STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Angela Robinson, individually and as the Guardian Ad Litem for M.C., a minor, and Robert Cooper, Plaintiff, vs. Uber USA, LLC, Uber Technologies, Inc., Rasier, LLC, Rasier-NY, LLC and Charles Touhey, Defendants.	C/A#: 2022-CP-40-00496 **ORDER GRANTING THE PARTAL MOTION TO DISMISS OF DEFENDANTS UBER USA, LLC, UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-NY, LLC**

Defendants Uber USA, LLC, Uber Technologies, Inc., Rasier, LLC, and Rasier-NY, LLC (the "Moving Defendants") moved to dismiss Plaintiffs' Second, Fourth, and Fifth Causes of Action for failing to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Moving Defendants and Plaintiffs submitted briefs in support of their respective positions, and the Court heard oral argument on November 1, 2022, via WebEx. After reviewing the briefs and arguments of counsel and for the reasons stated herein, the Court **GRANTS** the Moving Defendants' motion and dismisses Plaintiffs' Second, Fourth, and Fifth causes of action against them with prejudice.

BACKGROUND

This action arises out of an alleged incident that occurred on February 19, 2019, in which Plaintiffs claim Defendant Charles Touhey approached their vehicle on Interstate 77 in Richland County and fired gunshots at the vehicle in which Plaintiffs were traveling. *See* Am. Compl. at ¶¶ 23-27. According to Plaintiffs' Amended Complaint, Defendant Touhey fired three bullets while

driving down the highway, one of which hit Plaintiff Angela Robinson, and the other two Plaintiffs witnessed the event. *See* Am. Compl. at ¶¶ 27-28.

APPLICABLE LEGAL STANDARD

The Moving Defendants brought their motion pursuant to Rule 12(b)(6), SCRCP. Pursuant to Rule 12(b)(6), SCRCP, a "trial judge in the civil setting may dismiss a claim when the defendant demonstrates that the plaintiff has failed 'to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Williams v. Condon*, 347 S.C. 227, 230, 553 S.E.2d 496, 499 (Ct. App. 2001) (quoting Rule 12(b)(6), SCRCP). "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Id.* In deciding a 12(b)(6) motion, a court deems all of the complaint's well-pleaded factual allegations as true; however, conclusions of law and other summary, conclusory allegations stated in the complaint are not deemed true. *See HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635-636, 699 S.E.2d 699, 706 (Ct. App. 2010).

DISCUSSION

Pursuant to this standard and for the reasons stated herein, Plaintiffs' Second, Fourth, and Fifth Causes of Action are dismissed for failure to state a claim pursuant to Rule 12(b)(6), SCRCP.

1. The Moving Defendants Cannot Be Vicariously Liable For Touhey's Alleged Intentional Acts Which Were Outside The Scope of Any Alleged Relationship.

Plaintiffs' Second and Fifth causes of action allege the Moving Defendants are vicariously liable for the intentional acts allegedly committed by Touhey. Both claims are centered on the Moving Defendants being liable to Plaintiffs related to the intentional acts of Touhey. For these claims, assuming for purposes of the Motion to Dismiss that an employment or agency relationship exists, which the Moving Defendants have denied, Plaintiffs' claim still fail because Touhey's

alleged actions are so far outside the scope of any alleged relationship with the Moving Defendants that the Moving Defendants cannot be held vicariously liable for his intentional actions.

In South Carolina, the doctrine of *respondeat superior* "rests upon the relation of master and servant." *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 274-277, 639 S.E.2d 50, 51-53 (2006). "A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment." *Id.* To be within the scope of a servant's employment, an act must be "reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." *Id.* If a servant's act is "done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being," that act does not fall "within the scope of his employment so as to render the master liable therefor." *Id.* (citing *Lane v. Mod. Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964)). In such circumstances, "the servant alone is liable for the injuries inflicted." *Id.* Therefore, should a servant step "aside from the master's business for some purpose ***wholly disconnected with his employment***, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time." *Id.* (Emphasis added); *see also Kase v. Ebert*, 392 S.C. 57, 61-62, 707 S.E.2d 456, 458-459 (Ct. App. 2011) (upholding the finding that Ebert was acting outside the course and scope of his employment when he assaulted Kase as it was not related to protecting a company vehicle or the cargo he was transporting); *see e.g., Park v. Se. Serv. Corp.*, 771 F. Supp. 2d 588, 592 (D.S.C. 2011) (finding the plaintiff did not submit to the court a plausible argument that the employee's decision to video record the plaintiff using the restroom was an act committed in furtherance of his employment); *Arnette v. Limestone Coll.*, No. 7:20-CV-04260-JD, 2021 WL

