THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-00295

Ebony Bethea..... Appellant,

v.

Derrick Jones, John Doe, Individually and as employee/agent of Citi Trends, Inc., Citi Trends, Inc., and Palmetto Properties, Inc.,

Of whom Citi Trends, Inc. and Palmetto Properties, Inc. are .....Respondents.

INITIAL BRIEF OF RESPONDENT PALMETTO PROPERTIES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY RULE THAT THERE WAS NO DUTY TO PROTECT EBONY BETHEA FROM BEING SHOT BY HER EX-BOYFRIEND, DERRICK JONES, AT A STORE LOCATED WITHIN A SHOPPING CENTER OWNED BY PALMETTO PROPERTIES, INC. BECAUSE THE INCIDENT WAS NOT FORESEEABLE AND THE SECURITY MEASURES AT THE SHOPPING CENTER WERE NOT UNREASONABLE?

2. DID THE TRIAL COURT CORRECTLY RULE THAT NO ACTIONS OR INACTIONS ON THE PART OF PALMETTO PROPERTIES, INC. WERE THE PROXIMATE CAUSE OF EBONY BETHEA'S INJURIES?

3. DID THE TRIAL COURT CORRECTLY RULE THAT EBONY BETHEA'S COMPARATIVE NEGLIGENCE EXCEEDED THAT OF PALMETTO PROPERTIES, INC.?

STATEMENT OF THE CASE

This case stems from injuries suffered by Ebony Bethea in a shooting committed by her on again/ off again boyfriend, Derrick Jones, on December 27, 2010. On July 16, 2012, Bethea brought this action against Jones; the store where the shooting occurred, Citi Trends, Inc. ("Citi Trends"); and the owner of the Dillon Plaza Shopping Center ("Dillon Plaza") where the shooting occurred, Palmetto Properties, Inc. ("Palmetto"). (Complaint, R. at ____). The Complaint alleged causes of action for negligence against Palmetto. (Complaint at ¶¶ 56-68, R. at ____). Palmetto answered on April 12, 2013, asserting various defenses including: general denial, comparative/ contributory/ sole negligence, intervening acts/ criminal acts/ intentional acts of third parties, assumption of risk, and negligence of others. (Answer, R. at ____).

After extensive discovery, Palmetto joined Citi Trends' motion for summary judgment on the grounds that Palmetto owed no duty to protect Bethea from Jones or to warn Bethea about Jones, given the lack of foreseeability of this crime and Bethea's specific knowledge that Jones was threatening to shoot and paralyze her. (Motion, R .at ____). Palmetto also sought summary judgment because there was no evidence any action by Palmetto caused Bethea's injury, or stated another way, there was no evidence that Palmetto reasonably could have protected Bethea from the shooting. (*Id.*). The motions were heard on January 7, 2014. At the hearing, Palmetto raised an additional argument that it was entitled to summary judgment because Bethea's injuries occurred in Citi Trends, an area that was not under Palmetto's control. (Tr. at 19: 6-10, R. at ____).

After acknowledging the tragedy of the facts in this case, the trial court granted summary judgment to Citi Trends and Palmetto. (Tr. at 40:9-17, R. at ____). The trial court formalized that decision in a written order dated January 22, 2014, granting

summary judgment based on its findings that (1) that Palmetto did not owe Bethea any duty with respect to Jones's criminal actions, (2) that there was no evidence Palmetto's security measures were unreasonable, (3) that there was no evidence Palmetto proximately caused Bethea's injuries, and (4) that Palmetto was entitled to summary judgment because Bethea's comparative negligence exceeded that of Palmetto as a matter of law. (Order, R. at ____). This appeal followed.

