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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner, III,
Presiding Circuit Court Judge

Case No. 2018-CP-25-0357

Gary L. Mole, as the Personal Representative
of the Estate of Eddie Mole, Deceased. . . . . Appellant,

v.

Kramer Apartments, LLC . . . . Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The Respondent adopts the statement of the issues on appeal set forth in the Appellant's Brief.

STATEMENT OF THE CASE

Appellant Gary Mole ("Mole") filed a wrongful death action on behalf of the Estate of Eddie Mole (the "Decedent") on September 19, 2018, in Hampton County, South Carolina. (R. pp. 8-11.) Mole alleged in his complaint that Respondent Kramer Apartments, LLC ("Kramer") was negligent in failing to maintain the Decedent's apartment in a safe manner or otherwise protect the Decedent from criminal activity. (*Id.*) Initially, Mole also named another entity, Kramer Real Estate, as a Defendant and alleged that both Defendants were liable under *respondeat superior*, joint enterprise, and agency principles. (R. p. 48 at n. 1.) Mole subsequently amended the complaint on March 5, 2020, to assert negligence claims against Kramer only. (R. pp. 17-23.) Kramer answered the Amended Complaint on March 20, 2020. (R. pp. 24-27.) After exchanging written discovery, Kramer moved for summary judgment on June 12, 2019, on the basis that South Carolina law does not require residential landlords to protect their tenants from criminal activity. (R. pp. 47-54.)

In its motion, Kramer asserted that it did not owe the Decedent a legal duty to protect him from criminal activity solely on the basis of the landlord/tenant relationship. (*Id.*) Kramer further asserted that Mole failed to produce any evidence that an exception to this general rule applied. (R. pp. 51-52.) Mole filed a memorandum in opposition of summary judgment generally asserting that Kramer had notice of prior criminal activity occurring at the apartments and performed repairs to the Decedent's apartment. (R. pp 55-62.) Mole also presented an affidavit, which bore Mole's electronic signature and contained 13 exhibits. (R. pp. 63-150.) A hearing was convened at the Hampton County Courthouse on October 1, 2019, before the Honorable Perry M. Buckner, III. By Order dated October 10, 2019, Judge Buckner granted summary judgment in favor of Kramer on the following grounds:

(I) Defendant does not owe a general duty to its tenants to protect them from criminal activity and no evidence exists to support the existence of an exception to the no-duty rule.
(II) Defendant does not owe a duty to its tenants based on contract.
(III) The Decedent's attack was unforeseeable and severs the causal chain.

(R. pp. 1-7.) Additionally, Judge Buckner held that Mole's affidavit and its accompanying exhibits failed to meet the standard of Rule 56(e), SCRCP, and excluded them from evidence. (*Id.*) Mole did not file a motion pursuant to Rule 59(e), SCRCP.

Mole filed a Notice of Appeal on November 11, 2019. Kramer then moved to dismiss the appeal on December 10, 2019, on the basis that Mole failed to file the Notice with both the Clerk of the Court of appeal and Clerk of Court for Hampton County within 10 days as required by Rule 203(d)(1)(B), SCACR. In its motion, Kramer argued that mailing a copy of the Notice to the Clerk of Court for Hampton County failed to meet the filing requirements in the circuit court under Rule 5, SCRCP, and Section 2(b), SCEF, which require the notice to be electronically filed. By Order dated February 14, 2020, this Court denied Kramer's motion to dismiss. Mole submitted his brief of Appellant on June 11, 2020. This brief of Respondent follows.

STANDARD OF REVIEW

On appeal, Mole raises four issues for this Court's consideration. The first three issues allege the Trial Court's error in granting summary judgment. As set forth below, these issues are all reviewed under the *de novo* standard. The fourth issue, however, concerns the trial court's exclusion of evidence at the summary judgment hearing. This Court reviews evidentiary rulings under a different standard of review, which is accordingly set forth below and applies only to Section IV of this brief.

I. This Court reviews grants of summary judgment *de novo.*

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (citing *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011)). Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 440, 494 S.E.2d 827, 830 (Ct. App. 1997). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Bluestein*, at 462, 839 S.E.2d at 769 (citation omitted). "Neither the trial court nor this Court, however, is 'required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine.'" *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (citing *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 307 (1984)).

II. This Court reviews the trial court's evidentiary rulings for an abuse of discretion.

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, 168, 561 S.E.2d 654, 657 (Ct. App.

2002). The admission of evidence is a matter addressed to the sound discretion of the trial court. *Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). On appeal, this Court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). A trial court's decision to exclude evidence at the summary judgment stage is reviewed under the same standard that would be applied had the decision been made at trial. *See Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 618 S.E.2d 903 (2005) (applying the abuse of discretion standard to the exclusion of expert testimony at summary judgment hearing).

