STATE OF SOUTHCAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

GABRIEL CRESPO,

Plaintiff,

v.

RHETT RIVIERE, JOSEE RIVIERE, CHASE ENTERPRISES, LLC OF SOUTH CAROLINA, AND RC RIVIERE PROPERTIES, LLC,

Defendants.

C/A No. 2022-CP-02-02324

[PROPOSED] ORDER DENYING DEFENDANT JOSEE RIVIERE'S SUMMARY JUDGMENT MOTION

This matter is before the Court pursuant to Defendant Josee Riviere's Motion for Summary Judgment. Plaintiff filed a response opposing the motion. The motion has been fully briefed; the Court heard oral arguments on August 21, 2024; and the motion is ready for ruling. For the reasons stated below, the Court denies the motion.

I. BACKGROUND/FACTS

On October 10, 2022, Plaintiff filed this Complaint alleging several claims against Josee Riviere, including negligence and/or gross negligence, constructive fraud/misrepresentation, and negligence per se. Plaintiff filed this action shortly after discovering that between April and June 2001, when he and his wife stayed at a rental property in Aiken, South Carolina, they had been surreptitiously recorded by a camera that had been positioned to capture images in the bedroom and bathroom. The rental property was owned and/or managed by the then-married Defendants Josee and Rhett Riviere.

II. LEGAL STANDARD

Summary judgment is only appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 626 S.E.2d 1, 5 (2006). "The party moving for summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). Additionally, "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005).

Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant meets its burden of identifying issues where there is no genuine issue of material fact, the non-moving party must then produce evidence upon which a jury could return a verdict in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Additionally, "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.*

III. ANALYSIS

Viewing the evidence in the light most favorable to Plaintiff, there are material facts in dispute as to the issues raised by Defendant Josee Riviere which preclude granting summary judgment on any of Plaintiff's claims. Without referring to any specific claims, Josee Riviere generally argues that she is entitled to summary judgment because there is no evidence: that she

was engaged in a joint enterprise with Rhett Riviere or acting as a rental agent; that she did anything to damage the Plaintiff; or that she knew about the alleged cameras. She lists five specific "claims" which she contends are without any evidentiary support: 1) Josee Riviere "specifically manage[d] Chase Enterprise LLC"; 2) Josee Riviere held herself out as "host of the cottage"; 3) Josee Riviere was not aware of Rhett Riviere's voyeuristic activities and use of recording devices before 2001; 4) Josee and Rhett Riviere operated and managed a rental enterprise for property they jointly owned; and 5) Josee Riviere acted as a real estate broker and failed to adhere to state licensing requirements. However, as discussed below, there is some evidence supporting each of these "claims" which precludes the granting of summary judgment.

a. Negligence Claims

The elements of negligence claim are "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *See J.T. Baggerly v. CSX Transp., Inc.,* 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "Gross negligence is defined as 'the failure to exercise slight care.' " *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007) (quotation marks and citation omitted). "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *See Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 309, 628 S.E.2d 496, 512 (Ct. App. 2006). There is some evidence that Josee Riviere was engaged in a joint enterprise with Rhett Riviere, acted as an agent or host, and operated or managed a rental enterprise for property the Rivieres owned, such that she owed a duty to Plaintiffs and that she breached this duty causing damage to the Plaintiffs.

In support of her Summary Judgement Motion, Josee Riviere argues that she did not owe a duty to Plaintiffs. In *Wright v. PRG Real Estate Management, Inc.*, 426 S.C. 202, 826 S.E.2d

285 (2019), a tenant who was robbed and kidnapped at gunpoint sued not only the owner of the apartment complex, but also the management company and the individual property manager. 826 S.E.2d at 287. The Supreme Court reversed the grant of summary judgment as to all the defendants and remanded finding that it was a jury question as to whether a duty existed. *Id.* at 295. Simply put, "[o]ne who controls the use of property has a duty of care not to harm others by its use," and "one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). Here, there is some evidence that Josee Riviere acted as a property manager and owed Plaintiffs a duty.

The property which the Crespos rented included one side of a building with a living room, a bedroom, and a bathroom, and the other side of the building was Rhett Riviere's office. There was a door to the Rhett Riviere's office in the bathroom of the rental that was usually locked. Towards the end of the rental, Heather discovered the door open and she saw that Rhett Riviere's office contained "a lot of electronic equipment.

Plaintiff Gabriel Crespo always handled making the living arrangements for Plaintiffs when they were married. Typically, the couple would travel to Aiken for polo season which ran from the end of April until the end of June or the beginning of July.

