THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-295

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.

FINAL BRIEF OF APPELLANT

Eric M. Poulin
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
North Charleston, SC 29418

Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases
(Authoritative)

Cases
(Persuasive)

Statutes

Rules

STATEMENT OF JURISDICTION

This appeal arises out of an Order of the Circuit Court granting Respondents' Motions for Summary Judgment and dismissing Appellant's causes of action with prejudice.

The Trial Court's final judgment was entered on February 3, 2014 and disposed of all claims of all parties. Appellants filed a Notice of Appeal on February 17, 2014. This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in finding that Respondents owed no duty to Appellant and/or did not breach a duty; that Respondents were not the proximate cause of Appellant's injuries; and that Appellant was comparatively negligent, as a matter of law, therefore granting Respondents' Motions for Summary Judgment and dismissing Appellant's claims with prejudice?

STATEMENT OF THE CASE

Appellant was permanently injured when she was shot in the back while shopping at a Citi Trends, location in Dillon, South Carolina. Palmetto Properties, Inc owned the location. On July 16, 2012, Appellant filed suit in the Court of Common Pleas, Dillon County, alleging as against Derrick Jones (the shooter) causes of action for Assault, Battery, and Intentional Infliction of Emotional Distress, and alleging as against Respondents Citi Trends and Palmetto Properties causes of action for Negligence.

Respondents timely filed responsive pleadings and, following extensive discovery, filed Motions for Summary Judgment, alleging lack of duty and/or no breach of duty.

Respondents' Motions for Summary Judgment were argued before the Honorable Paul M. Burch on January 7, 2014. Subsequently, by Order filed February 3, 2014, the Circuit Court Granted Respondents' Motions for Summary Judgment and dismissed Appellant's claims with prejudice. R. at 1:3.

It is from that Order that Appellant appeals. Appellant's Notice of Appeal was served on the Respondents on February 17, 2014.

STATEMENT OF FACTS

Appellant Ebony Bethea and Derrick Jones were involved in an on-again, off-again, relationship. R. at 1:302-09 The relationship was off on December 27, 2010, although Jones was unhappy with that state of affairs, and had been calling Ms. Bethea. For her part, Appellant simply decided to go shopping, at Citi Trends, a chain operation with some 500 individual stores, primarily located east of the Mississippi and with its headquarters located in Savannah, Georgia. R. at 1:172. Citi Trends specifically targets areas that it identifies as being "distressed urban markets" when selecting store locations. R. at 1:179. Ms. Bethea regularly shopped at Citi Trends, and had done so in Jones' company on numerous occasions; Jones was familiar with the store and with the shopping center in which it was located. R. at 1:432.

Jones entered the Citi Trends store in order to confront Ms. Bethea, who had not been answering his phone calls. R. at 1:428. As he entered the store, Jones had no intention to shoot Ms. Bethea. *Id.* However, he was carrying a gun, as was his normal custom. Jones was wearing a ball cap that partially obscured his face at the time he entered the store.

Citi Trends' internal policies require that an employee great each customer within 20 seconds of that customer entering the store. *See Store Training Manual*, R. at 1:465; R. at 1:193. Despite this policy, the Citi Trends employees working on December 27, 2010 did not approach, acknowledge, or talk to Jones as he entered the store. R. at 1:426. Citi Trends had only two employees working at the time. *Incident Report and Narrative*, R. at. 2:491.

The Citi Trends store did have cameras at the door and the cash register. However, there is no visible signage indicating that such cameras exist. R. at 1:425. Moreover, the cameras are maintained primarily as a loss-prevention tool, and not for violent crime deterrence. R. at 1:185-86. Citi Trends admitted it does not consider proximate criminal activity when scouting locations for new stores or when making security-related decisions in existing ones. R. at 1:204. Instead, Citi Trends' security related focus is focused entirely on inventory control and theft prevention of its merchandise. *Id.*

Defendant Palmetto Properties, which owns and controls the parking lot, has instituted no security of any type; the parking lot is not under video surveillance and there are no guards or attendants. *See, generally,* Holliday Dep., R. at 1:239.

