.

22 Q. Okay. Are there any other opinions you
23 intend to offer in this case?

24 A. Those are the four basic opinions that I
25 intend to offer.

00079

1 Q. It's not a hotel?

2 A. No, it's not a hotel.

3 Q. And hotels and apartment complexes are
4 different, aren't they?

5 A. They are different.

6 Q. Do you know -- I know you've reviewed some
7 case law in this case. Do you recall looking at
8 some of that?

9 A. I do.

10 Q. Do you know if any of the cases you have
11 reviewed treat hotels and apartments differently?

12 A. They do.

13 Q. How do they treat them differently?

14 A. The -- some of the case law reviewed was
15 related to the South Carolina Landlord and Tenant
16 Act. And it has some specific things that it lays
17 out.

18 Q. Okay.

19 A. And although South Carolina also has some
20 law related to innkeepers and security, it doesn't
21 have a similar law related to apartments and
22 security.

23 Q. So based on the law that you reviewed,
24 it -- the case law you've reviewed, it appears that
25 the law treats them differently in terms of the

00080

1 security provided?

2 A. It treats the general apartment that they
3 describe in those cases in one way and hotels and
4 motels in another way.

5 Q. Would you agree that hotels are generally
6 -- and I'm not suggesting you are a hotel expert.
7 I'm just asking would you generally agree that
8 hotels are for shorter term stays?

9 A. Yes.

10 Q. And generally anyone with money can secure
11 a room at a hotel, correct?

12 A. No.

13 Q. Okay. Well, if there is availability.
14 I'm sorry.

15 A. Well, actually that is not even true
16 either.

17 Q. Okay. Well, tell me what makes you say no
18 to that question.

19 A. South Carolina is one of the areas where I
20 see this practice the most. They don't -- many
21 innkeepers will not rent to someone who is renting
22 with cash. So money is not necessarily the issue.
23 Many innkeepers will not rent to someone
24 who lives and produces an I.D. that shows that they
25 live within 30 to 50 miles of the inn. There are

00081

1 some other things that they will tend to exclude,
2 some previous behaviors that they may have -- been
3 experienced.

4 Many innkeepers have a do not rent list
5 with individuals specifically named on the list that
6 they will no longer rent to. So the statement that
7 you said is not one that I can agree with.

8 Q. Okay. And I -- you learn something new
9 every day. And I appreciate the distinction. Let
10 me ask you a different question then.

11 If someone walks in from the general
12 public and a room is available and they have an
13 acceptable form of payment, and there is not any
14 other reason to exclude them from prior behavior,
15 living in the proximity, that kind of thing,
16 generally can they get a room?

17 A. Yes.

18 Q. In other words, they don't require a
19 background or security check or anything like that
20 for a hotel, do they?

21 A. That's correct.

22 Q. People aren't required to sign a lease for
23 a hotel, are they?

24 A. They are not.

25 Q. And you would agree with me that the case

00082

1 law that you reviewed at least suggests that any
2 member of the public is free to say at a hotel?

3 A. I seem to recall that, yes.

4 Q. Would you agree that Wellspring is a place
5 where people tend to reside for a longer period of
6 time?

7 A. For longer than a hotel, yes.

8 Q. And some people may have it as a primary
9 residence, correct?

10 A. That's correct.

11 Q. And you would agree that someone's primary
12 residence is private property?

13 A. This is a unique property. And I don't
14 believe that this is the -- all of the other
15 statements that we have said up until this point I
16 think have been applying to the general apartment
17 complex in South Carolina.

18 This is the only one that I have ever seen
19 like this. And I have done hundreds of evaluations
20 of apartment complexes. Sergeant Isenhoward stated
21 that it was unique for Columbia. It is -- it
22 basically -- this apartment complex, Wellspring,
23 allows any person whatsoever who wishes to enter
24 their property and enter their common area.

25 And they make no attempt, in fact, they

00129

1 MR. COMER: Sure.

2 BY MR. COMER:

3 Q. I handed you what I believe we marked as
4 Deposition Exhibit Number 11. You've seen these
5 pictures before, haven't you?

6 A. I have.

7 Q. Do these appear to be or have these been
8 represented to be pictures of the vegetation around
9 Ms. Wright's unit around the time of her abduction?

10 A. They have.

11 Q. That is what you understand them to be,
12 correct?

13 A. That is what I understand.

14 Q. Take a look at the picture on what I have
15 marked as Page D at the bottom. And also look at
16 Page E. Do you think you've seen those pages?

17 A. I have.

18 Q. I'm asking you a safety question. You
19 remember the earlier questions we had about the
20 difference between safety and security, right?

21 A. Yes.

22 Q. Okay. Let me ask you a safety question.
23 Do any of the branches on Page D or E appear to be
24 impeding anyone's ability to walk to the apartment
25 without, for example, tripping over a branch or

00130

1 something like that?

2 A. No.

3 Q. Do you know if Ms. Wright was ever injured

4 because of shrubs that impeded onto her walkway?

5 A. I do not.

6 Q. Have you reviewed any of the work orders

7 from Ms. Wright in this case? In other words,

8 orders that she called in to the management about

9 any concerns with her apartment?

10 A. I did see some work orders. I don't

11 recall specific ones, but they are like dishwasher

12 or something similar.

13 Q. Do you know if she ever -- if any of the

14 work orders indicate she ever contacted management

15 about the height of her shrubbery?

16 A. The work orders do not indicate that.

17 Q. Do you have any belief as you sit here

18 today, any reason to believe that any of the work

19 orders have been falsified?

20 A. No, I don't.

21 Q. Do you have any knowledge as to whether

22 Wellspring contracted out the landscaping, including

23 the trimming of the shrubs, in this case?

24 A. They did.

25 Q. And, I'm sorry, I think I asked you this.

00152

1 Q. Did you look to see if there was ever
2 any -- did you look to see if there was ever a
3 report about -- strike that. I'm asking a terrible
4 question. Did you ever look at her work orders to
5 see if she reported anything about the pole light?

6 A. I didn't -- I don't believe I ever saw any
7 work orders reflecting pole lights at all.

8 Q. Okay. Did you see --

9 A. So I don't believe they were filling out
10 work orders for pole lights.

11 Q. Did you look at any work orders that
12 referenced breezeway lights?

13 A. I did.

14 Q. Did those work orders appear to have been
15 completed?

16 A. Yes. It's hard to determine when they
17 were completed sometimes, but they appear to have
18 been completed.

19 Q. And those work orders predate this
20 litigation, don't they?

21 A. They do.

22 Q. Do you have any reason to think -- well,
23 strike that. Let me ask you about courtesy officers
24 now. Do you know of any law that requires the
25 provision of a courtesy officer at an apartment

00196

1 the country that have public walking trails going
2 through them?

3 A. I did not.

4 Q. So you wouldn't be familiar with any -- if
5 there is such a property, you wouldn't be familiar
6 with any security measures, lack of or otherwise,
7 for any of those properties, right?

8 A. I would not.

9 MR. COMER: Tell you what, if you
10 guys don't mind waiting, I'm just basically looking
11 to see if I missed anything. We can take a
12 five-minute break or --

13 MR. HOOD: Sure.

14 MR. COMER: -- we can just sit here a
15 minute, either way.

16 MR. HOOD: We can take five.

17 (Recess 1:50 to 1:56.)

18 BY MR. COMER:

19 Q. Back on the record. Just a couple other
20 quick questions. Have you ever reviewed the South
21 Carolina Residential Landlord Tenant Act?

22 A. I have.

23 Q. Do you know if it contains anything within
24 it that requires an apartment complex or landlord to
25 provide security for a tenant?

00197

1 A. I don't recall security being in it.

2 Q. Well, if I've missed anything, I can't
3 imagine what it is.

4 A. I can't imagine what it is either.

5 MR. COMER: So at this point let me
6 turn it over.

7 EXAMINATION

8 BY MR. HOOD:

9 Q. Let me just go through this because it's
10 going to be quick. And then we'll get out of here.
11 You get yours, and then we'll get out of here.
12 Okay. The first thing I want to do is Brian asked
13 you about what you would do when you would go to an
14 apartment complex to determine whether there was
15 something that needed to be done or not. Do you
16 recall that whole line of questioning?

17 A. I do.

18 Q. Okay. And then used the term
19 "methodology." Do you recall that?

20 A. I do.

21 Q. Okay. Now, before we go there, I think
22 you said that the protocol that you utilized was
23 from A.S.I.S.?

24 A. It is.

25 Q. What is A.S.I.S.?

00074

1 Q. And Ms. Wright was a victim of a crime,
2 you would agree?

3 A. She was.

4 Q. And specifically, I believe, it was two
5 individuals who abducted her; is that right?

6 A. That is my understanding.

7 Q. And they made her drive around to various
8 A.T.M.s withdrawing money?

9 A. That is what I understand.

10 Q. And so you agree with me that is criminal
11 activity of a third party in this case, correct?

12 A. It is. It is.

13 Q. And when we talk about security in this
14 case, we are talking about preventing Ms. Wright
15 from being the victim of a crime, aren't we?

16 A. We are.

17 Q. And that is because security -- and
18 because security involves people, we can never
19 completely guarantee it, can we?

20 A. Never guarantee what?

21 Q. We can never completely guarantee
22 security, can we?

23 A. I'm not sure how you -- how one would
24 guarantee security.

25 Q. Okay. We can't prevent every crime?

00075

1 A. We can't prevent every crime, no.

2 Q. In other words, there is no crystal ball

3 or magic pill that would allow us to predict what

4 people may do with any certainty?

5 A. That's correct.

6 Q. All we can do is try and deter it, to

7 avoid it; is that right?

8 A. We know what works. And we can practice

9 those things that work.

10 Q. When I say "it" I mean all we can do is

11 try and deter crime and avoid it; is that right?

12 A. That's correct, using those things that we

13 know work. That's correct.

14 Q. Okay. Do you agree that security is a

15 response to conditions?

16 A. It is.

17 Q. And, in other words, industries generally

18 don't engage in unnecessary security practices, do

19 they?

20 A. They don't.

21 Q. And they respond to -- they respond after

22 events have shown them that such responses are

23 necessary, don't they?

24 A. They respond, yes, because it's a response

25 to the existing conditions at the time and place.

00074

1 Q. And Ms. Wright was a victim of a crime,
2 you would agree?

3 A. She was.

4 Q. And specifically, I believe, it was two
5 individuals who abducted her; is that right?

6 A. That is my understanding.

7 Q. And they made her drive around to various
8 A.T.M.s withdrawing money?

9 A. That is what I understand.

10 Q. And so you agree with me that is criminal
11 activity of a third party in this case, correct?

12 A. It is. It is.

13 Q. And when we talk about security in this
14 case, we are talking about preventing Ms. Wright
15 from being the victim of a crime, aren't we?

16 A. We are.

17 Q. And that is because security -- and
18 because security involves people, we can never
19 completely guarantee it, can we?

20 A. Never guarantee what?

21 Q. We can never completely guarantee
22 security, can we?

23 A. I'm not sure how you -- how one would
24 guarantee security.

25 Q. Okay. We can't prevent every crime?

00075

1 A. We can't prevent every crime, no.

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3 or magic pill that would allow us to predict what

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13 know work. That's correct.

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17 Q. And, in other words, industries generally

18 don't engage in unnecessary security practices, do

19 they?

20 A. They don't.

21 Q. And they respond to – they respond after

22 events have shown them that such responses are

23 necessary, don't they?

24 A. They respond, yes, because it's a response

25 to the existing conditions at the time and place.

00073

1 A. Yes.

2 Q. Do you agree with that characterization?

3 A. Yes.

4 Q. Would you agree that security is
5 protection from injury or loss caused by deliberate
6 action of another party?

7 A. Yes.

8 Q. And would you agree that the difference
9 between those two concepts as set forth in this Risk
10 Management Associates' document is people and
11 intent?

12 A. Yes.

13 Q. And so security is a people problem?

14 A. It is.

15 Q. And with regard to intent, that means
16 there is an intent to do harm; is that right?

17 A. Well, security is a people problem, but it
18 can be exacerbated by the surroundings in which the
19 security incident occurs.

20 Q. Okay. But the people are the ones who
21 actually intend to do the harm; is that right?

22 A. That's correct.

23 Q. And security would encompass a criminal
24 action; is that right?

25 A. It would.

00164

1 A. I am.

2 Q. Do you have any knowledge as to the kinds
3 of dogs she has?

4 A. I don't recall.

5 Q. Okay. So you don't know if they are -- if
6 she indicated they were aggressive or anything like
7 that?

8 A. I know that she had to hold one of the
9 dogs back.

10 Q. Okay. So we least know that someone being
11 in proximity to these criminals with some dogs that
12 had to be held back didn't stop them from doing it,
13 don't we?

14 A. We know that.

15 Q. And --

16 A. However, let me qualify that. The
17 kidnapping had already taken place and was
18 progressing at that point. So they were faced with
19 no other choice but to continue on or else shoot the
20 dogs and the neighbor.

21 Q. So your belief is that they started this
22 crime before she came walking up?

23 A. Yes.

24 Q. Now, obviously, like I said the record
25 doesn't know this, Building 2200 is not a building

00165

1 by itself, right? There are other buildings around

2 it is what I'm trying to say.

3 A. Oh, yes.

4 Q. It's part of a larger complex?

5 A. Yes.

6 Q. And so there are buildings to the left of

7 it, to the right of it, and even in front of the

8 walkway to Ms. Wright's residence; is that right?

9 A. Yes.

10 Q. And so we know people live in those

11 buildings, right?

12 A. Yes.

13 Q. They could hear somebody scream if they

14 screamed, right?

15 A. Correct.

16 Q. And we know that possibility didn't deter

17 them, too, right?

18 A. That's correct.

19 Q. Your belief is that the Defendants in this

20 case were at fault, correct?

21 A. That's correct.

22 Q. What percentage of fault do you apportion

23 to the two individuals who actually committed the

24 crime in this case?

25 MR. HOOD: Objection to the form.

00162

1 A. We do not.

2 Q. And, in fact, have you seen anything to
3 suggest that they were being followed when Ms.
4 Wright was driving them around?

5 A. I have.

6 Q. In another vehicle?

7 A. That's correct.

8 Q. Would that tend to indicate that maybe
9 they came there in a car with maybe some sort of
10 accomplice?

11 A. It might.

12 Q. It would not suggest that they walked up
13 to the complex, would it?

14 A. I have no way of knowing.

15 Q. Okay. Your opinion is that the
16 Defendants' actions or omissions were the proximate
17 cause of this abduction, correct?

18 A. Absolutely.

19 Q. I know and you know, but let me make my
20 record. You haven't spoken to the two individuals
21 that abducted the Plaintiff, right?

22 A. I have not.

23 Q. You don't know directly why they were
24 positioned where the Plaintiff claims they were at
25 the time of her abduction, do you?

00163

1 A. I do not.

2 Q. And if they said it was because they had
3 been watching the Plaintiffs coming and goings,
4 that would be relevant, wouldn't it?

5 A. Yes.

6 Q. And if they said they didn't care one way
7 or the other about the shrubs, that would also be
8 relevant, wouldn't it?

9 A. Yes.

10 Q. And if they said that any amount of
11 lighting wouldn't have mattered, that would also be
12 relevant, wouldn't it?

13 A. Yes.

14 Q. Do you know if anyone witnessed this
15 crime?

16 A. I know that a neighbor did not know she
17 was witnessing it, but she actually did.

18 Q. Do you know the name Lisa Watson? Have
19 you ever heard that name?

20 A. Yes.

21 Q. And you haven't spoken with Ms. Watson in
22 this case?

23 A. I have not.

24 Q. Are you aware that she was there with her
25 dogs?

00075

1 A. We can't prevent every crime, no.

2 Q. In other words, there is no crystal ball
3 or magic pill that would allow us to predict what
4 people may do with any certainty?

5 A. That's correct.

6 Q. All we can do is try and deter it, to
7 avoid it; is that right?

8 A. We know what works. And we can practice
9 those things that work.

10 Q. When I say "it" I mean all we can do is
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12 A. That's correct, using those things that we
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14 Q. Okay. Do you agree that security is a
15 response to conditions?

16 A. It is.

17 Q. And, in other words, industries generally
18 don't engage in unnecessary security practices, do
19 they?

20 A. They don't.

21 Q. And they respond to -- they respond after
22 events have shown them that such responses are
23 necessary, don't they?

24 A. They respond, yes, because it's a response
25 to the existing conditions at the time and place.

00182

1 A. May be.

2 Q. All right. But in retail establishment

3 cases you don't include motor vehicle theft or part

4 theft type incidents?

5 A. Typically don't.

6 Q. But in this case you've included them in a

7 residential area?

8 A. That's right.

9 (Mr. Ridgeway entered the room.)

10 BY MR. COMER:

11 Q. Looking at the second page, would you

12 agree with me that the vast majority on this page

13 are also vandalism or some type of theft of boat or

14 motor vehicle, that kind of thing?

15 A. I do.

16 Q. And I don't think there are any instances

17 on this page of what I would call violent crime like

18 assault or battery or anything like that, right?

19 A. I think you are correct.

20 Q. Okay. This list -- because I've gotten a

21 lot of criminal incident reports in this case.

22 Would this list constitute the ones you believe to

23 be relevant to your analysis?

24 A. Actually the ones that I would use in my

25 analysis, inside or outside of litigation, would be

00183

1 what is on the first page.

2 Q. So the ones on the first page are it?

3 A. That is it. I found these others

4 interesting. The same issues are continuing. I

5 made the little note up there in the balloon because

6 I noted that Ms. Wright said that she was told that

7 there was a security -- that they had security

8 officers when she signed her original lease.

9 This seems to support the fact that they

10 did have security officers at the time. Also noted

11 I could find nothing where they told people that the

12 didn't have security officers.

13 Q. I'm sorry. Where -- when you are talking

14 about the balloon, what are you talking about?

15 A. On the second page, it's the 2003, 2004.

16 Q. Yes, sir.

17 A. See the balloon up there?

18 Q. Uh-huh.

19 A. All of these are just notes to myself.

20 Q. Right.

21 A. It says, "Guard company, South Carolina

22 Security Enforcement Agency, in 5/15/03 report.

23 Q. What does that mean?

24 A. There is a report of a crime on 5/15/03 at

25 the location. And noted in that crime is a

00179

1 that I did not include. So these are those crimes
2 that appeared to be stranger-on-stranger crimes that
3 happened out in the parking lot that would have been
4 impacted by better lighting, courtesy officer
5 patrolling, better sight lines, things of this
6 nature.

7 Q. Okay. Looking on this first page, it
8 looks -- would you agree with me -- and we are going
9 to talk about some of the specifics in a minute, but
10 that the vast majority of the ones listed on this
11 page relate to motor vehicle theft or theft of
12 parts, that kind of thing?

13 A. That is what you have in parking lots.
14 That's right.

15 Q. All right. There is one dated
16 December 4th, 2006, which is assault. Do you see
17 that?

18 A. Yes.

19 Q. And that is stranger-on-stranger assault?

20 A. Yes.

21 Q. Okay. Further down there is a July 13th,
22 2008, attempted home invasion. Do you see that one?

23 A. I do.

24 Q. Was that when the people were home?

25 A. That is my understanding.

00185

1 correct, that is different from just having a

2 courtesy officer, right?

3 A. Absolutely.

4 Q. And just to make sure I'm clear, the

5 ones -- the criminal incident report on the page

6 that at the top says, 05-06-07-08, those are the

7 ones you believe to be relevant to your analysis?

8 A. Yes.

9 Q. The ones on the next page really aren't

10 relevant?

11 A. Well, they were interesting, you know.

12 Q. Okay. So at least in terms of the ones

13 listed at the page that has 05-06-07-08, looking on

14 that page, we basically just have two incidents of

15 violent crime where someone was assaulted or someone

16 was about to be part of a home invasion?

17 A. Yes.

18 Q. Two instances that predate Ms. Wright's

19 incident, correct?

20 A. Correct.

21 Q. Neither of these are abduction, right?

22 A. You are right.

23 Q. Do you know if -- neither of them,

24 obviously, involve instances of people assaulted by

25 someone hiding behind a shrub, right?

00186

1 A. Not as far as I know.

2 Q. Do you remember from looking at any
3 criminal incident report where a victim said that it
4 was dark and there was a lack of lighting?

5 A. I don't remember that.

6 Q. Do you remember from looking at any
7 criminal incident report where a victim said that
8 the shrubbery was overgrown?

9 A. I don't remember that.

10 Q. Okay. Looking at the first page of your
11 site visit notes, I notice about four or five lines
12 down it says, "She advised that she approached her
13 apartment from the parking lot. There were two
14 black males that were seated on the ramp that led up
15 to her door." Did that come from the criminal
16 incident report?

17 A. It did.

18 Q. Further down, and I apologize I'm
19 backtracking to lights here, you say about halfway
20 down, "Lights could be turned out with a single
21 switch that is available to anyone, even outside the
22 apartment." What are you talking about there?

23 A. I can show you better with a picture, if
24 you are asking for that reason?

25 Q. Sure.

00108

1 A. I think they categorized the crime as
2 being -- I don't know if they said it was a low
3 crime area, but an average -- just an average area.

4 Q. Average crime?

5 A. Yes.

6 Q. Did you determine -- strike that. And did
7 you rely on that testimony to any degree for your
8 opinions?

9 A. Yes. I had pulled crime reports prior to
10 reviewing their testimony. So I was aware of what
11 was going on in the area.

12 Q. How would you characterize crime in this
13 area? And when we are talking about the area, let's
14 characterize it the way I think it was characterized
15 in the Gabr and Isenhoward depositions, and I
16 believe that was the Harbison area.

17 A. I think it's an average area.

18 Q. Okay.

19 A. I don't think it's low crime. I don't
20 think it's high crime. I think Wellspring has got a
21 significant number of incidents occurring, but I
22 think the area is an average crime area.

23 Q. Okay. Did you review the policy and
24 procedure manual for Wellspring Apartments?

25 A. I did.



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(Cite as: 741 F.Supp. 1205)

▷

United States District Court,
D. South Carolina,
Columbia Division.

Stacey D. COOKE, Plaintiff,
v.

ALLSTATE MANAGEMENT CORPORATION, d/b/a
The Park Apartments, Defendant.

Civ. A. No. 3:89-1476-15.
Feb. 28, 1990.

Tenant brought action against landlord, seeking to recover damages after she was allegedly assaulted by an intruder who gained access to her second-floor apartment. Landlord moved for summary judgment. The District Court, Hamilton, J., held that: (1) the South Carolina Residential Landlord and Tenant Act imposed a duty on the landlord to provide habitable premises, but did not require the landlord to protect the tenant from criminal activity; (2) genuine issues of material fact existed, precluding summary judgment, on whether the landlord negligently left a ladder near the tenant's apartment that was used by the intruder to obtain entry; (3) South Carolina did not impose an affirmative duty on landlords to protect tenants from criminal activity; and (4) the landlord's representation that the apartment complex was "safe" was one of opinion rather than fact and could not form the basis of a fraud action.

Motion for summary judgment granted in part and denied in part.

West Headnotes

[1] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or

Dangerous Conditions. Most Cited Cases

Under South Carolina law, exculpatory clause of residential form lease did not bar tenant's negligence action against landlord arising out of alleged criminal assault in tenant's apartment; although exculpatory clause explicitly mentioned loss, injury or damage arising out of criminal acts, clause did not tie those criminal acts to any alleged negligence of landlord.

[2] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Obligation imposed on landlords by South Carolina Residential Landlord and Tenant Act to keep premises fit and habitable did not extend to protecting tenants from criminal activity. S.C.Code 1976, §§ 27-40-20(a), (b)(2), 27-40-440(a)(2).

