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-17-00295
Appellate Case No. 2014-000332

RECEIVED
AUG 25 2014
SC Court of Appeals

Ebony Bethea, Appellant,

v.

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

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

FINAL BRIEF OF RESPONDENT CITI TRENDS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT FAILED TO PRESENT EVIDENCE THAT THE CRIMINAL ACT OF DEFENDANT JONES WAS FORESEEABLE AND FAILED TO PRESENT EVIDENCE THAT RESPONDENT CITI TRENDS, INC.'S SECURITY MEASURES WERE UNREASONABLE?

II. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT PRESENTED NO EVIDENCE THAT RESPONDENT CITI TRENDS, INC. WAS THE PROXIMATE CAUSE OF HER INJURIES?

III. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT'S COMPARATIVE NEGLIGENCE WAS GREATER THAN ANY NEGLIGENCE OF RESPONDENT CITI TRENDS, INC.?

STATEMENT OF THE CASE

Appellant, Ebony Bethea, commenced this action by filing a Summons and Complaint on July 16, 2012. (R. p. 25). Appellant alleged causes of action of assault, battery and intentional infliction of emotional distress against Defendant Derrick Jones and of negligence against Respondents Citi Trends, Inc. ("Citi Trends") and Palmetto Properties, Inc. ("Palmetto Properties"). (R. pp. 33-39). Citi Trends denied Appellant's allegations of negligence and defended, *inter alia*, on the grounds of intervening superseding criminal acts of a third party, lack of proximate cause, and Appellant's contributory negligence. (R. pp. 44-45, 47-48).

On July 17, 2013, Citi Trends filed a motion for summary judgment. (R. p. 63). Thereafter, Citi Trends filed a memorandum in support of its motion for summary judgment, along with exhibits. (R. p. 67). On January 7, 2014, the Honorable Paul M. Burch heard the arguments of the parties on the motion for summary judgment and granted Citi Trends' motion for summary judgment. (R. pp. 119-159). A formal order granting summary judgment to both Citi Trends and Palmetto Properties was filed on February 3, 2014. (R. pp. 3-24). On February 17, 2014, Appellant served a notice of appeal from the February 3, 2014 order.

STATEMENT OF FACTS

Appellant brought this action after being shot by her former boyfriend, Defendant Jones, in a Citi Trends' store. Citi Trends operates a retail clothing store in the city of Dillon, South Carolina, which opened in March 2010. This store is located in the Dillon Plaza Shopping Center, owned by Palmetto Properties. The plaza is considered an area with a low incidence of crime. (R. p. 413, lines 14-17). Prior to opening this store, Citi Trends surveyed the shopping center and determined the location was a low security risk. (R. p. 487) The assessment was based on various considerations such as the security measures used by the other stores in the Dillon Plaza Shopping Center; the prior history of break-ins and armed robberies in the stores in this shopping center; and, the proximity to and response from the city and county law enforcement departments. (R. p. 487). Specifically, there were no bars in the windows of the other stores in the shopping center; there were no security guards employed by any stores in the shopping center or by the property owner; only one store had an EAS (sensor) system and cameras; there had been no break-ins or armed robberies in this shopping center during the previous few years; and, there was a good response time from the police departments, which was within about 1.1 miles from the shopping center. (R. p. 487).

Furthermore, prior to the events giving rise to this action, no violent crimes occurred anywhere in the Dillon Plaza Shopping Center and no shootings or other violent crimes occurred in the Dillon Citi Trends store. (R. p. 235, lines 5-6; R. p. 291, lines 4-7; R. p. 364, lines 12-15; R. p. 412, lines 22-25; R. p. 448). Prior to Appellant being shot, the only types of crimes that took place in the stores located in the Dillon Plaza Shopping Center were shoplifting, copper theft from a vacant store, and embezzlement. (R. p. 366, line 1-p. 367, line 17; R. p. 416, line 17-p. 417, line 20). In December 2010, Citi Trends was using several security measures in its

Dillon store: a video monitor at the front door, in view of the customer entering the store; stickers on each side of the cash register to notify the customers they were under video surveillance, and security cameras. (R. p. 186, lines 3-15; R. p. 194, lines 4-6; R. p. 451).

On December 27, 2010, Appellant was shot by her former boyfriend, Defendant Jones, in the Citi Trends' store located in the Dillon Plaza Shopping Center. The shooting was the result of the acrimonious long term relationship between Appellant and Defendant Jones, who had a son together. (R. p. 302, line 15-p. 304, line 25; R. p. 307, line 4-p. 309, line 5). Appellant and Defendant Jones had been in a relationship for about ten years which continued through approximately the Fall of 2010 until Appellant started dating another man. (R. p. 307, lines 4-5; R. p. 318, lines 7-24; R. p. 319, line 9-p. 320 line 13; R. p. 323, lines 16-18). Appellant's relationship with Defendant Jones had been deteriorating due to Defendant Jones's inability to control his anger, a problem of which Appellant was aware. (R. p. 307, line 22-p. 308 line 12). For example, Defendant Jones had beaten Appellant on November 15, 2009, because he believed she was "talking" to another man. (R. p. 311, lines 17-19; R. p. 314, line 13-p. 315, line 24). During the Fall of 2010, Defendant Jones engaged in a pattern of stalking Appellant and her new boyfriend and of threatening to kill them. (R. p. 320, line 13-p. 321, line 16; R. p. 323, line 10-p. 324, line 6; R. p. 355, lines 18-23; R. p. 408, 12-17; R. p. 414, lines 11-21). On one occasion, Appellant called the police because of Defendant Jones's aggressive behavior and the police recommended that she take out a restraining order against Defendant Jones. (R. p. 322, lines 3-7, 21-24; R. p. 323, lines 3-6). Appellant did not believe that a restraining order would stop Defendant Jones's aggressive conduct, recognizing that "[Jones] 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 [Jones]," who was "so far gone to where he

didn't care what he did . . . ." (R. p. 324, line 22-p. 325, line 5; R. p. 333, line 20-p. 334, line 14).