There were only two employees on duty at the Citi Trends store in question on December 27, 2010. R. at. 2:491. Jones entered the store and found Ms. Bethea in the young boys department. He approached her and the two had a loud verbal altercation. No employee ever approached them, ever said anything to them, or made any attempt to call law enforcement. Suddenly, as the argument became more heated, Jones lifted his shirt and revealed to Appellant that he had a gun in the waist of his pants. Ms. Bethea

attempted to escape Jones, and began screaming in apparent fear. As she ran toward the front of the store, Jones shot her in the back, leaving her paralyzed. Citi Trends instituted additional security measures immediately following the incident.

STANDARD OF REVIEW

Summary judgment is "an extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, S.C.R.C.P. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore has the authority to review this question presented *de novo*.

ARGUMENT

I. The Trial Court erred in Granting Respondents' Motions for Summary Judgment because Respondents owed a duty to protect Plaintiff, a retail invitee, from foreseeable violent crimes; Respondents breached this duty; their breach was the proximate cause of Appellant's injuries; and Appellant was not, as a matter of law, comparatively negligent.

A "cause of action for negligence requires: 1) the existence of a duty on the part of the defendant to protect the plaintiff; 2) the failure of the defendant to discharge the duty; 3) injury to the plaintiff resulting from the defendant's failure to perform." *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324, 325 (1986). Because there is at least a scintilla of evidence that could allow a reasonable jury to find in Appellant's favor as to each element, the trial court erred in granting summary judgment for Respondents and the order should be reversed and the matter remanded for a trial on the merits.

A. Respondents, as business owners and operators, owe their patrons a duty of protection from foreseeable harm.

At the heart of this case is the question of whether Respondents, as the owner of the shopping center in which Citi Trends is located, and the operator of the store itself, owe patrons such as Appellant a duty to protect them from foreseeable dangers. In answering this question, the Trial Court incorrectly viewed the duty as one to protect a single specific individual, on a specific date, against a single specific threat. The duty is, however, to patrons generally, and the question looks not to the acts of Derrick Jones, but to the foreseeability of danger to business invitees on the premises of the Respondents generally.

1. A business owner has a legal duty to take reasonable measures to protect his guests and invitees.

By analyzing the duty as one to protect this particular Appellant from this particular crime, the Trial Court failed to recognize a significant body of South Carolina case law. Appellant was at the Citi Trends location for the purpose of patronizing the Citi Trends' business, for the benefit of the Respondents. Therefore, it should be undisputed that Appellant was a business invitee. Our courts have long recognized the duty owed by business owners and operators to this type of guest.

In *Bass v. Gopal*, 395 S.C. 129, 716 S.E.2d 910 (2011), the South Carolina Supreme Court made it expressly clear that, while a business owner is not the absolute insurer of its invitees, it nonetheless "is under a duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm." *Id.* at 134, 716 S.E.2d at 913 (*quoting Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp. 2d 653, 659 (D.S.C. 2005)). Although both *Bass* and *Allen* are hotel cases, the Court specifically discussed the issue in light of all business owners, concluding that an owner has a duty "to take reasonable action to protect its invitees against the foreseeable risk of physical harm." *Id.* (emphasis in original).

The *Bass* court extensively examined the state of the law regarding the duties of business owners to their invitees in other jurisdictions before rejecting the primary theories which had been adopted both previously in this state and elsewhere. First, *Bass* concluded that the "prior or similar incidents test" and the "imminent harm rule," both of which had been employed in earlier cases such as *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000), were either outmoded or violated public policy.

Under the imminent harm rule, applied in *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977)(used as the basis for denying liability), the business owner owed no duty to protect an invitee from third party assault. The *Bass* Court specifically rejected this doctrine. It further held that the prior incidents rule, enunciated in cases such as *Taylor v. Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (Ill. App. 1981), violated public policy. Under the prior incidents rule, recovery was predicated upon the occurrence of an identical or nearly similar prior event, therefore, the first victim of any crime would always lose. Finally, it rejected the "totality of the circumstances" doctrine as overly burdensome to business. The Court settled instead on a balancing test, which was first adopted in *Ann M. v. Pacific Plaza Shopping Cntr.*, 6 Cal. 4th 666, 25 Cal. Rptr. 137, 863 P.2d 207 (Cal. 1993) and since accepted in several other jurisdictions. *See, e.g., McClung v. Delta Square Ltd. P'ship*, 937 S.E.2d (Tenn. 1996).