[3] Negligence 272 ⚡234

272 Negligence

272III Standard of Care

272k234 k. Voluntarily Assumed Duties. Most Cited Cases

(Formerly 272k2)

Under South Carolina law, person who undertakes affirmative act has duty to use reasonable care.

[4] Federal Civil Procedure 170A ⚡2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort Cases in General. Most Cited Cases

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Genuine issue of material fact existed, precluding summary judgment in tenant's negligence action against landlord under South Carolina law, about whether landlord negligently maintained premises by leaving unsecured ladder which was allegedly used by intruder to climb onto tenant's second-floor balcony, obtain entry to her apartment, and assault her.

[5] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

South Carolina's "concealed danger" exception to general rule that landlord has no affirmative duty to maintain physical condition of premises did not extend to protecting tenants against criminal activity.

[6] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

South Carolina's common areas exception to general rule that landlord has no general affirmative duty to maintain physical condition of premises did not apply to criminal activity; common areas exception applied to physical condition of premises.

[7] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Landlord's use of standard sliding glass doors with

standard locks was not actionable under South Carolina law by tenant who was allegedly assaulted by intruder who entered apartment through sliding glass door from balcony; tenant merely alleged that locks chosen for all sliding glass doors in apartment complex were inadequate, not that anyone negligently repaired lock.

[8] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Landlord's advice about safety of apartment complex did not give rise to actionable negligence under South Carolina law after intruder entered tenant's apartment and allegedly assaulted her; duty of due care in giving advice did not apply to casual conversation about apartment complex.

[9] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

South Carolina law does not impose duty on landlords to protect tenants from criminal activity.

[10] Negligence 272 ⚡433

272 Negligence

272XIII Proximate Cause

272k430 Intervening and Superseding Causes

272k433 k. Intentional or Criminal Acts. Most Cited Cases

(Formerly 272k62(1))

Under South Carolina law, criminal act is not necessarily superseding cause as matter of law that would prevent negligence from being proximate cause of injury.

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[11] Federal Civil Procedure 170A ⚡2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort Cases in General. Most

Cited Cases

Genuine issues of material fact existed, precluding summary judgment for landlord in tenant's negligence action under South Carolina law, about whether landlord's leaving unsecured ladder near tenant's apartment was proximate cause of injuries that occurred when intruder allegedly used ladder to obtain entry to tenant's second-floor apartment and assault her.

[12] Fraud 184 ⚡11(1)

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k8 Fraudulent Representations

184k11 Matters of Fact or of Opinion

184k11(1) k. In General. Most Cited Cases

Landlord's representation that apartment complex was "safe" was expression of opinion, rather than fact, and, thus, could not form basis of fraud action by tenant who was allegedly assaulted by intruder.

*1206 Joseph H. McCulloch, Jr., Swerling, Harpooflian & McCulloch, Columbia, S.C., for plaintiff.

Charles E. Hill, Robert A. Bernstein, Columbia, S.C., for defendant.

ORDER

HAMILTON, District Judge.

This action arises out of a criminal assault that occurred at approximately 3:00 a.m. on September 15, 1988. Plaintiff was asleep in her apartment at The Park apartment complex in Richland County, South Carolina when an intruder entered her apartment through the sliding glass door to the balcony. Plaintiff alleges that the attacker was able to reach the balcony of her second floor apartment by using a ladder left nearby. The attacker attempted to rape plaintiff and stabbed her several times before fleeing. Henry Mack Taylor, Jr. pled guilty to first degree burglary and attempted criminal sexual assault.

Plaintiff has brought this action against Allstate Management Corporation, the corporation that managed The Park apartment complex, alleging two causes of action: negligence and fraud. The matter is currently before the court on defendant's motion for summary judgment on both causes of action. After considering the arguments by the parties, the record, and the applicable law, this court has determined that summary judgment is appropriate on plaintiff's fraud claim and on all of plaintiff's allegations of negligence except the claim that by leaving an unsecured ladder nearby, defendant undertook an affirmative act that it did not perform with due care. Rule 56, Fed.R.Civ.Proc.

I. *Negligence*

A. Introduction

Plaintiff alleges that defendant was negligent in:

1. failing to adequately light the outdoor common areas around the buildings;
2. failing to hire security guards;
3. failing to provide adequate locks on the sliding glass doors;
4. failing to warn of past assaults in the complex;
5. failing to have Henry Mack Taylor, Jr. removed from the premises;
6. failing to warn of Taylor's presence;
7. failing to examine and improve security measures;
8. failing to maintain maintenance equipment safely on the premises.

Complaint, para. 14.

Defendant argues that summary judgment is appropriate on the negligence cause of action on following grounds: (1) Exculpatory Clause—The lease contained a provision relieving defendant of liability; (2) Duty—South Carolina law imposes no duty on a landlord to provide protection *1207 against the criminal activities of

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third parties; (3) Proximate Cause—Even if a duty did exist, the criminal activity of a third party constitutes, as a matter of law, a superseding cause, severing the chain of causation.

B. Exculpatory Clause

[1] The lease signed by plaintiff provides that defendants would not be liable for

any loss, injury or damage to person or property ... arising out of the failure of any appliance ... or caused by any casualty or catastrophe including without limitation ... criminal acts, or from any other cause whatsoever, whether or not due to negligent acts or omissions by You, your family and guests or by any third parties, including without limitation other occupants of this apartment, and you assume all risk and agree to indemnify Us from any such loss, injury, or damage.

Lease, para. 10. Defendant, emphasizing plaintiff's education, argues that this exculpatory clause is enforceable and bars plaintiff's cause of action based on negligence. Plaintiff argues that the clause is unenforceable, or, alternatively, that the clause should be narrowly construed in such a way as to allow plaintiff's allegation of defendant's negligence.

South Carolina law on exculpatory clauses in contracts makes clear that such clauses are disfavored:

Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. An exculpatory clause ... is to be strictly construed against the party relying thereon. "It will never be construed ... to exempt [a party] from liability for his own negligence ... in the absence of explicit language clearly indicating that such was the intent of the parties.

South Carolina Elec. and Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182, 322 S.E.2d 453, 458 (Ct.App.1984) (holding that exculpatory clause limiting liability for negligent manufacture did not exculpate defendant from alleged negligent design).

The South Carolina Supreme Court has held that such clauses "may or may not be enforceable," depending upon considerations of public policy. The court has listed as examples of violations of public policy attempts to exculpate "for negligence in the performance of a duty of public service, or where a public duty is owed, or public in-

terest is involved, or where public interest requires the performance of a private duty, or when the parties are not on roughly equal bargaining terms." Pride v. Southern Bell Telephone and Telegraph Co., 244 S.C. 615, 138 S.E.2d 155 (1964). See also Murray v. The Texas Co., 172 S.C. 399, 174 S.E. 231 (1934) ("even under the view that a person may under some circumstances contract against the performance of ... duties [a party owes independent of the contract], he cannot do so where the interest of the public requires the performance thereof, or where, because the parties do not stand on a footing of equality, the weaker party is compelled to submit to the stipulation")

In the case most helpful for our purposes, the South Carolina Supreme Court interpreted an extremely broad exculpatory clause as not including negligent acts of the party who drafted the clause. The clause at issue in Murray v. The Texas Co. provided that an agent would hold the company harmless from "all claims, suits and liabilities of every character whatsoever arising from the existence or use of the equipment at said station." Id. 174 S.E. at 232. The court held that

the provision of a contract relieving one of the parties thereto of liability for his or its own negligence should be clear and explicit.... The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give *1208 to the contract as written the effect claimed by the company.

Id.

In light of the extremes to which the South Carolina courts have gone to avoid enforcing a broad reading of an exculpatory clause, this court is confident that the clause does not bar plaintiff's negligence claim. A close reading of the clause reveals that the clause does not explicitly exculpate defendant from liability for its own allegedly negligent acts. The clause does mention the negligence of the lessee and of third parties, while glaringly omitting any reference to the negligence of defendant. Although it does mention criminal acts, the clause does not tie those criminal acts to any negligence of defendant. Because this is a form contract, plaintiff did not have equal bargaining power, and most importantly, the clause does not explicitly include the negligent acts of defendant, this clause

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does not bar plaintiff's negligence claims.

C. Statutory Basis of Duty

[2] Plaintiff argues that the South Carolina Residential Landlord and Tenant Act (SCRLTA) imposes upon a landlord the duty to provide protection against criminal assault. Plaintiff points specifically to S.C.Code Ann. § 27-40-440(a)(2), which requires that a landlord "do whatever is reasonably necessary to put and keep the premises in fit and habitable condition." Onto that section, plaintiff superimposes S.C.Code Ann. § 27-40-20(a), which provides that the SCRLTA "must be liberally construed and applied to promote its underlying purposes and policies," and S.C.Code Ann. § 27-40-20(b)(2), which encourages "landlords and tenants to maintain and improve the quality of housing." Plaintiff argues that these directives distinguish the S.C. Act from the acts of other jurisdictions in which arguments similar to plaintiff's have been rejected.

Defendant, on the basis of an interpretation of the Virginia Landlord/Tenant Act, argues that the duty of the landlord to keep the premises fit and habitable does not extend to protection against criminal activity. Defendant relies upon *Deem v. Charles E. Smith Management, Inc.*, 799 F.2d 944 (4th Cir.1986), in which the court interpreted Va.Code § 55-248.13(a)(3). That section requires a landlord to "keep all common areas shared by two or more dwelling units of the premises in a clean and safe condition." The court interpreted the phrase "safe condition" as referring to the protection of the tenant "from injuries caused by failures of the building—collapsing stairs, faulty walls, dangerous windows." *Id.* at 946. The Act, the court concluded, did not impose any duty on the landlord to protect against criminal activity. *Id.*

The SCRLTA does not impose any duty on a landlord to protect tenants from criminal activity. The reasoning of the *Deem* court is sound, and applies to the S.C. Act. In fact, the word "safe," which was the basis of plaintiff's argument in *Deem* (and similar arguments in other jurisdictions), is absent from the SCRLTA. The S.C. Act uses the terms "fit" and "habitable." It is an even greater stretch to construe those terms to include protection against criminal activity than it was to so construe the word "safe." The South Carolina Residential Landlord and Tenant Act does not impose a duty on a landlord to provide protection to his tenants against criminal activity of third parties. See also *Williams v. William J. Davis, Inc.*, 275 A.2d 231 (D.C.1971); *De Koven v. 780 West End Realty Co.*, 48 Misc.2d 951, 266 N.Y.S.2d 463

(1965); *Pippin v. Chicago Housing Authority*, 78 Ill.2d 204, 35 Ill.Dec. 530, 399 N.E.2d 596 (1979). See generally, Annotation *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331 § 5(a) (1972).

D. Common Law Basis of Duty

Having determined that the SCRLTA does not impose a duty on landlords to protect tenants from criminal activity, the initial question becomes whether South Carolina common law imposes such a duty. "The breach of legal duty is essential to negligence and such a duty is that which the law requires to be done or foregone *1209 with respect to a particular individual or the public at large." *South Carolina Electric & Gas Co. v. Utilities Construction Co.*, 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964). See also *Kershaw Motor Co. v. Southern Railway Co.*, 136 S.C. 377, 382, 134 S.E. 377, 378 (1926). The question of whether a duty is owed is a question of law for the court to determine. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct.App.1986); *Araujo v. Southern Bell Telephone and Telegraph Co.*, 291 S.C. 54, 351 S.E.2d 908 (Ct.App.1986). This court's task, in the absence of South Carolina case law on point, is to forecast how the South Carolina Supreme Court would view the question of a landlord's duty under these circumstances. ^{FN1} *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967); *Wilson v. Ford Motor Co.*, 656 F.2d 960 (4th Cir.1981).

FN1. The wide range of approaches taken by courts in other jurisdictions establishes only that support can be found for practically any position. See generally, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331. That annotation attempts to summarize the case law as follows:

Courts considering whether a landlord is under a duty to protect his residential tenants against criminal activities of third persons generally have held that no such duty exists merely by reason of the relationship, but that a duty may arise under the particular circumstances of individual cases. Thus, it has been said in a number of cases that a landlord is not an insurer of the safety of his residential tenants against third-person criminal activities, and that any liability of a landlord for injuries or damages resulting from such activities must be

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predicated either upon the breach of a contractual or statutory obligation, or upon a showing of negligence constituting the proximate cause of the loss.

Id. at § 2(a), p. 335.

Plaintiff and defendant agree that South Carolina common law imposes on a landlord no general affirmative duty to maintain the physical condition of the premises. See, e.g., *Young v. Morrissey*, 285 S.C. 236, 329 S.E.2d

Exception

Affirmative Acts
Concealed danger
Common area
Undertaking

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 8-14.

The cases agree that a landlord who increases the risk of loss from criminal activities is under a duty to exercise reasonable care to protect his tenants against the foreseeable risk of harm arising out of his action. See Annotation, 43 A.L.R.3d 331, § 7(b). The cases falling within this category include a landlord placing keys in an accessible place and a landlord leaving an apartment door unlocked. See, e.g., *McCappin v. Park Capitol Corp.*, 42 N.J.Super. 169, 126 A.2d 51 (1956); Annotation, 43 A.L.R.3d 331. Plaintiff has alleged that defendant's improper storage of the ladder brings it within this rule, which she argues is consistent with the South Carolina "affirmative act" exception to the rule against landlord liability. Defendant responds that no such duty is owed, and that even if South Carolina law does impose such a duty, there is no evidence to support plaintiff's allegation that The Park's ladder was used.

[3] It is necessary first to determine whether plaintiff's interpretation of the affirmative act rule is correct. Generally speaking, negligence principles impose a duty to act with due care regardless of the context. Whether a person was under a duty to take a particular action is irrelevant for purposes of this standard. "[O]ne who assumes to act, even though under no obligation to do so, may become subject to the *1210 duty to act with due care." *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct.App.1985). Having established that South

426 (1985) ("traditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition"). From that well-established rule, defendant reasons that South Carolina would not, under any circumstances, impose on landlords a duty to protect their tenants from criminal activity. Plaintiff relies on exceptions to that general rule, arguing that she has alleged facts that would bring the case within each of the four exceptions, and that it is not a significant extension of South Carolina law to apply those exceptions to foreseeable criminal activity. Those four exceptions are:

Allegation

Ladder improperly stored
Lurking criminals, improperly stored ladder, inadequate lock
Improperly stored ladder, design of the complex
Inadequate locks, advice about safety

Carolina law imposes a duty on a person to use reasonable care when any affirmative act is undertaken, it becomes necessary to examine the record for evidence relating to this duty in this case.

[4] Plaintiff alleges that defendant negligently maintained the premises by leaving an unsecured ladder outside, which plaintiff's assailant then used to climb onto her balcony. Henry Mack Taylor testified in his deposition that he used a wrought iron railing that he found on the patio of a nearby apartment to climb onto plaintiff's balcony. Deposition of Henry Mack Taylor, p. 26. He also testified that he did not use any property of The Park apartments to facilitate the break-in. *Id.* at 27. Defendant also points to the deposition testimony of Dwight Kraschnewski, a maintenance worker at The Park apartments, who testified that all ladders kept by The Park are stored in a building, except one extension ladder, which is kept outside. Deposition of Dwight Kraschnewski, p. 29. The extension ladder is kept "outside of Building 15-B between the bushes and the building, actually between the condensing units and the building." *Id.* Defendant argues that the testimony of Taylor and Kraschnewski refutes plaintiff's theory that Taylor used The Park's ladder to break into the apartment.

Plaintiff testified in her deposition that immediately after the attack, she saw a ladder leaning against her balcony. Deposition of Stacey Cooke, p. 63. She stated that the assailant grabbed the ladder and ran away. *Id.* at 64. She described the ladder as "gray," "short," and "light in color." *Id.* She stated that it "could have been" an extension ladder, and speculated that the ladder used "could

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have been" a ladder stored nearby and owned by The Park. *Id.* at 65, 71.

Construing the evidence in the light most favorable to the plaintiff, a factual issue has arisen as to whether a ladder was used by Taylor to enter plaintiff's apartment. The question on which there is scant evidence, however, is whose ladder was used. Plaintiff has shown that there was an unsecured ladder nearby that could have been used. Based on the marks made by Kraschnewski on a map of the apartment complex, it appears that The Park's unsecured ladder was located not far from plaintiff's apartment. See Exhibit 1 to deposition of Kraschnewski. Although this evidence is weak at best, this court will give plaintiff the benefit of every reasonable inference at this stage. There is a factual issue as to whether a ladder was used, and there is at least some evidence that The Park's ladder was unsecured nearby. For that reason, defendant's motion for summary judgment on the negligence claim based upon the storage of the ladder is denied.

Plaintiff attempts to bring the remaining allegations of negligence within other established exceptions to the rule against landlord liability. First, plaintiff argues that the concealed danger exception would include lurking criminals, the improperly stored ladder, and inadequate locks on the sliding glass doors. Second, plaintiff argues that the "common areas" exception would include the open design of the complex and the improper storage of the ladder. Third, plaintiff argues that the "undertaking" exception, as she describes it, would include the inadequate lock and the advice given regarding safety. The correctness of plaintiff's argument depends upon the reach of each of these exceptions under existing South Carolina law. Because the South Carolina cases do not give any indication that those exceptions include the type of allegations made by plaintiff, this court concludes that South Carolina law does not impose a duty on the landlord to take affirmative action to protect tenants from criminal activity.^{FN2}

^{FN2}. There is a fundamental difference between imposing a general duty to perform with due care all affirmative acts, and a duty to take certain affirmative precautions. The former is the general negligence standard the common law imposes on all persons regardless of the context (see affirmative act discussion, *supra*), and the latter depends upon the particular circumstances. The circumstances under which South Carolina imposes affirmative duties on landlords are limited,

and plaintiff has not shown that they exist here.

*1211 [5] In the case cited by plaintiff as support for her argument that South Carolina law requires a landlord to warn of concealed dangers on the premises, the South Carolina Supreme Court stated that many jurisdictions permit recovery "where injury results from a defective condition known to the landlord and concealed by him from the tenant." Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932). From that dictum, plaintiff asks this court to interpret South Carolina law as allowing recovery for a landlord's failing to advise of lurking criminals, failing to properly store the ladder, and failing to install stronger locks on the sliding glass doors. Plaintiff, acknowledging that the South Carolina courts have not applied the exception in the way she seeks to do so now, has ripped the law on concealed dangers from its context (the physical soundness of the premises). Criminal activity is a completely different type of danger than rotting stairways, and none of the concealed dangers alleged by plaintiff in this case can be said to fall anywhere near the existing parameters of that exception. The South Carolina Supreme Court has not indicated that it intends under the label "concealed danger" to shift to the landlord the responsibility for protecting tenants against one of the dangers of modern urban life. Because the leap plaintiff requests this court to make is simply too great, and because the proposed extension would revolutionize South Carolina landlord/tenant law, this court rejects the argument that the concealed danger exception has any application to the facts of this case.^{FN3}

^{FN3}. Plaintiff argues that at least one other jurisdiction has made that leap on the basis of this theory. See O'Hara v. Western Seven Trees Corp., 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977). Plaintiff did not include a copy of this case as required by Local Rule 12.05(d). In any event, South Carolina recognizes a duty owed by a landlord to a tenant only in narrowly defined circumstances, and it has not followed California's liberal expansion of that duty in this or other contexts.

[6] Plaintiff also argues on the basis of the "common areas" exception. South Carolina law provides that a landlord must maintain common areas of an apartment complex that remain under his control: "The law ... creates a legal duty to keep the same in repair and to operate properly such parts of the premises which the lessor reserves possession and control of for the common use of several

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tenants and this is peculiarly applicable to halls, entrances, porches or stairways of which no particular tenant has exclusive possession or control." Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149 (1950). 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. Again, to extend this rule to include a duty to protect against criminal activity would stretch it well beyond its current limits and change the landlord/tenant relationship dramatically. Plaintiff has presented evidence that some jurisdictions have made this extension; many others have not.^{FN4} Faced with the task of predicting what South Carolina would do, this court has concluded that it would not expand the realm of landlord liability to the extremes advocated by plaintiff.^{FN5}

FN4. See, e.g., Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974). In that case, the Virginia Supreme Court recognized a landlord's duty "to maintain the areas over which he has control in good repair and free from latent defects, rather than the duty to police." The court concluded that because the landlord/tenant relationship is not a "special" one in the eyes of the law, and because a landlord is not an insurer of his tenants' safety, a landlord owes no duty to provide protection against criminal acts.

FN5. Plaintiff attempts to bring the storage of the ladder and the general layout of the complex within this exception. Plaintiff never makes clear how the design of the complex is allegedly negligent. Whatever the basis for the claim, however, plaintiff has cited no South Carolina case imposing an affirmative duty on landlords to install gates, hire guards, or build fences. Despite plaintiff's attempts to apply the common areas cases to this allegation, those cases do not hold or even imply that such a duty exists.

*1212 [7] Finally, plaintiff attempts to expand the rule that a landlord's repairs must be performed with due care. See, e.g., McQuillen v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974). This rule is nothing more than a specific application of the general negligence standard discussed in this order, and this court does not disagree with its possible relevance to some allegations arising out of

violence committed against tenants. For example, if a plaintiff offers evidence that a landlord had been asked to repair a lock on a door, and that the work was performed negligently, a crime committed by a person entering through that door may present an actionable negligence claim against the landlord under South Carolina law. Plaintiff's attempt to use this rule is not nearly so compelling in this case, however. Plaintiff merely alleges that the locks chosen for all sliding glass doors in the complex were inadequate. There is nothing to distinguish this particular lock from others in the complex, or to indicate that it malfunctioned. It is a far cry from established principles of South Carolina law to conclude that a landlord's use of standard sliding glass doors with standard locks is somehow actionable under the principles discussed in McQuillen v. Dobbs. To hold otherwise would result in the exception swallowing the rule, and would impose something approaching strict liability on landlords who use accepted materials and devices in their apartment buildings.

[8] For similar reasons, plaintiff's attempt to bring the comments of defendant's agent into this rule must fail. Plaintiff argues that when defendant provided advice about the safety of the complex, it did so negligently. Plaintiff relies upon Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct.App.1987), in which the court of appeals held that genuine issues of material fact prevented summary judgment on an allegation that an investment advisor had not investigated the soundness of a partnership venture with due care. South Carolina law imposes a duty of due care in giving advice when the advisor has a pecuniary interest in the transaction. *Id.* See also Winburn v. Insurance Co. of North America, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct.App.1985). That rule has never been extended as far as plaintiff would like it to reach now, however. There is again a world of difference between a financial advisor who performs his job negligently and a rental agent making casual conversation about an apartment complex. It raises no issue of material fact to allege that a comment that the complex is safe is "advice." Such a causal and general comment certainly does not fall within the current boundaries of the law on this point. See also Foltens v. Hunt, 290 S.C. 194, 348 S.E.2d 839 (Ct.App.1986) (public accountant who undertakes a task on behalf of a client owes a duty to perform that task with due care).

The South Carolina Court of Appeals has described the process by which the common law has developed, resulting in a duty being imposed under some circumstances and not others:

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There is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.

Araujo v. Southern Bell Telephone and Telegraph Co., 291 S.C. 54, 351 S.E.2d 908, 910 (Ct.App.1986). Aware of those policy considerations in this case, this court is simply not convinced that the South Carolina Supreme Court would recognize a duty as argued by plaintiff. Plaintiff's attempt*1213 to extend the duty owed by store owners and innkeepers in South Carolina is simply not persuasive in light of the cautious approach the South Carolina appellate courts have taken even in those contexts.

In Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977), the supreme court implied that under certain circumstances, a store owner may be liable for injuries suffered by an invitee as a result of criminal attack. The court cited comment (f) to Restatement of Torts (Second) § 344, which provides that "[i]f the place or character of [a storeowner's] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, ... he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." The court went on to assume that a duty was owed, but concluded that the evidence at trial did not show a breach of the duty. Id. 238 S.E.2d at 169. See also Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984) (storeowner owes duty of reasonable care to protect invitees against criminal attacks that he knows or has reason to know); Munn v. Hardee's Food System, Inc., 274 S.C. 529, 266 S.E.2d 414 (1980).

In Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct.App.1987), the court declined to address the issue head-on of whether a hotel owes a duty to protect its guests from foreseeable criminal conduct. Concluding that defendant had not properly raised the issue

on appeal, the court determined that "it should not be allowed to do so now." Id. 356 S.E.2d at 131. The court again cited the Restatement (Second) of Torts § 344. See also Courtney v. Remler, 566 F.Supp. 1225 (D.S.C.1983), aff'd, 745 F.2d 50 (4th Cir.1984) (analogizing from the possessor/invitee and common carrier/passenger relationships, district court concludes that South Carolina would impose duty on innkeeper to provide reasonable protection against criminal act).

[9] On the basis of these cases, plaintiff argues that the South Carolina Supreme Court would extend the exceptions to the general rule against landlord liability to include an affirmative duty to protect tenants from reasonably foreseeable criminal conduct. That argument rests on the assumption that the relationships of storeowner/invitee and innkeeper/guest are analogous to the relationship of landlord/tenant. This court is not convinced that the analogy is a sound one, and agrees with the Pennsylvania Supreme Court, which has articulated the key differences between these relationships:

[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. The common areas of an apartment complex are not open to the public, nor are the general public expected or invited to gather there for other purposes than to visit tenants.

Tenants in a huge apartment complex ... do not live where the world is invited to come. Absent agreement, the landlord cannot be expected to protect them against the wiles of felony 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 complex 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.

Feld v. Merriam, 506 Pa. 383, 485 A.2d 742, 745-46 (1984). Because this court agrees that the landlord/tenant

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relationship is fundamentally different than the relationships for which South Carolina law will impose a duty to protect against criminal activity, it declines plaintiffs invitation *1214 to extend the law of South Carolina so far beyond its current boundaries.

B. Proximate Cause

Because under general South Carolina negligence law, all affirmative acts must be performed with due care, plaintiff has shown that defendant had a duty to use due care when maintaining the premises and storing equipment. It is necessary, therefore, to turn to defendant's argument that proximate cause is lacking as a matter of law. Defendant argues that the criminal activity of Taylor constitutes a superseding cause that would break the chain of causation. Plaintiff argues that several complaints had been received by defendant about Taylor's presence on the premises, and that he was a suspected peeping tom. After considering the deposition testimony of defendant's agents, this court cannot determine as a matter of law that the criminal activity by Taylor was unforeseeable and that proximate cause is lacking.

[10] South Carolina law on proximate cause as applied to criminal activity makes clear that a criminal act is not necessarily a superseding cause as a matter of law. The original negligent actor is not relieved of liability unless the subsequent criminal act was unforeseeable. In Shepard v. South Carolina Dept. of Corrections, 385 S.E.2d 35 (Ct.App.1989), for example, the South Carolina Court of Appeals affirmed the factfinder's conclusion, but found the proximate cause issue to be a close one. In that case, plaintiff sued the South Carolina Department of Corrections after a criminal escaped from its custody and went on a crime spree. The court concluded that the trial court could have determined that the criminal activity was not foreseeable, which would relieve the original negligent actor of its liability. Calling the factual question of foreseeability a "close one," the court affirmed the trial court's finding. See also Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct.App.1987) (hotel's argument that it could not have foreseen that one of its guests would attack another guest is a question of proximate cause that "should not be decided at the summary judgment stage"); Cf. Annotation, 43 A.L.R. 331 §§ 8-9 (cases approaching the proximate cause issue by examining foreseeability of criminal activity in general, as well as specific criminal acts by known persons).

[11] The evidence in the record establishes that the management, at the very least, suspected Henry Mack

Taylor of criminal activity on the premises. Connie O'Connor Harris, defendant's regional property manager, testified in her deposition that she was aware of criminal activity in general on the premises, both before her arrival in January, 1986, and after that date. Deposition of Harris, pp. 10, 26. Harris testified that she knew that Henry Mack Taylor was staying with a tenant in the complex. *Id.* at 48-49. And finally, most important to this court's examination of the foreseeability issue, Harris testified that tenants had complained of peeping tom activity by a black male whose description she recognized as matching Taylor's. *Id.* at 53-55. As a result of those complaints, Harris "told the police about [Taylor]." *Id.* at 55.

Carolyn Caulder, defendant's leasing agent, testified that after an attempted break-in into the apartment of a tenant named Sherry Hensley in August, 1988, Caulder and other agents and employees of defendant "probably" discussed Henry Mack Taylor as a suspect. Deposition of Caulder, pp. 21-22. And finally, Denise Porter, another leasing agent, also testified that she thought of Taylor after hearing tenants' descriptions of the peeping tom. Deposition of Porter, pp. 88-89.

Because plaintiff has offered evidence that Henry Mack Taylor was suspected of criminal activity on the premises of The Park, plaintiff is correct that the court cannot rule as a matter of law that such activity constituted a superseding cause which would break the chain of causation. Proximate cause is generally a question for the jury, and plaintiff has presented some evidence that Mack was suspected of such activities. For that reason, this court cannot rule as a matter of law that the alleged negligence of defendant was not the proximate cause of plaintiff's injuries.

*1215 II. Fraud

Plaintiff alleges that defendant represented to plaintiff that The Parks apartment complex was safe, when in fact, the complex was not safe. Plaintiff has pled all nine elements of fraud, alleging that her decision to rent the apartment was fraudulently induced. Citing her deposition testimony, plaintiff argues that several statements by defendant's agents were representations of material facts known to be false. Plaintiff alleges that Carolyn Caulder, a rental agent with whom she met on her third visit to the complex, agreed with her statement that "she thought it was a safe place." Deposition of Stacey Cooke, pp. 35-36. Plaintiff described her second visit to the complex (this time with her mother):

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Well, my mother and I were both saying that we thought it was more safe. And, [the agent] was saying there is really nothing to worry about because this complex is really safe.... She said a lot of people sleep with their sliding glass doors open because it is really shaded.... She said, "So it's safe."

Deposition of Stacey Cooke, p. 31. The agent also allegedly responded to a question from Martha Cooke, Stacey's mother, about the safety of the premises by stating: "No, it's safe, the apartment complex and for the money it is a really nice place to live, reasonable." Deposition of Stacey Cooke, p. 31. Martha Cooke's version of the exchange concerning safety is the same as her daughter's:

Q. So, you made the representations that the place looks safe?

A. Yes.

Q. Was there any other discussion whatsoever about safety?

A. No, other than she agreed yes.

Deposition of Martha Cooke, p. 35.

Defendant argues that plaintiff cannot establish three of the nine elements of fraud: representation of fact, materiality, and reliance.^{FN6}

^{FN6} In arguing that the statement cannot be considered material to plaintiff's decision to rent the apartment, defendant relies primarily upon the absence of any specific questions asked by plaintiff or her mother. This court cannot agree as a matter of law that safety was not material to plaintiff's decision. Plaintiff demanded her mother's approval before renting the apartment, and her mother was clearly very concerned about safety. In addition, plaintiff's decision to rent a second floor apartment was apparently influenced by her perception that it would be safer than one on ground level. The fact that specific questions were not asked about the type of problems that had taken place at The Park does not lead to the inevitable conclusion that the matter was not material.

In addition, defendant argues that plaintiff's deposition testimony shows as a matter of law

that plaintiff did not rely upon the comments of the agents regarding safety. Defendant uses one answer in the deposition in which plaintiff listed the factors that led her to rent the apartment, and failed to mention safety. The fact that "safety" is missing from one significant answer does not, as matter of law, establish that she did not rely upon the statement. She did indicate that she would have hesitated or thought differently had she been told of crime at the complex. Deposition of Stacey Cooke, p. 109. For that reason, the court cannot find as a matter of law that plaintiff did not rely upon the statement about safety.

[12] Defendant argues that the agent's comments regarding safety are representations of opinion rather than fact, and that an action for fraud may not lie for an expression of opinion. Plaintiff argues that the agent's responses to the inquiries regarding safety were factual, or, alternatively, that they were hybrids of fact and opinion. Finally, as a third alternative, plaintiff argues that if they were opinion, the facts underlying that opinion would support the fraud claim.

Explaining the difference between fact and opinion, the South Carolina Supreme Court has held as a matter of law that a representation that a person was a "competent mechanic" is opinion. *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct.App.1985). In that case the court cited with approval an Arizona case holding that a statement by a bank official that a person was a "good businessman" was an expression of opinion rather than fact. *Id.* 339 S.E.2d at 146, citing *Springer v. Bank of Douglas*, 82 Ariz. 329, 313 P.2d 399 (1957).

*1216 To be contrasted with the court's holding the statement in *Winburn* to be opinion is the court's conclusion in *Gilbert v. Mid-South Machinery Co., Inc.*, 267 S.C. 211, 227 S.E.2d 189 (1976). In that case the court upheld the jury's conclusion that a statement that a business is "profitable" is one of fact. The court then went on to give some guidance in drawing the line between fact and opinion: "The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was made is usually considered to be a matter of fact." *Id.* 227 S.E.2d at 193.

Another attempt to draw a general distinction between fact and opinion can be found in the Restatement of

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Torts: 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." Restatement (Second) of Torts § 538A. The comment to this section goes on to explain:

One common form of opinion is a statement of the maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ. Thus the statement that an automobile is a good car is a relative matter, depending entirely upon the standard set as to what is a good automobile and what is not, and it is a matter upon which individual judgments may be expected to differ. The maker of a statement of this nature will normally be understood as expressing only his own judgment.

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 Park 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.^{FN7} 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.

^{FN7} Plaintiff urges the court to read plaintiff's deposition as showing that a more specific allegation was made. The testimony is as follows: "My mother ... said, you know, 'Is it safe around here' and 'Have you had any problems?' And [the agent] said, 'No, it's safe, the apartment complex and for the money it is a really nice place to live, reasonable.'" This testimony does not, as plaintiff argues, establish that defendant's agent fraudulently represented that there had been no criminal activity on the premises. The answer "No, it's safe" is no more specific than the other alleged statements about the safety of the premises. The agent's answer to what appears in plaintiff's deposition as a double question is, like the other comments allegedly made, not a representation of fact upon which a fraud claim may be based.

III. Conclusion

Because the statements by defendant's agent concerning the safety of the complex can only be characterized as opinion, they do not support a fraud claim. Defendant's motion for summary judgment as to plaintiff's fraud claim is granted. Rule 56, Fed.R.Civ.Proc.

On the negligence claim, only one allegation made by plaintiff is both cognizable under existing South Carolina law and arguably supported by the record. For that reason, defendant's motion for summary judgment is granted on all causes of action except the allegation that defendant was negligent in storing the ladder. Rule 56, Fed.R.Civ.Proc.

IT IS SO ORDERED.

D.S.C., 1990.
Cooke v. Allstate Management Corp.
741 F.Supp. 1205

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P

Supreme Court of South Carolina.
 John W. CRAMER, as Personal Representative of the
 Estate of Genevieve Zitricki, Deceased, Plaintiff,
 v.
 BALCOR PROPERTY MANAGEMENT, INC., and
 Hidden Lake Partners, an Illinois Limited Partner-
 ship, T. Walker Brashier, individually and d/b/a Hid-
 den Lake Apartments, Defendants.

No. 24004.
 Heard Jan. 4, 1994.
 Decided Feb. 7, 1994.

The United States District Court for the District of South Carolina certified cause to South Carolina Supreme Court for determination of whether landlord could be liable under wrongful death theory for tenant's murder. The Supreme Court, Finney, J., held that landlord owed no duty to tenant to provide security in and around leased premises to protect tenant from criminal activities of third parties.

Questions answered.

West Headnotes

[1] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
 Thereof

233VII(E) Injuries from Dangerous or Defec-
 tive Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
 Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord does not owe duty to tenant to provide security in and around leased premises to protect tenant from criminal activity of third parties.

[2] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
 Thereof

233VII(E) Injuries from Dangerous or Defec-
 tive Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
 Dangerous Conditions. Most Cited Cases

Neither common law nor South Carolina Residential Landlord-Tenant Act imposes duty on landlord to provide protection to tenants against criminal activity of third parties. Code 1976, § 27-40-10 et seq.

***317 *440** Douglas Franklin Patrick and Stephen R.H. Lewis, both of Covington & Patrick, Greenville, for plaintiff.

W. Howard Boyd, Jr., and James P. Walsh, both of Rainey, Britton, Gibbes & Clarkson; and Ray D. Lathan, of Lathan & Barbare, Greenville, for defendants.

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, Columbia, for the South Carolina Defense Trial Attorneys' Ass'n, amicus curiae.

***441 FINNEY**, Justice:

Pursuant to Rule 228, SCACR, the following questions have been certified to this 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?

If so, is the duty derived from the South Carolina Residential Landlord-Tenant Act, S.C.Code Ann. Section 27-40-10, et. seq. (1991), or from common law and under what circumstances does that duty arise?

FACTS

The deceased Genevieve Zitricki was murdered in her apartment on or about April 5, 1990. The unknown assailant entered her apartment by prying open the patio sliding glass door. The plaintiff instituted a wrongful death action against the managing agents and owners of the apartment complex. The plaintiff alleges that the defendants had a duty to protect the deceased tenant from the criminal acts of a third party and breached this duty.

The defendant moved for summary judgment, asserting that there was no duty owed by the landlord to the decedent to protect her from criminal activity of a third party. As a result of that motion, the above questions were certified to this Court.

DISCUSSION

[1] The initial question before this Court is whether a landlord has a duty to provide security to protect tenants from the criminal activity of third parties.

The plaintiff urges this Court to recognize a view of the relationship between the landlord and tenant which is analogous to that of the innkeeper and guest relationship. In so doing, the plaintiff urges the Court to adopt the corresponding duty of the landlord to **318 protect its tenants from foreseeable criminal activity. The plaintiff asks the Court to find that those persons*442 in exclusive control of the access to their property and who have the power to provide the necessary protection, bear the responsibility of reasonably protecting their tenants, invitees, and guests from foreseeable criminal activity.

The plaintiff claims that the landlord's duty is derived from common law. This conclusion is based on the assumption that the landlord/tenant relationship is analogous to innkeeper/guest and store owner/invitee relationships. The plaintiff asserts that the broader view draws little distinction between the above relationships. The plaintiff contends that the trend has been to impose a duty on innkeepers and merchants to protect their guests or invitees from foreseeable criminal activity of third parties. See Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984); Munn v. Hardee's Food System, Inc., 274 S.C. 529, 266 S.E.2d 414 (1980); and Shipes v. Piggy Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977). The district court in Cooke v. Allstate Management Corp., 741 F.Supp. 1205

(D.S.C.1990) considered the same cases relied on by this appellant and rejected the argument that South Carolina courts would extend the exceptions to the general rule to recognize an affirmative duty to protect tenants from criminal conduct.

Cooke v. Allstate Management Corp. is directly on point in addressing the questions raised here. In Cooke, the intruder gained access to the tenant's apartment through a sliding glass door. The tenant alleged that the attacker was able to reach her balcony by using a ladder left nearby. The tenant in Cooke alleged that the landlord was negligent for a number of reasons, including leaving an unsecured ladder nearby. The district court decided there was a factual issue whether the landlord's ladder was used by the attacker. Thus, the defendant's motion for summary judgment was denied on the negligence claim based upon the questions surrounding use of the ladder.

The plaintiff in Cooke, as in this case, attempted to extend the duty owed by store owners and innkeepers to landlords. However, the district court found that argument unpersuasive "in light of the cautious approach the South Carolina appellate courts have taken even in those contexts." Cooke, 741 F.Supp. at 1213. The district court was not convinced that the assumption was sound that the relationships of store owner/*443 invitee and innkeeper/guest are analogous to the relationship of landlord/tenant. The difference between the relationships was articulated as follows:

[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 felony any more than the society can always protect them upon the common streets and highways lead-

ing 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 1213, (quoting *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984)). The district court found the landlord/tenant relationship to be fundamentally different from the relationships for which South Carolina law will impose a duty to protect against criminal activity.

We agree with the U.S. District Court in *Cooke* in finding a fundamental distinction between the relationships of landlord/tenant and store owner/invitee and innkeeper/guest. Accordingly, we decline to find that landlords **319 owe an affirmative duty to protect tenants from criminal activity merely by reason of the relationship.^{FN1}

^{FN1}. The plaintiff is not precluded from asserting a general negligence principle. A duty may arise under the particular circumstances of the individual case based upon a showing of negligence constituting the proximate cause of the loss.

*444 [2] The plaintiff concedes that no statutory duty upon the landlord arises from the S.C. Residential Landlord-Tenant Act. We agree. The South Carolina Residential Landlord-Tenant Act does not impose a duty upon landlords to protect tenants from criminal activity of others.^{FN2} While section 27-40-440 imposes a duty on a landlord to keep the premises in a fit and habitable condition,^{FN3} the statute does not impose a duty on a landlord to provide protection to tenants against criminal activity by third parties.^{FN4}

^{FN2}. S.C.Code Ann. §§ 27-40-10 to -940 (1991).

^{FN3}. See *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct.App.1989).

^{FN4}. *Cooke*, 741 F.Supp. at 1208.

CONCLUSION

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

CERTIFIED QUESTIONS ANSWERED.

CHANDLER, TOAL and MOORE, JJ., concur.
HARWELL, C.J., not participating.

S.C., 1994.
Cramer v. Balcor Property Management, Inc.
312 S.C. 440, 441 S.E.2d 317

END OF DOCUMENT

848 F.Supp. 1222
(Cite as: 848 F.Supp. 1222)

H

United States District Court,
D. South Carolina,
Greenville Division.

John W. CRAMER, as personal representative of the
estate of Genevieve Zitricki, deceased, Plaintiff,
v.

BALCOR PROPERTY MANAGEMENT, INC.,
Hidden Lake Partners, an Illinois Limited Partner-
ship, and T. Walter Brashier, individually, and d/b/a
Hidden Lake Apartments, Defendants.

Civ. A. No. 6:92-3191-20.
April 7, 1994.

Personal representative of deceased tenant's es-
tate brought wrongful death action against owners
and managers of apartment complex for their alleged
breach of duty to protect tenant from criminal acts of
third parties. Following certification to South Caro-
lina Supreme Court for answers to certified ques-
tions, 312 S.C. 440, 441 S.E.2d 317, the District
Court, Herlong, J., held that landlord did not owe or
assume any duty of care to protect tenant from death
at hands of burglar.

Summary judgment for defendants.

West Headnotes

[1] Landlord and Tenant 233 ↪164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
Thereof

233VII(E) Injuries from Dangerous or Defec-
tive Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord does not, as
general rule, have duty to provide security in and

around leased premises to protect tenant from crimi-
nal activity of third parties.

[2] Landlord and Tenant 233 ↪164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
Thereof

233VII(E) Injuries from Dangerous or Defec-
tive Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord did not as-
sume duty to protect tenant from criminal acts of
third parties, such as might render landlord liable in
tort for tenant's death at hands of burglar, merely be-
cause landlord, for a period of time prior to burglary,
had hired a "courtesy" officer to patrol apartment
grounds and terminated officer without replacing
him.

[3] Negligence 272 ↪231

272 Negligence

272III Standard of Care

272k231 k. Due Care. Most Cited Cases
(Formerly 272k3)

Under South Carolina law, one who assumes to
act, even though under no obligation to do so, may
become subject to duty to act with due care.

[4] Landlord and Tenant 233 ↪164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
Thereof

233VII(E) Injuries from Dangerous or Defec-
tive Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
Dangerous Conditions. Most Cited Cases

Under South Carolina law, the "affirmative acts"

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(Cite as: 848 F.Supp. 1222)

exception to traditional rule that landlord is under no obligation to protect tenant from criminal acts of third party envisions a situation in which such action as landlord assumes to take leads directly to tenant's injury.

[5] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Under South Carolina law, fact that tenant had requested that an additional safety device be installed on her sliding glass door prior to her death at hands of burglar did not impose any obligation on landlord to protect tenant from third party's criminal acts, under the so-called "undertaking" exception to traditional rule of nonliability, where landlord had never undertaken to add additional security device requested by tenant.

[6] Landlord and Tenant 233 ¶164(3)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(3) k. Injuries Due to Negligence in Making Repairs. Most Cited Cases

Under South Carolina law, if landlord undertakes to make repairs, repairs must be performed with due care.

[7] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord's duty to maintain common areas of leased property in safe condition included duty to protect tenant only from injuries that resulted directly from condition of premises themselves; landlord could not be held liable, under "common areas" doctrine, for tenant's death at hands of burglar, though burglary was allegedly facilitated by design and operation of common area, including lack of fencing around perimeter of apartment building, insufficient lighting, and lack of security guards.

[8] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord has duty to maintain common areas of leased property in safe condition.

[9] Landlord and Tenant 233 ¶164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Under South Carolina law, landlord's duty to maintain common areas of leased property in safe condition involves duty to protect tenant from physical injuries resulting directly from condition of premises themselves.

*1223 Douglas Franklin Patrick, and Stephen R.H. Lewis, Greenville, SC, for plaintiff.

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(Cite as: 848 F.Supp. 1222)

W. Howard Boyd, Jr. and James P. Walsh, Greenville, SC, for defendants Balcor Property Management, Inc. and Hidden Lake Partners, an Illinois Ltd. Partnership.

ORDER

HERLONG, District Judge.

This matter is before the court on the motion of the defendants Balcor Property Management, Inc. ("Balcor") and Hidden Lake Partners ("Hidden Lake") for summary judgment. For the reasons stated in this order, the motion is granted.

This wrongful death action was brought by John W. Cramer ("Cramer"), as the personal representative of the deceased, Genevieve Zitricki ("Zitricki"). Zitricki was murdered in her apartment at Hidden Lake Apartments in Greenville, South Carolina on April 5, 1990. The police investigation indicated that an unknown assailant entered Zitricki's *1224 apartment through the sliding glass door off of her patio by using a tool to pry the door open. An autopsy concluded the cause of death was a head injury, possibly caused by the same tool used to gain entry, and asphyxia. Cramer filed this lawsuit on November 6, 1992, to recover for Zitricki's death. As a basis for recovery, Cramer argued that either a landlord has a duty to its tenants to protect them from criminal activities of third parties, or that the facts of this case fit into one of the established exceptions to the traditional rule of non-liability of landlords.

[1] Balcor and Hidden Lake move for summary judgment. The grounds for their motion are that they, as landlords, did not owe a duty to their tenant Zitricki to protect her from the criminal assault of a third party, and that the facts of this case do not fit into any exception to the general rule of non-liability for landlords. Because no South Carolina court had ever dealt with the issue of whether landlords have a duty to protect their tenants from the criminal activity of third parties, the question was certified to the Supreme Court of South Carolina. On February 7, 1994, the Supreme Court answered the question in the negative.^{FN1} "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." Cramer v. Balcor Property Management, Inc., 312 S.C. 440, —, 441 S.E.2d 317, 319 (1994). Therefore, Balcor and Hidden Lake owed no special duty to Zitricki. Al-

though Cramer has requested the opportunity to re-brief the issues in light of the Supreme Court's ruling, additional argument will be of no assistance in the disposition of the summary judgment motion.

FN1. The opinion of the Supreme Court of South Carolina is attached to this order as Appendix I.

