



**BACKGROUND**

The Association is the owners association for a Hilton<sup>1</sup> branded timeshare resort in Myrtle Beach known as Ocean 22 (the "Project"). (See Ex. B to Motion to Dismiss [Aff. of Kelly Lodde] ¶¶ 2-7.) The timeshare structure of the Project is formalized in the recorded Declaration of Covenants, Conditions and Restrictions and Vacation Ownership Instrument for Ocean 22 Vacation Suits (the "Declaration"). (*Id.* at ¶ 6; see also Ex. C to Motion to Dismiss [Declaration].)

The Association has no direct employees. (Ex. B to Motion to Dismiss [Aff. of Kelly Lodde] ¶ 8.) In accordance with the Declaration, the Association's duties and obligations are delegated to and carried out by a manager, namely, Hilton, pursuant to a written Timeshare Management Agreement (the "Management Agreement"). (See *Id.* ¶¶ 7-10; see also Ex. D to Motion to Dismiss [Management Agreement].)<sup>2</sup>

Under the terms of the Management Agreement, Hilton "manage[s] and operate[s] the Project in accordance with the same practices and standards utilized in the management of other Hilton Grand Vacation Club projects;"<sup>3</sup> "maintain[s] and repair[s] the Project to a first class reso

<sup>1</sup> "Hilton" refers to Hilton Grand Vacations, Inc.  
<sup>2</sup> Technically, the Management Agreement is between the Association and Hilton Grand Vacations, Inc.'s wholly owned subsidiary Hilton Grand Vacations Management, however, for present purposes, the distinction between Hilton Grand Vacations Management, Grand Vacations Management, LLC, is immaterial, because, as the Court explained in the of Dismissal (*see* Order of Dismissal p. 3 n.1), and as Mr. Sullivan does not dispute in the Motion (*see* Subject Motion), Hilton Grand Vacations, Inc., and Hilton Grand V Management, LLC, are properly considered a single employer for workers' compensation purposes. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 374, 747 S.E.2d (2013) ("A holding company and its wholly owned subsidiary will be considered a single employer for workers' compensation purposes if the two corporations are so integrated and controlled that neither can be realistically viewed as a separate economic entity.") (quoting 1 Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43.80 (Supp. 2017 for the sake of simplicity, the reference "Hilton" is sufficient to cover both Hilton Inc., and Hilton Grand Vacations Management, LLC, herein.  
<sup>3</sup> (Ex. B to Motion to Dismiss [Aff. of Kelly Lodde] ¶ 11.)

standard;”<sup>4</sup> and “employ[s], compensate[s] and supervise[s] all persons necessary to manage, maintain, administer and operate the Project.” (*Id.* at ¶ 12.)

Hilton employed Mr. Sullivan to serve as a bellperson at the Project. (*Id.* at ¶ 14.) The role of bellperson required Mr. Sullivan to assist owners and guests with transporting and/or securing their luggage; to provide instructions regarding the amenities of the room and property services and activities offered; and to deliver messages, express checkout folios, newspapers, and other requested items to the owners and guests. (*Id.* at ¶ 16.) The performance of this role was an important part of meeting Hilton’s obligations under the Management Agreement and a necessary, essential, and integral part of the operation of the Project on behalf of the Association. (*Id.* at ¶ 17.)

In this lawsuit, Mr. Sullivan alleges the Association is liable to him in tort for damages arising out of the Underlying Accident. (*See* Complaint.) In his complaint, Mr. Sullivan describes the Underlying Accident as follows: “On August 9, 2019, [Mr. Sullivan] was working at the Ocean 22 resort owned by [the Association] as an employee for [Hilton]. While walking along a paved sidewalk on the property [Mr. Sullivan] slipped and fell after stepping in a low spot on the sidewalk in which a small amount of water had pooled and very slick algae/mold had also formed.” (*Id.* at ¶ 5.) Prior to bringing this lawsuit, Mr. Sullivan sought and received workers’ compensation benefits through Hilton. (Ex. B to Motion to Dismiss [Aff. of Kelly Lodde] ¶ 18.)<sup>5</sup>

The Association responded to the lawsuit with the Motion to Dismiss. (*See* Motion to Dismiss.) The Court granted the Motion to Dismiss via the Order of Dismissal, concluding Mr. Sullivan was a statutory employee of the Association at the time of the Underlying Ac

<sup>4</sup> (*Id.*)  
<sup>5</sup>

Mr. Sullivan’s workers’ compensation claim has been fully resolved. (*Id.* Ex. A to Motion to Dismiss [Workers’ Compensation Settlement Agreement and Releas

and, therefore, cannot hold the Association liable in tort for damages arising out of the Underlying Accident, because his exclusive remedy against the Association for such damages is under the Act. (*See* Order of Dismissal.) The Subject Motion challenges the Order of Dismissal. (*See* Subject Motion.)

