

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No: 2012-CP-17-00295
Supreme Court No. 2015-002231

RECEIVED

NOV 25 2015

S.C. Supreme Court

Ebony Bethea, Petitioner,

v.

Derrick Jones, John Doe, Individually and as
Employee/agent of Citi Trends, Inc., Citi Trends, Inc.,
and Palmetto Properties, Inc.
Of whom Citi Trends, Inc., and
Palmetto Properties, Inc. are Respondents.

**RESPONDENT CITI TRENDS, INC. RETURN TO EBONY BETHEA'S
PETITION FOR WRIT OF CERTIORARI**

Catharine Garbee Griffin
Alina Dudau
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Respondent Citi Trends, Inc.

Roy T. Willey, IV
Eric M. Poulin
Anastopoulo Law
Firm, LLC
62 Columbus Street
Charleston, SC 29403
Attorneys for Petitioner

Robert W. Buffington
Haynsworth Sinkler
Boyd, P.A.
PO Box 340
Charleston, SC 29402-0340
*Attorneys for Respondent
Palmetto Properties, Inc.*

Sarah P. Spruill
Haynsworth Sinkler
Boyd, P.A.
PO Box 2048
Greenville, SC 29602
*Attorneys for Respondent
Palmetto Properties, Inc.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
COUNTER-STATEMENT OF THE QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT	
I. STANDARD FOR GRANTING REVIEW	4
II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO CITI TRENDS, INC. BECAUSE PETITIONER PRESENTED NO EVIDENCE THAT CITI TRENDS, INC. OWED HER A DUTY UNDER THE CIRCUMSTANCES	6
A. Factors to consider in determining the foreseeability of crime	6
B. Consideration of security measures on a cost- efficiency scale	15
C. Internal policy requiring greeting	17
III. THE COURT OF APPEALS DID NOT REACH THE ISSUE OF PROXIMATE CAUSE AND PETITIONER DID NOT ADDRESS IT IN HER PETITION	18
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986).....11

Ann M. v. Pac. Plaza Shopping Ctr. 6 Cal. 4th 666, 863 P.2d 207 (1993).....13, 14

Bass v. Gopal, Inc. 395 S.C. 129,
716 S.E. 2d 910 (2011)4, 5, 6, 7, 8, 9, 10, 12, 13, 14

Bethea v. Jones Op. No. 2015-UP-350 (S.C. Ct. App. filed July 15, 2015).....4

Blakely v. Moore No. 5:12-cv-1214-RMG, 2013 WL 980412 at *2 (D.S.C. Mar. 12,
2013)11

Burnette v. Family Kingdom, Inc. 387 S.C. 183 691 S.E.2d 170 (2010)6

Caldwell v. K-Mart Corp. 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991)17

Doe ex rel. Doe v. Wal-Mart Stores, Inc. 393 S.C. 240, 711 S.E.2d 908 (2011)17

Lord v. D & J Enterprises, Inc. 407 S.C. 544, 757 S.E. 2d 695 (2014) reh'g denied (May
22, 2014)5, 7, 8, 9, 11, 12, 13, 14, 15

Posecai v. Wal-Mart Stores, Inc. 752 So. 2d 76214

Reid v. Google, Inc. 50 Cal. 4th 512, 235 P.3d 988 (2010).....14

Shadday v. Omni Hotels Mgmt. Corp. 477 F.3d 511 (7th Cir. 2007)16

Tidwell v. Columbia Ry., Gas & Elec. Co. 109 S.C. 34, 95 S.E. 109 (1918)17

Young v. Tide Craft, Inc. 270 S.C. 453, 242 S.E.2d 671 (1978).....12

SOUTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 2424

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO CITI TRENDS, INC. WHEN PETITIONER PRESENTED NO EVIDENCE THAT CITI TRENDS, INC. OWED HER A DUTY?
- II. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO CITI TRENDS, INC. WHEN PETITIONER PRESENTED NO EVIDENCE THAT CITI TRENDS, INC. WAS THE PROXIMATE CAUSE OF HER INJURIES?

COUNTER-STATEMENT OF THE CASE

Petitioner, Ebony Bethea, commenced this action by filing a Summons and Complaint on July 16, 2012. (R. p. 25-41). Petitioner 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 Petitioner'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 Petitioner's contributory negligence. (R. pp. 44-45, 47-48).