FACTS[1]

I. THE RELATIONSHIP BETWEEN JONES AND BETHEA.

The facts surrounding the tumultuous relationship between Bethea and Jones are not in dispute and are at the heart of this appeal. Bethea and Jones have a son together and were in a relationship off and on for approximately ten years. (Bethea Dep. at 13, 15, 81, R. at ____). Bethea knew Jones had an anger problem and could not control his anger, particularly when it came to her spending time with other men. (*Id.* at 18-20, 27, 67-69, R. at ____). She also knew from experience that this anger could turn violent. (*Id.*). On November 15, 2009, Defendant Jones assaulted Plaintiff when he believed she was "talking" to another man. (*Id.* at 67-69, R. at ____). She also knew about an incident in which Jones shot a former girlfriend. (*Id.* at 15-16, R. at ____).

When Bethea started dating someone else in late 2010, Jones took every opportunity to try to catch the couple together, waiting outside the new boyfriend's apartment and following Bethea. (*Id.* at 86-88, R. at ____). Bethea called the police after she learned Jones was banging on the door to her new boyfriend's mother's house. (*Id.* at 88, 90-91, R. at ___). She told police that Jones had threatened to kill her and her

[1] Palmetto hereby joins in the factual background recited by Citi Trends and notes that much of this factual recitation was drawn from Citi Trends' memorandum in support of its motion for summary judgment.

boyfriend. (*Id.*). Bethea declined to seek a restraining order against Jones at that time because "[h]e was just at that moment to where he just didn't really care about what he would do now. It was just how I felt, like this thing is– this restraining order is not going to scare Derrick." (*Id.* at 91-92, R. at ____). When questioned whether anything could have prevented Jones from shooting her, Bethea responded that if Jones had been incarcerated after this incident it might have helped, but concluded that she "didn't know if this would have helped or not because I'm thinking maybe if he would have got out, he probably still would have done what he's done." (*Id.* at 110-11, R. at ____). Bethea further testified that Jones was so angry with her that it did not matter if she saw him at day or night or in front of the Sheriff's Department because he was determined to hurt her. (*Id.* at 134, R. at ____).

Jones continued to stalk Bethea. He threatened that Bethea would be "paralyzed by Christmas." (*Id.* at 123, R. at ____). He left at least seventeen (17) threatening voice mail messages for Bethea and warned if he were going to go to prison, it would be for "something big." (Voice Mail Transcript, R. at ____). The following are samples of the messages:

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

(*Id.*, Message 4 of First Voicemails, R. at ____).

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

(*Id.*, Message 4 of Second Voicemails, R. at ____). One of Jones's cousins warned Bethea that Jones was telling people that he was going to shoot her after Christmas. (Bethea Dep. at 114, R. at ____).

Bethea began to take precautions regarding interaction with Jones and would not go to his house after dark. (*Id.* at 110, 134, R. at ____). On Christmas day, Bethea took their son to open presents at Jones's house. (*Id.* at 99, R. at ____). While there, Jones threatened to hit Bethea and started "talking crazy mess about [Bethea]." (*Id.*).

II. THE SHOOTING.

Two days later at around 6:00 p.m., Bethea went to Citi Trends to exchange some clothes for her son. (*Id.* at 100, 136, R. at ____). She testified that minutes earlier she was on the phone with Jones and told him that she was going inside Citi Trends so she could not talk. (*Id.* at 101, 135, R. at ____). At that time, she did not tell anyone at Citi Trends about Jones and the threats he had made. (*Id.* at 146, R. at ____). There is no evidence that either Citi Trends or Palmetto had any knowledge of the relationship between Jones and Bethea or Jones's threats to Bethea.

Roughly fifteen minutes after Bethea started shopping, Jones arrived at Citi Trends. (*Id.* at 137, R. at ____). As shown on the store's surveillance tape, when Jones entered the store he was not wearing a hood, both hands were visible, and no gun was apparent. (Tape, R. at ____). There was no outward indication that Jones had any criminal motive. Jones found Bethea in the back of the store, approached her, and calmly stated he was "tired of [Bethea] disrespecting" him and put his fingers in her face. (Bethea Dep. at 102-03, R. at ____). Bethea then told Jones that he was "not going to be putting [his] fingers in [her] face." (*Id.*). Jones then lifted his shirt and said "Oh, I ain't going to put my fingers in your face." (*Id.*). Bethea then began running towards the front

of the store. (*Id.* at 103-04, R. at ____). Three to four seconds later, Jones shot her in the back, leaving her paralyzed from the chest down. (*Id.*). Jones then fled. (Tape, R. at ____).

