

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2011-CP-40-4068
Appellate Case No. 2013-002157
Opinion No. 5326 (Ct. App. filed July 15, 2015)

Denise Wright Petitioner

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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENTS

I. Petitioner has not “recast” or “retreated” from arguments made in the lower courts and there is no preservation issue.

From this appeal’s opening moments, Petitioner has consistently argued that the landlord-tenant relationship Respondents formed with Petitioner was different than the one discussed in Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) and more like the innkeeper-guest and storeowner-invitee relationships for which Cramer acknowledges South Carolina recognizes a security duty. Petitioner has consistently argued that the facts of Cramer are distinguishable but that the principles underlying its ~~duty~~ discussion actually support Petitioner’s claim. At the same time, Petitioner has always argued that Cramer leaves unanswered questions including the parameters of the “particular circumstances” exception Cramer recognized. Contrary to Respondents’ suggestions in the Return, the Petition neither “recast[s]” nor “retreats” from arguments made earlier in this case.

Petitioner is not retreating from an argument that a property’s physical layout directly controls the property owner’s duty to secure the property. That contention was never the only part of Petitioner’s argument. Petitioner cites the walking trails and other physical features at Wellspring because of their effect on the landlord-tenant relationship and specifically the landlord’s expectations for that relationship. Property owner expectations are an explicit part of the duty question. Cramer, 312 S.C. at 443, 441 S.E.2d at 318 (noting requirement for property owners to take “reasonable precaution against [a] common expectation”). Respondents knew the public was using the walking trails that pass through its common area. (App. p. 675 at 143, lines 12-16; p. 696 at 225, lines 10-18). Respondents’ awareness of the public’s recreational use of its property

should affect Respondents' duty to its tenants in the same way that a storeowner's awareness of a store's public character affects the owner's duty to its customers.

For similar reasons, Respondents are incorrect to conclude the trails are a "red herring" since Petitioner's attackers may not have used them to access Wellspring. Return at 15. The trails, Respondents' knowledge of their public character and use, and Respondents' invitation for the public to use the trails affected Respondents' duty to secure its premises for the benefit of its tenants. The trails are important because inviting the public to a trail that weaves through Wellspring's parking lot and near its dwelling units affects Respondents' relationship to the property and its users and should affect Respondents duty as property owner. In contrast, how the attackers accessed the property relates not to the duty question but to whether Respondents' failure to reasonably secure its premises was a proximate cause of Petitioner's attack.

This distinction is important for two reasons. First, while the existence of a legal duty is a legal question, proximate cause is a fact question for which summary judgment is proper only when a plaintiff has not produced a scintilla of evidence to establish the required causal connection. Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). Second, Petitioner presented substantial evidence to show that, regardless of how the attackers entered the premises, Petitioner likely would not have been attacked if Respondents had acted with reasonable care. Petitioner offered expert testimony demonstrating that a reasonable security program (and specifically the proper operation of the security program Respondents actually undertook) would have caused the attackers to stay away from Wellspring entirely. (App. p. 605 at 113, lines 3-

15). Also, Petitioner testified that proper lighting and landscaping would have exposed the lurking criminals before it was too late to avoid the encounter. (App. p. 357 ¶ 10).

Petitioner's arguments regarding Cramer are consistent, preserved, and present important questions for this Court's review. Cramer's role in this case has been hotly contested by the parties and was disputed in the Court of Appeals' opinion. Compare Wright v. PRG Real Estate Mgmt. Inc., 413 S.C. 276, 289, 775 S.E.2d 399, 406 (Ct. App. 2015) ("we find the respondents had no duty to protect [Petitioner] from third-party criminal activity under Cramer I . . .") with Wright, 413 S.C. at 294, 775 S.E.2d at 409 (Lockemy, J. concurring in part, dissenting in part) ("In finding [Petitioner] failed to show a duty, the majority relies on [Cramer II]. I believe that reliance is misplaced"). Cramer noted a framework South Carolina courts have used to determine whether various relationships create a duty for a property owner to provide security services for the benefit of those using their property. 312 S.C. at 443, 441 S.E.2d at 318 (noting duty to secure applies to "places to which the general public are invited" and to "place[s] of public resort"). Cramer also made certain assumptions about the residential landlord-tenant relationship before concluding that relationship does not create a duty. Petitioner has consistently argued that, if the Cramer framework is proper, then a duty arose here because the landlord-tenant relationship Respondents formed with Petitioner related to a "place to which the general public [is] invited." In other words, Cramer did not consider a relationship like the one the parties formed but its framework supports a finding in Petitioner's favor.

