THE STATE OF SOUTH CAROLINA
In the 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 RESPONDENTS

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Court of Appeals erred in failing to apply Restatement (Second) of Torts Section 323 to Petitioner Denise Wright's allegation that Respondents PRG Real Estate Management, Inc., Franklin Pineridge Associates, and Karen Campbell voluntarily assumed a duty to provide security to protect Ms. Wright from third-party criminal activity.

STATEMENT OF THE CASE

Respondents adopt the Statement of the Case set forth in the Brief of Petitioner. Petitioner's appeal arises from the decision of the Court of Appeals in Wright v. PRG Real Estate Management, Inc., 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015) ("Wright").

STATEMENT OF FACTS

At the time of the incident in question, Respondent Franklin Pineridge Associates was the owner of Wellspring Apartment Complex ("Wellspring"), located at 500 Harbison Boulevard in Richland County. (App. pp. 92-93, ¶¶ 2-3). Respondent PRG Real Estate Management, Inc. ("PRG") managed Wellspring. Respondent Karen Campbell was Wellspring's property manager and an employee of PRG at the time of the events giving rise to this case. (Id. at ¶¶ 2, 4).

Petitioner Denise Wright ("Petitioner") leased an apartment at Wellspring in approximately May of 2003. (App. p. 382 at 39, lines 18-22). She chose Wellspring because several members of her church lived there at one time or another and recommended it and because it was in close proximity to her work, i.e., "right down the street." (App. p. 381 at 38, line 21 – App. p. 381 at 39, line 2; App. p. 382 at 40, lines 3-7 ("Q. Okay. So we've talked about proximity and the fact that some of your friends at church had recommended it. Anything else? A. **No**.") (emphasis added)). After additional prompting about any "amenities," Petitioner testified there was a pool, she could use a nearby recreation center, and she was told "there were security officers on duty. So I felt like it would be a safe place." (App. p. 382 at 40, lines 16-21). However, Petitioner was clear that proximity and the recommendation of her friends drove her decision. "Those were probably the two reasons I went [to Wellspring] first." (App. p. 381 at 39, lines 1-2).

Wellspring had a courtesy officer program whereby a resident who was affiliated with law enforcement (with jurisdiction over Wellspring) received a reduced rent to serve as a courtesy officer for the complex. (App. p. 303 at 147, lines 15-20; App. p. 681 at 165, lines 11-14; App. p. 695 at 223, line 20 – App. p. 695 at 224, line 9). Wellspring's corporate representative testified the courtesy officers were there for the customer service of the residents

and to walk the property for up to two hours per day. (App. p. 476 at 50, lines 5-21). If someone observed certain activity on the property and called the courtesy officer, the courtesy officer was expected to answer the call. Such issues included domestic altercations, excessive noise, loitering, and conduct contrary to that expected of individuals on the property. (App. p. 497).

Although courtesy officers were also expected to answer calls if "criminal acts" were observed, this did not include life threatening criminal activity, e.g., when two perpetrators abduct a resident at gunpoint. Wellspring's corporate representative testified courtesy officers were to be available for "non-life threatening issues," and the Courtesy Officer Independent Contractor Agreement set forth the courtesy officer agreed to **not** carry a weapon while performing services unless required by his employer. (App. p. 476 at 50, lines 5-21; App. p. 497). An additional benefit was Wellspring preferred a courtesy officer park his/her official vehicle on-site at the complex to show an official presence. However, it was not a requirement. (App. p. 315; App. p. 695 at 223, line 12 – App. p. 695 at 224, line 9; App. p. 702 at 252, line 16 – App. p. 703, line 11).

Furthermore, the program was limited by circumstances beyond Respondents' control. There is nothing in the record to suggest Wellspring ever terminated a courtesy officer, but there were periods of time when Wellspring had no courtesy officer for various different reasons (e.g., a resident no longer wished to serve in this capacity, was no longer affiliated with law enforcement, or wanted free rent instead of reduced rent). (App. p. 695 at 222, line 12 – App. p. 695 at 224, line 9). In these circumstances, Wellspring sought to fill the position with a new courtesy officer by advertising the position. (App. p. 305, lines 7-22; App. p. 315). The advertisement indicated the officer would receive a discount on rent, be required to respond to "non-life threatening emergency phone calls whenever possible," assist with identifying street

lights that were out, locking and unlocking the pool gate, and other tasks. (App. p. 315). The courtesy officer position was vacant in September of 2008. (App. p. 475 at 31, lines 3-12).

On September 18, 2008, Petitioner parked her car in Wellspring's parking lot and was walking to her apartment at approximately 10:30 p.m. (App. pp. 218-219 at 1). According to the police report, "[t]he [Complainant/Victim] saw two black males sitting in front of the 2200 building." (Id.). Nothing in the report indicates the perpetrators were concealed by shrubbery or lack of lighting, and Petitioner did not indicate they were concealed to the officer who did the report. (App. p. 223 at 29, line 25 – App. p. 224, line 7; App. p. 225 at 31, lines 7-9).

The men pointed a handgun at Petitioner and asked for her money. Petitioner responded she did not have any. (App. pp. 218-220 at 1). Wellspring residents were on their balconies and in the parking lot as the incident happened. (App. p. 397 at 67, lines 1-7; App. p. 617 at 164, line 24 – App. p. 618 at 165, line 18). Another resident actually walked up with her dogs as the incident was occurring and engaged Petitioner and the men in conversation. (App. pp 218-220 at 2; App. p. 402 at 74, line 17 – App. p. 407 at 75, line 6). After the men finished talking to the resident, they made Petitioner drive them in her car to various automatic teller machines to make withdrawals from her account. (App. pp. 218-220 at 2). After approximately 35 minutes, the men released Petitioner, and she drove to her daughter's house, where police responded. (App. pp. 218-220 at 1). The perpetrators were never caught.

Petitioner was not physically injured during her incident. (App. p. 434 at 131, lines 7-11). She admitted in her deposition she was not undergoing treatment for any mental injuries, including mental distress and anxiety. (App. p. 435 at 134, lines 2-6). She was not taking medications for anxiety. (Id. at lines 7-9). The money she withdrew from her account was

returned to her. (App. p. 439 at 140, lines 19-24). She went back to work for ten months after the incident before retiring. (App. p. 437 at 137, lines 15-23).

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c); Padgett v. South Carolina Ins. Reserve Fund, 340 S.C. 250, 252, 531 S.E.2d 305, 306 (Ct. App. 2000). Rule 56(e) of the South Carolina Rules of Civil Procedure sets forth that for purposes of summary judgment, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such acts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." South Carolina's appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)).

While the party seeking summary judgment has the burden of proof to show no issue of material fact exists, that party may discharge this responsibility by showing an absence of evidence to support the non-moving party's case. Etheredge v. Richland School Dist. I, 330 S.C. 447, 452, 499 S.E.2d 238, 241 (Ct. App. 1998), rev'd on other grounds, 341 S.C. 307, 534 S.E.2d 275 (2000).

Once the moving party has met its initial burden, the non-moving party may not rely upon denials or allegations in the pleadings, but must come forward with specific facts showing a genuine issue for trial. Id. at 453, 499 S.E.2d at 241.

Absent any triable issue, summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. Pye v. Aycock, 325 S.C. 426, 431, 480 S.E.2d 455, 457 (Ct. App. 1997).

LAW/ANALYSIS

Petitioner would have this Court believe she leased an apartment at Wellspring "most of all" because of Wellspring's "security program," which "sealed the deal" and was a "crucial factor." (Pet.'s Br. at 2, 5). She also argues Wellspring "lured [her] into a false sense of security" through its "promise and provision" of this "robust service" of personnel "committed to rooting out suspicious activity." (Id. at 5). Finally, Petitioner contends the courtesy officer program was "in shambles," it "failed" Petitioner, and the result was "pitch darkness and men leaping from behind an overgrown bush near Ms. Wright's front door." (Id. at 5-6).

These are a few examples of the overgeneralizations and misstatements of the record Petitioner relies on in an effort to convince this Court the Court of Appeals reached an erroneous decision. The reality is Petitioner chose to lease an apartment from Wellspring because her friends recommended it and it was close to her place of work. The reality is Wellspring had a courtesy officer program as an amenity, but it depended on having a resident member of law enforcement willing to serve in this position; this was not the case at the time of Petitioner's incident. The reality is Petitioner's assailants did not leap from behind overgrown bushes; she saw them sitting in front of her building as she made her way to her apartment. Finally, there is no evidence anything would have stopped these criminals. They were armed and committed their crime in spite of the fact that residents were on their apartment balconies, and a third-party resident actually engaged the perpetrators in conversation as they were abducting Petitioner.