The action arises out of the shooting on December 27, 2010 of Petitioner by Defendant Jones, her bitter ex-boyfriend and the father of her son, in the retail clothing store operated by Citi Trends in the Dillon Plaza Shopping Center, which was owned by Palmetto Properties. The plaza, located in Dillon, South Carolina, is considered an area with a low incidence of crime. (R. p. 413, lines 14-17). Prior to opening this store in March 2010, Citi Trends surveyed the shopping center and determined the location was a low security risk, considering that 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 were within about 1.1 miles from the shopping center. (R. p. 487). 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).

Nevertheless, 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 customers 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).

Petitioner's shooting by Defendant Jones was the result of the acrimonious, long-term relationship between Petitioner and Defendant Jones, which had been deteriorating for some time due to Defendant Jones's inability to control his anger (a problem of which Petitioner was aware), and which had ended around the Fall of 2010 when Petitioner started dating another man. (R. p. 302, line 15-p. 304, line 25; R. p. 307, line 33-p. 309, line 5; R. p. 318, lines 7-24; R. p. 319, line 9-p. 320 line 13; R. p. 323, lines 16-18). Following the break-up, Defendant Jones made numerous threats of violence against Petitioner by leaving voicemail messages on her cell phone or face-to-face, including some threats made only 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 Recordings¹).

¹ In addition to the Record on Appeal included in the Appendix prepared by Petitioner, the Court of Appeals also had available for review two exhibits in electronic format, which had also been provided to the trial court, specifically Voicemail Recordings and Surveillance Tape.

Prior to entering Citi Trends' store at approximately 6:00 p.m. on the night at issue, Petitioner, who was on the phone with Defendant Jones, informed him she could no longer continue their argument 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). About fifteen minutes later, Defendant Jones, appropriately dressed for a winter night and with his face clearly visible, entered Citi Trends and, without appearing to be in a hurry, walked toward the back of the store where Petitioner was selecting clothes. (R. p. 329, lines 2-3; R. p. 343, lines 5-17; R. p. 358, lines 19-24; R. p. 450; Surveillance Tape; R. p. 536; R. p. 538). Defendant Jones was inside Citi Trends for about a minute, during which time he reached Petitioner, talked to her (initially in a calm voice), and then shot her in the back with a hidden gun retrieved from under his shirt after she started running away from him. (R. p. 329, line 14-p.331, line 9). Only about three or four seconds passed from the moment Petitioner screamed and ran away from Defendant Jones until he shot her. (R. p. 362, lines 1-13; Surveillance Tape; R. pp. 540-549).

On July 17, 2013, Citi Trends filed a motion for summary judgment. (R. p. 63-65). Thereafter, Citi Trends filed a memorandum in support of its motion for summary judgment, arguing that Petitioner failed to present any evidence that Citi Trends owed her a duty to protect her from the criminal act against her because there was no evidence that the criminal act of Defendant Jones was foreseeable to the store and there was no evidence that the store's security measures were unreasonable under the circumstances; that Petitioner presented no evidence that Citi Trends was the proximate cause of her injuries; and that Citi Trends was entitled to judgment as a matter of law because of Petitioner's comparative negligence. (R. p. 67-94).

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). Petitioner appealed the trial court's order and the Court of Appeals affirmed in an unpublished opinion, *Bethea v. Jones*, Op. No. 2015-UP-350 (S.C.Ct.App. filed July 15, 2015), pursuant, among others, to: *Bass v. Gopal, Inc.*, 395 S.C. 129, 135, 716 S.E.2d 910, 913 (2011) (“[A] business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm.”).

ARGUMENT

I. STANDARD FOR GRANTING REVIEW

Petitioner moved this Court to issue a writ of certiorari pursuant to Rule 242(b), SCACR. A writ of certiorari “is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Among the reasons which will be considered by the Court in granting review are the two specifically cited by Petitioner: novel questions of law (Rule 242(b)(1)) and a conflict between the decision of the Court of Appeals and a prior decision of the Supreme Court (Rule 242(b)(3)). However, Petitioner's request should fail because this case presents no novel questions of law and the decision of the Court of Appeals in this case is not in conflict with a prior decision of this Court. Instead, the question of law regarding a business owner's duty of care to protect its invitees against the foreseeable risk of physical harm was elucidated in *Bass*, on which the Court of Appeal's decision relied.