Under the balancing test, the presence or absence of prior criminal activity is a significant factor in the analysis. However, the absence of prior criminal activity, alone, does not foreclose the duty to provide some level of security if other factors exist. Similar to the totality of circumstances approach in some ways, the balancing test allows the business owner to weigh the relative gain of each dollar spent in security against the economic feasibility of spending each additional dollar. It permits the business to balance the foreseeability of criminal activity against the cost of heightened security measures intended to protect invitees. The balancing test does not establish any kind of bright line that would determine what type or how much security must be provided, let alone what the cost of the security must be. But, the Court stated that the appropriate

balance occurred when the business owner "increase[ed] its expenditures on security until the last dollar buys a dollar in reduced expected crime costs... to the [owner's] guests." *Bass* at 139, 716 S.E.2d at 915 (*quoting Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 514 (7th Cir. 2007)).

The significance of the balancing test in the instant action cannot be understated, and does not appear to have been fully considered by the Trial Court. Rather than looking to the presence of reasonable security in light of the foreseeable level of criminal activity in the shopping center and Citi Trends store, the Trial Court focuses exclusively on the possibility that on December 27, 2010, Derrick Jones might decide to shoot his ex-girlfriend. Were the duty of business owners dependent on a showing that the owner might be able to predict whether or not any specific individual would commit a particular crime on a given day – under no circumstances would there ever be a duty. Such an argument effectively imitates the old "prior incidents" rule that has been specifically rejected.

Under the balancing test in *Bass*, a Plaintiff need only show – and certainly all she need demonstrate in order to withstand summary judgment – is that Respondents failed to provide adequate security to protect patrons generally, in light of known risks existing at Citi Trends and the surrounding shopping center and parking lot.

2. Violent criminal activity was foreseeable at Respondents' location.

Foreseeability of criminal activity can be demonstrated by expert testimony, by criminal activity reports prepared by law enforcement agencies, or by another method acceptable to the Court. In the present action, Appellant produced the Affidavit of Michael A. Hodge, Board Certified in Security Management, certified as a Security

Officer by the Department of Defense, and a retired Secret Service Agent. R. at 1:434. Mr. Hodge reviewed both Dillon City police records/incident reports, and the FBI's Uniform Crime reporting statistics in order to reach his conclusions regarding the level of safety, the extent of violent crime, and the foreseeability of criminal activity in the vicinity of the store at which Appellant was shot. R. at 1:435-36.

Mr. Hodge's research revealed that violent crime is prevalent in the area in which the particular Citi Trends store at issue is located. In a general sense, FBI statistics show that the violent crime rate of the State of South Carolina is 56% greater than the national average, and the rate within Dillon City is 359% higher than the State as a whole. R. at 1:438. Specifically, Mr. Hodge studied actual crime reports from the police department and concluded that the area within one half-mile of the Citi Trends store had a high record of police incident reports of violent crime. R. at 1:437. These figures, especially when combined with Citi Trend's corporate policy of locating its stores in "distressed urban neighborhoods," led him to draw one conclusion: in his expert opinion, the lack of security measures taken by Defendants falls well below the standard of reasonable care within the industry. R. at 1:436.

An event is "foreseeable" if it is the "natural and probable consequence of a breach of duty." *See, e.g., Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008); *Vinson v. Hartley*, 324 S.C. 398, 477 S.E.2d 715 (Ct. App. 1996). Foreseeability is, of course, tied to the concept of duty and difficult to separate from it. With respect to invitees, generally, our courts have stated that the owner – or, as in this case, the owner and the lessee in control of a portion of the premises – owes a business invitee the duty of exercising reasonable or ordinary care for her safety, and is liable for injuries resulting

from the breach of that duty. *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). The breach occurs when the injury is foreseeable; if the possessor of the property can anticipate the occurrence of a certain type of injury, he is liable to the invitee.

As an initial matter, common sense would seemingly suggest that operations which intentionally target, and establish facilities in areas of urban distress are more likely to suffer violent crimes than businesses in suburban malls. As Mr. Hodge notes, this fact, alone, would tend to make it more foreseeable to such businesses that crime would occur on their premises. As Mr. Hodge also notes, Respondents either knew, or should have known, of the significantly higher incidence of violent crime in the City of Dillon, and in the neighborhood in which they were located. R. at 1:438. They had a duty to take reasonable steps to protect their invitees from becoming the victims of such crimes on their premises.