The Court of Appeals properly affirmed summary judgment and held Respondents had no duty to provide security for Petitioner, and there was no evidence Respondents engaged in unfair or deceptive acts. The Court of Appeals was correct, and this Court should affirm its decision.

I. The Court of Appeals Applied the Right Standard to Petitioner's Duty Claim.

Petitioner argues the Court of Appeals applied the "wrong standard" to her argument Respondents assumed a duty to provide security by undertaking a courtesy officer program. (Pet.'s Br. at 6). Specifically, Petitioner argues because the Court of Appeals did not "cite or apply" Restatement (Second) of Torts Section 323 ("Section 323"), it erroneously held Wellspring's courtesy officer program did not impose on Respondents a duty to exercise reasonable care in providing security at the complex. (Id.).

This Court has held "[u]nder South Carolina law a landlord does not owe a duty to a tenant to provide security in and around a leased premises to protect the tenant from criminal activity of third parties." Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 444, 441 S.E.2d 317, 319 (1994) ("Cramer I"). However, South Carolina's courts have recognized certain exceptions to this general rule in the landlord-tenant context. The Court of Appeals applied this law as it has evolved in the landlord-tenant context to address whether any of the recognized exceptions applied in this case. After analyzing the exceptions in the same manner they have been analyzed by prior courts, the Court of Appeals concluded Respondents had no duty.

The lack of citation to Section 323 in the majority opinion does not mean the Court of Appeals ignored it. To the contrary, the earliest South Carolina court considering voluntary actions in the landlord-tenant context cited to case authority interpreting Section 323 for the rule as to whether a duty arises. Later courts have done the same, but only one has actually cited and applied Section 323 itself. The Court of Appeals' decision was no different, and it applied the

correct standard based on the law preceding it. Petitioner seeks to create controversy where none exists.

A. In the Landlord-Tenant Context, South Carolina's Courts Prior to Wright Analyzed Voluntary Actions Pursuant to the "Affirmative Acts" and "Undertaking" Exceptions.

Prior to this Court's holding in Cramer I, the United States District Court for the District of South Carolina considered whether a landlord had a duty to protect tenants from criminal activity in Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990). The Court in Cooke recognized its task—in the absence of South Carolina case law on point—was "to forecast how the South Carolina Supreme Court would view the question of a landlord's duty under these circumstances." Cooke, 741 F. Supp. at 1209. The plaintiff in Cooke invited the Court to extend the duty owed by storeowners/innkeepers to landlords so as to impose on them a duty to protect tenants against criminal conduct. In forecasting how the South Carolina Supreme Court would rule, the Court noted the "cautious approach the South Carolina appellate courts have taken" on this issue even in the storeowner/innkeeper context. Id. at 1213. The Court then analyzed how the landlord-tenant relationship is fundamentally different from relationships for which South Carolina law imposes a duty to protect against criminal activity and declined to extend the duty to landlords. Id. at 1313-14 (citing Feld v. Merriam, 506 Pa. 383, 485 A.2d 742, 745-46 (1984)).

Notwithstanding the Court's forecast of how South Carolina's courts would rule on this issue, Cooke addressed four exceptions[1] to the rule against landlord liability as they were argued by the plaintiff. Cooke, 741 F. Supp. at 1209-12. The plaintiff argued the "affirmative acts"

[1] In Cooke, the plaintiff cited to four exceptions characterized as the "affirmative acts" exception, the "concealed danger" exception, the "common area" exception, and the "undertaking" exception. Cooke, 741 F. Supp. 1209. Because they are not really at issue in this appeal, Respondents do not address the concealed danger and common areas exceptions as they are discussed in Cooke or other cases unless the analysis has relevance to the affirmative acts and undertaking exceptions.

exception gave rise to a duty because the defendant negligently left an unsecured ladder outside, which the plaintiff claimed was used by the assailant to access the apartment. Id. at 1209-10. The plaintiff also argued the undertakings exception gave rise to a duty because the landlord failed to use adequate locks. Id. at 1212.

The Court recognized the "affirmative acts" exception as "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Cooke, 741 F. Supp. at 1209-10. The Court cited to Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), as authority for this principle and said South Carolina law imposes a duty on a person to use reasonable care when any affirmative act is undertaken. Id. at 1210. The Court applied the exception and denied summary judgment on the plaintiff's negligence claim. The Court held there was a factual question as to whether the assailant used the unsecured ladder to access the victim's apartment. Id. at 1210.

With regard to the undertaking exception, the plaintiff argued the locks in the apartment were inadequate. The Court stated the plaintiff's application of the undertaking exception to these claims was "nothing more than a specific application of the general negligence standard discussed in this Order." Id. at 1212. Although the Court recognized negligent repair of a door lock could present an actionable claim if someone entered through that door, the plaintiff's claim that the landlord's standard locks were "inadequate" was a "far cry from established principles of South Carolina law" to make such a claim actionable. Id. Cooke did not cite or specifically apply Section 323 in its analysis of the affirmative acts or undertaking exceptions.

Four years later, Cramer I addressed a certified question from the United States District Court for the District of South Carolina: "Does a landlord owe a duty to a tenant to provide security in and around a leased premises so as to protect the tenant from criminal activity of third

parties?" Cramer I, 312 S.C. at 441, 441 S.E.2d at 317. This Court stated Cooke was "directly on point in addressing the questions raised here," and the Court echoed the district court's characterization of the "cautious approach the South Carolina appellate courts have taken" with regard to extending a duty to protect from criminal activity. Id. at 442-43, 441 S.E.2d at 318 (quoting Cooke, 741 F. Supp. at 1213)). This Court agreed with Cooke that landlords do not owe an affirmative duty to protect tenants from criminal activity merely by the landlord-tenant relationship. Id. at 443, 441 S.E.2d at 318-19. Nevertheless, the Court stated the plaintiff is not precluded from asserting a general negligence principle, and "[a] duty may arise under the particular circumstances of the individual case **based upon a showing of negligence constituting the proximate cause of the loss**." Id. at 443 n.1, 441 S.E.2d at 319 n.1 (emphasis added). Cramer I did not cite or specifically apply Section 323 as part of this rule for when a duty may arise

Based on this Court's answer to the certified question, Cramer v. Balcor Property Management, Inc., 848 F. Supp. 1222 (D.S.C. 1994) ("Cramer II"), addressed a summary judgment motion brought by a landlord in a wrongful death case where the plaintiff alleged the owners and managers of an apartment complex breached a duty to protect the tenant from the criminal acts of a third party. Applying the rule in Cramer I, the Court held the defendants did not owe any special duty to the plaintiff based on the landlord-tenant relationship. Id. at 1224. The Court then addressed whether any exceptions applied to give rise to a duty. Id. at 1224-25.

Significant to this case, the plaintiff in Cramer II argued that by initially hiring a "courtesy officer" to patrol the property and then terminating him without replacing him, the defendants breached a duty falling within the affirmative acts exception. Id. at 1224. The Court disagreed. The Court cited to Cooke's principle for the affirmative acts exception that "one who

assumes to act, even though under no obligation to do so, may become subject to a duty to act with due care." Id. at 1224. The Court then held the plaintiff "misapprehended the scope of this duty" with regard to the courtesy officer argument because the affirmative acts exception "envision[ed] a situation where the act of the landlord led directly to the injury complained of." Id. "The cases which fit this exception are those where there is a stronger connection between the act and the injury, such as when a landlord leaves an apartment door unlocked and a third party enters." Id. With regard to the undertaking exception, the Court stated the exception stands for the principle that if a landlord undertakes to make repairs, they must be done with due care. Id. (citing Mcquillen v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974)). Applying this law, the Court denied that the plaintiff's request that an additional safety device be installed on her door gave rise to a duty because the defendant did not actually undertake to do anything. Id. at 1225. The Court granted summary judgment, and Cramer II also did not cite or specifically apply Section 323 in its analysis.

Goode v. St. Stephens United Methodist, 329 S.C. 433, 494 S.E. 2d 827 (Ct. App. 1998), was the next case to address whether a landlord had a duty to provide security. In Goode, a social guest of a tenant sued the owner and employees of an apartment complex after third parties assaulted him during a visit to the complex. The Circuit Court granted summary judgment, and the plaintiff appealed. The Court of Appeals applied Cramer I's rule to find that—because there was no common law duty for a landlord to protect tenants from criminal activity—it would be "absurd" to find landlords hold a higher duty of care to their guests. Id. at 443, 494 S.E.2d at 832.

The appellant then argued the apartment complex "created a duty to protect him from the violent acts of third parties by undertaking to provide security to tenants and their guests." Id. at

444, 494 S.E.2d at 832. He argued under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care. Id. at 444, 494 S.E.2d at 832 (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Sherer v. James, 290 S.C. 404, 351, S.E.2d 148 (1986)). This principle of law is analogous to what had been characterized by Cooke and Cramer II as the affirmative acts exception. However, the appellant also cited to Section 323 to support this duty, which sets forth as follows:

> 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.