Statement of the Facts

This matter arises out of the death of the Decedent, who was attacked on October 28, 2015, at the Holly Street East Apartments (the "Apartments") in Hampton, South Carolina. (R. p. 1.) The Decedent was a longtime tenant of the Apartments and his assailant, Maurice Mitchell (the "Assailant"), resided there as the designated occupant under the lease of another tenant. (*Id.*) On the day of the attack, the Assailant approached the Decedent in the parking lot near his apartment and confronted him with a handgun. (Br. of Appellant, p. 15; *See also* R. pp. 135-50.) The Decedent retreated toward his apartment and the Assailant chased him to his apartment door, where the pair struggled for control over the door. (R. pp. 135-50.) During this struggle, the Assailant shot the Decedent and "pistol whipped" him to the point of unconsciousness and disfigurement. (*Id.*) The Decedent later succumbed to his wounds and the Assailant was convicted of murder and burglary, *inter alia*. (*Id.*)

The Apartments are owned and operated by Respondent Kramer Apartments, LLC ("Kramer"). (R. p. 1.) It is undisputed that Kramer does not provide security measures at the Apartments but does perform repairs to the individual apartments as needed. (R. p. 31, lines 19-24.) On prior occasions, Kramer has repaired damage to the individual apartments resulting from break-ins. (R. p. 126, Interrog. No. 48.) The Decedent's apartment had been broken into on two prior occasions, 18 and 15 months prior to the fatal attack respectively; however, Kramer only had notice of one of these occurrences. (R. pp. 71-75; *but see* R. p. 119, Interrog. No 15 (denying notice of the second break-in).) There is no evidence that the Decedent complained to Kramer about the quality of any repairs Kramer performed or that he informed Kramer of any concerns about his safety at the apartment. (R. p. 43, line 16-p. 44, line 5.) There is also no evidence the Decedent requested increased security measures, reported increased criminal activity, or made

complaints about the Assailant at any time. (R. p. 37, lines 7-19 (citing only prior incidents as "notice" to Kramer).)

Argument

I. The Trial Court properly granted summary judgment because no evidence supports the existence of an exception to the no duty rule.

The Trial Court properly granted summary judgment because *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C. 440, 441 S.E.2d 317 (1994), remains the law in this state and Mole did not present any evidence that an exception to *Cramer* applies. The Supreme Court of South Carolina plainly stated in *Cramer*:

> Under 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. Neither common law nor the South Carolina Residential Landlord–Tenant Act, imposes a duty on a landlord to provide protection to tenants against criminal activity of third parties.

312 S.C. at 444, 441 S.E.2d at 319. While some exceptions to this rule have been recognized, *see, e.g., Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1209 (D.S.C. 1990) (enumerating four exceptions), South Carolina's appellate courts have restated *Cramer* as the controlling law each time they have addressed the issue. *See Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 220, 826 S.E.2d 285, 294 (2019) ("[*Cramer*] is still undoubtedly the law in South Carolina."). Thus, as a baseline, any analysis of whether a landlord has a duty to protect his or her tenants from criminal activity must begin with the presumption that the landlord does not.

Mole concedes that South Carolina law does not generally impose an affirmative duty on residential landlords to protect tenants from the criminal activity of third parties. (Br. of Appellant, p. 14.) Mole argues instead that the Trial Court erred in ruling that none of the exceptions to *Cramer's* "no-duty" rule apply to this case. (*Id.*, at pp. 10-12.) It is not clear from Mole's brief, however, which specific exception he argues should apply. (*See generally Id.*) Mole only alleges that "triable issues of fact exist" because: (1) the physical condition of the premises contributed to the criminal activity which lead to the Decedent's death, and (2) Kramer performed repairs on the

property. (*Id.*) Thus, it appears that Mole argues that a duty of care arises under the common areas, affirmative acts, and undertakings exceptions. (*See* R. p. 39, line 20-p. 42, line 12 (alleging Kramer's negligent repairs trigger the affirmative acts, undertakings, and common areas exception).) A plaintiff alleging that an exception applies must present specific evidence which would give rise to the alleged duty. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997) (declining to find that any exception applies where the no evidence supported their application); *see also Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 9, 106, 374 S.E.2d 910, 916 (Ct. App. 1988) ("The burden is on the plaintiff to establish a duty of care owed to him"). The Trial Court correctly found that none of the recognized exceptions to *Cramer* apply to this case *because* Mole did not present any evidence supporting their application.

a. The common areas exception does not apply to criminal activity or the facts of this case.

Mole argues that "[t]here is a question and triable issue of fact regarding whether the physical condition of the premises leased from Defendant by Eddie Mole contributed to the criminal activity which lead to his death." (Br. of Appellant, p. 10.) This ostensibly invokes the common areas exception, which requires a landlord to maintain common areas of an apartment complex. *See Cooke,* 741 F. Supp. at 1211.[1] Kramer did not owe the Decedent a legal duty under the common areas exception because it does not apply to criminal activity. *See Id.* This duty of

[1] Kramer notes that any argument that the common areas exception applies is not preserved for appeal. Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. *Elam v. S. Carolina Dept of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). When an issue is raised but not ruled upon, the party must file a Rule 59(e) motion to preserve it for appellate review. *Id.* In this case, Mole did not file any motion pursuant to Rule 59(e), SCRCP, regarding the Trial Court's Order. Thus, the only issues preserved for appeal are those which were in fact ruled upon in the Trial Court's Order. The Trial Court did not rule on whether or not the common areas exception applies. The only reference to this exception in the Trial Court's Order is the remark in a footnote that "the common areas exception 'has never been applied to anything except physical injuries resulting directly from the *condition* of the premises themselves.'" (R. p. 3 (citing *Cooke*) (emphasis in *Cooke*).) An issue is not preserved merely because the court mentions it in passing. *Columbia (SC) Teachers Fed. Credit Union v. Newsome Chevrolet-Buick, Inc.*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990); *Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 64 S.E.2d 253 (1951). The trial court's observation is correct, but it does not constitute a ruling sufficient to preserve the issue for appeal.

