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Tort Law

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Tort Law

I. LANDLORD CANNOT AVOID LIABILITY WHERE INDEPENDENT CONTRACTOR NEGLIGENT

In *Durkin v. Hansen*[1] the South Carolina Court of Appeals addressed whether a landlord's liability for personal injuries sustained by a tenant extends to negligent acts committed by an independent contractor hired by that landlord.[2] The court determined that the landlord owed a duty of reasonable care to the tenant and could not avoid liability by hiring an independent contractor to perform the work.[3] However, the court concluded that a jury issue existed as to whether the landlord breached this duty. Therefore, the court reversed the earlier summary judgment award for the defendants and remanded.[4] This decision extends the scope of landlord liability in South Carolina.

The defendants, Kevin and Denise Hansen, owned a condominium in Myrtle Beach, South Carolina. The Hansens authorized Sea Breeze Property Management and Contract Services, Inc. (Sea Breeze) to handle the rental and upkeep of their unit. The plaintiff, Bernadette Durkin, rented the Hansen unit beginning in January 1990. Sea Breeze contracted with Rainbow International Carpet (Rainbow) to clean the carpets in the units, including those in the Hansen's unit. Durkin did not request this cleaning nor did she complain about the carpets' condition. Sea Breeze asked Durkin to remain out of the unit for two to two-and-one-half hours during the cleaning. On the cleaning day, Durkin left the unit for four hours. After returning, Durkin entered the kitchen where she slipped on a soapy substance and fell, sustaining injuries.[5]

The court began its analysis with the principle that a landlord who undertakes to repair or improve the premises must exercise reasonable care and is liable for the injuries caused by the landlord's own negligence or by the negligence of the landlord's servants and employees.[6] Thus, a jury issue of

1. ___ S.C. ___, 437 S.E.2d 550 (Ct. App. 1993).

2. *Id.* at ___, 437 S.E.2d at 552.

3. *Id.* at ___, 437 S.E.2d at 553 (citing Livingston v. Essex Inv. Co., 14 S.E.2d 489 (N.C. 1941); Strayer v. Lindeman, 427 N.E.2d 781 (Ohio 1981)).

4. *Id.* at ___, 437 S.E.2d at 551-52.

5. *Id.* at ___, 437 S.E.2d 551-52.

6. *See Durkin*, ___ S.C. at ___, 437 S.E.2d at 552 (citing Conner v. Farmers & Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963)).

liability would have existed if the Hansens, Sea Breeze, or their direct employees cleaned the carpets.[7]

In *Durkin* the South Carolina Court of Appeals was faced with an issue of first impression. The benchmark South Carolina case dealing with the tort liability of property owners is *Timmons v. Williams Wood Products Corp.*[8] In *Timmons* the South Carolina Supreme Court held that a court can hold a landlord or property owner liable for breach of contract when the owner fails to comply with an express agreement to repair. However, that remedy is limited to contractual damages and does not include recovery for personal injuries.[9] After *Timmons*, in *Conner* the supreme court extended liability to include tort liability where the landlord made negligent repairs or improvements.[10] Relying on the majority rule at that time, the court reasoned that the landlord owes a duty to the tenant to exercise reasonable care in performing repairs or improvements and that a breach of this duty gives rise to liability for any personal injury caused by such breach.[11] In *Durkin* the court of appeals further extended a landlord's tort liability, encompassing acts of negligence committed by an independent contractor.[12]

The general rule is that an owner or landlord is not liable for the negligence of an independent contractor;[13] however, a host of exceptions to this rule exist.[14] The South Carolina Supreme Court has recognized an

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7. *Id.* at ___, 437 S.E.2d at 552.

8. 164 S.C. 361, 162 S.E. 329 (1932).

9. *Id.* at 369-70, 162 S.E. at 332. In dicta the court indicated that recovery for personal injury may be possible under certain exceptions, one being "where the lessor actually undertakes to make the needed repairs and negligently does so--where there is misfeasance as distinguished from nonfeasance." *Id.* at 374, 162 S.E.2d at 333-34.

10. *Conner*, 243 S.C. at 139-40, 132 S.E.2d at 388-89.

11. *Id.* at 140, 132 S.E.2d at 388-89 (quoting 32 AM. JUR. *Landlord and Tenant* § 678 (1941)). In 1989, the Court of Appeals faced again the issue of a landlord's tort liability, this time under the South Carolina Residential Landlord and Tenant Act, (SCLRTA) S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. 1991). *See* Watson v. Sellers, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989). In *Watson* the court held that the SCRLTA expressly creates a cause of action for recovery of tort damages when a landlord fails to do whatever is reasonably necessary to keep the premises in a habitable condition. *Id.* at 433, 385 S.E.2d at 373.

12. *Durkin*, ___ S.C. at ___, 437 S.E.2d at 533.

13. *Id.* at ___, 437 S.E.2d at 533 (quoting Conlin v. City Council, 49 S.C.L. (14 Rich.) 201 (1868)) (citing Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1985)).

14. Widely recognized exceptions to this general rule mandating a factual decision as to the landlord's liability include situations where the owner employs an incompetent independent contractor, Ozan Lumber Co. v. McNeely, 217 S.W.2d 341, 344 (Ark. 1949), where the owner retains some control over the work being done, Brown v. George Pepperdine Foundation, 143 P.2d 929, 930-31 (Cal. 1943), where contract binds the owner to perform the work, Vitale v. Duerbeck, 62 S.W.2d 559, 560-61 (Mo. 1933) (per curiam), or where statute binds the owner to perform the work, Strayer v. Lindeman, 427 N.E.2d 781, 784 (Ohio 1981). *See also* 49 AM.

exception to the general rule where the independent contractor performs inherently dangerous work.[15] Another exception, relied upon by the *Durkin* court, is that an owner who delegates an absolute duty to an independent contractor remains liable as if the independent contractor were the owner's employee.[16]

Thus, the general rule is not absolute; exceptions develop when circumstances, justice, and logic dictate. In light of the facts in *Durkin*, the court of appeals properly created an exception to the general rule. The reasoning behind this rule is sound: Where a landlord owes an absolute duty to a tenant, that duty is not met by delegating the work to a third party, but is met only by inspecting and taking other reasonable action to ensure that the premises and the repairs are safe. The determinative question was, therefore, whether the Hansens and Sea Breeze owed an absolute duty to Durkin.

The court determined that the Hansens and Sea Breeze owed an absolute duty to Durkin. First, the contract between the Hansens and Sea Breeze authorized Sea Breeze to maintain the condominium.[17] Second, the South Carolina Residential Landlord and Tenant Act (SCRLTA) imposes specific duties on a landlord.[18] Further, a landlord who makes repairs or improvements owes a duty of reasonable care to the tenant, and the landlord cannot avoid this duty by hiring an independent contractor.[19]

The finding of an absolute duty in *Durkin* is a bit conclusory. In essence, the court stated that the Hansens and Sea Breeze owed an absolute duty to Durkin, that they could not avoid this duty by delegating it to an independent contractor, and that, therefore, the Hansens and Sea Breeze still owed a duty to Durkin. This logic assumes the existence of the so-called absolute duty, but

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JUR. 2D *Landlord and Tenant* § 874 (1970) (stating that because a variety of considerations determine a landlord's duty with regard to an independent contractor's work, it is difficult to construct a general rule).

15. *Young*, 285 S.C. at 242, 329 S.E.2d at 429 (recognizing the existence of the exception, but finding it inapplicable).

16. *See Durkin*, ___ S.C. at ___, 437 S.E.2d at 552-53 (citing 57 C.J.S. *Master and Servant* § 591 (1948)); *see also* 49 AM. JUR. 2D *Landlord and Tenant* § 875 (1970) (discussing a landlord's liability for repairs or improvements done by an independent contractor).

17. *Durkin*, ___ S.C. at ___, 437 S.E.2d at 553. The contract authorized Sea Breeze "to enter the condominium unit for 'inspections, to perform routine maintenance, and to effect such repair work as may be necessary, in the sole discretion of Agent, to keep the unit suitable for rent.'" *Id.* at ___, 437 S.E.2d at 553.

18. *Id.* at ___, 437 S.E.2d at 553. The court relied on section 27-40-440 of the SCSCRLTA, which provides: "A landlord shall . . . make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition . . . ." S.C. CODE ANN. § 27-40-440(a) (2) (Law. Co-op. 1991); *see Durkin*, ___ S.C. at ___ n.3, 437 S.E.2d at 553 n.3.