Under her Argument I., Petitioner repeats the arguments made in her Petition for Rehearing and Rehearing En Banc brought before the Court of Appeals pursuant to Rule 219, SCACR. Arguing that “Certiorari is necessary for this Court to maintain uniformity of its decisions,” Petitioner adds a few paragraphs purporting to explain how the trial court strayed in

the application of *Bass* to the facts of the present case and also briefly comments on *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 757 S.E.2d 695 (2014), *reh'g denied* (May 22, 2014). Then, Petitioner erroneously concludes that the trial court in this case confined its foreseeability analysis to “violent crimes in or around the premises [of the Respondents].”

A review of the trial court’s order indicates that the trial court analyzed whether Petitioner presented evidence of prior criminal incidents and whether, in absence of prior criminal incidents, other factors supported a heightened risk imposing a duty on the business owner to provide some security, pursuant to *Bass*, 395 S.C. at 138, 716 S.E.2d at 915. Finding no evidence of prior criminal incidents in or around Citi Trends’ store and finding no evidence of other factors supporting a heightened risk, the trial court concluded that no evidence existed that the crime against Petitioner was foreseeable. (R. pp. 13-19). Thus, Petitioner does not show how the uniformity of this Court’s decisions is not maintained. More to the point, Petitioner does not show that the decision of the Court of Appeals in this case is in conflict with a prior decision of this Court.

In regard to Petitioner’s argument that this case involves a question of exceptional importance, Citi Trends notes that according to Petitioner’s reasoning, all the cases involving criminal acts of third parties against customers on the premises of businesses in this state would warrant the issuance of a writ of certiorari, making the grant of review a matter of right in these types of cases. Because of the Supreme Court’s discretion and power to grant review in general, Citi Trends believes this determination is to be left to the Court, but disagrees with Petitioner statement, even if it were supported by evidence (which it is not), that this case presents an issue of exceptional importance because South Carolina is “a state where the crime rate is more than

50% greater than the national average, and criminal acts in public places are not rare occurrences.”

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT TO CITI TRENDS, INC. BECAUSE PETITIONER PRESENTED NO EVIDENCE THAT CITI TRENDS, INC. OWED HER A DUTY UNDER THE CIRCUMSTANCES

The trial court properly granted, and the Court of Appeals properly affirmed, summary judgment in favor of Respondent Citi Trends because Petitioner failed to present any evidence for the court to find that Citi Trends owed a duty to Petitioner 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 v. Gopal, Inc.*, 395 S.C. 129, 133, 716 S.E.2d 910, 912 (2011). *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 the 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.

a. Factors to consider in determining the foreseeability of crime

In *Bass*, this 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, [this Court did] 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 *Bass* 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.” *Id.*, at 139, 716 S.E.2d at 915 (emphasis added).

Bass involved an attempted robbery at a Super 8 motel. The starting point in the Court's analysis of the foreseeability prong in *Bass* was the fact that prior incident reports for Super 8 were not available. *Id.*, at 140, 716 S.E.2d at 916. *Bass*, however, presented CRIMECAST reports showing the risk of crimes against persons (i.e. homicide, rape, robbery, and aggravated assault) at the Super 8 motel, the specific location where the attempted robbery against *Bass* took place. *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. Thus, in absence of prior criminal incidents at Super 8 motel, other factors supported a heightened risk.

This Court re-affirmed the balancing test in *Lord*. *Lord* was shot inside a "Cash on the Spot" business. *Id.* at 548, 757 S.E.2d at 696. The owner and the manager testified they were aware of a string of armed robberies in the county because the local 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.* at 558, 757 S.E.2d at 702. The shooter at the Cash on the Spot was also the perpetrator of the previous seven armed robberies, which happened at businesses that fit the profile of Cash on the Spot's business. *Id.* at 548, 757 S.E.2d at 696. 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.* at 560, 757 S.E.2d at 703. This Court concluded that the

circumstances in *Lord* presented a heightened risk of danger beyond the ordinary operation of Cash on the Spot and the depositions of the owner and the manager constituted the scintilla of evidence to send the case to the jury because it showed there was a foreseeable risk of a shooting at Cash on the Spot perpetrated by the known “madman.” *Id.* at 558, 560-61, 757 S.E.2d at 702, 703.

