THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Supreme Court Case No. 2015-001921

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.

BRIEF OF PETITIONER

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1. Whether the Court of Appeals erred in failing to apply Restatement (Second) of Torts § 323 to Ms. Wright's allegation that Respondents voluntarily assumed a duty to secure their premises.

STATEMENT OF THE CASE

Petitioner Denise Wright filed suit on June 24, 2011 against Respondents PRG Real Estate Management, Inc. ("PRG"), Franklin Pineridge Associates, and Karen Campbell for negligence, violation of implied warranties, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (App. pp. 78-84). The suit arose from a criminal attack against Ms. Wright on September 18, 2008, at the hands of two unidentified perpetrators. Respondents own or manage Wellspring Apartments, the complex where Ms. Wright lived and where she was attacked. Respondents contend they owed Ms. Wright no duty to reasonably secure Wellspring's premises and that any of their alleged wrongdoings were not a proximate cause of Ms. Wright's losses.

On September 23, 2013, the Honorable W. Jeffrey Young of the Richland County Court of Common Pleas entered summary judgment in Respondents' favor on all claims. (App. pp. 56-76). Ms. Wright filed a timely notice of appeal for the negligence and SCUTPA claims on October 8, 2013. The Court of Appeals heard arguments on January 15, 2015. On July 15, 2015, a divided court affirmed summary judgment on both claims. (App. pp. 1-20). Judge Lockemy concurring in part and dissenting in part, stated that, while the SCUTPA claim should be dismissed, Ms. Wright was entitled to a trial on her negligence claim. Id. Ms. Wright submitted a timely petition for rehearing on July 23, 2015, relating solely to her negligence claim. (App. pp. 23-33). The petition was denied on August 20, 2015, with Judge Lockemy dissenting. (App. p. 21-22). Ms. Wright submitted a petition for writ of certiorari on September 15, 2015, asserting three proposed issues for review. The Court issued an order on August 25, 2017, granting review of one of Ms. Wright's proposed issues.

STATEMENT OF FACTS

Denise Wright became a tenant of Wellspring Apartments in the Harbison area of Columbia, South Carolina in May 2003 after considering at least two other apartment complexes in the area. (App. pp. 381-82). Wellspring was owned by Franklin Pineridge Associates, operated by PRG, and managed on a day-to-day basis by PRG employee Karen Campbell. (collectively Respondents). Ultimately, it was the amenities Respondents offered that convinced Ms. Wright to choose Wellspring over its competitors. (App. p. 382 at 40:13-21). Wellspring had a pool and offered its tenants access to the nearby Harbison Recreation Center. (App. p. 382 at 40:17-19). Most of all, Ms. Wright based her decision on Wellspring's security services. (App. p. 427 at 119:11-12). She was told Wellspring had security officers on duty who patrolled the premises. (App. p. 383 at 40:25-41:6; 391 at 56:7-8). Respondents told Ms. Wright to call the officers' cell phones or a "security pager" the officers carried if ever in need. (App. p. 501; 705 at 264:23 – 706 at 265:24). These security services were part of Respondents' courtesy officer program offered for tenant protection so that "if somebody needed somebody or needed assistance for anything, a courtesy officer would be there." (App. p. 697 at 229:2-6; 230:10-14).

On September 18, 2008 at approximately 10:30 p.m., Ms. Wright left choir practice and drove home to her apartment. (App. p. 357 ¶ 5; 392 at 58:3-7). When Ms. Wright arrived at Wellspring, she exited her car and walked toward the ramp leading to her front door. D. Wright Dep. (App. p. 395, at 63:13-15). The nearly full parking lot was dimly illuminated by pole lights and small dome lights in the buildings' breezeways. Many parts of the parking lot and the ramps leading to the building had little to no light illuminating the area. The pole light nearest Ms. Wright's car was not working. (App. p. 386 at 47:3-5). There was no sign of the security officers

Wellspring promised Ms. Wright when she moved in. The shrubs in front of her building were overgrown and capable of concealing unknown persons or potential assailants. (App. p. 446 ¶ 8).

As Ms. Wright neared the ramp and steps leading to her apartment, she was attacked by two men. (App. p. 396 at 65, lines 1-5). Ms. Wright could not see the perpetrators as she drove up and parked her car due to dense, overgrown, and much maligned shrubbery near the ramp, as well as the darkness enveloping her apartment building. (App. p. 395 at 63, lines 13-15; R. p. 357 ¶ 9-10). The men accosted Ms. Wright and shoved gun barrels in her face. (App. p. 396 at 65:9-13). Too scared to scream, Ms. Wright acceded to her attackers' demands. The perpetrators needed money and intended to pillage Ms. Wright's bank account to get it. No matter how much money the perpetrators could ultimately steal from Ms. Wright, she was assured that she would be killed when it was all over. Ms. Wright was pushed back toward her car and forced by her attackers to drive to various banks and withdraw hundreds of dollars. (App. p. 402-11). Along the way, the perpetrators repeatedly promised to kill Ms. Wright, telling her at one point, "You will never see home again." (App. p. 405 at 80, lines 7-8).

Unsatisfied with the amount of money in Ms. Wright's account and visibly nervous over some sort of drug debt they owed, the perpetrators forced Ms. Wright to park her car at a closed fast food restaurant behind a darkened shopping center. (App. p. 404 at 78 line 18 – 79 line 8; 406 at 82 line 21 - 83 line 7). Ms. Wright feared this was the moment she would be killed. One of the attackers said bluntly: "We've got to kill you." (App. p. 408 at 86 lines 17-18). The other attacker put his hand down the back of Ms. Wright's pants, called her "fatty ass," and pondered aloud taking Ms. Wright back to her apartment and "hav[ing] some fun before we kill her." (App. p. 422 at 110:9, 11). After several minutes, the perpetrators demanded Ms. Wright drive to a nearby apartment complex. During the drive, Ms. Wright was forced to listen as the

perpetrators debated how and when they would kill her. One suggested Ms. Wright's dead body should be thrown in a river. (App. p. 408 at 86 lines 16-19). Once at the apartment complex, the perpetrators fled the car. (App. p. 410-11 at 90, lines 5 – 22).