Mr. Sullivan makes two arguments in support of the Subject Motion, i.e., two arguments why, according to him, the Court was wrong to issue the Order of Dismissal and should now reverse course and deny the Motion to Dismiss instead. First, he argues the Court was mistaken in finding that he was a statutory employee of the Association. (Subject Motion pp. 3–5.) Second, he argues that, even assuming the Court was not mistaken in finding the Association to be his statutory employer, i.e., even assuming that he was indeed a statutory employee of the Association, the Association still was not entitled to tort immunity under the Act, because the Association did not establish that it maintained workers’ compensation insurance as required by the Act. (*Id.* at pp. 5–7.)

The Court’s analysis of Mr. Sullivan’s arguments follows.

### ANALYSIS

#### 1.

For his first argument in support of the Subject Motion, Mr. Sullivan contends that reconsideration is warranted because he was not a statutory employee of the Association. (Subject Motion pp. 3–5.) The Court disagrees.

As the Court explained in the Order of Dismissal, “In assessing whether the Association qualifies as [Mr. Sullivan’s] statutory employer for the purposes of workers’ compensation exclusivity, the court must make two (2) determinations: First, the Association must qualify as a business under the Act. Second, the work contracted out to [Mr. Sullivan’s] employer, [Hilton],

must have constituted part of the Association’s ‘trade, business, or occupation.’” (Order of Dismissal pp. 5–6 (citing *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 321, 523 S.E.2d 766, 770 (1999)).) And the Court has determined (1) that the Association qualifies as a business under the Act and (2) that the work in which Mr. Sullivan was engaged at the time of the Underlying Accident was an important part of the Association’s trade, business, or occupation. (*Id.* at pp. 6–7.)

In the Subject Motion, Mr. Sullivan does not dispute the Court’s first determination, i.e., its determination that the Association qualifies as a business under the Act. (*See* Subject Motion.)

Mr. Sullivan’s criticism of the Court’s second determination, i.e., its determination that the work in which he was engaged at the time of the Underlying Accident was an important part of the Association’s trade, business, or occupation, is based on an erroneous distinction he attempts to draw between the business of the Association and that of his direct employer, Hilton. According to Mr. Sullivan, Hilton’s business is the “resort business,”<sup>6</sup> or “resort operation business;”<sup>7</sup> the Association’s business is the “timeshare ownership and vacation suite ownership business;”<sup>8</sup> and the “resort business – for which Hilton was hired to manage – is wholly separate and distinct from the ownership of timeshares.” (*Id.*)

As an initial matter, there is a procedural problem with Mr. Sullivan’s argument, because he did not raise any argument based on this supposed distinction previously, and an argument cannot be raised for the first time in a motion under Rule 59(e), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (“[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior

---

<sup>6</sup> (Subject Motion p. 4.)

<sup>7</sup> (*Id.* at p. 5.)

<sup>8</sup> (*Id.*)

to judgment, but did not.”) (citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)); *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482 (same) (citing *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F. Supp. 698, 701 (D.D.C. 1989), *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier.”); *Smith v. Stoner*, 594 F. Supp. 1091, 1118 (N.D. Ind. 1984) (“Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.”); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D. Va. 1984) (“I do not conceive of Fed. R. Civ. P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment.”). In any event, however, the argument is without merit, as Mr. Sullivan is mistaken in claiming that the “resort business” is separate from the Association’s business.

In support of this argument, Mr. Sullivan quotes the following language from the Declaration:

Management of the Hotel Interests shall be independent of the management of the other Vacation Ownership Interests to the greatest extent practically and economically feasible, provided, however, this requirement does not contemplate any prohibition or restriction on the use of personnel hired to regularly furnish materials and services for the Hotel Interests in the Project and to furnish the same or similar services to the other Vacation Ownership Interests. Such use of common personnel shall not imply that the Hotel Interests and Vacation Ownership Interests are under common management.

(Subject Motion pp. 4–5 (quoting Ex. C to Motion to Dismiss [Declaration] p. 10 § 6.1) (emphasis added by Mr. Sullivan omitted).)<sup>9</sup>

---

<sup>9</sup> The language that Mr. Sullivan quotes is immediately preceded by the following language explaining what is meant by “Hotel Interests:” “Declarant shall have the right to use and

