

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

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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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Does a residential landlord with property bisected by walking trails, which are advertised for public recreational use and enjoyment, owe its tenant a duty to reasonably secure the common areas a tenant must pass through to access her residence while the public routinely travels the intersecting trails?
2. Does a residential landlord who provides “courtesy officers,” security lighting, and landscaping owe a duty to perform these tasks with reasonable care?
3. Whether Ms. Wright presented the circuit court any evidence that her abduction by lurking gunman leaping from the dark behind overgrown shrubbery in her apartment complex’s common area was proximately caused by her landlord’s lack of due care in operating a courtesy officer program, maintaining security lighting, and landscaping?
4. Whether Ms. Wright presented the circuit court any evidence to support the required elements of her SCUTPA claim?

STATEMENT OF THE CASE

Denise Wright, a tenant at Wellspring Apartments (“Wellspring”), left choir practice and drove home to her apartment at approximately 10:30 p.m. on September 18, 2008. (R. p. 301 ¶ 5). Wellspring was owned by Franklin Pineridge Associates, operated by PRG Real Estate Management, Inc. (“PRG”), and managed on a day-to-day basis by PRG employee Karen Campbell. (collectively Respondents). Wellspring is part of the Harbison community, a planned use development conceived as a community for residents of any age or socioeconomic status.¹ Several multi-use trails weave through Harbison’s neighborhoods. The Harbison Community Association describes “Harbison pathways” as 12 miles of concrete paths flowing through multiple neighborhoods in the Harbison area.²

Wellspring advertises membership to the Harbison Recreation Center and “Walking Trails” as amenities for all Wellspring tenants.³ SCTrails.net, a site maintained by the South Carolina Department of Parks, Recreation and Tourism, provides the public with a map of trails “within the neighborhoods of Harbison” and invites the public to use “neighborhood streets” to traverse the trails as they “pass the backyards of homes.”⁴ The map clearly shows several trails in Wellspring’s immediate vicinity including one trail that goes directly through Wellspring.⁵

¹ “What is Harbison?, Harbison Community Association”, *available at* <http://www.harbisonhoa.com/community/faqs#faq1>.

² *Id.*

³ Amenities, Wellspring Apartments, *available at* <http://www.wellspringapartments-prg.com/amenities.aspx>

⁴ Haribson Neighborhood Trails, South Carolina State Trails Program, *available at* <http://www.sctrails.net/trails/ALLTRAILS/Multi-use/HarbisonNeighborhood.html>

⁵ Map is also available at <http://www.sctrails.net/trails/MAPS/HarbisonNbrhood%20map.html>

When Ms. Wright arrived at Wellspring building 2200 on September 18, 2008, she exited her car and walked toward the ramp leading to her front door. D. Wright Dep. (R. p. 339, lines 13-15). The nearly full parking lot was dimly illuminated by pole lights and small dome lights in the buildings' breezeways. Many parts of the parking lot in front of building 2200 and the ramps leading to the building had little to no light illuminating the area. The pole light nearest Ms. Wright's car was not working. (R. p. 330, lines 3-5). There was no sign of the security officers Wellspring promised Ms. Wright when she moved in. (R. p. 326 at 40, lines 17-21). The shrubs in front of her building were overgrown and capable of concealing unknown persons or potential assailants. (R. p. 390 ¶ 8).

As Ms. Wright neared the ramp and steps leading to her apartment, she was attacked by two African American men. (R. p. 340 at 65, lines 1-5). 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 darkness enveloping her apartment building. (R. p. 339 at 63, lines 13-15; R. p. 301 ¶ 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. (R. p. 346-47).

Along the way, the perpetrators repeatedly promised to kill Ms. Wright, telling her at one point, "You will never see home again." (R. p. 349 at 80, lines 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. (R. p. 348 at 78 line 18 – 79 line 8; R. p. 350 at 82 line 21 - 83 line 7. Ms. Wright feared this was the moment she would be killed. One of the attackers said bluntly: "We've got to kill you." (R. p. 352 at 86 lines 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." (R. p. 366 at 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. (R. p. 352 at 86 lines 16-19). Once at the apartment complex, the perpetrators fled the car. (R. p. 354 at 90, lines 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 could assist her. A police officer was dispatched 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?" (R. p. 369 at 116, lines 16-17). The Wellspring representative could only shrug her shoulders and say, "I'm sorry." (R. p. 369 at 116 line 22).

STANDARD OF REVIEW

To grant a motion for summary judgment, the circuit 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 (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. Summer 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 S.E.2d 688 (2000). An appellate court "applies the same standard used by the [circuit] court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING RESPONDENTS HAD NO DUTY TO REASONABLY SECURE WELLSPRING'S COMMON AREAS.

A. By operating an apartment complex where non-tenant pedestrians were invited to and anticipated to stroll the common areas, Respondents owed a duty to reasonably secure the common areas.

Many landowners face a common law duty to take affirmative precautions to protect others on their property from criminal acts of third parties. This duty has been

imposed by South Carolina courts on storeowners, innkeepers, and other commercial entities. Bass v. Gopal, Inc., 395 S.C. 129, 716 S.E.2d 910 (2011) (motel); see also Restatement (Second) of Torts § 344. South Carolina's federal district court addressed a residential landlord's potential liability to its tenant stemming from injuries suffered by the tenant in a criminal attack by a third party occurring at the landlord's apartment complex. Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205 (D.S.C. 1990). In Cooke, a woman was assaulted in her second-floor apartment by an intruder entering a sliding glass door, which he allegedly accessed with a ladder left unattended by the landlord. Id. at 1206.