Appellant was aware of Defendant Jones's numerous threats of violence against her, which were made either by threatening voicemail messages to her cell phone or directly to her when she was visiting him with their son on Christmas day, two days before the shooting incident. (R. p. 326, line 5-p. 327, line 9; R. p. 332, lines 13-18; R. p. 339, lines 5-19; R. p. 503-513; Voicemail Recordings). In one particular chilling voicemail message, Defendant Jones told Appellant he was not going to kill her, but make her suffer for the rest of her life, and that she would be paralyzed by Christmas. (R. p. 512; Voicemail Recordings). Additionally, Defendant Jones's cousin sent Appellant a Facebook message to warn her that Defendant Jones was telling others he was going to shoot Appellant after Christmas. (R. p. 336, lines 1-23). Appellant was also aware that ten years earlier, Defendant Jones had shot a former girlfriend and another woman at a club. (R. p. 305, line 23-p. 306, line 13; R. p. 310, lines 15-24; R. p. 338, lines 15-20; R. p. 516).

On December 27, 2010, at approximately 6:00 p.m., Appellant entered Citi Trends' store while talking on the phone with Defendant Jones, whom she informed she could no longer continue the conversation because she was entering Citi Trends. (R. p. 327, line 21-p. 328, line 14; R. p. 341, lines 12-15; R. p. 353, lines 3-16; R. p. 356, lines 20-23). Despite her knowledge of Defendant Jones's threats against her and her knowledge of his use of violence against her and others in the past and after having just told him where she was, Appellant did not ask the employees of Citi Trends to be on the lookout for Defendant Jones. (R. p. 348, lines 3-7; R. p. 354, lines 13-22; R. p. 360, lines 13-20). After about fifteen minutes, Defendant Jones, who lived about ten minutes from the store, entered Citi Trends and, without appearing to be in a

hurry, walked towards Appellant, who was in the back of the store. (R. p. 102, lines 2-3; R. p. 343, lines 5-17; R. p. 41, lines 19-24; Surveillance Tape; R. p. 536; R. p. 538). Defendant Jones' movements were recorded by the surveillance camera positioned at the store's entrance. (Surveillance Tape). Appellant described the conversation she initially had with Jones, which was held in a calm voice. (R. p. 329, lines 14-15). During the conversation when Jones accused Appellant of disrespecting him, Appellant admonished Defendant Jones not "to be putting [his] fingers in [her] face." (R. p. 330, lines 3-6). Defendant Jones replied, while he lifted his shirt, "Oh, I ain't going to put my fingers in your face." (R. p. 330, lines 6-9). At this moment, Appellant started running towards the front of the store without taking the time to look at what was under Defendant Jones's shirt. (R. p. 330, lines 9-14). As Jones pursued Appellant toward the front of the store, he shot her in the back, causing her to be paralyzed from the chest down. (R. p. 330, line 14-p. 331, line 9; R. p. 349, line 24-p. 350, line 8).

Based on the time stamp of the surveillance video, only about one minute passed from the time when Defendant Jones entered the store until the time he exited after having shot Appellant. (R. p. 359, lines 4-10; R. p. 411, lines 9-14; Surveillance Tape; R. pp. 534, 536, 558). Only about three or four seconds passed from the moment Appellant screamed and ran away from Defendant Jones until he shot her. (R. p. 362, lines 1-13; Surveillance Tape; R. pp. 540-549). Appellant acknowledged that the events unraveled so fast that the two woman employees of Citi Trends working that evening did not have time to do anything; obviously, there was not enough time for the store employees to call 911 to get a police officer to protect Appellant from Defendant Jones. (R. p. 347, lines 7-13). Defendant Jones pled guilty to charges of attempted murder and felon in possession of a firearm and was incarcerated.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRCP." *Bass v. Gopal, Inc.*, 395 S.C. 129, 133, 716 S.E.2d 910, 912 (2011). A trial court may properly grant summary judgment when "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 that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, when triable issues exist, those issues must go to the jury. *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). The burden is on the moving party to clearly establish an absence of a genuine issue of material fact. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Once the moving party meets the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In meeting its burden, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). It is not sufficient that a party create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). A trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT APPELLANT FAILED TO PRESENT ANY EVIDENCE THAT THE CRIMINAL ACT OF DEFENDANT JONES WAS FORESEEABLE AND THAT SHE FAILED TO PRESENT ANY EVIDENCE THAT RESPONDENT CITI TRENDS' SECURITY MEASURES WERE UNREASONABLE

The trial court properly granted summary judgment in favor of Respondent Citi Trends because Appellant failed to present competent evidence for the court to find a duty under the facts of the instant case. "In any negligence action, the threshold issue is whether the defendant owed a duty of care to the plaintiff." *Bass*, 395 S.C. at 134, 716 S.E.2d at 913. The issue of whether a duty is owed to the Plaintiff is a question of law to be decided by this court. *Burnette v. Family Kingdom, Inc.*, 387 S.C. 183, 691 S.E.2d 170 (2010). "[A] business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm." *Bass*, 395 S.C. at 135, 716 S.E.2d at 913. In *Bass*, the Supreme Court reviewed "the four basic approaches to the foreseeability issue" used by the courts nationwide and adopted the balancing approach to determine the business owner's duty. *Id.*, at 135-39, 716 S.E.2d at 913-15. "In adopting a balancing approach, [it] do not alter this duty, but merely elucidate[d] how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." *Id.*, at 139, 716 S.E.2d at 915.