Respondents' focus on the foreseeability of a violent attack by Derrick Jones on Ebony Bethea is a red herring. It is highly unlikely that any particular event, any singular attack by one individual on another, would ever be foreseeable. That violent crime of some type would occur is, however, highly foreseeable, and Respondents had a duty to ensure that they took reasonable measures to protect the public under South Carolina law.

B. Respondents breached this duty because their security measures were inadequate.

As noted, although there is no duty to act as an absolute insurer, a property owner must nevertheless exercise reasonable care to protect invitees from known dangers, including dangers created by third parties. Where the owner negligently fails to do so, he may be found liable: *Jeffords v. Lesesne,* 343 S.C. 656, 541 S.E.2d 847 (Ct. App.

2000)(bar owner is not the insurer of the safety of his patrons but if the place or character of the business is such that he should reasonably anticipate criminal conduct on the part of third parties, he has a duty to take adequate precautions); *Daniel v. Days Inn of America, Inc.*, 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987)(innkeeper is bound to exercise reasonable care with respect to the safety of guests, and may be liable for negligent failure to do so; he need not have contemplated the actual event that occurred, and proximate cause is a jury question).

All of the cases, and all of the facts and supporting deposition testimony in this action, lead to one inescapable conclusion: Respondents took not even the most rudimentary safety precautions, despite knowledge of extensive criminal activity in the neighborhood in which they ran their businesses.

1. Citi Trends breached its duty of care.

The primary aim of our Supreme Court in adopting the "balancing test" rather than the "totality of circumstances test" was to give business owners more control over the decision making process and more certainty as to when liability might arise. Under the totality test, the court must consider all relevant factual circumstances. Bass at 129, 137, 716 S.E.2d 910, 914 (emphasis added). The criticism of this test, of course, is that the court has the luxury of hind-sight, and the ability to look back and second guess the business owner based upon information presently available to the court, but not previously available to the business owner.

Thus, our Supreme Court adopted the balancing test, which is intended to give slightly more deference to the safety related decisions made by the business owner at the time those decisions were made. However, even under the balancing test, the business

owner must actually consider patron safety and weigh alternative solutions. The business owner is not entitled to any such deference if he chooses to ignore the issue of safety altogether.

Stated differently, the totality of circumstances test and the balancing test are essentially the same with respect to factors considered, except that the former considers the factors at the time of trial, and the latter allows some deference to the considerations that the business owner made prior to the harm. In either event, in adopting the balancing test, the Court did not intend to shield business owners from liability altogether, or to give deference to business owners who failed to consider safety issues at all. Indeed, in adopting the balancing test, our Court explicitly rejected the old, more restrictive, "imminent harm test." As Chief Justice Toal stated, "In replacing our imminent harm test with a balancing test, we hope to 'encourage [] a reasonable response to the crime phenomenon without making unreasonable demands.'" *Bass* at 139, 716 S.E.2d 910, 915-16 (*quoting McClung*, 937 S.W.2d at 902).

Thus, the Court both acknowledges the growing "crime phenomenon" in our retail establishments, and explicitly expects business owners to take reasonable measures in response. Because Citi Trends failed to consider patron safety altogether, and further failed to comply with its own internal policies, the Trial Court erred in granting its Motion for Summary Judgment.

a. Citi Trends failed to take any measures whatsoever to protect patrons from foreseeable harm.

A business owner is required to consider and take reasonable precautions to protect its patrons from foreseeable danger. In the present case, Citi Trends openly admits that it never made any such considerations. Ivy Council, Citi Trends' Executive

Vice President of Human Resources, Chief Compliance Officer, and 30(b)(6) designee, summed it up quite succinctly: "The crime rate in that area, I don't know, it doesn't impact us. We're a retailer. People are there to shop. Our issue and our concern is the theft of merchandise. That's where we may be exposed." R. at 1:204.

Indeed, the facts seem to substantiate Ms. Council's testimony. Although the Citi Trends location in question had some security cameras, these cameras were designed and placed for the function of deterring actions that cause the company to experience inventory loss, not for the protection of customers. R. at 1:185-86.

Likewise, Citi Trends employees are not trained or instructed on how to deal with a violent crime within the store, such as an armed robbery. R. at 1:196. Employees are not trained to look for or identify out of place customers such as those demonstrating suspicious or erratic behavior, nor are employees trained on how to deal with such people. R. at 1:208-09.