The tenant argued her landlord was negligent in failing to warn her of previous crimes in the complex, failing to adequately light the exterior of her apartment, failing to employ security guards, and failing to maintain adequate control over the ladder allegedly used to initiate the intrusion. Id. Interpreting and forecasting South Carolina law, the district court first held that the South Carolina Residential Landlord and Tenant Act's ("SCRLTA") "fit and habitable" standard in S.C. Code Ann. § 27-40-440 does not impose on a landlord the duty to provide security services for tenants. Id. at 1208. Turning to common law, the district court held that South Carolina law does not impose on residential landlords a general affirmative duty to maintain the physical condition of leased premises. Id. at 1209 (citing Young v. Morrissey, 285 S.C. 236, 242, 329 S.E.2d 426, 429 (1985)). The district court ultimately concluded that South Carolina law does not recognize the landlord-tenant relationship as a relationship from which an affirmative duty to provide security arises. 741 F. Supp. at 1213-14.

The district court considered the issue again four years later in Cramer v. Balcor Prop. Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) ("Cramer I"). In this instance a woman was murdered in her apartment when an unknown attacker pried open the sliding glass door leading to her apartment. Id. Due to the lack of South Carolina case law discussing this issue, the district court certified questions to the South Carolina Supreme Court regarding a landlord's potential duty to provide security in and around its leased premises. Id. at 441, 441 S.E.2d at 317. The Supreme Court adopted Cooke's conclusion and held that the landlord-tenant relationship is different from those relationships from which a duty to provide security services may arise. Id. at 444, 441 S.E.2d at 319. Back at the district court, the landlord's summary judgment motion was granted with the district court interpreting Cramer I to hold that the landlord "had no special duty to [a tenant] pursuant to the landlord/tenant relationship." Cramer v. Balcor Prop. Mgmt., Inc., 848 F. Supp. 1222, 1224 (D.S.C. 1994) ("Cramer II").

This Court also considered this issue in Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997). This Court read Cooke, Cramer I, and Cramer II to hold that "landlords do not owe a duty to protect tenants from criminal activity merely by reason of the landlord/tenant relationship." Goode, 329 S.C. at 441, 494 S.E.2d at 831. Despite these sweeping holdings, the rule established in Cooke and Cramer is far from a total bar on landlord liability stemming from a third party criminal attack on a tenant. Cooke identified multiple instances where a landlord's actions may impose a duty to reasonably provide or maintain security services for the benefit of its tenants. 741 F. Supp. at 1209. Cooke labeled these exceptions to the general no duty rule as (1) affirmative acts; (2) concealed danger; (3) common area; and (4) undertaking.

741 F. Supp. at 1209. Additionally, without referencing the Cooke exceptions, the Cramer court held that the Cooke/Cramer general rule did not preclude a plaintiff from asserting a “general negligence principle” based on the “particular circumstances” of any case. Cramer I, 312 S.C. at 443, 441 S.E.2d at 319 n. 1. Goode also recognized the potential for landlord liability for security issues based on a voluntary assumed duty as described in Restatement (Second) of Torts § 323. Goode, 329 S.C. at 444, 494 S.E.2d at 833. Finally, as the opinions clearly show, the Cooke/Cramer rule is fundamentally contingent on a specific factual premise. The rule’s specific premise also serves as a limitation on the rule’s breadth because where the premise is not present, the ultimate “no duty” conclusion cannot stand.

Cooke first restates the common law rule generally rejecting a landlord’s duty to maintain the physical condition of leased premises. Cooke, 741 F. Supp. at 1209. The common law was altered by SCRLTA, which imposed a statutory duty on residential landlords to maintain dwelling units and common areas to prevent tenant injuries caused by the physical condition of the premises. Id. at 1208. The common law is also different for certain types of landowners like storeowners or innkeepers who have a duty to provide “reasonable protection” to people on their premises in certain circumstances and may face liability arising from a third party criminal attack on their premises. Id. at 1213. The Cooke court had to determine whether the landlord-tenant relationship was “analogous” to the storeowner-invitee or innkeeper-guest relationship. Id. Cooke concluded the analogy was inapt and refused to impose a security duty on a landlord based on the landlord-tenant relationship. Id.

Cramer I adopted Cooke's reasoning on this point in full. 312 S.C. at 443, 441 S.E.2d at 318. The Cooke court deemed the typical apartment complex "fundamentally different" than a retail store or motel. The court supported its holding by adopting the reasoning of a single 1984 Pennsylvania Supreme Court opinion. Cooke, 741 F. Supp. at 1213 (citing Feld v. Merriam, 485 A.2d 742, 745-46 (Pa. 1984)). No landlord whose premises falls within Feld's description of the typical apartment complex is in a relationship with its tenants that imposes on the landlord a duty to reasonably secure their premises.⁶ Neither Feld nor Cooke, however, held that a duty based on the landlord-tenant relationship cannot exist where the apartment complex does not fall within Feld's description. In such circumstances, the clear implication from these cases is that the atypical apartment complex very well may be analogous to a retail store or motel and its landlord may have an analogous duty to reasonably secure the premises.

Accordingly, understanding Feld's description of a typical apartment complex and the ways in which the typical complex differs from a retail store or motel are crucial in determining whether the Cooke/Cramer rule applies to this case. The typical apartment complex is different than a retail store or motel in that stores and motels are "places to which the general public are invited." Id. at 1213 (quoting Feld, 485 A.2d at 745-46). 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

⁶ A landlord in this position may still owe a duty to reasonably secure its premises, but the duty would have to be grounded in something other than the landlord-tenant relationship, e.g. the exceptions identified in Cooke or the "general negligence principle" and "particular circumstances" mentioned in Cramer I. Cooke, 741 F. Supp. at 1209; Cramer I, 312 S.C. at 443, 441 S.E.2d at 319 n. 1.

what men can do, they might.” A landlord at a typical apartment complex does not have the same expectation 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.”⁷ Id. In sum, the court distinguished the typical apartment complex from retail stores and motels 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 stated in Feld and underlying the Cooke/Cramer rule is a far cry from the conditions at Wellspring. 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 is 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.”⁸ 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.