Ms. Wright drove away and went to her daughter's house. A police officer was dispatched to Ms. Wright's daughter's house and took her statement. Shortly after the attack, Ms. Wright met with Wellspring personnel. Ms. Wright had a single primary question for Wellspring, "Where [were] these security officers that are supposed to be walking the beat?" (App. p. 425 at 116, lines 16-17). The Wellspring representative could only shrug her shoulders and say, "I'm sorry." (App. p. 425 at 116 line 22).

STANDARD OF REVIEW

To grant a motion for summary judgment, the circuit court must find that "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). An appellate court

"applies the same standard used by the [circuit] court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

Columbia is a competitive residential rental market. Potential renters have options and property owners must offer a competitive bundle of services to entice tenants. Square footage and rent rates remain important but it is the extra services a landlord offers that may help it stand out from the pack. Respondents' business at Wellspring Apartments succeeds by offering potential tenants more than just four walls and a roof. Respondents offer entertainment options like access to walking trails and a full-service recreation center. They also sell potential renters peace of mind by both promising and providing security services for tenants. Respondents do not just rent land or building space, they rent peoples' homes, where they want and need to feel reasonably secure. For Denise Wright, a woman in her sixties living alone, it was Wellspring's security program that helped sealed the deal. Unfortunately, it was also the security program that nearly cost Ms. Wright her life.

Ms. Wright was lured into a false sense of security by Respondents' courtesy officer program, a robust service involving daily patrols by trained law enforcement personnel committed to rooting out suspicious activity and being available by phone and pager for tenants in need. When Ms. Wright decided to move to Wellspring rather than its neighboring competitors, the courtesy officer program was a crucial factor. However, at the time of her attack, the program Ms. Wright relied on was in shambles. There were no patrols to scare off her captors or to even make them nervous. There was no one to respond to calls for assistance. There was only pitch darkness and men leaping from behind an overgrown bush near Ms. Wright's front door.

The courtesy officer program Respondents planned, undertook and used to secure Ms. Wright's tenancy failed her. In a split decision, the Court of Appeals held Respondents could not be held liable for the program's failures. As Judge Lockemy recognized in his dissent, that ruling is at odds with a long-standing common law rule that required Respondents to operate their voluntarily assumed courtesy officer program in a reasonable manner.

I. The Court of Appeals Applied the Wrong Standard to Ms. Wright's Duty Claim.

Ms. Wright's negligence claim alleges Respondents had a duty to conduct a reasonably prudent courtesy officer program at Wellspring because Respondents chose to undertake the program, because Ms. Wright relied on it when she moved to Wellspring and every day leading to her attack, and because the program's failures increased her risk of attack. To evaluate the Court of Appeals' analysis of this claim, the Court should start with two key principles. First, South Carolina law uses Restatement (Second) of Torts § 323 to determine whether a party's voluntarily undertaken duty supports a tort claim. Second, the Court of Appeals' majority opinion did not cite or apply Section 323 to Ms. Wright's negligence claim.

Section 323 stands on its own firm doctrinal footing and may not be narrowed or ignored when considering a residential landlord's voluntarily assumed security program. In fact, Section 323's application is not at all dependent on common law duty theories created in the landlord-tenant context. See Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1209 (D.S.C. 1990) (outlining four landlord-specific duty theories); Cramer v. Balcor Prop. Mgmt., Inc., 848 F. Supp. 1222, 1224-25 (D.S.C. 1994) ("Cramer II") (considering the Cooke theories). These theories and Section 323 sometimes run on parallel tracks but the Cooke/Cramer theories are no substitute for a Section 323 analysis when a landlord is accused of creating and poorly performing an apartment security program. Goode v. St. Stephens United Methodist Church, 329

S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (considering a landlord's security program under both Section 323 and an independent common law rule); Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 295, 775 S.E.2d 399, 409-10 (Ct. App. 2015) (Lockemy J., dissenting) (citing Goode to show that a tenant "may be able to establish a duty owed by a landlord who has undertaken to provide security pursuant to section 323").

Therefore, Section 323 is a glaring omission from the Court of Appeals' analysis. If Section 323 had been properly applied, then Respondents' summary judgment motion should have been denied. Respondent Karen Campbell, Wellspring's property manager when Ms. Wright was assaulted, made three crucial admissions in her deposition testimony: (1) Respondents voluntarily undertook a courtesy officer program at Wellspring; (2) Respondents were required to conduct the program in a reasonable manner; and (3) The program was not administered as required by its governing documents. (App. p. 642 at 19:22-20:9; 648 at 44:6-19). These admissions, along with Ms. Wright's statements and her expert's testimony, were sufficient to establish Respondents' duty and to defeat Respondents' motion.

A. Section 323 is the Universal Standard of South Carolina Law for Voluntarily Undertaken Duties.

For negligence claims, a legal duty may be created by statute, contract, relationship, status, property interest, or another special circumstance. Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). This Court has ruled that, in general, the landlord-tenant relationship does not impose on landlords a duty to secure their premises for tenants' benefit. Cramer v. Balcor Prop. Mgmt., Inc., 312 S.C. 440, 443, 441 S.E.2d 317, 318-19 (1994) ("Cramer I"). Cramer I, however, made certain its holding was a general rule, not a blanket one. Id. at 319 n. 1, 441 S.E.2d at 443 n. 1 (noting a tenant "is not precluded from

asserting a general negligence principle"). One such "general negligence principle" excepted from Cramer I's rule is this voluntarily undertaken duty rule:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increases the risk of such harm; or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Section 323 had been South Carolina law for a decade when Cramer I was decided, and Cramer I neither held nor suggested Section 323 does not apply in the apartment security context.

In fact, all voluntarily undertaken tort duties are "rooted" in Section 323. Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012); Wright, 413 S.C. at 291, 775 S.E.2d at 407 (Lockemy J., dissenting). South Carolina courts began applying Section 323 in Roundtree Villas Association v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984).[1] Roundtree was also a case involving residential rental units which held that a lender who took over construction repairs at a condo project had a duty to use reasonable care in conducting the repairs. Id. The lender had no independent obligation, but having undertaken repairs, the lender could face liability for performing them negligently. Id. at 423, 321 S.E.2d at 51 ("a common law duty to use due care arose" from the lender's undertaking). The following year, the Court of Appeals applied Section 323 twice to create a duty in wildly varying circumstances. Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985); Winburn v. Ins. Co. of N. Am., 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985). Under Section 323, a party may be charged with the very serious duty to supervise an emotionally disturbed relative

[1] The Court first considered Section 323 in Shropshire v. Jones, 277 S.C. 468, 471, 289 S.E.2d 410, 411 (1982), but did not apply it there because the defendant never actually undertook to provide services on the plaintiff's behalf.