care applies only to injuries caused by defects in the premises. This Court has stated as recently as 2015 that "South Carolina does not recognize a landlord's duty to keep common areas 'secure' from third-party criminal activity." *Wright*, 413 S.C. 276, 286, 775 S.E.2d 399, 405, *rev'd on other grounds*, 426 S.C. 202, 826 S.E.2d 285 (2019); *see also Cramer v. Balcor Prop. Mgmt., Inc.*, 848 F. Supp. 1222, 1225 (D.S.C. 1994) ("*Cramer II*") ("to . . . apply the common areas exception to this situation would stretch the exception to the point of swallowing the rule"). The Trial Court correctly observed the limitations of the common areas exception, and Mole has not cited any authority suggesting that the law has changed.

Even if the common areas exception did apply to criminal activity, Mole did not assert evidence to support its application to the facts of this case. First, Mole describes the "defect" as the door and widow to the Decedent's apartment, which Mole argues Kramer negligently repaired. (Br. of Appellant, p. 10.) A "common area" is an area that all tenants may use though the landlord retains control over it. *Black's Law Dictionary* 332 (10th ed. 2014). Some examples of "common areas" are the parking lot, hallways, and playgrounds at an apartment or condominium complex. On the other hand, a door and window to a singular apartment that only the Decedent and his guests could use is not a common area. (R. p. 41, lines 17-24.) Even if the exception applied to criminal activity, it would not apply to these facts.

b. No evidence supports the application of the Affirmative Acts or Undertakings exceptions

Two exceptions to the "no-duty" rule – the affirmative acts and the undertakings exceptions – have been recognized as applying to instances of criminal activity, but the Trial Court correctly ruled that the evidence did not support their application in this case. The affirmative acts exception is limited to situations where the landlord's direct action increases a tenant's risk of harm from criminal activities. *Wright*, at 216, 826 S.E.2d at 292. On the other hand, the undertakings

exception applies when landlord's failure to exercise due care in undertaking an action increases a tenant's risk of harm or if harm is suffered because of the tenant's reliance upon the landlord's undertaking. *Id.* (citing Restatement (Second) of Torts § 323). Both of these exceptions require some showing of negligence related to the harm suffered and the Trial Court properly held that Mole failed to produce any.

i. The Affirmative Acts Exception does not apply.

South Carolina law imposes a duty on a person to use reasonable care when any affirmative act is undertaken. *Cooke*, 741 F. Supp. at 1209-10. Put another way, anything done must be done reasonably. Thus, this exception applies to the "no-duty" rule of *Cramer* only when a landlord's actions directly and unreasonably lead to the tenant being harmed. *Id.* In *Cooke*, the District Court held that whether an improperly stored ladder was used by a criminal to enter the plaintiff's apartment constituted a factual issue under which the exception might apply. 741 F. Supp. at 1210. Our Supreme Court has given additional examples such as a landlord giving out a master key to someone who should not have one or a landlord leaving an apartment door or window unlocked. *Wright*, at 216, 826 S.E.2d at 292. In *Cramer II*, the District Court provided guidance on the limitations of the exception in holding that terminating a "courtesy officer" without hiring a new officer does fit the exception's parameters. 848 F. Supp. at 1224. In this case, Mole alleges the negligent repairs of the door and window of the Decedent's apartment failed to prevent the Assailant from entering the apartment. (Br. of Appellant, p. 11.) Multiple courts have rejected this fact pattern as going beyond the scope of the exception. *See Cooke* 741 F. Supp. at 1211; *Cramer II*, 848 F. Supp. at 1224. Thus, the affirmative acts exception does not apply to the facts of this case.

ii. The Undertakings Exception does not apply.

The undertakings exception is more attenuated and considers the circumstance where a landlord indirectly increases the tenant's risk of harm. *Wright*, at 216-217, 826 S.E.2d at 292. Our Supreme Court has recently instructed that Section 323 of the Restatement (Second) of Torts is the standard in South Carolina when analyzing voluntarily assumed duties. *Wright*, at 216, 826 S.E.2d at 292. The Trial Court, citing Section 323, properly held that this exception does not apply here because the facts mirror those of *Goode* and no evidence in the record suggested that any undertaken measures were performed with less than due care or that reliance upon them caused the fatal attack. (R. pp. 3-4.) Again, Mole argues that Kramer negligently repaired the door and window to the Decedent's apartment and that this led or contributed to the fatal attack. (Br. of Appellant, p. 11.) While *Cooke* recognized that this fact pattern *might* present a case in which the undertakings exception applies, Mole has merely alleged the fact pattern but not presented any evidence to support his allegations. 741 F. Supp. at 1211 (Noting that it is a "far cry from established principles of South Carolina law" to apply the exception to the mere allegation that locks were inadequate without any indication of a malfunction).