⁷ This statement was omitted from Cramer I’s quotation of Feld, which was included in the circuit court’s order. Order at 5; Cramer I, 312 S.C. at 443, 441 S.E.2d at 318. Cooke included the full Feld quote. Cooke 741 F. Supp. at 1213.

⁸ See *Frequently Asked Questions*, Harbison Community Association, available at <http://www.harbisonhoa.com/community/faqs#faq2> (last visited Sept. 19, 2012).

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. (R. p. 395). 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 is 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). These statements are further evidence that the Harbison trail bisecting Wellspring is a place where the public is invited in and welcomed to remain.⁹ 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.” (R. p. 400 at 47, lines 21-22). Deputy

⁹ The Harbison trails public character is also seen in a brochure entitled “Richland County Trails” published by the Richland County Conservation Commission. (R. p. 397-98). The brochure describes Harbison Community to include “paved pathways **weaving through neighborhoods**, natural areas, and around two lakes.” (emphasis added)

Gabr describes open access to the trails. In short, “[a]nybody can come and go.” (R. p. 400 at 48, lines 3-6).

The Cooke/Cramer rule is further premised on the property owner’s expectations regarding the property’s openness. Cooke noted that the general public is 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 general no-duty rule is not borne out in this case. Respondents certainly knew the public was entering Wellspring’s common areas to use the trails and expected this conduct from members of the public. For example, Ms. Campbell, Wellspring’s property manager at the time of Ms. Wright’s abduction, acknowledged that anyone could come into the apartment complex. (R. p. 402 at 9, lines 12-14). Ms. Campbell also acknowledged that anyone could use the Harbison trail that bisect Wellspring. (R. p. 410 at 143, lines 3-5; R. p. 410 at 225, line 25) (“It was a public trail”). Meschelle Roten, a PRG employee speaking as the company’s corporate representative, noted simply, “Anybody can go on those walking trails.” (R. p. 422 at 80, lines 11-15).

Respondents knew members of the public were using Wellspring common areas openly as part of the Harbison trails. They also knew the trails were being used by people with evil intentions. (R. p. 410 at 143, lines 6-9). Additionally, Wellspring documents refer to “The Woods at Harbison,” a neighboring apartment complex, as a “troubled property.” (R. p. 424). Ms. 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.” (R. p. 406 at 57, lines 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. (R. p. 406 at 58, lines 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.

Feld reached its restrictive conclusion only because the general public is not expected to gather in apartment complex common areas for non-visiting purposes. This statement is false as applied to Wellspring. Wellspring bears no resemblance to the high rise apartment buildings the Feld court considered when discussing the typical apartment complex. There are no trails or public walking paths traversing the corridors of high rise apartment buildings. Those are locations truly limited to tenants and guests on the premises for the limited purpose of visiting tenants.

Cooke and Cramer adopted a general rule related to residential landlords and tenants harmed by criminal actors on the landlord's property founded on general understandings of typical apartment complexes. 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 rule cannot be applied. As Plaintiff's apartment security expert Bill Booth stated, Wellspring is a "unique property." (R. p. 427 at 65, lines 12-18); see also (R. p. 437 at 37, line 11 – 40, line 21) (noting "permanent easement for walking trails through Wellspring" indicating public access to Wellspring was what trail "was obviously designed to do"). Officer Kevin Isenhoward had a distinctive recollection of his first impression of Wellspring. He described the area as an "unusual place" with "a particularly creepy kind of tunnel . . . where vagrants hang out." (R. p. 655 at 22, lines 18-24).

At the summary judgment hearing, the circuit court pointed out that any apartment complex is accessible by roads and many rental homes are fronted by public sidewalks. (R. p. 74, lines 2-5). All such properties are publically accessible. The circuit court's order is similarly grounded in the notion that the "manner of access" to Wellspring is no different than the manner of access to the apartment complexes in Cooke or Cramer where the courts found landlords had no duty to reasonably secure common areas. (R. p. 7). It appears the circuit court was concerned about the slippery slope that would develop if a security duty applied to every rental property accessible by public street or sidewalk. Not only would this result swallow the Cooke/Cramer rule, but it would also force landlords to either (1) operate a security program; or (2) eliminate all means by which the public could access the property. See (R. p. 76, lines 4-8) (suggesting Ms. Wright's position would require all landlords to convert their properties to gated communities).

Reducing the Harbison trails' effect on the landlord-tenant relationship to a "manner of access" discussion again ignores the reasons Feld, Cooke, and Cramer distinguished the typical apartment complex from a motel or retail store. The operative differences between these properties are not their manners of access but rather who is invited and what is expected. It is not whether or, if so, how easily the public can access the property but whether the public is invited on to the property and with the expectation that members of the public will enter for non-visiting purposes. Unlike the Harbison trails, streets and sidewalks are not advertised on community and state-sponsored website as recreation destinations for all pedestrians, bicyclists, hikers, and other outdoor enthusiasts. The circuit court's concerns are well-founded and no doubt form part of the

policy underlying the general Cooke/Cramer rule that applies to a typical apartment complex. These concerns simply are not implicated by an atypical apartment complex like Wellspring.

Wellspring is not like the average apartment complex or any apartment complex discussed in earlier case law. (R. p. 541 at 82, line 11 to 83, line 4). The Cooke/Cramer rule does not apply. Thus, this current case presents an issue of first impression for South Carolina courts: whether the landlord-tenant relationship is analogous to the storeowner-invitee and innkeeper-guest relationships when the landlord knows the complex's common areas are open to the public and knows the public accesses the common areas for non-visiting purposes. This question has not been answered by South Carolina courts but the Cooke/Cramer line of cases shows that Wellspring is the rare apartment complex that is analogous to a retail store or motel.¹⁰ On the points considered most important to the courts (i.e. openness to the public and the landowner's expectations), Wellspring is more like a motel or retail store than the prototypical apartment complex.¹¹ Accordingly, Respondents owed Ms. Wright a duty of reasonable care to protect her from foreseeable criminal acts of third parties.