(Crowley) or the menial duty to oversee boat repairs (Winburn) if the party volunteers for and attempts the task. Voluntarily undertaken duties may be imposed on a textile company controlling water levels in a reservoir or a police officer assisting an intoxicated bar patron. Miller v. City of Camden, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct. App. 1994); Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 340 (1991).

Moreover, the Court of Appeals has previously considered Section 323 in the apartment security context. Goode, 329 S.C. at 445, 494 S.E.2d at 833. In Goode, a tenant's social guest attacked in an apartment complex's common area alleged the landlord undertook a duty to provide reasonable security by undertaking routine inspections and periodically notifying tenants of crime occurring in the area. Id. at 438-39, 494 S.E.2d at 830. Goode considered but ultimately refused to find a voluntary undertaking because a tenant's guest was not the intended recipient of the security program's benefits and, since the guest was unaware of the program, he could not have relied on it when entering the complex. Regardless of its outcome, Goode is crucial to this case because it shows Section 323 is the proper analytical framework for the duty Ms. Wright asserts. Plus, Ms. Wright has a much stronger claim than the Goode plaintiff because, as a tenant, she was the intended beneficiary of Respondents' courtesy officer program and she relied on the program when choosing to live at Wellspring.

Respondents have suggested applying Section 323 to Ms. Wright's claim represents bad public policy. (App. p. 43). However, South Carolina courts have never doubted the policy wisdom of Section 323. The cases on which Respondents rely only caution against expanding the recognition of voluntarily assumed duties in situations that do not meet Section 323's requirements. For example, in Staples v. Duell, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997), the court's policy concern was not Section 323's viability but the plaintiff's attempt

to expand its application beyond its recognized requirements. Staples did not hold that the defendant could not undertake a legal duty, it held only that an undertaking would require proof the defendant's service "either increases the risk of harm to others or others detrimentally rely" on the service. Id.; see also Johnson, 401 S.C. at 506, 737 S.E.2d at 515 (noting this court's "reluctance to expand the voluntary assumption of duty doctrine beyond the circumstances set forth in the Restatement 323").

Additionally, Respondents base their policy argument on cases that present very different duty claims. Respondents cite Staples and Underwood v. Coponen, 367 S.C. 214, 219, 625 S.E.2d 236, 239 (Ct. App. 2006), both of which considered a landowner's proposed duty to perform tree maintenance for the benefit of motorists traveling on adjacent highways. Both held a landowner's prudent choice to periodically trim plants near her property line would be discouraged if doing so would expose her to liability to the motoring public. In each of these cases, there was no existing relationship between the parties and no self-interested business motive for inspecting and trimming the trees. In those circumstances, the fear of a "chilling effect" is real. Here, however, Ms. Wright was Respondents' tenant, and Respondents' courtesy officer program was not a benevolent undertaking. Instead, the program was a calculated business decision designed to entice tenants to choose Wellspring over its competitors. (App. p. 383 at 40:25-41:6; 391 at 56:7-8). Requiring Respondents to take reasonable care for their business-boosting undertakings does not run afoul of South Carolina public policy.

In sum, Section 323 applies to all types of voluntarily undertaken duties in any factual context and has been applied to apartment security cases both in South Carolina and a number of

other jurisdictions.[2] Since Section 323 applies universally to voluntarily assumed duties and Ms. Wright bases her claim on Respondents' undertakings at Wellspring, the Court of Appeals should have applied Section 323 when considering the circuit court's summary judgment order.

B. The Court of Appeals' Ruling does not Contain a Section 323 Analysis or its Equivalent.

While the parties agree the Court of Appeals' majority opinion makes no reference to Section 323, Respondents have suggested the analysis actually applied was its equal. (App. p. 41). However, the "affirmative acts" analysis described in Cramer II and applied in this case is less flexible and more onerous than what Section 323 demands. Wright, 413 S.C. at 295, 775 S.E.2d at 409-10 (Lockemy J., dissenting) (explaining that the majority's reliance on the "affirmative acts" exception imposed requirements inapplicable to Ms. Wright's undertaking claim).

Even before Cramer I, courts applying South Carolina law recognized as a general rule that a landlord does not owe security related duties to tenants merely because of the landlord-tenant relationship. Cooke, 741 F. Supp. at 1209 (citing Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1985)). In Cooke, the federal district court listed four exceptions to this general rule

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[2] See Walls v. Oxford Mgmt. Co., Inc., 633 A.2d 103, 106-07 (N.H. 1993) (citing Section 323 and holding that "a landlord who undertakes, either gratuitously or by contract, to provide security will thereafter have a duty to act with reasonable care"); Pamer v. Pritchard Brothers, 575 N.E.2d 900, 901-02 (Ohio Com. Pl. 1990); Lay v. Dworman, 732 P.2d 455, 459 (Okla. 1986) (finding "area of liability in the landlord-tenant relationship arises out of the principles embodied in the Restatement (Second) of Torts § 323"); Scott v. Watson, 359 A.2d 548 (Md. 1976) ("We think it clear that even if no duty existed to employ the particular level of security measures provided by the defendants, improper performance of such a voluntary act could in particular circumstances constitute a breach of duty"); see also Pippin v. Chicago Housing Auth., 399 N.E.2d 596, 599 (Ill. 1979) (applying voluntarily undertaken duty rule without citing Section 323); Sharp v. W.H. Moore, Inc., 796 P.2d 506, 509 (Idaho 1990) (applying voluntarily assumed duty rule to commercial building security without referencing Section 323); Jardel Co., Inc. v. Hughes, 523 A.2d 518, 524 (Del. 1987) (citing Section 323 to support voluntarily undertaken security duty by shopping mall owner).

including an "affirmative acts" exception. Cooke applied the exception and denied summary judgment to a landlord whose negligent maintenance practices may have facilitated the physical and sexual assault of a tenant inside her apartment. 741 F. Supp. at 1210. The district court's order in Cramer II also considered the "affirmative acts" exception but substantively altered its requirements. For the first time, Cramer II ruled the exception requires "the act of the landlord lead[] directly to the injury," thereby suggesting the exception could not apply when the landlord's act contributes to or facilitates a third party's harm to the tenant. 848 F. Supp. at 1224.

