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

RECEIVED

JAN 0 3 2018

S.C. SUPREME COURT

Denise Wright ..... Petitioner

v.

PRG Real Estate Management, Inc.; Franklin Pineridge Associates; Karen Campbell Individually, and in her Representative Capacity as an Agent of PRG Real Estate Management .... Respondents.

REPLY BRIEF

S. Randall Hood
Jordan C. Calloway
Deborah G. Casey
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

E. Wayne Ridgeway, Jr.
Burris Ridgeway
907 Elmwood Avenue
Columbia, SC 29201
(803) 779-5842
(803) 227-0384 (fax)
wayne@burrisslaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

South Carolina

Other Jurisdictions

Secondary Source

REPLY ARGUMENT

1. Respondents' Security Program Should be Evaluated Using the Restatement's Generally Applicable Assumed Duty Standard Rather Than the Murky Cooke Exceptions.

Respondents defend the Court of Appeals' failure to cite Restatement (Second) of Torts § 323 by making inconsistent claims. Respondents waffle between arguing the Court of Appeals did not need to apply Section 323 (Resp'ts Br. at 9-15) and the Court of Appeals effectively applied Section 323 through reference to exceptions laid out in Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990). See Resp'ts Br. at 20-25. Both arguments raise issues Respondents do not address. For instance, if the Court of Appeals was permitted to address Ms. Wright's duty claim without applying section 323, then South Carolina law inexplicably treats a residential landlord's voluntarily assumed duty differently than one assumed by any other actor. Alternatively, Respondents fail to explain how the Court of Appeals' use of the Cooke exceptions equals section 323 when its essential components were absent from the Court of Appeals' reasoning. In other words, Respondents ask the Court to stubbornly cling to the Cooke exceptions as the analytical framework for voluntarily undertaken duties by landlords even though that framework (1) was not developed by a South Carolina court; (2) stands at odds with a venerable alternative framework—section 323—South Carolina courts apply in every other context; and (3) is not even consistently defined in the cases purporting to apply it.

Respondents portray the Cooke exceptions as long-standing South Carolina law and the Court of Appeals' previous use of section 323 for a landlord's duty[1] as an anomaly. Resp'ts. Br. at 8 (arguing "South Carolina courts have recognized" the Cooke exceptions). However, **prior to**

[1] Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 444-45, 494 S.E.2d 827, 832-33 (Ct. App. 1997).

the Court of Appeals' ruling in this case, no South Carolina appellate court had adopted or applied Cooke's exceptions for a residential landlord's voluntarily assumed duty. Cooke is a federal district court order, not South Carolina law. The same is true for Cramer v. Balcor Property Management, Inc., 848 F. Supp. 1222 (D.S.C. 1994) ("Cramer II"). District court orders are persuasive authority at most[2], and our appellate courts declined two previous opportunities to adopt the Cooke exceptions as South Carolina law for residential landlords.

When this Court first considered the issue in Cramer v. Balcor Property Management, Inc., it addressed Cooke but only adopted that portion of the district court's order ruling the landlord-tenant relationship alone does not create a duty to provide security services. 312 S.C. 440, 443, 441 S.E.2d 317, 318-19 (1994) ("Cramer I"). Cramer I declined the opportunity to adopt or even discuss Cooke's exceptions, choosing instead to note the general rule must yield to claims based on a "general negligence principle." Id. at 444 n. 1, 441 S.E.2d at 318-19 n. 1. When Cramer I was decided, the general negligence principles recognized by South Carolina courts included section 323 but not Cooke's exceptions. The next South Carolina case to address a landlord's voluntary undertaken duty was Goode, and the Court of Appeals also refused to adopt the exceptions Respondents tout. Goode cited Cramer I's general rule (derived from Cooke) along with its "general negligence principle" note and concluded there are some "special circumstances" that would support a landlord's duty to provide security services. Goode, 329 S.C. at 441-42, 494 S.E.2d at 831-32.

[2] Walden v. Harrelson Nissan, Inc., 399 S.C. 205, 209, 731 S.E.2d 324, 326 (Ct. App. 2012) (noting district court orders are "not binding upon this court"); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 629 n. 4 776 S.E.2d 426, 434 n. 4 (Ct. App. 2015) (Lockemy J. dissenting) (citing Walden).