Based on the time stamp on the surveillance video, Jones was in the store for around a minute. (*Id.*). Bethea testified that the incident happened so fast that the two women working at Citi Trends did not have time to do anything to protect her. (*Id.* at 145, R. at ____). Law enforcement further corroborated that there was nothing the store employees could have done. (Hayes Dep. at 52-53, R. at ____). The shooting occurred in the store, not the common areas under Palmetto's control.

Jones pled guilty to attempted murder and possession of a firearm. He is currently incarcerated.

III. THE HISTORY OF CRIMES IN AND AROUND CITI TRENDS AND DILLON PLAZA.

Law enforcement testified that there is about one shooting a month in Dillon, mostly at nightclubs or residences. (Hayes Dep. at 57-58, R. at ____). Prior to Bethea's injury, there had not been any shootings or any other violent crime at Dillon Plaza, and police considered it a low crime area. (Turner Dep. at 36, R. at ____). In fact, the only other crimes in the stores located at Dillon Plaza were shoplifting, copper theft from a vacant store, and financial crimes, such as embezzlement. (Hayes Dep. at 63-64, Turner Dep. at 50-51, R. at ____). Even considering the crime statistics presented by Bethea's expert for the half-mile radius surrounding the shopping center, the only evidence of specific crimes were an aggravated assault (1/2 mile away), one carjacking without weapon, (1/3 of a mile away), two simple assaults (1/2 mile away), and one simple assault (cursing only), that occurred in the theatre parking lot across the street. (Booth Aff. at 7, R. at ____).

STANDARD OF REVIEW

On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is warranted when there is no genuine issue of material fact, and it appears that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Issues of existence and scope of duty, however, are questions of law for the court. *Burnette v. Family Kingdom*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (2010); *Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997).

If a summary judgment motion has been properly made and supported, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

ARGUMENTS

In an action for negligence, a plaintiff has the burden of proving the following elements: "(1) the defendant owed her a duty of care; (2) the defendant breached that duty of care; and (3) the defendant's breach proximately caused her damage." *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 608-09 (Ct. App. 2001). In

this case, the trial court granted summary judgment for three specific and independent reasons: (1) Palmetto and Citi Trends did not owe any duty to Bethea, (2) Palmetto and Citi Trends did not proximately cause Bethea's injuries, and (3) Bethea's negligence exceeded that of Palmetto and Citi Trends as a matter of law.

I. PALMETTO DID NOT OWE ANY DUTY TO PROTECT OR WARN BETHEA AGAINST THE DANGER OF INJURY AT THE HANDS OF JONES.

In South Carolina, a landowner or merchant only has a duty to protect invitees from foreseeable criminal harm. *Bullard v. Ehrhardt*, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984). The mere fact that an injury occurs on the defendant's premises does not establish any liability on the part of the defendant, and no such liability may be presumed. *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991).

With respect to random crimes occurring on a business premises, the South Carolina Supreme Court refined the rules relating to duties with respect to criminal acts of third parties in *Bass v. Gopal, Inc.*, 395 S.C. 129, 134-36, 716 S.E.2d 910, 913-16 (2011). There, the court adopted a balancing approach requiring an analysis of "(1) if a crime is foreseeable, and (2) given the foreseeability, [a determination of] the economically feasible security measures required to prevent such harm." *Id.* at 139, 716 S.E.2d at 915. The balance is between the degree of foreseeability and the cost of additional safety measures. "As the foreseeabilty of a potential harm increases, so, too, does the duty to prevent against it." *Id.* If there is some evidence a crime was foreseeable, the reviewing court must determine whether the defendant's preventative actions were unreasonable given the risk. *Id.*

A. Jones's action was not foreseeable by Palmetto.

The factual evidence in this case is clear. As shown in Section III of the Facts above, there was no history of violent crime in or around Dillon Plaza. With respect to foreseeabilty, "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Id.* In this case, there is no evidence that other factors support a heightened risk, and therefore, the foreseeability prong of the *Bass* test has not been satisfied.

