THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case No. 2011-CP-40-4068

Denise Wright .... Appellant,

v.

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

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Respondents PRG Real Estate Management, Inc., Franklin Pineridge Associates, and Karen Campbell, Individually, and in her Representative Capacity as an Agent of PRG Real Estate ("Respondents") respond to Appellant's Petition for Rehearing regarding the July 15, 2015, opinion of this Court. In its opinion, the Court affirmed the Circuit Court's grant of summary judgment, finding Respondents had no duty to provide security for Appellant and there was no evidence Respondents engaged in unfair or deceptive acts. Wright v. PRG Real Estate Mgmt., Inc., Op. No. 5326 (S.C. Ct. App. Filed July 15, 2015).

In her petition, Appellant cites to three issues for reconsideration by the Court. First, Appellant argues the Court erred in finding that a duty of reasonable care did not arise under the "particular circumstances" of this case. Second, Appellant argues the Court "overlooked" her argument that Respondents owed a duty pursuant to the principles stated in Restatement (Second) of Torts Section 323. Finally, Appellant raises that the majority opinion declined to address proximate causation based on its resolution of whether Respondents owed Appellant a duty to provide security. Respondents submit that the Court correctly determined each of these issues and request that the Court deny the petition.

LAW/ANAYSIS

I. The Court Correctly Determined Respondents Did Not Owe Appellant a Duty to Protect Her From Criminal Activity Under the "Particular Circumstances" of This Case.

Appellant cites to two reasons that the Court erred in finding a duty did not arise under the "particular circumstances" of this case. First, Appellant argues the majority opinion "misconstrued" the basis for the general rule set forth in Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) ("Cramer I"). Second, Appellant argues that even if the majority opinion's interpretation of Cramer I is correct, there is evidence in the record that Respondents invited the public to Wellspring's common areas. Petition for Rehearing ("Petition") at 3.

With regard to the first issue, the Court did not misconstrue Cramer I's general rule. As context, Cramer I has a three-paragraph description of what distinguishes a landlord-tenant relationship from an innkeeper-guest relationship. Cramer I, 312 S.C. at 443, 441 S.E.2d at 318 (quoting Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990)). Appellant argues the majority opinion improperly applied Cramer I's explanation because it "'focused on whether apartment owners or managers invited the public onto the premises.'" Petition at 4

(quoting Wright v. PRG Real Estate Mgmt., Inc., Opinion No. 5326, 2015 WL 4269684, at *3 (Ct. App. July 15, 2015) (the "Majority Opinion")). Appellant maintains that correct application of the law focuses on whether the public was invited (regardless of source) and whether Respondents expected the public to enter the premises. Id. at 3-5.

From a review of Cramer I's discussion in its entirety, the Court was correct in its interpretation and properly applied the law. For example, the Court appropriately quoted from these paragraphs in the Majority Opinion that "'**[o]ne who invites all** may reasonably expect that all might not behave' and therefore bears responsibility for any injury resulting from the failure to take reasonable precautions against criminal activity." Wright, 2015 WL 4269684, at *2 (quoting Cramer I, 312 S.C. at 443, 441 S.E.2d at 318) (emphasis added). The connotation is that the landlord must invite the public. Cramer I also references that "[t]enants in a huge apartment complex, or a tenant on the second floor of a house converted to an apartment, do not live where the world is invited to come." Cramer I, 312 S.C. at 443, 441 S.E.2d at 318. This language also suggests that any invitation must emanate from the property owner.

Finally, Cramer I sets forth that "[a]n apartment building is not a place of public resort where **one who profits from the very public it invites** must bear what losses that public may create." Id. (emphasis added). This language also focuses on whether the property owner has invited the public, and not on whether a third party may have extended the invitation. This language also addresses the very reason Appellant's interpretation of Cramer I is untenable. If Cramer I's focus included whether a third party invited the public to the premises, then landlords would be required to be insurers of their tenants' safety in spite of the fact that they did not invite the public and did not profit from them. This is an unreasonable burden that can never be completely met. See, e.g., Resp. Final Br. at 12 (discussing Feld v. Merriam, 485 A.2d 742, 746

(Pa. 1984) and the burden of foisting such a duty on landlords). Therefore, the Court correctly applied Cramer I's general rule.