¹⁰ The position Ms. Wright advocates here and argued to the circuit court is simply an application of the principles discussed in Cooke and Cramer and in no way departs from or argues against these precedents. See (R. p. 51, line 21 – 52, line 10) (Ms. Wright's counsel explaining to Judge Young that counsel's argument is "within case precedent" rather than against precedent). Further, since Wellspring is atypical among apartment complexes in its openness and public invitation, reversing the circuit court's decision and finding a duty in this case requires no fundamental reordering of long-standing premises liability principles generally applicable to landlords and tenants.

¹¹ Some courts have explicitly 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").

B. Respondents owed Ms. Wright a duty on a “general negligence principle” based on the “particular circumstances” of this case.

Even for those instances where the Cooke/Cramer no-duty rule applies, the court made clear that this rule 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 I, 312 S.C. at 443, 441 S.E.2d at 319 n. 1. This principle has been explicitly recognized after Cramer. See Goode, 329 S.C. at 442, 494 S.E.2d at 832 (citing Cramer I).

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, and Cramer I does not reference the Cooke exceptions in its introduction of “particular circumstances” cases. 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 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, 728 S.W.3d at 346. 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. *Id.* (citing Irma W. Merrill, *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 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 but “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 nonexclusive control over the dwelling unit¹² and 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.

¹² *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).

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 a 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) (en banc). The Martinez court simply refused to hold that the law “recognizes such a lack of responsibility for safety.” Id.

In this case, Respondents retained exclusive control over the Wellspring common areas for the entire period Ms. Wright rented a unit at the complex. As property manager, Ms. Campbell acknowledged, tenants were not permitted to make their own repairs or provide their own maintenance for Wellspring common areas. (R. p. 632 at 201, lines 17-21). PRG Chief Operating Officer Samuel Foster confirmed Wellspring tenants were helpless to secure the complex's common areas. (R. p. 439 at 46, line 22 – 47, line 14). As discussed above, many courts view this as a circumstances in 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, Respondents knew of previous crimes at Wellspring committed by residents of a "troubled property" along the Harbison trails. Respondents knew or should have known about a series of crimes committed in the Wellspring parking lots around the time of Ms. Wright's abduction. Respondents' 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.

The circuit court suggested at the hearing on October 1, 2012, that imposing a duty on a property owner to provide reasonable security for the benefit of people on its premises was unreasonable or futile given the ubiquity and variability of criminality. (R. p. 75). The circuit court further suggested protection of a person on the property of another falls on the person alone and not on the landowner or even the police. Yet, despite the inherently pervasive and uncertain crime risk in society, South Carolina law does impose a duty of reasonable care on hotels and storeowners (and owners of similarly situated properties) to protect people on their premises. Thus, South Carolina law does not deem the unpredictability of crime to be the determinative factor for assessing the existence of a duty. Instead, courts focus on the property's character & the property owner's expectations.

Ms. Wright does not disagree with the circuit court's statement that a person on the property of another has a role in providing for her own protection in many circumstances. See (R. p. 75, lines 17-18) ("You have to protect yourself"). Ms. Wright never claimed Respondents must be insurers of security or that they are strictly liable for injuries caused by criminal attacks on their premises. See (R. p. 41-42, ¶¶ 24-26) (alleging negligent and reckless conduct). However, to the extent the circuit court concluded an individual has the sole responsibility for self-protection¹³, the court gave insufficient consideration to Cooke, Cramer I, and other cases where a landowner's duty to reasonably secure its premises has been recognized in various circumstances. From a

¹³ See (R. p. 75, lines 10-15) (discussing importance of self-protection including Judge Young's support for concealed weapons legislation).

public policy perspective¹⁴, assigning all responsibility for security to a tenant ignores the fact that a landlord is better positioned to know when and where crimes are occurring on the property and, in the “particular circumstances” of this case, was the only person in a position to make the premises more secure.

II. EVEN IF RESPONDENTS HAD NO AFFIRMATIVE DUTY TO REASONABLY SECURE WELLSPRING’S COMMON AREAS, RESPONDENTS WERE REQUIRED TO REASONABLY PERFORM THEIR VOLUNTARILY UNDERTAKEN DUTIES TO PROVIDE SECURITY AND MAINTAIN COMMON AREAS IN A REASONABLE MANNER

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 due care. Cooke, 741 F. Supp. at 1209-10 (quoting Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985)). 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.” Id. This legal principle is stated in Restatement (Second) of Torts § 323, a section 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

¹⁴ Public policy is a proper consideration for determining a legal duty’s scope. See e.g., Tobias v. Sports Club, Inc., 332 S.C. 90, 92, 504 S.E.2d 318, 320 (1998) (interpreting tavern owner’s duty in dram shop action in light of what “serves public policy”).

residential landlord's voluntarily assumed duty to provide security measures for the benefit of its tenants. For example, in Pamer v. Pritchard Brothers, 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 the landlord voluntarily conducted a security program at the complex including full-time security officers for common areas. Id. at 901. The court also found evidence that the resident relied on the landlord's security program. Specifically, the resident asked her 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. Although the landlord had no general duty to protect its tenant from third party criminal acts, it did have a duty to conduct its voluntarily undertaken security program reasonably. Id. Whether the landlord's performance of its voluntarily assumed duty was reasonable presented a jury question that could not be decided 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 landlord's apartment building. The plaintiff's attacker entered her building through an unsecured front door the landlord promised to keep continually 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 511.¹⁵

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 undertakes to render services for the protection of another.” Id. at 407, 351 S.E.2d at 150. Crowley provides a good example of the factors a court should consider for “undertaking” duties. 285 S.C. at 403-04, 329 S.E.2d at 778.