Id. at 444, 494 S.E.2d at 833 (emphasis added).

The Court of Appeals then characterized the appellant's argument as "Duty Created by **Undertaking**," as opposed to the affirmative acts exception. Id. at 444, 494 S.E.2d at 832 (emphasis added).[2] Applying the Section 323 authority cited by the appellant, the Court held the record did not support a duty by the apartment complex. There was no evidence the security measures undertaken were performed with less than due care. There was no evidence any reliance on security by the tenants caused the appellant to suffer the beating. The appellant admitted he knew the complex did not provide security at the time of the incident. "Therefore, he obviously could not have relied on any undertaking by [the apartment] to prevent the intentional, personal attack." Id. at 444-45, 494 S.E.2d at 833. The Court of Appeals found no

[2] This distinction is noteworthy because prior courts characterized the undertaking exception as a more specific application of a general negligence principle focused on voluntary repairs. See Cooke, 741 F. Supp. at 1212 ("Finally, plaintiff attempts to expand the rule that a landlord's repairs must be performed with due care); Cramer II, 848 F. Supp. at 1222 ("Under [the undertaking] exception, if a landlord undertakes to make repairs, they must be performed with due care.").

basis for liability under the common law rule or the appellant's citation to Section 323, and it affirmed summary judgment for the apartment complex.

Finally, this Court addressed a commercial landlord's obligation to provide security in Jackson v. Swordfish Investments, L.L.C., 365 S.C. 608, 620 S.E.2d 54 (2005). In Jackson, the landlord undertook to provide security in the common areas outside a nightclub at the tenant's request and expense. Id. at 610, 620 S.E.2d at 55. The landlord discontinued the service after the tenant failed to pay the additional amount due on the rent for the service. Id. at 611, 620 S.E.2d at 55. After discontinuing the service, the plaintiff was shot multiple times by an assailant inside the nightclub. Id. She sued the landlord and claimed it had had a duty to protect her from criminal activity in the club by providing adequate security on or in the vicinity of the property. Id. The circuit court granted summary judgment, and the plaintiff appealed.

This Court cited to Cramer I to reiterate a landlord has no duty to protect a tenant from the criminal acts of third parties. Id. at 612, 620 S.E.2d at 56. The Court also reiterated Cramer I's rule a plaintiff is not precluded from asserting a general negligence principle that may give rise to a duty "under the particular circumstances of an individual case **based upon a showing of negligence constituting the proximate cause of the loss**." Id. at 613, 620 S.E.2d at 56 (emphasis added). The Court then turned to the appellant's argument of the affirmative acts exception, i.e., once the landlord acted to provide security, it was obligated to maintain adequate security. The Court addressed the exception by saying "[u]nder the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care." Id. (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)). However, the Court disagreed the exception applied because although the landlord agreed to arrange for security in common areas outside the nightclub, there was no evidence the

landlord agreed to provide security inside the club. Jackson affirmed summary judgment, and this Court did not cite or specifically apply Section 323. The dissenting opinion also did not raise it as applicable authority.

B. The Court of Appeals Correctly Applied This Prior Law As It Has Always Been Applied to Hold Respondents' Voluntary Actions Did Not Give Rise to a Duty to Provide Security.

With this context, Petitioner argues the Court of Appeals in Wright applied the wrong standard to her voluntarily undertaken duty claim. (Pet.'s Br. at 6-7). This is incorrect. The Court of Appeals applied the law in precisely the same manner it has been applied by prior courts that have addressed voluntary actions and whether they give rise to a duty in the landlord-tenant context. Based on this application, the Court correctly found Respondents' voluntarily actions did not give rise to a duty to provide security.

At the outset of its analysis of the affirmative acts exception, the Court of Appeals cited to Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986) and Cooke, 741 F. Supp. at 1209-10, as supporting authority for the duty of reasonable care when acts are voluntarily undertaken. Wright, 413 S.C. at 287, 775 S.E.2d at 405 (citing to Sherer as "providing that one who undertakes to act, even though under no obligation to do so, becomes obligated to act with reasonable care" and to Cooke for the same principle). The Court of Appeals then appropriately applied this law to each of the three affirmative acts Petitioner contends gave rise to a duty by Respondents: (1) hiring courtesy officers to patrol the premises, (2) providing common area lighting, and (3) trimming shrubbery throughout the common areas. Wright, 413 S.C. at 287-88, 775 S.E.2d at 405-06.

With regard to the courtesy officer program, the Court found Respondents' creation of the program did not impose on Respondents a duty to exercise reasonable care in providing

security at Wellspring. Id. at 287-88, 775 S.E.2d at 405 (citing 65 C.J.S. Negligence § 40 (2010); Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992)). The program contemplated times during when no officer would be on patrol and the position itself may be vacant.

> The record in this case demonstrates the courtesy officer program contemplated times during which no officer would be on duty because the program required only that an officer patrol the complex two hours per day. The program also contemplated there would be times during which the courtesy officer positions would be vacant, and the respondents would seek to fill the position in a timely manner. Thus, the duty the respondents assumed by undertaking to provide a courtesy officer program did not include a general duty to provide security for its tenants.

Id. at 288, 775 S.E. 2d at 405-06.

The Court then addressed the fact that the courtesy officer position was vacant at the time of Petitioner's abduction and whether these circumstances gave rise to a duty under the affirmative acts exception. Id. at 288, 775 S.E.2d at 406. The Court applied the reasoning in Cramer II, which it stated had facts "indistinguishable" from the instant case. Id. (citing Cramer II, 848 F. Supp. at 1224). As in Cramer II, the Court agreed the affirmative acts exception required a stronger connection between the act and the injury. Id. "The fact that the courtesy officer position was vacant at the time is a circumstance too attenuated from the kidnapping and robbery of Wright to establish a duty to provide security." Id.

The Court of Appeals then turned to Petitioner's claim that Respondents' voluntary provision of lighting and shrubbery maintenance gave rise to a duty to provide security. Id. The Court held neither of these actions imposed this duty on Respondents "even if done in part for purpose of making the premises more secure . . . ." Id. at 289, 775 S.E.2d at 406. Cramer I held the duty to provide a "safe" premises (physically/structurally) under the South Carolina Residential Landlord Tenant Act does not impose a duty on landlords to provide a "secure"

premises. Cramer I, 312 S.C. at 444, 441 S.E.2d at 319. The Court of Appeals in Wright noted that "[i]f the law recognized these as 'undertakings' sufficient to impose on developers and apartment managers a duty of reasonable care to provide security services, the rule of Cramer I would be swallowed by the affirmative acts exception." Wright, 413 S.C. at 289, 775 S.E.2d at 406.

C. The Absence of Citation to Section 323 from the Court of Appeals' Opinion is Not a "Glaring Omission" or Erroneous.

The crux of Petitioner's argument is the Court of Appeals did not cite or apply Section 323 in its analysis of Petitioner's duty claim. This argument suggests Section 323 has been either applied extensively in the landlord-tenant context in the past (and was not in Wright) or Wright wholly ignored the principles of law embodied in Section 323. Neither is true.

(1) South Carolina Courts Pre-Dating Wright Incorporated Section 323's Principle of Law Into the Affirmative Acts Exception.

Five cases pre-dating Wright addressed whether a landlord owed a general duty to protect tenants from criminal activity of third parties: Cooke, Cramer I, Cramer II, Goode, and Jackson. Of these five prior cases, only Goode cited to Section 323. The appellant in Goode cited to Section 323 as a source of the "Duty Created by Undertaking," but there is nothing in Goode's decision to indicate the Court adopted it as a rule for (what it called) the undertaking exception in the context of a landlord-tenant security case. See also footnote 2. Instead, the Court applied the appellant's own authority to show how the circumstances still did not warrant the finding of a duty. The absence of citation in Wright to Section 323 is not a "glaring omission;" the vast majority of prior cases did not cite or specifically apply Section 323.

Be that as it may, the law surrounding whether a landlord assumes a duty to provide security does not ignore Section 323. Petitioner cites to various South Carolina cases applying

Section 323 to support that all voluntarily undertaken duties are rooted in it, and the Court of Appeals' failure to cite it was erroneous. (Pet.'s Br. at 7-11). For example, Petitioner cites to Roundtree Villas Association v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984), Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App.), and Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 340 (1991). (Pet.'s Br. at 8-9).

Courts considering the affirmative acts exception have incorporated this body of law into their analysis. Cooke was the first case to address the affirmative acts exception, and it quoted from Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985), that "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." Cooke, 741 F. Supp. at 1209-10. From the very beginning Cooke cited to authority applying Section 323 as part of its analysis for the affirmative acts exception.[3] Cramer II later cited to Cooke and also quoted from Crowley as authority for its analysis of the affirmative acts exception. Cramer II, 848 F. Supp. at 1224.