Even if Appellant's first argument was correct, she ignores that the Court thoroughly addressed all potential sources of public invitation in its Majority Opinion, which also speaks to her second issue: Whether there is evidence in the record that Respondents invited the public. The Court considered Appellant's argument that third parties – the Harbison Community Association, the South Carolina Department of Parks, Recreation and Tourism, and the Richland County Conservation Commission – advertise the availability of the Harbison trails and the fact that they pass through neighborhoods, including Wellspring and other backyards. Wright, 2015 WL 4269684, at *3. In considering Appellant's argument that the "public is invited," the Court stated that "Wright produced no evidence that these entities invited the public **onto Wellspring's property**." Id. at *4 (emphasis added). The Court also noted that the trail that goes through Wellspring is also on public property, not Wellspring's premises. Id; see also note 1.

In considering whether Respondents' invited the public onto its premises, the Court noted that "Wright presented no evidence [Respondents] invited the public to use the trails" and that "Wright conceded at oral argument the respondents took no action to invite the public onto Wellspring's property." Wright, 2015 WL 4269684, at *4. In an attempt to withdraw this concession, Appellant now cites to an advertisement for Wellspring apartments, which she claims was a public invitation. Appellant believes that an advertisement stating, "Come stroll along our walking path on your way to the pool or on your way to your spacious apartment home" equates to an invitation to the public to occupy Wellspring's premises. Petition at 5 (citing R. p. 437 at 35 line 21-36, line 19). By Appellant's own admission – and as should be clear from the advertisement's language – this media was directed to "potential tenants for Wellspring." Id. Any other interpretation would have the effect of inviting the general public to

use the pool at Wellspring or the "spacious apartment homes" occupied by private tenants, which was clearly unintended by the language of the advertisement.[1]

In considering all potential sources for whether the public was invited to Wellspring, the Majority Opinion found that "Wright presented no evidence to support a finding the respondents – or anyone else – invited the public onto Wellspring's premises. Therefore, even if Wright's theory is valid – that Cramer I does not apply when such an invitation did occur – the facts of this case do not support the theory." Wright, 2015 WL 4269684, at *4. This decision was correct, and the Court should not reconsider Appellant's first issue.

II. The Court Properly Addressed the Affirmative Acts Exception to Find That it Did Not Give Rise to a Duty of Reasonable Care.

Appellant's second issue is that the Court "overlooked" her argument that Respondents owed a duty pursuant to the principles stated in Restatement (Second) of Torts Section 323. Petition at 6. Although the Majority Opinion did not cite directly to Section 323, it is evident that the Court appropriately considered Section 323 in reaching its opinion that Respondents' actions did not give rise to a duty of care under the "affirmative acts" exception.

Cooke v. Allstate Management Corporation, 741 F. Supp. 1205, 1209-10 (D.S.C. 1990) originally identified the "affirmative acts" exception as one of four exceptions to the general rule

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[1] Appellant also argues for the first time that Respondents "boasted ownership of the trails" by citing to "our walking path" in this advertisement. Petition at 5, n.3. Appellant has already argued to the Court that the trails are public property, as noted in the Majority Opinion: "**Wright argues**, however, that Wellspring is different . . . because 'Wellspring is **part of the Harbison Community Association,' which Wright points out 'maintains a series of walking trails** that weave through the community,' 'including one trail that goes directly through Wellspring.'" Wright, 2015 WL 4269684, at *3 (emphasis added). In another attempt to change her argument, Appellant now tries to use this cursory advertisement reference to transform the trails into private property. In reality, and in the context of the advertisement, the focus of the reference is to highlight the availability of the trails to access other parts of the property.

that a landlord has no duty to provide security.[2] As set forth in Cooke, this exception holds that "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Id. Since Cooke, no South Carolina court considering the "affirmative acts" exception in a landlord-tenant security case has held that Section 323 displaces the rule set forth in Cooke. In Goode v. St. Stephen United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997), the appellant argued Section 323 as a source of the "undertaking duty." However, this Court did not adopt it as the applicable analysis for the "affirmative acts" exception. Instead, the Court applied the appellant's own authority (Section 323) to again show that circumstances did not warrant the finding of a duty by the landlord to provide security. Id. at 442, 494 S.E.2d at 832.