3772728, at *3 (D.S.C. Aug. 25, 2021) (dismissing the plaintiff's vicarious liability claims due to the "implausibility of Murphy videotaping the student athlete [p]laintiffs while they were fully nude, or in various stages of undress as being in the course and scope of his employment with Limestone based on [the p]laintiffs' allegations"); *Odom v. CVS Caremark Corp.*, No. CV 3:14-0456-MGL, 2016 WL 4536341, at *4 (D.S.C. Aug. 31, 2016) (dismissing claims when alleged defamatory statements made by an agent were not made within the scope of her employment or within the scope of her apparent authority).

Additionally, courts outside of South Carolina have addressed the issue of intentional acts by drivers logged into the Uber App, and they have held that said intentional conduct is outside the scope of any relationship, if any, between a driver using the Uber App who commits an alleged intentional act, and Uber. *See e.g., Phillips v. Uber Techs., Inc.,* 2017 U.S. Dist. LEXIS 94979 (S.D.N.Y. June 14, 2017).[1] In *Phillips v. Uber Techs., Inc.,* 2017 U.S. Dist. LEXIS 94979

[1] *See also, e.g., Cho v. McEwan, et al.*, BC697693 (Cal. Super. Mar. 18, 2021) (granting Lyft's motion for summary judgment in a case with similar facts, holding that the plaintiff's vicarious liability argument failed as a matter of law because, regardless of how one characterized the relationship between Lyft and subject defendant driver, at the time of the incident, McEwan was not acting within the scope of that relationship when he allegedly assaulted an individual in an act of road rage); *Dier v. Armbruster, et al.*, MSC20-01742 (Cal. Super. May 21, 2021) (granting Airbnb's demurrer dismissing the plaintiffs' negligence claim in case in which the plaintiffs alleged that an individual who rented next door property through Airbnb platform assaulted them during course of the rental); *Gonzalez v. Sierras, et al.*, 20STCV22103 (Cal. Super. Apr. 29, 2021) (granting Lyft's demurrer in a case in which the driver allegedly assaulted rider when rider would not exit the driver's vehicle); *Hoffman v. Silverio-Delrosar, et al.*, No. 20-cv-13291 (D.N.J. Dec. 23, 2021) (dismissing the plaintiff's *respondeat superior* claim as a matter of law finding that the driver's punching of rider was not a foreseeable act and did not further the driver's role.); *Cortese v. Aman, et al.*, Supreme Court of Suffolk County, New York, Index No. 605477/2019 (Feb. 19, 2021) (dismissing the plaintiff's assault, battery, false imprisonment, and negligent hiring claims); *Owens v. Uber Techs., Inc.*, et al., No. 20-13942 (Ct. of Common Pleas, Berks Co., PA Mar. 11, 2021) (dismissing the plaintiff's battery, assault, and intentional infliction of emotional distress claims with prejudice in incident where driver alleged to have thrown tire iron at rider outside of driver's vehicle); *Coughlin v. Uber Techs., Inc., et al.*, No. 200203083 (Ct. of Common Pleas, Philadelphia Co., PA June 12, 2020) (dismissing the plaintiff's *respondeat superior* and assault and battery claims with prejudice in case where driver allegedly sexually assaulted rider); and

(S.D.N.Y. June 14, 2017), plaintiff Phillips used the Uber App to connect with a driver offering transportation services. Allegedly, the plaintiff-rider and the driver got into a disagreement about the fare which escalated to a physical altercation.

The Southern District of New York granted Uber's motion to dismiss in that matter, finding that the defendant driver's actions in assaulting the riders, who ultimately were passengers in the driver's vehicle, went beyond the course and scope of any employment relationship if one existed. The Court held that:

> ...it need not make a determination on whether [the driver] should be classified an employee or independent contractor, because even assuming that [the driver] was an employee of Uber, his actions are so far outside the scope of employment that no reasonable employer, or Court for that matter, could have anticipated them. Thus, Plaintiffs' Complaint would be dismissed regardless of whether [the driver] were classified as an employee or independent contractor.