Notably, when turning to address arguments in support of a landlord's duty, Goode made no mention of Cooke's exceptions. Goode's "Duty Created by Undertaking" section does not include a single Cooke or Cramer II citation. Goode, 329 S.C. at 444-45, 494 S.E.2d at 832-33. The Court of Appeals bypassed Cooke's "affirmative act" exception entirely and instead went directly to section 323 and early South Carolina cases applying its provisions. Id. (citing 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)). Respondents try to minimize Goode, arguing the Court of Appeals did not adopt section 323. Resp'ts Br at 17. That is true but only because section 323 needed no adopting—it had been South Carolina's generally applicable voluntary duty framework for more than a decade. See Petitioner's Br. at 8-9 (tracing section 323 through South Carolina case law dating back to 1982). Goode counted section 323 as established South Carolina law and used its principles to address a landlord's purported duty. 329 S.C. at 445, 494 S.E.2d at 833 (finding no duty because party admitting apartment complex lacked security could not have relied on security undertaking).

This Court did apply two of the Cooke exceptions in Jackson v. Swordfish Investments, LLC, 365 S.C. 608, 613, 620 S.E.2d 54, 56 (2005) but Jackson is distinguishable in several ways. There, the Court was considering a commercial landlord-tenant relationship. Plus, the Jackson plaintiff's duty claim never really got off the ground because it was based on security issues in a location the defendant neither controlled nor possessed. Id. at 612, 620 S.E.2d at 56. Here, Respondents had exclusive control over Wellspring's common areas when Ms. Wright was attacked. Moreover, Jackson did not suggest section 323 should not be applied in the landlord-tenant context. The Court again relied on Cramer I's "general negligence principle" note which applies to section 323 as much as any other common law duty rule. Id. at 613, 620 S.E.2d at 56.

In sum, the Court of Appeals' use of the Cooke exceptions in this case to the exclusion of section 323 has no precedent in South Carolina law. Cramer I and Goode's refusal to adopt these exceptions demonstrates an unease with their strictures and lack of clarity. Even within its own paragraphs, Cooke struggled to differentiate the "affirmative act" and "undertaking" exceptions. 741 F. Supp. at 120 ("South Carolina law imposes a duty on a person to use reasonable care when any affirmative act is undertaken . . ."). That struggle is evidenced in the Court of Appeals' opinions in this case. Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 288, 775 S.E.2d 399, 406 (Ct. App. 2015) (finding Cramer II applied the "affirmative acts" exception); Id. at 295, 775 S.E.2d at 409 (Lockemy J. dissenting) (countering that landlord security claims have been considered using the "undertaking" exception or "the 'affirmative acts' exception (a/k/a 'undertaking' exception)").

By any reasonable reading of the majority opinion below, section 323 was not a part of the analysis even though Ms. Wright raised it to support her claim. Thus, affirming summary judgment in this case requires the Court to choose the Cooke exceptions over the generally applicable framework in section 323[3], and Respondents have offered no legal or logical reason for that choice. South Carolina law does not impose subject matter restrictions on section 323's application and a number of other jurisdictions have applied it to residential landlords undertaking security services. Petitioner's Br. at. 11 n. 2. Section 323 itself refutes the notion that its provisions apply to some alleged tortfeasors but not others. Restatement (Second) of Torts § 323 cmt. a ("This Section

[3] Affirming summary judgment here would also undercut Goode, which holds that a court should at least apply section 323's substantive elements when a plaintiff builds her claim on a landlord's voluntarily assumed duty. If this Court affirms a decision that disposes of such a claim while omitting section 323 entirely, then Goode loses its substantial value in acknowledging this generally applicable, hefty yet flexible, assumption of duty standard. Goode should not be made a relic; it provides a prudent way forward from the lack of doctrinal clarity existing in its absence.

applies to *any undertaking* to render services to another" that meets the section's substantive requirements) (emphasis added).