Section 323 establishes a duty of care when a landlord undertakes to do something and either (a) his or her failure to exercise due care in performing the undertaking increased the risk of harm to the tenants or (b) the tenant suffered harm because of her reliance upon the undertaking. *Wright*, at 219, 826 S.E.2d at 294. When the requirements are satisfied, only a duty of care is established. *Id.* In *Wright*, our Supreme Court held that a factual question of whether a duty arose under Section 323 because an apartment complex provided a security program to its tenants but failed to fully inform them of its scope or discontinuation. *Id.* The tenant testified that she chose her residence, at least in part, because there were security officers on duty. The scope of the

program was limited in both its size and application, but the complex did not explain the parameters of the program to its tenants. Instead, the tenants were merely informed that security was provided and a "very top priority" of the complex. Further, the complex did not notify its tenants when it no longer employed courtesy officers at the property. The Supreme Court noted that the analysis of whether a duty arose should be conducted from the standpoint of the tenant. *Id.* Based on her knowledge of the program, and her testimony of reliance upon the program, the court held that a question existed as to whether the requirements of Section 323 were satisfied. *Id.*, at 221, 826 S.E.2d at 295.

Conversely, Kramer did not undertake to provide security at the Apartments. Instead, Mole asserts the exception should apply because Kramer performed repairs to individual apartments as needed. (Br. of Appellant, pp. 10-12.) Section 323 can only be satisfied if any evidence shows that Kramer failed to exercise due care in performing any repairs and either a) Kramer's failure increased the risk of harm to the Decedent or b) the Decedent was harmed because of his reliance upon Kramer's repairs. The linchpin of Mole's argument is the allegation that the Assailant actually exploited this "defect" in carrying out his attack upon the Decedent.[2] There is no indication in the record however, to establish the alleged defect or that the Assailant accessed the Decedent's apartment because of it.

Mole cites Kramer's discovery responses to support the assertion that Defendant "cheaply and negligently" performed repairs to the Decedent's apartment. (R. p. 67 at ¶ 7.) The specific response cited, however, only states, in relevant part, that Kramer re-keys each apartment in between tenants and has provided replacement door locks to its tenants as needed. (R. p. 118 at

[2] Although Mole argues that Kramer was obligated in contract to evict the Assailant for prior criminal activity, Mole does not make any argument that an exception to *Cramer* would apply if the attack occurred outside of the Decedent's apartment.

Interrog. No. 13.) Mole has not presented any evidence, in the form of complaints, subsequent repair requests, or even expert testimony, which would show that Kramer performed these repairs with less than due care. Mole instead presents police reports of prior break-ins and asserts that because the door or window to the apartment has been compromised before it must have been compromised by the Assailant in accessing the apartment. (R. pp. 100-12.) Mole essentially asks this Court to apply the doctrine of *res ipsa loquitor* in determining that Kramer must have performed faulty repairs. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) (A party may not rely solely on the fact that an accident occurred to prove liability under a negligence theory). This, standing alone, is insufficient to show that Kramer performed repairs with anything less than due care.

Second, and most importantly, Mole has not provided any evidence to show that the Assailant exploited this defect in carrying out the attack. In fact, the only evidence in the record refutes this assertion. This evidence comes from the Assailant's indictments for Murder and Burglary. (R. pp. 135-150.)[3] A close examination shows that the indictments are based on the Assailant's own confession. (*Id.*) According to the indictments,

> "[the Assailant] acknowledged that he confronted [the Decedent] in the parking area, presented the . . . handgun, pointed it at [the Decedent] through a partially opened door, then fought with [the Decedent] over control of the door firing a shot, and then "pistol whipping" [the Decedent] in the head area.

(*Id.*) Notably, Mole even concedes that the attack began in the parking lot. (Br. of Appellant, p. 15 ("Although his assailant approached him in the parking lot area, he was able force his way into the apartment door before he brutally attacked [the Decedent]").) There is simply no evidence to

[3] Kramer recognizes that indictments are not considered evidence. *See infra* at Section IV(b) (arguing that the Trial Court properly excluded Mole's affidavit as inadmissible). In this case, however, the indictments are the only documents in the record that speak to how the fatal attack unfolded and to the extent Mole relies upon them in opposing summary judgment it must be recognized that they undermine his position.

show that the Assailant accessed the apartment by breaking the window next to an already shut and locked door. Without any evidence showing this, whether or not Kramer performed sufficient repairs to the window and door becomes irrelevant because it has no impact on the analysis of whether Kramer owed a legal duty to protect the Decedent from criminal activity in general or to evict the assailant. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Whatever doesn't make any difference, doesn't matter").

The lack of evidence in this case mirrors the case of *Goode v. St. Stephens United Methodist Church,* in which this Court affirmed summary judgment in favor of the landlord. 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997). In *Goode,* the social guest of a tenant was attacked at an apartment complex and sued the landlord for failing to provide security. The record indicated that the landlord provided security to the tenants by repairing locks "as quickly as possible" and by securing windows, and affidavits showed that the tenants relied upon the apartment complex to provide security. This Court noted, however, that the record did not contain any evidence that these measures were performed with less than due care or that the social guest was harmed because of his reliance upon the landlord's undertakings. *Id.* at 438-439, 494 S.E.2d at 827.