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. Id. The plaintiff, wary of the mother’s general instability and reported gun ownership, initially refused to permit the mother to visit the children. Id. 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 relying on Restatement § 323 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

¹⁵ 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”).

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 II, 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.

The circuit court’s order does not address Ms. Wright’s claim that Respondents’ duty to reasonably secure Wellspring’s common areas arose from Respondents’ assumed security tasks as provided in Restatement (Second) of Torts § 323. The circuit court only considered the Cooke exceptions in refusing to find a duty. In Cooke, the “affirmative action” exception states that “one who assumes to act, even though under no obligation to do so, may become subject to duty to act with due care.” Id. (quoting Crowley, 285 S.C. at 406, 329 S.E.2d at 780). The “affirmative act” exception has been defined the same way by the South Carolina Supreme Court in Jackson v. Swordfish Investments, LLC, 365 S.C. 608, 613, 620 S.E.2d 54 (2005).

South Carolina case law is not clear as to how the “affirmative acts” exception differs from the “undertaking” exception. Cooke appears to define the “undertaking” exception as the “rule that a landlord’s repairs must be performed with due care.” 741 F. Supp. at 1212. The Cooke court held this exception did not apply to a landlord’s decision to install a certain variety of sliding glass door in all of the complex’s units or to the landlord’s nonspecific conversation with a tenant regarding security at the complex. Id. In other places, however, Cooke is less clear in its delineation of the “affirmative act” and “undertaking” exceptions. Id. at 1210 (“South Carolina law imposes a duty on a person to use reasonable care when any affirmative act is undertaken . . .”). In Goode, the Court of Appeals used similar language to define an “undertaking” duty. In describing the undertaking exception, this Court determined that “even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care.” 329 S.C. at 444, 494 S.E.2d at 832 (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

Goode also identified two distinct sources for the “undertaking” duty. Traditionally, South Carolina common law recognizes a duty of reasonable care when acts are voluntarily undertaken. 329 S.C. at 442, 494 S.E.2d at 832 (citing Russell, 305 S.C. at 89, 406 S.E.2d at 339; Sherer v. James, 290 S.C. at 406, 351 S.E.2d at 150). Additionally, Restatement (Second) of Torts § 323 states the circumstances in which a voluntarily undertaken duty is created and breached. Goode clearly shows that a residential landlord can voluntarily assume a duty to provide security services in the common areas of its apartment complex. For reasons inapplicable to Ms. Wright’s

claim¹⁶, Goode's facts did not meet the requirements of the common law or Restatement-based voluntarily assumed duty rule. 329 S.C. at 445, 494 S.E.2d at 833 ("We find no basis for liability under either the Restatement (Second) of Torts nor the common law rule").

Even so, Goode's use of test demonstrates that the section is a viable duty source in South Carolina law and may be applied to a residential landlord who acts to create and maintain security for common areas of an apartment complex. Goode's § 323 analysis was conducted independently of the long-standing South Carolina common law undertaking duty analysis (e.g. Russell) and independently of the "affirmative acts" analysis discussed in the circuit court's order. See Order at 8-11. Thus, if Ms. Wright made the requisite showing for each of § 323's elements, then the duty component of her negligence claim was adequately demonstrated and summary judgment should have been denied.

There is evidence in this case that Respondents assumed a responsibility to create, maintain, and perform a security program at Wellspring for the benefit of its tenants. Ms. Wright has also presented evidence that she relied on Respondents' security program when choosing to move to Wellspring and to renew her lease year after year. Additionally, Ms. Wright has presented evidence that Respondents' failure to properly perform the security program they promised their tenants and undertook to perform

¹⁶ The Restatement-based duty did not apply in Goode because the plaintiff was a tenant's social guest and any alleged security duty undertaken by the landlord was provided only for the benefit of the complex's tenants. Additionally, the plaintiff provided no evidence that the security duty was performed with less than due care, and the plaintiff could not demonstrate the required element of reliance since he admitted that he knew the landlord did not provide security at the complex. 329 S.C. at 444-45, 494 S.E.2d at 833. As discussed in more detail below, none of these deficiencies apply to Appellant's claim.

increased the risk that Plaintiff would suffer the harm she ultimately experienced. This evidence satisfies Restatement § 323's elements and establishes Respondents' duty to Ms. Wright even if this Court concludes Respondents were not otherwise required to provide security. Accordingly, Respondents' motion for summary judgment on the basis of a perceived lack of duty should have been denied.

Respondents assumed responsibility for a sophisticated security program at Wellspring. Courtesy officers were a large part of the program. See (R. p. 586 at 19, lines 19-21); M. Roten Dep. 22:8-21; 55:18-19 ("The property did contract for security officers"). Courtesy officers were law enforcement personnel who received a reduced rate on rent or other compensation in exchange for providing various security services at Wellspring. (R. p. 623 at 165, lines 11-14). Wellspring conducted an intricate courtesy officer program. Each potential courtesy officer signed a Courtesy Officer Independent Contractor Agreement (R. p. 441-42) that defined the officer's responsibilities at the complex. These responsibilities included (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 were extensive and included 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 Ms. Wright was aware of Respondents' security program far before her September 2008 attack and her reliance on that program when deciding to move to and remain at Wellspring. When Ms. Wright was investigating various apartment complexes in the Columbia area in spring 2003, she considered the amenities each location offered. (R. p. 326 at 40, lines 13-15). One of the primary amenities at Wellspring was its security program. Ms. Wright "felt like it would be a safe place" because she "was told that there were security officers on duty." (R. p. 326 at 40, lines 16-21). Security was such an important consideration for Ms. Wright that she asked Wellspring officials about the program. (R. p. 326 at 40, line 25 – 41, line 6). She decided to move to Wellspring only after receiving a satisfactory answer to a direct question about the security program.