Goode next addressed this duty question, and it cited to Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) and Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986)[4] for the same principle underlying the affirmative acts exception: "Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care." Goode, 329 S.C. at 444, 494 S.E.2d 832. This is the same principle cited in Cooke and Cramer II, which cited to Crowley. However, instead of referring to

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[3] Moreover, Crowley cited to Roundtree Villas Association, Inc. v. 4701 Kings Corporation, 282 S.C. 415, 321 S.E.2d 46, 51 (1984), which also cited Section 323. Crowley, 285 S.C. at 406, 329 S.E.2d at 780. Petitioner cites to Roundtree as the first case applying Section 323 to voluntarily undertaken duties. (Pet.'s Br. at 8).

[4] Although not cited by Petitioner, Sherer also cited and analyzed Section 323. Sherer, 290 S.C. at 406, 351 S.E.2d at 150.

it as the affirmative acts exception, the Court in Goode characterized it as the "Duty Created by Undertaking." See footnote 2. This is likely because the appellant in Goode cited to Section 323 as supporting authority, which references one who "undertakes" to render services to another. Goode, 329 S.C. at 444, 494 S.E.2d at 832-33 (quoting Section 323). Goode was the only court pre-dating Wright to analyze a "Duty Created by Undertaking" pursuant to Section 323, and the Court applied Section 323 (as cited by the appellant) to affirm summary judgment.

This Court in Jackson again addressed the affirmative acts exception by also citing to Russell for the same principle of law concerning voluntarily undertaken duties: "Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care." Jackson, 365 S.C. at 613, 620 S.E.2d at 56 (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

When the Court of Appeals addressed the affirmative acts exception in the instant case, the Court cited to Sherer and Cooke as authority for the affirmative acts exception that "one who undertakes to act, even though under no obligation to do so, becomes obligated to act with reasonable care." Wright, 413 S.C. at 287, 775 S.E.2d at 405 (citing Sherer, 290 S.C. at 406, 351 S.E.2d at 150; Cooke, 741 F. Supp. at 1209-10). In Sherer, this Court noted this principle was taken essentially verbatim from Section 323(a). Sherer, 290 S.C. at 406, 351 S.E.2d at 150. Similarly, and as discussed above, Cooke cited to Crowley for this duty principle. See also footnote 3.

In short, Petitioner's argument that Wright's absence of citation to Section 323 is a "glaring omission" is unfounded. Only one prior case cited Section 323 in the landlord-tenant security context. However, every case considering whether a landlord's voluntary actions gave rise to a duty cited to authority citing and/or interpreting Section 323. The very law Petitioner

argues the Court of Appeals failed to consider is incorporated in the rule applied by the Court to address the affirmative acts exception. Wright applied it just as it had been applied by prior courts.

(2) The Court of Appeals' Determination of the Duty Question is in Accordance With Cramer I and Section 323.

Nevertheless, Petitioner argues the Court of Appeals' ruling does not contain a Section 323 analysis or its equivalent. (Pet.'s Br. at 11-15). Although the Court of Appeals did not cite Section 323 in the majority opinion, it applied the law set forth by this Court in Cramer I and in the affirmative acts exception, and this application is not at odds with Section 323. Section 323's analysis is parallel to this Court's analysis in Cramer I for whether a duty arises under the particular circumstance of a case.

Cramer I set forth "[a] duty may arise under the particular circumstances of the individual case **based upon a showing of negligence constituting the proximate cause of the loss**." Cramer I, 312 S.C. at 443 n.1, 441 S.E.2d at 319 n.1. Therefore, the determination of a duty is a function of a showing by the plaintiff of negligence proximately causing the loss. After Cramer I, Cramer II addressed whether a landlord's termination of a courtesy officer without replacing him gave rise to a duty. Cramer II, 848 F. Supp. at 1224. Applying the affirmative acts exception, the Court held the exception envisioned a situation where the act of the landlord led directly to the injury complained of, and cases fitting this exception are those where there is a "stronger connection between the act and the injury, such as where a landlord leaves an apartment door unlocked and a third party enters." Cramer II, 848 F. Supp. at 1224. This holding, post-dating Cramer I, is congruent with Cramer I's rule that a duty may arise based on a showing of negligence constituting the proximate cause of the loss. The Court held termination

of a courtesy officer without replacing him was too attenuated from the injury to satisfy this showing.

Petitioner argues Cramer II's version of the affirmative acts exception is problematic for several reasons. (Pet.'s Br. at 12-13). First, Petitioner argues Cramer II departed from correct application of the exception in Cooke, which found a duty based on a factual question as to whether a ladder was used by the perpetrator to enter the plaintiff's apartment. Cooke, 741 F. Supp. at 1210. Petitioner further argues Cramer II is not consistent with South Carolina law because a third-party criminal's act does not absolve a negligent party from liability.

Cramer II did not depart from Cooke's application of the affirmative acts exception or South Carolina law. Cramer II applied the exception to analyze whether failure to replace a courtesy officer gave rise to a duty, and the Court found it to be too "attenuated." Cramer II, 848 F. Supp. at 1224. This is consistent with Cramer I's rule that a duty may arise based on a showing of negligence constituting the proximate cause of the loss. The Court did not believe the plaintiff's showing created a factual issue that terminating the courtesy officer without replacing him led to the injury. Id. The difference was there was a factual question in Cooke as to whether the perpetrator used an unsecured ladder to access the tenant's apartment versus the more speculative question of whether replacing a courtesy offer would have resulted in him/her being in the vicinity of the perpetrator at the time of the crime in Cramer II. Cramer II's application of the affirmative acts exception is consistent with Cramer I's rule for the showing required to give rise to a duty.

Petitioner also argues the question of whether a duty arises is independent of any proximate cause analysis, and Cramer II was erroneous because "the court actually grounded its holding proximate cause terms." (Pet.'s Br. at 12-13). Petitioner's argument is inconsistent with

this Court's rule in Cramer I. The Court stated in Cramer I and again in Jackson that whether a duty arises under the particular circumstances of a case is based on a showing of negligence constituting the proximate cause of the loss. Jackson, 365 S.C. at 613, 620 S.E.2d at 56 (citing Cramer I, 312 S.C. at 443, 441 S.E.2d at 319). Cramer II held the alleged negligence was too attenuated from the loss to give rise to a duty. This was not the case in Cooke because there was a factual question as to whether the perpetrator used the ladder to access the apartment.[5]

Petitioner's argument that a determination of duty is independent of any analysis of proximate causation is also inconsistent with at least one South Carolina court analyzing whether a duty arises pursuant to Section 323. In McPherson v. CSX Transportation, Inc., C/A No. 4:16-cv-2725-BHH, 2017 WL 1135291 (D.S.C. Mar. 27, 2017), the plaintiff train engineer received a citation from the local police department for obstructing a highway while operating a train. Id. at *1. The plaintiff alleged his employer assured him its legal department would address the citation, failed to do so, and its failure resulted in issuance of a bench warrant for his arrest and subsequent incarceration. Id. The plaintiff sued his employer for negligence and alleged it voluntarily assumed a duty pursuant to Section 323. He alleged his incarceration was a foreseeable result of his employer's failure to use due care after it voluntarily undertook to address the legal citation, giving rise to a duty under Section 323. Id. at *6. The Court dismissed the Complaint. With regard to the Section 323 duty, found "Plaintiff's assertion that a

[5] Even Cooke, which Petitioner argues correctly applied the affirmative acts exception (Pet.'s Br. at 11-12), noted there needed to be some connection between the alleged negligence and the proximate cause of the loss. In analyzing the undertaking exception, Cooke noted "if a plaintiff offers evidence that a landlord had been asked to repair a lock on a door, and that work was performed negligently, a crime committed by a person **entering through that door** may present an actionable negligence claim again the landlord under South Carolina law." Cooke, 741 F. Supp. at 1212 (emphasis added). However, the mere allegation the lock was "inadequate" was a "far cry" from established principles of South Carolina law to be actionable. Id. Conversely, the Court found the connection was present with regard to the claim that an unsecured ladder may have been used to access the apartment.

duty arises from the foreseeability that Defendant's failure to defend the citation would result in his arrest and incarceration is **attenuated at best**." Id. (emphasis added)

The Court of Appeals applied this same principle in Wright. Although Respondents undertook a courtesy officer program, the voluntary undertaking contemplated times when an officer would not be on duty or the position may be vacant. Wright, 413 S.C. at 288, 775 S.E.2d at 405-06. The Court held the fact that the courtesy officer position was vacant at the time was a circumstance too attenuated from the kidnapping and robbery of Petitioner to establish a duty to provide security. Id. This application of the affirmative acts exception comports with Cramer I's rule that the duty question is a function of a showing of negligence constituting the proximate cause of the loss.[6]

Petitioner next argues this rule for reaching a determination of the duty question "should not be considered an acceptable substitute for Section 323 because it did not address Section 323's most important components . . . ." (Pet.'s Br. at 14). As already discussed, the majority of South Carolina's landlord-tenant security cases have not cited Section 323 or engaged in an analysis of reliance and/or increase in the risk of harm. Courts have applied the affirmative acts exception and Cramer I/Jackson's rule.