Additionally, Petitioner has consistently argued that this case presents a novel question because Cramer left an important question unanswered. While a duty to provide

security may arise for relationships relating to “places to which the general public are invited,” Cramer recognized another means by which the duty may arise. 312 S.C. at 443 n. 1, 441 S.E.2d at 319 n. 1 (holding that “[a] duty may arise under the particular circumstances of the individual case”). It does not appear that this Court has ever defined the parameters of the “particular circumstances” in which this duty may arise. For the reasons stated in her Petition, Petitioner believes the particular circumstances of this case support a duty.

Finally, Respondents’ suggestion that Petitioner cannot argue Respondents invited the public to the Wellspring common areas must fail. Whether Respondents invited the public to Wellspring’s common areas has been an actively disputed issue at every level of this litigation. (App. pp. 29-30; 113, lines 17-21; p. 128, lines 6-14). Respondents cannot allege Petitioner is pursuing a new argument in her Petition because Petitioner made the same argument during the circuit court hearing on Respondents’ summary judgment motion. (App. p. 128, lines 6-9) (“in their literature they advertise one of the perks that they have is a recreation center, that you can use the walking trails”). The circuit court specifically discussed with Respondents’ counsel Respondents’ advertisements to the public. (App. p. 113).

Respondents also cannot argue that the issue was not properly before the Court of Appeals since deposition testimony supporting Petitioner’s argument was included in Petitioner’s Designation of Matter to be Included in the Record on Appeal pursuant to Rule 209, SCACR and was included in the Record on Appeal. (App. p. 493). The issue was properly preserved for the Court of Appeals’ review. See Rule 210(h), SCACR (limited appellate court review to matters appearing in the record on appeal). Plus,

Respondents cannot credibly contend Petitioner's public invitation argument was a surprise to them or prejudices them in any way. It was Respondent PRG Real Estate Management, Inc.'s ("PRG") chief operating officer that acknowledged and read into the record his company's advertisements inducing the public to stroll the walking trails that pass through Wellspring's common areas. (App. p. 493).

In sum, it is unfair for Respondents to argue Petitioner is aimlessly shifting her position or presenting unpreserved arguments. This contention is not consistent with the record. Petitioner argued to the circuit court that Cramer's framework, properly applied to the modern landlord-tenant relationship the parties formed, shows that Respondents owed a duty. (App. pp. 105-06; 124; 332-36). She made the same argument to the Court of Appeals and in her Petition. (App. p. 924¹). Petitioner argued to the circuit court that the "particular circumstances" language of Cramer was undefined and that it should apply to the modern landlord-tenant relationship exemplified by the parties in this case. (App. pp. 332-36). She made the same argument to the Court of Appeals and in her Petition. (App. P. 840-45); see also Petition at 7-8. Petitioner has always argued that there has been a shift in the landlord-tenant relationship from the time when South Carolina common law rules were initially developed. See e.g. (App. p. 333) (Petitioner's circuit court memorandum arguing "The modern era of residential leases is not the same" as past landlord-tenant relationships" and noting "major difference[s] between modern residential leases and historic leases"); (App. p. 841) (same argument to Court of Appeals). Respondents' express invitation for the public to come to their premises to

¹ This portion of Petitioner's Reply Brief reads in part, "the entire course of South Carolina jurisprudence on this subject from Cooke to Cramer supports [Petitioner's] position."

enjoy the walking trails is included in the record on appeal. (App. p. 493). There is no validity to Respondents' preservation objections.