19. *Durkin*, ___ S.C. at ___, 437 S.E.2d at 553 (citing Livingston v. Essex Inv. Co., 14 S.E.2d 489 (N.C. 1941); *Strayer*, 427 N.E.2d at 781; *see also* Hill v. McDonald, 442 A.2d 133, 135-36 (D.C. 1982) (recognizing that a landlord can be held vicariously liable for the negligence of the landlord's independent contractor).

neither the contract nor the SCRLTA actually imposed an absolute duty on either the Hansens or Sea Breeze to clean the unit's carpets. The contract did not specifically state that the carpets had to be cleaned periodically;[20] likewise, the SCRLTA hardly requires landlords to frequently clean carpets for a rental unit to remain habitable.[21] These sources may have authorized the Hansens and Sea Breeze to clean the carpets, but neither source affirmatively placed an absolute duty on the landlords to do so. If Durkin complained about the unit's condition, then the contract might impose on Sea Breeze a duty to act because the contract specifically required Sea Breeze to do whatever was necessary to maintain the unit.[22] Similarly, had the condition of the carpets made the unit uninhabitable, then the SCRLTA would place on the landlord a duty to act.[23] The court simply found that an absolute duty existed by virtue of the contract and the SCRLTA without further discussing how the court reached this conclusion. However, reliance on the contract and the SCRLTA to find an absolute duty was unnecessary. The mere undertaking of repairs or improvements itself created a duty of reasonable care upon which liability could rest.

In *Livingston v. Essex Investment Co.*,[24] the North Carolina Supreme Court quoted the Supreme Court of Nebraska:

> Conceding that the relation of landlord and tenant existed between the parties to this action, we think it is clear that the landlord is not relieved of liability for injury to his tenant by the fact that he employed an independent contractor to perform the work . . . . So long as the relation of landlord and tenant existed between the parties, the landlord owed a duty to the defendant not to do, or cause to be done, anything which would render the premises dangerous and unsafe for his tenant.[25]

Using *Livingston*'s logic, the Hansens and Sea Breeze created a duty of reasonable care for themselves when they undertook to clean the carpets in the condominium. Finding such a duty when the landlord undertakes repairs is well-supported by the case law in other jurisdictions.[26]

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20. While arguably the contract imposed a duty upon Sea Breeze because the contract expressly stated that Sea Breeze was "to perform routine maintenance," the contract simply authorized Sea Breeze to take such action and did not require or mandate that action. *See Durkin*, ___ S.C. at ___, 437 S.E.2d at 553.

21. *See* S.C. CODE ANN. § 27-40-440 (Law. Co-op. 1991) (imposing a duty upon landlords to "maintain premises").

22. *See Durkin*, ___ S.C. at ___, 437 S.E.2d at 552-53.

23. *See* S.C. CODE ANN. § 27-40-440(a) (2) (Law. Co-op. 1991).

24. 14 S.E.2d 489 (N.C. 1941).

25. *Id.* at 493 (quoting Doyle v. Franek, 118 N.W. 468, 469 (Neb. 1908) (per curiam)).

26. *See, e.g.*, Bailey v. Zlotnick, 149 F.2d 505, 506 (D.C. Cir. 1945); Arlington Realty Co. v. Lawson, 153 So. 425, 426-27 (Ala. 1934); Frazier v. Edwards, 190 P.2d 126 (Colo. 1948).

Furthermore, South Carolina law supports finding the duty. In *Conner* the South Carolina Supreme Court held that a landlord assumed a duty of reasonable care when the landlord undertook repairs or improvements.[27] In addition, in *Watson v. Sellers*[28] the court of appeals held that a landlord must keep the premises in a fit and habitable condition and that the tenant can recover tort damages for a breach of this duty.[29] Thus, the law in South Carolina has followed the majority rule in other jurisdictions in finding that a duty of reasonable care binds the landlord when the landlord undertakes repairs or improvements. The court correctly determined that the Hansens and Sea Breeze owed a duty of reasonable care to Durkin because they undertook to clean the carpets.

Upon finding that the Hansens and Sea Breeze assumed a duty, the court then found that the defendants could not delegate this duty. Thus, the landlord would remain liable for breach of this duty whether the landlord or an independent contractor whom the landlord employs actually performs the negligent work.[30] Relying on *Hill v. McDonald*,[31] the court concluded that a landlord owes a nondelegable duty of reasonable care not to create unsafe conditions when the landlord undertakes repairs or improvements. Thus, the landlord is vicariously liable for the negligence of an independent contractor.[32] This seems to be the true source of liability in this case. Sea Breeze certainly assumed a duty of reasonable care when it endeavored to clean the carpets. In finding that Sea Breeze cannot delegate such a duty to an independent contractor, the court correctly concluded that the landlord still owed a duty to Durkin and could be held liable for breach. Therefore, the court did not need to focus on the contract and the SCRLTA as sources of an absolute duty; the duty that the Hansens and Sea Breeze took upon themselves when they undertook to make improvements was enough to find a jury issue of liability.

The court's ultimate conclusion is correct and well supported by the vast majority of law throughout other jurisdictions. In their hornbook on the law of torts, Prosser and Keeton state that "[w]hen the lessor entrusts the repairs to an independent contractor, the general weight of authority is that his duty of care in making them cannot be delegated, and he will be liable for the contractor's negligence."[33] The Restatement (Second) of Torts and the

27. Conner v. Farmers & Merchants Bank, 243 S.C. 132, 140, at 140, 132 S.E.2d 385, 389 (1963).

28. 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989).

29. *Id.* at 433-37, 385 S.E.2d at 373-75.

30. *See* Durkin v. Hansen, ___ S.C. ___, ___, 437 S.E.2d 550, 552-53 (Ct. App. 1993).

31. 442 A.2d 133 (D.C. 1982).

32. *Durkin*, ___ S.C. at ___, 437 S.E.2d at 553 (citing *Hill*, 442 A.2d at 133).

33. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 445 (5th ed. 1984) (citing RESTATEMENT (SECOND) OF PROPERTY (1977)).

Restatement (Second) of Property agree that a landlord who employs an independent contractor to perform work that the landlord undertakes gratuitously is subject to liability for physical harm caused by the contractor's negligence as if the contractor's conduct was the landlord's conduct.[34] In fact, the reporter's note to section 19.3 of the Restatement (Second) of Property states:

> While it is sometimes stated that the authority in this area of the law is confused, the confusion is more apparent than real. Nearly all jurisdictions have held, on one theory or another, that the landlord may be liable where he has used an independent contractor to make repairs even though the repairs were gratuitous.[35]

The courts generally agree that when a landlord undertakes repairs or improvements, the landlord is liable for the negligence of the independent contractor just as if the landlord committed the negligence.[36] The court's ultimate conclusion, to extend a landlord's liability to include negligent acts committed by independent contractors, places South Carolina within that view.

In reaching its decision, the court did not distinguish the "collateral negligence" theory. Carpet cleaning does not involve inherent danger. In *May v. 11 1/2 East 49th Street Co.*,[37] the New York Court of Appeals held that where the work being performed was not intrinsically dangerous and where the only negligence was in the actual performance of the work, collateral negligence existed, and the landlord could not be held liable.[38] The RESTATEMENT (SECOND) OF PROPERTY also states that the landlord "is not liable for the collateral negligence of an independent contractor hired by him to make gratuitous repairs which do not affect the quality of the job when completed."[39]

This brings us full circle: Normally there must be some absolute duty imposed upon the landlord for the landlord to remain responsible for an independent contractor's negligence. Absent an absolute, nondelegable duty, the landlord's duty properly would extinguish after reasonably hiring a competent independent contractor. Any negligence committed by the independent contractor then would be collateral negligence and not the landlord's responsibility. Thus, the court had to find some absolute or nondelegable duty to avoid this rule. Although neither the contract between

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34. RESTATEMENT (SECOND) OF TORTS § 420 (1965); RESTATEMENT (SECOND) OF PROPERTY § 19.3 (1977).

35. RESTATEMENT (SECOND) OF PROPERTY § 19.3 reporter's note 4 (1977).

36. 49 AM. JUR. 2D *Landlord and Tenant* § 875 (1970).

37. 54 N.Y.S.2d 860 (N.Y. App. Div. 1945), *aff'd*, 68 N.E.2d 881 (N.Y. 1946).

38. *Id.* at 866.

39. RESTATEMENT (SECOND) OF PROPERTY § 19.3 cmt. c (1977).

the Hansens and Sea Breeze nor the SCRLTA placed on Sea Breeze an absolute duty to clean the carpets, the court found a nondelegable duty of reasonable care arose when Sea Breeze undertook to clean the carpets. The general rule is that where there is collateral negligence of an independent contractor and where the landlord has failed to meet some other duty the landlord will remain liable for his breach of this other duty.[40] Thus, the collateral negligence rule likely would have little effect on the outcome of this case even had the court considered it.

The court reached the correct and equitable conclusion in *Durkin.* Although the court found an absolute duty existed without explaining the basis of such a finding and although the court failed to analyze the collateral negligence rule, the court enunciated a well-reasoned and well-supported ruling.

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II. DILIGENCE STANDARD FOR REASONABLE RELIANCE

In *Nine v. Henderson*[1] the South Carolina Court of Appeals affirmed the granting of summary judgment for the defendant seller in a fraud action by a home purchaser for the seller's failure to disclose the extent of known termite damage. The majority held that Nine, the purchaser, could not reasonably have relied on the representations of Henderson, the seller, because Henderson provided termite inspection reports at the closing recommending that a building inspector be consulted to determine if any structural damage to the property existed. Also, Nine discovered additional termite damage to the property.[2] The dissent argued that summary judgment was inappropriate, stating that it was unable to "conclude as a matter of law that Nine failed to exercise reasonable diligence under the circumstances."[3] The majority opinion raises doctrinal questions concerning the diligence standard to which courts will hold a plaintiff in a fraud case.