However, this application is not at odds with Section 323. Section 323 imposes a duty where "(a) [the] failure to exercise such care **increases the risk of harm**, or (b) the harm is suffered **because of** the other's reliance on the undertaking." (Emphasis added). Inherent within each subsection is some analysis of a causal connection between the injury and the voluntary undertaking. There mere act of voluntary undertaking, by itself, is insufficient to show a duty.

[6] Petitioner assumes that because duty is a question of law for the Court to decide, the Court is barred from any consideration of proximate cause whatsoever. (Pet.'s Br. at 12-13). This is not the rule as set forth in Cramer I/Jackson for when a duty may arise.

Otherwise, subsections (a) and (b) to Section 323 would not exist. This is not at odds with this Court's rule in Cramer I and Jackson for when a duty may arise under the particular circumstances of a case: a showing of negligence constituting the proximate cause of the injury. It is also supported by the Court's analysis of whether a duty arose pursuant to Section 323 in McPherson.

This analysis is also the proper approach for determining whether a party assumes a duty to provide security. As noted in Cooke and Cramer I, South Carolina's appellate courts have adopted a "cautious approach" with regard to this question. Cooke, 741 F. Supp. at 1213; Cramer I, 312 S.C. at 443, 441 S.E.2d at 318. The Court's rule in Cramer I/Jackson and application of the affirmative acts exception allows flexibility to determine if imposition of a duty under particular circumstances promotes good public policy. The Court of Appeals recognized this issue in Wright in finding Petitioner's argument that shrubbery maintenance and lighting did not give rise to a duty provide security, as it created the risk that Cramer I would be "swallowed" by the affirmative acts exception. Wright, 413 S.C. at 289, 775 S.E.2d at 406.

This recognition also comports with South Carolina case law interpreting Section 323 in such a way to ensure it does not have a chilling effect on conduct that inures to the public good. See, e.g., Johnson v. Robert E. Lee Academy, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012) ("[C]ontorting the Restatement to create a precedent that may have a chilling effect on . . . conduct that inures to the public good is ill-advised and poor public policy."). If Respondents' decision to provide a courtesy officer program, lighting, and shrubbery maintenance also required they ensure the security of tenants from criminal activity, then such contortion of

Section 323 would discourage landlords from voluntarily providing such programs. Under these circumstances, the Court of Appeals has held Section 323 should not impose a duty.[7]

II. Even if Petitioner is Correct, the Court of Appeals Should Have Directly Applied Section 323, Petitioner Cannot Satisfy Its Requirements.

Respondents have shown Section 323 is not a "glaring omission" from the Court of Appeals' analysis in Wright based on how courts have applied the law of voluntarily undertaken duties in the landlord-tenant context. However, assuming (for the sake of argument) Petitioner is correct, Petitioner cannot satisfy Section 323's requirements to show Respondents undertook a duty to provide security. In the second section of her brief, Petitioner argues Respondents failed to exercise reasonable care in operating the courtesy officer program, she relied it to her detriment, and Respondents' operation of the program increased her risk of harm. (Pet.'s Br. at 15-23). The record does not support a duty based on application of Section 323.

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[7] See also Underwood v. Coponen, 367 S.C. 214, 219 n. 3, 625 S.E.2d 236, 239 n. 3 (Ct. App. 2006) ("If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a public roadway or highway in an effort to shield themselves from unwarranted liability."); Staples v. Duell, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App.1997) (declining to impose duty on defendant to inspect property under circumstances because doing so "would create the highly undesirable precedent of encouraging rural landowners to shield their eyes and never inspect their land").

Petitioner distinguishes these cases by arguing the different relationship Respondents had with Petitioner (i.e., its resident) and the program was a "calculated business decision designed to entice residents to choose Wellspring over its competitors." (Pet.'s Br. at 10). No part of Section 323 distinguishes between relationships between a party undertaking to provide services and a party who may experience physical harm. Furthermore, Petitioner cites to nothing in the record to support her arguments that the courtesy officer program was to "entice tenants" and "help it stand out from the pack." (Pet.'s Br. at 5). The only citation for this argument is Petitioner's testimony about the courtesy officer program as an amenity, and the record does not support Petitioner relied on the program in making her decision to leas an apartment at Wellspring. Respondents thoroughly address this issue on pages 30 to 33 of this brief.

A. The Courtesy Officer Program Was Not "Necessary" to or Designed for Petitioner's Protection.

Section 323 addresses the undertaking of services a party "should recognize as **necessary** for the protection of the other's person or things . . . ." (Emphasis added). It "establishes a duty on one who undertakes to render services for the protection of another." Sherer, 290 S.C. at 407, 351 S.E.2d at 150. Respondents admit they provided a courtesy officer program. However, the program was not designed, intended, or expected to protect Petitioner from abduction by two armed criminals, and Petitioner overstates the program in her attempt to create a duty.

As set forth in the Statement of Facts, the program was for customer service, not private security. At all times, Wellspring was subject to jurisdiction of the Richland County Sheriff's Department, which patrolled Wellspring's complex. (App. p. 226 at 26, lines 1-12; App. p. 714 at 25, lines 12-16). The program was not a private security detail licensed by the South Carolina Law Enforcement Division with the authority and arrest powers of a deputy sheriff. S.C. Code § 40-18-20 et seq.; id. at § 40-18-110. It could not interfere with local law enforcement. (App. p. 714 at 27, lines 5-17). Courtesy officers were not Wellspring employees. (App. p. 497). Wellspring undertook no responsibility for training them to serve in the position. An officer had to be a member of law enforcement with jurisdiction over Wellspring, and s/he agreed to walk Wellspring's property while off-duty and be available to answer calls. It only required the officer to walk the property for two hours per day and otherwise be available to answer calls from residents for non-life threatening issues. The courtesy officer was not to carry a firearm (unless required by his employer).[8]

[8] It is noteworthy that in Zambito v. Occidental Fire & Casualty Co. of North Carolina, No. 9:16-cv-03039-DCN, 2016 WL 7239279 (D.S.C. Dec. 15, 2016), the District Court for the District of South Carolina addressed a motion to remand and discussed the courtesy officer program in Wright as compared to the security program at issue in that case. The defendants removed the

There is no doubt Wellspring wanted residents to be vigilant, as would any apartment complex, homeowner's association, or community association. Therefore, it is no surprise Wellspring included in its newsletter, "Security is also very top priority with us. So please call the security pager or Richland County Sheriff's Department if you see anything suspicious." (App. p. 501). However, Petitioner now equates a request for vigilance to be an undertaking to provide security, arguing the security pager was a "first-line option for addressing suspicious activity on par with calling police." (Pet.'s Br. at 17). This is a gross overstatement.

In having a courtesy officer program, Respondents did not undertake to protect Petitioner from abduction by two armed criminals any more than they undertook for the courtesy officer to serve as a lifeguard by having him lock/unlock the pool gate. (App. p. 315). Respondents did not recognize the service as "necessary" for the protection of Petitioner's person or things as set forth in Section 323.

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case to federal court based on their argument that a property owner's association had been fraudulently joined to defeat diversity. The defendants argued the property's owner's association had no duty to keep the common areas secure from criminal activity, making it an improper defendant. The Court disagreed.

> In Wright, the court found that even under the affirmative acts exception, the creation of a courtesy officer program did not impose a duty to exercise reasonable care in providing security at the complex. Here, HHPPOA maintains 27 full-time Security Officers who are directly employed by the HHPPOA, and are responsible for enforcing the "stringent" requirements for entering the community. The Security Officers of the HHPPOA are responsible for providing a number of services, including "access control to the Plantation at three gates" and "enforcement of ... Plantation regulations." This veritable fleet of Security Officers is distinguishable from the voluntary courtesy officer program in Wright, where the apartment complex contemplated in the creation of the program itself that there would be times when there was no courtesy officer on duty.

Id. at *3.

B. Petitioner's Arguments for How Respondents Failed to Exercise Reasonable Care in Operating the Courtesy Officer Question Are Irrelevant to the Question of Whether Respondents Had a Duty.