Gabriel testified that he communicated with Josee Riviere about the rental and that she "rented that apartment to me." He testified that Josee "help[ed] us with the property rental with showing us the place, the house," and Josee Riviere went with them into the building when they saw it for the first time. While he testified that they were shown around by both Rivieres and given the key, he testified that it was Josee who gave them the lease to sign, and who he gave a check to for the entire rental period. He testified that Josee "was there more than [Riviere]] was." One day Gabriel locked himself out of the rental, and it was Josee who opened the door for him.

At her deposition, while Josee Riviere repeatedly testified that she could not remember or recall anything about the rental, she clarified that she was not disputing anything – just that she could not remember. As for what Josee Riviere did in regard to the rental properties, she testified that she did not do anything; however, when asked specific questions, she again testified that she could not remember but that she was not disputing anything, and she reiterated once again that she just could not remember. For example, she was asked if she acted as an agent to Plaintiffs, and she responded that she could not remember.

As noted above, at her deposition, while Josee Riviere repeatedly testified that she could not remember or recall anything about the rental, she clarified that she was not disputing anything – just that she could not remember anything about her interaction with the Plaintiffs. However, Plaintiff Gabriel Crespo did remember his interactions with Josee Riviere in regard to the rental. He testified that he communicated with Josee Riviere about the rental and that she "rented that apartment to [him]." He testified that Josee "help[ed] us with the property rental with showing us the place, the house," and Josee Riviere went with them into the building when they saw it for the first time. He testified that it was Josee who gave them the lease to sign, and who he gave a check to for the entire rental period. He testified that Josee "was there more than [Riviere]] was." and that Josee opened the door for him when he locked himself out. There is more than sufficient evidence to create a jury question as to whether Josee Riviere was in control and or managed the rental property, owed a duty to Plaintiff, and breached that duty causing damage to the Plaintiff.

Further, while Josee Riviere contends that at most she was an "errand girl," as set out above, there is testimony supporting that Josee Riviere was acting as an apparent agent for Rhett Reviere and/or Chase Enterprises LLC or involved in a joint enterprise with him.

"A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992).

"Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct* of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Froneberger v. Smith*, 748 S.E.2d 625, 630 (S.C. Ct. App.2013) (emphasis added) (citation omitted). " The apparent authority of an agent results from conduct or other manifestations of the principal's consent, whereby third persons are justified in believing the agent is acting within his authority. *Genovese v. Bergeron*, 327 S.C. 567, 490 S.E.2d 608 (Ct.App.1997). Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf. *Id.* "Generally, agency is a question of fact." *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000). If there are any facts tending to prove an agency relationship, it then becomes a question for the jury. *Id*

As set out above, Gabriel Crespo testified that both Rivieres were present when showing the rental property. Further, based on Rhett Riviere's conduct in allowing Josee Riviere to show the rental, handle the lease, and accept the rental payment, Plaintiffs were justified in believing that she was either acting as an agent or involved in a joint venture with Rhett Riviere in regard to the rental property.

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Schmidt v. Courtney*, 357 S.C. 310, 317. 592 S.E.2d 326,

330 (Ct. App. 2003). Because there is some evidence that Josee Riviere was engaged in a joint enterprise with Rhett Riviere, acted as an agent or "host," and operated or managed a rental enterprise for property the Rivieres owned, there exists a genuine issue of material fact precluding the grant of summary judgment on the negligence claims. Moreover,

> it is important to note that, "[g]enerally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause." (citing *Folkens v. Hunt*, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct. App. 1986)).

Courtney, 357 S.C. at 323. 592 S.E.2d 326. Accordingly, Josee Riviere's Motion for Summary Judgment as to the Negligence and/or Gross Negligence claims is denied.

b. Constructive Fraud/Misrepresentation Claim

"To establish constructive fraud, all elements of actual fraud except the element of intent must be established." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct.App.1993).

> In order to prove [actual] fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Id. To prove a claim of negligent misrepresentation, a plaintiff must establish:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)). "The fact that the information is given in the course of the defendant's business, profession or employment is a

sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time." *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 442, 339 S.E.2d 142, 146–47 (Ct. App. 1985) ((quoting Restatement (Second) of Torts § 552, Cmt. d, at 129–30 (1977)).

As discussed above in regard to foreseeability, Josee Riviere should have known that there were cameras and recording devices in the office adjoining the bathroom of the rental property, and she should have disclosed their presence to Plaintiffs. Josee Rivier's failure to disclose their presence is the basis of Plaintiffs' Constructive Fraud/Misrepresentation claim. (Compl. ¶¶ 70-72).

Constructive fraud has been defined as follows:

> Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.
>
> Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. An intent to deceive is an essential element of actual fraud.
>
> The presence or absence of such an intent distinguishes actual fraud from constructive fraud.