Respondents' second argument is also in error. Cooke's "affirmative act" exception, as applied by the Court of Appeals' majority, does not "parallel" section 323 or "incorporate" its requirements. See Resp'ts Br. at 20. The majority opinion below did not consider Ms. Wright's reliance on Respondents' security services or whether Respondents' performance of those service increased the risk Ms. Wright would be harmed. Section 323 has not been applied unless these core components are considered. Respondents seem to suggest these two essential elements are not required in every section 323 analysis. Resp'ts Br. at 32-33 (citing Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984)). Respondents do not explain what substance remains in section 323 if these elements are omitted. Moreover, their conclusion is not supported by previous landlord cases or very recent precedent applying Section 323. Goode's section 323 analysis was only complete when the court examined whether the plaintiff relied on the landlord's security services before entering the apartment complex where he was assaulted. 329 S.C. at 444-45, 494 S.E.2d at 833. Similarly, in Doe 2 v. The Citadel, the reliance and risk of harm elements were deciding factors in the court's section 323 analysis. 421 S.C. 140, 147-48, 805 S.E.2d 578, 582 (Ct. App. 2017) (affirming summary judgment because there was "no evidence . . . [the defendant] . . . increased the risk of harm" and "no evidence indicates [the plaintiff] relied on" the defendant's undertaking).

Respondents then argue that, whatever the technical requirements of a voluntary duty analysis, Cramer II is controlling because it too considered a courtesy officer program and a criminal assault. Resp'ts Br. at 11-12, 20, 21; see also Wright, 413 S.C. at 288, 775 S.E.2d at 406 (finding Cramer II's facts "indistinguishable" from the current case). The Court of Appeals echoed

Cramer II's conclusion that an assault occurring during a courtesy officer program's period without an active officer did not create a strong enough connection to support a legal duty. Id. (quoting Cramer II, 848 F. Supp. at 1224). However, by equating Cramer II and Respondents' security program, the Court of Appeals drew a causation conclusion without accounting for key facts in the record. The Cramer II landlord hired a courtesy officer but passively failed to hire a replacement when the officer left. 848 F. Supp. at 1224. The record shows Respondents' program was far more in depth. Wellspring's courtesy officers were required to patrol and to respond to all criminal incidents a police officer would face. (App. p. 497). Wellspring's security pager and monthly newsletters also distinguish Cramer II because Respondents' program instructed tenants to rely on the officers when Respondents knew none were available. (App. p. 501). This distinction is crucial for section 323's reliance and "risk of harm" elements. The Court of Appeals majority's failure to account for the pager and newsletter in discussing Cramer II demonstrates the court's error in adopting Cramer II's holding. See also Wright, 413 S.C. at 293-94, 775 S.E.2d at 409 (Lockemy J. dissenting) (citing pager and newsletter as evidence supporting duty).

Finally, even if the Court agrees with Respondents that voluntarily assumed duties in the residential landlord context are confined to the Cooke exceptions, Respondents still owed Ms. Wright a duty through the "undertaking" exception. The "undertaking" exception imposes a duty when a landlord undertakes and poorly performs security services for its tenants. This exception is more commonly considered for negligent repair work but can apply "to some allegations arising out of violence committed against tenants." Cooke, 741 F. Supp. at 1212. Cooke refused to apply this exception to the lock on a tenant's door because all the evidence demonstrated the undertaken service was reasonably performed—i.e. the lock was properly installed. Id. Cramer II did not apply the "undertaking" exception because the tenant's complaint was based on a security feature the

tenant requested but the landlord never attempted to provide. 848 F. Supp. at 1224-25. Importantly, Cramer II concluded the "undertaking" exception could apply to an apartment security case under different facts. Id. at 1225 (finding exception could apply if landlord undertook security devices and "installed those devices in a negligent manner"). Ms. Wright makes a stronger claim for applying the exception. Unlike Cooke, Ms. Wright has provided evidence Respondents' security undertakings were performed with less than due care. At the time of Ms. Wright's attack, Respondent's courtesy officer program consisted of a security pager no one answered. (App. p. 476 at 51, line 10 – 52, line 12) Unlike Cramer, Ms. Wright's claim is not for unfulfilled requests but for poor performance of security services Respondents acknowledge undertaking. (App. p. 642 at 19:22-20:9).

In sum, the Court of Appeals erred in failing to apply section 323 to Ms. Wright's claim and instead limiting its analysis to the Cooke exceptions. Alternatively, even within Cooke's undue restraints, Ms. Wright has properly asserted a duty through the "undertaking" exception.