In the present case, however, Petitioner failed to present a scintilla of evidence that her shooting on Citi Trends’ premises was foreseeable to the store. There were no prior criminal incidents involving shooting or other types of violent crimes or crimes against persons at Citi Trends or in the shopping plaza where Citi Trends was located, as evidenced by the testimony of Sergeant James Hayes and Sergeant Jason Turner, both of the City of Dillon Police Department, and of James Holliday, the representative who testified on behalf of the landlord, Respondent Palmetto Properties. (R. p. 291, line 4-R. p. 292, line 18; R. p. 364, lines 12-15; R. p. 412, lines 22-25). They all considered the area where Citi Trends was located to be low crime, where only crime against property was encountered. (R. p. 298, lines 14-19; R. p. 366, line 1-p. 367, line 17; R. p. 368, lines 2-4; R. p. 416, line 17-p. 417, line 20).

Even Petitioner’s expert, Michael A. Hodge, admitted he did not find any violent crimes that took place inside Citi Trends prior to Petitioner’s injury and that no 911 calls were made from Citi Trends to the police department prior to this incident. (R. p. 384, lines 6-12; R. p. 395, lines 12-15). However, Petitioner contends that a review of the “violent crimes in or around the premises” is an “illusory geographic restriction” and a departure from *Bass* because “a strict geographic restriction is not found anywhere within *Bass*’s actual language.” Petitioner disregards the fact that, in the *Bass* Court’s view, the test applied by the circuit court and the court of appeals the facts in *Bass* was the “prior or similar incidents test” under which

“foreseeability may only be established by evidence of previous crimes on or near the premises.” *Bass*, 395 S.C. at 135-36, 716 S.E.2d at 913. It then stands to reason that when the Court subsequently addressed the balancing test and referred to “the presence or absence of prior criminal incidents,” it was referring to previous crimes on or near the premises. *Id.* at 138, 716 S.E.2d at 915. Further, in applying the balancing test to the specific facts of the case, the *Bass* court noted Bass’s inability to provide a report of criminal incidents at the Super 8 where the attack against him took place. *Id.* at 140, 716 S.E.2d at 913. Additionally, the trial court properly considered in its analysis the cases from other jurisdictions cited in *Bass* for their use of the balancing test because they were persuasive on this particular point that was not necessary to the analysis of the facts in *Bass*. (R. p. 16).

Also important, the Court specifically rejected in *Lord* a suggestion that the case held that prior armed robberies, which happened two or more miles away from the store, were a factor supporting a heightened risk of harm. *Lord*, 407 S.C. at 561 n.4, 757 S.E.2d at 703 n.4. Instead, the court found some evidence the shooting was foreseeable based on the store owner’s actual foresight of an attack by the “madman” who committed prior armed robberies and had been described in the newspapers. *Id.* at 558, 757 S.E.2d at 702. Therefore, the trial court in this case properly sought “violent crimes in or around the premises” as the starting point of its analysis of foreseeability, followed by an analysis of the evidence presented for any other factors supporting a heightened risk of danger. (R. p. 13-18).

The incident reports from the Dillon Police Department and the 911 calls from the Dillon Plaza Shopping Center referred to by Petitioner do not contain any violent crimes occurring inside Citi Trends or in the entire Dillon Plaza Shopping Center. (R. p. 448; R. pp. 563-853). Thus, Petitioner failed to provide evidence indicative of foreseeability through prior criminal incidents.

In their absence, Petitioner must show that “other factors support a heightened risk.” *Bass*, at 139, 716 S.E.2d at 915.

Petitioner presented an affidavit of his expert, in which 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). 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 by Petitioner’s counsel, believing they were all incident reports of 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 the one 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. 401, lines 10-13). 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).