Considering the evidence in the record here, the voluntary undertakings exception does not apply because there is no evidence that any undertaking by Kramer was even a factor in the Decedent's attack. The evidence merely shows that Kramer has previously performed repairs at the Decedent's apartment and that the Decedent was attacked near his apartment. This is insufficient for establishing a duty of care under Section 323. To do so would extend a duty to all landlords, developers, and property managers any time an apartment is burglarized, rendering the rule of *Cramer* swallowed by its exception.

II. The Trial Court properly granted summary judgment because Kramer did not owe the Decedent a contractual duty to protect him from criminal activity.

Mole also argues that the lease agreements between Kramer and its tenants created a duty to protect the Decedent from criminal activity. First, Mole alleges that Kramer owed a duty to protect the Decedent because Kramer precluded him from performing repairs.[4] (Br. of Appellant, p. 12.) Second, Mole alleges that Kramer owed a duty to protect the Decedent by evicting tenants who engaged in criminal activity. (*Id.*, at pp. 12-13.) The Trial Court correctly recognized that *Goode* applies directly to this issue and declined to deviate from this Court's holding. (R. p. 5.) A plain reading of the lease agreements does not and cannot support Mole's arguments that these duties exists.

In *Goode*, the plaintiff claimed that he was owed a duty as the third-party beneficiary of the tenant's lease agreement, which prohibited criminal activity and warned that engaging in or permitting violent or criminal activity is good cause for termination of the lease. 329 S.C. at 445, 494 S.E.2d at 833. The plaintiff argued that this translated into a duty to protect tenants and their guests by evicting all those who in fact engaged in criminal activity. This Court squarely rejected this argument, stating, "[i]n none of these provisions does [the landlord] covenant to prevent or to protect *tenants* from the violent acts of other tenants or third parties. Therefore, the parties to the lease could not have intended to create such a benefit directly in favor of [the plaintiff]." *Id.*, at 446, 494 S.E.2d at 833 (emphasis in original). Plainly stated, a contractual right is not a contractual duty, and landlords who prohibit criminal activity are not obligated to police their tenants to prevent against it. *See, e.g., Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha*, 269 S.C.

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[4] This argument essentially restates Mole's argument that an exception to the "no duty" rule of *Cramer* applies because Kramer performed repairs on the premises. To the extent any duty to perform repairs does exist, whether arising in contract or by undertaking, Kramer rests on its arguments above that these duties did not encompass a duty to protect the Decedent from harm and there is no evidence in the record that any repairs were performed with less than due care. *See supra* at Section I.

183, 186-87, 236 S.E.2d 818, 820 (1977) (comparing an insurer's duty to defend with its obligation to pay a judgment rendered).

Mole argues that Kramer owed the Decedent a duty to evict the Assailant because the lease agreement in which the Assailant was listed as a designated occupant both prohibited criminal activity and identified criminal activity as grounds for eviction. (Br. of Appellant, p. 12.) Mole argues that this provision creates an affirmative duty to evict those who do engage in criminal activity. (*Id.*) This Court's holding in *Goode* specifically rejects this argument and the Court properly granted summary judgment for that reason. (R. p. 5.) Further, even if Kramer had this duty, there is no evidence to indicate Kramer was aware of the Assailant's criminal activity or record. Kramer does not conduct background checks of its tenants, nor does South Carolina law require it to do so.[5] Although Mole alleges that the Assailant had an extensive criminal record that disqualified him from residing at the Apartments, Kramer did not have knowledge of his record. Without some form of notice, Kramer had no duty to evict the Assailant even if Kramer had a duty to evict tenants engaging in criminal activity of which it was aware.

III. The Trial Court properly granted summary judgment because the attack which caused Decedent's death was not foreseeable.

In its Order, the Trial Court properly ruled that the circumstances surrounding the Decedent's death were unforeseeable because nothing in the record shows that Kramer had notice of an impending attack. Instead, the intentional and criminal act of the Assailant severed the causal chain between any alleged negligence on Kramer's part and the Decedent's death. Specifically,

[5] The Undersigned is not aware of any South Carolina case addressing whether a landlord has a duty to conduct background checks of potential tenants. The Federal Government, however, discourages the practice. *See* U.S. Dep't of Hous. and Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, 5 n. 27 (April 4, 2016) (noting that the FBI's Interstate Identification Index system . . . "the most comprehensive single source of criminal history information in the United States," is "still missing final disposition information for approximately 50 percent of its records") (internal citation omitted).

the Trial Court stated, "[t]here is no evidence in the record to connect the events of the Decedent's death with prior break-ins more than a year prior or with any other criminal activity occurring at the Apartments." (R. p. 5.) Absent some notice or connection, Kramer's operation of the apartment complex cannot be linked to the attack upon the Decedent.

