THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000754
Civil Action No. 2020-CP-2481

Stefani Eddins,. ..... Appellant,

v.

Tall Sam I Am, LLC d/b/a Tabbuli,..... Respondent.

FINAL BRIEF OF RESPONDENT

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2. Should the Court of Appeals reverse the trial court's entry of summary judgment where the trial court properly found that the Appellant failed to present any evidence that Respondent breached any duty to Appellant?

3. Should the Court of Appeals reverse the trial court's entry of summary judgment where the trial court properly found that Respondent failed to present any evidence that any alleged negligence by Respondent caused Appellant's alleged damages?

COUNTER-STATEMENT OF THE CASE

Appellant Stefani Eddins filed the Complaint in this action on June 5, 2020, against Respondent Tall Sam I Am, LLC d/b/a Tabbuli for negligence seeking damages for injuries allegedly sustained in a July 20, 2017 incident at Respondent's restaurant. Respondent was served with the Complaint on June 9, 2020, and served its Answer on June 26, 2020. Appellant filed an Amended Complaint on September 2, 2020.

Following extensive discovery and numerous depositions, Respondent filed a Motion for Summary Judgment on March 21, 2022, and a Memorandum in Support of Defendant's Motion for Summary Judgment on April 20, 2022. Appellant filed her Response to Defendant's Motion for Summary Judgment on April 20, 2022.

The Honorable Bentley D. Price heard the parties' arguments on Respondent's Motion for Summary Judgment on April 21, 2022, and granted summary judgment to Respondent in a detailed Order filed May 24, 2022.

Appellant did not file any motion for reconsideration of the Court's Order granting summary judgment.

Appellant filed her notice of appeal on June 1, 2022.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings" but rather "must come forward with specific facts showing there is a genuine issue for trial." Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008) (citation omitted). See also Doe v. Batson, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001) ("Rule 56(e), SCRCP, . . . requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial."). "The rule governing summary judgment provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003) (citations and emphasis removed).

"A scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror," and "[a]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative." Lemmons v. Macedonia Water Works, Inc., 431 S.C. 186, 200, 847 S.E.2d 471, 479 (Ct. App. 2020) (citations omitted). Accordingly, the rule "does not authorize submission of

speculative, theoretical, and hypothetical views to the jury. . . . verdicts may not be permitted to rest upon surmise, conjecture, or speculation.'" Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (citation omitted) (quoting Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)).

STATEMENT OF THE FACTS

This is a negligence action in which the Circuit Court granted summary judgment after Respondent indicated that Appellant, with substantial evidentiary gaps, seeks to hold Respondent liable as the absolute insurer of its patrons' safety, and moreover that Appellant seeks to hold Respondent liable for the acts of an independent contractor.

On July 20, 2017, at 10:20 p.m., a temporary portable stage light fell on Appellant's head while she was attending a fashion show at Respondent's restaurant. (R.p. 15 (Complaint)). Appellant testified that she and her fiancé Ashley Haynes arrived at Respondent's restaurant around 9:00 p.m. on the night of the incident and were initially seated in the front of the restaurant. (R.p. 294 (Eddins Dep. 23:1-17)). Appellant further testified that waitstaff then informed the two of a fashion show that was to occur shortly on the restaurant's back patio, and the two moved to a couch facing a stage in the back of the restaurant. (Id.). The couch was located adjacent to a structural roof pillar, onto which a large concert speaker had been attached. The light in question was possibly placed on top of this speaker. (See, e.g., R.p. 3 (Summary Judgment Order at 2); R.p. 398 (Photograph SWB 000066, depicting a possibly similar arrangement)). Appellant estimated that she had been sitting on the couch for approximately forty-five minutes before the light fell. (R.p. 298 (Eddins Dep. 27:12-13)). Appellant admitted that she has no knowledge of why the light fell, how it was attached, whether it was secured, who owned the light, or who installed the light. (R.p. 298–99 (Eddins Dep. 27:20–28:6)).

Appellant further admitted that she did not see the light at any point before it fell. (R.p. 290 (Eddins Dep. 27:14–16)). Haynes testified identically. (R.p. 370 (Haynes Dep. 17:5–14)).

Appellant's expert Mark Williams does not know specifically why the light fell, and he speculated about a wide variety of potential causes, including "a bird," "an earthquake," or "someone. . . touch[ing] it in a manner to cause it to become unstable." (R.p. 154 (Williams Dep. 79:3–4); R.p. 145 (id. at 44:12); R.p. 157 (id. at 92:22–93:2)). Ultimately, in the "absence of evidence" of what caused the light to fall, Mr. Williams concluded that "it fell because gravity exists." (R.p. 157 (Williams Dep. 92:12, 16; 93:2–3)). Respondent's manager, Cait Chapin, was likewise unable to say why the light fell, testifying "I don't even know how the light fell in the first place[,] [s]o my investigation didn't really go anywhere because I couldn't find answers." (R.p. 223 (Chapin Dep. 71:4–7)). Ultimately, Ms. Chapin, who was deposed only in her individual capacity as manager of Respondent's restaurant, was also forced to speculate that the light was able to fall because "[i]t was not secured properly[;] [t]hat's all I can come up with." (R.p. 228 (Chapin Dep. 92:4–5)).

Respondent's Rule 30(b)(6) designee understood that the DJ the night of the incident was an independent contractor known as Beck Danger. (R.p. 255 (Diehl Dep. 87:9–18); R.p. 262 (id. at 114:2–116:2); R.p. 268 (id. at 139:20–140:1). The DJ was responsible for setting up his or her own lights. (R.p. 211 (Chapin Dep. 23:9-11)). Although the Respondent could object if its representatives "saw something in the set-up they did not like," Respondent did not consider itself to have exclusive control over the DJ, and if something was to be changed, it was not simply Respondent's decision. (R.p. 211 (Chapin Dep. 24:4-24)). Respondent did not "in any. . . way control the work of the DJ's," and the light itself "did not belong to [the Respondent]", as "the DJ brought [the light] in with him that night and took it home with him when he left." (R.p.

262 (Diehl Dep. 116:12–21); R.p. 252–53 (id. at 77:22–78:2); R.p. 252 (id. at 77:4–14)). Appellant's own expert acknowledged that with a DJ, the restaurant does not just "go grabbing their stuff." (R.p. 185 (Rivenbark Dep. 68:3-12)). In sum, the secure set-up of the light was "the duty and responsibility of the DJ that was there that night," who was not an employee of the Respondent. (R.p. 248 (Diehl Dep. 60:18–61:8); R.p. 255 (id. at 87:15–18)).