The Supreme Court acknowledged the criticism expressed by at least one court in regard to the balancing test, which is "bleeding the line between the duty and breach." *Id.* at 139, 716 S.E.2d at 915. The *Bass* court evaluated the facts of the case for indicia of foreseeability and only after finding that Bass "produced at least some evidence the aggravated assault was foreseeable," it determined based on the evidence he introduced that he "failed to provide any

evidence that [Super 8] should have expended more resources to curtail the risk of criminal activity that might have been probable." *Id.*, at 139-42, 716 S.E.2d at 916-17.

a. Appellant failed to present any evidence that the criminal act of Defendant Jones was foreseeable to Citi Trends

Respondent Citi Trends contends that the *Bass* standard does not apply to this domestic attack which occurred at Citi Trends because *Bass* is premised on the crime being random. However, even if the *Bass* standard applies in the instant case, Appellant failed to present a scintilla of evidence that her shooting on Citi Trends' premises was foreseeable to the store.

Bass involved an attempted robbery at a Super 8 motel. In *Bass*, the court found some evidence of foreseeability in the CRIMECAST report presented by Bass, showing the risk of crimes against persons (i.e. homicide, rape, robbery, and aggravated assault) at the Super 8 motel. *Bass,* at 140, 716 S.E.2d at 916. "The CRIMECAST model produces probability measures that place any location in the United States in context with national, state and county levels of criminality." *Id.* at 141 n.3, 716 S.E.2d at 916 n.3. The court found the CRIMECAST report that showed an "especial high probability of crime at Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against [Bass] was foreseeable." *Id.* at 141, 716 S.E.2d at 916.

More recently, the Supreme Court found that a person shot while inside a business presented at least some evidence that the shooting was foreseeable through the deposition testimony of the owner and the manager of the business. *Lord v. D & J Enterprises, Inc.*, Op. no. 27376 (S.C. Sup. Ct. filed Apr. 9, 2014) (Shearouse Adv. Sh. No. 14 at 21) reh'g denied (May 22, 2014).[1] Lord was shot inside a "Cash on the Spot" business. *Id.* The owner and the manager testified they were aware of a string of armed robberies in the county because the local

[1] 2014 WL 1386678

newspapers had covered the incidents and the owner discussed these robberies with his employees, warning them "to be on their toes to look out for suspicious people" because there was a "madman on the loose." *Id.* The shooter at the Cash on the Spot was also the perpetrator of the previous armed robberies, which happened at businesses that Lord's expert opined "fit the profile of [Cash on the Spot's] business." *Id.* The court found the business recognized it was susceptible to an armed robbery because it had security cameras, bars on the windows of the building, bulletproof glass on its teller's windows, panic buttons, and immediate access to a silent alarm by the employees. *Id.*

In the present case, the evidence indicates there were no prior criminal incidents involving shooting or other types of violent crimes at Citi Trends or in the shopping plaza where Citi Trends was located. (R. p. 291, lines 4-15; R. p. 235, lines 4-7; R. p. 448). Sergeant James Hayes and Sergeant Jason Turner, both of the City of Dillon Police Department, testified that there have been no other shootings in Citi Trends prior to the shooting involving Plaintiff. (R. p. 364, lines 12-15; R. p. 412, lines 22-25). Furthermore, Sergeant Turner testified that Citi Trends was located in a low-crime area, where the most common crimes were shoplifting, theft, or embezzlement, and not violent crimes against persons. (R. p. 416, line 17-p. 417, line 20). Likewise, Sergeant Hayes only investigated copper theft at the Dillon Plaza Shopping Center and had knowledge about shoplifting incidents. (R. p. 366, line 1-p. 367, line 17). Sergeant Hayes indicated that the part of town where Citi Trends was located was not a high-crime area. (R. p. 368, lines 2-4). Mr. Holliday, the representative who testified on behalf of the landlord, Respondent Palmetto Properties, stated that from 2001 until December 27, 2010, that there had been no shootings in the parking lot of the shopping center. (R. p. 291, line 4-12). Mr. Holliday also testified that there were no shootings in any of the leased spaces. (R. p. 291, lines 13-16).

Mr. Holliday was also not aware of any assaults at the shopping center. (R. p. 292, lines 3-11). He stated that there had not been any trouble in or around the shopping center. (R. p. 292, lines 15-18). Mr. Holliday also characterized the crime rate as a "very low crime area." (R. p. 298, lines 14-19).

Appellant argues that violent criminal activity was foreseeable in Citi Trends because her expert, Michael A. Hodge, opined in an affidavit that "violent crime is prevalent in the area in which the particular Citi Trends store at issue is located." (App. Br. 8). Appellant specifies that Mr. Hodge relied on "actual crime reports from the police department" and FBI statistics. However, Mr. Hodge's conclusion in his affidavit is not supported by the incident reports he contended he relied upon and which were presented to the trial court as an exhibit to Citi Trends' Memorandum in Support of its Motion for Summary Judgment. (R. pp. 563-853).