In August 1987 Henderson and Nine executed a contract for the sale of Henderson's residential property. Three structures stood on the property - a main house, a cottage, and a garage.[4] In May 1987, before putting the property on the market, Henderson employed Terminix to inspect the structures for termite infestation.[5] Although the sales contract incorporated by reference the May wood infestation reports, Henderson never offered these

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40. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY § 19.3 cmt. c (1977).

1. ___ S.C. ___, 437 S.E.2d 182 (Ct. App. 1993).
2. *Id.* at ___, 437 S.E.2d at 184.
3. *Id.* at ___, 437 S.E.2d at 188 (Cureton, J., dissenting).
4. *Id.* at ___, 437 S.E.2d at 183.
5. *Id.* at ___, 437 S.E.2d at 185 (Cureton, J., dissenting).

reports to Nine during the negotiations and only disclosed infestation damage to the house's eaves and to the garage's window sills and doors. The May infestation reports revealed additional undisclosed damage.[6]

Nine rented and occupied the house for two weeks before the closing, during which Nine repaired the disclosed termite damage, as well as additional damage he discovered.[7] After the parties signed the sales contract, Henderson had Terminix perform another inspection. Prepared by Terminix, the wood infestation reports detailed extensive visible termite damage and warned of probable hidden damage to the structures.[8] The reports counseled the owner "'to call a qualified . . . expert in the building trade to ascertain their [sic] opinion as to whether there is structural damage to this property.'"[9] Henderson provided the reports to Nine and Nine's attorney at the closing. Nine closed despite the reports' cautionary language and despite his discovery of undisclosed termite damage while making the repairs.[10] At trial Nine testified that the total repair cost would be $43,000.[11]

Nine filed an action for breach of warranty and fraud, claiming that by withholding the May 1987 wood infestation reports Henderson failed to disclose the full extent of termite damage known to Henderson.[12] On Henderson's summary judgment motion, the trial court held that Nine could not reasonably have relied on Henderson's representations concerning the degree of infestation because the August termite inspection reports warned of prior infestation and advised Nine to consult an expert to assess possible structural damage.[13] Nine appealed.[14]

Relying principally on *Bostick v. Orkin Exterminating Co.*,[15] the majority found that Nine could not reasonably have relied on Henderson's representations.[16] In *Bostick* the home purchaser sued a professional exterminating company for fraud in the preparation of a wood infestation report.[17] On the face of the report, the defendant gave favorable responses opining that insufficient visible damage existed to warrant repair. However, the report

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6. *Nine*, ___ S.C. at ___, 437 S.E.2d at 183.

7. *Id.* at ___, 437 S.E.2d at 183. A provision in the contract for sale required Henderson to pay Nine $200 for the labor and materials expended in making the repairs. *Id.* at ___, 437 S.E.2d at 183.

8. *Id.* at ___, 437 S.E.2d at 183-84.

9. *Id.* at ___, 437 S.E.2d at 184 (quoting the infestation reports).

10. *Nine*, ___ S.C. at ___, 437 S.E.2d at 183-84.

11. *Id.* at ___ n.4, 437 S.E.2d at 185 n.4 (Cureton, J., dissenting).

12. *See id.* at ___, 437 S.E.2d at 183; *id.* at ___, 437 S.E.2d at 185 (Cureton, J., dissenting).

13. *Id.* at ___, 437 S.E.2d at 184.

14. *Nine*, ___ S.C. at ___, 437 S.E.2d at 183.

15. 806 F.2d 504 (4th Cir. 1986).

16. *See Nine*, ___ S.C. at ___, 437 S.E.2d at 184.

17. *Bostick*, 806 F.2d at 505.

noted that the property previously was treated for wood decay fungus, termites, and powder post beetles.[18] The back page of the report stated that if evidence of active or past infestation existed, "'it must be assumed that there is some damage to the building caused by this infestation.'"[19] The report recommended that a qualified expert in the building trade be consulted to determine the existence of structural damage.[20] The court found that "Bostick's reliance on the answers on the face of the form was unjustified," noting, "One claiming fraud in South Carolina must 'exercise reasonable diligence and prudence under the circumstances.'"[21] The court stated specifically that "Bostick's failure to comply with the simple warnings and recommendations indicated in the Report . . . was not reasonable diligence and prudence under the circumstances."[22]

Analogizing *Bostick*, the majority stated that "Nine . . . had no reasonable right to rely on Henderson's representations."[23] The majority found determinative that Nine was aware of the termite problems from the beginning, that Nine discovered additional termite problems himself, and that Nine elected to close despite this knowledge and despite the warnings on the termite reports.[24] In summary the majority thought that "Nine's own actions placed him in the predicament in which he now finds himself."[25]

The majority cited *Watts v. Monarch Builders*[26] and *Aaron v. Hampton Motors*[27] to support the proposition that a plaintiff's lack of diligence is a proper basis for denying relief.[28] In *Watts* the purchasers of residential property sued the seller for fraud, alleging that the seller misrepresented the property lines.[29] While visiting the lot, from a distance the seller pointed out the property lines. The purchasers never asked to walk the boundaries and ignored other opportunities to learn the lot's exact size.[30] Denying relief, the

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18. *Id.*

19. *Id.* at 509 (quoting the wood infestation report).

20. *Id.*

21. *Id.* (quoting Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985)).

22. *Bostick*, 806 F.2d at 509.

23. Nine v. Henderson, ___ S.C. ___, ___, 437 S.E.2d 182, 184 (Ct. App. 1993).

24. *Id.* at ___, 437 S.E.2d at 184.

25. *Id.* at ___, 437 S.E.2d at 184. (citing Watts v. Monarch Builders, 272 S.C. 517, 252 S.E.2d 889 (1979); Aaron v. Hampton Motors, 240 S.C. 26, 124 S.E.2d 585 (1962)).

26. 272 S.C. at 517, 252 S.E.2d at 889.

27. 240 S.C. at 26, 124 S.E.2d at 585.

28. *Nine*, ___ S.C. at ___, 437 S.E.2d at 184.

29. *Watts*, 272 S.C. at 517, 519, 252 S.E.2d at 890.

30. *Id.* at 518, 252 S.E.2d at 890.

court stated, "This is not a case of fraudulent misrepresentation. This is a case where two purchasers chose to shut their eyes."[31]

In *Aaron* a used car purchaser sued the seller in fraud for misrepresentations concerning the car's condition and mileage.[32] Although finding for the plaintiff, the South Carolina Supreme Court stated the rule that "one will not be heard to say that he was deceived by a vendor's misrepresentations if, by his own negligent failure to avail himself of information easily within his reach, he has contributed to the perpetration of the alleged fraud."[33] In *Nine* the majority thought sufficient evidence existed to support the trial court's conclusion that Nine "had no reasonable right to rely on Henderson's representations." Therefore, the court affirmed the trial court's grant of Henderson's summary judgment motion.[34]

In contrast, the dissent could not "conclude as a matter of law that Nine failed to exercise reasonable diligence under the circumstances of this case in relying upon representations regarding the extent of termite damage, despite his knowledge of previous termite infestations and the cautionary language of the August [wood infestation] report."[35] The dissent cited *May v. Hopkinson*[36] for the proposition that a home purchaser "has a right to rely on the seller to disclose latent or hidden defects which are not discoverable by reasonable examination and of which the seller has knowledge."[37] The dissent continued by noting, "South Carolina law provides that insect infestation may be a latent defect in property, giving rise to a duty to disclose on the part of the seller."[38] Although claiming that the recipient of fraudulent information can rely on the statements even if further investigation may

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31. *Id.* at 519, 252 S.E.2d at 891.

32. *Aaron*, 240 S.C. at 29, 124 S.E.2d at 586.

33. *Id.* at 34, 124 S.E.2d at 589 (quoting Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959)).

34. Nine v. Henderson, ___ S.C. ___, ___, 437 S.E.2d 182, 184 (Ct. App. 1993).

35. *Id.* at ___, 437 S.E.2d at 188 (Cureton, J., dissenting). Henderson offered two further defenses rejected by the dissent. First, Henderson claimed that "the 'as is' provision of the contract of sale gave Nine notice that Henderson had made no representations as to the condition of the property." *Id.* at ___, 437 S.E.2d at 186 (Cureton, J., dissenting). The dissent asserted that an as is provision does not bar recovery in fraud. *See id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting) (citing MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980)). Second, Henderson alleged that "by assuming responsibility to repair all damage to the property, Nine assumed responsibility for determining the extent of damage." *Id.* at ___, 437 S.E.2d at 186 (Cureton, J., dissenting). The dissent disagreed, noting, "The record does not reflect that Nine agreed to assume responsibility for discovering and repairing all damage to the properties regardless of the extent of damage." *Nine*, ___ S.C. at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

36. 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).