Ms. Wright, 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 Respondents' property. Respondents invited Ms. Wright and all tenants to rely on Wellspring's security program. To facilitate a courtesy officer's responsibility to answer calls, Respondents provided each officer with a cell phone. (R. p. 647 at 264, lines 23-25). The number for a courtesy officer's phone was printed in each month's Wellspring Apartments tenant newsletter. The August 2008 newsletter (R. p. 444-45) 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, Respondents' newsletter represented to each Wellspring tenant that "Security is also very top priority with us." The "security pager" was presented as one of the means by which Respondents made security their "top priority." The implications from the totality of Respondents' security program are clear: (1) Ms. Wright and other tenants relied on the program when deciding whether to enter or renew their leases at Wellspring; (2) Respondents knew or should have known Ms. Wright and other tenants relied on the program; and (3) Respondents invited Ms. Wright and other tenants to rely on the security program by advertising its courtesy officers and encouraging tenants to call the "security pager."¹⁷

Respondents' voluntary undertaking of a security program and Ms. Wright's reliance on that program is sufficient to establish a duty for Respondents 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, Ms. Wright presented evidence demonstrating that the deficiencies in Respondents' security program increased the risk of the harm Ms. Wright suffered. If Respondents' security program was functioning in a reasonable manner, then courtesy officers would have been patrolling Wellspring's common areas for hours each day and responding promptly to calls to the "security pager." The risk of criminal attack

¹⁷ 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. (R. p. 420 at 51, line 19 – 52, line 12).

was much higher because Respondents' security program was not performed as it should have been. Ms. Wright's expert used his expertise to confirm the common sense notion that criminals are less likely to lurk in places where officers are actively patrolling. (R. p. 427 at 67, lines 17-21).

Respondents conducted at least two other tasks that affected the security of Wellspring's common areas. Respondents provided some of the common area lighting and had the exclusive authority to trim the shrubbery throughout the common areas. Ms. Wright presented evidence that Respondents' 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. Respondents 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. Respondents 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." (R. p. 407 at 84, line 25- 408 at 85, line 8).

Adequate common areas lighting discourages people who didn't belong from congregating at the complex. (R. p. 404 at 27, lines 1-5). In other words, well-lit common areas have a role in the protection of Wellspring tenants. (R. p. 415 at 227, line 8 – 228 line 11); see also (R. p. 436 at 26, lines 18-24) (referring to crime deterrent capacity of adequate lighting as "a common sense position"). Respondents clearly considered their provision of common area lighting a duty of both safety and security. In

the “Maintenance” section of Respondents’ policy and procedure manual for Wellspring, the “Security” subsection acknowledges a “duty to help our residents to enjoy a safe and pleasant stay.” (R. p. 446). To fulfill their “Security” duty to keep residents “safe,” Respondents agreed that “[t]he property should be well lit” and Respondents should “replace bulbs promptly and use adequate wattage.” It is clear Respondents viewed their 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).

Lights were installed at different locations in Wellspring 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 lighting installation and maintenance through contractors and made other modifications to Wellspring after undertaking the duty to own and manage the complex. Officer Kevin Isenhoward testified that, during the police investigation of Ms. Wright’s abduction, 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.” (R. p. 655 at 24, lines 7-8). 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. (R. p. 427 at 67, lines 1-7). This testimony was based on a light study and objective lighting standards promulgated by the Illuminating Engineers Society of North America. (R. p. 426 at 29, lines 4-12; 429 at 140, line 19 - 142, line 18) (describing light study methodology).

Respondents also voluntarily undertook a duty to maintain the shrubbery and other landscaping throughout Wellspring’s common areas. K. Campbell Dep. 142:1-7.

This responsibility included the shrubs near the ramp to Ms. Wright's unit. See (R. p. 449-54). Ms. Wright's attackers were concealed by these shrubs on the night of her abduction. (R. p. 301 ¶ 8).¹⁸ Respondents 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. Ms. Campbell testified that shrubbery maintenance is also provided for tenants' protection. (R. p. 416 at 230, lines 10-14). The height of shrubs surrounding the approaches to tenants' dwelling units also has an effect on the complex's security.

Respondents hired H&S Landscaping to perform various landscaping tasks. For the shrubs, H&S was hired to "trim[] and shape[] as needed." (R. p. 456). H&S owner Shawn Howland was concerned about overgrown shrubbery around Wellspring and had numerous conversations with Wellspring manager Ms. Campbell about the issue. Ms. Campbell's response was always that additional shrubbery maintenance was simply not in Wellspring's budget. (R. p. 390, ¶ 9). Shortly after Ms. Wright's attack, Respondents relented and authorized a special budget item for shrub maintenance. (R. p. 435 at 22, line 19 – 23, line 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." (R. p. 421 at 64, line 17 – 65, line 6). The post-incident "severe trimming" conducted by Respondents made a significant difference in visibility near Ms. Wright's apartment. A quick comparison of the area before and after the "severe trimming"

¹⁸ Respondents take issue with Ms. Wright's claim that her attackers were concealed by the dark or overgrown shrubbery because some details of her attack are not included in the police report. However, in addition to her affidavit, Ms. Wright also testified that the attackers were concealed in her deposition. (R. p. 339 at 63, lines 18-22) (attackers were "behind the bush" and Ms. Wright could not seek them until she passed the bush). At the very least, there is a factual dispute on this issue that a jury must resolve.

clearly shows that proper pruning would significantly decrease the areas where a criminal actor could hide. According to Mr. 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." (R. p. 537 at 66, lines 18-23).