In his affidavit, Mr. Hodge maintained generally that his "review of the Dillon City's incident reports indicated that violent crime is very prevalent within a half-mile radius of the [Citi Trends] immediate location." (R. p. 437). Considering the crimes within a half-mile radius from the store is a distance customarily used when conducting a security analysis. (R. p. 448). Mr. Hodge explained in his deposition that he ascribed a 95% weight to these City of Dillon incident reports in determining foreseeability. (R. p. 397, line 20-p. 398, line 25). However, Mr. Hodge acknowledged during his deposition that he did not prepare a summary of the types, number, and location of crimes within a half-mile radius of Citi Trends' location. (R. p. 373, line 14-p. 25). He also 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 because he believed the Appellant's counsel provided him only incident reports for crimes within a mile radius from the store. (R. p. 375, line 1-p. 377, line 13; R. p. 387, lines 18-23; R. p. 403, lines 3-4). Mr. Hodge admitted that

he did not independently evaluate the distances between the store and the location of the crimes in the incident reports. (R. p. 375, lines 7-11; R. p. 377, lines 10-13; R. p. 385, line 20-p. 386, line 13; R. p. 387, line 24-p. 389, line 2; R. p. 400, line 6-p. 401, line 23; R. p. 402, line 3-p. 403, line 4). Mr. Hodge testified that some of the incidents were outside a mile radius based on information provided by the plaintiff's office. (R. p. 402, lines 7-24). He also stated that he would consider ten to fifteen "assaults, batteries, various violent crimes" to be a "high amount." (R. p. 149, lines 10-13). On one hand, Mr. Hodge could identify no specific incidents of specific crimes in a specific location upon which he based his flawed opinion. On the other hand, Mr. Hodge admitted that no violent crimes took place inside Citi Trends prior to Plaintiff's injury. (R. p. 384, lines 6-12). He agreed that there had been no shootings in Dillon in retail stores before this incident. (R. p. 393, lines 7-16). Mr. Hodge had no evidence of shootings occurring in a retail store in Dillon County. (R. p. 394, lines 19-25).

Appellant failed to present any evidence of foreseeability when the opinion expressed by Mr. Hodge in his affidavit is considered together with the statements he made in his deposition concerning his review of the incident reports and together with the incident reports that purportedly formed the basis of his opinions. In *Bass*, when explaining how to determine whether a crime is foreseeable, the court stated: "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 if other factors support a heightened risk." *Bass*, at 139, 716 S.E.2d at 915. Prior incident reports for Super 8 were not available in *Bass*. *Id.*, at 140, 716 S.E.2d at 916. However, it is very significant that the CRIMECAST report considered by the *Bass* court a factor supporting a heightened risk was showing the risk of crimes at the Super 8 motel, the specific location where the attempted

robbery against Bass took place. Even in the more recent case referenced above, the court did not look at the two prior armed robberies that happened some miles away from the store as a factor supporting a heightened risk of harm. *Lord*, Op. no. 27376. In a footnote, the *Lord* court characterized as erroneous the dissent's statement that "Today the Court holds that a merchant has a duty to provide a security guard where random acts of criminal violence occur miles away from the business." *Id.* The court specified: "we make no such definitive determination regarding a merchant's duty." *Id.* Instead, the court found some evidence the shooting was foreseeable based on the store owner's actually foreseeing an attack of the "madman" who committed the "rash" of armed robberies described in the newspapers. *Id.*

Appellant does not present competent evidence of foreseeability because Mr. Hodge cannot create a "genuine" issue of material fact regarding the foreseeability of the crime by misinterpreting the reports he contended he relied upon. A fact is genuine "if the evidence is such that a reasonable person could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conclusory or speculative allegations are not facts. *Blakely v. Moore*, No. 5:12-cv-1214-RMG, 2013 WL 980412 at *2 (D.S.C. Mar. 12, 2013). "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). "[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.

In contrast to Mr. Hodge's nebulous claims, the 911 calls from Dillon Plaza Shopping Center and the Dillon Police Department Incident Reports referred to by Mr. Hodge show, in actuality, rather than generalities, only a handful of violent crimes within half of a mile from Citi

Trends: one aggravated assault half of a mile away; one carjacking a third of a mile away; two simple assaults half of a mile away; and one simple assault (cursing only) in the theater parking lot across the street from Dillon Plaza. (R. pp. 448, 500). Mr. Hodge did not identify any calls made from Citi Trends to the Police Department. (R. p. 395, lines 12-15).

Here, Appellant failed to provide evidence indicative of foreseeability because there are no prior incidents in the store. In their absence, while the duty of the store to provide some level of security is not foreclosed, Appellant must show that "other factors support a heightened risk." *Bass*, at 139, 716 S.E.2d at 915. As a matter of law, Appellant failed to bring evidence of other factors supporting a heightened risk. First, incident reports of an unknown distance from the store and of a dissimilar nature do not provide evidence that an attempted murder or an assault with a firearm by a third party against a customer in the store was foreseeable. This is not a situation like in *Lord* because Defendant Jones was not a person who had previously committed a string of shootings in businesses that fit the profile of Citi Trends and of whom the store employees were aware. Even if incidents within half a mile from the Citi Trends, as Mr. Hodge contends, should be considered in implementing security measures to determine whether they are a factor supporting a heightened risk, there are only five incidents within a half mile radius that include two simple assaults and a "cursing" across the street. Since Mr. Hodge defines a high crime rate within an area of half-mile as ten to fifteen incidents, then these incidents would not be deemed a "high crime rate." (R. p. 401, lines 10-13). Additionally, it is unclear what supports Mr. Hodge's opinion, and consequently Appellant's contention, that violent crimes are more likely to occur in stores located in economically distressed areas. (R. p. 438; App. Br. 9-10). Therefore, this contention cannot constitute evidence of a heightened risk of harm to Citi Trends' customers.