Citi Trends makes no effort to track or chart the occurrences of specific violent crimes from store to store, or to compare the level of violent crimes from one store to another in order to assess security measures. R. at 1:198-201. Perhaps not surprisingly, and in sharp contrast to its efforts to identify violent crime trends, Citi Trends does have a method of tracking and monitoring the prevalence of merchandise theft. R. at 1:200.

Likewise, when opening a store in a new location, Citi Trends has a process through which a team of loss prevention personnel survey the new location to determine the relative "risk" of the location with respect to possible loss of merchandise. R. at 1:180-81; *Loss Prevention New Site Survey*, R. at 1:487.

However, importantly, while inspecting the new site for possible problems with theft of merchandise, Citi Trends makes no effort to ascertain the prevalence of violent crime. There is no attempt to evaluate the crime statistics for neighborhoods surrounding the location. R. at 1:207. Citi Trends does not independently conduct any neighborhood crime studies. R. at 1:231. The survey team is not even required to make contact with the local police department. R. at 1:206.

From this evidence, it seems clear that Citi Trends gave no consideration to patron safety when making any financial decisions. Thus, there is at least a scintilla of evidence, if not a mountain, that Citi Trends has breached its duty under the balancing test because they failed to take reasonable measures to prevent foreseeable crime. Citi Trends did not, as required by the balancing test, "increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs ... to guests." *Bass* at 138-9, 716 S.E.2d 910, 915 (*citing Shadday v. Omni Hotels Mgmt. Corp.,* 477 F.3d 511, 514 (7th Cir.2007). Thus, summary judgment was inappropriate.

b. Citi Trends failed to follow its own internal procedures.

Even though Citi Trends made no effort to protect its customers from foreseeable violent crime, it might be said that Citi Trend's vigorous efforts to protect its merchandise could have an incidental, though not intentional, impact on customer safety. Even assuming this is the case, the evidence suggests that Citi Trends failed to even abide by its own internal policies in this matter.

Pursuant to the corporate "Store Training Manual" employees are required to greet all customers within 20 seconds of the customer's entering the store. R. at 1:466.

This is a corporate policy that is supposed to be followed by every store. R. at 1:193. Local stores are not given any leeway to deviate from this policy. R. at 1:177.

Notwithstanding this policy, Derrick Jones testified that he was not greeted when he entered the store on December 27, 2010. R. at 1:426. In fact, there were only 2 people working in the entire store on December 27, 2010 – seemingly not enough to carry out the corporate meet and greet policy. R. at 2:491. Nor does this problem of understaffing appear to be an anomaly. Instead, Citi Trends makes staffing decisions not on safety considerations, but on cost considerations. R. at 1:215. Each store is allocated a certain number of associate hours, and the store managers are left to staff the store within those restrictions. *Id.*

Thus, the evidence demonstrates not only a corporate failure to properly consider questions of customer safety, but a broader failure of the Dillon store to even follow what limited regulations Citi Trends had in place.

2. Palmetto Properties breached its duty of care.

In addition to the deposition of Defendant Citi Trends, Appellant also produced the 30(b)(6) deposition of Defendant Palmetto Properties. The officer produced by this Defendant was James Holliday, its Vice President. Unlike Citi Trends, which at least does some site evaluation (if only for selfish purposes) when it decides to open new stores, Palmetto Properties makes no investigation at all, nor does it keep records.

Mr. Holliday testified that Palmetto Properties had been in existence since the 1950s, and was formed and headquartered in Dillon. R. at 1:249. It owns approximately two-dozen properties, including South of the Border. R. at 1:252.[1] Although Palmetto

[1] South of the Border, which is located just off Interstate 95 outside Dillon, describes itself on its website as being "America's favorite highway oasis & gateway to the southeast." It consists of several general

Properties maintains and manages most of the properties it owns, the only maintenance or security personnel affiliated with it are those employed by South of the Border.

Defendant Palmetto Properties is responsible for the parking lots of all of its properties. R. at 1:255. It does not provide cameras or other security in any of them; to the extent that there are cameras in some of its parking lots, those have been installed by its tenants. R. at 1:257-59. There are no signs in any of the lots indicating that there might be video surveillance, or that the Dillon Police or local sheriff's department patrol the area. R. at 1:283-84. Palmetto Properties does not investigate the clients to whom it rents; Mr. Holliday noted that he talks to people who might be familiar with a company if he does not already know the name, but that the primary consideration is the ability to pay. R. at 1:262.