The 911 calls from Dillon Plaza Shopping Center and the Dillon Police Department Incident Reports purportedly relied upon by Mr. Hodge show 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). Therefore, 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 Citi Trends 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 as a factor supporting a heightened risk, there are only five incidents within a half mile radius that include two simple assaults and a “cursing” in a parking lot across the street. More importantly, 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” even according to his standards. (R. p. 401, lines 10-13).

Additionally, 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.

Mr. Hodge’s statements at his deposition show that he did not take into consideration the actual reports. Further, the Court did not rely on expert testimony to determine the foreseeability of a third-party criminal act in its analysis of a business’s duty neither in *Bass* nor in *Lord*. In both cases, the Court accepted the testimony of an expert only as evidence of the reasonableness of the business’s preventative security measures. *Bass*, 395 S.C. at 141-42, 716 S.E.2d at 917; *Lord*, 407 S.C. at 559, 757 S.E.2d at 702.

Also, there are no bases presented for Mr. Hodge’s opinion, and consequently Petitioner’s contention, that violent crimes are more likely to occur in stores located in economically distressed areas. (R. p. 438; Pet. pp. 10-11). 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.

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, even Petitioner's expert characterized the FBI statistics as "challenged" for their reliability. (R. p. 404, lines 3-5). Therefore, Petitioner failed to provide evidence of other factors supporting a heightened risk of harm from violent crimes to customers of Citi Trends thorough all of the above.

Additionally, 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). Therefore, there was no actual foreseeability of violent crime happening on Citi Trends' premises.

Aside from the lack of evidence indicating foreseeability, this case presents a different situation than those encountered in *Bass* and the cases cited within or in *Lord*. 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. A violent criminal act against a random victim by is very different from a domestic disturbance. See, e.g., *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 764 (finding implicitly that a prior attack of an employee of Sam’s in the store’s parking lot committed by the employee’s husband was so dissimilar from the robbery of the plaintiff in the same parking lot by an unknown assailant because it did not warrant consideration in the court’s determination of foreseeability).

In the present case, the violent crime was not committed against a random victim. Defendant Jones went to Citi Trends to find Petitioner, knowing from her that she was there, and not to rob or assault 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). 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).

Petitioner argues that the trial court’s focus on the foreseeability of a violent attack by Defendant Jones on Petitioner is a misleading red herring. (Pet. p. 12). First, a review of the

order entered in this case contradicts the assertion that the trial court “focused” on the foreseeability of a violent attack by Defendant Jones on Petitioner. Rather, the trial court included that analysis and finding in addition to its analysis under *Bass*. (R. pp. 16-19). Second, 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 . . .”).

Thus, as a matter of law, Petitioner failed to bring any evidence that there was a foreseeable risk of a third party shooting a customer inside the Citi Trends’ store.

b. Consideration of security measures on a cost – efficiency scale

Citi Trends disagrees with Petitioner’s contention that “[t]he balancing test adopted by this Court requires a business owner to weigh the relative gain of each dollar spent in security against the economic feasibility of spending each additional dollar” and that “a business owner must actually examine the prevalence of crime and based upon that spend money to protect is patrons” (Pet. p. 13). While “a business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm[,]” this Court’s opinion in *Bass* does not support Petitioner’s contentions. *Bass*, 395 S.C. at 135, 716 S.E.2d at 913. As the Court specified, in *Bass* it “merely elucidate[d]” the approach to be used by the courts in this jurisdiction to determine the business owner’s duty to its invitees in regard to criminal acts of third parties. *Id.* at 139, 716 S.E.2d at 915. *Bass* “did not create any new right, liability, or cause of action.” *Lord*, 407 S.C. at 557, 757 S.E.2d at 701.

As far as applying the balancing approach to the facts in *Bass*, after finding that Bass “produced at least some evidence the aggravated assault was foreseeable” through the CRIMECAST report, the *Bass* Court determined that Bass “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. The Court did not look for and did not require a showing that the business owner of Super 8 had actually examined the prevalence of crime in the area and then increased its “expenditures on security until the last dollar [bought] a dollar in reduced expected crime costs . . . to the [business’s] guests.” *Id.* at 138-39, 716 S.E.2d at 915 (citing to *Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 514 (7th Cir. 2007)).