Secondly, the *Bass* court implicitly indicated it would not consider criminal acts foreseeable to a business owner when the evidence only indicated that a business was located in a high crime area. Specifically, the *Bass* court rejected the totality of the circumstances test because this test "effectively requires businesses to anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society." *Bass*, 395 S.C. at 138, 716 S.E.2d at 915. Consequently, the fact that shootings may have occurred around the country in shopping malls, like the one in Annapolis, Maryland, referenced by Mr. Hodge in his deposition, is not evidence of foreseeability of violent criminal acts against Citi Trends' customers in Dillon, South Carolina.

Furthermore, FBI's Uniform Crime Reporting statistics for the year of 2009, which weighed at most 5% in Mr. Hodge's opinion, are not evidence of foreseeability. (R. p. 404, lines 5-8). These FBI statistics compared the violent crime rate of the State of South Carolina with the national average, and the rate of Dillon City with that of the state as a whole. (R. pp. 437-438). Similarly, *Bass* attempted to rely, as evidence of foreseeability on a report indicating that the robbery rate in the county for the year of his attempted robbery exceeded the state benchmark by approximately 190 percent. The *Bass* court specified:

> We do 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.

Bass, at 140, 716 S.E.2d at 916.

The FBI statistics do not show the probability of violent crime taking place inside the Citi Trends' store. Furthermore, Appellant's expert characterized the FBI statistics as "challenged"

for their reliability. (R. p. 404, lines 3-5). Therefore, Appellant failed to provide evidence of factors supporting a heightened risk of harm from violent crimes to customers of Citi Trends.

Furthermore, the deposition of Ms. Ivy Council, the Citi Trends' Rule 30(b)(6) representative, shows that Citi Trends did not foresee and had no reason to foresee any violent crimes happening in their stores because of the nature of their business-- a retail clothing store, where people go to shop and where only theft of merchandise is a problem-- but not violent crimes. (R. p. 200, line 19-p. 201, line 7; R. p. 204, lines 4-7). Furthermore, Ms. Council stated that safety had not been an issue in Citi Trends' stores and Citi Trends did not have a problem with violent crime at their Dillon location. (R. p. 205, lines 5-7; R. p. 235, lines 3-6).

Aside from the lack of evidence indicating foreseeability or of other factors supporting a heightened risk, Respondent submits that the approach established in *Bass* is not applicable to the facts and circumstances of this case and has not been endorsed by the South Carolina Supreme Court as applicable when the criminal act is not random. In *Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 678, 863 P.2d 207, 215 (1993) *disapproved on different grounds by Reid v. Google, Inc.*, 50 Cal. 4th 512, 235 P.3d 988 (2010), the first case recognized by the *Bass* court as originally formulating the balancing approach, the court states: "Unfortunately, **random**, violent crime is endemic in today's society." (emphasis added). *Bass* and the cases cited therein, including *Ann M.*, and *Lord*, are all cases in which a third party committed a violent act against a random victim – a victim that the assailant happened to find at that particular time in those particular places. For example, in *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 764, one of the cases cited in *Bass*, the plaintiff was robbed at gun point in Sam's parking lot. The court reviewed three prior incidents in Sam's parking lot in analyzing the foreseeability of that plaintiff being robbed in Sam's parking lot. *Posecai*, 752 So.2d at 762. One

of the three incidents involved an attack of an employee of the store in the parking lot where the employee's purse was taken by her husband. *Id.* The *Posecai* court implicitly found this incident dissimilar with the robbery of the plaintiff by an unknown assailant when it did not consider it in its determination of foreseeability. *Id.*

In the present case, the violent crime was not committed against a random victim. Defendant Jones did not go to Citi Trends to find a random person to shoot. Defendant Jones went to Citi Trends to find Appellant, knowing from her that she was there, and not to rob a random Citi Trends' customer. (R. p. 328, lines 10-14). Defendant Jones did not try to shoot anyone else in Citi Trends. (R. p. 345, line 143-p. 346, line 7). Even if, under *Bass*, the foreseeability may be established in the absence of prior criminal incidents on the store's premises but in the presence of other factors supporting a heightened risk, in this case, Appellant's burden is different. Appellant must show Citi Trends had foreseen that Mr. Jones would attempt to murder his ex-girlfriend or, at a minimum, that women in abusive relationships are likely to be hunted down by their spouses, boyfriends, or exes, inside Citi Trends' store. As stated in the Affidavit of the security expert, Bill Booth:

> This crime had nothing to do with location and everything to do with a terribly deteriorating relationship between two people. Domestic violence is famously difficult for a landowner or business to prevent because it has nothing to do with the location and everything to do with an interpersonal relationship. Citi Trends was not aware of the relationship, the nature of the relationship, or the impending violence that was going to result from the relationship.

(R. pp. 448-449).