In keeping with its casual approach to rental, Palmetto Properties makes no investigation into local crime, nor does it keep records other than copies of a tenant's lease, any correspondence with the tenant, and a register showing rent payments. Contacts with local police departments run through the security department at South of the Border, and problems might never even come to the attention of Palmetto Properties' management. The company would respond if there was property damage at one of its locations, but otherwise maintains no records of phone calls or reports of other types of criminal or potentially criminal activity received from law enforcement. R. at 272-77.

Accordingly, summary judgment was inappropriate as to this defendant as well.

"attractions," a Fun Park containing amusement park style rides, and numerous souvenir shops and general travel stores, all of it set up in an area with a Mexican – i.e., south of the border – theme.

C. Economically feasible security measures were available to Respondents that would have prevented the harm suffered by Appellant.

In *Bass,* the court hoped to "encourage a reasonable response to the crime phenomenon without making unreasonable demands." 395 S.C. 139. The court listed these factors to consider when distinguishing a business owner's duty to protect: (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm. The court's goal should be to decide the optimal point at which a dollar spent equals a dollar's worth of prevention which may be ascertained with the aid of experts, or some other testimony. *Id.* (*citing Shadday,* 477 F.3d at 514.) As Chief Justice Toal stated by quoting Judge Posner of the United States Court of Appeals for the Seventh Circuit, when discussing a business owner's duty, "the hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs ... to guests." *Bass*, 395 at 138-9 (*citing Shadday v. Omni Hotels Mgmt. Corp.,* 477 F.3d 511, 514 (7th Cir.2007).

Here, there were several measures that Defendants could have employed to make the premises safer for customers, ranging the gamut from something as cheap (or free) as establishing a relationship with local law enforcement, to something as expensive as employing uniformed security personnel. Respondents' failure to implement any of these measures was the direct and proximate cause of Appellant's harm.

In the instant case, Appellant's expert set forth a number of reasonable and cost effective measures that Respondents could have, and should have taken. First and foremost, the evidence suggests that, as a generally accepted principle in the security industry, an owner or occupier of a public retail establishment, such as Respondents,

should reach out to the local police department and establish a good working relationship. R. at 1:439. The police should be asked to periodically patrol the premises – a safety measure that would be absolutely free to Respondents, and one that would likely be easily accomplished, given the store's location within city limits. *Id.* Likewise, something as simple and cost effective as a warning sticker or other indicator that closed circuit surveillance cameras existed within the store would have greatly enhanced the level of security afforded to patrons of Defendants' premises. R. at 439-40.

In addition to the methods that could have been employed at the management level, discussed above, better training at the associate level would have also reduced the risk of violent crime for a relatively inexpensive investment. As already noted, the associates were supposed to greet customers as the customers entered the store, although this did not happen. R. at 1:465; R. at 1:426 Likewise, the associates and other employees should have been given at least basic training on how to spot and deter suspicious subjects, such as those wearing hoods, caps, unseasonably heavy clothing, etc. According to Mr. Hodge, such training was not made available to an adequate degree. R. at 1:439.

Finally, Defendants could have taken measures as simple as thinking about safety when organizing inventory and stocking the store. Merchandise can be displayed in any number of ways, some increasing or obstructing visibility more than others, and thus impacting safety. It is custom practice within the industry to consider such things on the corporate level. *Id.* However, Citi Trends had no such policy. R. at 1:191.

The sworn statement of Derrick Jones makes it absolutely clear that minimal security measures at Defendants' premises would have prevented the attack on Plaintiff.

Jones testified that if he had known there were security cameras in the Citi Trends store, he would not have entered with a gun. R. at 1:425. He would not have gone in had there been a security guard. R. at 1:426. He would not have confronted Plaintiff had there been more than a single employee on duty, or if anyone in the store had mentioned an intention to call law enforcement. *Id.* He testified that this was a crime of passion, and that if he had time to think – time he testified he would have had if he had seen cameras, or guards, or additional personnel – he would never have committed the shooting. R. at 428-30.

He also testified that he was familiar with not only the store itself but the shopping center in which it is located. *Id.* He would never have gone to the vicinity of the Citi Trends store if there had been cameras in the parking lot. *Id.* He would not have gone if there had been any kind of security patrolling the lot. R. at 431. In fact, his testimony was clear that had he seen any indication that there might be any interference, or if he had had any belief that he might be seen or identified, he would never have accosted his ex-girlfriend.