Petitioner expends a substantial portion of her brief arguing Respondents failed to comply with the terms of its Courtesy Officer Agreement when the position was filled, and generally arguing facts not previously argued to the Court of Appeals and/or not in the record to overstate it as a as a "robust," "comprehensive, and "broad, intensive" program to provide security. (Pet.'s Br. at 5, 16-17). Petitioner admits "[t]his is the breach element of Mrs. Wright's negligence claim." (Pet.'s Br. at 16).

As such, these arguments are a red herring and irrelevant to whether Petitioner can establish a voluntary undertaking of a duty by Respondents. The adoption of policies relating to a courtesy officer program by themselves do not create a duty under Section 323. Rather, they can only serve as evidence of the standard of care if the duty is established by law. See Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011) ("[I]f no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established."); id. at 248, 711 S.E.2d at 912 (holding Wal-Mart did not voluntarily undertake a duty despite creating an internal policy that its photo technician violated by destroying photographs depicting child abuse and not informing the store manager or keeping them as evidence, and finding the policy only served as evidence of the standard of care). Any violation of an internal policy by Respondents does not give rise to the voluntary assumption of a duty and does not establish Respondents owed a duty as a matter of law.

Nevertheless, Petitioner discusses at length various ways she claims Respondents failed to act with due care in operating the courtesy officer program, and she argues facts not in the

record based on speculation.[9] (Pet.'s Br. at 17-20). She provides this analysis in response to the Court of Appeals' statement in Wright 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. (Pet.'s Br. at 19) (quoting Wright, 413 S.C. at 288, 775 S.E.2d at 406). Petitioner argues "[b]ased on the evidence detailed above, this conclusion was in error." (Pet.'s Br. at 19).

Petitioner's problem is—other than her argument that the courtesy officer position was vacant at the time of her abduction—her opposition to summary judgment and her Final Brief to the Court of Appeals did not raise any other evidence of Respondents' alleged failure to operate the program with due care. (Compare App. pp. 324 to 353, at 13-18 (Pl.'s Memo. in Opp. to Summary Judgment) and App. pp. 818-870, at 20-29 (Final Br. of Appellant) to Pet.'s Br. at 17-20). Based on what Petitioner argued to the Circuit Court and Court of Appeals in her briefs, the Court of Appeals correctly held there was no evidence the program was operated with less than due care. Wright, 413 S.C. at 287, 775 S.E.2d at 405 (noting the arguments raised by Petitioner to be the patrols for two hours per day, provision of a security pager, publication of the security pager in a newsletter, and the vacancy of the position).

Petitioner's motive in raising these alleged deficiencies now is clear. In spite of Respondents' admission there was no courtesy officer in place at the time of Petitioner's abduction, she seeks to overturn summary judgment by coloring this Court's view of Respondents based on alleged deficiencies not previously raised and relating to operation of the

[9] For example, Petitioner argues the program's requirement that courtesy officers make daily written reports was to "report responses to calls, to note security risks throughout the premises, or to report any suspicious incidents observed during patrols." (Pet.'s Br. at 17). There is no citation in the record to this purported purpose of the reporting requirement, and it is equally likely the reporting requirement served no purpose other than ensuring the courtesy officer was doing what was asked by Wellspring in order to receive reduced rent.

program when the courtesy officer position was filled. These arguments are (a) irrelevant to the question of duty, (b) irrelevant since the position was vacant at the time of Petitioner's abduction, and (c) improper based on Petitioner's failure to preserve them.

C. The Record Does Not Support Petitioner's Injury Was Because of Her Reliance on Respondents' Courtesy Officer Program.

In order to establish a duty under Section 323, Petitioner must show she suffered her harm because of reliance on the courtesy officer program. Petitioner claims "it was Wellspring's security program that helped seal the deal" for her decision to become a resident at Wellspring, and that its alleged failures "almost cost [Petitioner] her life." (Pet's Br. at 5). She claims it was a "crucial factor" in her decision to move to Wellspring over its competitors. (Id.). She argues her reliance is evidenced by her question to Wellspring's property manager the day after her incident: "Where are these security officers that are supposed to be walking the beat?" (App. p. 790 at 116, lines 16-17). It is understandable Petitioner would ask this question after her abduction. However, the record does not support Petitioner relied on the courtesy officer before her incident.

First, even though Petitioner claims she relied on the courtesy officer program and asked about the courtesy officers after her abduction, she did not contemplate an action against Respondents on her own. Instead, when asked how she found her current counsel, Petitioner responded "He found me . . . . Through another case." (App. p. 738 at 23, line 25 – App. p. 738 at 24, line 5). Notwithstanding the fact Petitioner did not seek counsel to bring an action, one would expect—if she truly relied on the courtesy officer program to the extent she claims—her Complaint commencing her action would detail her reliance on the courtesy officer program once she conferred with counsel.

However, there is no mention of the courtesy officer program in the entirety of Petitioner's Second Amended Complaint. (App. pp. 92-98). She alleges she "chose to live at Wellspring in part based on Defendants' representations that Wellspring was safe, habitable, clean and professionally managed." (App. p. 93, ¶ 7). Her allegations of negligence focus entirely on allegations of high criminal activity, lack of adequate lighting, and overgrown foliage. (Id. at ¶¶ 8-9). There is not one allegation Respondents undertook a duty to provide security. There is not one mention of "courtesy officer," the program generally, or Petitioner's reliance on it in the entirety of her Complaint. (App. at pp. 92-98). Instead, Petitioner's allegations of negligence assume Respondents had a duty to provide security and protect Petitioner. (App. p. 95, at ¶ 26). To the extent Wellspring's courtesy officer "sealed the deal" and failed Petitioner, it is not reflected in the pleading commencing this action.

Petitioner's alleged reliance is also not supported in her deposition. The primary reasons cited by Petitioner for her decision to lease an apartment at Wellspring were (1) members of her church recommended it; and (2) it was in close proximity to her work. (App. p. 746 at 38, line 21 – App. p. 747 at 39, line 2; App. p. 747 at 40, lines 3-7 ("Q. Okay. So we've talked about proximity and the fact that some of your friends at church had recommended it. Anything else? A. **No**.") (emphasis added)). These were the two reasons Petitioner "went there first." (App. p. 746 at 39, lines 1-2). After additional prompting about any "amenities," Petitioner testified there was a pool, she could use a nearby recreation center, and she was told "there were security officers on duty. So I felt like it would be a safe place." (App. p. 689 at 40, lines 16-21).

These alleged representations were made to Petitioner in 2003 when she signed her lease. (App. p. 747 at 39, lines 18-20; App. p. 747 at 40, line 13 – App. p. 748 at 41, line 10). From 2003 to Petitioner's abduction in 2008, there is nothing in the record to support she ever

relied on the courtesy officer program or raised any deficiencies with it based on her observations. She never spoke with a courtesy officer at Wellspring. She never reported an incident to a courtesy officer at Wellspring. (App. p. 793 at 121, lines 11-17). When she had an incident with young men who were soliciting on the premises, she called the Sheriff's Department because she "wanted something done then." (App. p. 793 at 121, line 14 – App. p. 793 at 122, line 5). She testified that prior to her incident, "I've never seen one the whole time I've lived there." (App. p. 790 at 116, lines 18-20). For someone who claims the courtesy officer program was a "crucial factor" for her residency at Wellspring, one would expect Petitioner to have asked about, relied upon, or otherwise utilized the courtesy officer program after signing her lease in 2003 and before her abduction in 2008 (especially if her testimony is she never saw one). However, there is nothing in the record to support Petitioner gave the courtesy officer program another thought until five years later, and after her abduction. Furthermore, on the night of her abduction, Petitioner did not call for the courtesy officer; her first call was to her daughter. (App. p. 776 at 91, lines 9-14).

South Carolina case law applying Section 323 and addressing the reliance element to find a duty has required a higher degree of reliance than that evidenced by Petitioner. In Roundtree Villas Association, Inc. v. 4701 Kings Corp., this Court held there was a duty pursuant to Section 323 when a lender took over a condominium project for the owner, undertook to market the units, and undertook to repair defects in the units in an effort to promote sales. Roundtree, 282 S.C. at 423, 321 S.E.2d at 51. (Contrary to Petitioner's claims concerning the need to address the reliance and increased risk of harm elements of Section 323, it is interesting to note the Court in Roundtree did not walk through either element in its analysis of whether the lender's

voluntary actions gave rise to a duty). However, it is reasonable to assume the Court found the owner relied on the voluntary actions of the lender under these factual circumstances.

In Crowley v. Spivey, a father only allowed visitation by his mentally ill wife to resume with his children after their grandparents assured him they would supervise visitation and had conducted a search for a pistol owned by his wife and were satisfied she no longer had it. Crowley, 285 S.C. at 406, 329 S.E.2d at 780. The Court found these circumstances gave rise to a voluntarily undertaken duty (citing to Section 323), and the factual circumstances supported the harm occurred (i.e., the children's deaths) because of the father's reliance on the grandparents' undertaking. Id.

