

COUNTY OF CHARLESTON

☐ Plaintiff,

**V.**

■ Defendants.

) IN THE COURT OF COMMON PLEAS  
) NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2018-CP-10-2831

## MOTION INFORMATION AND COVER SHEET

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6046249v.1

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-10-2831

Sarah Jordan as Personal Representative of )  
the Estate of Whitney Anne Jordan, )


Plaintiff, )

v. )

69 Darlington Company LLC, Boneworks, )  
LLC f/k/a Reyworks LLC d/b/a Boneworks )  
Property Management, and Boneworks )  
Contracting, LLC f/k/a Boneworks, LLC )  
d/b/a Boneworks Property Management, )

Defendants. )

**AMENDED NOTICE OF MOTION AND  
MOTION TO DISMISS**

2019 MAR 13 AM 11:59  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY 

PLEASE TAKE NOTICE that Defendants Boneworks, LLC f/k/a Reyworks LLC d/b/a Boneworks Property Management, and Boneworks Contracting, LLC f/k/a Boneworks, LLC d/b/a Boneworks Property Management (“these Defendants”), by and through their undersigned attorneys, amends its previous Notice of Motion and Motion to Dismiss, and will move before the Court within ten (10) days from the service of this Motion, or as soon thereafter as counsel may be heard, for an Order dismissing this suit pursuant to South Carolina Rules of Civil Procedure 12(b)(6), and such other law and argument as is appropriate. Plaintiff has failed to state facts sufficient to constitute her causes of action for negligence and violations of the South Carolina Unfair Trade Practices Act (“SCUTPA”) and her Complaint should be dismissed with prejudice pursuant to SCRCP 12(b)(6). This Motion is based upon and supported by the pleadings, Rules of Civil Procedure, applicable statutes, applicable case law, and any supporting Memoranda to be filed with the Court prior to the hearing of this Motion. Further, this amended motion adds additional grounds on which Plaintiff’s claim under the South Carolina Unfair Trade Practices Act (“SCUPTA”) should be dismissed.

## **BACKGROUND**

This case arises out of the death of Decedent Whitney Jordan on July 28, 2016. See Cmplt. ¶27. These Defendants manage the residential rental property located at 28 Blake Street in downtown Charleston where Plaintiff claims Decedent Whitney Jordan sustained life ending injuries. Cmplt. ¶27, 14. The sole factual assertions forming the basis for this lawsuit are contained within Paragraph 27 of Plaintiff's Complaint:

On or about the early morning of July 28, 2016, Whitney Jordan was injured, on the Premises due to the dangerous and unsafe condition prevailing and existing thereon. The injuries Whitney sustained on the Premises ultimately resulted in her death hours later.

Beyond this statement, Plaintiff's Complaint completely fails to describe the circumstances surrounding Ms. Jordan's death. Specifically, it is devoid of any allegation as to *how* Whitney Jordan was injured on the premises, *where* on the premises she was injured, *what condition* was dangerous and unsafe to Ms. Jordan at the time of her injuries, or how such a condition *caused or contributed* to her injuries. Although Plaintiff's failure to adequately plead facts sufficient to support her causes of action is most likely due to the fact that no one, including the Charleston Police Department, is able to explain how or where Ms. Jordan was injured during the early morning hours of July 28, 2016, such facts are necessary to sustain her causes of action.

In spite of the unknowns surrounding Ms. Jordan's death, Plaintiff, as the PR for the Estate of Whitney Jordan, brings this action alleging claims for negligence, wrongful death, survivorship and Unfair Trade Practices. See generally Pl.'s Cmplt. These Defendants move for a Motion to Dismiss as Plaintiff has failed to state facts sufficient to constitute her causes of action against them pursuant to SCRPC 12(b)(6).

## **MOTION TO DISMISS STANDARD**

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides that a defendant may move for dismissal based on the plaintiff's failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). In considering a 12(b)(6) motion, "the trial court must base its ruling *solely* upon allegations set forth on the face of the complaint." Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (emphasis added); see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). "The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law." Flateau, 355 S.C. at 202, 584 S.E.2d at 416.

## **ARGUMENT**

### **I. Negligence**

Plaintiff has not pled facts sufficient to support her negligence claims and therefore Causes of Action 1 – 3 should be dismissed<sup>1</sup>. Under South Carolina Law, "to establish a cause of action for negligence, a plaintiff must show three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damage proximately resulting from a breach of duty." Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Insurance Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). Under the facts as pled, Plaintiff has not sufficiently supported any of these three elements.

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Huggins v. Citibank, N.A., 355 S.C. 329, 332,

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<sup>1</sup> Plaintiff drafts her claims for wrongful death and survivorship as separate causes of action from the negligence claims. Since these claims hinge upon the viability of the negligence claim, they are not separately discussed.