In *Bass*, the Supreme Court found that there was evidence of a heightened risk and therefore foreseeability for a shooting incident at a hotel based on a report showing the incidence of crimes against persons *at the hotel site* was well above the national state average risk. *Id.* at 140, 716 S.E.2d at 916. The court was careful to note that it "[did] not believe evidence of an elevated crime rate covering the expanse of an entire county, on its own, is sufficient to prove foreseeability by a preponderance of the evidence. Such a finding would diminish a business's economic incentive to expand into higher crime counties, which arguably are in the greatest need of commercial stimulus." *Id.* In *Bass*, the court was careful to state that South Carolina businesses are not required to "anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society." *Id.* Thus, generalized evidence relating to a large geographic area alone will not support a finding that there is a heightened risk of crime at a location with no history of similar crimes.

Heightened risk can also be shown be evidence of knowledge of recent, similar crimes in the area. *Lord v. D & J Enters.*, Op. No. 27373 (S.C. Sup. Ct. filed April 9,

2014) (Shearouse Adv. Sh. No. 14 at 21). *Lord* stemmed from a shooting at a lending business committed by an armed robber who had committed numerous similar crimes in the area. The court there found the foreseeability prong of the *Bass* test was met based on a wave of high profile crimes in the area targeting similar businesses, and the business owner's warning to his employees to be careful because "there's a madman on the loose." In *Lord*, the record showed that not only was the crime foreseeable, it was actually foreseen by the business owner.

Here, however, there was no location specific or other, specific rather than general, evidence that this crime was foreseeable. Local police and the corporate representatives of Citi Trends and Palmetto all testified that there was no history of violent crime in the store and shopping center. (Holliday Dep. at 51, Council Dep. at 73, Booth Aff. at 7, Hayes Dep. at 57, Turner Dep. at 35, R. at ____). Local police further testified this event occurred in a low crime area. (Turner Dep. at 50-51, Hayes Dep. at 65, R. at ____). Further, there is no indication that Palmetto had any knowledge of the danger Jones posed to Bethea. (Holliday Dep. at 58, R. at ____). Thus, there is no evidence showing a heightened risk of a violent attack or shooting at Dillon Plaza.

In her brief, Bethea attempts to avoid this evidence by reliance on conclusory statements made by her expert, Michael Hodge, to the effect that Citi Trends and Dillon Plaza are in a high crime area. However, "the opinion of the expert 'must be based upon facts . . . sufficient to form a basis for an opinion. . . . Expert opinion is inadmissible if its factual foundation is nebulous.'" *Young v. Tide Craft, Inc.*, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) (citations omitted). "[The expert] must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried

which was necessary to the formation of an intelligent opinion." *Id.* at 469, 242 S.E.2d at 678. Hodge's testimony does not meet this standard.

The two bases for Hodge's opinion are (1) FBI statistics for South Carolina and the City of Dillon and (2) "actual crime reports from the police department." With respect to the FBI statistics, Hodge conceded in his deposition that those statistics have been challenged and he only placed a five percent weight on them. (Hodge Dep at 164, R. at ____). Further, as set forth above, *Bass* expressly declined to hold that broad, general statistics were enough to trigger foreseeability and noted that such a holding would deter investment in underprivileged areas. With respect to the crime reports, the actual crime reports submitted to the trial court at the summary judgment stage simply do not support Hodge's conclusion. (Exh. 6 to Citi Trends' Mem. Supp. Mot. Summ. J., R. at ____). As noted in the trial court's order, Hodge acknowledged the following points when challenged on this point in his deposition:

- He did not prepare a summary of the types, number, and location of crimes within a half-mile radius of the incident. (Hodge Dep. at 33-34, R. at ____).