"Foreseeability is to be judged from the perspective of the actor *at the time of the negligent act*, not after the injury has occurred." *Shepard v. South Carolina Dept. of Corrections*, 299 S.C. 370, 375, 385 S.E.2d 35, 39 (Ct. App. 1989) (holding that the criminal activity of an escaped prisoner was not the foreseeable result of any negligence on the part of the Department of Corrections) (emphasis added). Mole argues that a defective door made the Decedent's attack foreseeable because it increased the risk of harm. (Br. of Appellant, p. 15.) Like Mole's other allegations, this Court has addressed and rejected this issue before. In *Goode*, this Court held that a landlord had no reason to foresee that a breach of its alleged duties would have the natural and probable consequence of resulting in an intentional attack upon the decedent by third parties at the apartment complex. 329 S.C. at 448, 494 S.E.2d at 835. Here, Mole argues only that the Decedent's attack was foreseeable because Kramer "knew about the lack of structural integrity of the windowed door [it] placed on [the Decedent's] apartment." Notwithstanding the lack of evidence supporting the allegations of a defective door, a defect in the premises alone does not make criminal activity foreseeable. In cases where courts have found criminal acts were foreseeable, the plaintiff has provided documentary evidence and expert testimony of increased or suspected criminal activity. *See Wright* at 222, 826 S.E.2d at 295. Absent evidence of notice, South Carolina law implicitly deems criminal activity unforeseeable. *Goode*, at 442, 494 S.E.2d at 831 (citation omitted) ("absent agreement, the landlord cannot be expected to protect them against the wiles of felony any more than the society can always protect them upon the common

streets and highways leading to their residence or indeed in their home itself"). Here, as in *Goode*, nothing in the records connects criminal activity occurring in the past to the incident which led the attack upon the Decedent.

IV. The Trial Court did not abuse its discretion in excluding Mole's Affidavit and its exhibits because they failed to meet the standards of Rule 56(e), SCRCP.

The only evidence Mole presented in opposition of summary judgment was an affidavit, which did not bear his signature but purported to be made by him.[6] An affidavit opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert v. Netherlands Ins. Co.*, 31 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (citing Rule 56(e), SCRCP). The Trial Court properly excluded Mole's affidavit because it failed to demonstrate Mole's personal knowledge of the facts set forth within it and instead relied upon inadmissible evidence in violation of Rule 56(e), SCRCP. Moreover, nearly every exhibit Mole cites is inadmissible as evidence in direct contravention of Rule 56(e), SCRCP. Because the affidavit failed in form and in substance, the Trial Court properly excluded it from evidence.

a. The Trial Court properly excluded Mole's Affidavit because it failed to show Mole's personal knowledge of the facts alleged within it.

The personal knowledge requirement of Rule 56(e) is vital to ensure that an affidavit provides accurate and reliable testimony setting forth probative facts. Conclusory allegations are not an appropriate substitute for statements made upon personal knowledge. *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). Few pleadings will satisfy the requirements of Rule 56(e), even when verified. *Id.* (citation omitted). Affidavits which fail to show the affiant's knowledge or belief, or basis thereof, are defective and fail to meet the standards of the Rule.

[6] The Affidavit was signed and notarized using electronic "s/" signatures. Electronic signatures cannot be used in making affidavits and render an affidavit invalid. *See infra* at Section IV(c).

Englert, 315 S.C. at 303, 433 S.E.2d at 873. Mole's affidavit does exactly what the rule prohibits by repeating the conclusory statements set forth in Mole's Amended Complaint rather than statements of facts within Mole's personal knowledge.

Mole's affidavit consists of only eight paragraphs. The first paragraph identifies Mole as the Plaintiff and the second makes a single assertion that he "has personal knowledge of the facts which bore upon Kramer's motion and that he visited the Decedent at his apartment daily." (R. p. 63, ¶¶ 1-2.) The remaining six paragraphs are conclusory statements about the knowledge and actions of others. (R. pp. 63-68.) Even assuming Mole's statement to be true that he has personal knowledge of the facts bearing upon the motion, Mole's affidavit does not demonstrate how he has personal knowledge of the facts *set forth within the affidavit. See Englert*, at 304, 433 S.E.2d at 874 (finding an affidavit defective where the affiant did not demonstrate personal knowledge to support the assertion of competence to testify on job specification). There is no indication anywhere in the affidavit that Mole observed the events he describes or that Mole otherwise had firsthand knowledge of their occurrence.

For example, Mole does not explain how he has knowledge of Kramer's response to a burglary at a different apartment in 2012. (*See* R. pp. 63-64 at ¶ 3.) Mole asserts that the burglary placed Kramer on notice of an "insufficiency of the door/locks," but there is no indication that Mole, or the Decedent, witnessed this burglary, spoke with Kramer about the facts or his response, or did anything beyond reviewing the police report attached as Exhibit A to the affidavit. (*Id.*) Likewise, Mole makes no indication that he was present at the time of two prior burglaries involving the Decedent's apartment, or the Decedent's fatal attack in 2015, yet Mole claims to have personal knowledge of these events and offers conclusory opinions as to how they occurred. (*Id.* at pp.65-66, ¶ 5.) Perhaps the most egregious claim is that Kramer allowed "rampant drug

activity" at the apartment complex. (*Id.* at pp. 66-67, ¶ 6.) This claim, designed to paint the apartments as a hotbed of criminal activity, is based upon indictments for crimes alleged to have occurred *two years after* the Decedent's death. (*Id.* at pp. 100-12.) Mole does not make any effort to describe his personal knowledge of this claim. Moreover, events occurring two years after the Decedent's death have zero bearing on this issue. *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (citation omitted) ("Evidence that tends to establish or to make more or less probable some matter at issue and to bear directly or indirectly thereon is relevant and admissible").