Appellant's two expert witnesses provided testimony related to the set-up of the light. Appellant's first expert—already mentioned above—is forensic architect Mark Williams. Mr. Williams admitted at deposition that he does not know the manufacturer of the light in question, whether it was included with any safety devices designed to secure it to a base, what installation or usage instructions were included with this particular light, the weight of the light, what kind of lightbulb was installed, whether music was playing through the speaker, or whether the light was in the same condition when it fell as when it was installed. (R.p. 144 (Williams Dep. 39:13–40:10); R.p. 145 (id. at 42:13-18); R.p. 146 (id. at 48:18–24); R.p. 147 (id. at 52:18–21); R.p 153 (id. at 74:1–2); R.p. 157 (id. at 92:23–93:2)). Williams was likewise unsure of the industry standard regarding the usage of these types of lights by DJs:

> Q. Actually, we can agree on that. I'm right there with you. Do you know if any other DJs in the Charleston area use these same kind of lights?
>
> A. I don't have any knowledge about other DJs.

(R.p. 153 (Williams Dep. 75:20–23)). Williams further admitted that he has no knowledge of how several of his cited sources pertain to the industry standard for temporary restaurant lighting in Charleston:

> Q. Do you know of any restaurant in Charleston that has researched lighting facts sheets from lighting manufacturers from the United Kingdom from 30 years ago prior to bringing in temporary lighting?

A. I do not.

(E.g., R.p. 160 (Williams Dep. 103:14–19)). The lack of background research Williams completed in researching his sources was notably demonstrated in the following exchange:

> Q. What do you know about the backgrounds of the authors of this handbook?
>
> A. I don't.
>
> Q. Do you know if they were safety professionals?
>
> A. I don't know about the backgrounds.
>
> Q. What research was this based on?
>
> A. Can't answer that.
>
> Q. Do you know if it's even peer—sorry. Go ahead.
>
> A. I don't know the answer to that.
>
> Q. Do you know if this publication's been peer reviewed? Do you know if this publication is generally accepted in the industry?
>
> A. I can't say yes or no.

(R.p. 160 (Williams Dep. 105:1–14)).

Williams was also unable to point to a single building, fire, or electrical code section applicable and binding in Charleston, South Carolina that Appellant violated, and admitted that it would be "preposterous" to get a code inspector to review the temporary lighting in question. (R.p. 154 (Williams Dep. 80:22–81:6)). Indeed, Williams did not even know whether the various code sections included in his file materials were the most recently adopted versions—or whether Charleston County had adopted one cited body of code at all. (R.p. 150 (Williams Dep. 64:1–3); R.p. 158 (id. at 96:14–97:1); R.p. 153 (id. at 75:24–76:3) ("Q: Do you know if Charleston County has adopted the 2015 IPMC [International Property Maintenance Code]? A: I don't

know, but I doubt it.")). Williams could not even remember whether he has ever previously been retained in a case dealing with how a lighting fixture was secured. (R.p. 164 (Williams Dep. 119:10–13)). As related above, Williams could only guess as to what caused the light to fall:

> Q. How is the wire a potential probable cause of the light falling? What evidence do you see in this case that indicates that the wire in any way contributed to the light falling?
>
> A. I didn't say I saw evidence. I said in the absence of evidence, the way that you would approach this is to analyze the probable causes of something happening, a differential diagnosis. So, why the—if you ask me why did it fall, I would say it fell because gravity exists. So, the real pertinent question here is what made it unstable? Because you used the word stationary earlier, so I mean, I could give you examples off the top of my head that are rationale (sic) and I could give you some that are kind of absurd. I could say that maybe a bird landed on it or there was an earthquake, or I could say that someone in some way interacted with the cable or the cord or someone interacted with the actual light fixture itself and touched it in a manner to cause it to become unstable. Neither of us has any evidence to point to, to say that's what happened. All I can do is say here's a list of probable events, and then rank them according to what's most probable or improbable.
>
> Q. Right. Right. And so, as far as the wiring itself though, the cord of the light, do you have any opinions on whether that existed in a hazardous condition?
>
> A. I don't have any information to say yes or no. I only see a picture of it. If the cable was draped in a manner where it came down next to somebody who walked by and they could have brushed against it, then that's not safe. But, you know, we don't—you and I don't have the level of information and facts here that we'd like to have that we normally get in other types of cases. So, we have—

(R.p. 157 (Williams Dep. 92:7–93:19) (emphasis added)).

In summary, Williams lacked any evidence and was forced to rely on speculation. Thus, Williams concluded, in circular fashion, that the light fell because it was not properly secured and that the light was not properly secured because it fell:

> Q. Okay. What evidence do you have that says anyone violated a manufacturer's recommendation for this specific light?
>
> A. Well, we've gone over this before. You can ask me how do I know it wasn't properly secured, and I said I'm familiar with the technical data sheets and I'm familiar with what it takes to anchor it and make it safe and the redundant chain with the cable. So, if you take all that action and you do all of that, then this wouldn't have happened. . . .

(R.p. 158 (Williams Dep. 95:10–20)).

> A. The intent is that fixtures shall be securely fastened in place. It's one short sentence. It seems self-evident to me what it means. <u>If it had been secured in place, then it wouldn't have fallen and struck her in the head.</u>

(R.p. 158 (Williams Dep. 97:10–14) (emphasis added)).

Plaintiff's second retained expert witness, Mr. James Rivenbark, owns several restaurants and runs a restaurant operation consulting business (R.p. 172 (Rivenbark Dep. 14:3–12)). He had never previously consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18-20)). He has no background in engineering, lighting design, installation, or maintenance:

> Q. As far as lighting design, the installation, maintenance, you don't know anything about that, right?
>
> A. Huh-uh. When somebody walks in with lights, things like that, I'm concerned about, you know, "Where's you GFI outlet?" things like that.

(R.p. 182 (Rivenbark Dep. 56:2–6)). He admitted that he knows "very little" about stage lighting. (R.p. 182 (Rivenbark Dep. 55:15–17)).