Cramer II's version of the "affirmative acts" exception is problematic for several reasons. First, it is at odds with Cooke, where the exception was originally shaped. Cooke found a duty even though a landlord's act (i.e. failing to secure a ladder) and a tenant's attack were separated by a criminal's act of breaking into the tenant's rental unit. 741 F. Supp. at 1210. Second, what Cramer II proposes is not consistent with South Carolina law. A third person's intervening conduct, even a criminal act, does not necessarily absolve a negligent party from liability for the resulting injury. For these cases, the original actor's liability depends on foreseeability and, specifically, whether the ultimate injury was within the general range of consequences that any reasonable person might foresee as a probable consequence of the negligent act. Roddey v. Wal-Mart Stores East, LP, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016); Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 375 S.E.2d 37, 38 (Ct. App. 1989).

Third, by folding a foreseeability analysis into the "affirmative acts" exception, Cramer II eliminates an important distinction between duty and the other elements of a negligence claim. Whether a defendant owes a legal duty is a pure question of law that is always a court's to decide. Cole v. Boy Scouts of Am., 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) (quoting Oblachinski v. Reynolds, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011)). However, whether a

duty was breached and whether the breach proximately caused damage are questions of fact that are generally reserved for a jury's resolution. Singletary v. S.C. Dep't of Educ., 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994); Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law").

In this case, the Court of Appeals applied the Cramer II version of the "affirmative acts" exception. Wright, 413 S.C. at 288, 775 S.E.2d at 406. In ruling on the purely legal question of duty, the court actually grounded its holding in proximate cause terms. Respondents had no duty, the court held, because Respondents' courtesy officer program failures were "too attenuated from the kidnapping and robbery." Id. The remoteness in time and place of a defendant's conduct relative to a plaintiff's injury is a proximate cause question. Small v. S.C. Dep't of Educ., 339 S.C. 208, 228, 528 S.E.2d 682, 692 (Ct. App. 2000) (holding that a trial judge's proximate cause charge covered issue of whether "a negligent act could be so remote in time" that no liability would apply); Nettles v. Southern Ry. Co., 211 S.C. 187, 44 S.E.2d 321, 327 (1947) (finding jury question as to whether allegedly negligent conduct was a proximate or only a "remote cause"); see also Fettler v. Gentner, 396 S.C. 461, 467, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting Matthews v. Porter, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962) ("Evidence of an independent negligent act of a third party **is directed to the question of proximate cause**") (emphasis added). By finding a "stronger connection" was required between Respondents' acts and Ms. Wright's injury, the Court of Appeals drew a causation conclusion when the real

question was duty. Wright, 413 S.C. at 288, 775 S.E.2d at 406 (quoting Cramer II, 848 F. Supp. at 1224).[3]

Additionally, the Court of Appeals' "affirmative acts" discussion should not be considered an acceptable substitute for Section 323 because it did not address Section 323's most important components including whether Respondents' conduct increased the risk of Ms. Wright's harm or whether Ms. Wright's losses were the result of her reliance on Respondents' voluntarily undertaken security services. Instead, the court dismissed the courtesy officer program as "too attenuated." Id. The court also failed to consider reliance and increased risk of harm for Ms. Wright's claims related to landscaping and lighting. The court held that there could be no duty for these services because they were not provided *solely* for security purposes. Id. at 289, 775 S.E.2d at 406. The court went on to cite a policy concern, reasoning that Cramer I's general rule would be fatally undermined if every landlord who erected a streetlight or hired a landscaper became liable for crimes against tenants. Id. But, this is where the failure to apply Section 323's provisions is especially troubling. Ms. Wright's claim would not implicate every landlord. The duty she asserted only applies if the landscaping and lighting either increased her risk of harm or she was injured in reliance on these services. The Court of Appeals forecasted the end of Cramer I's rule only because the court failed to apply the proper standard to the duty on which Ms. Wright based her claim.

Therefore, while the "affirmative acts" act exception was originally formed by citing a case where Section 323 was applied,[4] the exception has never considered Section 323's specific

[3] This confusion may be a byproduct of the "affirmative acts" exception itself. When Cooke first identified the exception, its primary supporting authority was one New Jersey opinion from the 1950s. Cooke 741 F. Supp. at 1209 (citing McCappin v. Park Capitol Corp., 126 A.2d 51 (N.J. Super. 1956)). However, McCappin was not a duty creation case—the New Jersey court ruled "in view of the failure of proximate causation." 126 A.2d at 53.

requirements (i.e. reliance and increased risk of harm). Moreover, the version of the exception applied in Cramer II and by the Court of Appeals in this case is even further removed from the Section 323 standard and other South Carolina tort principles. In other words, whatever the "affirmative acts" exception currently stands for, it is not equivalent to Section 323 and was not an acceptable substitute for the Section 323 analysis Ms. Wright's duty claim required.

II. Ms. Wright's Claim Meets All Section 323 Requirements.

Section 323 required Ms. Wright to show (1) Respondents undertook to provide services to her; (2) Respondents should have recognize those services as necessary for Ms. Wright or her things; (3) Ms. Wright suffered physical harm because Respondents failed to exercise reasonable care in their undertakings; and (4) either Respondents' failure "increase[d] the risk" of harm to Ms. Wright or Ms. Wright suffered harm "because of [her] reliance upon the undertaking." The record presents sufficient evidence on all of these elements.

A. Respondents Undertook a Courtesy Officer Program.

No statute, regulation, or common law rule required a courtesy officer program at Wellspring, but Respondents chose to undertake one anyway. The program was good for Respondents' business because it allowed their agents to assuage tenants' security concerns and sometimes made the difference between getting and losing a potential renter. (App. p. 427 at 119:9-12; 706 at 265:15-21). The courtesy officer program was acknowledged by Respondent PRG's corporate representative. (App. p. 476 at 50:5-21). The record also contains Wellspring's "Courtesy Officer Independent Contractor Agreement," ("Courtesy Officer Agreement") a contract between Respondents and prospective courtesy officers describing their duties and their compensation for participating in the program. (App. p. 497). The Courtesy Officer Agreement

[4] Cooke, 741 F. Supp. at 1209-10 (quoting Crowley, 285 S.C. at 406, 329 S.E.2d at 780).

definitively demonstrates both the program's existence and its terms. Respondents also agree that, having undertaken the courtesy officer program, they were required to operate it in a reasonable manner. (App. p. 648 at 44:6-19).