2. Ms. Wright Presented Evidence to Support all Section 323 Requirements.

Respondents conclude section 323 does not support Ms. Wright's duty claim because she cannot meet its requirements. But, Respondents' evaluation of the evidence is flawed and only proves a jury must decide whether Ms. Wright relied on Respondents' security services and whether Respondents' security program increased the risk she would be harmed.

First, Respondents contend the Wellspring courtesy officer program was not intended for the protection of its tenants. Resp'ts Br. at 26; see also Restatement (Second) of Torts § 323 (requiring duty that actor "should recognize as necessary for the protection of the other's person or things"). Respondents rely heavily on their corporate representative who testified the program was not for protection but "customer service." Resp'ts Br. at 26 (citing App. p. 476 at 50, lines 5-

21). However, even the testimony of Respondents' other representatives shows the "customer service" statement undersells what the courtesy officer program was intended to provide. Karen Campbell, the property manager and on-the-ground agent at Wellspring, acknowledged the program was not for customer service but was specifically intended for tenant protection and to deter criminal activity. (App. p. 697 at p. 229, lines 17-19; 230:10-14). The program Ms. Campbell described was not just a customer convenience but was intended to make a courtesy officer available if a tenant "needed assistance with anything." (App. p. 697 at 229, lines 2-6).

"Anything" included security threats. Otherwise, Respondents' agents would not have described the program's participants as "security officers." (App. p. 383 at 41, lines 1-6). These officers carried a "security pager" which was advertised to tenants next to the image of a law enforcement officer as an alternative to calling police for "anything suspicious." (App. p. 501). The tenant newsletter even further rebuts Respondents' claim that courtesy officers were effectively customer service representatives. As advertised in the newsletter, security was a different department at Wellspring from structural issues and other common tenant complaints. Courtesy officers addressed security but there was an entirely different "maintenance pager" for typical customer service issues. (App. p. 501).

Similarly, Respondents argue the courtesy officer program had no security functions because it was not a state sanctioned police force. Resp'ts Br. at 26. That argument also undersells the program. The courtesy officer program was populated exclusively by current police officers, and Respondents considered the presence of a courtesy officer's state-issued patrol vehicle to be one of the program's benefits. (App. p. 702 at 252, lines 16-20). The program also empowered its officers to perform security services up to "the normal duty as performed by a police officer of the locality." (App. p. 497). Additionally, the suggestion that apartment security measures failed to

meet section 323's "protection" requirement was also rejected in Goode. 329 S.C. at 444, 494 S.E.2d at 833 ("The security measures undertaken by [landlord] were for the protection of the residents of the complex").

Every Wellspring courtesy officer was charged by contract with a duty to respond to "criminal acts." Id. The "Courtesy Officer Independent Contractor Agreement" ("Courtesy Officer Agreement") also imposed a number of other duties Respondents acknowledge breaching. (App. p. 682 at 169, lines 1-12). Respondents now argue the Courtesy Officer Agreement is irrelevant. Resp'ts Br. at 28-29. However, this document is important to understanding the scope of Respondents' courtesy officer program, which is crucial here because the Court of Appeals found Ms. Wright's duty claim exceeded the program's scope. Wright, 413 S.C. at 288, 775 S.E.2d at 405-06 (affirming summary judgment in part because Respondents' courtesy officer program was "limited"). Respondents also assert a scope argument. Resp'ts Br at 28 (arguing Ms. Wright "overstate[s]" the courtesy officer program). Moreover, contract terms are relevant evidence for determining the scope of a voluntarily undertaken duty. Hammond v. AlliedBarton Sec. Servs., LLC, Civil Action No. 3:10-cv-02441-JFA, 2011 WL 5827604 * 2 (D.S.C. Nov. 16, 2011) (citing Madison v. Babcock Ctr., Inc., 371 S.C. 123, 137, 638 S.E.2d 650, 657 (2006)) ("The South Carolina Supreme Court has recognized that a contract can serve as evidence of a voluntary undertaking"). Respondents also suggest a preservation argument here (Resp'ts Br. 30) but the Courtesy Officer Agreement is in the record, and Respondents cited it in their account of this case's background facts. Resp'ts Br. at 4 (citing App. p. 497).

