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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas
The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-17-00295

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.

RETURN OF RESPONDENT PALMETTO PROPERTIES, INC. TO EBONY
BETHEA'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This Petition for a Writ of Certiorari (“Petition”) arises from a unanimous, unpublished *per curiam* opinion of the Court of Appeals. (App. at 952-54). It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals. The Petition fails to acknowledge that the existence and scope of duty are questions of law for the Court and fails to address the facts of this case in which Ebony Bethea herself was in the best position to protect herself from the injuries she suffered at the hands of her ex-boyfriend after he made repeated threats to harm her. Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE GRANT OF SUMMARY JUDGMENT TO PALMETTO PROPERTIES, INC. BASED IN ITS FINDINGS THAT THERE WAS NO DUTY TO PROTECT EBONY BETHEA FROM BEING SHOT BY HER EX-BOYFRIEND AT A STORE LOCATED WITHIN A SHOPPING CENTER OWNED BY PALMETTO PROPERTIES, INC. BECAUSE THE INCIDENT WAS NOT FORESEEABLE, THE SECURITY MEASURES AT THE SHOPPING CENTER WERE NOT UNREASONABLE, AND THE INCIDENT OCCURRED WITHIN THE LEASED PREMISES OF PALMETTO PROPERTIES, INC.’S TENANT?

COUNTER-STATEMENT OF THE CASE AND FACTS

This case stems from injuries suffered by Bethea in a shooting committed by her on again/ off again boyfriend, Derrick Jones, on December 27, 2010. On July 16, 2012, Bethea brought this action against Jones; the store where the shooting occurred, Citi Trends, Inc. (“Citi Trends”); and the owner of the Dillon Plaza Shopping Center (“Dillon Plaza”) where the shooting occurred, Palmetto Properties, Inc. (“Palmetto”). (R. at 25-41).

I. After repeated threats, Jones shot Bethea.

The facts surrounding the tumultuous relationship between Bethea and Jones are not in dispute. Bethea and Jones have a son together and were in a relationship off and on for approximately ten years. (R. at 303, 305, 318). Bethea knew Jones could not control his anger, particularly when it came to her spending time with other men. (R. at 307-09, 311, 314-16). When Bethea started dating someone else in late 2010, Jones took every opportunity to try to catch the couple together. (R. at 320-22).

Bethea called the police after she learned Jones appeared at her new boyfriend's mother's house. (R. at 322-24). She told police that Jones had threatened to kill her and her boyfriend. (*Id.*). When questioned whether anything could have prevented Jones from shooting her, Bethea responded that if Jones had been incarcerated after this incident it might have helped, but concluded that she "didn't know if this would have helped or not because I'm thinking maybe if he would have got out, he probably still would have done what he's done." (R. at 333-34). Bethea further testified that Jones was so angry with her that it did not matter if she saw him at day or night or in front of the Sheriff's Department because he was determined to hurt her. (R. at 340).

Jones continued to stalk Bethea. He threatened that Bethea would be "paralyzed by Christmas." (R. at 339). He left at least seventeen (17) threatening voice mail messages for Bethea and warned if he were going to go to prison, it would be for "something big." (R. at 506, Message 6). On Christmas day, Bethea took their son to open presents at Jones's house. (R. at 326). While there, Jones threatened to hit Bethea and started "talking crazy mess about [Bethea]." (*Id.*).

Two days later at around 6:00 p.m., Bethea went to Citi Trends to exchange some clothes for her son. (R. at 327, 342). She testified that minutes earlier she was on the

phone with Jones and told him that she was going inside Citi Trends so she could not talk. (R. at 326, 341). At that time, she did not tell anyone at Citi Trends about Jones and the threats he had made. (R. at 348). There is no evidence that either Citi Trends or Palmetto had any knowledge of the relationship between Jones and Bethea or Jones's threats to Bethea.