Jones' testimony regarding the actual event that took place would be secondary but for the fact that the security measures mentioned are, for the most part, free or relatively inexpensive. Many of them are already in place in other Citi Trends locations, locations that are – simply based upon the numbers obtained by Mr. Hodge – presumably less dangerous than the Dillon store. Several of them are required by Citi Trends' internal policies. Therefore, under the balancing test, there appears at least a scintilla of evidence that Defendants herein were negligent in failing to install security devices, or take other reasonable measures, that would have protected Appellant, and Appellant has

shown that there is considerably more than a scintilla of evidence to suggest that Respondents' breaches of this duty were a proximate cause of her injuries.

D. Appellant was not Comparatively Negligent.

At the end of its Order granting summary judgment, the Trial Court, seemingly in dicta, notes that Appellant might also be barred because her comparative negligence, as a matter of law, would be more than that of either Respondent. However, the question of comparative negligence is one for a jury. Moreover, all facts must be viewed and inferences drawn in favor of Appellant. Here, there are no facts to suggest that she did anything wrong. She was simply shopping. If she is comparatively negligent at all, she is not so negligent as to be barred as a matter of law. Instead, the question is one for the trier of fact.

CONCLUSION

Appellant is required to show no more than the existence of a genuine issue of material fact in order to withstand a motion for summary judgment. She has done considerably more. Respondents asked the Trial Court to focus on whether or not they could have foreseen that, on December 27, 2010, Derrick Jones would enter onto their property and shoot the Plaintiff. In so holding, the Trial Court deviated from the legal standard as set forth in *Bass*. The question is whether Respondents should have foreseen that there was a likelihood of violent crime occurring on their property, and whether they could have taken reasonable and cost-effective measures to prevent it.

Appellant has set forth evidence showing that the incidence of violent crime in the neighborhood in which she was injured is high. She has also provided evidence showing that Respondents neither investigated these statistics nor took steps to prevent crime from

entering upon their own land and injuring third parties, business invitees on the property. Most tellingly, the testimony of Derrick Jones was that had any of the inexpensive security measures Respondents declined to put in place – including placing signs, making certain that visitors knew of the possibility that there would be a police presence, or that they would be shown on a video camera, or that a security guard or store employee would approach them – existed, he would never have left his car with a firearm, would never have entered Citi Trends while carrying a gun, and would never have accosted Appellant.

Appellant has come forward with facts sufficient to demonstrate that Respondents owed her a duty, and breached it. She has also shown that their breach was the proximate cause of her injuries. Appellant would, consequently, respectfully argue that the Trial Court's Order granting Summary Judgment was in error, should be reversed, and that the case be remanded to the Circuit Court for a trial on the merits.

August 15, 2014

Respectfully submitted,

Eric M. Poulin
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
North Charleston, SC 29418

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 22 2014
SC Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-295

Ebony Bethea,

Appellant,

v.

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

Of Whom Citi Trends, Inc., and Palmetto Properties, Inc., are,

Respondants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

August 15, 2014

Eric M. Poulin
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
North Charleston, SC 29418
(843) 614-8888

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-295

Ebony Bethea.....Appellant,

v.

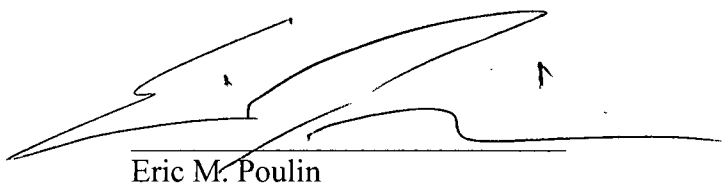
Derrick Jones, John Doe, Individually and
As employee/agent of Citi Trends, Inc., Citi
Trends, Inc., and Palmetto Properties, Inc.

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

PROOF OF SERVICE

I certify that I have served a copy of the Record on Appeal and Appellant's Final Brief on Citi Trends, Inc. and Palmetto Properties, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on August 19, 2014, addressed to their attorneys of record as shown below.

August 19, 2014



Eric M. Poulin
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
North Charleston, SC 29418
(843) 614-8888

ATTORNEYS FOR APPELLANT