In sum, Respondents voluntarily undertook a security program at Wellspring by employing courtesy officers, providing security lighting, and maintaining common area landscaping for the purpose of securing the premises. Respondents publicized its security program to Ms. Wright when she signed her lease and each month via the tenant newsletter. Ms. Wright testified that she relied on Respondents' security program in choosing Wellspring over other area apartment complexes. Respondents' poorly operated security program significantly increased the risk of third party criminal attacks to its tenants. All elements of Restatement § 323 are met and Respondents owed Ms. Wright a duty of reasonable care in operating its voluntarily assumed security program.

III. MS. WRIGHT PRESENTED THE CIRCUIT COURT EVIDENCE THAT RESPONDENTS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE INJURIES SHE SUFFERED IN A CRIMINAL ATTACK INITIATED IN WELLSPRING'S COMMON AREAS .

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”). The circuit court even noted, summary judgment on proximate cause is appropriate only where there is “absolutely no evidence in the record” indicating that proximate cause exists. Order at 12 (quoting Parks v. Characters Night Club, 345 S.C. 484, 500, 548 S.E.2d 605, 614 (Ct. App. 2001)).

Where a negligence claim alleges an injury directly caused by the intervening act of a third party, a “special case” is presented. Cody P., 395 S.C. at 620, 720 S.E.2d at 478. In 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). Ms. Wright’s proximate cause showing was not deficient merely because not every crime is preventable or because precisely predicting a criminal’s conduct is an inexact proposition. See (R. p. 14).

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 provided 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 guests. 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 135. 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 Respondents foresaw third party criminal attacks at Wellspring. Respondents' policies and procedures recognize

this risk. Respondents' "Courtesy Officer Independent Contractor Agreement" creates a relationship between Respondents and an officer to provide specific services to prevent certain harms. Courtesy officers are to respond to calls regarding "Domestic altercations" and "Criminal acts." (R. p. 441). Similarly to Daniel, it is clear from the Courtesy Officer Independent Contractor Agreement that Respondents perceived some threat of third party criminal acts directed at its tenants. This was a threat Respondents recognized and undertook to guard against. Accordingly, a third party criminal act directed at Wellspring's tenants was not unforeseeable if Respondents negligently perform the duty they had undertaken to guard against such crimes.

Ms. Wright's security expert testified that, in his opinion, Respondents' negligence was a proximate cause of Ms. Wright's injuries. (R. p. 561 at 162, lines 15-18). Mr. Booth has provided uncontroverted testimony that Ms. Wright's abduction was a "foreseeable incident." (R. p. 537 at 66, lines 8-15). Mr. Booth's opinion was based in part on his analysis on various crimes at Wellspring including other crimes in the Wellspring parking lot. See (R. p. 564 at 175, line 12 – 176, line 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. (R. p. 565 at 178, line 21 – 179, line 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. (R. p. 565 at 180, lines 18-23). Defendants’ witnesses also acknowledge that crime was foreseeable at Wellspring. Ms. Campbell admitted that it “would be fair to say” that there is going to be a certain amount of crime at Wellspring. (R. p. 610 at 114, line 1).

Respondents disputed Mr. Booth’s analysis of previous crimes in Wellspring’s common areas. (R. p. 118). Using similar language, the circuit court appeared to dismiss nonviolent crimes in the area as irrelevant to the foreseeability of violent crimes. (R. p. 15). Ms. Wright adamantly disagrees with Respondents’ characterization of Wellspring’s extensive crime record. More importantly for sake of Respondents’ summary judgment motion, only Ms. Wright’s position was supported by evidence. Ms. Wright presented Mr. Booth’s expert testimony on the effect of “precursor” crimes on the foreseeability of violent crime. Respondents offered no evidence to support their conclusion that precursor crimes are irrelevant. On a summary judgment motion where a movant bears the burden and on the issue of proximate cause where only the exceptional case can be decided without a fact finder, the circuit court’s dismissal of Mr. Booth’s foreseeability testimony was in error.

In addition to this evidence supporting legal cause, there is also evidence that Respondents’ negligence was a cause in fact of Ms. Wright’s injuries. The testimonial evidence from several witnesses demonstrates that but for Respondents’ 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.” (R. p. 301 ¶ 8; 339 at 63, lines 16-18). A representative of the company Respondents 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.” (R. p. 390 ¶ 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.” (R. p. 537 at 66, lines 16-23).

Mr. 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. (R. p. 555 at 140, line 23 – 556 at 142, line 4). The lighting was “totally inadequate” and “this crime would not have occurred” had lighting met the industry standard. (R. p. 537 at 66, line 24 – 67, line 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. (R. p. 301 ¶ 10). In fact, even after getting out of the car, if the lighting and shrubbery maintenance was such that Ms. Wright could have seen 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. (R. p. 301 ¶ 10). The attackers remained concealed and were able to execute a surprise attack only because of the poor lighting and overgrown shrubs.¹⁹

¹⁹ The circuit court’s order dismissed lighting and shrubbery as a proximate cause since one police investigation report did not mention that the attackers were concealed. (R. p. 16). The order did not acknowledge Ms. Wright’s affidavit or deposition where Ms. Wright swore under oath that the attackers were concealed by darkness and overgrown shrubbery. Respondents clearly intend to challenge the veracity of Ms. Wright’s

Additionally, but for Respondents' sloppily executed courtesy officer program, the perpetrators likely would not have been in the area to abduct Ms. Wright. Respondents' 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. Respondents acknowledge the required patrolling was not performed. (R. p. 586 at 19, line 22 – 20, line 3). Mr. Booth estimates that based on Wellspring's size, a courtesy officer could cover the premises five to six times in two hours. (R. p. 560 at 158, lines 23-24). Using that estimate, Respondents' 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.

(R. p. 549 at 113, lines 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

testimony on this point and would be free to do so at trial. However, credibility determinations are inappropriate for summary judgment motions. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 548-49, 634 S.E.2d 1, 6 (2010); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (“where the credibility of the witness has been questioned, the matter is properly left to the jury to decide”).

program been conducted as required by Respondents' own policies. Accordingly, there is certainly evidence to show Respondents' negligence was a cause in fact of Ms. Wright's injuries. With at least a scintilla of evidence on legal cause and causation in fact, Respondents' motion for summary judgment on the issue of proximate cause must be denied.