Because it is now clear that Balcor and Hidden Lake had no special duty to Zitricki pursuant to the landlord/tenant relationship, the court must determine if an exception to the general rule that South Carolina common law imposes upon a landlord no general affirmative duty to maintain leased premises in a safe condition applies in this case. There are three exceptions that Cramer argues are applicable. They are the "affirmative acts" exception, the "undertaking" exception and the "common area" exception. See Cooke v. Allstate Management Corp., 741 F.Supp. 1205, 1209 (D.S.C.1990). In Cooke, the court recognized that these exceptions might be applicable to a situation similar to the one involved in this case, but strictly applied the exceptions to the particular facts present. *Id.* at 1209-1212. In applying the exceptions to the particular facts of this case, the court is convinced that the conduct involved here does not fit into any of the three exceptions.

[2][3][4] The Cooke court recognized that "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." *Id.* at 1209-10, quoting Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Cl.App.1985). This is known as the affirmative acts exception. Cramer argues that by initially hiring a "courtesy officer" to patrol the grounds and then terminating that officer without replacing him, Balcor and Hidden Lake breached this duty. Cramer misapprehends the scope of the affirmative acts exception. 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. See, e.g., McCappin v. Park Capitol Corp., 42 N.J.Super. 169, 126 A.2d 51 (1956).

[5][6] Cramer next argues that Balcor and Hidden Lake breached a duty which arose pursuant to the

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undertaking exception. Under this exception, if a landlord undertakes to make repairs, they must be performed with due care. See, e.g., Mcquillen v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974). Cramer claims that Zitricki made a request to a maintenance employee of Cramer and Hidden Lake that an additional safety device be installed on her sliding glass door. It is *1225 undisputed that Cramer and Balcor did not install such a device. Again, however, Cramer misunderstands the scope of the exception. In order to fall within the undertaking exception, the defendant must undertake to do something. Here, it is clear that Cramer and Balcor did not undertake to add additional security devices to Zitricki's sliding glass door. Had they done so, and somehow installed those devices in a negligent manner, then this case might possibly fit within the undertaking exception. There is no appreciable difference between the facts here and the facts of Cooke. The fact that Zitricki may have requested the service, does not change the fact that Cramer and Balcor never undertook to perform the work.

[7][8][9] Finally, Cramer attempts to hold Balcor and Hidden Lake liable under the common areas exception. Cramer contends that the design and operation of the apartment complex was inadequate due to the lack of fencing around the perimeter, the insufficient lighting, the lack of security guards, and the poor locks on apartment doors. This exception is inapplicable to these facts. The common areas exception simply states that a landlord has a duty to maintain the common areas of a leased property in a safe condition. As correctly noted in Cooke, "[t]his rule clearly has never been applied in South Carolina to anything except physical injuries resulting directly from the condition of the premises themselves." Cooke, 741 F.Supp. at 1211 (emphasis in original). To attempt to apply the common areas exception to this situation would stretch the exception to the point of swallowing the rule.

The facts of this case do not fit within any of the exceptions to the traditional rule of non-liability of landlords. In addition, the Supreme Court of South Carolina has expressly ruled that a landlord has no duty to a tenant to provide security in and around a leased premises to protect the tenant from criminal activity of third parties. For these reasons, Balcor and Hidden Lake's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

APPENDIX I THE STATE OF SOUTH CAROLINA In The Supreme Court

John W. Cramer, as Personal Representative of the
Estate of Genevieve Zitricki, Deceased, Plaintiff,
v.

Balcor Property Management, Inc., and Hidden Lake
Partners, an Illinois Limited Partnership, T. Walker
Brashier individually and d/b/a Hidden Lake Apart-
ments, Defendants.

On Certification from the United States District Court
for the District of South Carolina

Opinion No. 24004 Heard January 4, 1994- Filed
February 7, 1994

CERTIFIED QUESTIONS ANSWERED

Douglas Franklin Patrick and Stephen R.H. Lewis,
both of Covington & Patrick, of Greenville, for
Plaintiff.

W. Howard Boyd, Jr., and James P. Walsh, both of
Rainey, Britton, Gibbs & Clarkson; and Ray D.
Lathan, of Lathan & Barbare, all of Greenville, for
Defendants.

C. Mitchell Brown, of Nelson, Mullins, Riley &
Scarborough, of Columbia, for the South Carolina
Defense Trial Attorneys' Association, Amicus Cu-
riae.

FINNEY, A.J.: Pursuant to Rule 228, SCACR,
the following questions have been *1226 certified to
this 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?

If so, is the duty derived from the South Carolina
Residential Landlord-Tenant Act, S.C.Code Ann.
Section 27-40-10, et seq. (1991), or from common
law and under what circumstances does that duty
arise?

FACTS

The deceased Genevieve Zitricki was murdered

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(Cite as: 848 F.Supp. 1222)

in her apartment on or about April 5, 1990. The unknown assailant entered her apartment by prying open the patio sliding glass door. The plaintiff instituted a wrongful death action against the managing agents and owners of the apartment complex. The plaintiff alleges that the defendants had a duty to protect the deceased tenant from the criminal acts of a third party and breached this duty.

The defendant moved for summary judgment, asserting that there was no duty owed by the landlord to the decedent to protect her from criminal activity of a third party. As a result of that motion, the above questions were certified to this Court.

DISCUSSION

The initial question before this Court is whether a landlord has a duty to provide security to protect tenants from the criminal activity of third parties.

The plaintiff urges this Court to recognize a view of the relationship between the landlord and tenant which is analogous to that of the innkeeper and guest relationship. In so doing, the plaintiff urges the Court to adopt the corresponding duty of the landlord to protect its tenants from foreseeable criminal activity. The plaintiff asks the Court to find that those persons in exclusive control of the access to their property and who have the power to provide the necessary protection, bear the responsibility of reasonably protecting their tenants, invitees, and guests from foreseeable criminal activity.

The plaintiff claims that the landlord's duty is derived from common law. This conclusion is based on the assumption that the landlord/tenant relationship is analogous to innkeeper/guest and store owner/invitee relationships. The plaintiff asserts that the broader view draws little distinction between the above relationships. The plaintiff contends that the trend has been to impose a duty on innkeepers and merchants to protect their guests or invitees from foreseeable criminal activity of third parties. See *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984); *Munn v. Hardee's Food System, Inc.*, 274 S.C. 529, 266 S.E.2d 414 (1980); and *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977). The district court in *Cooke v. Allstate Management Corp.*, 741 F.Supp. 1205 (D.S.C.1990) considered the same cases relied on by this appellant and rejected the argument that South Carolina courts would ex-

tend the exceptions to the general rule to recognize an affirmative duty to protect tenants from criminal conduct.

Cooke v. Allstate Management Corp. is directly on point in addressing the questions raised here. In *Cooke*, the intruder gained access to the tenant's apartment through a sliding glass door. The tenant alleged that the attacker was able to reach her balcony by using a ladder left nearby. The tenant in *Cooke* alleged that the landlord was negligent for a number of reasons, including leaving an unsecured ladder nearby. The district court decided there was a factual issue whether the landlord's ladder was used by the attacker. Thus, the defendant's motion for summary judgment was denied on the negligence claim based upon the questions surrounding use of the ladder.

The plaintiff in *Cooke*, as in this case, attempted to extend the duty owed by store owners and innkeepers to landlords. However, the district court found that argument unpersuasive "in light of the cautious approach the South Carolina appellate courts have taken even in those contexts." *Cooke*, 741 F.Supp. at 1213. The district court was not convinced that the assumption was sound *1227 that the relationships of store owner/invitee and innkeeper/guest are analogous to the relationship of landlord/tenant. The difference between the relationships was articulated as follows:

[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 felony 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.

848 F.Supp. 1222
(Cite as: 848 F.Supp. 1222)

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 1213, (noting *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984)). The district court found the landlord/tenant relationship to be fundamentally different from the relationships for which South Carolina law will impose a duty to protect against criminal activity.

We agree with the U.S. District Court in *Cooke* in finding a fundamental distinction between the relationships of landlord/tenant and store owner/invitee and innkeeper/guest. Accordingly, we decline to find that landlords owe an affirmative duty to protect tenants from criminal activity merely by reason of the relationship.^{FN1}

^{FN1}. The plaintiff is not precluded from asserting a general negligence principle. A duty may arise under the particular circumstances of the individual case based upon a showing of negligence constituting the proximate cause of the loss.

The plaintiff concedes that no statutory duty upon the landlord arises from the S.C. Residential Landlord-Tenant Act. We agree. The South Carolina Residential Landlord-Tenant Act does not impose a duty upon landlords to protect tenants from criminal activity of others.^{FN2} While section 27-40-440 imposes a duty on a landlord to keep the premises in a fit and habitable condition,^{FN3} the statute does not impose a duty on a landlord to provide protection to tenants against criminal activity by third parties.^{FN4}

^{FN2}. S.C.Code Ann. §§ 27-40-10 to -940 (1991).

^{FN3}. See *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct.App.1989).

^{FN4}. *Cooke*, 741 F.Supp. at 1208.

CONCLUSION

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

CERTIFIED QUESTIONS ANSWERED.

CHANDLER, TOAL and MOORE, JJ., concur.
HARWELL, C.J., not participating.

D.S.C.,1994.
Cramer v. Balcor Property Management, Inc.
848 F.Supp. 1222

END OF DOCUMENT

▷

Supreme Court of South Carolina.
 Rochelle FAIR, Individually and as Mother and
 Natural Guardian of Ashley Marie Poland, a Minor,
 Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

No. 24905.
 Heard Dec. 1, 1998.
 Decided Feb. 22, 1999.

Mother of child bitten by dog on tenant's premises at Marine Corps Air Station sued United States in federal district court. On certified question, the Supreme Court, Moore, J., held that Residential Landlord and Tenant Act (RLTA) did not alter common law rule that a landlord is not liable to tenant's invitee for injury caused by tenant's dog.

Certified question answered.

West Headnotes

[1] Animals 28 ⚡66.5(8)

28 Animals

28k66 Injuries to Persons

28k66.5 Dogs

28k66.5(8) k. Landlords. Most Cited Cases

es

(Formerly 28k72)

"Fit and habitable" provision of the Residential Landlord and Tenant Act (RLTA) does 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. Code 1976, § 27-44-40(a)(2).

[2] Landlord and Tenant 233 ⚡125(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
 Thereof

233VII(A) Description, Extent, and Condition
 233k125 Tenantable Condition of Premises
 233k125(1) k. In General. Most Cited

Cases

Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use
 Thereof

233VII(E) Injuries from Dangerous or Defective
 Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or
 Dangerous Conditions. Most Cited Cases

Landlord's duty to keep premises in "fit and habitable" condition applies to the inherent physical qualities of the premises, whereas the tenant, who has duty to keep dwelling "reasonably safe," is responsible for other safety concerns on the premises. Code 1976, §§ 27-40-440(a)(2), 27-40-510(2).

**616 *322 James B. Richardson, Jr., of Svalina, Richardson & Larson, of Columbia; Daniel A. Larson, of Svalina, Richardson & Larson, of Beaufort; and J. Brent Kiker, of Kiker & Douds, P.A., of Beaufort, for plaintiff.

United States Attorney J. Rene Josey, and Assistant United States Attorney John H. Douglas, of Charleston, for defendant.

MOORE, Justice:

Plaintiff brought this action in federal district court to recover for injuries her daughter sustained when she was attacked by a dog. The attack occurred on another tenant's premises at the Marine Corps Air Station in Beaufort, South Carolina. We are asked to answer the following certified question:

Does the South Carolina Residential Landlord and Tenant Act overrule Mitchell v. Bazzle, 304 S.C. 402, 404 S.E.2d 910 (Ct.App.1991), so that a landlord, having actual or constructive notice of the presence of a dangerous dog on leased premises, may be responsible for injuries inflicted by that dog upon

another tenant invited upon the premises under § 27-40-440(a)(2) of that Act?

DISCUSSION

[1] In *Mitchell v. Bazzle*,^{FN1} our Court of Appeals held a landlord is not liable to a tenant's invitee for injuries inflicted by the tenant's dog.^{FN2} Because the Residential Landlord and *323 Tenant Act (RLTA) had not been enacted at the time the cause of action arose in that case, the Court of Appeals did not apply it. Plaintiff claims that enactment of RLTA, specifically subsection (a)(2) of S.C.Code Ann. § 27-40-440 (1991), changed the common law rule stated in *Mitchell v. Bazzle*. We disagree.

FN1. This Court dismissed certiorari as improvidently granted. 306 S.C. 407, 412 S.E.2d 416 (1991).

FN2. In refusing to find liability, the Court of Appeals declined to adopt the analysis of a California case, *Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975). *Uccello* found as a matter of public policy that a landlord who has notice and right to control a tenant's possession of a vicious animal may be liable for injuries to the tenant's invitee caused by the animal.

Section 27-40-440(a)(2) provides "a landlord shall ... make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." (emphasis added). Other courts have held this "fit and habitable" provision, which **617 originates from the Uniform Landlord and Tenant Act, imposes a duty on the landlord relating only to the physical state of the premises. *Newton v. Magill*, 872 P.2d 1213 (Alaska 1994); *Rodgers v. Rosen*, 737 P.2d 562 (Okla.1987); see also *Walls v. Oxford Management Co.*, 137 N.H. 653, 633 A.2d 103 (1993) (implied warranty that premises are habitable and fit for living includes only structural defects).

[2] Further, S.C.Code Ann. § 27-40-510(2) (1991), another section of the RLTA, imposes a corresponding duty on the tenant to "keep the dwelling unit and that part of the premises that he uses reasonably safe and reasonably clean." (emphasis added). As noted by the *Newton* court in construing similar provisions based on the Uniform Residential

Landlord and Tenant Act, these separate statutory duties of a landlord and tenant are reconciled by holding the landlord's duty applies to the inherent physical qualities of the premises whereas the tenant is responsible for other safety concerns on the premises. 872 P.2d at 1217.

We construe § 27-40-440(a)(2) in conjunction with § 27-40-510(2) and hold that under the RLTA, a landlord may be held liable only for defects relating to the inherent physical state of the leased premises. Accordingly, we answer the certified question as follows: The "fit and habitable" provision of the RLTA found in § 27-40-440(a)(2) does not alter the common *324 law rule that a landlord is not liable to a tenant's invitee for injury caused by a tenant's dog.

CERTIFIED QUESTION ANSWERED.

FINNEY, C.J., TOAL, WALLER and BURNETT, JJ., concur.

S.C., 1999.
Fair v. U.S.
334 S.C. 321, 513 S.E.2d 616

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H

Court of Appeals of South Carolina.
 Alphonso GOODE, Appellant,
 v.

ST. STEPHENS UNITED METHODIST CHURCH,
 d/b/a St. Stephens Apartments, Mack Gibson, Kevin
 Purnell, Darren Boatwright, Edward Rose, Insignia
 Financial Group, and Donald E. Bowen, Defendants,
 of whom St. Stephens United Methodist Church,
 d/b/a St. Stephens Apartments, Mack Gibson, Insignia
 Financial Group, and Donald E. Bowen, Jr., Personal
 Representative of the Estate of Donald E. Bowen,
 Deceased, are Respondents.

No. 2750.

Submitted Nov. 4, 1997.

Decided Nov. 17, 1997.

Rehearing Denied Jan. 22, 1998.

Certiorari Denied Sept. 28, 1998.

Social guest of tenant at apartment complex, who was assaulted by third persons while at complex, sued owner of complex and employees. Defendants moved for summary judgment, and the Circuit Court, Dillon County, Jackson V. Gregory, J., granted motion. Appeal was taken, and the Court of Appeals, Anderson, J., held that: (1) social guest was "licensee" on premises; (2) even if guest was viewed as invitee, owner did not owe duty to protect from assault; (3) guest could not enforce provision of lease creating duty on part of owner to exclude criminal activity; (4) federal regulation requiring owner to maintain and operate project, which was federally subsidized, so as to provide decent, safe, and sanitary housing did not impose duty to protect tenants and their guests from violent, intentional attacks; and (5) any negligence on owner's part was not proximate cause of assault.

Affirmed.

West Headnotes

[1] Negligence 272  1040(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1040 Licensees

272k1040(2) k. Who Are Licensees.

Most Cited Cases

(Formerly 272k32(2))

Negligence 272 1041

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1041 k. Social Guests. Most Cited

Cases

(Formerly 272k1040(4), 272k32(2.13))

"Licensee" is a social guest, or a person who is privileged to enter upon land by virtue of possessor's consent.

[2] Negligence 272 1040(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1040 Licensees

272k1040(2) k. Who Are Licensees.

Most Cited Cases

(Formerly 272k32(2))

To be considered licensee, entrant's presence on property must be for primary benefit of entrant, not owner.

[3] Negligence 272 1037(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1037 Invitees

272k1037(2) k. Who Are Invitees.

Most Cited Cases

(Formerly 272k32(2.3))

"Invitee" is a person who enters onto property of another at the express or implied invitation of property owner.

[4] Negligence 272 ⚡1037(5)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1037 Invitees

272k1037(5) k. Public Invitees in General. Most Cited Cases
(Formerly 272k32(2.3))

"Public invitee" is one who is invited to enter or remain on land as member of public for purpose for which land is held open to public.

[5] Negligence 272 ⚡1076

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1075 Care Required of Store and Business Proprietors

272k1076 k. In General. Most Cited Cases
(Formerly 272k32(2.8))

"Business visitor" is an invitee whose purpose for being on property is directly or indirectly connected with business dealings with owner.

[6] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Social guest of tenant at apartment complex, who was criminally assaulted while he was on apartment

premises, was "licensee" on premises; guest was not public invitee, as an apartment complex is not place held open to public, and was not business invitee, since he was there merely to visit a friend.

[7] Landlord and Tenant 233 ⚡164(1)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k164 Injuries to Tenants or Occupants

233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Landlords do not owe duty to protect tenants from criminal activity merely by reason of landlord/tenant relationship.

[8] Negligence 272 ⚡1078

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1075 Care Required of Store and Business Proprietors

272k1078 k. Protection Against Acts of Third Persons. Most Cited Cases
(Formerly 272k50, 272k32(2.8))

Business owner has duty to take reasonable care to protect invitees; however, duty does not extend to protection from criminal attacks from third parties unless business owner knew or had reason to know criminal attack would occur.

[9] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Owner of apartment complex did not have

knowledge that tenant at complex was violent person who had been in numerous fights, or that tenant had been involved in altercation with individual, who was assaulted by tenant and others when he visited premises as social guest, earlier in day of assault, and thus, even assuming that guest was business invitee, owner did not owe duty to protect individual from assault.

[10] Negligence 272 ⚡234

272 Negligence

272III Standard of Care

272k234 k. Voluntarily Assumed Duties.

Most Cited Cases

(Formerly 272k2)

Under the common law, if there is no duty to act, but defendant voluntarily undertakes to act, defendant assumes duty to use due care.

[11] Negligence 272 ⚡234

272 Negligence

272III Standard of Care

272k234 k. Voluntarily Assumed Duties.

Most Cited Cases

(Formerly 272k1)

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for protection of the other's person or things is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (1) his failure to exercise such care increases risk of such harm, or (2) harm is suffered because of the other's reliance upon the undertaking. Restatement (Second) of Torts § 323.

[12] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Owner of apartment complex did not, through its actions in providing security to tenants of complex, undertake duty to protect social guest at complex from criminal assault which occurred on premises; security measures taken were for protection of residents, not the general public, and guest admitted that he did not have any expectation that owner would prevent attack.

[13] Contracts 95 ⚡185.1

95 Contracts

95II Construction and Operation

95II(B) Parties

95k185 Rights Acquired by Third Persons

95k185.1 k. In General. Most Cited Cases

Generally, third person not in privity of contract with contracting parties has no right to enforce contract.

[14] Contracts 95 ⚡187(1)

95 Contracts

95II Construction and Operation

95II(B) Parties

95k185 Rights Acquired by Third Persons

95k187 Agreement for Benefit of Third Person

95k187(1) k. In General. Most Cited Cases

When contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct, rather than incidental or consequential, benefit to such third person.

[15] Contracts 95 ⚡154

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k154 k. Reasonableness of Construction. Most Cited Cases

Common sense and good faith are key principles of construction of provisions of contract.

[16] Contracts 95 ⚡147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract.

Most Cited Cases

In construing terms of contract, reviewing court must look at language of contract to determine intentions of parties.

[17] Contracts 95 ⚡152

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k152 k. In General. Most Cited Cases

When language of contract is clear, explicit and unambiguous, it must be taken and understood in its plain, ordinary, and popular sense.

[18] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Parties to apartment lease did not intend to create direct benefit to social guest of tenant for protection of tortious acts of others while on apartment premises, and thus, guest, who was criminally assaulted during visit, could not recover for his injuries based on breach of duty by landlord to exclude any unlawful activity which was created by lease.

[19] United States 393 ⚡82(3.5)

393 United States

393VI Fiscal Matters

393k82 Disbursements in General

393k82(3) Public Works and Utilities; Housing and Urban Development

393k82(3.5) k. Operation of Housing Projects; Tenancy and Rent. Most Cited Cases

Federal regulation requiring owner of federally subsidized apartment complex to maintain and operate project so as to provide decent, safe, and sanitary housing does not impose duty on landlord of subsidized apartment complex to protect tenants and their guests from violent, intentional attacks of others. 24 C.F.R. § 886.123(a).

[20] Appeal and Error 30 ⚡497(1)

30 Appeal and Error

30X Record

30X(A) Matters to Be Shown

30k497 Grounds of Review

30k497(1) k. In General. Most Cited

Cases

Appellant has burden of presenting reviewing court with adequate record to allow consideration of issue.

[21] Negligence 272 ⚡202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited

Cases

(Formerly 272k1)

To prevail on negligence claim, plaintiff must prove (1) duty of care owed to him, (2) breach of that duty by negligent act or omission, and (3) damage proximately caused by breach of that duty.

[22] Negligence 272 ⚡385

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k385 k. Efficient or Direct Cause. Most Cited Cases

(Formerly 272k56(1.8), 272k56(1.7))

Proximate cause is the efficient, or direct, cause, or the thing which brings about injuries complained of.

[23] Negligence 272 ⚡372

272 Negligence

272XIII Proximate Cause

272k372 k. Necessity of Legal or Proximate Causation. Most Cited Cases
(Formerly 272k56(1.3))

Negligence 272 ⚡379

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases
(Formerly 272k56(1.12))

Negligence is not actionable unless it is a proximate cause of injuries, and it may be deemed a proximate cause only when without such negligence, injury would not have occurred or could have been avoided.

[24] Negligence 272 ⚡387

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k387 k. Foreseeability. Most Cited Cases

(Formerly 272k59)

Touchstone of proximate cause is foreseeability, which is determined by looking to natural and probable consequences of act complained of.

[25] Negligence 272 ⚡386

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

tions

272k386 k. Natural and Probable Consequences. Most Cited Cases
(Formerly 272k58)

Plaintiff proves legal cause by establishing that injury in question occurred as natural and probable consequence of defendant's negligence.

[26] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Any negligence on part of owner of apartment complex was not proximate cause of criminal assault of social guest at complex, as owner had no reason to foresee that breach of any duty guest sought to impose against it would have natural and probable consequence of resulting in intentional attack on guest by third parties.

****829 *437** William P. Hatfield and Gary I. Finklea, both of The Hyman Law Firm, Florence, for Appellant.

Thomas C. Cofield and Andrew E. Haselden, both of Barnes, Alford, Stork & Johnson, Columbia, for Respondents.

ANDERSON, Judge:

Alphonso Goode filed a complaint against St. Stephens United Methodist Church, d/b/a St. Stephens Apartments, Insignia Financial Group, Donald Bowen and Mack Gibson (collectively called "St. Stephens") for injuries he sustained when he was attacked on the grounds of the St. Stephens Apartments. The trial judge granted St. Stephens's motion for summary judgment, finding St. Stephens had no duty to protect a visitor to the apartment complex from the criminal acts of third parties. Goode appeals. ^{FN1} We affirm. ^{FN2}

FN1. Defendants Kevin Purnell, Darren Boatwright and Edward Rose, Goode's attackers, failed to answer the complaint and were held in default. They are not parties in this appeal.