37. *Nine*, ___ S.C. at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

38. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting) (citing Cohen v. Blessing, 259 S.C. 400, 192 S.E.2d 204 (1972)).

expose the fraud,[39] the dissent conceded that one alleging fraud "must exercise reasonable diligence under the circumstances" to satisfy the requirement for justifiable reliance.[40]

The dissent distinguished *Bostick*, which concerned the reasonability of a purchaser's reliance on alleged misrepresentations made in an infestation report where the purchaser ignored the report's warnings to consult a building expert.[41] The dissent stated, "Whether or not exculpatory statements made by a third party should defeat Nine's right to rely presents a different issue than was involved in *Bostick*."[42] Believing that a reasonable juror could find that Nine exercised reasonable diligence, the dissent remained unconvinced that "the law would require Nine to discover the significance of the language in the reports concerning possible hidden termite damage, delay the closing and go out and hire an engineer to inspect the properties."[43] Viewing the facts in the light most favorable to Nine, the dissent believed that the record provided sufficient evidence to imply that Henderson was aware of extensive termite damage, that Henderson failed to disclose this knowledge to Nine, that Henderson made positive representations that if Nine made certain minor repairs, the properties would receive a clean bill of health from the termite inspector, and that Henderson rushed the closing where he provided Nine with the August infestation reports.[44]

In conclusion the dissent found the issue of Nine's right to rely inappropriate for disposition by summary judgment.[45] Quoting *Unlimited Services v. Macklen Enterprises*,[46] the dissent stated, "'Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts.'"[47]

Nine presented a difficult decision for the court. Construing the evidence in a light most favorable to Nine, as the court must on a summary judgment motion,[48] the court could infer that Henderson did not disclose the full extent

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39. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting) (citing Reid v. Harbison Dev. Corp., 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985) (per curiam), *aff'd in part and rev'd in part*, 289 S.C. 319, 345 S.E.2d 492 (1986)).

40. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting) (citing Bostick v. Orkin Exterminating Co., 806 F.2d 504 (4th Cir. 1986)).

41. *See Bostick*, 806 F.2d at 508-09.

42. *Nine*, ___ S.C. at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

43. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

44. *See id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting). The dissent also found it unfair to hold Nine to a higher standard of diligence than the Terminix professionals, who were unable to detect the termite damage. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

45. *Id.* at ___, 437 S.E.2d at 188 (Cureton, J., dissenting).

46. 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991).

47. *Nine*, ___ S.C. at___, 437 S.E.2d at 188 (Cureton, J., dissenting).

48. *See* Byers v. Westinghouse Elec. Corp., ___ S.C. ___, ___, 425 S.E.2d 23, 24 (1992)

of known termite damage.[49] At a minimum, the court could infer that Henderson did not notify Nine of the need to contact an expert to determine the scope of the infestation.[50] Then the court had to consider Nine's duty to exercise reasonable diligence under the circumstances.[51]

In making this analysis,[52] the court must weigh two policies: "on the one hand, to suppress fraud, and on the other, not to encourage negligence and inattention to one's own interest."[53] Because a fraud perpetrator is a wrongdoer, courts generally have required conduct greater than negligence to bar the defrauded plaintiff from recovery.[54] Otherwise, the perpetrator of fraud would escape with impunity because of the victim's carelessness. In *J.B. Colt Co. v. Britt*[55] the South Carolina Supreme Court adopted the rule that only "reckless or conscious disregard of [their] duty" will deprive victims of their right to rely.[56] Additionally, the court stated that "mere negligence or inadvertent failure to exercise due care, when such failure is induced by a

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(citing SSI Medical Serv. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)).

49. The dissent found that Henderson positively represented "that if certain minor repairs were accomplished, the house would receive a 'clean bill of health' from Terminix." *Nine*, ___ S.C. at ___, 437 S.E.2d at 187 (Cureton, J., dissenting). Additionally, Henderson admitted that he did not reveal the May graphs to Nine and agreed that "prior to closing he only informed Nine of the repairs noted by Nine." *Id.* at ___, 437 S.E.2d at 185 (Cureton, J., dissenting). In his deposition Henderson testified that he "didn't see any reason to [show Nine the May inspection graphs prior to closing]. It's like if I sell a used car, do I need to show the man how much I originally paid for the car, or the contracts?" *Id.* at ___, 437 S.E.2d at 185 (Cureton, J., dissenting). (alteration in original).

50. In South Carolina the buyer has a right to rely on a home seller to disclose latent insect infestation known to the seller and not discoverable on a reasonable examination of the property. *See* May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986) (citing Cohen v. Blessing, 259 S.C. 400, 192 S.E.2d 204 (1972)).

51. Bostick v. Orkin Exterminating Co., 806 F.2d 504, 509 (4th Cir. 1986). Failure by the plaintiff to show a right to rely on the defendant's misrepresentations can defeat the action for fraud.

52. The court's analysis is fact-driven:

> The determination of what constitutes reasonable diligence and prudence must be made on a case by case basis. Various circumstances which will be considered include the form and materiality of the representation; the respective age, experience, intelligence and mental and physical conditions of the parties; and the relations and respective knowledge and means of knowledge of the parties.

Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (citing Parks v. Morris Homes Corp., 245 S.C. 461, 141 S.E.2d 129 (1965)).

53. Thomas v. American Workmen, 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941).

54. *See* 37 AM. JUR. 2D *Fraud & Deceit* § 250 (1968).

55. 129 S.C. 226, 123 S.E. 845 (1924).

56. *Id.* at 234-35, 123 S.E. at 848; *see also* F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 283-85 (1990) (discussing the right to rely in South Carolina jurisprudence and stating that "South Carolina is in accord with the general rule that the victim has a right to rely so long as he is not reckless or grossly negligent").

fraudulent representation of the adversary, should not on principle debar the negligent party from asserting a right to relief on the ground of fraud."[57] Subsequently, explaining the policy for this doctrine, the South Carolina Supreme Court stated "that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary."[58]

Since first establishing the standard to which a fraud victim is held, the South Carolina appellate courts have revisited the issue numerous times.[59] In older cases, the court restated the *J.B. Colt* standard that only the victim's recklessness or gross negligence will bar recovery.[60] More recently, the court has stated simply that the representee must use reasonable prudence and diligence under the circumstances without articulating whether mere negligence or recklessness would defeat the victim's right to rely.[61] In some cases the court implied that mere negligence will bar the plaintiff's recovery.[62]

Although it is not stated explicitly, the majority in *Nine* may have applied a mere negligence standard, rather than a recklessness or gross negligence standard, to bar Nine's recovery. The facts present a strong argument for this conclusion. Henderson made a positive representation to Nine that the house would receive a clean bill of health from Terminix if certain minor repairs were made.[63] Henderson did not surrender the wood infestation reports

57. *J.B. Colt*, 129 S.C. at 234, 123 S.E. at 848.

58. Thomas v. American Workmen, 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941).

59. The issue of a plaintiff's right to rely commonly arises when a plaintiff seeks to avoid a contract signed before read. The failure of an educated, literate person to read a contract is per se reckless unless no meaningful opportunity to read exists or other extenuating circumstances exist. *See* HUBBARD & FELIX, *supra* note 56, at 285-86 & nn.73-75.

60. *See* Reid v. George Washington Life Ins. Co., 234 S.C. 599, 602, 109 S.E.2d 577, 579 (1959); Tallevast v. Herzog, 225 S.C. 563, 570, 83 S.E.2d 204, 207 (1954); Shumpert v. Service Life & Health Ins. Co., 220 S.C. 401, 412, 68 S.E.2d 340, 345 (1951); O'Connor v. Brotherhood of R.R. Trainmen, 217 S.C. 442, 448, 60 S.E.2d 884, 886 (1950); *Thomas*, 197 S.C. at 182, 14 S.E.2d at 888; Souba v. Life Ins. Co., 187 S.C. 311, 319-20, 197 S.E. 826, 829 (1938); Hood v. Life & Casualty Ins. Co., 173 S.C. 139, 145, 147, 175 S.E. 76, 79 (1934); Scott v. Newell, 146 S.C. 385, 408, 144 S.E. 82, 90 (1928).

61. *See* Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985); Gilbert v. Mid-South Mach. Co., 267 S.C. 211, 220, 227 S.E.2d 189, 193 (1976); Parks v. Morris Homes Corp., 245 S.C. 461, 466-67, 141 S.E.2d 129, 132 (1965); Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985); Reid v. Harbison Dev. Corp., 285 S.C. 557, 561, 330 S.E.2d 532, 535 (Ct. App. 1985); *see also* Bostick v. Orkin Exterminating Co., 806 F.2d 504, 509 (4th Cir. 1986) (interpreting South Carolina law).

62. *See* Aaron v. Hampton Motors, 240 S.C. 26, 34, 124 S.E.2d 585, 589 (1962) (citing Jones v. Cooper, 234 S.C. 477, 490, 109 S.E.2d 5, 12) (1959) (stating that "one will not be heard to say that he was deceived by a vendor's misrepresentations if, by his own negligent failure to avail himself of information easily within his reach, he has contributed to the perpetration of the alleged fraud"); Weatherford v. Home Fin. Co., 225 S.C. 313, 319, 82 S.E.2d 196, 199 (1954) (per curiam) (standing that "it could not be held as a matter of law that respondent here, under all the circumstances, was guilty of negligence or carelessness in his reliance upon the representations upon which the action is founded").