- He could not point to the violent crimes he was referring to, only that they could be found among the incident reports that he was provided. (Hodge Dep. at 35-37, 118, 152, R. at ____).

- He admitted that he did not independently evaluate the distances between this incident and the crimes in the incident reports. (Hodge Dep. at 35, 37, 116-120, 148-149, 151-152, R. at ____).

- He testified that some of the incidents included in his opinion were outside a mile radius of the incident. (Hodge Dep. at 151, R. at ____).

- He considers ten to fifteen "assaults, batteries, various violent crimes" to be a "high amount," but did not identify any set of crimes that would satisfy that definition in this case. (Hodge Dep. at 149, R. at ____).

- He agreed that there had been no shootings in Dillon in retail stores before this incident. (Hodge Dep. at 126-27, R. at ____).

Bethea has not clarified these discrepancies either at the summary judgment stage or on appeal. Given the lack of evidentiary basis for Hodges's opinion, there simply was no competent evidence in the record that this was a high crime area or that this crime was in any way foreseeable by Palmetto. Thus, the trial court correctly granted summary judgment on the legal issue of duty.

B. Palmetto's security measures were reasonable.

In the event this Court determines there was some evidence of foreseeability, it must then determine whether Bethea presented evidence that Palmetto's actions were unreasonable given the risk. *Bass* at 139-40, 716 S.E.2d at 916. Here, Palmetto was merely the landlord to Citi Trends. It did not manage the Citi Trends location. (Holliday Dep. at 15, 27, R. at ___). Nor did it have any kind of control over the security measures deployed by Citi Trends; thus, any argument relating to the store premises is inapplicable to Palmetto.

With respect to Palmetto, the evidence shows that Palmetto is a Dillon business run by Dillon residents that owns roughly two dozen properties, including South of the Border. (Holliday Dep. at 11-12, R. at ___). Palmetto has its roots in Dillon, its owners and employees know the Dillon landscape and Dillon residents, and it has good connections with the local police and sheriff's departments. (Holliday Dep. at 25, 27, R. at ____). The Citi Trends lease with Palmetto included some provisions for Citi Trends to install security equipment. (Holliday Dep. at 25, R. at ____). In addition, Palmetto "would check the property periodically. And other tenants or the local police would have told us [] if there was a problem." (Holliday Dep. at 26, R. at ____). Palmetto's 30(b)(6) representative, James Holliday, testified that Dillon Plaza was quiet and very different

from South of the Border in terms of security needs, stating "[c]ompared to South of the Border, sure, it's a cakewalk in a church." (Holliday Dep. at 57-58, R. at ____).

Contrary to Bethea's brief, the evidence shows that Palmetto had a relationship with local law enforcement. (Holliday Dep. at 25, 27, R. at ____). The evidence further showed that Palmetto had owned Dillon Plaza since 2001 without incident. (R. at ____). As far as the other measures suggested, Bethea does not provide any evidence of the cost of those measures or the degree of additional security those measures would provide. (R. at ____). As stated in *Bass,* a business "should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs ... to the [invitees]." *Id.* at 138-39, 716 S.E.2d at 915. However, in this case, history showed that the expected crime costs for physical assaults were zero; thus, Palmetto should not have been expected to increase its spending on security by even a dollar.

For all of these reasons, the trial court correctly analyzed the legal issue of whether there was a duty in this case. Neither prong of the balancing test set forth in *Bass* is met here, and Palmetto was entitled to summary judgment.