Second, Respondents contend Ms. Wright did not rely on the courtesy officer program when choosing to move to Wellspring or during her time as a Wellspring tenant. Here, Respondents seize on Ms. Wright's testimony that, when choosing an apartment complex, she

considered Wellspring because friends recommended it and it was close to work. Those were the reasons Ms. Wright considered Wellspring[4], but they were not the sole reasons she chose it over its competitors. She was not solely concerned with convenience, she worried about crime. (App. p. 427 at 11, lines 1-12) ("it was important to me that I felt safe and secure"). Security was a concern so big that Ms. Wright asked her guide about it and made her decision only after the "security officer" program was described to her. (App. p. 80 at ¶ 7; 381 at 38, line 21 – 39, line 2; 382, lines 13-21).

Respondents then argue Ms. Wright could not have relied on the courtesy officer program because the program was not mentioned by name in Ms. Wright's complaint. Resp'ts Br. at 31. The phrase "courtesy officer" does not appear in the Complaint, but the program's failings have been an important part of Ms. Wright's claim from the beginning. Ms. Wright alleged her injuries were the result of a number of "personal safety concerns" and that Respondents "compromise[d] the personal safety" of its tenants. (App. p. 93 ¶ 8; 94 ¶ 20). The Complaint also alleged Respondents failed to provide a reasonable protection against foreseeable criminal acts on the premises. (App. p. 95 ¶ 26(b)). The Complaint then effectively pled section 323's elements by alleging Respondents made Wellspring more dangerous than necessary (App. p. 96 ¶ 26 (k)) and invited tenants to rely on a security program Respondents knew to be deficient. (App. p. 95 ¶ 26 (i)).[5]

[4] Ms. Wright testified that she visited two competitors on Columbiana Drive before touring Wellspring. (App. p. 382 at p. 39, lines 3-12).

[5] It would be unreasonable to require Ms. Wright to fully explain the courtesy officer program's failings in her initial pleading. South Carolina law does not require that level of detail before discovery. Watts v. Metro Sec. Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001) ("The purpose of a pleading is fair notice to the opponent and the court").

The Court should also reject Respondents' other two reliance-based arguments. Respondents argue Ms. Wright could not have relied on the courtesy officer program during her Wellspring tenancy because she had never before called on it for assistance. Resp'ts Br. at 32. This argument suggests a wholly unreasonable standard for reliance. Citizens routinely rely on services they have not previously needed to summon. For example, a person who has never before required emergency medical assistance is still reasonable in expecting both an answer and response if she dials 911. Lastly, Respondents contend Ms. Wright's level of reliance was less than previous South Carolina cases applying section 323. Resp'ts Br. at 32-33 (citing 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)). However, Ms. Wright's claim is right in line with these cases. The Crowley plaintiff was assured his potentially-dangerous wife would be supervised and therefore allowed his children to visit her. 285 S.C. at 406, 329 S.E.2d at 780. The Winburn plaintiff was assured a boat would be properly repaired and therefore endorsed an insurance check. 287 S.C. at 445, 339 S.E.2d at 148. Similarly, Ms. Wright was assured security officers were in place and therefore chose Wellspring over other apartment complexes.

Third, Respondents challenge the evidence indicating Respondents' security failures increased the risk of harm to Ms. Wright. That evidence includes: (1) Ms. Wright's testimony that the overgrown shrubbery and poor lighting led her to an encounter she would have otherwise seen and avoided (App. p. 357 ¶¶ 7-10); (2) police officer testimony confirming dangerous conditions at Wellspring (App. 713 at p. 24, lines 2-8) (3) photos confirming shrubbery created blind spots near Ms. Wright's door (App. p. 448; 505-10) (4) tenant newsletter advising Ms. Wright to rely on courtesy officers and a security pager when there were no officers and no one answered the pager (App. p. 501); and (5) expert testimony concluding Respondents' security services caused

Ms. Wright and her tenants to let down their guard when passing through Wellspring's common areas. (App. p. 628 at p. 208, line 20 – P. 629 at p. 209, line 11). Respondents do not counter this evidence but summarily dismiss it as speculative. Resp'ts Br. at 34-36.[6] Respondents argue crime is unpredictable and whether Respondents increased Ms. Wright's is effectively unknowable. The variability of crime aside, South Carolina law does not immunize negligent conduct when a resulting third-party crime is foreseeable. Pet. Br. at 25-26. Plus, as Ms. Wright's expert testified, property owners can affect criminal behavior by the security measures they choose to perform and the diligence with which they perform them. (App. p. 605 at p. 113, lines 3-10).