B. Respondents Failed to Exercise Reasonable Care in Operating the Courtesy Officer Program.

Section 323 also requires evidence Respondents failed to exercise reasonable care in operating their courtesy officer program at Wellspring. This is the breach element of Ms. Wright's negligence claim. Since Ms. Wright's claim is grounded in Respondents' voluntary undertaking, the scope of Respondents' duty is limited by the scope of their undertaking. Therefore, to determine whether Respondents breached their duty, it is important to understand the broad, intensive courtesy officer program Respondents chose to create and the numerous ways in which Respondents admit the program violated its own terms.

As Respondent and Wellspring property manager Karen Campbell describes it, the courtesy officer program's purpose was tenant "protection." (App. p. 697 at 230:10-14). Specifically, Respondents designed and implemented the program so that "if somebody needed somebody or needed assistance for anything, a courtesy officer would be there." (App. p. 697 at 229:2-6). According to Respondents' testimony and the Courtesy Officer Agreement's terms, the program had at least six specific components. First, a courtesy officer was required to patrol Wellspring's grounds for two hours per day. (App. p. 497). For an apartment complex of Wellspring's size, a courtesy officer could cover the premises five to six times during a daily patrol. (App. p. 616 at 158:21-24). Second, Respondents issued cell phones to their courtesy officers. Courtesy officers' cell phone numbers were provided to every new Wellspring tenant and the whole complex was reminded of the number in monthly newsletters. (App. 705 at 264:23 – 706 at 265:24). Third, Respondents maintained a security pager that was carried by courtesy

officers and advertised each month to tenants. Respondents put great value in the security pager, suggesting in their newsletter that the pager was a first-line option for addressing suspicious activity on par with calling police. (App. p. 501) ("Security is also very top priority with us. So please call the security pager or Richland County Sheriff's Dept. if you see anything suspicious").

Fourth, to make the cell phones and security pager an effective part of the courtesy officer program, Respondents required their officers answer calls related to domestic violence, excessive noise, loitering, criminal acts, and "[a]ny act that within the professional opinion of the [officer] is contrary to the expected conduct of individuals on the property." (App. p. 497). Fifth, courtesy officers were required to make daily written reports of their duties and submit them to Wellspring's property manager. (App. p. 497). These reports could be used to report responses to calls, to note security risks throughout the premises, or to report any suspicious incidents observed during patrols. Sixth, courtesy officers were required to provide written notice if they intended to discontinue their services at the complex. (App. p. 497). These notices were crucial because they would allow Respondents to keep track of when they had courtesy officers and when they needed to pursue new courtesy officers. Overall, these six components combined to form a comprehensive program that tasked its participants with "the normal duty as performed by a police officer." (App. p. 497).

Respondents did not exercise reasonable care in operating the courtesy officer program when Ms. Wright was abducted. Respondent Karen Campbell testified that the standard of care for its voluntarily undertaken courtesy officer program included the Courtesy Officer Agreement's terms (App. p. 665 at 104:7-9). Therefore, any deviation from these terms constitute a lack of reasonable care and a breach of Respondents' legal duty. The program did

not come close to complying with those terms. Wellspring had no courtesy officers in place when Ms. Wright was abducted, yet Respondents continued to provide the security pager number to Wellspring tenants on a monthly basis. According to security expert Bill Booth, Respondents were required to have courtesy officers since they told tenants they would be there and instructed tenants to rely on them. (App. p. 599 at 91:19-25). Respondents also never communicated to tenants that Wellspring was without officers for those periods when Respondents had no courtesy officers under contract. (App. p. 476 at 52:21-53:19) (stating PRG's official corporate stance that it does not know whether tenants were advised of courtesy officers' absence).

In fact, tenants were encouraged to trust the security pager as much as the local sheriff's office even when there was no one there to answer pages. (App. p. 476 at 51:10-52:12; 501) (stating Respondent PRG's official corporate position that it was unsure where security pager calls went when Wellspring had no courtesy officers). Ms. Wright's expert testimony established that Respondents' routine practice of instructing tenants to call a security pager while knowing there was no one available to respond was "very unreasonable" and even reckless. (App. p. 632 at 222:6-20). Having undertaken the pager as a security tool and having promoted it to new and existing tenants, the standard of care required Respondents to have the pager at all times in the hands of someone who was both on the property and capable of providing help. (App. p. 634 at 232:9-13). Other elements of the program were also conducted improperly. Respondents could not produce any daily reports courtesy officers were required to file. (App. p. 642 at 19:22-20:9). Plus, it is unclear whether Respondents bothered to track when courtesy officers came in and went out of the program. There is no evidence Respondents obtained the required written notices when outgoing courtesy officers left their positions. (App. p. 682 at 170:3:12). Taken as a whole,

this evidence supports a finding in Ms. Wright's favor on the breach element of her negligence claim.

The Court of Appeals' ruling appeared to find Ms. Wright could not demonstrate Respondents breached a duty. The opinion couches its ruling as a purely legal question of duty creation. Wright, 413 S.C. at 289, 775 S.E.2d at 406 ("We find Respondents had no duty to protect Wright . . ."). However, at least a portion of the ruling was based on the alleged absence of evidence to support a breach of duty. The court held that, even if Respondents undertook a duty to perform a courtesy officer program, there was "no evidence they failed to exercise reasonable care in fulfilling that duty." Id. at 288, 775 S.E.2d at 406. Based on the evidence detailed above, this conclusion was in error. Ms. Wright presented documents, lay witness testimony, and expert opinions to support the conclusion that Respondents' courtesy officer program was not operated in a reasonable way according to its own governing documents or industry standards.

In addition to this evidence, the record shows at least one Respondent acknowledged Wellspring's courtesy officer program was conducted unreasonably. Karen Campbell admitted in her deposition that Respondents did not follow the Courtesy Officer Agreement's requirements:

Q. And when you had courtesy officers there, they were supposed to walk the property two hours a day, and they were supposed to fill out a daily report and hand it to you, weren't they?
A. It is stated in their form, yes.
Q. But that didn't happen, did it?
A. No, it didn't.
Q. And as the manager you're the person that's supposed to make sure it's supposed to happen, right?
A. Yes.
Q. But you didn't do that, did you?
A. No.