Roughly fifteen minutes after Bethea started shopping, Jones arrived at Citi Trends. (R. at 343). As shown on the store's surveillance tape, when Jones entered the store he was not wearing a hood, both hands were visible, and no gun was apparent. (Tape). There was no outward indication that Jones had any criminal motive. Jones found Bethea in the back of the store, approached her, and calmly stated he was "tired of [Bethea] disrespecting" him and put his fingers in her face. (R. at 329-30). Bethea then told Jones that he was "not going to be putting [his] fingers in [her] face." (*Id.*). Jones then lifted his shirt and said "Oh, I ain't going to put my fingers in your face." (*Id.*). Bethea then began running towards the front of the store. (R. at 330-31). Three to four seconds later, Jones shot her in the back, leaving her paralyzed from the chest down. (*Id.*). Jones then fled.¹

Bethea testified that the incident happened so fast that the two women working at Citi Trends did not have time to do anything to protect her. (R. at 347). Law enforcement further corroborated that there was nothing the store employees could have done. (R. at 362-63). The shooting occurred in the store, not the common areas under Palmetto's control.

¹ Jones pled guilty to attempted murder and possession of a firearm. He is currently incarcerated.

II. The history of crimes in and around Citi Trends and Dillon Plaza.

Law enforcement testified that there is about one shooting a month in Dillon, mostly at nightclubs or residences. (R. at 364-65). Prior to Bethea's injury, there had not been any shootings or any other violent crime at Dillon Plaza, and police considered it a low crime area. (R. at 413). In fact, the only other crimes in the stores located at Dillon Plaza were shoplifting, copper theft from a vacant store, and financial crimes, such as embezzlement. (R. at 366-67, 416-17). Even considering the crime statistics presented by Bethea's expert for the half-mile radius surrounding the shopping center, the only evidence of specific crimes were an aggravated assault (1/2 mile away), one carjacking without weapon, (1/3 of a mile away), two simple assaults (1/2 mile away), and one simple assault (cursing only), that occurred in the theatre parking lot across the street. (R. at 448).

III. The trial court granted summary judgment, which was affirmed by the Court of Appeals.

After extensive discovery, Palmetto joined Citi Trends' motion for summary judgment on the grounds that Palmetto owed no duty to protect Bethea from Jones or to warn Bethea about Jones, given the lack of foreseeability of this crime and Bethea's specific knowledge that Jones was threatening to shoot and paralyze her. (R. at 95-99). Palmetto also sought summary judgment because there was no evidence any action by Palmetto caused Bethea's injury, or stated another way, there was no evidence that Palmetto reasonably could have protected Bethea from the shooting. (*Id.*). The motions were heard on January 7, 2014. At the hearing, Palmetto raised an additional argument that it was entitled to summary judgment because Bethea's injuries occurred in Citi Trends, an area that was not under Palmetto's control. (R. at 137:6-10).

The trial court granted summary judgment to Citi Trends and Palmetto. (R. at 158:9-17). The trial court formalized that decision in a written order dated January 22, 2014, granting summary judgment based on its findings (1) that Palmetto did not owe Bethea any duty with respect to Jones's criminal actions, (2) that there was no evidence Palmetto's security measures were unreasonable, (3) that there was no evidence Palmetto proximately caused Bethea's injuries, and (4) that Palmetto was entitled to summary judgment because Bethea's comparative negligence exceeded that of Palmetto as a matter of law. (R. at 3-24). This appeal followed.

The Court of Appeals affirmed the trial court's order granting summary judgment in an unpublished opinion issued pursuant to Rule 220, SCACR. (App. at 952-54). The Court of Appeals summarily denied Bethea's Petition for Rehearing. (App. at 965-66).

ARGUMENT

The Court of Appeals affirmed the grant of summary judgment in a brief, unpublished opinion. In reaching its result, the Court of Appeals referenced the summary judgment standard generally, the standard to be applied in a premises liability case, and the general rule that a commercial landlord is not liable for criminal actions that occur inside the leased premises of a tenant. The Court of Appeals declined to rule on the additional arguments presented by the Respondents based on its disposition of the preliminary issue of duty.²

² As set forth above, the trial court's order rested on four grounds: (1) that Palmetto did not owe Bethea any duty with respect to Jones's criminal actions, (2) that there was no evidence Palmetto's security measures were unreasonable, (3) that there was no evidence Palmetto proximately caused Bethea's injuries, and (4) that Palmetto was entitled to summary judgment because Bethea's comparative negligence exceeded that of Palmetto as a matter of law. (R. at 3-24). The Court of Appeals only ruled on the first of these issues, and Bethea did not raise the remaining issues in her Petition for Rehearing. As set forth in Palmetto's Respondent's brief, each of these grounds also supports affirmance in

I. The Court of Appeals correctly found that Palmetto did not owe any duty to protect or warn Bethea against the danger of injury at the hands of Jones, and nothing about the opinion of the Court of Appeals is inconsistent with this Court's precedent.