II. The Court of Appeals' discussion of the "affirmative acts" exception was not a proper way of addressing Petitioner's argument that Respondents undertook a duty.

South Carolina law holds that a party voluntarily undertaking a responsibility for another's benefit owes a duty to perform the undertaking with due care. Shopshire v. Jones, 277 S.C. 468, 471, 289 S.E.2d 410, 411 (1982). That duty is "rooted" in Restatement (Second) of Torts § 323. Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012). Respondents acknowledge and it is clear from the ruling that the Court of Appeals' majority opinion did not cite Section 323's elements in relation to Petitioner's claim. Return at 16. Respondents argue Section 323's conspicuous absence from the Court of Appeals' analysis should not concern this Court because Section 323's essence was considered when the Court of Appeals discussed the "affirmative acts" exception. Id. However, the Court of Appeals' "affirmative acts" discussion was not an acceptable substitute for addressing Petitioner's undertaking argument and the Section 323 provisions the Court of Appeals previously recognized as the governing standard.

Cramer v. Balcor Property Management, Inc., 848 F. Supp. 1222 (D.S.C. 1994) ("Cramer II") interpreted the "affirmative acts" exception to include an element that goes beyond Section 323's requirements for a voluntarily undertaken duty. The district court concluded the "affirmative acts" exception requires not just proof a duty was undertaken but also proof that the breach of duty "le[d] directly to the injury." Id. at 1224. The district court essentially read a causation requirement into a duty creation standard.

Section 323 does not impose a causation requirement to form a duty.² The district court then went a step further and concluded that courtesy officer program failures did not have a sufficiently “strong[] connection” to an assault on a tenant to support a duty. Id. (citing McCappin v. Park Capitol Corp., 126 A.2d 51 (N.J. App. 1956)). The district court limited the affirmative acts exception to a narrow category of negligently undertaken duties such as an unsecured door through which a third party enters. Id.

The Court of Appeals relied on this specific language to conclude Respondents had no duty under the affirmative acts exception. Wright, 413 S.C. at 288, 775 S.E.2d at 406. In other words, the Court of Appeals refused to apply the “affirmative acts” exception not because Petitioner failed to meet any of Section 323’s requirements but because the affirmative acts exception was interpreted by Cramer II to include a causation requirement Section 323 does not impose. Even Cramer II recognized a distinction between the analyses applicable to the “affirmative acts” and “undertaking” exceptions. Cramer II later discussed the undertaking exception and refused to apply it only because there was no evidence the landlord undertook any duty. 848 F. Supp. at 1225. A lack of evidence of an actual undertaking meant that Section 323’s requirements were not satisfied and there was no duty. Even though it did not cite Section 323 when discussing the undertaking exception, Cramer II recognized that the affirmative acts and undertaking exceptions require different analyses and Section 323’s requirements are the key considerations for the undertaking exception.

² Petitioner does not suggest she can prevail without demonstrating a causal connection between Respondents’ conduct and her injuries. Proximate causation is an element of all negligence claims. However, proximate cause is a question of fact for which summary judgment is proper only in rare cases. Ballou, 291 S.C. at 147, 352 S.E.2d at 493. Additionally, as discussed in the Petition, Petitioner produced substantial evidence that Respondents’ failure to perform their undertakings was a proximate cause of her attack.

In spite of its ruling in this case, the Court of Appeals also previously recognized Section 323 as the standard for judging a landlord's voluntarily undertaken duty to secure its premises. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 491 S.E.2d 827 (Ct. App. 1997); see also Wright, 413 S.C. at 295, 775 S.E.2d at 409-410 (Lockemy J.). In sum, the Court of Appeals failed to apply the longstanding rule on voluntarily undertaken duties (Section 323) and its own precedent (Goode) applying the rule to a residential landlord's voluntarily undertaken duty to secure its premises.