Mr. Rivenbark testified that in his capacity as a restaurant owner and manager, he has hired musical acts and DJs to play for events, and that he was unable to recall a single instance on which he had requested such a contractor to install their lighting in a different way. (R.p. 182

(Rivenbark Dep. 56:14–19)). Moreover, Mr. Rivenbark testified that he has never heard of anyone in the restaurant industry removing a DJ's equipment because it was unsafe. (R.p. 201 (Rivenbark Dep. 133:3–7)). Mr. Rivenbark further admitted that the procedure he would follow to render the premises in his restaurants safe in a situation like this would be to keep a lookout for obvious hazards in equipment set up by independent contractors, discuss that situation with the contractor in question, and expect them to remedy the situation—not his restaurant personnel. (R.p. 182 (Rivenbark Dep. 54:13–55:2); see also R.p. 185 (id. at 67:1) ("No, I'm not going to touch their stuff.")). Mr. Rivenbark concurred that he had no knowledge of how the light was secured prior to falling. (R.p. 185 (Rivenbark Dep. 69:13)). Finally, Mr. Rivenbark was unable to point to any alleged actions by Defendant or its personnel that violated an industry standard, regulation, or code in any way causally related to the light falling:

> Q. One based on that. What safety rules did the placement of this light prior to its falling violate? What specific rules did it violate?
>
> A. What's the list of rules? I mean, I don't—you're asking me to create a rule. The light was placed above a table, so that table—it's a temporary light above the table. I don't have a list of safety rules, per se, but—
>
> [Respondent's counsel]: All right. That's all I got.

(R.p. 202 (Rivenbark Dep. 136:8–19)).

ARGUMENT

The Circuit Court granted Tall Sam I Am summary judgment as to Appellant's claims for negligence. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." See Madison ex rel. Bryant v. Babcock Ctr., Inc., 371

S.C. 123, 135, 638 S.E.2d 650, 656 (2006). Likewise, "[t]o establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." Roe v. Bibby, 410 S.C. 287, 296, 763 S.E.2d 645, 650 (Ct. App. 2014).

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE NO SPOLIATION OCCURRED.

Appellant's spoliation argument is without any merit. Specifically, in South Carolina, a spoliation charge is only appropriate "when evidence is lost or destroyed by a party…". Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009). However, "[a]s an initial matter… the party seeking the inference 'must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder.'" Id. Where the evidence in question would not have provided any additional information indicating negligence, such a charge is not appropriate. See id.

Here, not only did Respondent not lose or destroy evidence, but moreover, Appellant has made no showing that any allegedly lost or destroyed evidence might reasonably have supported a finding of negligence by Respondent.

Regarding the first issue, Respondent's camera system was a Lorex video system. Six cameras were working on the date of the incident. (R.p. 253 (Diehl Dep. 78:16–23)). The Lorex system was on a 14-day loop, which meant that every 14 days new footage overrides the prior footage. (R.p. 253 (id.)). It is undisputed that Appellant did not file this lawsuit until June 5, 2020, nearly three years after the alleged incident occurred on July 20, 2017. (R.p. 16 (Complaint p. 1)). Thus, while Appellant now argues that this case is a "notice" case for which some other video footage might have been relevant, Appellant had filed no such case within 14 days after

the accident, nor had Appellant submitted any evidence preservation letter or similar notice of a potential suit.

Despite the fact that the video was automatically overwritten years before Appellant filed a Complaint, the restaurant's staff did review the video for any footage of the incident, which footage was saved and produced to Appellant. Specifically, in deposition testimony, Jeff Diehl confirmed that Respondent's IT Manager, Ms. Christina Tsang, pulled all video of the relevant incident. (R.p. 263 (Diehl Dep. 118:1–14)). That video was produced.

In short, not only did Respondent not destroy or lose evidence in the case, but even in the absence of a lawsuit, it actually went above and beyond to pull the portion of the video footage showing the light fall. Respondent took this action prior to the 14-day automatic video override, and that video footage has been produced to Appellant. By the time Appellant filed this lawsuit nearly three years later, the video system no longer stored footage from the night of the incident. Nonetheless, Respondent still produced the portion of the video it had pulled, which reflected all video of the incident. (See R.p. 263 (Diehl Dep. 118:1–14)). As a result, Appellant cannot establish the first element of spoliation: a showing that Respondent destroyed or lost evidence.

Moreover, Appellant has failed to make a showing that any other video might "reasonably have supported whatever presumption is being requested of the fact finder." Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009). Specifically, Appellant appears to argue that the video footage might have shown:

1. Who came in the restaurant;
2. What they brought with them into the restaurant;
3. The light being set upside down on the speaker;
4. The light not being properly installed with a bracket, bolt and safety chain;

5. Respondent setting up seating under the light.

(Appellant's Initial Brief at 27).

Appellant's arguments, though, are without any support. Regarding the first two items—who came into the restaurant and what they brought—Appellant does not in any way show how a video of these elements would impact the issues at hand. As to who came into the restaurant, Respondent's 30(b)(6) witness already identified the DJ who installed the light. (See R.p. 268 (Diehl Dep. 139:20–140:1)). As to the issue of what items were "brought into the restaurant," Appellant does not even attempt to explain how this relates to any element of his claim. Regarding the final three items, Appellant has identified no footage that ever existed of the light being set up or installed or of Respondent setting up seating. It is undisputed that the actual footage retained did not show the light prior to the fall, only the light as it was falling. (See, e.g., R.p. 178 (Rivenbark Dep. 41:23–42:4) (confirming that "you can't see where [the] light is before it falls" and that it's "out of the frame of the video")). Moreover, as to all of these issues, Respondent could not have lost or destroyed any evidence supporting Appellant's case because Appellant's case did not exist until nearly three years after the footage had been automatically overwritten.

II. BECAUSE APPELLANT FAILED TO ESTABLISH A DUTY OWED BY RESPONDENT IN RELATION TO THE UNDERLYING INCIDENT, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT.

"It has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of exercising ordinary care to keep the premises in reasonably safe condition." Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); see also Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971); Hunter v. Dixie Home Stores, 232 S.C. 139, 143, 101 S.E.2d 262, 264 (1957);

Wintersteen v. Food Lion, Inc., 336 S.C. 132, 135-136, 516 S.E.2d 828, 829 (1999); Cook v. Food Lion, Inc., 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997). Accordingly, South Carolina law requires proof of a dangerous or defective condition as a prerequisite for the imposition of premises liability upon a business owner. E.g., Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997); Scott v. Cedar Fair Entm't Co., No. Civ. A 0:11-00910, 2012 WL 5306222, at *6 (D.S.C. Oct. 26, 2012). Beyond establishing the existence of a dangerous or defective condition, a plaintiff must show: (1) that the dangerous or defective condition was created by the business owner, or (2) that the business owner had actual or constructive notice of the dangerous or defective condition and failed to remove it. Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828, 829–30 (Ct. App. 1999), aff'd, 344 S.C. 32, 542 S.E.2d 728 (2001) (citing Pennington, 252 S.C. at 178, 165 S.E.2d at 696).