Consequently, Citi Trends is not required to show it considered whether any violent crimes were foreseeable when it made financial decisions in regard to the store’s security, but it is Petitioner’s burden to prove that the business owner’s security measures were not reasonable considering the foreseeability of the risk of physical injury to the store’s customers.

Additionally, Petitioner disregards that Citi Trends actually conducted a survey of the Dillon Plaza shopping center about a year prior to the incident herein and determined the location was a low security risk, considering among others that there had been no break-ins or armed robberies in this shopping center during the previous few years. (R. p. 487). Petitioner also ignores, like her expert did, the security measures that existed in the store in December 2010, even though they were not put in place because any violent crime was foreseeable. Those security measures were recommended or approved by Petitioner’s expert as reasonable measures in his deposition. To the extent it is necessary in the context of the questions presented by Petitioner, Citi Trends incorporates by reference the argument made in its appellate brief that

Petitioner failed to present evidence that Citi Trends' security measures were unreasonable given the foreseeable risk of harm to its customers. (App'x pp. 911-916).

c. Internal policy requiring greeting

Petitioner's contention that Citi Trends' internal policy requiring greeting of all customers upon entering the store provides evidence of Citi Trends' duty was not supported by authority neither in Petitioner's memorandum in opposition of Citi Trends' motion for summary judgment, nor in Petitioner's appellate brief. (R. pp. 112-113; App'x pp. 880-881). The first time Petitioner provided authorities purportedly in support of this position was in Petitioner's Petition for Rehearing and Rehearing En Banc. (App'x pp. 961-962). Consequently, this issue was not preserved and cannot be properly reviewed at this time.

Additionally, the authorities Petitioner cited do not stand for the proposition that the internal policy of greeting provides evidence of Citi Trends of the existence of a duty, but that internal policies are admissible evidence in negligence actions on the issue of the failure to exercise due care. *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991); *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 95 S.E. 109, 109 (1918). However, failure to follow an internal policy could serve as evidence of the standard of care only after that duty was established by law. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 248, 711 S.E.2d 908, 912 (2011) (holding that violation of an internal policy "cannot be said to constitute the voluntary undertaking of a duty" but "it could simply serve as evidence of the standard of care, once that duty was established by law).

III. THE COURT OF APPEALS DID NOT REACH THE ISSUE OF PROXIMATE CAUSE AND PETITIONER DID NOT ADDRESS IT IN HER PETITION

Petitioner includes as an additional question for review the issue of proximate cause. The Court of Appeals did not reach this issue since no authorities were quoted in this regard and the issue of duty was dispositive. (App'x pp. 952-954). More importantly, Petitioner abandoned this issue because she did not specifically argue it in her Petition. For this reason, Citi Trends will not address it in its return, but incorporate by reference its argument on this issue from Citi Trends' appellate brief. (App'x pp. 916-918).

CONCLUSION

For all the above reasons, the trial court properly granted summary judgment in favor of Citi Trends and the court of appeals properly affirmed. Therefore, Citi Trends submits this Court should deny the Petition for a Writ of Certiorari.



Catharine Garbee Griffin
Alina Dudau
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
P.O. Box 8057
Columbia, South Carolina 29202
(803) 799-9091
cgriffin@brblegal.com
Attorneys for Respondent Citi Trends, Inc.

November 25, 2015

RECEIVED

NOV 25 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No: 2012-CP-17-00295
Supreme Court No. 2015-002231

Ebony Bethea, Petitioner,

v.

Derrick Jones, John Doe, Individually and as
Employee/agent of Citi Trends, Inc., Citi Trends, Inc.,
and Palmetto Properties, Inc.
Of whom Citi Trends, Inc., and
Palmetto Properties, Inc. are Respondents.


CERTIFICATE OF SERVICE

I, Jilian M. Kurka, Paralegal 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 Citi Trends, Inc. Return to Ebony Bethea's Petition for Writ of Certiorari, 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:

Roy T. Willey, IV
Eric M. Poulin
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Robert W. Buffington
Haynsworth Sinkler Boyd, P.A.
PO Box 340
Charleston, SC 29402-0340

Sarah Spruill, Esquire
Haynsworth Sinkler Boyd, PA
P. O. Box 2048
Greenville, SC 29602


Julian M. Kurka

November 25, 2015