FN2. We decide this case without oral argument pursuant to Rule 215, SCACR.

***438 FACTUAL/PROCEDURAL BACKGROUND**

On May 12, 1993, Alphonso Goode was giving his cousin a ride home when they encountered Defendant Edward Rose. Rose and Goode's cousin got into a fight; Goode and his cousin then left. Later that evening, around 9:00 p.m., Goode went to the St. Stephens Apartments to visit a friend, Georgia German. While there, Goode was attacked and severely beaten on the grounds of the apartment complex by Defendants Rose, Kevin Purnell, and Darren Boatwright. Boatwright lived at St. Stephens Apartments with his mother. Purnell and Rose were not tenants at St. Stephens, nor was Goode.

St. Stephens is a federally subsidized apartment complex, commonly known as Section 8 housing. At the time of the incident, St. Stephens Apartments was owned by Donald E. Bowen, and managed by Insignia Financial Group through its property manager, Mack Gibson. Goode brought this action alleging that the St. Stephens defendants were negligent in failing to provide security at the apartment complex. St. Stephens moved for summary judgment on the ground that under South Carolina law there was no duty on the part of St. Stephens to protect Goode from the criminal acts of third parties.

Several depositions and affidavits were submitted for the hearing on the motion for summary judgment. Mack Gibson, the property manager for St. Stephens at the time of the attack, testified in his deposition that, in accordance with posted guidelines for accepting new tenants, he did background checks, credit checks, home visits, and income verifications for all residents over the age of eighteen. The lease prohibited criminal activity on or near the property by tenants and their **830 guests. Gibson stated when criminal activity occurred, he could initiate proceedings for eviction of the tenant even before the person was convicted. However, no one was evicted from St. Stephens for criminal activity during Gib-

son's tenure as property manager.

Gibson stated the apartment complex provided security to the tenants by repairing locks as quickly as possible, securing windows, and informing the residents in a newsletter about criminal activity occurring within the complex. The newsletter was posted in the office and in the laundry room and was *439 taken to each of the apartments. Gibson also routinely inspected the property. Gibson asserted he was unaware of the fight between Goode and Defendants Rose, Purnell, and Boatwright until he received a letter from Goode's attorney.

Macio Williamson, a former manager who worked at St. Stephens for thirteen years beginning in 1973, provided an affidavit stating he had been aware of criminal activity at the complex. He said he considered it his duty to patrol the complex and that the tenants relied upon him to provide the additional security.

In his deposition, Goode described the neighborhood surrounding St. Stephens as "[r]ough. It's like a jungle." He admitted he knew there was no security on the grounds of St. Stephens at the time of the incident. Goode also stated he had witnessed Defendant Boatwright in several fights with other people at the complex.

Helena Purnell, Goode's mother, stated by affidavit that she and Goode lived at St. Stephens from 1979 to 1988, when she moved out due to "the increased criminal activity and poor management of the complex." Purnell said it was her "impression the management owed a duty to the tenants to provide adequate security and maintain the complex in a safe condition." Purnell stated she saw the manager of the complex patrol the grounds on several occasions.

Georgia German, the person Goode was planning to visit the night he was attacked, stated in her affidavit that she understood, pursuant to the lease, St. Stephens had a duty to prevent criminal activity from occurring on the premises, especially criminal activity instigated by residents. German believed the apartment complex assumed the responsibility for policing the area to keep criminal activity from occurring. Similarly, Elizabeth Smith, who was also a tenant at the time of the attack, stated in her affidavit that she believed the lease required the management

at St. Stephens to provide a safe environment free of criminal activity. Smith stated she and her family "relied on the management to perform some type of security and protection."

The trial judge granted summary judgment in favor of St. Stephens, finding under South Carolina law St. Stephens had *440 no duty to protect Goode from the intentional attacks of third parties. Goode appeals.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991). See also Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862, 863 (1997) (the evidence and the inferences therefrom should be viewed in the light most favorable to the non-moving party). "Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991).

LAW/ANALYSIS

Goode argues under a negligence theory that St. Stephens owed him a duty to warn, prevent, or protect him from the tortious activity of a tenant and his guests. He bases this duty on (1) his alleged status as an invitee under the common law; (2) St. Stephens's undertaking to render security services; (3) provisions in the lease; and (4) federal regulations and directives and handbooks promulgated thereunder.

*831 1. Status as Invitee v. Licensee

Although St. Stephens conceded during the hearing that Goode was an invitee for purposes of the motion for summary judgment, the trial court found there was no evidence in the record supporting his status as an invitee; instead, the trial court found he was a licensee. Goode offers as evidence of his status as an invitee (1) the deposition of property manager Mack Gibson, in which Gibson stated that tenants were allowed to have guests; (2) the affidavit of Georgia German, in which she stated Goode was invited to visit her at the apartment complex on the night of the attack; and (3) the affidavit of Goode's

mother, Helena Purnell, in which she stated Goode *441 had a standing invitation to visit friends such as Georgia German at the complex. Purnell noted that she and Goode previously lived at St. Stephens and that Goode frequently returned to see his friends.

[1][2][3][4][5] "A licensee is a social guest or 'a person who is privileged to enter upon land by virtue of the possessor's consent.'" Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 64 (Ct.App.1996) (quoting Neil v. Byrum, 288 S.C. 472, 343 S.E.2d 615 (1986)), cert. dismissed (June 2, 1997). A licensee's presence on the property is for the primary benefit of the licensee, not the owner. Id. at 535, 479 S.E.2d at 64. On the other hand, an invitee is a person who enters onto the property of another at the express or implied invitation of the property owner. Id. A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public. A business visitor is an invitee whose purpose for being on the property is directly or indirectly connected with business dealings with the owner. Id. at 536, 479 S.E.2d at 65 (citing Restatement (Second) of Torts § 332 (1981)). See also Parker v. Stevenson Oil Co., 245 S.C. 275, 140 S.E.2d 177 (1965) (the term "invitee" in premises liability cases means the same thing as a business visitor and refers to one who enters upon the premises of another at the express or implied invitation of the occupant, especially when he is there about a matter of mutual interest or advantage).

[6] Goode was not a public invitee because an apartment complex is not a place held open to the public and is instead a private place for only people who are specifically invited. See Cramer v. Balcor Property Mngt., Inc., 312 S.C. 440, 443, 441 S.E. 2d 317, 318 (1994) ("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.") (quoting Cooke v. Allstate Mngt. Corp., 741 F.Supp. 1205 (D.S.C.1990)). In addition, Goode was not a business invitee because he was not at the complex for a reason directly or indirectly connected with business dealings of the owner. Goode was not at the apartment complex as a prospective tenant. Instead, he was there to visit a friend when the attack *442 occurred. Goode was simply a social guest of a tenant at the complex, and was no more than a licensee.

[7] Moreover, in Cramer, the South Carolina Supreme Court, on a certified question from the federal district court, stated landlords do not owe a duty to protect tenants from criminal activity merely by reason of the landlord/tenant relationship. The court explained:

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 felony 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.

Cramer, 312 S.C. at 443, 441 S.E. 2d at 318 (quoting Cooke, 741 F.Supp. 1205).

Goode attempts to distinguish Cramer from the facts of this case. In Cramer, a tenant was killed in her apartment by an unknown assailant. Goode asserts his case is different because he was attacked by a tenant in a common area rather than inside an apartment. The Cramer court specifically held that "[u]nder South Carolina law a landlord does not owe a duty to a tenant to provide security in and around a leased **832 premises to protect the tenant from criminal activity of third parties." Id. at 444, 441 S.E. 2d at 319 (emphasis added). The court's holding clearly imposes no duty to provide security in apartments or common areas. In addition, in finding that the landlord owes no duty to protect tenants from the criminal acts of third parties, the court did not distinguish between known and unknown assailants. The court noted in Cramer that a duty may arise under the particular circumstances of the individual case upon a showing of negligence constituting the proximate cause of the loss. Id. at 443 n. 1, 441 S.E. 2d at 319 n. 1. However, without special circumstances that would create a duty to protect a tenant or guest from attack from a particular tenant, the attacker's status as a tenant does not in itself create such a duty.

Goode also contends Cramer is inapplicable because the case is limited to situations involving a landlord/tenant relationship and not owner/invitee.

The court found a fundamental*443 distinction between the relationships of landlord/tenant and owner/invitee. Id. at 442-43, 441 S.E. 2d at 318. The court declined to impose a duty on the landlord to protect tenants from criminal activity merely because of the relationship. We think it would be absurd to find a landlord owes a higher duty of care to the guests of tenants than to the tenants themselves.^{FN3}

^{FN3} The Latin phrase "*reductio ad absurdum*" [leading to absurd consequences] is efficacious. See Black's Law Dictionary 1279 (6th ed. 1990).

Finally, Goode attempts to distinguish Cramer because he is not relying on the South Carolina Residential Landlord Tenant Act to create the duty of care owed to him. The Supreme Court explicitly stated, "Neither common law nor the South Carolina Residential Landlord-Tenant Act imposes a duty on a landlord to provide protection to tenants against criminal activity of third parties." Id. at 444, 441 S.E. 2d at 319 (emphasis added). Therefore, Goode's argument is clearly without merit.

[8] Even if Goode were a business invitee at the time of the incident, St. Stephens would not be liable for his injuries. A business owner has a duty to take reasonable care to protect invitees. However, this duty does not extend to protection from criminal attacks from third parties unless the business owner knew or had reason to know the criminal attack would occur. Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984). In Callen v. Cale Yarborough Enterprises, 314 S.C. 204, 442 S.E.2d 216 (Ct.App.1994), cert. denied (Oct. 20, 1994), this Court found a Hardee's restaurant was not liable for injuries an invitee suffered as a result of a fight in the drive-through service lane of the restaurant. Although Hardee's knew other violent incidents had occurred at the location over the past several years, there was no previous incident that night to put Hardee's on notice of any problems. Thus, there was no evidence Hardee's knew or had reason to know a fight was occurring or about to occur. Id. at 206, 442 S.E.2d at 218.

[9] In this case, both Goode and his mother stated they knew of criminal activity that had occurred at St. Stephens in the past, including an alleged shooting. In addition, Goode *444 asserted he

knew Darren Boatwright was a violent person and that he had seen Boatwright involved in other fights at the complex. However, there is no evidence in the record that St. Stephens was aware of Boatwright's previous fights or of any incident that day that would put management on notice the attack on Goode by Boatwright and the others might occur. Therefore, St. Stephens had no duty to protect Goode from the intentional attack even if he were an invitee.

2. Duty Created by Undertaking

Goode also argues St. Stephens created a duty to protect him from the violent acts of third parties by undertaking to provide security to tenants and their guests.

[10][11] Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986). Goode cites the **833 Restatement (Second) of Torts § 323 (1965) to support this duty. This section provides:

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

[12] Mack Gibson, the resident manager, testified that St. Stephens provided security to the tenants by repairing locks, securing windows, informing tenants of criminal acts occurring in the complex, and routinely inspecting the complex. The security measures undertaken by St. Stephens were for the protection of the residents of the complex, not the general public. Gibson acknowledged that after the incident, daily security patrols were made by local law enforcement at the request of St. Stephens. Nonetheless, the record on appeal contains no evidence that any of the security measures undertaken by St. Stephens were performed with less than due care. Although several tenants and a former property manager*445 stated in affidavits that the tenants relied on the com-

plex to provide security, there is no evidence their reliance caused Goode to suffer the beating. Moreover, Goode admitted in his deposition that he knew St. Stephens did not provide security for the complex at the time of the incident. Therefore, he obviously could not have relied on any undertaking by St. Stephens to prevent the intentional, personal attack. We find no basis for liability under either the Restatement (Second) of Torts nor the common law rule.

3. Duty Created by the Lease

Goode next argues that the lease in effect at the time of the incident created a duty for St. Stephens to protect Goode from the attack by third parties. According to Goode, St. Stephens contracted to exclude any unlawful activity within the common areas and to terminate the lease of any tenant who engaged in such activity. Goode asserts he was a third-party beneficiary to the lease and may therefore enforce the promise made for his benefit.

[13][14] Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct.App.1994).

[15][16][17] Thus, to determine if Goode was a third party beneficiary of the lease, we must construe the terms of the lease to ascertain the intentions of the parties. Common sense and good faith are key principles of construction of the provisions of a contract. In construing terms of a contract, the reviewing court must look at the language of the contract to determine the intentions of the parties. When the language of the contract is clear, explicit and unambiguous, it must be taken and understood in its plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health & Human Serv. Fin. Comm'n. 296 S.C. 373, 373 S.E.2d 584 (1988).

[18] *446 To establish St. Stephens's duty to protect him, Goode refers to provisions in the lease where the resident agrees not to engage in or permit unlawful activities in the apartment, in the common areas or on the property grounds, and is warned that

engaging in or permitting violent or criminal activity is good cause for termination of the lease. We find St. Stephens and the other parties to the lease did not intend to create a direct benefit to Goode of protection from the tortious acts of others. In none of these provisions does St. Stephens covenant to prevent or to protect tenants from the violent acts of other tenants or third parties. Therefore, the parties to the lease could not have intended to create such a benefit directly in favor of Goode.

****834 4. Duty Created by Federal Regulations and Directives**

Goode argues St. Stephens's duty to protect him was created by federal regulations and Department of Housing and Urban Development (HUD) directives and handbooks.

[19] As a federally subsidized complex, St. Stephens is governed by federal law and regulations. Goode directs the Court's attention to 24 C.F.R. § 886.123(a) (1996), which provides, "[t]he Owner shall maintain and operate the project so as to provide Decent, Safe, and Sanitary housing and he shall provide all the services, maintenance and utilities which he agrees to provide under the Contract...." However, "[t]he [phrase] 'decent, safe, and sanitary' housing is a subjective term at best." Perry v. Housing Auth. of Charleston, 664 F.2d 1210, 1218 n. 13 (4th Cir.1981) (quoting Boston Pub. Housing Tenants' Policy Council, Inc. v. Lynn, 388 F.Supp. 493 (D.Mass.1974)). We find this regulation does not impose a duty on the landlord of a subsidized apartment complex to protect tenants and their guests from the violent, intentional attacks of others.

[20] Goode also attempts to establish the duty through HUD handbooks and directives. However, he failed to include these materials in the record on appeal. Goode, as the appellant in this issue, has the burden of presenting this Court with an adequate record. Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996) (appellant has the burden to present a sufficient record for appellate court to make a *447 decision); Germain v. Nichol, 278 S.C. 508, 299 S.E.2d 335 (1983) (appellant has the burden of presenting a sufficient record for review); Vespaziani v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (Ct.App.1992) (appellant has the burden of presenting a sufficient record for review). Because Goode did not provide adequate materials for the

Court to consider this argument, we must affirm the trial court on this issue.

5. Proximate Cause

Although Goode valiantly attempts to establish a duty on the part of St. Stephens to protect him from attacks by tenants and others, he fails to address the trial court's finding that even if Goode had established a duty, the breach of this duty was not the proximate cause of his injuries.

[21][22][23][24][25] To prevail on his negligence claim, Goode must prove three elements, (1) a duty of care owed by St. Stephens to him; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of that duty. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). "[P]roximate cause is the efficient, or direct, cause-the thing which brings about the injuries complained of. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). "The touchstone of proximate cause in South Carolina is foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the act complained of. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." Vinson, 324 S.C. at 400, 477 S.E.2d at 721 (citations omitted). In addition,

The proposition that the wrongful or illegal act of an independent third person may not be regarded as such a consequence of a tort-feasor's alleged wrong as should entail legal liability must rest ... upon the assumption that such a consequence is not one of which a person who assumes the discharge of the ordinary civil obligation has knowledge or the opportunity by the exercise of reasonable diligence to *448 acquire knowledge; that it is an unnatural and abnormal intervention in the ordinary train of events and consequences not reasonably to be anticipated from the act or omission which is charged to the alleged tort-feasor as a breach of duty.

Crowley v. Spivey, 285 S.C. 397, 407, 329 S.E.2d 774, 780-81 (Ct.App.1985) (quoting Green v.

Atlanta & Charlotte Air Line Ry. Co., 131 S.C. 124,
126 S.E. 441 (1925)).

**835 [26] As noted above, St. Stephens had no notice the attack on Goode was going to occur. It had no reason to foresee that a breach of any of the duties Goode attempts to impose on it would have the natural and probable consequence of resulting in an intentional attack upon Goode by third parties at the apartment complex. Accordingly, St. Stephens was not negligent.

CONCLUSION

Considering the facts in the light most favorable to Goode, we conclude there is no genuine issue of material fact concerning St. Stephens's liability for the injuries Goode suffered. Consequently, the trial court did not err in granting summary judgment in favor of St. Stephens.

The decision of the trial court is AFFIRMED.

CONNOR and HUFF, JJ., concur.

S.C.App.,1997.
Goode v. St. Stephens United Methodist Church
329 S.C. 433, 494 S.E.2d 827

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H

Supreme Court of South Carolina.
 Octavia JACKSON, Appellant,
 v.
 SWORDFISH INVESTMENTS, L.L.C., Respondent.

 No. 26037.
 Heard June 2, 2005.
 Decided Sept. 6, 2005.
 Rehearing Denied Oct. 5, 2005.

Background: After nightclub patron was shot multiple times by an assailant inside nightclub, she filed an action against commercial landlord that alleged that it had a duty to protect her from criminal activity in the club by providing adequate security on or in the vicinity of the property where she was shot. The Circuit Court, Richland County, J. Ernest Kinard, Jr., J., granted landlord summary judgment. Patron appealed.

Holdings: After certifying the case, the Supreme Court, Burnett, J., held that:

(1) landlord had no duty to protect patron from the criminal acts of third parties that occurred inside the leased premises;
 (2) the affirmative acts exception to the traditional rule that commercial landlords were not liable to protect invitees from criminal acts by third parties did not apply to impose liability on landlord; and
 (3) the fact that assailant was allowed to re-enter nightclub after having been escorted from the club did not establish that landlord breached its duty to maintain the common areas in a safe and secure manner.

Affirmed.

Pleicones, J., filed a dissenting opinion in which Toal, C.J., concurred.

West Headnotes

[1] Negligence 272 ⚡202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited Cases

In a negligence action, a plaintiff must show the (1) defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages.

[2] Negligence 272 ⚡1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases

Whether the law recognizes a particular duty is an issue of law to be determined by the court.

[3] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

Commercial landlord for premises occupied by nightclub had no duty to protect nightclub patron from the criminal acts of third parties that occurred inside the leased premises; landlord did not control or possess the leased premises.

[4] Landlord and Tenant 233 ⚡167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

The affirmative acts exception to the traditional rule that commercial landlords were not liable to protect invitees from criminal acts by third parties did not apply to impose liability on landlord, after nightclub patron was shot inside nightclub located on leased property, even though landlord arranged for security in the common areas of the leased property, where there was no evidence that landlord ever agreed to provide security inside nightclub.

[5] Negligence 272  218

272 Negligence

272II Necessity and Existence of Duty

272k217 Voluntarily Assumed Duty

272k218 k. In General. Most Cited Cases

Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care.

[6] Landlord and Tenant 233  167(8)

233 Landlord and Tenant

233VII Premises, and Enjoyment and Use Thereof

233VII(E) Injuries from Dangerous or Defective Condition

233k167 Injuries to Third Persons and Their Property

233k167(8) k. Injuries to Visitors or Guests of Tenant. Most Cited Cases

The fact that assailant was allowed to re-enter nightclub after having been escorted from the club, where he then proceeded to shoot randomly and shot and injured nightclub patron, did not establish that commercial landlord breached its duty to maintain the common areas in a safe and secure manner; patron failed to present any evidence of any alleged criminal or suspicious activity occurring outside of

the club before assailant re-entered the club.

****55** Carl L. Solomon, of Gergel, Nickles & Solomon, P.A. and Tony Dessausure, of The Dessausure Law Firm, both of Columbia, for Appellant.

J.R. Murphy and Adam J. Neil, both of Murphy & Grantland, P.A., of Columbia, for Respondent.

Justice BURNETT.

***610** This is a negligence action against a commercial landlord arising out of a shooting which occurred inside the leased premises. The trial court granted the landlord's motion for summary judgment. We certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ronald O. Swinson, Jr. and his wife each own a fifty-percent share of Swordfish Investments, LLC ("Swordfish"), a limited liability company which Swinson set up to own real estate. Swinson is employed by C.B. Richard Ellis, a commercial real estate and brokerage firm.^{FN1} C.B. Richard Ellis is the leasing agent for properties owned by Swordfish.

FN1. Swinson is a partner in C.B. Richard Ellis and is employed to run the overall operations of the company. He is not a commercial real estate broker.

Swordfish owns the Columbia East Shopping Center in Columbia. Uptop Management, Inc. ("Uptop"), a South Carolina corporation, leased a portion of the shopping center for use as a nightclub. The lease dated December 21, 2000, was signed by Swinson on behalf of Swordfish and by Pearl Ingram on behalf of Uptop. Swinson testified he believed Uptop subsequently entered into a management agreement with Dance, Inc. ("Dance") over its portion of the shopping center during the term of Uptop's lease. When operated by Dance, Uptop's nightclub was known by various names, including Club Voodoos.

During the operation of the various nightclub establishments in Uptop's leased portion of the shopping center, numerous crimes, including narcotics violations, assaults, and various instances of disorderly conduct, were committed on the premises. Ingram requested security be provided by either Sword-

fish or C.B. Richard Ellis on Swordfish's behalf. Swordfish agreed to provide security in the common areas, first by employing off-duty deputies and later employing a private security company.

*611 Larry Capall, director of property management for C.B. Richard Ellis, testified Swordfish switched from the off-duty officers to the private security company because the club owners complained about the cost to employ the off-duty deputies. Although Swordfish arranged for the security in the common areas, it charged the tenants for the cost of maintaining the security. Swordfish considered security "additional rents" under the lease to be paid by the tenant. Prior to November 3, 2001, Swordfish, because of the failure of payment by Uptop, discontinued the security in the common areas.

On November 3, 2001, Octavia M. Jackson (Appellant) and several friends entered Club Voodoos. While Appellant was in the club, two altercations occurred. One involved a male patron who was escorted from the club. Soon thereafter Appellant and her party decided to leave and began exiting the club. At that time, the male patron re-entered the club with a gun and began shooting in the air and indiscriminately into the crowd. Appellant was shot multiple times.

Appellant argues Swordfish had a duty to protect her from the criminal activity in the club by providing adequate security on or in the vicinity of the property where Appellant was shot. The trial court granted Swordfish's motion for summary judgment.

ISSUE

Did the trial court err in granting Swordfish's motion for summary judgment?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. **56 *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995). Further, summary judgment should not be granted even when

there is no dispute as to the evidentiary *612 facts, if there is a dispute as to the conclusion to be drawn therefrom. *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

[1][2] In a negligence action, a plaintiff must show the (1) defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages. *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). Whether the law recognizes a particular duty is an issue of law to be determined by the court. *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996).

[3] Appellant argues the trial court erred in concluding Swordfish had no duty to protect her from the criminal acts of her assailant inside the leased premises. We disagree.

In *Cramer v. Balcor Property Management, Inc.*, 312 S.C. 440, 441 S.E. 2d 317 (1994), we concluded, on a certified question from the federal district court, that residential landlords do not owe a general duty to protect tenants from criminal activity of third parties. We agreed with the federal district court opinion in *Cooke v. Allstate Management Corp.*, 741 F.Supp. 1205 (D.S.C.1990), which found the residential landlord/tenant relationship to be fundamentally different from the relationships for which South Carolina law will impose a duty to protect against criminal activity.