As is discussed in Section III below, Appellant cannot establish a dangerous or defective condition, that the Respondent created such a condition, or that Respondent had actual or constructive notice of such a condition. Appellant attempts to circumvent this failure by inventing some higher standard on Respondent. However, Appellant's efforts were properly rejected by the Circuit Court because Appellant (1) presented unreliable expert testimony as to industry standards relating to lighting and seating in restaurants in her attempt to show Respondent created or had notice of a dangerous condition, and (2) impermissibly attempted to impose, via expert testimony, an absolute duty on Respondent to keep its patrons safe.

A. Testimony of Appellant's experts as to duty was unreliable and thus inadmissible to support Appellant's opposition to summary judgment.

"The rule governing summary judgment provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein." Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003) (citations and emphasis removed). Rule 702, SCRE provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Elaborating on this general Rule, the South Carolina Supreme Court has held that "[t]he trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford Motor Co., 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010). First, the trial court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Id. Second, "while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Id. Third, "the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. Notably, "[e]xpert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." Id.

As explained above (see supra pages 4–9), Appellant retained two expert witnesses: forensic architect Mark Williams and restaurant owner/consultant James Rivenbark. Mr. Williams' testimony focused on the installation of the light, but his testimony proved to be markedly unreliable. Mr. Williams asserted that the industry standard for installing the subject light was to use a bracket and safety chain and to barrier the light from any patrons in case it fell. Despite these assertions, Mr. Williams admitted at his deposition that he did not know the manufacturer of the subject light, did not know for certain whether it came with a safety chain,

did not know what means would have been included with it for attaching it to a base, did not know what installation or usage instructions were included with the light, did not know the weight of the light, and did not know what kind of lightbulb it contained. (R.p. 144 (Williams Dep. 39:13–40:10); R.p. 144 (id. at 41:13–20); R.p. 144–45 (id. at 41:21–42:22); R.p. 146 (id. at 48:18–24); R.p. 147 (id. at 52:18–21)). Further, Mr. Williams admitted that he was unsure of the industry standard regarding usage of stage lights by DJs (R.p. 153 (Williams Dep. 75:20–23)), had no knowledge of how several of his cited sources pertain to the industry standard for temporary restaurant lighting in Charleston (e.g., R.p. 160 (id. at 103:14–19)), and could not vouch for the scholarly nature of at least one of his cited sources (R.p. 160 (id. at 105:1–14)).

Additionally, despite Mr. Williams' reliance on various building, fire, and electrical code sections in his file materials and deposition, Mr. Williams was unable to say what code sections applicable and binding in Charleston, South Carolina the Respondent had violated; whether the code versions he cited were the most recently adopted versions; or indeed whether Charleston County had adopted one cited body of code at all. (R.p. 150 (Williams Dep. 64:1–3); R.p. 158 (id. at 96:24–97:1); R.p. 153 (id. at 75:24–76:3) ("Q: Do you know if Charleston County has adopted the 2015 IPMC [International Property Maintenance Code]? A: I don't know, but I doubt it.")). He further admitted that it would be "preposterous" to get a code inspector to review the light in question. (R.p. 154 (Williams Dep. 80:22–81:6)). When asked near the end of his deposition whether he had ever previously been retained in a case dealing with how a light fixture was secured, Mr. Williams indicated he did not remember. (R.p. 164 (Williams Dep. 119:10–13)).

Given his lack of any reliable bases for his opinions regarding the industry standard for installation of the subject light, Mr. Williams' testimony that Respondent had a duty to secure

the light with a bracket and redundant safety chain and to barrier the light from patrons in case it fell is far from reliable. As such, Mr. William's testimony is inadmissible to support Appellant's burden to establish the Respondent's duty of care in the present case.

Plaintiff's second retained expert witness, Mr. James Rivenbark, owns several restaurants and runs a restaurant operation consulting business (R.p. 172 (Rivenbark Dep. 14: 3–12)). Mr. Rivenbark testified that Respondent had a duty not to seat Appellant beneath temporary lighting and that the light should have been discovered to be dangerous and taken down by Respondent's staff before the incident occurred. Prior to this case, Mr. Rivenbark had never consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18–20)). He has no background in engineering, lighting design, installation, or maintenance, and he admitted that he knows "very little" about stage lighting. (R.p. 182 (Rivenbark Dep. 56:2–6); R.p. 182 (id. at 55:15–17)). Mr. Rivenbark testified that in his capacity as a restaurant owner and manager, he has hired musical acts and DJs to play for events, and that he was unable to recall a single instance on which he had requested such a contractor to install their lighting in a different way. (R.p. 182 (Rivenbark Dep. 56:14–19)). Moreover, Mr. Rivenbark testified that he has never heard of anyone in the restaurant industry removing a DJ's equipment because it was unsafe. (R.p. 201 (Rivenbark Dep. 133:3–7)). Mr. Rivenbark further admitted that the procedure he would follow to render the premises in his restaurants safe in a situation like this would be to keep a lookout for obvious hazards in equipment set up by independent contractors, discuss that situation with the contractor in question, and expect them to remedy the situation—not his restaurant personnel. (R.p. 182 (Rivenbark Dep. 54:13–55:2); see also R.p. 185 (id. at 67:1 "No, I'm not going to touch their stuff.")). Mr. Rivenbark concurred that he had no knowledge of how the light was secured prior to falling. (R.p. 185 (Rivenbark Dep. 69:13)). Finally, Mr. Rivenbark

was unable to point to any alleged actions of Defendant or its personnel that violated an industry standard, regulation, or code related to the placement of the light. (R.p. 202 (Rivenbark Dep. 136:8–19)).

Given his lack of litigation expert experience and especially his lack of background in and knowledge of stage lighting design and installation, Mr. Rivenbark was not qualified to provide testimony as to the standard of care relating to the placement and installation of the light in this case. As a result, his testimony as to the duty of care was not reliable, as further demonstrated by its substance, and it is therefore not admissible to support Appellant's burden to establish the Respondent's duty of care with regard to the subject light.

B. Appellant's attempt to impose a duty on Respondent to provide an absolutely safe premises is controverted by South Carolina law.

As already mentioned above, "It has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of exercising ordinary care to keep the premises in reasonably safe condition." Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); see also Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971); Hunter v. Dixie Home Stores, 232 S.C. 139, 143, 101 S.E.2d 262, 264 (1957); Wintersteen v. Food Lion, Inc., 336 S.C. 132, 135-136, 516 S.E.2d 828, 829 (1999); Cook v. Food Lion, Inc., 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997).