Mr. Sullivan's reliance on the above-quoted language reflects a misunderstanding of the Declaration. The distinction he would draw between the business of the Association and that of his direct employer, Hilton, is based on the mistaken belief that the "resort" is only the "Hotel Interests" in the "Project" and the "Vacation Ownership Interests" in the "Project" are separate from the "resort." What Mr. Sullivan fails to understand is that the "Project" is the "resort" and the "resort" is the "Project." In other words, the "Project" and the "resort" are one and the same, and just as the "Vacation Ownership Interests" in the "Project" are a part of the "Project," so, too, are they a part of the "resort." (*See* Ex. C to Motion to Dismiss [Declaration] p. 6 § 2.56 (defining the "Project" as all real property and improvements thereon submitted to the terms of the Declaration and the South Carolina Timeshare Act); *id.* at p. 7 § 4.1 ("Declarant hereby submits the Project, including but not limited to, the property, the buildings and all other improvements associated with the Project to the provisions of this Declaration and the Timeshare Act creating a Timeshare Plan. All of said Project is and shall be held, conveyed, hypothecated, encumbered, leased, subleased, rented, used and improved as a vacation ownership (timeshare) undivided interest project."); *id.* at p. 6 § 2.53 (defining "Owner" as "[a]ny person or entity . . . owning an Ownership Interest within the Project."); *id.* at p. 6 § 2.54 (defining "Ownership Interest" as "[a] Vacation Ownership Interest."); *id.* at p. 6 § 2.68 (defining "Vacation Ownership Interest or Ownership Interest" as "[a]n undivided interest in a Phase of the Project together with (i) a membership in the Club, (ii) membership in the Association, and (iii) a recurring right (either annually or biennially) to occupy and use, on an exclusive basis as described hereinafter, a Suite in the Project in accordance with, and subject to, the terms of this Declaration and the Project

---

operate the Vacation Support Areas and Vacation Ownership Interests it owns as a hotel available to the public for nightly occupancy ('Hotel Interests')." (Ex. C to Motion to Dismiss [Declaration] p. 10 § 6.1.)

Documents.”); *id.* at p. 2 § 2.14 (defining “Club Member” as “[a]n Owner at the Project and/or an Affiliated Resort . . . .”); *id.* at p. 4 § 2.37 (defining “Home Resort” as “[t]he Affiliated Resort at which a Club Member owns an ownership interest.”); *see also* Ex. B to Motion to Dismiss [Aff. of Kelly Lodde] ¶ 3 (“[Hilton] is a publically traded corporation which develops, manages, markets, and operates timeshare and vacation club ownership *resorts* whereby the [Hilton] properties are jointly owned by individual purchasers giving them use of the club properties for limited periods of time.”) (emphasis added); *id.* at ¶ 10 (“[T]he Association entered into a management agreement with [Hilton] on October 25, 2013.”); *id.* at ¶ 11 (“Under the terms of the management agreement, [Hilton] would ‘manage and operate the Project in accordance with the same practices and standards utilized in the management of other Hilton Grand Vacation Club projects’ and ‘maintain and repair the Project to a first class *resort* standard.’”) (emphasis added).)

As the Court explained in the Order of Dismissal, “[t]he operation of the [Hilton] *Resort*, on behalf of the time-share owners, is the Association’s sole business, and the work being performed by [Hilton, i.e., Mr. Sullivan’s direct employer] was essential to its operation:”

Here, the business of the Association is governed by the Declarations and is performed in its entirety by [Mr. Sullivan’s] direct employer. The Association hired [Mr. Sullivan’s direct employer] to manage, operate, and administer the [Hilton] *Resort*. The Association instructed [Mr. Sullivan’s direct employer] to hire and employ all employees necessary for the operation of the [Hilton] *Resort* and empowered it to perform all necessary duties. The operation of the [Hilton] *Resort*, on behalf of the time-share owners, is the Association’s sole business, and the work being performed by [Mr. Sullivan’s direct employer] was essential to its operation. [Mr. Sullivan’s direct employer] acts in every respect on behalf of the Association, employing [Mr. Sullivan] to perform certain duties essential to the operation of the [Hilton] *Resort*. Therefore, the Association is the [Mr. Sullivan’s] statutory employer. Furthermore, as pointed out by authorities cited by the Association, the South Carolina Workers’ Compensation Commission has held that *resort* subcontractors’ work constitutes part of the *resort* operator’s trade, business or occupation.

(Order of Dismissal p. 6 (emphasis added).)

Accordingly, the Court adheres to its ruling that Mr. Sullivan was a statutory employee of the Association at the time of the Underlying Accident and rejects Mr. Sullivan's challenge to that ruling.

2.

For his second argument in support of the Subject Motion, Mr. Sullivan contends that reconsideration is warranted because the Association failed to provide evidence that it carried workers' compensation insurance as required by law. (Subject Motion pp. 5–7.) The Court disagrees.

Mr. Sullivan's second argument in support of the Subject Motion is based on an erroneous legal premise, namely, that, to be immune from tort liability as Mr. Sullivan's statutory employer, the Association had to show that it maintained workers' compensation insurance.