Respondents are also incorrect to conclude Petitioner cannot meet Section 323's requirements. Respondents acknowledged undertaking a courtesy officer program as well as lighting and security services for their tenants' benefit. These services were provided (at least in part) for tenant security purposes.³ (App. pp. 464 at 85, lines 9-15; 472 at 230, lines 10-14). Petitioner testified that she relied on the courtesy officer program when choosing to move to Wellspring. (App p. 382 at 40, lines 13-21). Respondents' negligence in operating their courtesy officer program meant that the patrol officers were out of position which increased the risk that tenants like Petitioner would be attacked. Section 323 was the proper analysis, the Court of Appeals failed to apply it, and Petitioner meets all of its requirements to demonstrate Respondents owed her a duty.

³ Any suggestion that the "courtesy" officer program was unrelated to tenant security is not consistent with the program Respondents actually designed and operated. Petitioner was promised "security officers" when she moved to Wellspring and the tenant newsletter advertised a "security pager." (App pp. 382, 500-01). Also, Wellspring's officers were empowered to answer calls regarding "criminal acts" and permitted to perform "the normal duty as performed by a police officer." (App. p. 497).

III. Petitioner offered expert and lay witness testimony establishing proximate cause.

Petitioner presented substantial evidence that Respondents' conduct was a proximate cause of the attack that caused her injuries. For example, the only expert to testify in this case concluded that the attack on Petitioner was "foreseeable" and "occurred because of the lack of security and the inadequacy of the security that [Respondents] provided." (App. p. 593 at 65-66; see also App. p. 617 at 162, lines 15-18). If the parking lot was properly lit and landscaped to eliminate hiding spots near her door, Petitioner testified that she could have seen her attackers before leaving her car and avoided the attack entirely. (App. p. 357 ¶ 10).

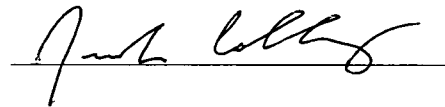
Finally, Respondents have not fully stated South Carolina law in their assertion that the attackers' act severs the causal chain between Respondents' acts and Petitioner's injuries. Return at 20 (citing Shepard v. S.C. Dept. of Corrs., 299 S.C. 370, 375, 385, S.E.2d 35, 37 (Ct. App. 1989)). Shepard held that the intervening criminal act of a third party does not always sever the causal link between an earlier tortfeasor and the victim's injuries. The finder of fact must determine whether "the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." Shepard v. S.C. Dep't of Corr., 299 S.C. at 375, 375 S.E.2d at 37. Petitioner need not prove the "particular chain of events" was foreseeable but only that the injury the criminal inflicted was "within the general range of consequences which any reasonable person might foresee." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 621, 720 S.E.2d 473, 478 (Ct. App. 2011) (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38).

Petitioner's physical and testimonial evidence created a jury question on the proximate cause issue and should be considered by a jury.

CONCLUSION

Based on the arguments above and those in the Petition, Petitioner respectfully requests an order granting certiorari to review the Court of Appeals' decision. There are several reasons the Court should grant the Petition including the fact that this case raises novel questions of law and the fact that the Court of Appeals' opinion includes a dissent. The Court of Appeals failed to apply the proper duty standard to Petitioner's negligence claim. Contrary to Respondents' assertions, the Petition poses no preservation issues as Petitioner's duty claim is based on the same arguments she presented to the lower courts.

Respectfully submitted,



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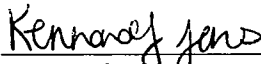
SC SUPREME COURT

CERTIFICATE OF SERVICE

I, Kennardy Jones, an employee of the law firm McGowan, Hood & Felder, LLC do hereby certify that I served copies of the *Appellant's Reply in Support of Petition For a Writ of Certiorari* on the Defendants in the above-captioned matter by depositing the same in the United States Postal Service, with proper postage affixed thereto, on this 26th day of October, 2015, addressed to the attorney(s) listed below:

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