(App. p. 642 at 19:22-20:9). She also admitted Respondents did not collect the required daily written reports from courtesy officers. (App. p. 682 at 169:1-12).

Therefore, the Court of Appeals erred in finding no evidence to support the breach element of Ms. Wright's negligence claim. The documents, testimony, expert opinions, and Respondents' admissions at least create a jury question on this element. Moreover, to the extent the Court of Appeals grounded its duty ruling on a supposed lack of evidence of breach, the court improperly decided on summary judgment what is a question of fact for the jury. Singletary, 316 S.C. at 157, 447 S.E.2d at 233 ("The breach of a duty of due care is ordinarily a question of fact.") (citation omitted).

C. Ms. Wright Relied to Her Detriment on the Courtesy Officer Program.

Pursuant to Rule 323, Ms. Wright may recover for losses related to Respondents' failing courtesy officer program if either she relied to her detriment on the program or the program increased her risk of harm. The record demonstrates Ms. Wright did rely on the courtesy officer program when choosing Wellspring over other apartment complexes in the area and throughout her time as a Wellspring tenant. The record also demonstrates Ms. Wright's reliance on the program is exactly what Respondents wanted. From Respondents' perspective, a potential renter who feels secure is more likely to become a tenant and an existing tenant who feels secure is more likely to renew her lease.

As a single woman in her sixties looking for a new place to live, Ms. Wright considered three factors in choosing an apartment complex. She wanted a place that was close to work, she valued the recommendations of friends, but, most of all she was concerned about security. (App. p. 80 at ¶ 7; 381 at 38:21-39-2; 382:13-21). Ms. Wright investigated the matter by specifically asking the agent showing her the premises about security. She was told Wellspring had "security

officers." (App. p. 383 at 40:25-41:6). Respondents' agents described the courtesy officer program in specific terms by telling Ms. Wright that Wellspring had "officers that patrolled regularly." (App. p. 391 at 56:7-8). Confident in Respondents' courtesy officer program, Ms. Wright signed a lease and became a Wellspring tenant. (App. p. 427 at 119:11-12) (testifying that in making her final decision "it was important to me that I felt safe and secure").

Ms. Wright's reliance on the program continued throughout her tenancy. She received the monthly newsletters touting Respondents' security commitment and promoting the security pager as an extra layer of protection against suspicious activity. (App. p. 501) (newsletter from one month before attack promising security is Respondents' "very top priority"). She was led to believe the courtesy officer program, with all six of its required components, was in place and operational on the day she was attacked. This is demonstrated most clearly by Ms. Wright's spirited conversation with Respondents' agent the day after the attack. Ms. Wright's consternation was grounded in the courtesy officer program's failings. She had only one question: "Where are these security officers that are supposed to be walking the beat?" (App. p. 425 at 116:14-20).

Respondents also encouraged Ms. Wright to rely on the courtesy officer program. Respondents both promised and described the program when Ms. Wright was considering moving to Wellspring. Karen Campbell acknowledges telling all potential and new tenants about the courtesy officer program. (App. pp. 705-06 at 264:23 – 265:21). Respondents also invited tenants to rely on the program through the monthly newsletter. When South Carolina courts applying Section 323 have refused to find the required reliance, it is usually because the plaintiff was either unaware of the undertaking or had reason to believe the defendant was not actually undertaking services on the plaintiff's behalf. Underwood, 367 S.C. at 219, 625 S.E.2d at 239

(refusing to apply Section 323 when plaintiff was previously unaware of tree maintenance undertaking on which he based his negligence claim); Staples, 329 S.C. at 510, 494 S.E.2d at 643 (same); Shopshire, 277 S.C. at 472, 289 S.E.2d at 412 (finding employee could not have reasonably relied on former coworker's assistance with legal matter when coworker repeatedly refused meetings on matter). In contrast, Ms. Wright was aware of the courtesy officer program because Respondents told her about it in specific terms. Through the newsletter and by other means, Respondents invited Ms. Wright to rely on the program to provide reasonable security at Wellspring. Under these circumstances, security expert Bill Booth concluded Ms. Wright's reliance on the courtesy officer program was reasonable. (App. p. 593 at 67:14-16; 629 at 209:1-2).

In sum, Ms. Wright provided the evidence required to support the reliance element of Section 323. As the dissenting opinion correctly identifies, Ms. Wright's reliance is sufficiently supported by her testimony on why she chose Wellspring and how she responded to her attack in addition to the tenant newsletters. Wright, 413 S.C. at 293, 775 S.E.2d at 293 (Lockemy, J. dissenting).

D. Respondents' Operation of the Courtesy Officer Program Increased the Risk of Harm to Ms. Wright.

As an alternative basis for liability under Section 323, Respondents may be liable for their courtesy officer program failures if their manner of undertaking and operating the program increased the risk of harm to Ms. Wright. Since the record demonstrates she detrimentally relied on the program, Ms. Wright need not prove increased risk of harm to defeat summary judgment. Nevertheless, there is evidence the courtesy officer program's failings increased the likeliness of a criminal attack on Wellspring tenants like Ms. Wright.

Failing to have a courtesy officer and failing to have anyone available to answer security pager calls "undoubtedly" increased the risk of an attack on Wellspring tenants. Id. at 294, 775 S.E.2d at 409 (Lockemy J., dissenting). Criminals are less likely to lurk in areas actively patrolled on a periodic basis. Id. Drawing on his experience, review of Respondents' courtesy officer program, and visits to Wellspring, Mr. Booth concluded the perpetrators' chances of success in attacking Ms. Wright were increased by the courtesy officer program's failures. (App. p. 593 at 67:17-21). Rooting out loiterers was one of the program's express objectives. (App. p. 497). Additionally, by undertaking the responsibility to provide courtesy officers and in encouraging tenants to rely on their presence and accessibility, Respondents created a more dangerous situation during those periods when courtesy officers were not present or available to take tenant calls.