In South Carolina, a landowner or merchant only has a duty to protect invitees from foreseeable criminal harm. *Bullard v. Ehrhardt*, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984). The mere fact that an injury occurs on the defendant's premises does not establish any liability on the part of the defendant, and no such liability may be presumed. *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991).

With respect to random crimes occurring on a business premises, the South Carolina Supreme Court refined the rules relating to duties with respect to criminal acts of third parties in *Bass v. Gopal, Inc.*, 395 S.C. 129, 134-36, 716 S.E.2d 910, 913-16 (2011), a case cited by the Court of Appeals in its opinion. There, the court adopted a balancing approach requiring an analysis of "(1) if a crime is foreseeable, and (2) given the foreseeability, [a determination of] the economically feasible security measures required to prevent such harm." *Id.* at 139, 716 S.E.2d at 915. The balance is between the degree of foreseeability and the cost of additional safety measures. "As the foreseeability of a potential harm increases, so, too, does the duty to prevent against it." *Id.* If there is some evidence a crime was foreseeable, the reviewing court must determine whether the defendant's preventative actions were unreasonable given the risk. *Id.*

this case. Palmetto hereby incorporates all of the arguments presented in its Respondent's brief and those arguments raised by its Co-Respondent, Citi Trends.

A. Jones's action was not foreseeable by Palmetto.

As an initial matter, this was not a random criminal act. Jones was determined to injure Bethea. As shown above, there was no history of violent crime in or around Dillon Plaza. With respect to foreseeability, “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 of security if other factors support a heightened risk.” *Id.* In this case, there is no evidence that other factors support a heightened risk, and therefore, the foreseeability prong of the *Bass* test has not been satisfied.

In *Bass*, the Supreme Court found that there was evidence of a heightened risk and therefore foreseeability for a shooting incident at a hotel based on a report showing the incidence of crimes against persons *at the hotel site* was well above the national state average risk. *Id.* at 140, 716 S.E.2d at 916. The court there noted that it “[did] 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.” *Id.* The *Bass* court was careful to state that South Carolina businesses are not required to “anticipate crime by virtue of the unfortunate fact that crime is endemic in today’s society.” *Id.* Thus, generalized evidence relating to a large geographic area alone will not support a finding that there is a heightened risk of crime at a location with no history of similar crimes. As discussed above, there was no evidence of similar crime in or near Dillon Plaza.

Heightened risk can also be shown by evidence of knowledge of recent, similar crimes in the area. *Lord v. D & J Enters.*, 407 S.C. 544, 757 S.E.2d 695 (2014). *Lord* stemmed from a shooting at a lending business committed by an armed robber who had committed numerous similar crimes in the area. The Court there found the foreseeability prong of the *Bass* test was met based on a wave of high profile crimes in the area targeting similar businesses, and the business owner's warning to his employees to be careful because "there's a madman on the loose." In *Lord*, the record showed that not only was the crime foreseeable, it was actually foreseen by the business owner.

Here, however, there was no location specific or other, specific rather than general, evidence that this crime was foreseeable. Local police and the corporate representatives of Citi Trends and Palmetto all testified that there was no history of violent crime in the store and shopping center. (R. at 235, 291, 364, 412, 448). Local police further testified this event occurred in a low crime area. (R. at 368, 416-17). Further, there is no indication that Palmetto had any knowledge of the danger Jones posed to Bethea. (R. at 298). Thus, there is no evidence showing a heightened risk of a violent attack or shooting at Dillon Plaza.