C. The shooting occurred at Citi Trends, a location outside the control of Palmetto.

In addition to all of the above arguments and pursuant to Rule 220, SCACR, Palmetto contends that it was entitled to summary judgment because the injuries to Bethea occurred in Citi Trends, an area outside the control of Palmetto. (Holliday Dep. at 15, 27, R. at ___). Absent an exception, a landlord owes no duty to protect a tenant's customers from the criminal acts of third parties. *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 613, 620 S.E.2d 54, 56 (2005) (upholding grant of summary judgment in "a negligence action against a commercial landlord arising out of a shooting which occurred

inside the leased premises"). There is no evidence that Palmetto, the commercial landlord, controlled or possessed Citi Trends or that it undertook to provide security within Citi Trends. Therefore, the trial court correctly granted summary judgment in Palmetto's favor.

II. PALMETTO DID NOT PROXIMATELY CAUSE BETHEA'S INJURIES. JONES WAS DETERMINED TO HURT BETHEA, AND THE FACT THE SHOOTING OCCURRED WITHIN A LEASED PREMISES AT DILLON PLAZA IS MERELY INCIDENTAL.

"Proximate cause requires proof of both causation in fact and legal cause." *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998). "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's action." *Mellen v. Lane*, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). "Legal cause is proved by establishing foreseeability." *Id.* "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought." *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). To determine foreseeability, courts look to the "natural and probable consequences of the complained of act." *Young* at 462-66, 242 S.E.2d at 675-77. A defendant cannot be charged with "that which is unpredictable or that which could not be expected to happen." *Id.* When the evidence permits but one reasonable inference as to causation, a question of law is presented for the court. *Id.* at 464, 242 S.E.2d at 676.

Bethea relies heavily on *Bass* in her brief. However, that case addresses the threshold issue of duty, it does not address the issue of causation. The relationship between Jones and Bethea is central to the causation analysis here.

The testimony of Bethea and law enforcement indicates that Jones was determined to hurt Bethea and there was nothing Palmetto or Citi Trends could do to stop

him. One officer testified that he did not think "there's anything that anyone in that store could have done to have stopped what happened that night without getting hurt or possibly hurt." (Turner Dep. at 35, R. at ____). Moreover, the officer who investigated the shooting said that there was nothing that the store employees could have done to prevent the shooting from happening in the store and that he believed that Jones went to Citi Trends to shoot Bethea for the sole reason that he knew she was going to be there at that time. (Hayes Dep. at 52-53, R. at ____). The entire incident lasted less than one minute, and it was only apparent that Bethea was in danger in the 3-4 seconds where she was running away from Jones. (Tape, R. at ____). As Bethea testified, she "really wouldn't know if [the employees] would have time to do anything, it happened so fast." (Bethea Dep. 145, R. at ____). Bethea also testified that she did not think the police could help, stating among other things:

> Q. And what did you say about the restraining order . . .?
>
> A. In my mind, I knew it wouldn't help. When I did it—because I knew that Derrick, he just looked like he was just so far gone to where he didn't care what he did, and I knew that that wasn't going to scare him, not a piece of paper. That wasn't going to do anything to Derrick.

(Bethea Dep. at 110-11, R. at ____). She went as far as testifying that Jones was determined to hurt her and it did not matter where it was. (Bethea Dep. at 134, R. at ____).

Given this testimony, there is no evidence in the record showing proof of causation in fact or legal cause. As argued above, there is no indication this crime was foreseeable by Palmetto and there was no opportunity to act given the sudden and abrupt nature of this crime, which occurred in an area that was not controlled by Palmetto. *See Parks* at 500, 548 S.E.2d at 613 (noting that the attack on plaintiff "was unexpected and

occurred abruptly" as one reason for a finding no proximate cause in a case alleging breach of a nightclub's duty to protect a guest from the criminal acts of third parties). In addition, the nature of the threats and the relationship of Jones and Bethea establishes that Bethea's injuries did not occur "but for" any action or inaction on Palmetto's part because the location of the shooting was merely incidental to Jones's crime.