In Winburn v. Insurance Co. of North America, the Court found there was a jury question as to whether an insurance company and its adjuster assumed a duty to ensure repairs were made to a boat after the boat's owner only agreed to endorse a check for the repairs after the adjuster assured him he would "see to it that [the mechanic] fixed the boat." Winburn, 287 S.C. 435, 445, 339 S.E2d 142, 148 (Ct. App. 1985). Similar to Roundtree, the Court did not specifically address the reliance or increase in the risk of harm elements of Section 323. However, it is relatively clear from the factual circumstances that the level of reliance by the boat owner on the adjuster's representations had a strong connection to the harm alleged.

Petitioner's claims of reliance do not rise to this same level of proof in Roundtree, Crowley, or Winburn. Although she claims Wellspring's security program was the reason she chose to lease an apartment, her Complaint, testimony, and actions during her residency do not support this claim.

D. Respondents' Operation of the Courtesy Officer Program Did Not Increase the Risk of Harm to Petitioner.

Petitioner also argues Respondents' failure to operate the courtesy officer program with reasonable care increased the risk of harm to her. (Pet.'s Br. at 22-24). The dissenting opinion in Wright also found "[b]y not having officers in place to patrol the area or answer the 'security pager,' the respondents undoubtedly increased the risk that tenant would be attacked at the complex." Wright, 413 S.C. at 294, 775 S.E.2d at 409.

Some of these arguments are addressed below in argument concerning Petitioner's proximate causation arguments. However, for purposes of analyzing Section 323, the dissenting opinion's conclusion and Petitioner's argument ignore the nature of the harm in this case: criminal activity. In Cramer I, this Court quoted from Cooke that "[a]bsent agreement, the landlord cannot be expected to protect them against the wiles of felonry any more than the society can always protect them upon the common streets and highways leading to their residence or indeed their home itself . . . The criminal can be expected anywhere, any time, and has been a risk of life for a long time." Cramer I, 312 S.C at 442, 441 S.E.2d at 318 (quoting Cooke, 741 F. Supp. at 1213). In Goode, the Court of Appeals found a lack of reliance and noted the "intentional, personal attack" on the appellant. Goode, 329 S.C.at 444-45, 494 S.E.2d at 833.

With this context, it is relatively easy to argue any activity undertaken or not undertaken by Respondents "increased the risk" because the harm at issue—criminal activity—is based on third-party activity that is unpredictable by its nature. More lighting can always have a benefit of deterring criminal activity. Less foliage may make it easier to see criminals (although it may come at the expense of preventing injury and/or aesthetic appeal). Wright, 413 S.C. at 289, 775 S.E.2d at 406. However, with regard to the courtesy officer program (and as discussed above), the Richland County Sheriff's Department had jurisdiction over Wellspring for law enforcement.

It patrolled Wellspring, Wellspring was subject to its authority, and the courtesy officer program was not a licensed security detail that served as a replacement or supplement to law enforcement. The question is whether the courtesy officer program caused law enforcement to alter their oversight, patrols, investigation, or other activities to protect residents at Wellspring from crime.

There is no such evidence, and this approach is consistent other South Carolina case law applying Section 323. In Rainey v. Charlotte-Mecklenburg Hospital Authority, No. 2015-UP-209, 2015 WL 1880212 (S.C. Ct. App. 2015), the plaintiff alleged a hospital had a duty to assess the home environment of a child before he was discharged from the hospital's care. The plaintiff alleged, in part, this duty arose pursuant to Section 323 based on the hospital's voluntary undertaking of a psychosocial assessment of the child. Id. at *2-3. The Court of Appeals noted the legislature has designated the South Carolina Department of Social Services ("DSS") as the entity responsible for investigating child abuse or neglect. There was no evidence the hospital social worker's participation in the assessment of the child caused DSS or law enforcement to perform a less through investigation than they would have otherwise. Id. at *2. "There is no evidence that DSS caseworkers omitted certain tasks from their investigations with the understanding that [the hospital's] social workers would cover those tasks. Further, there is no evidence that [the hospital's] social workers caused DSS to determine that the Child's discharge to his parents was appropriate when DSS would not have otherwise made that determination." Id. The same is true in this case.

Nevertheless, Petitioner argues Respondents' operation of the courtesy officer program "left [Petitioner] worse off than if the program had never been undertaken." (Pet.'s Br. at 24). This is a dubious claim, at best, in light of the fact law enforcement personnel involved with investigation of Petitioner's incident characterized the crime rate as "average," as did Petitioner's

expert. (App. p. 226, lines 10-22; App. p. 603 at 108, lines 12-17; App. p. 720 at 51, line 24 – App. p. 720 at 52, line 9). Furthermore, Petitioner's expert's suggestion that she was encouraged to "let [her] guard down" because "there is a guardian there that is looking out for [her] safety" is pure speculation in light of the lack of evidence Petitioner relied on the program.

III. Petitioner Cannot Prove Proximate Causation.

Because the Court of Appeals affirmed summary judgment based on Petitioner's duty claim, it did not address the Circuit Court's ruling that Respondents' conduct did not proximately cause Petitioner's injuries. Wright, 413 S.C. at 289 n.5, 775 S.E.2d 406 n. 5. However, Petitioner addresses proximate causation in her brief. (Pet.'s Br. at 24-30). Therefore, Respondents address her arguments here.

Although the question of proximate cause is usually a question for the jury, when there is "absolutely no evidence in the record" indicating proximate cause exists, it is appropriate for the court to decide the issue as a matter of law. Parks v. Characters Night Club, 345 S.C. 484, 500, 614, 548 S.E.2d 605, 614 (Ct. App. 2001). If a plaintiff cannot prove proximate cause, then there is no claim for negligence. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827,834 (Ct. App. 1998) (granting summary judgment in apartment complex case involving claim of inadequate security).

Negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. Id. In order to hold a landlord liable for the breach of any duty, the negligence of the landlord must lead directly to the injury the plaintiff suffers. Cramer II, 848 F. Supp. at 1224. In applying this rule, courts require a strong causal connection between the negligent act and the injury, such as where a landlord

leaves an apartment door unlocked and a third party enters. Id. (citing McCappin v. Park Capitol Corp., 126 A.2d 51 (N.J. Super. Ct. 1956)).

Even if Petitioner could prove Respondents owed her a duty, the Circuit Court held Petitioner's negligence claim failed because she could not prove a breach that proximately caused her injury. (App. pp. 56-70, and 12-16). First, a willful and malicious crime (e.g., an abduction, kidnapping, and robbery) breaks the causal link between any negligence of Respondents and Petitioner's alleged injuries. As stated by the South Carolina Court of Appeals:

> Generally, if between the time of the original negligent act or omission and the occurrence of the injury, there intervenes a willful, malicious, or criminal act of a third person producing the injury, and the intervening act was not intended by the negligent actor and could not have been foreseen by him as a probable result of his own negligence, the causal link between the original negligence and the injury is broken, and there is no proximate causation.

Sheppard v. South Carolina Dept. of Corrections, 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). The test under Sheppard is whether the author of the primary negligence should have reasonably anticipated the intervening act and resulting injury based on the circumstances. Id. at 375, 385 S.E.2d at 37-38. However, "[o]ne is not charged with foreseeing that which is unpredictable or which could not have been expected to happen." Id. Foreseeability is judged from the perspective of the actor at the time of the negligent act, and not with the benefit of hindsight after an injury. Id., 385 S.E.2d at 38.

Applying the law enunciated within Sheppard, the Circuit Court agreed Petitioner could not prove proximate causation in this case. Petitioner and her expert admitted this case involves criminal activity. (App. p. 426 at 118, lines 5-7; App. p. 595 at 74, lines 1-12). Petitioner also admitted that although crime may be deterred, it cannot all be prevented. (App. p. 426 at 117, line 24 – App. p. 426 at 118, line 4). Petitioner's expert admitted there is no "crystal ball" or "magic pill" that allows us to predict what people may do with any certainty. (App. p. 595 at 75,

lines 2-5). Petitioner's expert also admitted every crime cannot be prevented. (App. p. 595 at 74, line 25 – App. p. 595 at 75, line 1). As stated by the expert, security is a "people problem." (App. p. 595 at 73, lines 13-14). Although it may be exacerbated by surroundings in which the security incident occurs, people are the ones who actually intend the harm. (App. p. 595 at 73, lines 15-22). The perpetrators in this case committed their crime in spite of the fact that Wellspring residents were on their balconies and in the parking lot as the incident happened. (App. p. 397 at 67, lines 1-7; App. p. 617 at 164, line 24 – App. p. 618 at 165, line 18). They continued to commit the act in spite of the fact that another resident actually walked up with her dogs as the incident was occurring and engaged the criminals in conversation. (App. p. 402 at 74, line 17 – App. p. 402 at 75, line 6).