Given the scope of Respondents' undertaking, they had a duty to take "affirmative steps to ensure tenants were aware of the limitations of the courtesy officer program." Wright, 413 S.C. at 293, 775 S.E.2d at 408 (Lockemy J., dissenting). Section 323 imposes liability for failures in the way a voluntary undertaking is performed and the way in which the undertaken duty is discontinued. In other words, Respondents are liable for the courtesy officer program as an undertaking "in the manner of [their] performance of the undertaking, or from [their] failure to exercise reasonable care to complete it or to **protect the other when he discontinues it.**" Restatement (Second) of Torts § 323 cmt. a (emphasis added). Here, Respondents never told Ms. Wright or her neighbors that courtesy officers had left Wellspring without replacements. Worse yet, Respondents told Wellspring tenants to call for a courtesy officer during periods when Respondents knew or should have known there were no officers to respond. (App. p. 501).

This course of conduct left Ms. Wright worse off than if the program had never been undertaken. As Mr. Booth explained, taking on the robust courtesy officer program Respondents undertook can create in tenants a false sense of security if the program is poorly performed. (App. p. 628 at 208:12- 629 at 209:11). Ms. Wright was effectively encouraged to "let down [her] guard" because "there is a guardian there that is looking out for [her] safety." Id. Thus, Respondents' courtesy officer program increased the risk of harm to Ms. Wright and her claim satisfies all elements of Section 323.

E. Respondents' Conduct Proximately Caused Ms. Wright's Losses.

In overlooking Section 323 when evaluating Ms. Wright's negligence claim, the Court of Appeals referenced supposed causation deficiencies that would support summary judgment to Respondents. Wright, 413 S.C. at 288, 775 S.E.2d at 406 (suggesting courtesy officer program deficiencies were "too attenuated" from Ms. Wright's attack and suggesting a "stronger connection" was required). However, Ms. Wright presented documentary evidence and expert testimony to show Respondents' conduct was a direct and proximate cause of Ms. Wright's injuries. Id. at 298, 775 S.E.2d at 411 (Lockemy J., dissenting). Moreover, the intervening criminal acts of Ms. Wright's attackers do not absolve Respondents of liability under South Carolina law. At the very least, Ms. Wright's evidence creates a question of fact on proximate cause that the court improperly took away from a jury.

Proximate cause is an essential element of any negligence cause of action. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010). This element requires proof of both "causation in fact and legal cause." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1987) (citing Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). Causation in fact is established by proof that the injury

"would not have occurred but for the defendant's negligence." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011) (citing Mellen v. Lane, 377 S.C. 267, 278, 659 S.E.2d 236, 245 (Ct. App. 2008)). Legal cause is established by determining foreseeability, a factor which focuses on "whether the injury is the natural and probable consequence of the alleged negligent act." Id. As the Cooke court noted, "[p]roximate cause is generally a question for the jury." 741 F. Supp. at 1214; see also Ballou, 291 S.C. at 147, 352 S.E.2d at 493 (Ct. App. 1986) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law"). Ms. Wright was only required to present a scintilla of evidence on proximate cause to defeat Respondents' summary judgment motion. Bass v. Gopal, Inc., 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011).

Where a negligence claim alleges an injury directly caused by the intervening act of a third party, a "special case" is presented. Cody P., 395 S.C. at 620, 720 S.E.2d at 478. In special cases, the test becomes whether a third-party criminal act was foreseeable to the defendant. 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. 370, 375, 375 S.E.2d 37, 37 (Ct. App. 1989). Ms. Wright 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., 395 S.C. at 621, 720 S.E.2d at 478 (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38). Ms. Wright's proximate cause showing was not deficient merely because not every crime is preventable or because precisely predicting a criminal's conduct is an inexact proposition.

Several different types of evidence may be used to demonstrate that a defendant could reasonably foresee injuries ultimately perpetrated by an independent third party. Expert testimony may be used to establish foreseeability. An expert with knowledge of the defendant's business may testify regarding the types of harms the defendant anticipates in its business. See Cody P., 395 S.C. at 621-22, 720 S.E.2d at 478 (considering banking expert's testimony that banks anticipate theft). The defendant's policies and procedures may also demonstrate that it foresees certain types of harms may flow from its negligent conduct. In Cody P., the defendant's policies and procedures established rules to guard against certain harms. Id. at 622, 720 S.E.2d at 478. The policies themselves provided some evidence that the defendant foresaw the types of harms it took the time and effort to guard against. Id.

In Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987), the court considered whether a motel could have foreseen a third-party criminal attack on its guest. In finding a jury question on this issue, the court considered several pieces of evidence indicating the hotel foresaw potential attacks on its guests. For example, the hotel required an employee to walk the premises once or twice per night. The hotel also requested the local sheriff's department patrol the hotel parking lot. These actions made it "evident that the hotel perceived some threat of physical harm to its guests." Id. at 302, 356 S.E.2d at 135. The court also considered other crimes in the hotel's vicinity including the number of crimes and their circumstances. Id. at 298, 356 S.E.2d at 135.

There are several pieces of evidence demonstrating Respondents foresaw third party criminal attacks at Wellspring. The Courtesy Officer Agreement provides that courtesy officers are to respond to calls regarding "Domestic altercations" and "Criminal acts." (App. p. 497). Similar to Daniel, this document shows Respondents perceived some threat of third party

criminal acts directed at tenants. This was a threat Respondents recognized and undertook to guard against. Accordingly, a third-party criminal act directed at Wellspring's tenants was not unforeseeable if Respondents negligently perform the duty they had undertaken to guard against such crimes.

Ms. Wright's security expert testified that, in his opinion, Respondents' negligence was a proximate cause of Ms. Wright's injuries. (App. p. 617 at 162, lines 15-18). Mr. Booth has provided uncontroverted testimony that Ms. Wright's abduction was a "foreseeable incident." (App. p. 593 at 66, lines 8-15). Mr. Booth's opinion was based in part on his analysis on various crimes at Wellspring including other crimes in the Wellspring parking lot. See (App. p. 620 at 175, line 12 – 176, line 9) (describing methodology for analysis). For 2007 and the first nine months of 2008, Mr. Booth documented 15 parking lot offenses at Wellspring. Mr. Booth's analysis did not include all criminal incident reports from the Wellspring property. Instead, he pulled all such reports and winnowed them down to those that may have been impacted by lighting, courtesy officer patrolling, or better sight lines. (App. p. 621 at 178, line 21 – 179, line 6).