Even under the lower evidentiary burdens in place under South Carolina's workers' compensation scheme, courts have long denied coverage for injuries arising from the relationship of the criminal and the victim and where the fact that the attack occurred at the victim's workplace was simply by happenstance. In a case where a worker was injured by a co-worker in a dispute about two packs of cigarettes and 3 cents, the court ruled as follows:

> The only suggestion that the employment had any bearing upon the injury was that the employment brought the two men together. . . *The fact that the killing took place on the employer's premises was a mere incident. It might equally as well have happened on the sidewalk in front of the building where the two men were employed; or at any other place. There was no causal relation between the work and the assault.*

Cyrus v. Miller Tire Serv., 208 S.C. 545, 548-49, 38 S.E.2d 761, 762 (1946) (emphasis added). Similarly, in *Bridges v. Elite, Inc.*, 212 S.C. 514, 520, 48 S.E.2d 497, 499 (1948), the court found no causal link between the shooting of a restaurant hostess by an ex-boyfriend that had threatened her numerous times in the past.[2] In reaching this result, the court reasoned,

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[2] "[E]ven after her marriage . . . they corresponded, and [her shooter] persistently pursued her with his attentions on every occasion when he was in Spartanburg. It is evident from the record that [Victim] wished to terminate this affair, and in consequence thereof [Shooter] had more than once threatened to kill her." *Bridges* at 517, 48 S.E.2d at 497.

> This accident arose out of a purely personal transaction between Eula Mae Bridges and Smawley, having no connection with the employment. The fact that she met her violent death on the employer's premises was purely coincidental. The conclusion is inescapable that Smawley intended to kill Eula Mae Bridges whenever and wherever he met her. She was not exposed to his attack by anything connected with her employment. No other employee was subject to the hazard which confronted her. The causative danger was peculiar to her and not to her work.

Id. In a more recent example, this Court affirmed the denial of a workers' compensation claim where "the dispute between Claimant and [Attacker] originated from their personal relationship." *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 275, 600 S.E.2d 551, 553 (Ct. App. 2004). The analysis in these cases is instructive here, because Jones was set on harming Bethea and there was no "but for" relationship between her being at a store located at Dillon Plaza and the shooting.

For these reasons, the trial court correctly granted Palmetto's summary judgment motion based on the absence of causation evidence.

III. BETHEA IS BARRED FROM RECOVERY BECAUSE HER NEGLIGENCE IN THIS CASE EXCEEDS THAT OF PALMETTO AS A MATTER OF LAW.

A. Bethea has abandoned this issue on appeal.

Contrary to the statement in Bethea's brief, the trial court's determination that Bethea's negligence exceeded Palmetto's was an independent basis for the grant of summary judgment, not dicta. (Order at 23-22, R. at ____). Bethea fails to meaningfully address or provide any citations of authority regarding the trial court's grant of summary judgment based on comparative negligence. She has therefore abandoned any appeal of this issue. *See Shealy v. Doe*, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal."). Bethea cannot correct this failure in her reply brief. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C.

76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

B. Bethea's comparative negligence in failing to protect herself from the known danger posed by Jones necessarily exceeds any negligence on the part of Palmetto as a matter of law.

Bethea's argument fails on the merits as well. In the event the Court determines that Palmetto had a duty and further determines there is some causal link between Palmetto and Bethea's injuries, summary judgment was still appropriate because Bethea's claims are barred by her own negligence in failing to avoid Jones or seek police help in light of his history of violence and repeated threats to her.

"In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (upholding the trial courts grant of summary judgment because the plaintiff's fault was overwhelming). However, "[w]here evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." *Id.* at 424, 529 S.E.2d at 714. The same rule applies in cases like this one. *See Bass* at 143, 716 S.E.2d at 917 (Pleicones, J., concurring) ("I concur in the majority's decision to affirm the Court of Appeals' decision upholding the circuit court's grant of summary judgment, but would do so on the ground that petitioner's negligence in leaving the safety of his motel room exceeded respondent's negligence, if any, as a matter of law.").

Here and as discussed above, Bethea was well aware of the threat Jones posed to her. Bethea did not avail herself of police protection, was out alone after dark, and did

not tell anyone at Citi Trends to be on the alert for Jones. Palmetto, on the other hand had no indication there was anything amiss. Given these facts, Bethea was in the better position to protect herself from the threat posed by Jones and, thus, her negligence necessarily exceeded that of Palmetto as found by the trial court.