In an implicit admission that he does not have the required personal knowledge, Mole cites to 13 exhibits consisting, *inter alia*, of police reports, unauthenticated photographs, and criminal indictments. (R. pp. 69-150.)[7] The direct citation to other documents suggests that Mole's only knowledge and resulting opinion of these events is second-hand. *See Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (holding that an officer may not rely upon police reports for improper opinion testimony as to causation). Historically, the normal function of a witness was merely to state facts within his personal knowledge. *Knight v. Sullivan Power Co.*, 140 S.C. 296, 138 S.E. 818, 819 (1927). "One of the most pervasive manifestations of the common law preference is the rule that a witness testifying about a fact which can be perceived by the senses must: (1) have had an opportunity to observe, (2) have actually observed the fact, and (3) presently recall the observed fact." 1 McCormick On Evid. § 10 (8th ed.). Under

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[7] Mole's affidavit, and designation of matter, identify 14 exhibits, labeled A-N, as being attached; however, Kramer has only received 13 of these exhibits. The materials filed with the Trial Court do not contain any documents labeled "Exhibit N" nor did the draft record on appeal that Mole provided along with his initial brief. Kramer notes that the transcript of the hearing on its motion reflects that Mole submitted "Exhibits A-N" to the Trial Court, but to the best of the Undersigned's memory, the materials presented did not contain a 14th exhibit. (R. p. 36, lines 7-8.) Nonetheless, Mole's description of Exhibit N – "Hampton Police Department Criminal Complaints regarding criminal activity at Kramer Apartments" – suggests it would be no more admissible than the other exhibits Mole relies upon. *See infra* at Section IV(b).

South Carolina's rules of evidence, a lay witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. Even before South Carolina adopted its rules of evidence, its courts adhered to the rule that a witness may only testify to facts within his knowledge. *See, e.g.*, *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967) (holding that a highway patrolman who did not witness an accident was incompetent to testify that a wheel had been "knocked off" during the collision). While modern evidentiary rules have evolved to allows some opinion testimony by lay witnesses, personal knowledge remains a pre-requisite. *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973); *see also* Lay Witness Opinions, Hill, J., 19-Sep SCLAW 34 at *35-37 (2007) (noting the evolution the opinion testimony). Thus, personal knowledge is a critical foundation for any testimony provided by a lay witness in open court or in an affidavit governed by Rule 56, SCRCP.

Mole's affidavit fails to meet the requirements of Rule 56(e), SCRCP, because it does not demonstrate how Mole has personal knowledge of the matters set forth within it. Instead, Mole makes conclusory statements which subvert the purpose of Rule 56(e), SCRCP, and cites to inadmissible exhibits, rather than his own personal knowledge, as supporting evidence. *See* *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) (affidavits asserting personal jurisdiction which were conclusory in nature and based almost entirely upon hearsay should have been excluded from the trial court's consideration). Recognizing this, the Trial court properly deemed Mole's affidavit invalid.

b. The Trial Court properly excluded Mole's Affidavit because it relied upon exhibits containing inadmissible evidence.

An affidavit setting forth the affiant's personal knowledge of the facts set forth within it must also set forth facts and evidence that would be admissible in evidence. *Hall v. Fedor*, 349

S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). The Trial Court properly ruled that Mole's affidavit, and nearly all its exhibits, instead set forth inadmissible testimony and evidence. "The basic [hearsay] rule precludes testimony of a witness when sourced, not upon personal knowledge, but in the verbal or written word of another." *Ellison v. Pope*, 290 S.C. 100, 103, 348 S.E.2d 367, 369 (Ct. App. 1986) (internal citation omitted). Mole relies almost exclusively on inadmissible exhibits made by someone other than Plaintiff for support.

Eight exhibits to Mole's affidavit are plainly inadmissible.[8] Six are police reports offered for the purposes of showing how prior crimes at the apartment have occurred, that the Assailant engaged in criminal activity at the apartments, or that the apartments were simply infested with crime. (R. pp. 63-68, ¶¶ 3, 5, and 8.) Written reports of investigations made by persons not offered as witnesses are inadmissible as hearsay. *Stevenson v. Emerson Elec. Corp.*, 286 S.C. 331, 333 S.E.2d 116 (Ct. App. 1985). Another exhibit is a set of two, unauthenticated photographs offered for the purpose of showing that the Assailant broke the window next to the door of the Decedent's apartment to unlock the door and access the apartment. (R. pp. 65-66, ¶ 5.) A condition precedent to admissibility is a finding that the matter in question is what its proponent claims. Rule 901(a), SCRE. While Mole identifies the photographs as "crime scene photos," he does not identify the person who took the photographs or explain the circumstances under which Mole received them. (R. pp. 63-64, ¶ 3.) Mole also does not provide any testimony as to whether they fairly and accurately depict the crime scene.[9] In addition to issues of authenticity, the photographs are not

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[8] The remaining exhibits consist of Kramer's discovery responses, the lease agreements of the Decedent and the Assailant, a printout of the Assailant's arrest record, one certified conviction of the Assailant for failure to stop for a blue light, and records of the Assailant's arrest and conviction for Murder and Burglary. Kramer does not oppose Mole's use of its discovery responses or the lease agreements. The rest raise various evidentiary concerns. The more glaring issue, however, is that Mole uses all of these exhibits in order to make conclusory testimony which is improper under Rules 602 and 702 of the South Carolina Rules of Evidence. (R. pp. 63-68.)