In addition, it is also clear Respondents could not foresee Petitioner's incident. Petitioner argues she "adamantly disagrees with Respondents' characterization of Wellspring's extensive crime record" and "only [her] position was supported by evidence." (Pet.'s Br. at 28). This assertion again misstates the record. This is apparent from a review of police reports produced by Petitioner and testimony about them by Petitioner's expert.

Petitioner's expert admitted security is a response to conditions known at the time. (App. p. 595 at 75, lines 14-25). There were twenty police reports of incidents from 2005 to 2008, which pre-dated Petitioner's incident and Petitioner's expert considered relevant to his opinions. (App. p. 622 at 182, line 20 – App. p. 622 at 183, line 1; Supp. App. p. S-14). Of these twenty reports, the vast majority related to automotive/parts theft or vandalism. (App. p. 621 at 179, lines 7-14; Supp. App. p. S-14). Only two police reports from the four years preceding Petitioner's incident involved violent crimes: an assault and an attempted home invasion. (App. p. 623 at 185, lines 12-20; Supp. App. p. S-14). There were no other instances of abduction or

kidnapping like Petitioner's incident. (App. p. 623 at 185, lines 21-22). Petitioner's expert also could not recall any police report he reviewed that referenced shrubbery or lighting as a contributing factor to the crime. (App. p. 623 at 186, lines 2-9).

Respondents also supported the lack of foreseeability by citing to testimony of local law enforcement officials. Respondents' counsel deposed the reporting and investigating officers for Petitioner's case, Officer Mohammed Gabr and Detective Kevin Isenhoward. Both of these law enforcement officers were familiar with the area in which Wellspring lies and characterized the crime rate as "average." (A. p. 226, lines 10-22; App. p. 720 at 51, line 24 – App. p. 720 at 52, line 9). Detective Isenhoward stated it is not a particularly dangerous area; there were some incidents in 2008, but "since then it's fairly calm." (App. p. 720 at 52, lines 2-9). Notably, even Petitioner's expert characterized crime in the area where Wellspring lies as "average." (App. p. 603 at 108, lines 12-17). Petitioner's testimony also corroborated this characterization. She was not aware of any other criminal incidents at Wellspring prior to her incident. (App. p. 392 at 57, lines 18-20). She was never the victim of a crime at Wellspring prior to her incident, and she was not aware of crime involving other residents. (App. p. 392 at 57, lines 1-17). Members of her church recommended Wellspring. (App. p. 381 at 38, line 21 – App. p. 381 at 39, line 2).

In addition, there is nothing in the police report to support shrubbery or a lack of lighting contributed to conceal the perpetrators. Officer Gabr, the author of the police report, testified recording accurate information in police reports is important because others may rely on the reports as part of a criminal investigation. (App. p. 227, line 18 – App. p. 228, line 14). As stated in the report: "The Complainant stated to the [Responding Officer] that while she was coming back home she parked her vehicle and walked to her apartment building. The [Complainant/Victim] **saw two black males sitting in front of the 2200 building**." (App. p.

218) (emphasis added). Petitioner also testified when she saw the perpetrators, she said "I need to get through, please." (App. p. 396 at 65, lines 1-5). To the extent Petitioner claims shrubbery and inadequate lighting resulted in "pitch darkness and men leaping from behind an overgrown bush," neither her testimony nor the police report taken at the time of the incident support these factors as a proximate cause.

Petitioner also cites to testimony by her expert and by a man hired to trim the shrubs to support "witnesses" have provided evidence she would have seen the criminals but for the dim lighting and shrubbery. (Pet.'s Br. at 28). As a preliminary matter, neither of these men witnessed the crime so as to know where the criminals were in relation to Petitioner. The only witnesses were Petitioner, the criminals, and a third-party who was walking her dog and engaged Petitioner and the criminals as the crime occurred. Petitioner also cites to her affidavit in which she testifies she would not have gotten out of her car if she could have seen the perpetrators, or she would have retreated if she could have seen them as she approached the ramp. (Pet.'s Br. at 29 (citing App. p. 357, ¶ 10)). It is noteworthy Petitioner provided the referenced affidavit five months after her deposition, and after Respondent's filed their motion for summary judgment, in an attempt to cure her deposition testimony. In her deposition, she testified she eventually saw the perpetrators as she walked to her apartment. Instead of retreating, she said "I need to get through, please." (App. p. 396 at 64, line 22 – App. p. 396 at 65, line 1). See also Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (setting forth six considerations a court may use to determine if a post-deposition affidavit is a "sham affidavit").

Finally, Petitioner cites to the lack of a courtesy officer, and that "but for Respondents' sloppily executed courtesy officer program, the perpetrators likely would not have been in the area to abduct Ms. Wright." (Pet.'s Br. at 29). This argument is pure speculation. First, it

assumes the two hours patrolled by a courtesy officer would have been around the time of the incident on any given day. Second, it assumes the courtesy officer would have been nearby, in what is an expansive property. (Supp. App. at S-4). Third, and as explained in greater detail above, Petitioner's expert had no idea as to what motivated the perpetrators in this case. He has never spoken with them. (App. p. 617 at 162, lines 19-22). Therefore, he has no way of knowing whether they had been watching Petitioner's arrival and departure habits, whether they were aware of the presence or absence of a courtesy officer, or whether they chose their position based on overgrown shrubbery or inadequate lighting. (App. p. 617 at 162, line 23 – App. p. 617 at 163, line 13). He admitted answers to all of these questions would be relevant to his opinion that Respondents were the proximate cause of Petitioner's injury, and not the criminal perpetrators. (App. 617 at 162, line 15 – App. p. 617 at 163, line 13). To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture. McKnight v. S.C. Dept. of Corrs., 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App.2009). This is another reason Petitioner cannot prove proximate cause for her negligence claim.

As found by the Circuit Court, Respondents did not know two criminals would abduct, kidnap, and rob Petitioner. (App. p. 71). Respondents had no reason to foresee breach of any of the duties Petitioner attempts to impose upon them would have the natural and probable consequence of resulting in an intentional act by third parties against Petitioner at the complex. (App. p. 71). Accordingly, Petitioner cannot prove proximate causation, and Respondents were not negligent. (App. p. 71) (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 826 (Ct. App. 1988)).

CONCLUSION

Respondents respectfully request the Court affirm the Court of Appeals' ruling and affirm Respondents' summary judgment motion. The Court of Appeals applied the law surrounding voluntarily undertaken duties in the landlord-tenant context in the same manner courts pre-dating Wright applied it. This application considered Section 323 as part of the affirmative acts exception, and the Court held Respondents' voluntary actions relating to its courtesy officer program, shrubbery maintenance, and lighting did not give rise to a duty to provide security because Petitioner could not show negligence constituting the proximate cause of her injury.

This decision comports with Cramer I and Jackson's rule for when a duty may arise, and it promotes sound public policy. If Respondents' actions with regard to the courtesy officer program, shrubbery, and lighting gave rise to a duty to provide security in spite of Petitioner's lack of reliance and lack of evidence of increased risk of harm, it would have a chilling effect on any efforts by landlords to provide such services. The Court of Appeals' ruling should be affirmed.

Respectfully submitted,

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Columbia, South Carolina
December 5, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate 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.

PROOF OF SERVICE

I HEREBY CERTIFY THAT I SERVED the Respondents' Brief and Certificate of Counsel, by placing a copy in the United States mail, postage prepaid, to all counsel of record on December 5, 2017, addressed to the following:

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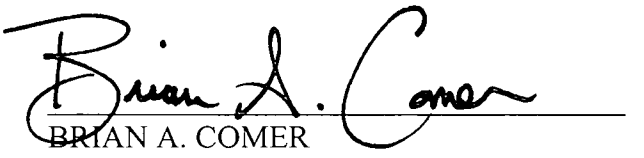
By: 

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PROOF OF SERVICE – RESPONDENTS' FINAL BRIEF AND CERTIFICATE OF COUNSEL

Columbia, South Carolina
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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' PRG Real Estate Management, Inc., Franklin Pineridge Associates, Karen Campbell, Individually, and in her Representative Capacity as an Agent of PRG Real Estate Management's Brief complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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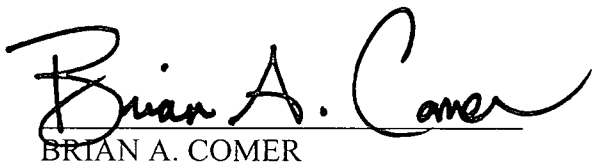
By: 

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