Whereas South Carolina case law clearly limits the duty on Respondents to exercise ordinary care to keep its premises in reasonably safe condition, Appellant attempts to impose an absolute duty on Respondent to keep its premises safe. James Rivenbark, Appellant's expert on restaurant management, testified that

> I mean, it's pretty—I think it's pretty cut and dry. I can't believe it's gone on this long. I mean, you know, someone is responsible for what goes on in a restaurant as far as being the operator/owner of the restaurant, what happens there. A light fell and hit someone in the head. My opinion is that the restaurant's responsible.

(R.p. 173 (Rivenbark Dep. 21:1–7)). When Appellant's counsel asked Mr. Rivenbark later in his deposition about the duties allegedly violated by Respondent, Mr. Rivenbark maintained this absolute-safety, strict-liability position:

> Q. I want to go over some of your testimony that you mentioned earlier. Does a restaurant have control over everything in the restaurant, regardless of who brings it in?
>
> A. Yeah.
>
> Q. Does a restaurant have a duty to make sure that whatever is brought into its restaurant is safe and not injurious to patrons?
>
> A. Yes.

(R.p. 198 (Rivenbark Dep. 120:24–121:7)). This testimony—that everything in the restaurant was necessarily under Respondent's control and that Respondent had an unmitigated duty to ensure patrons were not harmed by anything in the restaurant—sets the bar of Respondent's duty to patrons impermissibly high and contradicts South Carolina's long-settled law that a merchant is not the insurer of the safety of his customer. Because Appellant failed to establish the duties of care to which she attempted to hold Respondent, the circuit court properly granted summary judgment.

III. BECAUSE APPELLANT FAILED TO ESTABLISH ANY BREACH BY RESPONDENT OF A DUTY OWED TO APPELLANT, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT.

South Carolina law requires proof of a dangerous or defective condition as a prerequisite for the imposition of premises liability upon a business owner. E.g., Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997); Scott v. Cedar Fair Entm't Co., No. Civ. A

0:11-00910, 2012 WL 5306222, at *6 (D.S.C. Oct. 26, 2012). Beyond establishing the existence of a dangerous or defective condition, a plaintiff must show: (1) that the dangerous or defective condition was created by the business owner, or (2) that the business owner had actual or constructive notice of the dangerous or defective condition and failed to remove it. Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828, 829–30 (Ct. App. 1999), aff'd, 344 S.C. 32, 542 S.E.2d 728 (2001) (citing Pennington, 252 S.C. at 178, 165 S.E.2d at 696).

A. Appellant failed to produce probative evidence that the light constituted a dangerous condition.

As related in the prior section, Appellant's attempt to prove that the industry standard for temporary portable stage light installation requires use of a bracket, chain, and a barrier was based on unreliable and thus inadmissible expert testimony. However, even assuming that Appellant had established her desired standard of care with regard to the installation of the light, Appellant provided no probative evidence to show that standard was breached. Aside from the bare fact that the light fell, Appellant was unable to produce any evidence that the light was not secured with a bracket and chain, as discussed at length in Section IV. (See infra at pp. 23–26, regarding Appellant's res ipsa loquitur theory of causation). Further, although Appellant argues that "Respondent placed one of its seats under the temporary portable stage light," the deposition testimony to which Appellant cites in support of this claim indicates only that Respondent arranged its chairs and couches and set up the stage according to its floor plan, and that the DJ also came in and set up its equipment according to Respondent's floor plan. (Appellant's Brief at p. 4, citing R.p. 210 (Chapin Dep. 19:3–10); R.p. 211 (id. at 23:3–15)). Indeed, there is no evidence even to show that when Respondent seated Appellant on the couch, which occurred roughly forty-five minutes before the light fell, the light was already positioned on the speaker. (See R.p. 298–99 (Eddins Dep. 27:2–28:6); R.p. 370 (Haynes Dep. 17:2–14) (admitting that

Appellant and her fiancé did not see the light at any time before it fell)). (See also R.p. 220 (Chapin Dep. 58:19–60:18)).

As a result, Appellant has failed to carry her burden of proof to show that the light constituted a dangerous or defective condition.

B. Even if Appellant had shown the light constituted a dangerous condition, Appellant failed to produce probative evidence that Respondent created the condition or had actual or constructive notice of the condition.

Even if the light was a defective or dangerous condition, though, Appellant offers no evidence that *Respondent* created the allegedly dangerous condition posed by the light or that Respondent had actual or constructive notice of the allegedly dangerous condition. As will be discussed at length later in this argument (see Section V, infra at pp. 26–34), all evidence in this case indicates that the light was installed by a DJ who was an independent contractor. If, after the DJ installed the light, "someone interacted with the actual light fixture itself and touched it in a manner to cause it to become unstable," as Appellant's expert Mr. Williams speculated, there is no evidence of who that person might have been. (R.p. 157 (Williams Dep. 92:25–93:2)). Similarly, there is no evidence of when such a person may have tampered with the light or when some other instrumentality may have rendered the light unstable, leaving any arguments as to constructive notice reliant upon sheer speculation.

The South Carolina Supreme Court upheld summary judgment in favor of Bi-Lo under similar facts to those of the case at bar in Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001). In Garvin, the plaintiff alleged that she was injured when, after reaching to grab a box of canned items from the top of a stack taller than her, several cans fell and hit her face. Critically similar to this case, the plaintiff in Garvin presented no actual evidence of "some defective manner of stacking the boxes, or that Bi–Lo was on notice that the stacked cans had become

rickety," and merely claimed that the stack of cans was dangerous. Garvin, 343 S.C. at 628–29, 541 S.E.2d at 833; see also id., 343 S.C. at 628, 541 S.E.2d at 833 ("This evidence is insufficient, as a matter of law, to demonstrate the store created a dangerous condition."). Because the plaintiff failed to present such evidence, the Supreme Court held that "there [was] simply no evidence from which a jury could find a dangerous condition was created by Bi-Lo." Id.