Appellant argues that the trial court's and Respondent Citi Trends' focus on the foreseeability of a violent attack by Defendant Jones on Appellant is a misleading red herring. (App. Br. 7-8, 10). However, the Supreme Court in both *Bass* and *Lord* considered the specific

facts of those cases to determine whether Bass and Lord met their burden to present the scintilla of evidence required under the balancing approach for determining foreseeability of the crimes against them and reasonableness of the security measures in light of the particular risk of harm. *Bass*, 395 S.C. at 139, 716 S.E.2d at 916 ("We turn now to the facts of the instant case."); *Lord* ("Under the specific facts presented in this case . . . .").

Therefore, the trial court properly granted summary judgment in favor of Respondent Citi Trends because Appellant did not present a scintilla of evidence that the attempted murder against her was foreseeable to Citi Trends.

b. Appellant failed to present any evidence that the Citi Trends' security measures were unreasonable

Under the *Bass* standard for determining the existence of a duty of a business owner to an invitee, a determination by the court of the lack of foreseeability of a particular risk of harm to a business invitee ends the analysis of the owner's duty. *Bass*, 395 S.C. at 139, 716 S.E.2d at 915 (indicating that in the balancing approach to analyze the business owner's duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm, the determination of the economically feasible security measures required to prevent such a harm is made given the foreseeability). *See also Posecai*, 752 So.2d at 769 (concluding that business owner did not owe a duty to customer to protect her from criminal acts of third parties after holding that the business owner did not possess the requisite degree of foreseeability to provide any security in its parking lot).

Nevertheless, Appellant failed to present any evidence indicating that the security measures taken by Citi Trends were unreasonable given the foreseeable risk of harm to its customers. Appellant argues that economically feasible security measures were available to Citi Trends that would have prevented the harmed she suffered. (App. Br. 16). Appellant seemingly

relies on the opinions of her expert expressed in his affidavit and deposition. (App. Br. 17-18). However, in formulating his opinions, Mr. Hodge did not consider the security measures existing at the store on December 27, 2010. In his affidavit, Mr. Hodge listed the materials he reviewed to arrive at his opinions, and at his deposition, he reiterated that those were the materials upon which his opinions were based. (R. pp. 435-436; R. p. 371, lines 4-14). Even so, none of the documents or other materials listed purports to contain an exhaustive list of all the security measures in place in the Dillon Citi Trends on the evening in question. Furthermore, these documents, even taken together, do not show all the security measures existing in the store on December 27, 2010. Therefore, Mr. Hodge never became aware of all the security measures that were in place in Citi Trends when he opined that Citi Trends "did not have adequate security measures in place to prevent the criminal activity that was reasonably foreseeable to occur at their premises." (R. p. 437). As stated above, an expert's opinion "'must be based upon facts . . . sufficient to form a basis for an opinion. . . . Expert opinion is inadmissible if its factual foundation is nebulous.'" *Young*, 270 S.C. at 468, 242 S.E.2d at 678.

Furthermore, Mr. Hodge never visited Dillon or the store. (R. p. 370, line 17-p. 371, line 3; R. p. 379, lines 6-24). To the contrary, the plaintiff's expert in *Bass* visited the hotel on three occasions, and the plaintiff's expert in *Lord* "conducted a field investigation of the security measures" used at the business. *Bass*, 395 S.C. at 141, 716 S.E.2d at 917; *Lord*. Additionally, Mr. Hodge never interviewed police officers in Dillon to determine how often they were patrolling the area. (R. p. 372, lines 1-3). He never surveyed the other retail stores in the area as to their security measures. Mr. Hodge pointed to Ms. Council's deposition, which he claimed indicated that the store had only one camera focused on the cash register that he characterized as deficient. (R. p. 380, lines 18-22). However, Ms. Council was never asked how many cameras

were in Citi Trends' location in Dillon in her deposition. Furthermore, Appellant acknowledges in her brief at least two cameras in the store that evening: at the door and the cash register. (App. Br. 3). In fact, there were four recording cameras in the Dillon Citi Trends' store. (R. p. 451). Since the store was equipped with four cameras on the day of Appellant's incident, which is the number of cameras Mr. Hodges recommended in his deposition, Citi Trends had complied with the reasonable measures he suggested.

Mr. Hodge also contends, without factual support, that there was no monitor at the front door. (R. p. 381, lines 14-24). Mr. Hodge agreed that a monitor at the front door would give notice to a person walking in that there are surveillance cameras and would be a good security practice. (R. p. 381, line 25-p. 383, line 6). Ms. Council, whose deposition transcript Mr. Hodge claimed he reviewed before formulating his opinions, testified that the Dillon Citi Trends had a monitor near the front door in December 2010. (R. p. 187, lines 4-10). Therefore, Citi Trends was equipped with another security system that Mr. Hodge approved.

Furthermore, Appellant contends that the layout of the store was somehow deficient from a security perspective because the aisles were horizontal and not vertical. (App. Br. 18). This contention is baseless as the police photographs taken on the day of the incident show that the aisles were vertical, as Hodge recommended, and that the clothing racks did not block anyone's view. (R. pp. 561-562).

Appellant claims that a reasonable security measure for Citi Trends to take was to train its employees "on how to spot and deter suspicious subjects, such as those wearing hoods, caps, unseasonably heavy clothing, etc." (App. Br. 18). Aside from the fact that stopping customers for wearing hoods, caps, or unseasonably heavy clothing would most likely be perceived, at least, as offensive and unjustified, there would have been no reason to confront Defendant Jones

when he walked in the store. While Defendant Jones was wearing a baseball cap and a jacket, there was nothing suspicious about his clothing, as these events took place in the winter on December 27th when such clothing would be considered appropriate. Furthermore, contrary to Mr. Hodge's repeated assertions during his deposition that Defendant Jones's face was obscured by a hood, the video from the surveillance camera shows he was not wearing a hood, but the baseball cap, which was not obscuring his face. (R. p. 378, lines 2-9; R. p. 450; Surveillance Tape).