[9] For example, in one of the photos, the doorknob has already been removed from the door, presumably by law enforcement.

submitted in their original format and demonstrate the purpose of the Best Evidence Rule. *See* Rule 1002, SCRE ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." The original photographs, which are digital and in color, contradict Mole's allegations by showing the window next to the Decedent's apartment door intact. The black and white scans Mole relies upon obscure the entire scene. (*See, e.g.*, R. p. 40, lines 17-20 (conceding that the submitted photographs were not originals and did not present a clear image).) A side by side comparison of the two would show just how altered the image has become, rendering the black and white scans inadmissible. The eighth plainly inadmissible exhibit is a criminal indictment offered to prove that drug-related activity took place at the apartment. (R. pp. 66-67, ¶ 6.) Juries in South Carolina are routinely instructed that indictments are not evidence and prove nothing other than the accused has been charged with a crime. Anderson, S.C. Requests to Charge - Criminal, § 1-1. In short, these exhibits would not be admissible before a jury and the Trial Court properly excluded them as evidence at summary judgment. Because each and every factual assertion made Mole's affidavit relied upon these inadmissible exhibits, the Trial Court properly held that the affidavit failed to meet the requirements of Rule 56(e), SCRCP.

c. Mole's affidavit does not meet the requirements of South Carolina law or the South Carolina E-filing Procedures.

This Court should find, as an additional sustaining ground, that Mole's affidavit is defective on its face because it is signed and notarized electronically in violation of both South Carolina law and the procedures governing the electronic filing of documents. These defects are fatal to the affidavit and it should have been rejected at the filing stage.

First, and most strictly, an affidavit cannot be notarized electronically. *See* S.C. Code Ann. §26-1-110 (Supp. 2014) (When notarizing a paper record, a notary shall sign by hand in ink on the

notarial certificate). South Carolina law expressly prohibits a notary from signing an affidavit "using the facsimile stamp or an electronic or other printing method . . ." *Id.*[10] An affidavit without the signature and certification of an officer authorized to administer oaths is fatally defective and is not an affidavit at all. *Doty v. Boyd*, 46 S.C. 39, 24 S.E. 59 (1896).

Second, the affidavit is also defective because Mole's signature in electronic form does not comply with the South Carolina Electronic Filing Policies and Guidelines that govern filings in the circuit court. Under the filing policy of our trial courts, the use of electronic signatures on affidavits is expressly prohibited. Section 5(c), SCEF.[11] In one case, our Supreme Court stated that the use of an "s/" signature on an affidavit indicates that the document is a copy of the original rather than an effective signature itself. *See In re Robinson*, 393 S.C. 364, 713 S.E.2d 294 (2011). Documents filed in court must, therefore, be original and the filing of a copy is defective.

Conclusion

South Carolina is clear that a landlord does not generally owe a duty to his or her tenants to protect them from criminal activity. Exceptions to this rule require a showing of specific evidence to establish a duty of care. In this case, however, Mole has not made that showing and did not present any evidence or argument here or to the Trial Court which provides a basis for diverging from *Cramer* and its progeny. For these reasons, the Trial Court did not err in granting summary judgment and this Court should affirm that ruling.

[10] Even under the current circumstances of the Covid-19 pandemic, the Supreme Court has not relaxed the requirements of an affidavit. *See* Section (c)(16), Order Regarding the Operation of the Trial Courts During the Coronavirus Emergency, as amended April 22, 2020 (Shearouse Adv. Sheet No. 17) (providing for a Certification in Lieu of Affidavit but not relaxing the requirements of a traditional affidavit). Mole's affidavit, however, was made well before the onset of Covid-19 and no exception exists for the requirements of statute.

[11] Even where permitted, only an attorney who is an authorized e-filer may utilize an electronic signature on an e-filed document. Section 5(c), SCEF.

Dated this 28th day of August, 2020.

Respectfully,

WALL TEMPLETON & HALDRUP, P.A.

By: ______________________________

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner, III,
Presiding Circuit Court Judge

Trial Court Case No. 2018-CP-25-0357
Appellate Case No.: 2019-001884

Gary L. Mole, as the Personal Representative
of the Estate of Eddie Mole, Deceased. . . . . Appellant,

v.

Kramer Apartments, LLC . . . . Respondent.

PROOF OF SERVICE

I, Ford H. Thrift, of Wall Templeton & Haldrup, do hereby certify that I have served the RESPONDENT'S FINAL BRIEF, by electronic mail at the registered email address for opposing counsel as follows to counsel of record:

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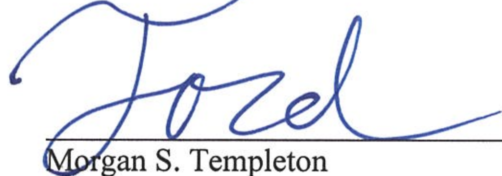
ATTORNEY FOR APPELLANT

SIGNATURE INTENTIONALLY ON FOLLOWING PAGE

Dated this _28th____ day of August, 2020.

Respectfully,

WALL TEMPLETON & HALDRUP, P.A.



By: ______________________________

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