Giles v. Lanford & Gibson, Inc., 285 S.C. 285, 287-288, 328 S.E.2d 816, 918 (1985) (citation omitted). Additionally, an affirmative representation is not required for actionable fraud to exist; nondisclosure is fraudulent when there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 83, 245 S.E.2d 129, 122 (1978). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Anthony v. Padmar, Inc.*, 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App.1995). There is some evidence that Josee Riviere and Plaintiffs were in a special relationship based on the rental agreement, and thus Josee Riviere had a duty to disclose that the

presence of cameras or other recording devices to Plaintiffs. Accordingly, Josee Riviere is denied summary judgment as to the Constructive Fraud/Misrepresentation claim.

c. Negligence Per Se Claim

"The doctrine of negligence *per se* applies in negligence cases where a statute seeks to impose a duty on a would-be [d]efendant." *Denson v. Nat'l Cas. Co.*,439 S.C. 142, 157, 886 S.E.2d 228, 236 (2023). The two criteria for a negligence per se claim: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute intended to protect." *Id.*

Josee Riviere violated South Carolina Code Ann. § 40-57-20, South Carolina's real estate licensure statute. Section 20-57-30(3) defines a broker as follows:

> (3) "Broker" means an associated licensee who has met the experience and education requirements and has passed the examination for a broker license and who, for a fee, salary, commission, referral fee, or other valuable consideration, or who, with the intent or expectation of receiving compensation:
>
> (a) negotiates or attempts to negotiate the listing, sale, purchase, exchange, lease, or other disposition of real estate or the improvements to the real estate;
> . . .
>
> (d) offers services as a real estate consultant, counselor, or transaction manager;
>
> . . .
>
> (f) advertises or otherwise represents to the public as being engaged in any of the foregoing activities.

S.C. Code Ann. § 40-57-30(3)(a), (d), (f). Josee Riviere falls under this definition because she negotiated the lease of the rental property and represented a client in a real estate transaction. Section 40-57-10 specifically states that the South Carolina Real Estate Commission's purpose "is to regulate the real estate industry so as to protect the public's interest when involved in real estate

transactions." S.C. Code Ann. § 40-57-10. Certainly, regulating and protecting the public's interest in real estate transactions include the underlying conduct alleged in this case.

Whether Josee Riviere was required to obtain a license under this statute is a novel issue. However, summary judgment is inappropriate on this novel issue. In *Schmidt v. Courtney*, a case raising a novel issue, the Court of Appeals found it "extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case." 357 S.C. at 318. Likewise, here, considering the injury to Plaintiffs and the novel issue, the Court denies summary judgment as to the Negligence Per Se claim.

Finally, the Court notes that Josee Riviere fails to make any specific arguments regarding the SCUTPA cause of action. Instead, she generally contends that all of Plaintiffs' claims are dependent upon there being proof that she knew that Rhett Riviere had placed cameras in the rental. However, as discussed above, there is some evidence that she should have known of Rhett Riviere's conduct which supports a willful violation of the SCUTPA and precludes the granting of summary judgment on this claim.

The SCUPTA states "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39–5–20 (Supp.2005). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Johnson v. Collins Entm't Co., Inc.*, 349 S.C. 613, 636, 564 S.E.2d 653, 665 (2002).

Section 39–5–140(d) provides that "a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39–5–20." S.C. Code Ann. 39-5-140(d). The statutory definition of willful has been construed by our Court of Appeals to mean: "if, in the exercise of due diligence, a person of ordinary prudence engaged in

trade or commerce could have ascertained that his conduct violates the Act, then such conduct is willful." *State v. Nest Egg Society Today, Inc.*, 290 S.C. 124, 348 S.E.2d 381 (Ct. App.1986). The statutory standard is therefore "not one of actual knowledge, but of constructive knowledge." *Id.* at 384. In other words, the statutory standard is met if a defendant "should have known" that his or her conduct was violative of the SCUTPA. As discussed above, there is evidence that Josee Riviere should have known that failing to discover and disclose the cameras in the rental property violated the SCUTPA. Based on the grounds raised by Josee Rivere in her Summary Judgment Motion, the Court also denies summary judgment as this claim.

IV. CONCLUSION

Based on the foregoing, there are numerous genuine issues of material fact. Accordingly, Josee Riviere's Motion for Summary Judgment is **DENIED.**

Aiken Common Pleas

Case Caption: Gabriel Crespo VS Rhett Riviere , defendant, et al

Case Number: 2022CP0202324

Type: Order/Summary Judgment

IT IS SO ORDERED.

s/Milton G. Kimpson 2783