63. Nine v. Henderson, ___ S.C. ___, ___, 437 S.E.2d 182, 187 (Ct. App. 1993) (Cureton,

disclosing the damage until closing.[64] These reports often are a morass of incomprehensible documents to the unwitting residential home purchaser. Furthermore, the dissent commented that the evidence reflected that the closing was rushed[65] and that the reports were difficult to read, not easily comprehended by a layman.[66] In affirming the trial court's decision on a summary judgment motion, it seems unlikely that the majority believed that Nine's conduct was reckless as a matter of law. Therefore, the majority may have denied recovery to Nine based on his merely negligent behavior.

In affirming, the majority held that no reasonable juror could have found that Nine had a right to rely on Henderson's representations concerning the termite. Through omission, the majority calls into question the appropriate standard to which plaintiffs are held to assert their right to rely. The facts of *Nine* indicate that the majority may have denied recovery because of Nine's negligence. If so, this result contradicts the South Carolina rule that only the victim's recklessness or gross negligence will bar recovery.

C. Jones DuBose, Jr.

III. COURT REJECTS FIXED LOCALITY RULE FOR NURSES, ADOPTS NATIONAL STANDARD OF CARE

McMillan v. Durant[1] addresses whether a physician expert witness should provide opinions as to the appropriate nursing standard of care in a negligence action and whether South Carolina should abandon the fixed locality rule as the appropriate standard of care for a hospital's nursing staff.[2] The South Carolina Supreme Court adopted a national standard of care for physicians in *King v. Williams*,[3] and in *McMillan* it extended the national standard of care to nurses and other health care professionals.[4]

As guardians ad litem, the McMillans sought damages for permanent brain damage to their son when his shunt[5] malfunctioned.[6] Joseph McMillan

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J., dissenting).

64. *Id.* at ___, 437 S.E.2d at 183.

65. *Id.* at ___, 437 S.E.2d at 187 (Cureton, J., dissenting).

66. *Id.* at ___ n.1, 437 S.E.2d at 185 n.1 (Cureton, J., dissenting).

1. ____ S.C. ____, 439 S.E.2d 829 (1993).

2. *Id.* at ___, 439 S.E.2d at 831.

3. 276 S.C. 478, 279 S.E.2d 618 (1981).

4. *See McMillan*, ___ S.C. at ___, 439 S.E.2d at 833.

5. "A shunt is a drain inserted into the brain, with a tube running to the abdominal cavity. The shunt allows excess fluid around the brain to drain into the abdominal cavity which prevents excess pressure on the brain. This excess pressure on the brain results in brain damage . . . ." *Id.* at ____, 439 S.E.2d at 830 n.1.

6. *Id.* at ___, 439 S.E.2d at 829-31.

was born prematurely and, as a result of his premature birth, "suffered intracranial bleeding which required the insertion of a shunt to relieve pressure and prevent brain damage."[7] Since the insertion of Joseph's shunt, a neurosurgeon had to revise the shunt three times.[8]

Eighteen months after birth, Joseph became ill. Three days later his family pediatrician treated him. The pediatrician diagnosed Joseph as suffering from an ear infection and an upper respiratory tract infection. Shortly thereafter, Joseph's condition deteriorated. The shunt was tested, and it was not the cause of his illness. Joseph was suffering from an inflammation of his stomach and intestines. Upon recommendation of the pediatrician, Joseph was admitted to Tuomey Hospital for intravenous hydration.[9]

It is unclear whether upon Joseph's admittance someone informed the hospital staff of Joseph's shunt, although evidence exists that no one did. That evening a nurse discovered the shunt and informed a supervisor who examined it and determined that it was functioning properly. Later that evening, Mrs. McMillan informed a nurse that Joseph was not acting normally; he was opening and closing his mouth to breath. The nurse determined that Joseph looked normal, but informed the nursing supervisor. The nursing supervisor also checked Joseph and determined that he looked normal. A minute or two later, Joseph stopped breathing.[10] Artificial respiration was provided until Dr. Young, the attending physician, arrived. Dr. Young then called Joseph's neurosurgeon who advised Dr. Young to tap the shunt and, if he found elevated intracranial pressure, to drain off the excess fluid until the pressure returned to normal. The staff drained the shunt twice before Joseph's intracranial pressure returned to a safe level.[11] Joseph was then transported to Richland Memorial Hospital where the staff discovered that abdominal tissue had obstructed the end of the shunt tube, blocking the return of fluid to the abdominal cavity and causing the elevated pressure. Joseph suffered permanent brain damage.[12]

The McMillans filed a complaint against Dr. Durant, Dr. Young, and Sumter Pediatrics, P.A., all of which settled before trial, and Tuomey Regional Medical Center, Inc., "alleging negligent failure to promptly and properly treat Joseph."[13] At trial, the jury returned a verdict against Tuomey, the only defendant left, for $734,100. The trial judge imposed the

7. *Id.* at ____, 439 S.E.2d at 830 (footnote omitted).
8. *Id.* at ___, 439 S.E.2d at 830.
9. *McMillan*, ___ S.C. ___, 439 S.E.2d at 830.
10. *Id.* at ___, 439 S.E.2d at 830.
11. *Id.* at ___, 439 S.E.2d at 830-31.
12. *Id.* at ___, 439 S.E.2d at 831; Final Brief of Appellant at 7.
13. *McMillan*, ___ S.C. at ___, 439 S.E.2d at 831.

$200,000 statutory cap. Tuomey appealed, and the court of appeals affirmed.[14]

The *McMillan* court decided first whether the trial court properly allowed a physician expert to testify as to the appropriate nursing standard of care. The South Carolina Supreme Court held that the trial judge did not abuse his discretion in admitting the physician's testimony.[15] In so holding, the court cited "the long-established rule that the qualification of . . . an expert falls largely within the trial judge's discretion."[16] In *Creed* a general practitioner testified as an expert witness as to emotional damages of a tort victim over objections that the expert was not a neurologist or psychologist.[17] The court held, "A physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved. The fact that he is not a specialist goes to the weight of his testimony, not its admissibility."[18] In *McMillan* the court noted that although a physician may be an expert in one field, that does not make him an expert in another.[19] The court stated, "In *Botehlo*, the orthopedic expert's lack of knowledge in the area of podiatry was fatal to the admissibility of his testimony."[20]

In *McMillan* the court found that the trial judge did not abuse his discretion in admitting the physician's expert testimony as to the nursing standard of care. The court stated, "The expert physician was thoroughly examined as to his credentials and background, which included his professional interaction with a multitude of various nursing staffs and his teaching nursing courses . . . ."[21] The court then concluded, "The fact that the expert was a physician and not a nurse would merely go to the weight of his testimony, not to its admissibility."[22] In distinguishing *Botehlo*, the court stated, "As a teacher in the field of nursing, the neurosurgeon here, unlike the orthopedist in *Botehlo*, was amply qualified to render an opinion in the field of nursing."[23]

The second issue addressed *McMillan* was whether "the trial court erred in not charging the 'locality rule' to define the appropriate standard of nursing

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14. *Id.* at ___, 439 S.E.2d at 831, 833.

15. *Id.* at ___, 439 S.E.2d at 831-32.

16. *Id.* at ___, 439 S.E.2d at 831 (citing State v. Schumpert, ____ S.C. ____, 435 S.E.2d 859 (1993) (applying Creed v. City of Columbia, ____ S.C. ____, 426 S.E.2d 785 (1993), for the same proposition in a civil action)).

17. *Creed*, ___ S.C. at ____, 426 S.E.2d at 786.

18. *Id.* at ____, 426 S.E.2d at 786 (citation omitted).

19. *McMillan*, ___ S.C. at ___, 439 S.E.2d at 832 (citing Botehlo v. Byoura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984)).

20. *Id.* at ___, 439 S.E.2d at 832.

21. *Id.* at ___, 439 S.E.2d at 832.

22. *Id.* at ___, 439 S.E.2d at 832.

23. *Id.* at ___, 439 S.E.2d at 832.

care in a medical malpractice action."[24] In *King*[25] the court adopted a national standard of care for physicians and dentists in South Carolina. In so holding, the court reasoned, "the 'locality' rule has been criticized also for creating practical difficulties, including a scarcity of local physicians willing to testify on the plaintiffs' behalf, and permitting a local standard of care below that which patients are entitled to expect."[26] Furthermore, the *McMillan* court found that Tuomey based its arguments for maintaining a local standard for hospitals and nurses on arguments similar to those advanced for maintaining the local standard for physicians. These arguments included disparate educational requirements and regional limits on training.[27]

The court recognized that, like nurses, physicians have varying educational levels and varying quality of training. However, the court asserted that under a national standard of care, "the appropriate comparative analysis must consider the physician by specialty, educational level, medical environment, and any factor which is relevant to sound medical practice."[28] The court also stated that "the evolution of the law appears to support the adoption of a national standard of care throughout the health care system."[29] To support its position, the court cited the Colorado Court of Appeals which "held that since the practice of nursing 'is a highly regulated profession in this state, . . . the applicable standard of care is that of the reasonable professional . . . . This minimum standard is not affected by standards which may be adopted by various hospitals.'"[30] The court also cited a California case in support of extending the national standard to nurses.[31] In *Fraijo v. Hartland Hospital*[32] the California Court of Appeals stated, "While nurses traditionally have followed the instructions of attendant physicians, doctors realistically have long relied on nurses to exercise independent judgment in many situations."[33] Therefore, the *McMillan* court extended the national standard to all health care professionals because the same policy reasons that applied to physicians also applied to other health care professionals. Finally, the supreme court noted that applying the national standard will not abolish the effects of the fixed

24. *McMillan*, ___ S.C. at ____, 439 S.E.2d at 832.