In this situation, where the plaintiff's knowledge of a risk exceeds that of the defendant, there can be no liability. 62A Am. Jur. 2d Premises Liability § 709 ("When a defendant's knowledge of the hazard or defect that gave rise to a premises liability claim is equal to or less than that of the plaintiff, the defendant is entitled to summary judgment as a matter of law."); *see Lee v. Food Lion*, 534 S.E.2d 507, 509 (Ga. Ct. App. 2000). The case of *Cook v. Micro Craft, Inc.*, 585 S.E.2d 628 (Ga. Ct. App. 2003) is instructive. There, Anna Cook was killed by her estranged husband, Willie Jackson, in the parking lot of her place of employment. Cook had told her employer she feared her husband was going to kill her once he was out of prison; however, she also told her husband her address and the address of her workplace. Jackson followed Cook to work and, although she had several opportunities to run into the building and get behind locked doors, Cook hid in her vehicle. Jackson then approached the vehicle and stabbed Cook to death. *Id.* at 630-31. In affirming summary judgment for Micro-Craft, the *Cook* court ruled:

> Even if an intervening criminal act may have been reasonably foreseeable, however, "the true ground of liability is the *superior knowledge* of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm." Further, a property owner or occupier is not liable for a plaintiff's injuries caused by a dangerous condition if the plaintiff had equal or superior knowledge of the danger and failed to exercise ordinary care to avoid the danger. Although the issue of a plaintiff's exercise of due diligence for his own safety is ordinarily a question for the jury, it may be summarily adjudicated where the plaintiff's knowledge of the risk is clear and palpable.

Id. (citations omitted); *see also Rice v. Six Flags over Ga.*, 572 S.E.2d 322 (Ga. Ct. App. 2002) ("Although the issue of a plaintiff's exercise of due diligence for his own safety is ordinarily a question for the jury, it may be summarily adjudicated where the plaintiff's knowledge of the risk is clear and palpable. Where a plaintiff has equal or superior knowledge of a dangerous condition existing on [a property owner's] property, there can be no recovery if the plaintiff fails to exercise reasonable care to avoid the danger."

The same rule should apply here. Bethea's knowledge of the risk is undisputed, as is Palmetto's lack of knowledge. Therefore, the trial court correctly ruled that Bethea's negligence exceeded Palmetto's as a matter of law.

CONCLUSION

Bethea's injuries are tragic; however, that fact alone is not sufficient to give rise to tort liability in this case. For all of the above reasons, this Court should affirm the trial court's grant of summary judgment in favor of Palmetto.

Respectfully submitted,

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June 27, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-00295

Ebony Bethea..... Appellant,

v.

Derrick Jones, John Doe, Individually and as employee/agent of Citi Trends, Inc., Citi Trends, Inc., and Palmetto Properties, Inc.,

Of whom Citi Trends, Inc. and Palmetto Properties, Inc. are .....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that, on the date indicated below, he/she served counsel of record with a copy of Respondent Palmetto Properties, Inc.'s Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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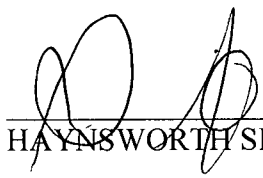
Respectfully submitted,



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June 27, 2014

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Ebony Bethea v. Derrick Jones, Citi Trends, Inc., *et al.*
C.A. No.: 2012-CP-17-00295
Appellate Tracking No.: 2014-000332

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the Initial Brief of Respondent Palmetto Properties, Inc. and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced matter together with a Proof of Service. For your records, please note the appearance of Sarah P. Spruill as counsel of record for Respondent Palmetto Properties, Inc. File the originals and return a clocked copy to me via my courier.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS:jmb
Enclosures

cc: Eric M. Poulin, Esquire
Catherine Garbee Griffin, Esquire