Appellant also asserts that Citi Trends gave no consideration to customer safety and that Citi Trends did not make an effort to identify violent crime trends. (App. Br. 13). To the contrary, Ms. Council testified the employees were trained not to leave an empty box in the middle of the floor where it could cause a customer to be injured and not to leave empty racks opened and exposed but hang at least one piece of clothing on them so a customer would see the racks and not get injured. (R. p. 195, line 25-p. 196, line 16) (Council Dep. 34). These were the types of injuries that Citi Trends foresaw as a potential risk to their customers. Additionally, the same incident report forms that were used in case of theft of merchandise were also used in other instances, for example in case of a robbery, and Ms. Council would have been informed if a robbery occurred. (R. p. 198, lines 1-17; R. p. 201, lines 15-19).

The *Bass* standard requires a determination of the economically feasible security measures required to prevent foreseeable risk of harm to an invitee of the store through balancing the foreseeability with the reasonable security measures. Given that the attack on Appellant was not foreseeable, the security measures in place in Citi Trends in December 2010 -- four security cameras, an EAS monitoring system, and the monitor by the front door indicating that the store was under security surveillance -- were reasonable. Mr. Hodge formulated his opinion without

evaluating these security measures. This situation is not exemplary of "an instance where a business would be required to employ costly security guards" due to the lack of evidence of prior crimes. *See Bass*, 395 S.C. at 141, 716 S.E.2d at 916-17. Even Mr. Hodge stated that he did not believe security guards or metal detectors were reasonable security measures that should have been taken. (R. p. 397, lines 7-17). Appellant also conceded at the summary judgment hearing that her argument was not that security guards or metal detectors were necessary. (R. p. 158, lines 19-21). Furthermore, no reasonable security measures were going to prevent the enraged ex-boyfriend from doing what he was repeatedly threatening to do before he entered Citi Trends and shot Appellant. (Supp. R. p. 2). Moreover, reasonable measures recommended or approved by Appellant's expert were already in place in Citi Trends. (Supp. R. p. 2).

Mr. Hodge also appears to base his opinion of what security measures were reasonable for the store to take on Defendant Jones' statement taken by the Appellant's counsel that he did not know there were security cameras inside Citi Trends and that had known, he would not have entered and shot Plaintiff. (R. p. 425, lines 12-19). Mr. Hodge's reliance is misplaced in light of the *Bass* standard in which the reasonable security measures to be taken by a store are to be balanced with the foreseeability by the store of future criminal acts of third parties. What a third party who committed a criminal act gratuitously contends after the fact that would have deterred him does not have any relevance for this standard.

Consequently, Appellant did not and cannot present any evidence that the security measures taken by Citi Trends were unreasonable given the foreseeable risk of harm to its customers when her expert has not evaluated the security measures in place in Citi Trends on the night of the shooting, when measures that were recommended or considered a good security

practice by Appellant's expert were already in place, and when Appellant conceded that security guards or metal detectors were not required.

Accordingly, this Court should affirm the trial court's grant of summary judgment in favor of Respondent Citi Trends because Appellant did not show that Citi Trends had a duty to take any specific, additional security measures to protect Appellant from an unforeseeable risk of physical harm arising out of domestic violence. Consequently, Appellant failed to show as a matter of law that Citi Trends owed a duty to Appellant in these circumstances and, consequently, that it breached it.

II. APPELLANT PRESENTED NO EVIDENCE THAT RESPONDENT CITI TRENDS WAS THE PROXIMATE CAUSE OF HER INJURIES

The trial court properly found that Appellant failed to present evidence showing that any action or inaction of Respondent Citi Trends was the proximate cause of her injuries.

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). "To prove causation, a plaintiff must demonstrate both causation in fact and legal cause." *Id.* "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id.* "Legal cause turns on the issue of foreseeability." *Id.* "An injury is foreseeable if it is the natural and probable consequence of a breach of duty." *Id.* "Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach." *Id.* "It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone." *Id.* "Ordinarily, the question of proximate cause is one of fact for the jury

and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 721 (Ct. App. 1996). "Only when the evidence is susceptible to only one inference does [the question of proximate cause] become a matter of law for the court." *Id.* In this situation, the evidence is susceptible to only one inference: Appellant's injury was not proximately caused by any alleged negligence of Citi Trends.

No evidence exists that there is anything that could have been done to prevent Appellant being shot by Defendant Jones. Because the foreseeability in the context of proximate cause is judged from the store's perspective, not that of the perpetrator, at the time of the incident, and not in hindsight, Defendant Jones's statement that he would not have entered Citi Trends and shot Appellant if he had known of the existence of the surveillance cameras in the store is irrelevant. It is not foreseeable to the store that a customer who enters a store equipped with a monitor displaying that the customer was under surveillance would not know that the store had surveillance cameras and would brazenly choose to shoot someone in a public place with numerous witnesses to the criminal act.