Without evidence of a dangerous condition in this case, Appellant cannot meet her burden of establishing constructive knowledge. See, e.g., Norris v. Wal-Mart Stores E., L.P., 2014 WL 496010 (D.S.C. Feb. 6, 2014) (holding that without evidence proving spill on ground for specific length of time, plaintiff cannot establish constructive knowledge). Despite the lengthy testimony of Appellant's experts, there is no evidence that Respondent installed the light in a manner which violated a binding and applicable code, regulation, industry standard, or policy. A stationary, inanimate object on top of another stationary, inanimate object is not an inherent hazard, nor is it a condition which a restaurant employee exercising reasonable care would be expected to remedy. (See R.p. 251 (Diehl Dep. 73:3-12) ("I don't know that any of our employees would be able to identify a light that belongs to somebody else that a DJ brought in that they are unfamiliar with, where it was placed, or why it was placed there to be a potential hazard.")). There is therefore no evidence that Respondent failed in its normal practice of "kind of constantly looking for safety issues" or that it had constructive notice of a dangerous condition with regard to the light. (R.p. 229 (Chapin Dep. 97:14–25)). Because Appellant failed to meet both its initial burden of evidence to show a dangerous or defective condition and its subsequent burden of evidence to show Respondent created or had notice of that condition, the circuit court properly granted summary judgment.

IV. BECAUSE APPELLANT FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RESPONDENT PROXIMATELY CAUSED DAMAGES TO APPELLANT, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT.

Like a bad guest, arguments about "res ipsa loquitur" often show up where they do not belong. This is not the case here. As explained below, Appellant's case is fatally built on res ipsa loquitur, and as a result, the circuit court properly granted summary judgment.

South Carolina courts have consistently and steadfastly rejected the doctrine of res ipsa loquitur. See, e.g., Watson v. Ford Motor Co., 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) ("We also note that Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of res ipsa loquitur."). In a negligence case in South Carolina*, actori incumbit onus probatio*: the plaintiff always bears the burden of affirmatively proving a failure to exercise reasonable care by a preponderance of the evidence, and "this burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App.1991) (citing King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940)). "No inference of negligence arises from the mere fact of injury." Id. (citing Covington v. Atlantic Coast Line Railway Co., 158 S.C. 194, 155 S.E. 438 (1930), cert. denied, 282 U.S. 858, 51 S.Ct. 33, 75 L.Ed. 759 (1930)). South Carolina's scintilla rule "does not set aside the rule of force in this state relating to res ipsa loquitur, which is that the doctrine does not prevail in this state." Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 180 S.E. 55, 56–57 (1935).

In short, South Carolina does not recognize the doctrine of res ipsa loquitur because in South Carolina, the plaintiff bears the burden of proving the defendant was negligent. This

standard is critical to safeguard innocent parties from being forced to pay liability they should not owe.

Where the plaintiff can only speculate about why the defendant might have been negligent, and where this speculation is based only on the fact of the injury itself, the plaintiff's case must fail because it is built on the doctrine of res ipsa loquitur. That Appellant relies on res ipsa loquitur to prove her case is demonstrated by her own expert's testimony, who admitted, among other things, that his analysis as to why the speaker fell was conducted in the "absence of evidence". (R.p. 157 (Williams Dep. 92:11–93:3)). In light of this evidentiary void, Appellant's experts offered a wide variety of possible causes for the light's fall. These ranged from birds to earthquakes, from gravity to someone tampering with the light. (R.p. 157 (Williams Dep. 92:12–93:2)). Appellant and her fiancé, neither of whom saw the light before it fell, were likewise unable to offer testimony as to why it fell, how it was installed, or whether it was secured. (R.p. 298–99 (Eddins Dep. 27:12–28:6); R.p. 370 (Haynes Dep. 17:5–14)).

As a result, Appellant relies solely on the fact that the injury occurred to say that some theoretical standard was violated. The light fell, Appellant says, because it was not properly secured. And, circularly, Appellant purports to know that the light was not properly secured because it fell. (R.p. 143 (Williams Dep. 35:18–21) ("And if you do those, if you take those actions and you follow manufacturer's recommendation, it won't fall off."); R.p. 158 (id. at 95:13–14, 18–20) ("Well, we've gone over this before. You can ask me how do I know it wasn't properly secured. . . . So, if you take all that action and you do all of that, then this wouldn't have happened."); R.p. 158 (id. at 97:12–14) ("If [the light] had been secured in place, then it wouldn't have fallen and struck her in the head.")). This is textbook res ipsa loquitur.

The value of South Carolina's stance on the doctrine of res ipsa loquitur is evident. If the law permitted Appellant to recover based on the type of circular reasoning Appellant has used here, it would entirely shift the burden of proof and could result in liability being imposed on innocent parties. To put it in other words, on the testimony presented, a host of possible outcomes exist which should result in a finding that Respondent being found not liable. As one example, it is entirely possible the light *was* properly secured at the time it was installed, but that it was later altered without any opportunity for notice to the Respondent. It is also possible the light was not present when the Appellant sat on the couch and that the DJ or a customer moved the light to a position over the Appellant during the nearly hour-long gap between when the Appellant sat and the light fell, again eliminating the opportunity for any notice to the Respondent. It is possible that the light was installed according to the manufacturer's instructions and that the instructions were faulty. It is also possible that the light was installed according to the instructions but that the light or devices used to install it were faulty. On Appellant's evidence, any of the above scenarios is as likely as another, and Appellant has failed to prove critical elements of her case. Appellant seeks to fill these gaps with res ipsa loquitur.

In summary, Appellant has the duty to prove each factor of her case and not to rely on speculation. Here, Appellant can say only that the light fell. The rest of Appellant's case relies on speculation. Thus, her case attempts to stand on the mere fact that she was injured. This is res ipsa loquitur and the circuit court thus properly granted summary judgment.

V. BECAUSE THE CIRCUIT COURT PROPERLY FOUND THAT RESPONDENT WAS NOT RESPONSIBLE FOR THE ACTS OF AN INDEPENDENT CONTRACTOR, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT.

Generally, under South Carolina law, a principal is not responsible for the negligence of an independent contractor. See, e.g., Duane v. Pressley Construction Co., 270 S.C. 682, 244

S.E.2d 509 (1978). An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of the work. Chavis v. Watkins, 256 S. C. 30, 180 S. E. 2d 648 (1971). The only exceptions to this general rule are if (1) the case involves inherently dangerous work, (2) the principal sees and realizes that the contractor is performing the work in a dangerous manner, (3) the contractor is known to be untrustworthy, (4) the case involves a nondelegable duty, or (5) the principal has hired the contractor for the purpose of performing a wrongful act. See Blue Ridge Rural Electric Co-op, Inc. v. Byrd, 238 F. 2d 346 (4th Cir. 1956), rev'd on other grounds, 356 U. S. 525 (1958); Alexander v. Seaboard Air Line R. Co., 221 S. C. 477, 71 S. E. 2d 299 (1952); Simmons v. Robinson, 303 S. C. 201, 399 S. E. 2d 605 (Ct. App. 1990), rev'd on other grounds, 305 S. C. 428, 409 S. E. 2d 381 (1991); Colin v. City Council of Charleston, 49 S. C. L. (15 Rich.) 201 (1868).