In the present case, Appellant argues that as the sub-lessee's invitee, Swordfish had a common law duty to protect her from the criminal acts of a third party. Appellant's status as an invitee does not, under the facts of this case, create a duty on the part of Swordfish to protect her from the criminal acts of third parties inside the leased premises, an area which Swordfish did not control or possess.^{FN2}

FN2. Appellant argues *Cramer* is inapposite because Swordfish is a commercial landlord

and Cramer addressed a landlord's duty only in the residential setting. We decline to address the issue of a commercial landlord's duty under the facts of this case, in which the crime occurred inside leased premises not under the landlord's control, and Appellant presented no evidence of any alleged criminal or suspicious activity occurring in areas under the landlord's control.

*613 In Cramer, we explained that even though South Carolina law does not impose a duty on a landlord to protect a tenant from the criminal acts of third parties, a plaintiff is not precluded from asserting a general negligence principle. A duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties. Cramer, 312 S.C. at 443, 441 S.E.2d at 319.

[4] Appellant argues the applicability of two exceptions to the traditional rule of non-liability of landlords. The exceptions are the "affirmative acts" exception and the "common areas" exception. We conclude neither exception is applicable in this case.

[5] Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991). Appellant argues that once Swordfish acted to provide security, it was obligated to maintain adequate security.

Although Swordfish agreed to arrange for security in the common areas at the tenant's expense, there is no evidence in the record Swordfish ever agreed to provide security inside the club. Swordfish had neither possession nor control over the activities inside **57 the club when Appellant was shot. Therefore, no duty arose, under the affirmative acts exception, on the part of Swordfish to protect its tenants or their patrons from the criminal acts of third parties occurring inside the club.

[6] Appellant next argues Swordfish, as owner of the property, had a duty to maintain common areas in

a safe and secure manner. Because Appellant's assailant was able to re-enter the club, Appellant argues Swordfish breached its duty under the common areas exception.

*614 In a case presenting different facts, we might well agree with the dissent that a commercial landlord has a duty to reasonably protect invitees from foreseeable criminal acts in areas under the commercial landlord's control. Assuming, without deciding, Swordfish had a duty under the lease to provide security in the common areas, Appellant has failed to present any evidence demonstrating a breach of this duty. Appellant has presented no evidence of any alleged criminal or suspicious activity occurring outside the club before Appellant's assailant re-entered the club. There simply is no evidence in the record suggesting the assailant's activities outside the club would have alerted security personnel in the common areas of the assailant's impending criminal conduct inside the club.

Finally, our resolution of this issue is dispositive and we need not address Appellants' remaining issues regarding proximate causation. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

AFFIRMED.

MOORE and WALLER, JJ., concur. PLEICONES, J., dissents in a separate opinion in which TOAL, C.J., concurs.

Justice PLEICONES.

I respectfully dissent. In my opinion, Swordfish had a duty to reasonably secure the common areas of the premises, and there are genuine issues of material fact concerning breach and causation.

By emphasizing the fact that Appellant was injured inside the club, an area over which Swordfish purportedly had no control, the majority avoids Appellant's argument that Swordfish had a duty to provide reasonable security measures in the common areas outside the nightclub, which were under Swordfish's control, and that the failure to do so allowed the assailant to return to the club and injure Appellant. That Appellant was shot inside the club relates to

causation, which in my opinion, is not here a proper element of negligence on which to base summary judgment.

*615 I agree with Appellant that a commercial landlord, under circumstances here appearing, has a duty to reasonably protect invitees from foreseeable criminal acts in areas under the landlord's control. Compare Cramer v. Balcor Prop. Mgmt. Inc., 312 S.C. 440, 441 S.E. 2d 317 (1994) (holding that a residential landlord has no duty to protect invitees from foreseeable criminal acts), with Bullard v. Ehrhardt, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984) (holding that a store owner has a duty to protect invitees from foreseeable criminal acts), and Munn v. Hardee's Food Sys., Inc., 274 S.C. 529, 531, 266 S.E.2d 414, 414-15 (1980) (same), and Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977) (same).

Swordfish is a commercial landlord which expects members of the general public to utilize the common areas as patrons of Swordfish's tenants. If a landlord like Swordfish should reasonably anticipate that the paying public will be exposed to society's criminal element, then it is appropriate that the landlord be expected to take measures to protect the patrons. As the party in control of the common areas, the landlord is in the best position to bear the burden with respect to those areas. See Cramer, 312 S.C. at 442-43, 441 S.E. 2d at 318-319 (distinguishing store owners, who invite the general public to their premises, from residential landlords, who do not invite the general public to their premises) (relying on Cooke v. Allstate Mgmt. Corp., 741 F.Supp. 1205 (D.S.C.1990)).

The question, then, is whether Swordfish should have foreseen criminal behavior taking**58 place in the common areas of its property. The evidence in the record is overwhelming that long before Appellant was shot, drug use, violence, and other criminal behavior were rampant in the common areas surrounding the nightclub. Swordfish was fully aware of the situation, and I would therefore hold that a duty to reasonably secure the common areas arose prior to the shooting at issue.

A jury ^{FN3} must determine whether Swordfish breached its duty after considering evidence relating

to what security measures, if taken, would have fulfilled that duty. I find summary judgment not properly based on this element of negligence.

^{FN3}. In her complaint, Appellant requested a jury trial.

*616 Likewise, there remain for further factual development matters relating to causation. Assuming a breach of Swordfish's duty in the common areas, it remains to be determined whether such breach was a proximate cause of the assailant's access to the club while armed.

Further, I disagree with the circuit court that proximate cause is absent as a matter of law. The circuit court held that there was no question but that the shooting was an unforeseeable, intervening act that broke the causal link between any breach by Swordfish and Appellant's injury. This determination is irreconcilable with Swordfish's duty arising from the foreseeability of criminal conduct. Like the presence of cause in fact, the presence of proximate cause would depend on the jury's decision on breach. It is impossible at this point to determine as a matter of law that a breach by Swordfish did not cause Appellant's injury.

On these grounds, the grant of summary judgment to Swordfish should be reversed, and the case remanded for trial.

In addition, and notwithstanding the previous discussion, the case must be remanded for a determination whether Swordfish had a contractual duty to secure the common areas. Appellant argued to the circuit court and this Court that Swordfish assumed such a duty in its lease with Up-Top. The circuit court did not interpret the lease, however, because the court held that Appellant's "negligence claim [could not] lie if it [were] based on a breach of contract between Swordfish and Up-Top in the absence of a duty independent of the contract." This was error. Even when a duty to the plaintiff does not otherwise exist, a duty may arise out of the alleged tortfeasor's contract with a third party. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). Accordingly, the grant of summary judgment should be reversed and the case remanded so that the circuit court can interpret the lease. Were the court to find that the lease imposed a duty on Swordfish, then breach and

620 S.E.2d 54
365 S.C. 608, 620 S.E.2d 54
(Cite as: 365 S.C. 608, 620 S.E.2d 54)

Page 6

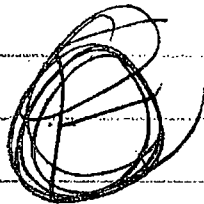
causation would depend on the nature and extent of that contractual duty, which could differ from the common-law duty discussed above.

For the reasons I have stated, I would reverse the grant of summary judgment and remand the case for trial.

TOAL, C.J., concurs.

S.C., 2005.
Jackson v. Swordfish Investments, L.L.C.
365 S.C. 608, 620 S.E.2d 54

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1 IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA

2 COUNTY OF RICHLAND

3 - - -

DENISE WRIGHT :

4 :

v. :

5 :

PRG REAL ESTATE : NO.

6 MANAGEMENT, INC., : 2011-CP-40-4068

FRANKLIN PINERIDGE :

7 ASSOCIATES, KAREN :

CAMPBELL, INDIVIDUALLY :

8 AND IN HER :

REPRESENTATIVE :

9 CAPACITY AS AN AGENT :

OF PRG REAL ESTATE :

10 MANAGEMENT :

11

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12

September 6, 2012

13

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14

Videotaped deposition of
15 MESCHELLE ROTEN, taken pursuant to
notice, was held at the offices of Magna
16 Legal Services, Seven Penn Center, 1635
Market Street, Philadelphia, Pennsylvania
17 19103, commencing at 9:28 a.m., on the
above date, before Chereese Cornish, a
18 Professional Court Reporter and Notary
Public in and for the Commonwealth of
19 Pennsylvania.

Roten, Meschelle 2012-09-06.txt

Page 1

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1 don't believe that we were -- there's
2 anything -- that we could have prevented
3 them from entering the property, no.

4 Q. Okay. Because in this
5 particular case, this property was in a
6 managed community, the Harbison
7 Community, right?

8 A. The property is located in
9 the Harbison Community.

10 Q. So anybody had access to
11 this apartment complex?

12 A. It's private property.

13 Q. It's private property, but
14 anybody could have come on that private
15 property from this Harbison Community or
16 pulling into the property, right?

17 A. It's not a -- it's private
18 property, but guests, individuals, can
19 enter the property.

20 Q. Just like if you go to the
21 mall. That's private property, but
22 anybody can drive on it, right?

23 A. Well, a mall is a little
24 different.

00147

1 A. Yes.

2 Q. And it's sent to

3 wellspring@prgrealestate.com.

4 Do you see that?

5 A. I do.

6 Q. Wellspring@prgrealestate.com

7 -- that comes to the corporate office,

8 doesn't it?

9 A. I don't believe so. It goes

10 to all of the people that are in the

11 office at Wellspring.

12 Q. Okay. Now, in 2008, before

13 the abduction occurred --

14 A. Okay.

15 Q. Okay? The courtesy officer

16 was supposed to receive a discount off

17 their rent as long as they were working

18 with you, right?

19 A. As long as they were an

20 active courtesy officer.

21 Q. And as a courtesy officer,

22 they were supposed to walk the property

23 two hours a day?

24 A. Correct.

00031

1 someone on duty 24/7. You see that?

2 A. I see that.

3 Q. Y'all did have some courtesy
4 officers that were on duty at Wellspring
5 during this time, right?

6 A. During this specific time?

7 Q. Yes.

8 A. No, we did not.

9 Q. Okay. So there was no
10 courtesy officers on duty at Wellspring?

11 A. Not at the time of the
12 incident.

13 Q. Okay. Go to the next. It
14 says: Five home security threats in an
15 apartment complex. It says: Living in a
16 large apartment complex can offer a
17 feeling of community, which means single
18 people and families. And here are five
19 security threats which often pop up in
20 apartments complex and how you should
21 address them.

22 You see that part, right?

23 A. Yes.

24 Q. And it says: Locks handed

00146

1 aware that lights were out for more than
2 one to two days?

3 A. I mean, I can't answer that.

4 I can't answer that question. I don't
5 have anything that shows statistics for
6 that.

7 Q. Okay. The next one, the
8 next page -- this -- this is a -- is a --
9 is an officer -- it looks like they were
10 looking for a courtesy officer.

11 It says: The courtesy
12 officer will receive 25 percent off their
13 rent for as long as they're working,
14 depending upon apartment size they
15 choose. And the courtesy officer will
16 receive a cell phone and will be required
17 to respond to non-life threatening
18 emergency phone calls whenever possible.
19 Usually, these are noise complaints,
20 suspicious sightings, et cetera.

21 Do you see that?

22 A. I see that.

23 Q. And that's from the property
24 manager at Wellspring Apartments?

G

00001

1 State of South Carolina)
)
2 County of Richland)
3 Denise Wright,) 2011-CP-40-4068
)
4 Plaintiff,)
)
5 vs.) Video Deposition
)
6 PRG Real Estate Management,) of
 Inc., Franklin Pineridge)
7 Associates, Karen Campbell) Karen Campbell
 Individually and in her)
8 Representative Capacity as)
 an Agent of PRG Real Estate)
9 Management,)
)
10 Defendants.)
)
11)
12
13
14 Video deposition of Karen Campbell, taken before
15 Sandra J. Ayers, a notary public in and for the State of
16 South Carolina, commencing at the hour of 10:10 a.m.,
17 Monday, August 20, 2012, at the office of Collins &
18 Lacy, PC, 1330 Lady Street, Sixth Floor, Columbia, South
19 Carolina.
20
21
22 Reported by
23 Sandra J. Ayers
24
25

00165

1 A He would have received a monthly concession.

2 Q Uh-huh.

3 A So that must have been his concession for February.

4 Q Okay. And then it says courtesy officer through

5 the last one I saw was 1/1/2008.

6 A Okay.

7 Q Is that the last one that you see on there?

8 A For courtesy officer?

9 Q Yes.

10 A Yes.

11 Q Okay. Now, when someone was a courtesy officer,

12 they could get a price break for -- for living on-

13 site, right?

14 A They would get a discount. Yes.

15 Q Now, what are the circumstances of someone being a

16 courtesy officer and not being -- then not being a

17 courtesy officer? Or receiving a discount and then

18 not getting the discount?

19 A As far as Frank, here?

20 Q Yes.

21 A I don't remember why he didn't want to be courtesy

22 officer any longer. I believe he was getting

23 married.

24 Q Right.

25 A And so he lived there -- he stopped being courtesy

00223

1 real long --

2 A Uh-huh.

3 Q -- and he was there for a long time --

4 A Right.

5 Q -- and -- but he stopped being a courtesy officer

6 like after 2007?

7 A Well, he wasn't always with Richland County --

8 Q Okay.

9 A -- so he was not able --

10 Q Okay.

11 A -- to be a courtesy officer.

12 Q Gotcha. Okay. Frank Panarello -- Frank Panarello

13 -- let me -- let me -- it says -- No. 30 -- No. 17.

14 And this just says, "List the courtesy officers."

15 And Frank Panarello is not in there, but I -- there

16 may have been a supplement to that, I'm not sure

17 of, but we know Frank Panarello was there sometime

18 in 2007/2008.

19 A Right.

20 Q And do you know why he quit being a --

21 A I don't. I remember he was a state trooper, and

22 then I knew he was getting married, so I don't know

23 if there was just a conflict or --

24 Q It wasn't --

25 A -- I don't know.

00224

1 Q -- just Richland County Sherriffs Department. H

2 could be a state trooper or Richland County

3 Sherriffs Department, right?

4 A Right. Right.

5 Q I mean, it's anybody that in law enforcement that

6 could park --

7 A That had jurisdiction.

8 Q -- an official vehicle. That had jurisdiction?

9 A Right.

10 Q Okay. Now, did y'all have any security cameras out

11 there?

12 A No.

13 Q You're over at Paces Brook now?

14 A Yes.

15 Q Do y'all have security cameras?

16 A We do now. They were just installed.

17 Q Okay. Do you know why they didn't have security

18 cameras out there then?

19 A It just wasn't -- the company just didn't do it.

20 Q Okay. It just wasn't in the budget?

21 A I have no idea about their budget.

22 Q Okay.

23 MR. HOOD: I'm not going to do that. Not

24 doing that.

25 Q Sometime in December 2007, you bought a house and

00222

1 Q Okay.

2 A Just to have it addressed.

3 Q But those quarterlies --

4 A Uh-huh.

5 Q -- that would've been something between 2006 and

6 2008 that would've been sent quarterly to Pamela

7 Williams?

8 A Yes.

9 Q Okay. Do you know the name of that particular

10 report?

11 A I do not.

12 Q Okay. And when you have courtesy officers, were

13 there times that there were periods of time where

14 there were no courtesy officers?

15 A Yes.

16 Q And is that because they weren't a resident any

17 longer, or -- or ...

18 A That, and most courtesy officers wanted free rent,

19 and we didn't offer that. So we would lose

20 courtesy officers for that.

21 Q If you didn't lose courtesy officers --

22 A Uh-huh.

23 Q -- and they stayed, why were they no longer

24 courtesy officers? Like -- for instance, like, you

25 know, you saw Mr. Hughes had that thing that was

00223

1 Q real long --

2 A Uh-huh.

3 Q -- and he was there for a long time --

4 A Right.

5 Q -- and -- but he stopped being a courtesy officer

6 like after 2007?

7 A Well, he wasn't always with Richland County --

8 Q Okay.

9 A -- so he was not able --

10 Q Okay.

11 A -- to be a courtesy officer.

12 Q Gotcha. Okay. Frank Panarello -- Frank Panarello

13 -- let me -- let me -- it says -- No. 30 -- No. 17.

14 And this just says, "List the courtesy officers."

15 And Frank Panarello is not in there, but I -- there

16 -- may have been a supplement to that, I'm not sure

17 of, but we know Frank Panarello was there sometime

18 in 2007/2008.

19 A Right.

20 Q And do you know why he quit being a --

21 A I don't. I remember he was a state trooper, and

22 then I knew he was getting married, so I don't know.

23 if there was just a conflict or --

24 Q It wasn't --

25 A -- I don't know.

00224

1 Q -- just Richland County Sherriff's Department. It

2 could be a state trooper or Richland County

3 Sherriff's Department, right? ...

4 A Right. Right.

5 Q I mean, it's anybody that in law enforcement that

6 could park --

7 A That had jurisdiction.

8 Q -- an official vehicle. That had jurisdiction?

9 A Right.

10 Q Okay. Now, did y'all have any security cameras out

11 there?

12 A No.

13 Q You're over at Paces Brook now?

14 A Yes.

15 Q Do y'all have security cameras?

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18 cameras out there then?

19 A It just wasn't -- the company just didn't do it.

20 Q Okay. It just wasn't in the budget?

21 A I have no idea about their budget.

22 Q Okay.

23 MR. HOOD: I'm not going to do that. Not

24 doing that.

25 Q Sometime in December 2007, you bought a house and

#

PRG Def 002427

From: wellspring_mgr [IMCEAEX-
_O=FIRST+20ORGANIZATION_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=WELI
Sent: Wednesday, March 25, 2009 11:58 AM
To: wellspring@pgrealestate.com
Subject: Officer revision- Great Job Katie!

Thank you for forwarding this message! Please let me know that you've received it!

Wellspring Apartments is currently looking for a Courtesy Officer. The courtesy officer will receive 25% off their rent for as long as they are working with us. This is a \$155 - \$225 discount, depending on what apartment size they choose. (We have one, two, and three bedroom apartments available.)

The courtesy officer will receive a cell phone and will be required to respond to non-life threatening emergency phone calls whenever possible. (Usually these are noise complaints, suspicious sightings, etc). The officer will also walk the property weekly at night to report streetlights out and anything else that the management office would need to know. During the summer the courtesy officer will also be responsible for locking and unlocking the pool gate, whenever possible.

It would be preferred if the officer brought his car home at night but it is not necessary.

Nayeli Lozada
Property Manager
Wellspring Apartments
500 Harbison Blvd,
Columbia, SC 29212
Phone: 803-781-9541
Fax: 803-749-2014

I

05-06-07-08

RELEVANT PARKING LOT CRIMES ON OUTSIDE

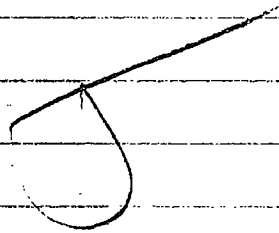
1-7-05	THEFT FR. MV
11-2-05	MV THEFT
3-21-06	THEFT OF MV PARTS
7-7-06	MV THEFT
12-4-06	ASSAULT (STRANGER)
2-4-07	MV THEFT
3-6-07	THEFT OF MV PARTS
5-27-07	THEFT FR. MV
6-23-07	THEFT OF MV PARTS
7-2-07	MV THEFT
8-16-07	MV THEFT
11-28-07	NARCOTICS (NOT IN PARKING LOT)
1-23-08	THEFT FR. MV
6-5-08	MV THEFT
7-6-08	MV THEFT
6-30-08	THEFT OF LIC. PLATE
9-13-08	VANDALISM
7-13-08	ATTEMPT HOME INVASION
10-8-07	ATT. BURG.
8-7-07	TRESSPASS (ON BACK PORCH - STRANGER)

THERE ARE ALSO
AT LEAST 9 BURG.
IN PREVIOUS
3 YEARS / ONE
OF THESE IS
ACTUALLY A
HOME INVASION

SOURCE - RCD REPORTS

2008 CASE & 2010 CASE

THEFT FR. MV.
ALSO INCLUDES
VEH. BUR.
USUALLY



00001

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND) CASE NO.: 2011-CP-40-4068

3

4 DENISE WRIGHT ,)

5 Plaintiff,) DEPOSITION OF

6 vs.) KEVIN ISENHOWARD

7 PRG REAL ESTATE MANAGEMENT,) AUGUST 14, 2012

8 INC., FRANKLIN PINERIDGE)

9 ASSOCIATES, KAREN CAMPBELL,)

10 INDIVIDUALLY AND IN HER)

11 REPRESENTATIVE CAPACITY AS AN)

12 AGENT OF PRG REAL ESTATE)

13 MANAGEMENT,)

14 Defendants.)

15)

16

17 Deposition on oral examination of Kevin Isenhoward,

18 reported by Frances C. Moyd, Court Reporter and Notary

19 Public in and for the State of South Carolina; pursuant to

20 Rule 30 of the South Carolina Rules of Civil Procedure;

21 said deposition was taken at the Law Offices of Collins &

22 Lacy, P.A., 1330 Lady Street, Columbia, South Carolina, on

23 Tuesday, the 14th day of August, 2012, scheduled for

24 o'clock a.m. and commencing at the hour of 11:39 o'clock

25 a.m.

00051

1 where, you know, he demanded money and someone was
2 punched in the face; is that right?

3 A. Yes.

4 Q. Is this still an active file, in other
5 words, is there still any investigation being done on
6 it?

7 A. Any -- any case that's unsolved, any major
8 offense remains active on the books, let's say --

9 Q. Sure.

10 A. And I hold it, especially ones that I took
11 some considerable time with. I'll keep them because
12 in today's world, tomorrow I may get a match on DNA so
13 I would have to explore it, but on a day to day basis,
14 nothing's being done on the case.

15 Q. We talked to Mr. Gabr earlier about -- it
16 sounded like something called a safety audit of
17 apartment complexes, that kind of thing, are you
18 familiar with that?

19 A. I'm familiar that we offer it, I don't
20 handle that myself.

21 Q. So you don't have any personal knowledge of
22 whether that's ever been done with Wellspring?

23 A. No.

24 Q. Are you familiar with that area of town
25 where Wellspring is?

00052

1 A. A little bit.

2 Q. And I was just gonna ask if you have any
3 frame of reference whether it would be considered an
4 average crime area, lower crime area, higher crime
5 area, that kind of thing?

6 A. I could give you, based upon the crimes that
7 I see, it's not a particularly dangerous area. We had
8 some activity in 2008, but since then it's fairly
9 calm.

10 Q. From your site visits to Wellspring, I know
11 you mentioned that there were some bushes that weren't
12 to your liking, but did you ever from any impressions
13 about the safety about the complex, generally?

14 A. It was a -- it was a typical apartment
15 complex and again, as a -- as a law enforcement
16 officer, the design -- the layout, I wasn't too
17 terribly happy with as far as for security reasons,
18 but it was -- I mean, it was a fairly nice apartment
19 complex -- I mean, I don't know how to answer it
20 anymore than that.

21 Q. Sure, I understand. And you don't have any
22 experience in your employment or educational
23 background with property management or the laws that
24 may govern how property is kept up, that kind of
25 thing; is that right?

K

By Outside Contractor

Only bonded contractors are allowed to work in occupied apartments without supervision by on-site personnel. They must provide a copy of the bond before entry. All others must be accompanied by one of our staff.

Key Control

Tight control over master keys and duplicate apartment keys must be maintained at all times. All keys should be kept in a secured location. The location should be located out of sight or easy access in the Leasing Center. Approval from the Property Manager or Senior Management will be needed for production or distribution of master keys. This practice should be kept to a minimum.

Where possible, common entries, laundry rooms, and storage shops should be on a working master, which Maintenance Technicians carry. This "service" master should not allow access to individual apartments or the Leasing Center. Duplicate apartment keys should be used by maintenance to gain access to apartments. Locks should be changed at each lease turnover. Locks may also be changed at the request of a resident for a nominal charge, payable directly to the office.