Accordingly, Ms. Wright presented sufficient evidence on all section 323 requirements and the Court of Appeals erred in granting Respondents summary judgment. Respondents certainly disagree with Ms. Wright's account of the attack, the corroborating witnesses, the physical evidence, and her expert's testimony on its cause but that disagreement does not support summary judgment. While section 323 is a duty creation standard, it is ***not*** always a pure question of law. Section 323's reliance and "risk of harm" elements are inherently based in fact and, when the evidence supports conflicting inferences, the section 323 question requires a jury's resolution. See Vaughan v. Town of Lyman, 370 S.C. 436, 446-47, 635 S.E.2d 631, 637 (2006) ("When there are factual issues regarding whether the defendant voluntarily undertakes a duty, the existence of a duty becomes a mixed question of law and fact"); Johnson v. Jackson, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012) (citing Vaughan) ("The question of whether a duty to act arises in a given case may depend on the existence of particular facts").[7] Based on the evidence in the

[6] Respondents also cite in this section Rainey v. Charlotte-Mecklenburg Hosp. Auth., No. 2015-UP-209, 2015 WL 1880212 (S.C. Ct. App. Apr. 22, 2015). That citation is prohibited by rule (Rule 268(d)(2), SCACR) and, therefore, Ms. Wright does not address Rainey in this reply.

[7] A number of state supreme courts have held section 323's elements create jury questions when disputed in the record. Clay Elec. Co-op, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003) (finding that,

record, a reasonable juror could conclude Ms. Wright met the section 323 elements and a jury must resolve the parties' dispute.

3. Respondents Cannot Meet their Summary Judgment Burden on Proximate Cause.

Respondents' burden in seeking summary judgment on proximate cause is to show the record does not contain even a scintilla of evidence supporting a causal link between Respondents' security program failings and Ms. Wright's injury. Bass v. Gopal, Inc., 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011). Respondents' brief does not meet this burden because Ms. Wright testified her attackers were concealed in her darkened breezeway by unkempt shrubbery and her testimony is supported by police and her fellow tenants. Plus, Ms. Wright's attack was foreseeable because a similar incident occurred one year earlier following repeated complaints about security issues in Wellspring's common areas. Finally, unchallenged expert testimony indicates a reasonably performed courtesy officer program likely would have deterred Ms. Wright's attackers from preying on a Wellspring tenant.

While portions of their brief suggest a third-party criminal act is an inherently superseding cause, Respondents later acknowledge they may face liability if the attackers' conduct was reasonably foreseeable given Respondents' knowledge when the incident occurred. Resp'ts Br. at

---

for analogous Restatement (Second) of Torts § 324A, "both 'increased risk' and 'reliance' poses viable issues to be decided by the trier-of-fact"); Jefferson Cnty. Sch. Dist. R-1 v. Justus, 725 P.2d 767, 771 (Colo. 1986) (declaring that the application of section 323 "is obviously not a purely legal question" but a "mixed question of law and fact" based in part on the "factual finding" of reliance or increased risk of harm); see also Williams v. Municipality of Anchorage, 633 P.2d 248, 251 (Alaska 1981) (finding jury question as to whether defendant's conduct was a "service" for section 323 purposes); Riley v. Champion Int'l Corp., 973 F. Supp. 634, 636-37 (E.D. Tex. 1997) ("Plaintiffs have created a genuine issue of material fact as to whether Defendant's [conduct] increased the risk or likelihood" of harm); Shipe v. Chesapeake Bay Fishing Parties, Inc., 940 F. Supp. 130, 133-36 (D. Md. 1996) ("it remains a question of material fact whether Defendants meet at least one of the other required criteria" for section 323 liability).