A. Appellant asserts the wrong burden of proof.

As an initial matter, with regard to the independent contractor issue, Appellant wrongly attempts to shift the burden of proof regarding the independent contractor issue to the Respondent by describing the independent contractor issue as an "affirmative defense." See Appellant's Initial Brief at 24. An "affirmative defense" is one which conditionally admits the allegations of the complaint but asserts new matter to bar the action. See Garrison v. Target Corp., 435 S.C. 566, 582, 869 S.E.2d 797, 806 (2022). Here, Respondent did not conditionally admit Appellant's allegations that Respondent was negligent and then raise some defense involving new matter to escape that negligence (for example, comparative negligence, laches, assumption of risk). Instead, Respondent in no way admits that it was negligent and instead contends that Appellant has failed to prove that Respondent breached a duty.

Appellant cites no authority holding that the independent contractor issue is an affirmative defense that would shift the Appellant's well-established burden to prove that Respondent breached a duty. In fact, the case cited by Appellant for this proposition—Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008)—does not address independent contractors at all. Instead, the Court in Youmans addressed comparative negligence, which South Carolina authority specifically holds is an affirmative defense that must be proven by the defendant. Id. at 281–82, 670 S.E.2d at 10.

In South Carolina, the *general* rule is that a principal is not liable for the acts of an independent contractor. Furthermore, in a negligence action, it is the plaintiff that must prove that the defendant owed plaintiff a duty and that it was the *defendant* who breached the duty. Here, the uncontradicted testimony is that an independent contractor, a DJ, was responsible for installing the light. Appellant, thus, has failed to carry its burden to prove that it was the *Respondent* who breached any duty. South Carolina law does not permit Appellant to shift this burden of proof to the Respondent.

B. Respondent is not liable for the acts of an independent contractor and no exception to this general rule applies.

As discussed above, the general rule is that a principal is not liable for the acts of an independent contractor unless one of five exceptions applies. Appellant has not introduced evidence creating a genuine issue of material fact as to the two exceptions she argues—without merit or supporting evidence—apply. Moreover, even if Respondent did bear the burden to prove an "independent contractor" defense, there is no genuine issue of material fact on this issue.

i. The DJ was an independent contractor.

First, Appellant has introduced no evidence to contest that the DJ responsible for installing the light was an independent contractor, nor has Appellant raised any such argument in

its brief. (See Appellant's Initial Brief at pp. 23–26). The only reasonable inference from the evidence in this case is that the DJ solely owned, controlled, maintained, and installed the light. (See, e.g., R.p. 257 (Deihl Dep. 96:4–9) ("I don't know that anything was wrong that we had the ability to correct, that wouldn't have been within the control of the DJ. So I am not sure what corrective action they took with their equipment"); R.p. 261 (id. at 110:17–19) ("The DJ brought [the light] in, the DJ took it with him. It was in the DJ's control. It is the DJ's equipment."); R.p. 262 (id. at 116:12–117:6) ("Q. Do [Respondent's general managers] give (sic) in any other way control the work of the DJ's? A. No."); See also R.p. 211 (Chapin Dep. 24:4–19) (indicating that if a disagreement were to arise between a DJ and Respondent's staff over where equipment was placed, they would collaborate to find a solution); R.p. 211 (id. at 25:4–22) ("Q. [DJs] couldn't just come in and do whatever they want, could they? A. They could, yeah. Q. You mean if a DJ came in and wanted to do whatever the DJ wanted to do, Tabulli had no control over whether or not they were allowed to be there? A. It's not control. It's do they have permission to, yes. Q. Okay. So they had to get permission from Tabulli to do what they wanted to do? A. No they did not. . . . there were definitely times that the DJ would just come in and set up.")).

While Appellant's brief does discuss the issue of control, it should be noted that on this point (and on several other points in Appellant's Initial Brief), Appellant misrepresents the content of the deposition testimony on which she relies. Although Appellant's Initial Brief repeatedly quotes Respondent's 30(b)(6) designee as stating that "[i]f they didn't want the DJ to put a piece of equipment in any particular spot, they could tell that DJ not to do it," this is a misrepresentation of the testimony. (See Appellant's Initial Brief at 9, 25 (quoting R.p. 265 (Deihl Dep. 127:1–19))). The actual testimony was as follows:

> Q [Appellant's counsel:] And do they also control where any particular DJ sets up its equipment? In other words, if they didn't want the DJ to put a piece of

> equipment in any particular spot, they could tell that DJ not to do it since they were the tenant of the premises, correct?
>
> A [Mr. Deihl:] We could advise them and say we don't like that piece of equipment there. We don't want that stage blocking a fire exit, so we need to move that stage; and the DJ or the contractor can say okay well, let's move the stage.
>
> So we have influence on that and we have the ability to cancel their event if they don't want to comply with what we are saying.
>
> Q And that is not just for stages, that is for any piece of equipment, correct?
>
> A Yeah, that is for any piece of equipment.

(R.p. 265 (Deihl Depo. 127:1–19)). In sum, the indisputable evidence in this case proves that the DJ was an independent contractor, not an employee.

ii. No exception to the independent contractor rule applies.

Regarding the five exceptions to the general rule that a principal is not liable for the acts of an independent contractor, it is undisputed that three of the five exceptions are not applicable. Specifically, Appellant does not argue that Respondent saw and realized the contractor was performing work in a dangerous manner; that the contractor is known to be untrustworthy; or that the principal hired the contractor for the purpose of performing a wrongful act. (See Appellant's Initial Brief at 23-26). Even if Appellant had raised these arguments, there is no evidence that the Respondent saw and realized that the DJ was performing work in a dangerous manner, that the lighting installation involved an untrustworthy contractor, or that the contractor was hired to perform a wrongful act. (Cf., R.p. 220 (Chapin Dep. at 58:6–60:25) (explaining that Ms. Chapin did not see the light before it fell and did not know how it fell, and further that no one from Respondent's staff stood by and watched the installation of the light.")).

As to the two exceptions raised in Appellant's brief—that (1) the case involves inherently dangerous work and (2) Respondent delegated to the independent contractor a "nondelegable

duty" (see Appellant's Initial Brief at 23-24)—there is no genuine issue of material fact that either of these exceptions applies.