IV. MS. WRIGHT PRESENTED THE CIRCUIT COURT EVIDENCE TO SUPPORT ALL REQUIRED 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). Regardless of the instances where SCUTPA is "predominantly applied," the statute's terms expressly apply to "any" trade or commerce.²⁰ SCUTPA 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" when it is

²⁰ The circuit court's order began its SCUTPA discussion with skepticism of Ms. Wright's claim because it arises in a different factual context than the typical SCUTPA claim. Order at 17; see also (R. p. 64, line 21) (noting "[c]ar dealers seem to get [SCUTPA claims]").

“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. (R. p. 326 at 40, lines 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. (R. p. 326 at 40, lines 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.” (R. p. 326 at 40, lines 16-21; 648 at 265, lines 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).

Respondents’ statements to Ms. Wright at the initial apartment visit and through her time as a Wellspring tenant by way of monthly security representations made in tenant newsletters were specific and not fleeting promises that the complex was “safe” as was the case in Cooke. See Cooke, 741 F. Supp. at 1215. By promising security guards, Respondents made specific statements as to how Wellspring was made secure. This factual distinction affirmatively distinguishes Cooke. The representations here are not only more concrete than those in Cooke but also arise in the context of a different cause of action. Cooke considered whether the landlord’s statement supported a fraud claim.

Id.; Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993) (listing fraud claim's nine elements). These are distinct claims in which Ms. Wright is not required to show all nine elements of fraud to present a jury question on her SCUTPA claim. See Clarkson v. Orkin Exterminating Co., Inc., 761 F. 2d 189, 191 (4th Cir. 1985) (concluding SCUTPA plaintiff "need not show intentional deception").

Respondents' statements 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." (R. p. 326 at 40, line 21).²¹ Ms. Wright's reliance on Respondents' representations of security is precisely the reason Respondents 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, Respondents' economic interests are best served when all Wellspring units are occupied. PRG's focus on high occupancy rates was especially pronounced. Ms. 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. (R. p. 629 at 189, lines 7-10). The specific security representations Respondents made to Ms. Wright demonstrate the lengths to which PRG was willing to go to increase profitability.

²¹ Respondents argue Ms. Wright admitted that she chose to live at Wellspring only because of church friend recommendations and Wellspring's proximity to her place of employment. (R. p. 126) (citing R. p. 325-26). Ms. Wright specifically said these were the two reasons why she "went there first." (R. p. 325 at 39, lines 1-2). In response to later questions, Ms. Wright testified that she considered Wellspring's "amenities" including Respondents' specific promises that security guards were on duty at Wellspring. (R. p. 326 at 40, lines 13-21).

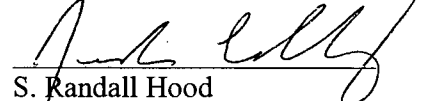
Respondent's representation of security guards at Wellspring was untrue. There were no "security officers" or courtesy officers at Wellspring when Ms. Wright was abducted in September 2008. Respondents' continued representations were, therefore, a misrepresentation and "unfair" as that term is used in 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 Respondents' property manager and Ms. Wright. In each tenant newsletter, Respondents 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 Respondents had no courtesy officers at that time. Respondents made this representation knowing it was untrue and knowing that its tenants relied on the representation. Respondents derived economic benefits from the promise of security services. This unfair trade practice had an impact on the public interest because it was capable of repetition and repeated toward all Wellspring tenants. This newsletter was sent to all Wellspring tenants. Thus, the false representation of security services was made to many people, not just Ms. Wright. Ms. Wright has presented evidence on all three SCUTPA elements identified in City of Charleston. Summary judgment on Ms. Wright SCUTPA claim should be denied.

CONCLUSION

Based on the arguments stated above, Ms. Wright respectfully requests this Court reverse the circuit court's order granting Respondents summary judgment. Respondents owed Ms. Wright a duty of reasonable care to reasonably secure Wellspring's common

areas. This common law duty was based on the parties' relationships and Wellspring's unique conditions. Alternatively, Respondents owed Ms. Wright a duty to use due care in its voluntarily assumed security program. Ms. Wright's evidence also creates a genuine issue of material fact on the issue of proximate cause. Finally, Ms. Wright's evidence met the requisite prima facie showing on all elements of a SCUTPA claim.

Respectfully submitted,


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MAY 15 2014

SC Court of Appeals

Rock Hill, South Carolina

May 14, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2011-CP-40-4068

Denise Wright

.....

Appellant

v.

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

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Respondents.

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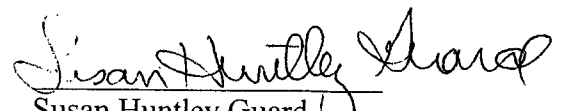
MAY 15 2014

SC Court of Appeals

PROOF OF SERVICE

The undersigned hereby certifies that on this 14th day of May, 2014, she served counsel for the Defendants with a copy of the Final Brief of Appellant and Final Reply Brief of Appellant in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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APPEAL FROM RICHLAND COUNTY
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Denise Wright Appellant

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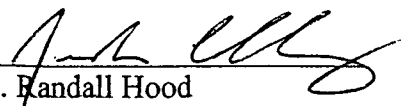
PRG Real Estate Management,
Inc., Franklin Pineridge
Associates, Karen Campbell
Individually and in her
Representative Capacity as an
Agent of PRG Real Estate
Management

..... Respondents.

CERTIFICATE OF COMPLIANCE

Appellant's counsel hereby certifies that the Final Brief of Appellant and Final Reply
Brief of Appellant comply with Rule 211(b), SCACR.

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