Mr. Booth's analysis showed that in the very parking lot where Ms. Wright was abducted, there had been an attempted home invasion and an attempted burglary within the previous two years. There had also been a series of vehicle related crimes over that same period that Mr. Booth referred to as "precursor crimes," i.e. incidents that likely would have included crimes against a person had the car's owner been present. (App. p. 621 at 180, lines 18-23). Respondent Karen Campbell even acknowledged crime was foreseeable at Wellspring. (App. p. 668 at 114, line 1).

Respondents dispute Mr. Booth's analysis of previous crimes in Wellspring's common areas and the circuit court appeared to dismiss nonviolent crimes in the area as irrelevant to the foreseeability of violent crimes. (App. p. 70). Ms. Wright adamantly disagrees with Respondents' characterization of Wellspring's extensive crime record. More importantly for sake of Respondents' summary judgment motion, only Ms. Wright's position was supported by evidence. Ms. Wright presented Mr. Booth's expert testimony on the effect of "precursor" crimes on the foreseeability of violent crime. Respondents offered no evidence to support their conclusion that precursor crimes are irrelevant. On a summary judgment motion where a movant bears the burden and on the issue of proximate cause where only the exceptional case can be decided without a fact finder, the circuit court's dismissal of Mr. Booth's foreseeability testimony was in error.

In addition to this evidence supporting legal cause, there is also evidence that Respondents' negligence was a cause in fact of Ms. Wright's injuries. The testimonial evidence from several witnesses demonstrates that but for Respondents' unreasonably dim lighting and improperly maintained shrubbery, the attackers would likely have been seen by Ms. Wright as she parked her car. Ms. Wright testified that her attackers "were not visible when I parked and exited my car due to the height and width of the overgrown shrubbery and the lack of lighting in the area." (App. p. 357 ¶ 8; 395 at 63, lines 16-18). A representative of the company Respondents hired to trim the shrubbery claimed under oath that, as they stood on the date of Ms. Wright's abduction, the shrubs "posed safety and security hazards for the residents." (App. p. 446 ¶ 8). Similarly, following his site visits and using his training, education, and experience in the security industry, Mr. Booth testified that the overgrown shrubbery "provided a hiding place for the individuals who committed this crime." (App. p. 593 at 66, lines 16-23).

Mr. Booth's analysis of Wellspring's common area lighting system revealed that there was too little light "to allow one individual to see another individual to be able to identify them later or identify a photograph or identify a drawing" of the individual at a later date. (App. p. 611 at 140, line 23 – 612 at 142, line 4). The lighting was "totally inadequate" and "this crime would not have occurred" had lighting met the industry standard. (App. p. 593 at 66, line 24 – 67, line 7). If the perpetrators had been visible as she parked her vehicle, Ms. Wright would never have gotten out of her car and she would have never been abducted. (App. p. 357 ¶ 10). In fact, even after getting out of the car, if the lighting and shrubbery maintenance was such that Ms. Wright could have seen the perpetrators as she approached the walkway and ramp, then she could have retreated to her car or sought assistance at a neighbor's house. (App. p. 357 ¶ 10). The attackers remained concealed and were able to execute a surprise attack only because of the poor lighting and overgrown shrubs.[5]

Additionally, but for Respondents' sloppily executed courtesy officer program, the perpetrators likely would not have been in the area to abduct Ms. Wright. Respondents' courtesy officer program required the officers to patrol Wellspring for at least two hours per day. Their patrols were to be recorded on forms Wellspring provided. Respondents acknowledge the required patrolling was not performed. (App. p. 642 at 19, line 22 – 20, line 3). Mr. Booth estimates that based on Wellspring's size, a courtesy officer could cover the premises five to six

[5] The circuit court's order dismissed lighting and shrubbery as a proximate cause since one police investigation report did not mention that the attackers were concealed. (R. p. 70). The order did not acknowledge Ms. Wright's affidavit or deposition where Ms. Wright swore under oath that the attackers were concealed by darkness and overgrown shrubbery. Respondents clearly intend to challenge the veracity of Ms. Wright's testimony on this point and would be free to do so at trial. However, credibility determinations are inappropriate for summary judgment motions. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 548-49, 634 S.E.2d 1, 6 (2010); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) ("where the credibility of the witness has been questioned, the matter is properly left to the jury to decide").

times in two hours. (App. p. 616 at 158, lines 23-24). Using that estimate, Respondents' courtesy officer program, if properly performed, would have a courtesy officer in the area of Ms. Wright's abduction every 15 minutes for the period of the courtesy officers' daily patrol. Consistent presence of an officer in Wellspring's common areas would have a significant effect on the average criminal's decision making process and ultimately his conduct. In Mr. Booth's expert opinion,

> If we can make [the criminal] believe that his activity is going to be viewed more than likely by someone, and that the chances of him being apprehended in the commission of the act are greater in one place than they are in another, we can move the commission of that—we may not stop that criminal act. We can move the commission of that criminal act to another location.

(App. p. 605 at 113, lines 3-10).

There is evidence Ms. Wright would not have exited her vehicle to encounter her attackers but for the poor lighting and unkempt shrubbery that allowed the attackers to remain concealed. There is also evidence showing that the perpetrators likely would not have been loitering in proximity to Ms. Wright's front door had the courtesy officer program been conducted as required by Respondents' own policies. Accordingly, there is certainly evidence to show Respondents' negligence was a cause in fact of Ms. Wright's injuries. With at least a scintilla of evidence on legal cause and causation in fact, Respondents' motion for summary judgment on the issue of proximate cause should have been denied.

CONCLUSION

For all these reasons, Ms. Wright respectfully requests the Court reverse the Court of Appeals' ruling and deny Respondents' summary judgment motion. Respondents voluntarily undertook a legal duty when they implemented a courtesy officer program for the benefit of Wellspring tenants like Ms. Wright. That duty exists pursuant to a South Carolina common law

standard expressed in Restatement (Second) of Torts § 323. A majority of the Court of Appeals erred in failing to apply this standard. Additionally, the Court of Appeals' ruling fails to acknowledge key evidence to support the breach and proximate cause elements of Ms. Wright's claim. The Court of Appeals ruling should be reversed.

Respectfully submitted

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October 20, 2017
Rock Hill, SC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
OCT 23 2017
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-002157

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of October, 2017, she served counsel for the Defendants with a copy of the corrected Brief of Petitioner in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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