1. The independent contractor was not performing inherently dangerous work.

Regarding the issue of "inherently dangerous work," Appellant argues that "seating a patron under a speaker with an unsecured 10-pound temporary portable stage light sitting on top and then starting the show is inherently dangerous." (Appellant's Brief at 25). From this argument, it is evident that Appellant misunderstands the "inherently dangerous work" concept at the outset. The DJ was responsible for setting up a stage and equipment, not for seating patrons. The DJ was responsible for installing the light at issue, and this "work" does not qualify as inherently dangerous work under South Carolina law.

Under South Carolina law, the "inherently dangerous work" exception applies "applies where the work is not of common occurrence and involves the risk of serious harm to others or their property during the course of the performance; it does not apply to alleged negligence manifesting itself after performance." Young v. Morrisey, 285 S.C. 236, 242, 329 S.E.2d 426, 429 (1985). To be inherently dangerous, the danger must "arise out of the nature of the work generally to be done," not out of the specific hazard that may be created by the immediate actor in a particularized instance. S.C. Nat. Gas Co. v. Phillips, 289 F.2d 143, 147 (4th Cir. 1961). A common example of an inherently dangerous activity is the use of explosives for blasting. Id. The principle applies "only to work not of common occurrence which of itself involves risk of serious harm to others." Id. Thus, even the use of heavy and powerful earth-moving equipment does not qualify as inherently dangerous where it is done routinely and commonly without harm to others and does not of itself create extraordinary risk of harm. Id.

There is no question that the "work" involved in this case is routine and commonly done without harm to others and that it does not itself create extraordinary risk of harm. The work involved here is the routine, general work of a DJ. Appellant's expert, James Rivenbark, indicated that one of his restaurants had DJs in every Sunday, and that they had different DJs for big events. (R.p. 177 (Rivenbark Dep. 36:9–12)). They also had "a lot" of different bands that could have also brought lights they set up. (R.p. 177 (Rivenbark Dep. 37:10–18)). The use of DJs in the restaurant industry is common enough that the method Respondent used to contract with the DJ in this case—by oral agreement—was "[v]ery common" and was "[c]ommonplace in all [the] restaurant industry." (R.p. 263 (Diehl Dep. 119:8–14)). At Respondent's restaurant, that the DJs were routine is shown by the fact that the Respondent's staff had known the DJs they used "for a long time" and that DJs might come not only on weekends but also on weekdays, where Respondent regularly hosted shows on Tuesdays and Thursdays. (See R.p. 209 (Chapin Dep. 14:22–25); (id. at 16:19–22; 43:1–9)). Respondent's 30(b)(6) testimony further illustrates that the work of a DJ is not something that he would consider "inherently dangerous." (R.p. 249 (Diehl Dep. 63:17–21) (testifying that unlike someone wanting to come in and shoot guns in a restaurant, vendors coming in to play music and perform a light show with lights brought by the vendor sounded "reasonably safe")). Respondent's manager indicated that from when she started in 2015 through July 2017, she did not sign any reports of other incidents or injuries and did not know of any other reports. (R.p. 214 (Chapin Dep. 35:1–22)).

In short, the work of the DJ setting up his equipment at Respondent's restaurant is not "inherently dangerous work" under South Carolina law. It is work that is commonplace, routine, and regularly performed across the restaurant industry, and it was regular and commonplace at Respondent's restaurant. There is no evidence of any similar prior injury or incident that would

have put Respondent on notice that there was any "inherently dangerous work" being performed the night of the incident, and Appellant has not identified any inherently dangerous work that was performed that night. The work performed by the DJ in setting up the show and lighting is utterly unlike an inherently dangerous project like blasting with dynamite. Moreover, if even the use of heavy, powerful earth moving equipment is not "inherently dangerous," then the routine work of a DJ even more clearly sits outside the category of "inherently dangerous" work. See S.C. Nat. Gas Co. v. Phillips, 289 F.2d at 146.

2. The independent contractor was not assigned a non-delegable duty.

Under South Carolina's non-delegable duty exception to the general rule preventing liability for acts of an independent contractor, "a person who delegates to an independent contractor an absolute duty owed to another remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (quoting Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552–553 (Ct. App. 1993)). This exception applies when an entity attempts to delegate to a third party an *absolute duty* it owes, as when a landlord delegates to a contractor his duty to repair his property properly, a municipality delegates to the state highway department its duty to provide safe streets, or a hospital delegates its duty to render competent services in its emergency room. Id. Where the duty delegated to an independent contractor is "a duty of reasonable care, not an absolute, non-delegable duty," the exception does not apply. Id., 363 S.C. 385, 392, 611 S.E.2d 235, 239.

In the present case, Respondent did not attempt to delegate an absolute duty to the DJ. To begin with, Respondent's "duty of exercising ordinary care to keep the premises in reasonably safe condition" (see Pennington, 252 S.C. 176, 178) is merely "a duty of reasonable care, not an

absolute, non-delegable duty." Cf. Rock Hill Tel. Co., 363 S.C. 385, 392, 611 S.E.2d 235, 239. And even if this were an absolute duty, Respondent did not attempt to delegate it to an independent contractor, as the DJ's work in setting up for and facilitating the show was not conducted in furtherance of Respondent's provision of a reasonably safe premises.

Moreover, Appellant has cited no authority demonstrating that a non-delegable duty exists in the case of a DJ or similar vendor performing work at a restaurant. Certainly, non-delegable duties may exist in certain circumstances, such as a hospital or in the case of ultra-hazardous activities. See Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 53, 533 S.E.2d 312, 323 (2000) (adopting non-delegable duty "on hospitals with regard to the physicians who practice in their emergency rooms"); S.C. Nat. Gas Co. v. Phillips, 289 F.2d at 146 (discussing non-delegable duties in the context of ultra-hazardous activities). However, Appellant has cited no authority to apply the non-delegable duty exception to the independent contractor rule where a DJ performs work at a restaurant.

Therefore, the Circuit Court correctly granted summary judgment because the only reasonable inference from the record is that the light installation would have been performed by an independent contractor and that no exception to the general rule regarding independent contractors applies.

CONCLUSION

In summary, this is not a case in which the Appellant offers competing evidence for a jury to evaluate; rather, the Appellant has failed to set forth specific issues of fact establishing duty, breach, or proximate cause. As a result, the Circuit Court properly granted Tall Sam I Am's motion for summary judgment, and the judgment of the Circuit Court should be affirmed.

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February 2, 2023.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-100-2481

Stefani Eddins, Appellant,

v.

Tall Sam I Am, LLC d/b/a Tabbuli, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

February 2, 2023

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