Nevertheless, the Majority Opinion did not "overlook" this body of law. At the outset of its analysis, the Majority Opinion cited to Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986) as support for the affirmative acts exception. Wright, 2015 WL 4269684, at *6 (citing to Sherer as "providing that one who undertakes to act, even though under no obligation to do so, becomes obligated to act with reasonable care."). In Sherer, our Supreme Court noted that this principle was taken essentially verbatim from Restatement (Second) of Torts Section 323(a). Id. at 406, 351 S.E.2d at 150. Therefore, the very law Appellant argues was "overlooked" is incorporated in the rule applied by the Majority Opinion to address the "affirmative acts" exception.

The Majority Opinion then appropriately applied the law to each of the three affirmative acts Appellant contends gave rise to a duty by Respondents. Wright, 2015 WL 4269684, at *6. The Majority Opinion found that Respondents' creation of a courtesy officer program did not impose on Respondents a duty to exercise reasonable care in providing security at the complex.

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[2] As noted in the Majority Opinion, use of the term "security" herein refers to a duty to protect against third-party criminal activity. It is not to be confused with the duty to provide a "safe" premises free from physical/structural defect. Wright, 2015 WL 4269684, at *5.

Instead, Respondents' undertaking required that they maintain the program with reasonable care. Id. (citing 65 C.J.S. Negligence § 40 (2010); Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992)). The Court found that Respondents' duty was limited to exercising reasonable care in maintaining the courtesy officer program, and there was no evidence that Respondents' failed in this regard. Id.

This analysis is correct both under the applicable law and Section 323. South Carolina's courts have held that Section 323 should not be extended to create a duty that has a chilling effect on conduct that inures to the public good. See, e.g., Johnson v. Robert E. Lee Academy, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012) ("[C]ontorting the Restatement to create a precedent that may have a chilling effect on . . . conduct that inures to the public good is ill-advised and poor public policy."). If Respondents' decision to provide a courtesy officer program also required that they also ensure the security of tenants from criminal activity, then such contortion of Section 323 would discourage landlords from voluntarily providing such programs. Under these circumstances, the Court of Appeals has held that Section 323 should not impose a duty. See also Underwood v. Coponen, 367 S.C. 214, 219 n. 3, 625 S.E.2d 236, 239 n. 3 (Ct. App. 2006) ("If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a public roadway or highway in an effort to shield themselves from unwarranted liability."); Staples v. Duell, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App.1997) (declining to impose duty on defendant to inspect property under circumstances because doing so "would create the highly undesirable precedent of encouraging rural landowners to shield their eyes and never inspect their land").

Even if this was not the case, the Majority Opinion cited to Cramer v. Balcor Property Management, Inc., 848 F. Supp. 1222 (D.S.C. 1994) ("Cramer II"), as a second basis for finding

that the "affirmative acts" exception did not apply to the courtesy officer program. Wright, 2015 WL 4269684, at *7. Cramer II rejected a similar claim, and the Majority Opinion found it to be "indistinguishable" from Appellant's case. Id. "The fact that the courtesy officer position was vacant at the time is a circumstance too attenuated from the kidnapping and robbery of Wright to establish a duty to provide security." Id.

The Majority Opinion then turned to Appellant's claims that Respondents' voluntary provision of lighting and shrubbery maintenance gave rise to a duty to provide security. Id. The Majority Opinion correctly cited to Cramer I as support for its holding that neither of these actions impose this duty on Respondents. Id. Cramer I unequivocally held that the duty to provide a "safe" premises (physically/structurally) under the South Carolina Residential Landlord Tenant Act does not impose a duty on landlords to provide a "secure" premises. Id. With regard to any common law exception, the Majority Opinion noted that "[i]f the law recognized these as 'undertakings' sufficient to impose on developers and apartment managers a duty of reasonable care to provide security services, the rule of Cramer I would be swallowed by the affirmative acts exception." Id. With this language, the Majority Opinion recognized the public policy implications of contorting Section 323 so as to create a duty to provide security, as distinguished from a duty to provide safe premises. See also Resp. Final Br. at 22-23.