On call service technician(s) should have access to the key cabinet during evenings and weekends to respond to emergencies.

Lockouts

Lockouts and lost keys are a fact of life. Maintenance personnel should respond to requests for assistance in these matters with a positive, helpful attitude. Privacy and security, however, remains a primary concern.

The resident should first be asked to produce a driver's license or photo ID. If they can, and if the name matches the listed name on the lease, they may be let into the apartment.

Security

~~We generally do not provide security for our residents and employees should never indicate that we do so.~~

Nevertheless, it is our duty to help our residents to enjoy a safe and pleasant stay. Always maintain the following conditions:

- The property should be well lit.
- Replace bulbs promptly and use adequate wattage.
- Solicitation should be prohibited.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
Denise Wright,	)	Case No.: 2011-CP-40-4068
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MEMORANDUM OF
	)	LAW IN OPPOSITION TO
PRG Real Estate Management, Inc.,	)	DEFENDANTS' MOTION FOR
Franklin Pineridge Associates, Karen	)	SUMMARY JUDGMENT
Campbell Individually and in her	)	
Representative Capacity as an Agent of	)	
PRG Real Estate Management,	)	
	)	
Defendants.	)	
	)	

Plaintiff, through her attorneys, respectfully submits this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

FACTS

Denise Wright left choir practice and drove home to Wellspring Apartments at approximately 10:30 p.m. on September 18, 2008. D. Wright Aff. ¶ 5, attached as **EXHIBIT 1**. Upon arrival at building 2200, Ms. Wright got out of her car and walked toward the ramp that led to her front door. D. Wright Dep. 63:13-15, attached as **EXHIBIT 2**. The nearly full parking lot was dimly illuminated by pole lights and small dome lights in the buildings' breezeways. There were many parts of the parking lot in front of building 2200 and the ramps leading to the building that had little to no light illuminating the area. The pole light nearest Ms. Wright's car was not working at approximately 10:00 P.M. on September 18, 2009. D. Wright Dep. 47:3-5. There was no sign of the security officers Wellspring promised Ms. Wright when she moved in. D. Wright Dep. 40:17-21. The shrubs in front of her apartment building were overgrown and

capable of hiding and concealing unknown persons or potential assailants. S. Howland Aff. ¶ 8, attached as **EXHIBIT 3**.

As Ms. Wright neared the ramp and steps leading to her apartment, she was attacked by two African American men. D. Wright Dep. 65:1-5. They have been described as being young and dirty or unkempt. Ms. Wright could not see the perpetrators as she drove up and parked her car due to dense, overgrown, and much maligned shrubbery near the ramp, as well as the lack of illumination near her apartment building. D. Wright Dep. 63:13-15; D. Wright Aff. ¶ 9-10.

The men accosted Ms. Wright. They shoved gun barrels in her face. The barrels were fixed on her, one to her back and the other to her head. D. Wright Dep. 65:9-13. Too scared to scream, Ms. Wright acceded to her attackers' demands. The perpetrators needed money and intended to pillage Ms. Wright's bank account to get it. No matter how much money the perpetrators could ultimately steal from Ms. Wright, she was assured that she would be killed when it was all over. Ms. Wright was pushed back toward her car and forced by her attackers to drive to various banks and withdraw hundreds of dollars. D. Wright Dep. 76-77. Along the way, the perpetrators repeatedly promised to kill Ms. Wright, telling her at one point, "You will never see home again." D. Wright Dep. 80:7-8.

Unsatisfied with the amount of money in Ms. Wright's account and visibly nervous over some sort of drug debt the perpetrators owed, Ms. Wright was forced to park her car at a closed fast food restaurant behind a darkened shopping center. D. Wright Dep. 78:18-79:8; 82:21-83:7. Ms. Wright feared this was the moment she would be killed. One of the attackers said bluntly: "We've got to kill you." D. Wright Dep. 86:17-18. The other attacker put his hand down the back of Ms. Wright's pants, called her "fatty ass," and pondered aloud taking Ms. Wright back to her apartment and "hav[ing] some fun before we kill her." D. Wright Dep. 110:9, 11. After

several minutes, the perpetrators demanded Ms. Wright drive to a nearby apartment complex. During the drive, Ms. Wright was forced to listen as the two felons debated how and when they would kill her. One suggested Ms. Wright's dead body should be thrown in a river. D. Wright Dep. 86:16-19. Once at the apartment complex, the perpetrators fled the car. D. Wright Dep. 90:5:22.

Ms. Wright drove away and went to her daughter's house. Ms. Wright's son-in-law was a Richland County Sheriff's Deputy and she knew she could count on them for help. A police officer came to Ms. Wright's Daughter's house and took her statement. Shortly after the attack, Ms. Wright met with Wellspring personnel. Ms. Wright had a single primary question for Wellspring: "Where [were] these security officers that are supposed to be walking the beat?" D. Wright Dep. 1116:16-17. The Wellspring representative could only shrug her shoulders and say, "I'm sorry." D. Wright Dep. 116:22.

SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Rule 56(c), SCRPC. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Sumner v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.

2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 SE 2d 688 (2000); Moriarity v. Garden Sanctuary Church of God, 534 S.C. 150, 511 S.E.2d 699 (Ct. App.1999). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).

ARGUMENT

I. Defendants are not entitled to summary judgment on Plaintiff's negligence claim.

A. Defendants owed Plaintiff a legal duty.

1. Defendants owed Plaintiff a duty to protect her from foreseeable criminal conduct.

Certain categories of landowners face a common law duty to take affirmative precautions to protect others on their property from criminal acts of third parties. See Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1213 (D.S.C. 1990). This duty is imposed on storeowners, innkeepers, and other commercial entities. See Shipcs v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977)(grocery store); Bass v. Gopal, Inc., 395 S.C. 129, 716 S.E.2d 910 (2011)(motel); see also Restatement (Second) of Torts § 344. The South Carolina Supreme Court addressed this rule in the context of a residential landlord in Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994). The Cramer court held that the residential landlord-tenant relationship does not create a duty on the landlord to protect tenants from third party criminal activity. 312 S.C. at 443, 441 S.E.2d at 318-19. This conclusion was based on an earlier holding in Cooke where the court concluded that the residential landlord-

tenant relationship is distinguishable from “the relationships for which South Carolina law will impose a duty to protect against criminal activity.” 741 F. Supp. at 1213-14.

The Cooke court borrowed extensively from earlier cases from Pennsylvania in reaching its conclusion. The typical residential landlord is different from a storeowner or innkeeper in that stores and motels are “places to which the general public are invited.” Id. at 1213 (quoting Feld v. Merriam, 485 A.2d 742, 745-46 (Pa. 1984)). Those “who invite[] all may reasonably expect that all might not behave, and bear[] responsibility for injury that follows the absence of reasonable precaution” to protect others. Id. These landowners should “anticipate” that their property are “places where what men can do, they might.” Residential landlords are different because “[a]n apartment complex is not a place of public resort.” Additionally, “[t]he common areas of an apartment complex are not open to the public” and the public is not “expected or invited to gather there for other purposes than to visit tenants.” Id. In sum, the court distinguished the typical residential landlord from storeowners and innkeepers on two issues: (1) 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 premise underlying the Cooke/Cramer rule is inaccurate as applied to Wellspring Apartments. None of the operative distinctions between a residential landlord and storeowner/innkeeper hold up when applied to Wellspring. As noted above, Feld (and by reference Cooke/Cramer) categorically concluded “[t]he common areas of an apartment complex are not open to the public.” While this may be true for the typical apartment complex, it is certainly not true at Wellspring. Wellspring Apartments are part of the Harbison Community Association, a “1700+ acre community which was developed as a planned unit development...that would provide housing types for all incomes, employment acreage, shopping

areas, schools, playgrounds, and a community center.”¹ The Association includes property owners and residents from several complexes and neighborhoods in the vicinity of Harbison Boulevard and Broad River Road in Columbia, South Carolina.

The Harbison community maintains a series of walking trails that weave through the community. The Harbison trails are places to which the public are invited to enter and expected to remain for extended periods. The South Carolina Department of Parks, Recreation and Tourism maintains a website that provides a description of the trails and directs the public to the trails. This site, SCTrails.net, describes the Harbison trails as “multiuse trails.” According to the site, the trails are “within the neighborhoods of Harbison.” The site also describes the experience of an average user of the trails: “As you walk these well shaded trails, you will pass the backyards of homes...” To facilitate the public’s use of the Harbison trails, the site also includes a graphic map of the area with suggested routes for the public to take upon arriving at Harbison. (Map attached as EXHIBIT 4). One of the trails, identified as the “1.2 mi. loop,” routes the public directly through Wellspring. In fact, Wellspring obtains an economic benefit from these trails because it advertises the trails and a lake beside the trails in its advertising literature.

It is clear from SCTrails.net that the public are invited into areas along the trails including the Wellspring common areas. The site encourages the public walking the Harbison trails to “us[e] spurs or connectors **along with neighborhood streets**” to traverse the paths or to eschew the typical path and “create your own.” (emphasis added). Even though these are not the Defendants’ representation, they are statements made on a site maintained by a South Carolina governmental organization and available to the whole world. These statements are further evidence that the Harbison trail bisecting Wellspring Apartments is a place where the public is

¹ See *Frequently Asked Questions*, Harbison Community Association, available at <http://www.harbisonhoa.com/community/faqs#faq2> (last visited Sept. 19, 2012).

invited in and welcomed to remain.² This is a broadly-understood reality of the area. Mohammed Gabr, a Richland County Deputy Sheriff who investigated Ms. Wright's abduction described the trails as "go[ing] to the back of the apartments." M. Gabr Dep. 47:21-22, excerpts attached as **EXHIBIT 6**. Deputy Gabr describes open access to the trails. In short, "[a]nybody can come and go." M. Gabr Dep. 48:3-6.

The Cooke/Cramer rule is further premised on the apartment owner's expectations regarding the property's openness. The Cooke court noted that the general public are not "expected" to enter apartment complex common areas for purposes other than visiting tenants. 741 F. Supp. at 1213 (quoting Feld, 485 A.2d at 745-46). Again, this fundamental building block of the court's general no-duty rule is not borne out in this case. Wellspring certainly knew the public was entering its common areas to use the trails and expected this conduct from members of the public. A short summary of what Wellspring representatives knew is instructive. Karen Campbell, Wellspring Apartments property manager when Ms. Wright was abducted, acknowledged that anyone could come into the apartment complex. K. Campbell 9: 12-14, excerpts attached as **EXHIBIT 7**. Ms. Campbell also acknowledged that anyone could use the Harbison trails that bisect Wellspring. K. Campbell Dep. 143:3-5; 225:25 ("It was a public trail"). Meschelle Roten, a PRG employee speaking as the Defendants' corporate representative, noted simply "Anybody can go on those walking trails." M. Roten Dep. 80:11-15, excerpts attached as **EXHIBIT 8**.

Defendants knew members of the public were using Wellspring common areas openly as part of the Harbison trails. They also knew that the trails were being used by people with evil

² The Harbison trails public character is also seen in a brochure entitled "Richland County Trails" published by the Richland County Conservation Commission. The brochure describes Harbison Community to include "paved pathways weaving through neighborhoods, natural areas, and around two lakes." (emphasis added). A copy of this brochure is attached as **EXHIBIT 5**.

intentions. K. Campbell Dep. 143:6-9. Additionally, Wellspring documents refer to "The Woods at Harbison," a neighboring apartment complex, as a "troubled property." PRG Def. 000842, attached as **EXHIBIT 9**. Karen Campbell defined "troubled property" as a place where there had been problems, where "rents were different," and where there were "a different class of people." K. Campbell Dep. 57:1-15. Criminal elements from the "troubled" Woods at Harbison or any of the Harbison community's complexes or neighborhoods could easily spill over to Wellspring via the walking trails. K. Campbell Dep. 58:10-13. In fact, a 2004 Report of Unusual Occurrence documents Wellspring's concern that individuals from The Woods were accessing Wellspring via the trails and performing criminal acts.

Cooke and Cramer adopt a general rule related to residential landlords and tenants harmed by criminal actors on the landlord's property. That rule is grounded on two foundations: (1) apartment complex common areas are used exclusively by tenants/guests; and (2) apartment owners do not expect the public to enter their common areas. For all apartment complexes where these foundations exist, the Cooke/Cramer rule is certainly the binding rule of law on duty. However, where neither foundation rings true, the Cooke/Cramer conclusion cannot be applied. As Plaintiff's security expert Bill Booth stated, Wellspring is a "unique property". B. Booth Dep. 65:12-18, excerpts attached as **EXHIBIT 10**; see also S. Foster Dep. 37:11-40:21 (noting "permanent easement for walking trails through Wellspring" indicating that public access to Wellspring was what the trail "was obviously designed to do"), excerpts attached as **EXHIBIT 11**. Officer Kevin Isenhoward had a distinctive recollection of his first impression of Wellspring Apartments. He described the area as an "unusual place" with "a particularly creepy kind of tunnel...where vagrants hang out." Isenhoward Dep. 22:18-24.

This complex is not like the average apartment complex or any apartment complex discussed in earlier case law. B. Booth Dep. 82:11-83:4. On the points considered most important to the courts (i.e. openness to the public and the owner's expectations), Wellspring is more like a hotel/motel than the prototypical apartment complex.³ Accordingly, Defendants owed Ms. Wright a duty of reasonable care to protect her from foreseeable criminal acts of third parties.

2. Cooke/Cramer permits negligence claims against residential landlords related to criminal acts of third parties in some circumstances.

Even for those instances where the Cramer no-duty rule applies, the court made clear that Cramer does not bar all negligence claims by a tenant against a residential landlord related to a third party criminal attack. At its core, Cramer held only that a duty to protect against third party criminal attacks is not implied by the residential landlord-tenant relationship. According to the court, "The plaintiff is not precluded from asserting a general negligence principle. A duty may arise under the particular circumstances of the individual case based upon a showing of negligence constituting the proximate cause of the loss." Cramer, 312 S.C. at 443, 441 S.E.2d at 319 n. 1 (1994). This principle has been explicitly recognized after Cramer. See Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 442, 494 S.E.2d 827, 832 (Ct. App. 1997)(citing Cramer).

The "particular circumstances" of a dispute between residential landlord and tenant that may support a negligence cause of action are not specified in Cramer or its progeny. As such, it is helpful to look to other jurisdictions to observe the circumstances where other courts have found a landlord owes a duty to protect its tenant. One common circumstance courts use to base

³ Some courts have explicated noted this similarity. See e.g. Tedder v. Raskin, 728 S.W.2d 343, 347 (Tenn. App. 1987)(noting "similarity between the special relationships and circumstances of the innkeeper and the modern landlord of a multiple-apartment building").

a landlord's duty is the landlord's exclusive control of an apartment complex's common areas. From a historic prospective, leases used to be primarily concerned with the agricultural use of the premises. Timothy O'Rourke, *Landlords have no Affirmative Duty to Protect Tenants from Criminal Activity*, 46 S.C. L. REV. 184, 185 (1994)(noting Feld "viewed the lease as a traditional conveyance of a property interest"); Tedder v. Raskin, 728 S.W.3d 343, 346 (Tenn. App. 1987). In that era, a tenant was granted exclusive control over the land for agricultural purposes and gave little thought to the condition or security of dwellings located on the premises. Tedder, 728 S.W.3d at 346 (citing *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 433 (1985)).

The modern era of residential leases is not the same. What was once viewed as a form of property conveyance is now understood as something quite different. As society has become more urban and suburban, "the common law recognized the essential differences between the lease of urban dwelling units and the lease of land for agricultural purposes." Tedder, 728 S.W.3d at 346; see also O'Rourke, 46 S.C. L. REV. at 185 (noting trend to alter common law "as it applies to modern apartment dwellers"). Tenants have changed from expecting full control over the entirety of the landlord's premises to expecting and receiving a dwelling unit surrounded by land owned and controlled by the landlord. To the modern tenant, a lease is not a property conveyance so much as "a well known package of goods and services." Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970).

A major difference between modern residential leases and historic leases is the degree of control a lessor surrenders to its lessee. While historic leases granted total control over entire parcels of land, a modern residential tenant is given limited control over the dwelling unit⁴ and

⁴ See e.g. S.C. Code Ann. § 27-40-530 (imposing duty on tenant to permit landlord's access to dwelling unit under certain circumstances).

no control over other portions of the property through which the tenant must pass to enter and exit their dwelling. This “circumstance” of modern society has led several courts to conclude that a landlord retaining exclusive control over common areas (and therefore exclusive ability to care for the common areas) must also have a duty to take reasonable actions to keep those areas reasonably secure. See e.g., Hemmings v. Pelham Wood LLP, 826 A.2d 443, 451-52 (Md. App. 2003); Tedder, 728 S.W.2d at 347 (finding landlord with exclusive control of common areas “is in a far superior position to take steps necessary to secure the premises for the safety of the tenants”).

This legal principle is so well recognized that it has become a part of Restatement (Second) of Torts § 360:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee...for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

See also Restatement (Second) of Property, Landlord & Tenant § 17.3 (same). For purposes of Restatement § 360, a “dangerous condition” includes “the unreasonable risk of harm from criminal intrusion.” McPherson v. Dept. of Corr., 152 P.3d 918, 922 (Or. App. 2007)(quoting Restatement (Second) of Torts § 360, cmt. 1). A landlord's duty to reasonably secure a complex's common areas “represents a well-settled consensus as reported in various restatements.” McPherson, 152 P.3d at 923. Other courts have deemed a security duty based on a landlord's exclusive control of common areas a simple matter of practicality. If a landlord does not have a duty to reasonably secure common areas, then “no one does because no one else possesses the ability.” Martinez v. Woodmar II Condominiums, 941 P.2d 218, 221 (Ariz. 1997). The Martinez court simply refused to hold that the law “recognizes such a lack of responsibility for safety.” Id.

In this case, Defendants retained exclusive control over the Wellspring Apartments common areas for the entire period that Ms. Wright was renting a unit at the complex. As property manager Karen Campbell acknowledged, tenants were not permitted to make their own repairs or provide their own maintenance for Wellspring common areas. K. Campbell Dep. 201:17-21. PRG Chief Operating Officer Samuel Foster confirms that Wellspring tenants are helpless to secure the complex's common areas. S. Foster Dep. 46:22-47:14. As discussed above, many courts view this as a circumstances upon which a landlord is charged with a duty to make reasonable efforts to reasonably secure the common areas.

A landlord's superior knowledge of the crime risk in the area is another "circumstance" courts have looked to in finding a landlord's duty. As compared to its tenants, a landlord is in a far better position to understand the premises' unique security vulnerabilities based on the landlord's knowledge of the entire complex and other crimes at the complex. Past crimes may put a landlord "on actual or constructive notice that third persons are likely to endanger the safety of tenants" and create a duty of reasonable care to guard against the danger posed by third party criminals. Schelp v. Cohen-Esrey Estate Servs., 889 S.W.2d 848 (Mo. App. 1994). A landlord's knowledge of previous crimes is a circumstance that can create a "duty to provide preventive security measures." Johns v. Housing Auth. for City of Douglas, 678 S.E.2d 571, 573 (Ga. App. 2009); see also Davenport v. D.M. Rental Props., Inc., 718 S.E.2d 188, 189-90 (N.C. App. 2011). In this case, Defendants knew of previous crimes at Wellspring Apartments committed by residents of a "troubled property" along the Harbison trails. Defendants knew or should have known about a series of crimes committed in the Wellspring parking lots around the time of Ms. Wright's abduction. Defendants' superior knowledge of Wellspring's crime history

and Wellspring's security vulnerabilities are another circumstance supporting imposition of a duty of reasonable care to reasonably secure the premises.

3. Even if Wellspring had no affirmative duty to provide security, the complex voluntarily conducted a security program.

A person having no affirmative duty to provide services to another may still face liability related to such services if the person voluntarily undertook a responsibility to provide services and performed that responsibility with less than reasonable care. In other words, "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 v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1209-10 (D.S.C. 1990) (quoting Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985)). This legal principle is codified in Restatement (Second) of Torts § 323, a section that South Carolina courts have repeatedly cited and applied. The section states as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement § 323's voluntary undertaking rule applies to any type of duty a person chooses to assume. This section has been applied in various jurisdictions to a residential landlord's voluntarily assumed duty to provide security measures for the benefit of its tenants. For example, in Pamer v. Pritchard Bros., 575 N.E.2d 900 (Ohio Com. Pl. 1990), a woman was physically and sexually assaulted in her apartment by an intruder who climbed through her bedroom window. The plaintiff uncovered evidence showing that the defendant apartment complex voluntarily conducted a security program at the complex including full-time security officers for the common areas. Id. at 901. The court also found evidence that the resident relied

on the landlord's security program. Specifically, the resident asked the landlord about security after a criminal act occurred on the premises. It was based on the landlord's assurances of full-time security guards that the plaintiff decided to remain at the complex. Id. at 902. Even though the landlord had no general duty to protect its tenants from third party criminal acts, it did have a duty to conduct its voluntarily undertaken security program with reasonable care. Id. Whether the landlord's performance of its voluntarily assumed duty was reasonable presented a jury question and was inappropriate on a summary judgment motion. Id.

Similarly, in Reider v. Martin, 519 A.2d 507 (Pa. 1987), the court reversed dismissal of a negligence claim by a college student who was raped, beaten, and robbed in the stairway of the defendant's apartment building. The plaintiff's attacker entered her building through an unsecured front door the landlord promised to keep properly locked. Id. at 508. The court concluded there was evidence the landlord assumed a responsibility to properly secure the building's exterior door and evidence the tenant justifiably relied on the landlord's efforts to secure the door. Id. at 510 (noting tenant "can expect...that the program [of security] will be reasonably pursued and not fail due to its negligent exercise"). The plaintiff's evidence clearly met the undertaking and reliance elements of Restatement § 323 and, therefore, the plaintiff made the requisite showing on the duty element of her negligence claim. Id. at 511.⁵

Restatement § 323 has a rich history in South Carolina jurisprudence. This section "prescribes a duty of care" for purposes of South Carolina common law. Sherer v. James, 290 S.C. 404, 408, 351 S.E.2d 148, 150 (1986). Specifically, § 323 "establishes a duty on one who

⁵ Restatement § 323 has been examined and applied to landlord security programs in many other jurisdictions as well. See e.g., Scott v. Watson, 359 A.2d 548, 555 (Md. App. 1976) ("We think it clear that even if no duty existed to employ the particular level of security measures provided by the defendants, improper performance of such a voluntary act could in proper circumstances constitute a breach of duty"); Walls v. Oxford Mgmt. Co., 633 A.2d 103, 106-07 (N.H. 1993) ("a landlord who undertakes, either gratuitously or by contract, to provide security will thereafter have a duty to act with reasonable care").

undertakes to render services for the protection of another.” Id. at 407, 351 S.E.2d at 150. The service in question must be definitely assumed. See Shropshire v. Jones, 277 S.C. 468, 472, 289 S.E.2d 410, 412 (1982)(duty does not arise from “indefinite and nebulous statement”). Additionally, for a § 323 “undertaking” duty, the duty must be actually attempted and not merely promised. See Cramer v. Balcor Prop. Mgmt., Inc., 848 F. Supp. 1222, 1225 (D.S.C. 1994)(“In order to fall within the undertaking exception, the defendant must undertake to do something”).

Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), provides a good example of the factors the court should consider for “undertaking” duties. In Crowley, the father of two murdered children sued the children’s maternal grandparents after the children’s mentally ill mother shot and killed them. The plaintiff, wary of the mother’s general instability and reported gun ownership, initially refused to permit the mother to visit the children. 285 S.C. at 403-04, 329 S.E.2d at 778. Seeking to maintain a connection between mother and children, the grandparents promised to take full responsibility and supervise all visits. Id. at 404, 329 S.E.2d at 779. The grandparents also reported that they had found no gun in the mother’s possession after repeated searches. Id. The father testified that he finally agreed to visitation in reliance on the grandparents’ promises that there was no gun and all visits would be supervised. Id. The court considered Restatement § 323 and determined that the grandparents owed a duty. The grandparents did not have an affirmative obligation to monitor visits or search for the gun but “once their performance began, a common law duty to exercise reasonable care arose.” Id. at 406, 329 S.E.2d at 780.

Restatement § 323 has been applied in other jurisdictions to a residential landlord’s voluntarily assumed duty to provide security. South Carolina recognizes this rule and has applied it in many different circumstances. South Carolina courts have also recognized that a residential

landlord can voluntarily assume a security duty for the benefit of its tenants. In Cramer, the court considered a landlord's security program that included devices to secure sliding glass doors. If a landlord decides to install such devices and actually "undertook to perform the work," then a duty would arise to install the device with reasonable care. 848 F. Supp. at 1225. The Cooke court reached the same conclusion in the context of a hypothetical: "if a plaintiff offers evidence that a landlord had been asked to repair a lock on a door, and that the work was performed negligently, a crime committed by a person entering through that door may present an actionable negligence claim against the landlord under South Carolina law." 741 F. Supp. at 1212; see also Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 444, 494 S.E.2d 827, 832 (Ct. App. 1997)(noting in case where tenant's social guest was assaulted at apartment complex that landlord may "assume[] a duty to use due care" if it undertakes to provide security).

There is evidence in this case that Defendants assumed a responsibility to create, maintain, and perform a security program at Wellspring for the benefit of its tenants. Plaintiff has also presented evidence that she relied on Defendants' security program when choosing to move to Wellspring and to remain there year after year. Additionally, Plaintiff has presented evidence that Defendants' failure to properly perform the security program they promised their tenants and undertook to perform increased the risk that Plaintiff would suffer the harm she ultimately experienced on September 18, 2008. This evidence satisfies Restatement § 323's elements and establishes Defendants' duty to Plaintiff even if the court concludes Defendants were not otherwise required to provide security. Accordingly, Defendants' motion for summary judgment on the basis of a perceived lack of duty should be denied.

Defendants assumed responsibility for a sophisticated security program at Wellspring. Courtesy officers were a large part of the program. See K. Campbell Dep. 19:19-21; M. Roten

Dep. 22:8-21; 55:18-19 ("The property did contract for security officers"). Courtesy officers are law enforcement personnel who receive a reduced rate on rent or other compensation in exchange for providing various security services at an apartment complex. K. Campbell Dep. 165:11-14. Wellspring conducted an intricate courtesy officer program. Each potential courtesy officer signed a Courtesy Officer Independent Contractor Agreement (PRG Def. 000746, attached as **EXHIBIT 12**) that defined the officer's responsibilities at the complex. These responsibilities include (1) patrolling the Wellspring grounds for "a minimum of two hours each day"; and (2) "answering calls from residents reporting a nuisance, crime in progress, or "[a]ny act that within the professional opinion of the [officer] is contrary to the expected conduct of individuals on the property." A Wellspring courtesy officer's responsibilities are extensive and include anything up to and including "the normal duty as performed by a police officer of the locality where the designated apartment is located."

Restatement § 323's second element is the plaintiff's reliance on the defendant's undertaking. There is no duty if the plaintiff is unaware of the defendant's undertaking until after the plaintiff has suffered harm. See Staples v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997)(refusing to find duty where injured motorist was unaware of landowner's tree inspection program until after motorist's auto accident). There is evidence in this case that Plaintiff was aware of Wellspring's security program far before her September 2008 attack and relied on that program when deciding to move to and remain at Wellspring. When Plaintiff was investigating various apartment complexes in the Columbia area in spring 2003, she considered the amenities each location offered. D. Wright Dep. 40:13-15. One of the primary amenities at Wellspring was its security program. Plaintiff "felt like it would be a safe place" because she "was told that there were security officers on duty." D. Wright Dep. 40:16-21. Security was such an important

consideration for Plaintiff that she asked Wellspring officials about the program. D. Wright Dep. 40:25-41:6. Plaintiff decided to move in to Wellspring only after receiving a satisfactory answer to a direct question about the security program.

Plaintiff, a sixty year old single woman, was concerned about security, asked about security, and relied on a promised security program (including patrol officers) when she chose to move to Defendants' property. Defendants invited Plaintiff and all tenants to rely on Wellspring's security program. To facilitate a courtesy officer's responsibility to answer calls, Defendants provide each officer with a cell phone. K. Campbell Dep. 264:23-25. The number for a courtesy officer's phone was printed in each month's Wellspring Apartments tenant newsletter. The August 2008 newsletter (PRG Def 002289-90, attached as **EXHIBIT 13**) printed a phone number, referred to as the "Security Pager" beneath the image of a police officer in full uniform.

Along with the phone number and police officer image, Defendants' newsletter represented to each Wellspring tenant that "Security is also very top priority with us." The "security pager" is presented as one of the means by which Defendants make security their "top priority." The implications from the totality of Defendants' security program are clear: (1) Plaintiff and other tenants relied on the program when deciding whether to enter or renew their leases at Wellspring; (2) Defendants knew or should have known Plaintiff and other tenants relied on the program; and (3) Defendants invited Plaintiff and other tenants to rely on the security program by advertising its courtesy officers and encouraging tenants to call the "security pager."⁶

⁶ Notably, Defendants continued to advertise the "security pager" number in their tenant newsletters even during periods where Wellspring had no courtesy officers. The fate of tenant calls to the pager during these periods is unclear. PRG corporate representative Meschelle Roten was unsure as to if or how these calls were processed. M. Roten Dep. 51:19-52:12.

Defendants' voluntary undertaking of a security program and Plaintiff's reliance on that program is sufficient to establish a duty for Defendants to perform the security program with reasonable care. Restatement § 323 includes a third element that can be used to establish a duty in the event that there is no evidence of reliance. In other words, a duty is established if the defendant voluntarily assumed a responsibility and the failure to exercise reasonable care in performing that responsibility increased the risk of harm to the plaintiff. In this case...

Defendants conducted at least two other tasks that affected the security of Wellspring's common areas. Defendants provided some of the common area lighting and had the exclusive authority to trim the shrubbery throughout the common areas. Plaintiff has evidence that Defendants' failure to exercise reasonable care in each of these undertakings were a proximate cause of her injuries. Wellspring's common areas were illuminated by two sources: (1) pole lights installed by South Carolina Electric & Gas; and (2) breezeway lights maintained by Wellspring. Defendants acknowledge undertaking a duty to illuminate the common areas for a number of "safety" reasons including reducing the risk that tenants or their guests will trip and fall when walking through the complex after dark. Defendants also acknowledge undertaking this duty for "security" purposes. When a breezeway light burned out, Defendants policy was to replace the light within one day. This was a matter of "security." K. Campbell Dep. 84:25-85:8.

Adequate common areas lighting discourages people who didn't belong from congregating at the complex. K. Campbell Dep. 27:1-5. In other words, well-lit common areas have a role in the protection of Wellspring tenants. K. Campbell Dep. 227:8-228:11; see also S. Foster Dep. 26:18-24 (referring to crime deterrent capacity of adequate lighting as "a common sense position"). Defendants clearly considered their provision of common area lighting a duty of both safety and security. In the "Maintenance" section of Defendants' policy and procedure

manual for Wellspring Apartments, the "Security" subsection acknowledges a "duty to help our residents to enjoy a safe and pleasant stay." PRG Defs. 000108 (attached as **EXHIBIT 14**). To fulfill their "Security" duty to keep residents "safe," Wellspring agreed that "[t]he property should be well lit" and Wellspring should "replace bulbs promptly and use adequate wattage." It is clear that Wellspring viewed its duty to provide light as a matter of safety (e.g. preventing falls) and security (e.g. deterring criminal acts by decreasing shadowy hiding places).

The apartment complex had lights installed at different locations in 2004 and in subsequent years. In 2003, PRG took over management of the complex and Franklin PineRidge initiated \$1.4 million of improvements to the property. They voluntarily undertook to contract out lighting and make other modifications to the apartment complex after undertaking the duty to own and manage the complex. Officer Kevin Isenhoward testified that Wellspring was dark and its lighting was poor. As Officer Isenhoward surveyed the scene and approached Ms. Wright's front door, he noted "it was just dark...too dark for my comfort." K. Isenhoward Dep. 24:7-8. The defendants had someone walk the complex every 90 days to check on things like lighting. Most of their people were not employed at night. Plaintiff's expert Bill Booth testified "the lighting on the property was totally inadequate and was a definite causative factor" in Ms. Wright's abduction. B. Booth Dep. 67:1-7. This testimony was based on a light study and objective lighting standards promulgated by the Illuminating Engineers Society of North America. B. Booth Dep. 29:4-12; 140:19-142:18 (describing light study methodology).

Defendants also maintained the shrubbery and other landscaping throughout Wellspring's common areas. This was a responsibility Defendants voluntarily undertook. K. Campbell Dep. 142:1-7. This responsibility included the shrubs near the ramp to Ms. Wright's unit. See Photos, attached as **EXHIBIT 15**. Ms. Wright's attackers were concealed by these shrubs on the night of

her abduction. D. Wright Aff. ¶ 8. Defendants chose to maintain Wellspring's shrubbery for multiple reasons. Overgrown shrubbery presents a safety risk in that tenants' movement around the facility could be impeded. Karen Campbell testified that shrubbery maintenance is also provided for tenants' protection. K. Campbell Dep. 230:10-14. The height of shrubs surrounding the approaches to tenants' dwelling units has an effect on the complex's security. As COO Foster acknowledged, it is "[a] lot harder to hide behind" a three foot shrub than a five to six foot shrub. S. Foster Dep. 32:24-33:10.

Wellspring hired H&S Landscaping to perform various landscaping tasks. For the shrubs, H&S was hired to "trim[] and shape[] as needed." PRG Def 000862, attached as **EXHIBIT 16**. H&S owner Shawn Howland was concerned about overgrown shrubbery around Wellspring and had numerous conversations with Wellspring manager Karen Campbell about the issue. Ms. Campbell's response was always that additional shrubbery maintenance was simply not in Wellspring's budget. S. Howland Aff. ¶ 9. Shortly after Ms. Wright's attack, Defendants authorized a special budget item for shrub maintenance. S. Foster Dep. 22:19-23:5 (additional pruning performed after Ms. Wright's attack was "outside of the budget"). This post-incident trimming was not usual maintenance but "severe trimming." M. Roten Dep. 64:17-65:6. The post-incident "severe trimming" Defendants conducted made a significant difference in visibility near Ms. Wright's apartment. A quick comparison of the area before and after the "severe pruning" clearly shows that proper pruning would significantly decrease the areas where a criminal actor could hide. See **EXHIBIT 15** (comparing pages 1 and 2). According to Bill Booth, the vegetation issue was a causative factor in Plaintiff's injuries. Mr. Booth testified that "if the vegetation had been properly maintained...this crime would not have occurred." B. Booth Dep. 66:18-23.

B. Plaintiff's evidence presents genuine issue of material fact on proximate cause.

Proximate causation is an essential element of any negligence cause of action. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010). This element requires proof of both "causation in fact and legal cause." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1987)(citing Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). Causation in fact is established by proof that the injury "would not have occurred but for the defendant's negligence." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011)(citing Mellen v. Lane, 377 S.C. 267, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). Legal cause is established by determining foreseeability, a factor which focuses on "whether the injury is the natural and probable consequence of the alleged negligent act." Id. As the Cooke court noted, "[p]roximate cause is generally a question for the jury." 741 F. Supp. at 1214; see also Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986)("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law"). Summary judgment on proximate cause is inappropriate where the plaintiff has produced "some evidence." Cooke, 741 F. Supp. at 1214.

Where a negligence claim alleges an injury directly caused by the intervening act of a third party, a "special case" is presented. Cody P. v. Bank of Am., N.A., 395 S.C. at 620, 720 S.E.2d at 478. In those special cases, the test becomes whether a third party criminal act was foreseeable to the defendant. The finder of fact must determine whether "the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 375 S.E.2d 37, 37 (Ct. App. 1989). Plaintiff need not prove the

“particular chain of events” was foreseeable but only that the injury the criminal inflicted was “within the general range of consequences which any reasonable person might foresee.” Cody P., 395 S.C. at 621, 720 S.E.2d at 478 (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38).

Several different types of evidence may be used to demonstrate that a defendant could reasonably foresee injuries ultimately perpetrated by an independent third party. Expert testimony may be used to establish foreseeability. An expert with knowledge of the defendant’s business may testify regarding the types of harms the defendant anticipates in its business. See Cody P., 395 S.C. at 621-22, 720 S.E.2d at 478 (considering banking expert’s testimony that banks anticipate theft). The defendant’s policies and procedures may also demonstrate that it foresees certain types of harms may flow from its negligent conduct. In Cody P., the defendant’s policies and procedures established rules to guard against certain harms. Id. at 622, 720 S.E.2d at 478. The policies themselves were some evidence that the defendant foresaw the types of harms it took the time and effort to guard against. Id.

In Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987), the court considered whether a motel could have foreseen a third party criminal attack on its guest. In finding a jury question on this issue, the court considered several pieces of evidence indicating the hotel foresaw potential attacks on its motels. For example, the hotel required an employee to walk the premises once or twice per night. The hotel also requested the local sheriff’s department patrol the hotel parking lot. These actions made it “evident that the hotel perceived some threat of physical harm to its guests.” Id. at 302, 356 S.E.2d at . The court also considered other crimes in the hotel’s vicinity including the number of crimes and their circumstances. Id. at 298, 356 S.E.2d at 135.

There are several pieces of evidence demonstrating that third party criminal attacks were something Defendants could have foreseen at Wellspring. Defendants' policies and procedures recognize this risk. Defendants' "Courtesy Officer Independent Contractor Agreement" creates a relationship between Defendants and an officer to provide specific services to prevent certain harms. Courtesy officers are to respond to calls regarding "Domestic altercations" and "Criminal acts." See **EXHIBIT 12**. Similarly to Daniel, it is clear from this Agreement that Defendants perceived some threat of third party criminal acts directed at its tenants. This was a threat Defendants recognized and undertook to guard against. Accordingly, a third party criminal act directed at Wellspring's tenants was not unforeseeable should Defendants negligently perform the duty they had undertaken to guard against such crimes.

Plaintiff's security expert Bill Booth testified that, in his opinion, Defendants' negligence was a proximate cause of Ms. Wright's injuries. B. Booth Dep. 162:15-18. Mr. Booth has provided uncontroverted testimony that Ms. Wright's abduction was a "foreseeable incident." B. Booth Dep. 66:8-15. Mr. Booth's opinion was based in part on his analysis of other crimes at Wellspring Apartments. Mr. Booth analyzed various crimes at Wellspring and focused his analysis on crimes in the Wellspring parking lot. See B. Booth Dep. 175:12-176:9 (describing methodology for analysis). For 2007 and the first nine months of 2008, Mr. Booth documented 15 parking lot offenses at Wellspring. Mr. Booth's analysis did not include all criminal incident reports from the Wellspring property. Instead, he pulled all such reports and winnowed them down to those that may have been impacted by lighting, courtesy officer patrolling, or better sight lines. B. Booth Dep. 178:21-179:6. Mr. Booth's analysis showed that in the very parking lot where Ms. Wright was abducted, there had been an attempted home invasion and an attempted burglary within the previous two years. There had also been a series of vehicle related

crimes over that same period that Mr. Booth referred to as "precursor crimes," i.e. incidents that likely would have included crimes against a person had the car's owner been present. B. Booth Dep. 180:18-23. Defendants' witnesses also acknowledge that crime was foreseeable at Wellspring. Karen Campbell admitted that it "would be fair to say" that there is going to be a certain amount of crime at Wellspring. K. Campbell 114:1.

In addition to this evidence supporting legal cause, there is also evidence that Defendants' negligence was a cause in fact of Plaintiff's injuries. The testimonial evidence from several witnesses demonstrates that but for Defendant's unreasonably dim lighting and improperly maintained shrubbery, the attackers would likely have been seen by Ms. Wright as she parked her car. Ms. Wright testified that her attackers "were not visible when I parked and exited my car due to the height and width of the overgrown shrubbery and the lack of lighting in the area." D. Wright Aff. ¶ 8; D. Wright Dep. 63:16-18. A representative of the company Defendants hired to trim the shrubbery claimed under oath that, as they stood on the date of Ms. Wright's abduction, the shrubs "posed safety and security hazards for the residents." S. Howland Aff. ¶ 8. Similarly, following his site visits and using his training, education, and experience in the security industry, Mr. Booth testified that the overgrown shrubbery "provided a hiding place for the individuals who committed this crime." B. Booth Dep. 66:16-23.

Expert Booth's analysis of Wellspring's common area lighting system revealed that there was too little light "to allow one individual to see another individual to be able to identify them later or identify a photograph or identify a drawing" of the individual at a later date. B. Booth Dep. 140:23-142:4. The lighting was "totally inadequate" and "this crime would not have occurred" had lighting met the industry standard. B. Booth Dep. 66:24-67:7. If the perpetrators had been visible as she parked her vehicle, Ms. Wright would never have gotten out of her car

and she would have never been abducted. D. Wright Aff. ¶ 10. In fact, even after getting out of the car, if the lighting and shrubbery maintenance was such that Ms. Wright could see the perpetrators as she approached the walkway and ramp, then she could have retreated to her car or sought assistance at a neighbor's house. D. Wright Aff. ¶ 10. The attackers remained concealed and were able to execute a surprise attack only because of the poor lighting and overgrown shrubs.

Additionally, but for Defendants' sloppily executed courtesy officer program, the perpetrators likely would not have been in the area to abduct Ms. Wright. Defendants' courtesy officer program required the officers to patrol Wellspring for at least two hours per day. Their patrols were to be recorded on forms Wellspring provided. Defendants acknowledge the required patrolling was not performed. K. Campbell Dep. 19:22-20:3. Expert Booth estimates that based on Wellspring's size, a courtesy officer could cover the premises five to six times in two hours. B. Booth Dep. 158:23-24. Using that estimate, Defendants' courtesy officer program, if properly performed, would have a courtesy officer in the area of Ms. Wright's abduction every 15 minutes for the period of the courtesy officers' daily patrol. Consistent presence of an officer in Wellspring's common areas would have a significant effect on the average criminal's decision making process and ultimately his conduct. In Mr. Booth's expert opinion,

If we can make [the criminal] believe that his activity is going to be viewed more than likely by someone, and that the chances of him being apprehended in the commission of the act are greater in one place than they are in another, we can move the commission of that we may not stop that criminal act. We can move the commission of that criminal act to another location.

B. Booth Dep. 113:3-10.

There is evidence Ms. Wright would not have exited her vehicle to encounter her attackers but for the poor lighting and unkempt shrubbery that allowed the attackers to remain

concealed. There is also evidence showing that the perpetrators likely would not have been loitering in proximity to Ms. Wright's front door had the courtesy officer program been conducted as required by Defendants own policies. Accordingly, there is certainly evidence to show Defendants' negligence was a cause in fact of Plaintiff's injuries. With at least a scintilla of evidence on legal cause and causation in fact, Defendants' motion for summary judgment on the issue of proximate cause must be denied.

II. Plaintiff has made a prima facie showing on all elements of her South Carolina Unfair Trade Practices Act ("SCUTPA") claim.

SCUTPA prohibits all "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). The terms "trade" and "commerce" include offering for sale or the sale of "any services...commodity or thing of value." S.C. Code Ann. § 39-5-10(b). SCUTPA's prohibition on unfair trade practices may be enforced by private party lawsuits. The Act authorizes a cause of action for "[a]ny person who suffers any ascertainable loss...as a result of the use or employment by another person of an unfair or deceptive" trade practice. S.C. Code Ann. § 39-5-140(a). To prevail on a SCUTPA claim, a 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). A trade practice is "unfair" for SCUTPA purposes when it is "offensive to public policy or when it is immoral, unethical, or oppressive." Bessinger v. Bi-Lo, Inc., 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2007). An unfair trade practice impacts the public interest "if the acts or practices have the potential for repetition." York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997).

In 2003, Ms. Wright was in need of a new place to live. She visited several apartment complexes in Columbia and compared the amenities each had to offer. D. Wright Dep. 40:13-15. Ms. Wright wanted a place that offered various recreation options and wanted a place close to work. She also wanted a place that was safe and where the owners worked diligently to secure the premises. During her apartment search, Ms. Wright met with Wellspring's property manager. D. Wright Dep. 40:22-24. In a clear effort to entice Ms. Wright to choose Wellspring over the many other apartment complexes in the area, the property manager told Ms. Wright that Wellspring had "security officers on duty." D. Wright Dep. 40:16-21; K. Campbell Dep. 265:19-21 (noting Wellspring residents are told about courtesy officers when they move in and the monthly newsletter provided a "reminder" of the officers' presence). This statement induced Ms. Wright to choose Wellspring. After hearing the property manager's assurances of a manned security program, Ms. Wright "felt like it would be a safe place." D. Wright Dep. 40:21.

Ms. Wright's reliance on Defendants' representations of security is precisely the reason Defendants made these representations. A potential tenant's peace of mind regarding security increased the likelihood that the potential tenant would sign a lease at Wellspring. As with all residential landlords, Defendants' economic interests are best served when all the Wellspring units are occupied. Defendants' focus on high occupancy rates is especially pronounced. Karen Campbell, who has worked at several different apartment complexes over her career as a property manager, described PRG as "a very aggressive company" where the occupancy numbers were "never enough" to suit management. K. Campbell Dep. 189:7-10.

Defendant's representation of security guards at Wellspring was untrue. There were no "security officers" or courtesy officers at Wellspring when Ms. Wright was abducted in September 2008. Defendants' representation was, therefore, a misrepresentation and "unfair" as

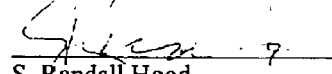
that term is used in SCUTPA. There can be little doubt that making a false representation of security at a person's dwelling to entice potential renters to sign a lease is immoral and unethical. This misrepresentation was not limited to a single conversation between Defendants' property manager and Ms. Wright. In each tenant's newsletter, Defendants advertised a "security pager" that tenants could call when in need of security services. The security pager number was always presented in proximity to an image of a police officer in full uniform. In the August 2008 newsletter, the security pager number is publicized again even though Defendants had no courtesy officers at that time. Defendants made this representation knowing it was untrue and knowing that its tenants relied on the representation. Defendants derived economic benefits from the promise of security services. This unfair trade practice had an impact on the public interest because it is capable of repetition. This newsletter was sent to all Wellspring tenants. Thus, the false representation of security services was made to many people, not just Ms. Wright. Plaintiff has presented evidence on all three SCUTPA elements identified in City of Charleston. Summary judgment on Plaintiff's SCUTPA claim should be denied.

CONCLUSION

Based on the arguments stated above, Plaintiff respectfully requests that the court deny Defendants' Motion for Summary Judgment. Under South Carolina law, Defendants owed Plaintiff a duty of reasonable care to protect against criminal attacks by third parties. This common law duty is based on the relationship between Defendants and Ms. Wright and the unique conditions at Wellspring apartments. Alternatively, Defendants owed Ms. Wright a duty to use due care in the performance of duties voluntarily undertaken. Defendants undertook duties to provide courtesy officers, maintain shrubbery, and properly illuminate the Wellspring common areas. Plaintiff's evidence also creates a genuine issue of material fact on the issue of

proximate cause. Finally, Plaintiff's evidence makes the requisite prima facie showing on all elements of a SCUTPA claim. Defendants' motion must be denied.

Respectfully submitted,



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October 1, 2012