In her Petition, Bethea takes the incredible position that the actual facts of this case (the relationship between Jones and Bethea and the history of threatening behavior) are a "red herring." (Petition at 12). She attempts to rely instead on conclusory statements made by her expert, Michael Hodge, to the effect that Citi Trends and Dillon Plaza are in a high crime area. However, "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) (citations omitted). “[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. Hodge’s testimony does not meet this standard as set forth in Palmetto’s Respondent’s Brief. (App. at 936-38).

For these reasons, the Court of Appeals correctly found there was no duty in this case. Nothing about the analysis of the Court of Appeals is inconsistent with *Bass* or *Lord*. Moreover, the disposition of this case is based on its unique facts and does not present general questions of exceptional importance.

B. Palmetto’s security measures were reasonable given the facts of this case.

In her Petition, Bethea also attempts to argue that Palmetto’s actions were unreasonable given the risk. Here, Palmetto was merely the landlord to Citi Trends. It did not manage the Citi Trends location. (R. at 255, 267). Nor did it have any kind of control over the security measures deployed by Citi Trends; thus, any argument relating to the store premises is inapplicable to Palmetto.

With respect to Palmetto, the evidence shows that Palmetto is a Dillon business run by Dillon residents that owns roughly two dozen properties. (R. at 251-52). Palmetto has its roots in Dillon, its owners and employees know the Dillon landscape and Dillon residents, and it has good connections with the local police and sheriff’s departments. (R. at 265, 267). Palmetto had owned Dillon Plaza since 2001 without incident. The Citi Trends lease with Palmetto included some provisions for Citi Trends to install security equipment. (R. at 265). In addition, Palmetto “would check the property periodically. And other tenants or the local police would have told us [] if there was a problem.” (R. at

266). The evidence further showed that Palmetto had a relationship with local law enforcement. (R. at 265, 267).

As far as the other measures suggested, Bethea does not provide any evidence of the cost of those measures or the degree of additional security those measures would provide. As stated in *Bass*, a business “should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs ... to the [invitees].” *Id.* at 138-39, 716 S.E.2d at 915. However, in this case, history showed that the expected crime costs for physical assaults were zero; thus, Palmetto should not have been expected to increase its spending on security by even a dollar.

For all of these reasons, the Court of Appeals correctly analyzed the legal issue of whether there was a duty in this case and determined Palmetto was entitled to summary judgment.

II. The Court of Appeals correctly included a citation to *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 613, 620 S.E.2d 54, 56 (2005).

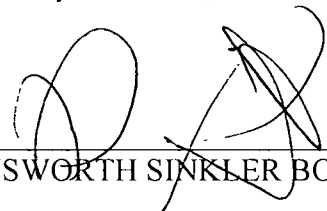
At the summary judgment hearing and in its Respondent’s brief, Palmetto argued that it was entitled to summary judgment because the injuries to Bethea occurred in Citi Trends, an area outside the control of Palmetto. Absent an exception, a landlord owes no duty to protect a tenant’s customers from the criminal acts of third parties. *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 613, 620 S.E.2d 54, 56 (2005) (upholding grant of summary judgment in “a negligence action against a commercial landlord arising out of a shooting which occurred inside the leased premises”). There is no evidence that Palmetto, the commercial landlord, controlled or possessed Citi Trends or that it undertook to provide security within Citi Trends. *Jackson* arises in the context of commercial landlords, not general premises liability, and there is no reason to believe

Bass and *Lord* changed the law in this area. Accordingly, the Court of Appeals correctly included this alternate sustaining ground in its opinion.

CONCLUSION

Bethea has failed to present any argument in her Petition that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with *Bass* or *Lord*, nor does the Petition present any question of exceptional importance. Therefore, the Petition must be denied.

Respectfully submitted,



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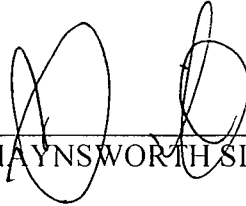
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PROOF OF SERVICE

The undersigned hereby certifies that, on the date indicated below, he/she served counsel of record with a copy of *Return of Respondent Palmetto Properties, Inc. to Ebony Bethea's Petition for A Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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