25. 276 S.C. 478, 279 S.E.2d 618 (1981).

26. *King*, 276 S.C. at 481-82, 279 S.E.2d at 620 (citing David D. Armstrong, Comment, *Medical Malpractice — The "Locality Rule" and the "Conspiracy of Silence,"* 22 S.C. L. REV. 810 (1970)).

27. *McMillan*, ___ S.C. at ___, 439 S.E.2d at 832.

28. *Id.* at ___, 439 S.E.2d at 832.

29. *Id.* at ___, 439 S.E.2d at 832.

30. *Id.* at ____, 439 S.E.2d 832-33 (alteration in original) (quoting Wood v. Rowland, 592 P.2d 1332, 1335 (Colo. Ct. App. 1978)).

31. *See McMillan*, ___ S.C. at ___, 439 S.E.2d at 833.

32. 160 Cal. Rptr. 246 (Cal. Ct. App. 1979).

33. *Id.* at 252.

locality rule because the national standard of care will use locality as one factor in its comparative analysis.[34]

In expanding *King* to nurses, the supreme court followed a national trend that has been gaining momentum since the 1960s, a decade that started a dramatic expansion of tort liability.[35] This era of expansion peaked in the early 1980s[36] when the court decided *King*. Now that the waters have settled, it is helpful to examine the reasoning behind the trends that developed during that period of "exuberant excesses."[37]

One such trend was the restriction or abolition of the fixed locality rule. The *McMillan* court abandoned the use of the fixed locality rule as to nurses and all other health care professionals, replacing it with a national standard of care, which merely treats locality as one factor in applying the standard of care. Some courts have abolished the locality rule in its entirety,[38] while other courts have abolished it as to specialists.[39]

As to a physician's standard of care, "there are minimum requirements of skill and knowledge, which anyone who holds himself out as competent to treat human ailments is required to have."[40] A fixed locality rule "held that allowance must be made for the type of community in which a physician carries on his practice, and for the fact . . . that a country doctor could not be expected to have the equipment, facilities, libraries, contacts, opportunities for learning, or experience afforded by large cities."[41] While "[s]ome courts still follow a strict 'same' locality rule,"[42] other courts have expanded the rule to include "'similar localities,' thus including other towns of the same general type."[43]

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34. *See McMillan*, ___ S.C. at ___, 439 S.E.2d at 832.

35. *See* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992) (analyzing the expansion of tort liability in the 1960s and its marked decrease in the early 1980s).

36. *Id.* at 708. According to Professor Owen, tort expansion peaked in 1982 with *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), which adopted a true strict liability doctrine or no-fault doctrine. *See* Owen, *supra* note 35, at 714-15.

37. Owen, *supra* note 35, at 704.

38. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187-88 (5th ed. 1984); James O. Pearson, Jr., Annotation, *Modern Status of "Locality Rule" in Malpractice Action Against Physician Who is Not a Specialist*, 99 A.L.R.3d 1133 (1980) (analyzing the current status of the locality rule).

39. *See generally* Jay M. Zitter, Annotation, *Standard of Care Owed to Patient by Medical Specialist as Determined by Local, "Like Community," State, National, or Other Standards*, 18 A.L.R.4th 603 (1982) (analyzing the status of the locality rule as applied to specialists).

40. KEETON ET AL., *supra* note 38, § 32, at 187 (citing Kelly v. Carroll, 219 P.2d 79 (Wash.), *cert. denied*, 340 U.S. 892 (1950); Treptau v. Behrens Spa, 20 N.W.2d 108 (Wis. 1945)).

41. *Id.* § 32, at 187-88.

42. *Id.* § 32, at 188 n.4 (citing Stanely v. Fisher, 417 N.E.2d 932 (Ind. Ct. App. 1981)).

43. *Id.* (footnote omitted).

Finally, several states have adopted yet another compromise between the national standard of care and a fixed locality rule in applying the standard of care to specialists. These states have expanded the scope of the community to include the entire state.[44]

That many states have not adopted the national standard of care even for specialists further supports the arguments against the adoption of national standard of care for nurses. The modifications to the fixed locality rule as applied to physicians seem to address the major criticisms of the rule, such as difficulty in finding physicians in the same locality to testify against one another and allowing substandard levels of care.[45] Yet, as courts cure the problems with the fixed locality rule by slightly varying the rule as applied to physicians, the problems with the rule may not be as apparent when applied to nurses and other health care professionals.

The *McMillan* court gave several reasons for abolishing the fixed locality rule for doctors in favor of a national standard of care, and it found those reasons equally applicable to the nursing profession. The first such reason is "the scarcity of local physicians who would be willing to testify against a peer."[46] However, this conspiracy of silence argument does not appear to apply equally to nurses. Because doctors often supply the expert testimony as to the appropriate standard of care of nurses,[47] the scarcity of experts argument is not as strong. Moreover, although the two professions often work side by side, no evidence exists that the same conspiracy of silence exists within the nursing profession between doctors and nurses. Although the court stated that "present day nursing professionals may also have a certain reluctance to testify against a local peer,"[48] it cited no authority for the proposition that plaintiffs have difficulty finding expert witnesses to testify against other nurses.

The second reason the court gave for abandoning the fixed locality rule was that it "allowed for a local standard of care below what a patient was entitled to expect."[49] However, applying this reason to all health care professionals, the court overlooked a compromise that many courts have adopted. For example, the Colorado Supreme Court distinguishes between the standard of care owed by a specialist and that owed by a general practitioner. In *Jordan v. Bogner*[50] the court stated, "A nonspecialist physician must act

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44. *See* Powers v. United States, 589 F. Supp. 1084, 1099 (D. Conn. 1984); Vasquez v. Markin, 731 P.2d 510, 517 (Wash. Ct. App. 1987); Zitter, *supra* note 39, § 5.

45. *See* McMillan v. Durant, ___ S.C. ___, ___, 439 S.E.2d 829, 833 (1993).

46. *Id.* at ____, 439 S.E.2d at 833 (citing King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981)).

47. *See, e.g., id.* at ___, 439 S.E.2d at 832.

48. *Id.* at ___, 439 S.E.2d at 832.

49. *Id.* at ____, 439 S.E.2d at 833 (citing *King*, 276 S.C. at 478, 279 S.E.2d at 618).

50. 844 P.2d 664 (Colo. 1993) (en banc).

consistently with the standards required of the medical profession in the community where he or she practices. . . . On the other hand, a specialist physician's performance is not measured against other physicians in the same or similar locality."[51] Thus, the Colorado Supreme Court recognized that courts should hold specialists to a national standard of care because they hold themselves out as being trained specially. Conversely, general practitioners do not hold themselves out as specialists, and they may not work in large hospitals with access to specialized training, equipment, and information. Therefore, the patient should not expect the same standard of care from a general practitioner as from a specialist.

Applying the patient expectation argument to nurses suggests the propriety of the fixed locality rule as the standard of care. The argument that the standard of care a patient expects does not depend on the health care deliverer "ignores the economic realities of our health care system and is unfair to practitioners."[52] Moreover, "[s]ociety has limited resources to expend on health care; use of nurses in expanded roles helps to allocate those resources so that patients in low-risk situations can receive less expensive health care."[53] Because the training and education of nurses vary dramatically, as does their level of responsibility,[54] it is reasonable that the patient should expect from nurses a standard of care commensurate with that practiced by other nurses in a similar locality.

A third reason that the court abandoned the fixed locality rule for nurses was that "[t]he old concerns for regional limits on training and lack of exposure to multi-regional practice for physicians is equally outdated for nurses."[55] However, this argument cannot apply equally to nurses because they do not have the standardized training that physicians do and because they have varying responsibility levels dictated by physicians. Specifically, a prospective nurse may take three different avenues: baccalaureate,[56] diploma,[57] and associate degree programs.[58] Although these programs can

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51. *Id.* at 666 (citations omitted); *see also* Gittens v. Christian, 600 F. Supp. 146, 148-49 (D.V.I. 1985) (finding a family practice specialist owes a higher degree of care than a general practitioner), *aff'd*, 782 F.2d 1028 (3d Cir. 1986).

52. Elizabeth J. Armstrong, Note, *Nurse Malpractice in North Carolina: The Standard of Care*, 65 N.C. L. REV. 579, 593 (1987).

53. *Id.*

54. *See id.* at 579-80.