Sergeant Turner, a nineteen-year employee of the City of Dillon Police Department, described the shooting as "outside the ordinary." (R. p. 409, line 23-p. 410, line 1). He opined 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." (R. p. 412, lines 2-5). The employees of Citi Trends had no knowledge of the nature of Appellant's relationship with Defendant Jones. (R. p. 361, lines 3-7). Sergeant Hayes, a member of the City of Dillon Police Department, who personally investigated Appellant's case, opined that there was nothing that the store employees could have done to have prevented the shooting from happening in the store.

(R. p. 362, lines 19-23). He believed that Defendant Jones chose Citi Trends to shoot Appellant because that was the location where he knew Appellant was going to be at that time. (R. p. 363, lines 19-24). Appellant's encounter with Defendant Jones lasted less than one minute, with only a few seconds of the exchange indicating that Appellant was in danger as she began to run away from him. Appellant herself testified that she "really wouldn't know if [the employees] would have time to do anything, it happened so fast." (R. p. 347, lines 7-13). Therefore, there is no evidence in the record that the store's alleged negligence in allegedly not having additional security measures had proximately caused Appellant's injury. *See Parks*, 345 S.C. 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 that a nightclub's alleged breach of a duty to protect a guest from the criminal acts of third parties did not proximately caused guest's injury). This Court, thus, should affirm the trial court's grant of summary judgment in favor of Respondent Citi Trends.

III. THE TRIAL COURT PROPERLY FOUND THAT APPELLANT'S COMPARATIVE NEGLIGENCE WAS GREATER THAN ANY NEGLIGENCE OF RESPONDENT CITI TRENDS, INC.

As the trial court found, Citi Trends was not negligent. Even if it was, Appellant's negligence is so great that Appellant is barred as a matter of law from claiming that Citi Trends caused her injuries. In South Carolina, "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). On a motion for summary judgment, though the facts are viewed in the light most favorable to the non-moving party, a court "cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citation omitted). "Where 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.

Appellant had actual knowledge of her ex-boyfriend Defendant Jones' propensity to act criminally since he had shot and injured a former girlfriend. (R. p. 305, line 20-p. 306, line 1; R. p. 310, lines 15-22; R. p. 338, lines 15-20). She also was cognizant of his goal to physically harm her because Defendant Jones left at least seventeen (17) voicemails on her phone, threatening in some of them to kill her or paralyze her. (R. p. 503-513; Voicemail Recordings). Defendant Jones had also appeared at her house uninvited, scaring her mother. (R. p. 323, line 10-p. 324, line 6). Defendant Jones followed Appellant to the country where she was spending the night with her new boyfriend and banged on the door. (R. p. 321, line 11-p. 322, line 7). Appellant called the police after Defendant Jones appeared at her boyfriend's house, but his harassment did not stop. (R. p. 323, line 8-p. 325, line 5). Despite the threats made by Defendant Jones, Appellant did not take any additional actions to protect herself by involving the police. She proceeded to enter Citi Trends on the night of the incident while informing Defendant Jones that she would be in the store. (R. p. 328, lines 10-14; R. p. 341, lines 12-15) (Bethea Dep. 101, 135). Though she was fearful that Defendant Jones would also enter the store, Appellant failed to inform the employees of her worries. (R. p. 348, lines 3-7). Appellant also failed to call the police upon seeing Defendant Jones in the store. Appellant did not scream out for help when she first saw him because she was not aware of his intentions. Instead, Appellant calmly talked to Defendant Jones until he made it known to her that he had a gun. (R. p. 329, line 14-p. 330, line 14; R. p. 344, lines 4-16). It was at that moment that Appellant screamed out and employees of Citi Trends became aware of the threat posed by Defendant Jones. (R. p. 330, lines 14-20; R. p. 347, lines 7-13). Appellant was shot within three to four seconds from that

moment. (R. p. 362, lines 1-13; Surveillance Tape; R. pp. 540-549) Appellant was in the better position to protect herself against the criminal act of Defendant Jones and, thus, her negligence was greater than that of any alleged negligence of Citi Trends as the trial court properly found. As such, this Court should affirm the trial court's grant of summary judgment.

CONCLUSION

As the trial court found, Appellant failed to bring even a scintilla of evidence that violent criminal acts or, more specifically, that an attempted murder arising out of a domestic dispute were foreseeable to Citi Trends in their Dillon store in December 2010. Furthermore, Appellant failed to bring any evidence that the security measures existing in the store were unreasonable in protecting its customers against the foreseeable risk of physical harm. Also, no evidence exists that any alleged negligence of Citi Trends was the proximate cause for Appellant's injury. Additionally, Appellant's negligence was as a matter of law greater than any alleged negligence of Citi Trends. For all the above reasons, this Court should affirm the trial court's grant of summary judgment to Respondent Citi Trends.

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August 25, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2014-000332
Case No. 2012-CP-17-00295

Ebony Bethea, Appellant,

v.

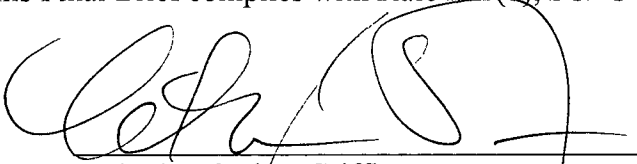
Derrick Jones, John Doe, Individually and as employee/agent of Citi Trends, Inc., Citi Trends, Inc., and Palmetto Properties, Inc., Defendants,

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

Appellate Case No. 2014-000332

CERTIFICATE OF COUNSEL

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



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CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Catharine Garbee Griffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Respondent's Final Brief, and Proof of Service, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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August 25, 2014