According to Mr. Sullivan, "South Carolina precedent . . . ha[s] consistently interpreted statutory employer liability as providing 'double protection' for employees." (Subject Motion p. 7.) While Mr. Sullivan is correct that there is precedent to this effect, *that precedent is out of date and is no longer good law*, because of the legislature's enactment and subsequent amendment of S.C. Code Ann. § 42-1-415, as our Supreme Court made expressly clear in *Glover v. U.S.*, 337 S.C. 307, 523 S.E.2d 763 (1999):

*[P]rior to the enactment and amendment of S.C. Code § 42-1-415 (Supp.1998), the fact that the immediate employer had properly secured the payment of compensation did not remove the statutory employer's obligation under the Act. As observed by this Court in Harrell, the Act imposed a scheme where the owner and the immediate employer were subjected to the requirements of the Act, and the employees received "double protection." See Long v. Atlantic Homes, 311 S.C. 237, 428 S.E.2d 711 (1993); Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980).*

Finally, we noted in *Harrell* that our conclusion on this point was supported by the enactment and subsequent amendment of S.C. Code Ann. § 42-1-415 (Supp.1998). *Under section 42-1-415, as amended, a statutory employer no longer needs to secure the payment of compensation to avail itself of tort immunity under the Act, if the requirements of section 42-1-415 are met.*

337 S.C. at 311, 523 S.E.2d at 764-65 (emphasis added).

As a practical matter, no further analysis is necessary at this point, because Mr. Sullivan staked the entirety of his argument here on the false premise that the Association needed to secure the payment of workers' compensation to avail itself of tort immunity, without addressing the change in the law effected by the enactment and amendment of § 42-1-415 and, thus, without arguing that the requirements of § 42-1-215 are not met. And having raised no such argument prior to the filing of the Order of Dismissal, Mr. Sullivan can make no such argument now. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695; *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482. In any event, however, the requirements of § 42-1-415 are met here.

In pertinent part, § 42-1-415(A) provides as follows:

Notwithstanding any other provision of law, upon the submission of *documentation* to the commission *that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work*, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

(emphasis added).

The “documentation” referenced in § 42-1-415(A), i.e., “documentation . . . that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or

subcontractor was engaged to perform work,” is present here in the form of the Management Agreement, which, in pertinent part, provides as follows:

4. Powers and Duties of Management Firm; Services.

\*\*\*

(a) Employment of Personnel. [Hilton] shall employ, compensate and supervise all persons necessary to manage, maintain, administer and operate the Project. Such persons shall be employees of [Hilton] and not of the Association. All matters pertaining to employment, interviewing and screening process, supervision, compensation, promotion, and discharge of employees of [Hilton] are the responsibility of [Hilton].

\*\*\*

(d) Compliance with Laws. [Hilton] shall take such actions as may be necessary to operate and manage the Project in compliance in all material respects with all applicable federal, state and local laws, statutes, ordinances, orders, rules, regulations and other requirements including, but not limited to any requirements of the Timeshare Act (as defined in the Declaration).

\*\*\*

(Ex. D to Motion to Dismiss [Management Agreement] pp. 5–6.)

The Management Agreement thus makes clear that Hilton is responsible for “employ[ing], compensate[ing] and supervis[ing] all persons necessary to manage, maintain, administer and operate the Project;” that Hilton is responsible for “[a]ll matters pertaining to employment, interviewing and screening process, supervision, compensation, promotion, and discharge of [such] employees,” which necessarily includes securing required workers’ compensation insurance; and, further, that Hilton expressly recognized and agreed that, in carrying out its responsibilities under the Management Agreement, it must comply with all applicable laws, which necessarily includes complying with the insurance requirements of the Act. And Hilton did in fact comply with the insurance requirements of the Act, as shown by the workers’ compensation

settlement reached between Mr. Sullivan and Hilton and its workers' compensation insurance carrier, Starr Indemnity & Liability Company. (See Ex. A to Motion to Dismiss [Workers' Compensation Settlement Agreement and Release].)

Accordingly, Mr. Sullivan's second argument in challenge to the Order of Dismissal is unavailing. It is based on inapplicable legal authority that does not account for the change in the law effected by the legislature's enactment and subsequent amendment of § 42-1-415. And having raised no timely argument based on the applicable law, i.e., based on § 42-1-415, Mr. Sullivan cannot raise any such argument now. But in any event, such an argument would be without merit, because the requirements of § 42-1-415 are met here.

**CONCLUSION**

The Subject Motion is hereby DENIED.

AND IT IS SO ORDERED.

---

R. KEITH KELLY  
Circuit Court Judge

Dated: \_\_\_\_\_



Horry Common Pleas

**Case Caption:** Terence Sullivan VS Ocean 22 Vacation Owners Association Inc  
**Case Number:** 2021CP2605377  
**Type:** Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165