Id., at 13.

Additionally, in *Doe v. Uber Techs., Inc.*, 2019 U.S. Dist. LEXIS 203466 (N.D. Cal. Nov. 22, 2019), a defendant driver was allegedly logged into the Uber App when he assaulted the

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Fusco v. Uber Techs., Inc., No. 17-36, 2018 WL 3618232 (E.D. Pa. July 27, 2018) (dismissing the plaintiff's *respondeat superior* and negligent hiring claims after driver allegedly violently attacked a passenger upon learning that the passenger wanted to travel from Philadelphia to New Jersey. Court found that conduct actuated by a purpose to serve the employer may nevertheless fail to create vicarious liability if the act is "so excessive and dangerous, as to be totally without responsibility or reason under the circumstances . . . [and here,]. the brutality of the beating takes the act outside the scope of employment as a matter of law."); *Burmakova v. Uber Techs., Inc., et al.*, 20STCV24517 (Cal. Super. Oct. 22, 2021) (granting Uber's demurrer in a case involving an alleged assault committed by a driver, finding that "there is nothing to suggest that [the driver's] actions were foreseeable in light of the nature of work performed in a ride-share trip. Rather, the assault was "the independent product of [the driver's] aberrant decision to engage in conduct unrelated to his duties."); *Freni v. Uber Techs., Inc.*, No. 2018CV00326-C (Suffolk Co. Sup. Ct., Mass. Aug. 10, 2021) (finding that the rider's criminal conduct was unforeseeable and did not rise to any duty for Uber); *Huh v. Carr, et al.*, HUD-L-2488-20 (Hudson Co. Sup. Ct. Mar. 25, 2021) (finding the driver's intentional act of assaulting a third-party was not foreseeable and was outside the scope of any relationship with Uber).

plaintiff. Uber filed a Motion to Dismiss the Complaint. In dismissing the *respondeat superior* claims against Uber, the Court held:

> [e]ven if the assailant was an actual Uber employee as opposed to an ostensible agent, and drawing all reasonable inferences in Plaintiff's favor, the complaint does not plausibly allege that the sexual assault arose from the assailant's job to drive Plaintiff to her chosen destination... The assault was the independent product of the assailant's aberrant decision to engage in conduct unrelated to his duties.

Id., at *11.

> Accordingly, drawing all reasonable inferences in Plaintiff's favor, Plaintiff has not plausibly alleged facts that support a finding that the assailant was acting within the scope of his ostensible employment when he assaulted Plaintiff. The first claim for relief must therefore be dismissed.

Id., at *15.

Similarly, in *Mazaheri* v. *Doe*, 2014 WL 2155049, *2 (W.D. Okla. May 22, 2014), the court dismissed the plaintiff's vicarious liability claims against Uber. There, the defendant driver was allegedly using the Uber App when he and the plaintiff and plaintiff's fiancé got into a verbal disagreement, the driver let the passengers out, and then physically assaulted the plaintiff. Applying Oklahoma law, the court found that the driver was not acting in the course of his employment, but rather "pursued this course of conduct for his own personal interest." *Id.*

Likewise, in *Flynn v. Bagumyan,* the court sustained Uber's demurrer as to the plaintiff's claims that were grounded in a theory of *respondeat superior*. *Flynn* v. *Bagumyan*, BC69997 (Cal. Super. Oct. 25, 2018). In that case, the court found that the independent driver was not acting within the scope of any alleged employment or partnership with Uber when he struck the plaintiff rider with his fists, explaining that it was "unconvinced" that the assault had a "causal nexus" to the defendant driver's work or that such conduct was "typical" to the defendants' business. *Id.*

Here, Plaintiffs' allegations fail to state any facts sufficient to support holding the Moving Defendants vicariously liable for the intentional acts of Defendant Touhey. Plaintiffs allege Touhey was "working in the course and scope of his employment on behalf of" the Moving Defendants because Touhey solely because he was logged into the App. Am. Comp., ¶¶ 33, 41. However, a plaintiff's mere showing that an alleged "employee" was on duty at the time he assailed someone is not sufficient to establish that the conduct occurred within the scope of employment; rather, for an act to be within the scope of employment, it must be "reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." *See e.g.*, *Armstrong*, 371 S.C. at 274-277, 639 S.E.2d at 51-53 (finding that Food Lion could not be vicariously liable when three men in Food Lion uniforms, who were on duty at the time of the incident, attacked a customer with a box cutter and punching another customer who came to the aid of the first because the employees "stepped away from their job of stocking shelves").