55. McMillan v. Durant, ___ S.C.___, ____, 439 S.E.2d 829, 832 (1993).

56. "In baccalaureate programs student nurses typically study humanities and science courses for two years, followed by two or three years of clinical and theoretical instruction in nursing." Armstrong, *supra* note 52, at 579 n.2 (citing COUNCIL OF STATE BDS. OF NURSING, AM. NURSES' ASS'N, EXAMINING THE VALIDITY OF THE STATE BOARD TEST POOL EXAMINATION FOR REGISTERED NURSE LICENSURE 7 (1979) [hereinafter COUNCIL]).

57. "Diploma degree programs usually are two or three years long and are conducted by hospitals." *Id.* at n.3 (citing COUNCIL, *supra* note 56, at 7).

58. "Associate degree programs usually require two years and are offered by community or

differ by at least two years of education — some focusing on practical aspects, others on classroom learning — any of these programs suffice to qualify the nurse to sit for the registered nurse licensing exam.[59] Conversely, as to physicians "[s]tate medical practice acts almost uniformly require graduation from an 'approved' medical school and satisfactory completion of basic science and medical examinations as conditions of licensure."[60] Additionally, physicians have residency requirements that provide them with multiregional exposure, whereas nurses do not.

Finally, this last argument disregards the economic reality that placing nurses in expanding roles promotes the important goal of low-cost health care. And, as noted in a University of North Carolina law review article, "Although nurse specialists' and physicians' functions often overlap, their education and approach to problems is not identical."[61]

In adopting the national standard of care as to all health care professionals, the South Carolina Supreme Court followed a broad national trend that developed in the 1960s and 1970s. In *McMillan*, the court applied the same reasons for abandoning the fixed locality rule for nurses as it did in abandoning application of the rule to physicians. In so doing, the court disregarded many vital distinctions between the two health care providers that would not justify application of the same standard of care. Moreover, important policy reasons, such as the ability to provide low cost health care, apply particularly to nurses. While in certain circumstances there may be little practical effect of abandoning the fixed locality rule in favor of the national standard of care, there are important distinctions, especially when the national standard is applied to nurses.

Victoria L. Miller

IV. LANDLORDS HAVE NO AFFIRMATIVE DUTY TO PROTECT TENANTS FROM CRIMINAL ACTIVITY

In *Cramer v. Balcor Property Management*[1] the South Carolina Supreme Court held, "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."[2] The ruling states South

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junior colleges." *Id.* at n.4 (citing COUNCIL, *supra* note 56, at 7).

59. *See id.* at 580 n.7 (citing COUNCIL, *supra* note 56, at 6).

60. Philip C. Kissam, *Physician's Assistant and Nurse Practitioner Laws: A Study of Health Law Reform*, 24 KAN. L. REV. 1, 15 (1975) (footnote omitted).

61. Armstrong, *supra* note 52, at 593.

1. ___ S.C. ___, 441 S.E.2d 317 (1994).

2. *Id.* at ___, 441 S.E.2d at 319.

Carolina's refusal to derive from the common law an affirmative duty for a landlord to protect the landlord's tenants from criminal conduct.

Genevieve Zitricki was slain in her apartment in April 1990. An unknown third party pried open a sliding glass patio door and entered her apartment. The victim's personal representative instituted a wrongful death action against her landlord in the United States District Court.[3] After the landlord moved for summary judgment, the district court certified to the South Carolina Supreme Court[4] the question of whether "a landlord owe[s] 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?"[5]

Before the state court, the victim's personal representative attempted to analogize the landlord-tenant relationship to the innkeeper-guest and store-owner-invitee relationships.[6] South Carolina has shown a willingness to impose a duty upon storeowners[7] and innkeepers[8] to protect their customers and guests from foreseeable criminal acts by third parties. The court, however, rejected these analogies.[9] In reaching its decision the South Carolina Supreme Court relied heavily on an earlier district court decision, *Cooke v. Allstate Management Corp.*[10] The South Carolina Supreme Court

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3. *Id.* at ___, 441 S.E.2d at 317.

4. *Id.* at ___, 441 S.E.2d at 317. At its discretion, the South Carolina Supreme Court may answer questions certified to it by any federal court. S.C. APP. CT. R. 228.

5. *Cramer*, ___ S.C. at ___, 441 S.E.2d at 317. A second question asked the source and circumstances giving rise to a duty identified in response to the first question. *Id.* at ___, 441 S.E.2d at 317.

6. *Id.* at ___, 441 S.E.2d at 318.

7. *See* Bullard v. Ehrhardt, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984) (holding that a storeowner has a duty to take reasonable care to protect its invitees and that the duty extends to protection from criminal acts by third parties only if the storeowner knew or had reason to know of the criminal attack); Munn v. Hardee's Food Sys., 274 S.C. 529, 531, 266 S.E.2d 414, 414 (1980) (per curiam) (recognizing that a storeowner generally does not have a duty to protect its customers from criminal acts unless the storeowner knows or has reason to know the acts are occurring or about to occur) (citing Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977)); *Shipes*, 269 S.C. at 483-85, 238 S.E.2d at 168-69 (holding that a storeowner does not have a duty to protect its customers from third party criminal acts unless the store owner knows or has reason to know the acts are occurring or about to occur) (citing Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975)). While the trend in the above cases has been to impose upon the storeowner a duty to protect its customers from foreseeable criminal acts by third parties, the court has narrowly defined foreseeable. In each of these cases, the court did not impose the duty upon the store owner because the criminal acts were not sufficiently foreseeable. *See Bullard*, 283 S.C. at 62, 324 S.E.2d at 559; *Munn*, 274 S.C. at 531, 266 S.E.2d at 415; *Shipes*, 269 S.C. at 485, 238 S.E.2d at 169.

8. *See* Courtney v. Remler, 566 F. Supp. 1225, 1232 (D.S.C. 1983), *aff'd*, 745 F.2d 50 (4th Cir. 1984); Daniel v. Days Inn, Inc., 292 S.C. 291, 296, 356 S.E.2d 129, 132 (Ct. App. 1987) (citing *Courtney*, 566 F. Supp. at 1225).

9. *See Cramer*, ___ S.C. at ___, 441 S.E.2d at 318.

10. 741 F. Supp. 1205 (D.S.C. 1990); *see Cramer*, ___ S.C. at ___, 441 S.E.2d at 318.

noted favorably that the district court in *Cooke* found the analogies "unpersuasive 'in light of the cautious approach South Carolina appellate courts have taken even in those contexts.'"[11] The state court held that the landlord-tenant relationship differs fundamentally from the storeowner-invitee and innkeeper-guest relationships. Therefore, the court refused to find that landlords owe an affirmative common law duty to protect their tenants from criminal activity by reason of that relationship.[12] The victim's personal representative conceded that the South Carolina Residential Landlord and Tenant Act[13] (SCRLTA) did not impose a duty on the landlord to protect tenants from criminal acts by third parties. The court concurred that the SCRLTA did not impose such a duty.[14]

The court's discussion and ruling generally were conclusory. In deciding that the landlord-tenant relationship fundamentally differs from the storeowner-invitee and innkeeper-guest relationships, the court cited *Cooke*, which quoted *Feld v. Merriam.*[15] In *Feld*, the Pennsylvania Supreme Court analyzed the landlord/tenant relationship:

> An apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public might create. It is of its nature private and only for those specifically invited. The criminal can be expected anywhere, any time, and has been a risk of life for a long time.[16]

The *Feld* court, and by inference the *Cooke* and *Cramer* courts, viewed the lease as a traditional conveyance of a property interest. This view is by no means universally accepted. The majority of jurisdictions find no duty in the landlord to protect tenants from third party criminal acts arising from the mere existence of the landlord-tenant relationship. Generally, the landlord does not insure the safety of his tenants against third party criminal acts.[17] However, some courts have found that this duty may arise from the circumstances of a particular case.[18] Courts that have found a duty have relied on

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11. *Cramer*, ___ S.C. at ___, 441 S.E.2d at 318 (quoting *Cooke*, 791 F. Supp. at 1213).

12. *Id.* at ___, 441 S.E.2d at 318-19.

13. S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. 1991 & Supp. 1993).

14. *Cramer*, ___ S.C. at ___, 441 S.E.2d at 319.

15. 485 A.2d 742 (Pa. 1984); *see Cramer*, ___ S.C. at ___, 441 S.E.2d at 318. In *Feld* the tenants were abducted from their apartment complex's guarded parking garage and later assaulted. *Feld*, 485 A.2d at 744.

16. *Feld*, 485 A.2d at 745-46.

17. Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1209 n.1 (D.S.C. 1990) (citing Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331 (1972)).

18. *See* Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3D 331 (1972 & Supp. 1993).

contract law, statutory law, or tort law.[19] A plaintiff seeking to impose liability on a landlord for damages arising from the criminal acts of third parties should examine each of these potential causes of action.