585 S.E.2d 275, 276 (2003). If there is no duty, then the defendant in a negligence action is entitled to dismissal. Ellis by Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). “An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance.” Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006).

Plaintiff has insufficiently pled the existence of the duty owed to Plaintiff’s Decedent. Plaintiff asserts that Whitney Jordan was a “lawful tenant” of 28 Blake Street by way of a “Lease Agreement” with these Defendants. Cmplt. ¶16. Plaintiff’s Complaint does not in any way cite a specific provision of the “Lease Agreement” nor incorporate it as an exhibit to her Complaint to support this statement or the alleged duty its provisions create. This is most likely due to the fact that this is an entirely untrue assertion and no such Lease Agreement between the two exists. Conversely, Plaintiff also alleges Decedent Whitney Jordan was “invited, and lawfully present, on the premises on July 27 and 28, 2016.” Cmplt. ¶17.

Under these pled facts, Defendants are unable to ascertain what duty Plaintiff alleges Ms. Jordan was owed. Plaintiff references lease terms and the “Lease Agreement” but fails to incorporate into the Complaint the actual agreement showing Ms. Jordan as a lawful tenant or the specific provisions upon which Plaintiff premises her negligence claims. Cmplt. ¶16, 18. This is insufficient pleading.

Adding further confusion as to what duty Plaintiff alleges is owed, Plaintiff also alleges that Ms. Jordan was “invited” to the premises with no further facts. If not a tenant, but rather an invited guest, Plaintiff’s status would then be that of a licensee. See Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997) (guests of tenants are social guests and thus no more than a licensee when on the premises). Such a change in status

would also change the duty owed, including rendering the lease provisions Plaintiff relies upon inapplicable to any alleged duty owed to Ms. Jordan. *Id.* However, no further facts are pled pertaining to Ms. Jordan's status on the premises the night in question. In short, Defendants are wholly unable to ascertain based upon this pleading what duty Plaintiff alleges Ms. Jordan was owed and the factual basis for it.

Further, the Complaint is utterly void of any factual allegations supporting a breach of a duty or how such breach caused Ms. Jordan's injuries. The Complaint alleges these Defendants' failed to maintain the outside of the premises, such as the trees, bushes, driveway, parking area, and exterior lighting, but it fails to relay how any of this relates to the death of Ms. Jordan. Cmpl't. ¶ 19-20. As stated above, the only facts alleged regarding what happened the night Ms. Jordan was injured is contained within Paragraph 27 of the Complaint. That Paragraph, or any other in the Complaint, does not plead sufficient facts showing *how* Whitney Jordan was injured on the premises, *where* on the premises she was injured, *what condition* was dangerous and unsafe to Ms. Jordan at the time of her injuries, or how such a condition *caused or contributed* to her injuries.

Plaintiff has failed to sufficiently plead her negligence claims. There are no factual allegations supporting any of the three elements necessary to sustain a negligence claim. As such, Plaintiff's Causes of Action 1- 3 should be dismissed as a matter of law.

## **II. South Carolina Unfair Trade Practices Act**

### **A. Plaintiff may not bring a SCUPTA action in a representative capacity.**

Plaintiff's claim under SCUPTA must be dismissed as Plaintiff brings this action not on her own behalf, but as the personal representative of her sister's estate. See generally Pl.'s

Cmplt. The explicit language of SCUPTA prohibits such a claim from being brought in a representative capacity:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, **but not in a representative capacity**, to recover actual damages.

See S.C. Code Ann. § 39-5-140(a) (emphasis added).

Furthermore, our controlling courts hold that SCUPTA does not authorize actions brought by the personal representative of an estate. For example, in Williams v. Preiss-Wal Pat III, LLC, 17 F.Supp.3d 428 (D.S.C. 2014), the South Carolina District Court dismissed a SCUPTA action against an apartment complex owner. Nearly identical to this case, the action was brought by the personal representative of a decedent who was killed in an incident at the apartment complex. See also Faircloth v. Jackie Fine Arts, Inc., 682 F.Supp. 837 (D.S.C.1988), judgment aff'd in part, rev'd in part on other grounds, 938 F.2d 513 (4th Cir.1991) (“[T]he statute precludes plaintiff from maintaining a SCUTPA action in her capacity as representative of Lynch's estate.”); Wogan v. Kunze, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005), judgment aff'd as modified 379 S.C. 581, 666 S.E.2d 901 (2008) (holding that wife could not maintain a claim under SCUTPA against physicians brought in her representative capacity as the personal representative of her husband's estate). Because the Plaintiff brings this action in a representative capacity, her claim under SCUPTA must be dismissed.

**B. Plaintiff fails to plead sufficient facts to establish a SCUPTA claim.**

Plaintiff's Cause of Action for SCUTPA violations should also be dismissed for a failure to plead facts sufficient to state a claim. To recover in an action under the South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff must show: (1) the defendant engaged in an unfair or

deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affects the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012). Since Plaintiff has utterly failed to plead any facts setting forth the circumstances surrounding Ms. Jordan's death or what dangerous condition allegedly caused by these Defendants contributed to it, Plaintiff also cannot sufficiently plead elements 1 and 2 of her SCUTPA claim.