Touhey's alleged intentional acts of shooting a gun at Plaintiffs and striking Plaintiff Robinson are a clear departure from any work that he was allegedly "hired" to do. *See id.* Plaintiffs have not even alleged any relation between Touhey's firing a gun at them and any work that he was allegedly "hired" to do, let alone alleged that the actions were reasonably necessary to accomplish the purpose of his alleged employment and in furtherance of the Moving Defendants' business. Rather, there is nothing in the nature of Touhey's alleged employment or agency relationship with the Moving Defendants that would require him to shoot a gun at a car on the highway while driving in furtherance of the Moving Defendants. Additionally, Plaintiffs were not even using the Uber App or any services of Touhey's at the time of the incident. It is simply inconceivable that such misconduct of Touhey, allegedly shooting toward Plaintiffs and striking Plaintiff Robinson, could ever be in furtherance of, or to serve the Moving Defendants' interests.

See id. Accepting all of Plaintiffs' factual allegations as true, there is no rationale that Touhey was acting in the Moving Defendants' interests, or within any alleged employment or agency relationship with them.

Accordingly, the Moving Defendants cannot be held vicariously liable for Touhey's intentional actions that were outside of the scope of any alleged employment or agency relationship with the Moving Defendants as a matter of law. Therefore, Plaintiffs' Second and Fifth causes of action, which are both based on a vicarious liability theory, must be dismissed with prejudice.

2. Plaintiffs Fail To State A Claim For Negligent Selection Of An Unfit Independent Contractor.

Plaintiffs name their Fourth cause of action as one for "Negligent Selection of an Unfit Independent Contractor," but no such cause of action has been recognized in South Carolina. Rather, Plaintiffs appear to be alleging a negligent hiring and retention claim. Plaintiffs' Fourth cause of action fails as a matter of law as Plaintiffs fail to plead the appropriate elements for such a claim, including that Defendant Touhey was an employee of the Moving Defendants.

South Carolina law is clear that a claim of negligent hiring and retention can only be brought against an employer. "In circumstances where ***an employer*** knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring . . . . the employee . . . ." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008) (emphasis added); *see also Watkins v. Hall*, No. 2017-UP-298, 2017 S.C. App. Unpub. LEXIS 326, at *3, 2017 WL 4810799, at *2 (Ct. App. July 19, 2017) (affirming circuit court dismissal of plaintiff's claim for negligent hiring and supervision because court found plaintiff failed to sufficiently allege one or more elements of both claims). Negligent hiring cases "generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties." *Kase*, 392 S.C. at 63, 707 S.E.2d 456,

459; *see also MacKenzie v. C&B Logging*, 436 S.C. 122, 129-130, 871 S.E.2d 185, 189-190 (Ct. App. 2022) (noting that the issue was whether the defendant employer was negligent in employing the employee based on the risk that he would not operate his truck properly). "From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused." *Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005). "[T]he court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard." *Id.*

In the Fourth cause of action, Plaintiffs fail to plead the appropriate elements for negligent hiring and retention; specifically, Plaintiffs failed to plead that Touhey is an employee of the Moving Defendants. Instead, Plaintiffs plead in the Fourth cause of action that Touhey is an independent contractor. There is not a case in South Carolina finding negligent hiring and retention claims apply to independent contractors. Additionally, Plaintiffs fail to plead actual facts about the knowledge of the Moving Defendants and the foreseeability of harm to third parties. Rather, they only provide conclusory allegations that allude to "publicly available information" without actually stating what the publicly available information says about Touhey's alleged behavior. Am. Compl., ¶¶ 65, 67, 68, and 69. Such conclusory allegations, along with the legal conclusions in Paragraphs 60, 61, 62, 63, 64, 65, and 66, of Plaintiffs' Fourth cause of action in the Complaint do not need to be taken as true for purposes of this Motion. *HHHunt*, 389 S.C. at 636-37, 699 S.E.2d at 705-06. As a result, Plaintiffs allege no facts to support how the Moving Defendants "knew or should have known that Defendant Touhey was an unsafe, incompetent, and dangerous driver." Am. Compl., ¶ 66. Further, Plaintiffs do not allege factual allegations about the

foreseeability of harm to others posed by Defendant Touhey. For example, Plaintiffs have not alleged that Touhey's actions in this case related to a certain number and type of prior acts of wrongdoing on his part or the nexus or similarity between any prior acts and the ultimate harm alleged as required. *ATC, Inc.*, 367 S.C. at 206, 624 S.E.2d at 45. Without such factual allegations and relying solely on conclusory statements and legal conclusions, Plaintiffs have not alleged all of the elements necessary to sustain their Fourth cause of action. Accordingly, the cause of action fails and is dismissed with prejudice.