In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[20] the District of Columbia Court of Appeals applied the contract view of the landlord-tenant relationship as it applies to modern apartment dwellers.[21] In *Kline* the court stated:

> [T]he value of the lease to the modern apartment dweller is that it gives him a "well known package of goods and services . . . . It does not give him the land itself, and to the tenant as a practical matter this is supremely unimportant. . . . [T]he trend toward treating leases as contracts is wise and well considered.[22]

In some instances, courts have imposed a duty on landlords due to breach of a contractual obligation, either implied or express. In *Kline*, the court found an implied covenant to maintain security at the level in existence when the tenant signed the lease.[23]

While it is unlikely that South Carolina courts will imply such a contractual covenant after the *Cramer* decision, an express agreement to provide protective services still might expose a landlord to liability. In *Thompson v. Cane Gardens Apartments,*[24] the Louisiana Court of Appeals held that a landlord who makes express or implied promises to provide security may be liable if the landlord breaches that obligation, and the breach proximately causes a crime committed by a third party.[25] Courts do not define when a mere failure of security will lead to liability. In *Feld* the court held that a landlord has no general duty to protect tenants from criminal acts, but may incur a duty by providing security to attract or keep tenants.[26]

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19. *See id.*

20. 439 F.2d 477 (D.C. Cir. 1970).

21. *See id.* at 481-82.

22. *Id.* (quoting Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)).

23. *See* 439 F.2d at 485-86. The court reached this decision in two steps. First, the landlord had an obligation to provide those protective services within the landlord's reasonable capacity. Second, the applicable standard was that level of protection in existence when the tenant signed the lease. *Id.* at 485. In *Kline,* the landlord drastically reduced the level of protection while the crime rate on and surrounding the premises increased. *See id.* at 487.

24. 442 So. 2d 1296 (La. Ct. App. 1983).

25. *Id.* at 1298. The plaintiffs alleged that the landlord assured them that the premises were safe and that the landlord would provide adequate security to make the property safe for older tenants. Someone who broke into their apartment assaulted the plaintiffs. *Id.* at 1297-98.

26. *See* Feld v. Merriam, 485 A.2d 742, 745, 747 (Pa. 1984); *see also supra* note 15 and text accompanying note 16.

Courts largely reject contractual claims arising under implied warranties of quiet enjoyment and habitability.[27] In *Young v. Morrisey*[28] the South Carolina Supreme Court held that no implied warranty of habitability or of fitness exists in a lease.[29] The court decided *Young* before the enactment of the SCRLTA in 1986, but the court has not interpreted the SCRLTA as creating any statutory covenant.

In *Cramer* the plaintiff conceded no statutory duty existed, and the court concurred.[30] However, in *Cooke* the court analyzed the plaintiff's claim that the SCRLTA imposed on landlords a statutory duty to protect tenants from criminal acts.[31] The plaintiff relied on an SCRLTA provision requiring the landlord to "put and keep the premises in a fit and habitable condition."[32] The plaintiff contended that maintaining the premises in a fit and habitable condition pertained not only to the property's physical conditions, but also required the landlord to protect the tenant from criminal assault. The court did not agree, finding the provision imposed only a duty to protect the tenant from injuries caused by "'failures of the building.'"[33] Generally, courts agree with the *Cooke* holding that a "safe and habitable" clause does not impose on the landlord a duty to do more than maintain the physical condition of the premises.[34]

This general consensus will not preclude a court's finding that a violation of a specific statute may lead to landlord liability for harm proximately caused by that violation. In *Paterson v. Deeb*[35] the Florida District Court of Appeals held that the trial court erred in dismissing a suit against a landlord

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27. *See generally* Spivey, *supra* note 18, § 6[b] (providing summaries of cases generally dismissing claims arising under these warranties).

28. 285 S.C. 236, 329 S.E.2d 426 (1985).

29. *Id.* at 241, 329 S.E.2d at 429.

30. Cramer v. Balcor Property Management, Inc., ___ S.C. ___, ___, 441 S.E.2d 317, 319 (1994).

31. *See* Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1208 (D.S.C. 1990).

32. S.C. CODE ANN. § 27-40-440(a) (2) (Law. Co-op. 1991).

33. *Cooke*, 741 F. Supp. at 1208 (quoting Deem v. Charles E. Smith Management, Inc., 799 F.2d 944, 946 (4th Cir. 1986)). In *Deem*, the court reviewed a Virginia statute requiring a landlord to maintain common areas in a clean and safe condition. *Id.* (quoting VA. CODE ANN. § 55-248.13(a) (3) (Michie 1914). The circuit court held that maintaining the premises in a safe condition did not extend to protecting tenants from criminal activity. *See Deem*, 799 F.2d at 945-46.

In *Cooke* the court stated, "The [SCRLTA] uses the terms 'fit' and 'habitable.' It is an even greater stretch to construe those terms to include protection against criminal activity than it was to so construe the word 'safe.'" 741 F. Supp. at 1208.

34. *See generally* Spivey, *supra* note 18, § 5[a] (providing a summary of cases analyzing statutes to maintain safe premises as a basis for a potential duty for landlords to protect tenants from criminal acts by third parties).

35. 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985), *review denied*, 484 So. 2d 8 (Fla.), *and review denied*, 484 So. 2d 9 (Fla. 1986).

who allegedly violated a statutory duty to provide locks and keys where a third party raped the tenant.[36] The court recognized that the statute was mandatory and that violation of the statute would be sufficient to state a cause of action for negligence.[37]

Courts imposing tort liability generally find negligent performance of some act or impose on landlords a duty to protect0 tenants from foreseeable risks or harm.[38] A landlord who increases the risk of a tenant's loss from criminal acts must exercise due care to minimize the risks to tenants arising from the landlord's actions.[39] In *Cooke* the only claim to survive the defendant's motion for summary judgment was that the defendant negligently stored a ladder that, according to the plaintiff, a third party used to break into the plaintiff's apartment.[40] Intuitively, this reasoning would apply to a landlord who negligently repairs or unreasonably fails to repair doors, windows, or locks.

The duty, found by some courts, that a landlord must protect tenants from reasonably foreseeable criminal acts of third parties is more problematic. Generally, these cases are fact-specific. Liability may depend on whether the criminal act occurs in the apartment or in a common area.[41]

The real problem is defining foreseeability. It is possible to find case law supporting almost any position. The specific facts required to make criminal acts reasonably foreseeable cover a wide spectrum.

At one extreme, in *Johnston v. Harris*[42] the court held that because the building was in a high crime district, the landlord could foresee that the failure to lock and adequately light the buildings vestibule could lead to criminal acts against tenants.[43]

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36. *See id.* at 1213-14, 1220. In *Paterson*, a tort suit, the court refused to rule on whether the case also stated a cause of action in contract. *Id.* at 1214 n.1.

37. *See id.* at 1218.

38. *See generally,* Spivey, *supra* note 18, §§ 7-9 (summarizing cases examining a landlord's duty under tort law to protect tenants from third party criminal acts).

39. Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1209 (D.S.C. 1990) (citing Spivey, *supra* note 18, § 7[b]).

40. *See id.* at 1210. The court noted that it did not impose an affirmative general duty on the landlord, but that it applied the general negligence standard that there is a duty to perform all acts with due care. *See id.* at 1210 n.2.

41. *See* Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F. Supp. 477, 480-81 (D.C. Cir. 1970) ("In this jurisdiction, certain duties have been assigned to the landlord because of his *control* of common [areas]. . . .

. . .

[The landlord] is the only party who has the *power* to make the necessary repairs or to provide the necessary protection.").

42. 198 N.W.2d 409 (Mich. 1972).

43. *Id.* at 410-11.

In *Czerwinski v. Sunrise Point Condominium,*[44] the court ruled that the trial court erred in holding that the attack on the plaintiff was unforeseeable. The condominium had a five-year history of crimes against persons and property on its premises.[45]

However, in *Shepard v. Drucker & Falk,*[46] the court held that four crimes on the premises involving passkeys were irrelevant to the foreseeability of the plaintiff's rape in the complex's parking lot. Additionally, evidence of a rape at another complex managed by the defendants was similarly irrelevant.[47]

At the other end of this spectrum is *Cramer* in which the court held there is no duty, regardless of the foreseeability of criminal acts by third parties.

Thus, a court that wants to impose a duty on landlords to protect tenants from third party crime can easily find a theory to support its action. The South Carolina Supreme Court was not so inclined. The facts the court faced made the *Cramer* decision inevitable.

The court previously rejected any contract claim due to an implied warranty of habitability.[48] Similarly, the court found no duty imposed by the fit and habitable provision of the SCRLTA.[49] The only option that the court realistically had was to impose a duty to protect tenants from reasonably foreseeable third-party criminal acts.

Given the court's narrow interpretation of reasonable foreseeability,[50] the court probably would impose this duty only in response to facts that strongly imply the criminal acts were in fact foreseeable. In *Cramer*, the appellant alleged no facts leading to the conclusion that the attack on Zitricki was reasonably foreseeable by the landlord.[51] In the future, a case whose facts strongly support that the criminal acts are indeed reasonably foreseeable may cause the court to revisit this issue.

Timothy J. O'Rourke

44. 540 So. 2d 199 (Fla. Dist. Ct. App. 1989) (per curiam).
45. *Id.* at 201.
46. 306 S.E.2d 199 (N.C. Ct. App. 1983).
47. *Id.* at 202.
48. *See supra* notes 27-29 and accompanying text.
49. *See supra* notes 30-33 and accompanying text.
50. *See supra* notes 7-8.
51. Brief of Appellant at 2-3.