The Majority Opinion was correct in its analysis, and it appropriately considered Section 323 as part of the general body of law underlying the affirmative acts exception. However, even if Appellant's assertion was correct, Respondents provided substantial evidence from the record to support that Appellant could not sustain her burden of proof that breach of a voluntarily assumed duty increased her harm, or that she relied on it to her detriment. See Restatement (Second) of Torts 323 (1965). Respondents thoroughly addressed any claims of reliance by

Appellant, as well as her claims that purported negligence in the courtesy officer program and lighting/shrubbery maintenance increased her risk of harm. See Resp. Final Br. at 18-30.

The Majority Opinion appropriately considered the applicable law for the "affirmative acts" exception and any considerations raised by Restatement (Second) of Torts Section 323. Therefore, Appellant's second issue should also be denied for rehearing.

III. The Court Correctly Declined to Address the Circuit Court's Ruling That Respondents' Conduct Did Not Proximately Cause Wright's Injuries.

Appellant's last issue is that the Majority Opinion did not address proximate causation based on its resolution of whether Respondents owed a duty. Petition at 8. The Majority Opinion correctly declined to address this issue based on the fact that its determination of the duty issue was dispositive of the appeal. Wright, 2015 WL 4269684, at *7, n. 5 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)); see also Whiteside v. Cherokee County Sch. Dist. No. 1, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) ("In view of our disposition of this issue, we need not address appellants' remaining exceptions.").

Notwithstanding this decision in the Majority Opinion, Respondents presented substantial law and evidence from the record to show that Appellant cannot prove proximate causation as a matter of law. Resp. Final Br. at 24 (citing Parks v. Characters Night Club, 345 S.C. 484, 500, 548 S.E.2d 605, 614 (Ct. App. 2001)). Appellant must show that any negligence by Respondents led directly to her injury. Id. at 25 (citing Cramer II, 848 F. Supp. at 1224). There must be a strong causal connection between the negligence and the injury, such as where a landlord leaves an apartment door unlocked and a third party enters. Id. Furthermore, a willful and malicious crime breaks the causal link between the negligence and the alleged injuries. Id. (citing

Sheppard v. South Carolina Dept. of Corrections, 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). See generally Resp. Final Br. at 24-25.

Based on this law, Respondents presented substantial evidence that Appellant could not prove proximate causation. Appellant's expert admitted criminal activity is a "people problem" for which there is no "crystal ball" or "magic pill" that allows it to be predicted with certainty. Resp. Final Br. at 26. Appellant's perpetrators committed their crime in spite of the fact that other residents were on their balconies, and one resident actually engaged the perpetrators in conversation as the crime was occurring. Id. Respondents also presented evidence that Appellant's expert could only find two police reports from the preceding four years involving violent crimes. Id. at 27. Officers who responded to Appellant's incident also characterized crime in the area as "average," and Appellant herself did not know of other criminal incidents at Wellspring. Id. Respondents also presented evidence that the perpetrators were not concealed by shrubbery or because of a lack of lighting, as claimed by Appellant. Id. at 27-28. Finally, Respondents showed the lack of evidence to support Appellant's claim that the perpetrators would not have been in the area to abduct her but for the absence of a courtesy officer. Id. at 29. Appellant's expert also could not testify as to whether the perpetrators considered the absence of courtesy officers in their decision to abduct Appellant. Id.

The Majority opinion did not need to address the issue of proximate causation based on its determination that Respondents owed no duty. However, in spite of this decision, Appellant cannot prove proximate causation based on the law and evidence in the record.

CONCLUSION

For the reasons set forth above, Respondent request that the Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY THAT I SERVED the Respondents' Return to Appellant's Petition for Rehearing, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 7, 2014, addressed to the following:

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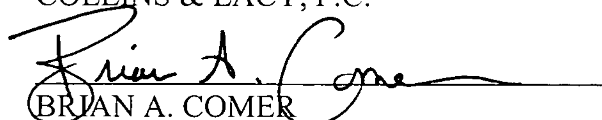
By: 

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