3. Plaintiffs' Fifth Cause of Action Impermissibly Commingles Allegations Against All Defendants And Is Dismissed Since It Does Not Allege Any Acts Taken By The Moving Defendants.

As to Plaintiffs' Fifth cause of action, it should be dismissed as it does not allege any negligent acts on the part of the Moving Defendants directly; rather, as stated in Section 2, *supra*, the negligence alleged is for vicarious liability based upon the alleged wrongful, intentional acts of Defendant Touhey. Vicarious liability cannot exist under these circumstances for such intentional acts. Without vicarious liability allegations, Plaintiffs' Fifth cause of action does not and cannot allege the appropriate elements against the Moving Defendants to sustain such a cause of action; therefore, it is dismissed with prejudice.

In South Carolina, the cause of action for negligent infliction of emotional distress is limited to bystander liability. Thus, to prevail, a plaintiff must be able to plead and prove, among other things, that "the negligence of the defendant caused death or serious physical injury to another." *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 67, 651 S.E.2d 305, 307 (2007).

Specifically, Plaintiffs did not and cannot plead negligent acts on the part of the Moving Defendants "caused death or serious physical injury to another" as required. Rather, Plaintiffs only allege combined, conclusory allegations such as "Defendants acts and/or omissions were the direct

and proximate cause of serious physical injury to Plaintiff Angela Robinson" and Defendants' "combined and concurring careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts were the direct and proximate cause of the incident that is the subject [sic] this litigation." Am. Compl., ¶¶ 75, 81. Plaintiffs do not claim an act by any of the individual Moving Defendants that proximately caused Plaintiff Angela Robinson's alleged injuries. As a result, such conclusory allegations as to the Moving Defendants in Plaintiffs' Fifth cause of action in the Complaint do not need to be taken as true for purposes of this Motion. *HHHunt*, 389 S.C. at 636-37, 699 S.E.2d at 705-06. Plaintiffs did not make actual factual allegations because they cannot do so as none of the Moving Defendants were involved or present at the time of Touhey's alleged actions and the alleged injuries. Accordingly, Plaintiffs are unable to plead the necessary elements of this cause of action as to the Moving Defendants, and their Fifth claim fails pursuant to Rule 12(b)(6), SCRCP. Therefore, the Fifth cause of action is dismissed with prejudice.

For the foregoing reasons, the Court

1. **GRANTS** Defendants Uber USA, LLC, Uber Technologies, Inc., Rasier, LLC, and Rasier-NY, LLC's Motion to Dismiss pursuant to Rule 12(b)(6) as to Plaintiffs' Second Cause of Action for Respondeat Superior;
2. **GRANTS** Defendants Uber USA, LLC, Uber Technologies, Inc., Rasier, LLC, and Rasier-NY, LLC's Motion to Dismiss pursuant to Rule 12(b)(6) as to Plaintiffs' Fourth Cause of Action for Negligent Selection of an Unfit Independent Contractor;
3. **GRANTS** Defendants Uber USA, LLC, Uber Technologies, Inc., Rasier, LLC, and Rasier-NY, LLC's Motion to Dismiss pursuant to Rule 12(b)(6) as to Plaintiffs' Fifth Cause of Action for Negligent Inflection of Emotional Distress; and

4. **DISMISSES** Plaintiffs' Second, Fourth, and Fifth causes of action against the Moving Defendants with prejudice.

IT IS SO ORDERED.

(Judge's electronic signature to follow)

Richland Common Pleas

Case Caption: Angela Robinson , plaintiff, et al vs Uber Usa Llc , defendant, et al

Case Number: 2022CP4000496

Type: Order/Dismissal

So Ordered

S/George M. McFaddin, Jr., #2759