37 (quoting Sheppard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989)). The record does not support Respondents' argument that the attack was "clear[ly]" unforeseeable. Resp'ts Br. at 38. A potentially violent crime inflicted by concealed criminals was reasonably foreseeable to Respondents because one such incident occurred at Wellspring less than one year before Ms. Wright was attacked. On October 18, 2007, two criminals burglarized the apartment of Wellspring tenant Timir Patel. (App. p. 816 ¶ 3; 817). The burglars broke through Mr. Patel's front door that was concealed from public view by overgrown shrubbery. (App. p. 816 ¶ 3). Mr. Patel's wife had previously complained about the shrubbery, but Respondents failed to adequately address those concerns. Id. The Patels also complained at least twice about inoperable breezeway lighting but the problem was never fully resolved. (App. p. 816 ¶ 4). The security risks posed by the poor lighting and unkempt shrubbery contributed to the Patels' decision to leave Wellspring. Id. The privacy conferred by poor lighting and overgrown shrubbery was a major factor in the Patel incident. The burglars' intrusion was stopped not because anyone saw them battering the Patels' door but only because someone heard a loud noise during the intrusion. (App. p. 817). If the burglars had been a bit quieter, then Respondents' negligence would have provided them the ideal setting for committing their crime.

Despite this very similar incident in the very recent past, Respondents argue Wellspring is not the type of place where criminal acts should be anticipated. Respondents even suggest Ms. Wright's security expert Bill Booth agreed her incident was unforeseeable. Resp'ts Br. at 39 (citing App. p. 603 at 108, lines 12-17). This is not a fair representation of Mr. Booth's testimony. Respondents seize on Mr. Booth saying the crime rate was "average" but misconstrue the context of that statement. Mr. Booth agreed the crime rate was average for the general Harbison area. (App. p. 603 at 108, line 16). For Respondents' property specifically, Mr. Booth was more critical

because there were "a significant number of incidents occurring" at Wellspring. (App. p. 603 at 108, lines 20-21). Mr. Booth relied on incident reports documenting 15 different crimes in Wellspring's parking lot in less than two years before Ms. Wright's attack. (App. p. 620 at p. 175-76; S-14). Given the quantity of previous crimes and their specific circumstances including the similar course of events in the Patel burglary, Mr. Booth concluded Ms. Wright's incident was a foreseeable incident. (App. p. 593 at 66, lines 8-15).

Respondents next argue lighting and shrubbery played no part in Ms. Wright's attack. Resp'ts Br. at 40. However, lighting and shrubbery were important to the attack because they concealed the attackers and led to an encounter Ms. Wright would have avoided had the attackers been visible from afar. (App. p. 357 ¶¶ 8-10). Contrary to Respondents' arguments, Ms. Wright's account of the encounter is supported by her deposition and a law enforcement officer that investigated her attack. Also, contrary to Respondents' arguments, breezeway lighting and shrubbery maintenance are crucial to security and their security hazard was well known at Wellspring before Ms. Wright was attacked. According to lead investigator Kevin Isenhoward, Wellspring's location presented tenant security concerns made worse by lighting and shrubbery maintenance issues. (App. p. 720 at 52, lines 16-17). Wellspring is adjacent to a property where there is a "particularly creepy" kind of tunnel frequented by vagrants. (App. p. 713 at p. 22, lines 22-24). Once on site, Isenhoward encountered overgrown hedges around the rental units including Ms. Wright's front door. (App. 713 at p. 24, lines 2-8; App. p. 722 at p. 58, lines 14-15). Isenhoward also testified that the area near Ms. Wright's door was "too dark for my comfort." (App. p. 713 at 24, lines 5-8). From a policing perspective, Isenhoward acknowledged proper lighting and shrubbery maintenance are key crime deterrents because they eliminate the blind spots Ms. Wright's attackers used to their advantage. (App. p. 477 at p. 62, lines 8-14; App. 492, at p.

26, lines 21-24). Police advise property owners like Respondents to keep shrubbery trimmed back to prevent blind spots because, according to fellow officer Mohammed Gabr, unkempt shrubbery "invit[es] criminals" to the premises. (App. p. 456 at p. 45, lines 14-15; App. p. 716 at p. 34, line 22 – p. 35, line 1).