Plaintiff has not sufficiently alleged an unfair or deceptive act. "Under South Carolina law, a trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." Beattie v. Nations Credit Fin. Servs. Corp., 69 F.App'x 585, 588 (4th Cir. 2003) (citations omitted). "[A] practice is 'deceptive' when it has a tendency to deceive." Johnson v. Collins Entm't Co., 349 S.C. 613, 637, 564 S.E.2d 653, 666 (2002). Plaintiff cannot adequately allege an unfair or deceptive act within these definitions that is capable of repetition when such "act" has failed to be delineated anywhere in the Complaint as set forth in Section I.

In regard to the second element of Plaintiff's SCUTPA claim, unfair or deceptive acts have an impact on the public interest if the defendant has repeated them or if the acts have the potential for repetition. Haley Nursery Co., Inc. v. Forrest, 298 S.C. 520, 524, 381 S.E.2d 906, 908 (1989). The potential for repetition may be shown in two ways: 1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or 2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998).

Plaintiff alleges these Defendants' conduct has placed the public at risk of "sudden and catastrophic injury" but asserts no more. Cmpl't. ¶ 52-53. Plaintiff must allege some sort of

competent evidence showing such past conduct beyond this conclusory and vague allegation. Furthermore, Plaintiff has alleged no facts at all regarding any of these Defendants' procedures.

Because the Plaintiff has failed to plead any facts showing a deceptive act, or that any of the Defendants' alleged conduct affects the public interest or is capable of repetition, this Court should dismiss the Plaintiff's SCUTPA claim. Other courts have found such deficient pleading as grounds for dismissal. See, e.g., Flucker v. Gantt (In re Flucker), C/A No. 11-03801-HB, Adv. Pro. No. 11-80078-HB (D.S.C. Oct. 21, 2011) ("[T]he Court concludes that the SCUTPA claim should be dismissed because Plaintiffs have failed to specifically allege what conduct the Firm engaged in that constituted a violation of SCUTPA."). See also Camp v. Springs Mortg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1993).

### CONCLUSION

Plaintiff has failed to plead facts sufficient to state a cause of action against these Defendants for either negligence or violations of the SCUTPA. For the foregoing reasons, these Defendants request the Complaint be dismissed with prejudice.

This 13<sup>th</sup> day of March, 2019.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By: 

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Boneworks Property Management***

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Defendants. )

**CERTIFICATE OF SERVICE**

BY \_\_\_\_\_  
JULIE J. ARMSTRONG  
CLERK OF COURT  
2019 MAR 13 AM 11:59

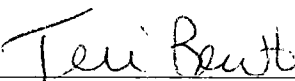
I hereby certify that I have this day served a copy of the within and foregoing **Amended Motion to Dismiss**, upon all parties to this matter via electronic and/or regular U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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**Counsel for Defendant Boneworks Contracting**

This 13<sup>th</sup> day of March, 2019.

  
Secretary to Lee C. Weatherly and  
Kristen K. Thompson

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REPLY TO SC OFFICE

March 13, 2019

**HAND-DELIVERED**

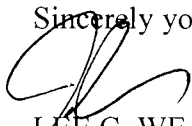
The Honorable Julie Armstrong, Clerk  
Charleston County Court of Common Pleas  
100 Broad Street  
Charleston, SC 29401

Re: Sarah Jordan as Personal Representative of the Estate of Whitney Anne Jordan v.  
69 Darlington Company LLC, Boneworks, LLC f/k/a Reyworks LLC d/b/a  
Boneworks Property Management, and Boneworks Contracting, LLC f/k/a  
Boneworks, LLC d/b/a Boneworks Property Management  
Case No: 2018-CP-10-2831  
CCS File No.: 3848-58181

Dear Julie:

Enclosed for filing, please find the original Amended Notice of Motion/Motion to Dismiss of Defendants Boneworks, LLC f/k/a Reyworks LLC d/b/a Boneworks Property Management, and Boneworks Contracting, LLC f/k/a Boneworks, LLC d/b/a Boneworks Property Management, as well as a Motion Information and Cover Sheet. **A filing fee was already paid** with the filing of the Motion to Dismiss on January 11, 2019. By copy of this letter am providing these Motions to all counsel of record. If you have any questions or concerns, please do not hesitate to give me a call.

Sincerely yours,

  
For LEE C. WEATHERLY  
KRISTEN K. THOMPSON

KKT:tjr

Enclosures

cc: (all with enclosures):  
Summer D. Eudy, Esq.  
Allen Leland DuPre, Esq.; Rose Beth G. Smith, Esq.  
John M. Grantland, Esq.