Along with the warnings from police, Respondents had other reasons to know their lighting and landscaping failures posed dangers to tenants. The Patel burglary less than one year earlier was aided by poor lighting and overgrown shrubbery. (App. p. 816 ¶¶ 3-4). Plus, Respondents were constantly receiving complaints from the Patels and other tenants. Nellisa Davis, a Wellspring tenant for five years, complained three times per month about poor lighting. (App. p. 810 ¶ 3). Ms. Davis raised concerns about overgrown shrubbery on more than twenty occasions because the shrubbery near her rental unit occasionally grew to 10 feet tall. (App. p. 810 ¶ 4). Ms. Davis' concerns were never properly addressed and she too was the victim of multiple burglaries two years after Ms. Wright's incident. (App. p. 811 ¶ 6). Even Respondents' landscaping contractor warned that more pruning was needed to make the area reasonably secure for tenants walking in and out of their apartments. (App. p. 812 ¶ 9). The landscaper attached a representative photo of Wellspring's overgrown shrubbery to demonstrate the blind spots they created. (App. p. 812 ¶ 7; 814). The large blind spots are depicted in additional photos taken within days of Ms. Wright's attack. (App. p. 505-10).

Ms. Wright testified by affidavit that the shrubbery and lighting issues were direct contributors to her attack. (App. p. 357 ¶¶ 7-10). Respondents ask the Court to exclude Ms. Wright's testimony by labeling it a sham affidavit. Resp'ts Br. at 40 (citing Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). In limited instances, a post-deposition affidavit may be excluded from consideration for a summary judgment motion. Notably, Respondents do not list

the stringent sham affidavit requirements and make no effort to apply them to Ms. Wright. The sham affidavit doctrine consists of six elements[8] all of which center on the notion that the affidavit contradicts former sworn testimony. Ms. Wright's affidavit did not contradict her deposition testimony by stating her attackers were concealed by poor lighting and overgrown shrubbery. In her deposition, Ms. Wright testified her attackers were not immediately visible when she pulled in the parking lot and she could not see them without going around an overgrown bush. (App. p. 760 at p. 63, lines 18-25) ("They were behind the bush"). Ms. Wright also testified that she, like Mr. Patel and Ms. Davis, had previously noticed security dangers related to lighting and shrubbery and she too had presented these issues to Respondents. (App. p. 750 at p. 45, lines 18-22; App. p. 751 at 47, lines 9-14).

Ms. Wright's deposition testimony is not only consistent with her affidavit, it is also corroborated by law enforcement. Ms. Wright did not make up the fact that her attackers were concealed in an effort to avoid summary judgment, she reported this fact to Officer Isenhoward during the criminal investigation. App. p. 716 at p. 34, lines 12-19. Officer Isenhoward lends further support to Ms. Wright's causation argument because he agreed that, under these circumstances (late night, dim lighting), a single woman of Ms. Wright's age would have been less likely to exit her car if the attackers had been visible when she first arrived in the parking lot. (App. p. 722 at p. 59, line 17 – p. 60, line 3). Accordingly, there is no contradiction and no basis for

[8] Cothran, 357 S.C. at 218, 592 S.E.2d at 633 (finding the sham affidavit doctrine is based on considerations of (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) important to the litigation oft the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted).

excluding Ms. Wright's testimony under the sham affidavit doctrine. The statements made in the affidavit are well supported by other witnesses and provide strong evidence on both the sequence of events leading to Ms. Wright's attack and their cause.

CONCLUSION

Based on the arguments stated above and those in her earlier brief, the Court of Appeals' ruling should be reversed. Using the duty creation standard South Carolina courts routinely apply to voluntary undertakings, Ms. Wright presented sufficient evidence to get her claim to a jury. She also offered expert testimony and other evidence to show Respondents conduct was the proximate cause of her injuries.

Respectfully submitted

S. Randall Hood
Jordan C. Calloway
Deborah G. Casey
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

E. Wayne Ridgeway, Jr.
Burris Ridgeway
907 Elmwood Avenue
Columbia, SC 29201
(803) 779-5842
(803) 227-0384 (fax)
wayne@burrisslaw.com

Attorneys for Petitioner

January 2, 2018
Rock Hill, SC

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of January, 2018, she served counsel for the Defendants with a copy of the Petitioner's Reply Brief in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

Brian A. Comer, Esquire
Collins & Lacy, PC
Post Office Box 12487
Columbia, SC 29211

Honorable Daniel Shearouse
SC Supreme Court Clerk of Court
1231 Gervais Street
Columbia, SC 29201

Kennardy Jones
Paralegal to Jordan Calloway