IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2017-000988
Case No.: 2015-CP-10-02050

Robert Larsen and Marie Larson ..... Appellants,

-v-

Nudo Nympha, LLC, DBA Thee Southern Belle and Gentleman's Club and Wet and Wild, Robin Robinson and Red Dog, LLC, Vincent Destaso and Fine Housing, Inc.,.....Defendants,

Of which, Vincent Destaso and Fine Housing, Inc. are .....Respondents.

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II. DID THE LOWER COURT ERR IN HOLDING THAT NO DUTY WAS OWED TO APPELLANTS WHEN DESTASO AND FINE HOUSING TOLD FOGLE TO FIRE THE EXISTING SECURITY BEFORE DESTASO WOULD BECOME INVOLVED?

STATEMENT OF THE CASE

This appeal arises from a negligence action filed by Robert Larsen for permanent brain injuries he suffered while standing near a fight outside of a club. Larsen sued the club, its lessor, and several interconnected entities. Larsen alleged the lessor, Vincent Destaso ("Destaso") and Fine Housing, Inc. ("Fine Housing"), asserted control over the operations of the club through operations manager, Anthony Fogle, and were part of joint venture with the other interconnected Defendants. (2d Amd. Compl.; Reply to SJ). Larsen filed a Complaint against Destaso/Fine Housing, and other defendants, on April 10, 2015, in the Charleston County Court of Common Pleas. (Compl.).

Destaso and Fine Housing served their Answer to Larsen's Amended Complaint[1] on September 4, 2015 that generally denied the allegations. (Ans.). On June 22, 2016, Destaso and Fine Housing moved for summary judgment. (Mot. for SJ). On January 19, 2017, Larsen filed a Reply to Destaso and Fine Housing's Motion for Summary Judgment. (Reply to SJ). The Court heard argument on Destaso and Fine Housing's motion on January 24, 2017. In an Order filed March 14, 2017, the Court granted Destaso and Fine Housing's Motion for Summary Judgment. (Order). On March 20, 2017, Larsen moved to alter or amend pursuant to Rule 59(e), SCRCP. (Mot. to Alter). In a Form 4 Order dated March 30, 2017, Larsen's Motion to Alter or Amend was denied without rehearing. (Order Denying Alter). Larsen timely filed his Notice of Appeal on April 19, 2017. (Not. of App.).

[1] Larsen filed an amended and second amended complaint on June 24, 2015 and May 11, 2016, respectively. (Amd. Compl.; 2d Amd. Compl.).

FACTS

On appeal from an order granting summary judgment, the facts below must be viewed in a light most favorable to Larsen as the non-moving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

I. EVENTS GIVING RISE TO ACTION

On January 11, 2014 at approximately 11:15 PM, Larsen was a patron of Nudo Nympha, which does business as Thee Southern Belle, and Red Dog, which does business as Beverage Station, along with his friend, Theodore Westervelt. (2d Amd. Compl. ¶ 14). During that time, Westervelt had words with another patron, Kevin Anderson. (2d Amd. Compl. ¶ 14). The Beverage Station furnished liquor to Anderson when he was in an obviously intoxicated state in violation of S.C. Code Ann. §. 61-6-2220. (2d Amd. Compl. ¶ 13). Security personnel took control of the situation and ordered Anderson to leave. (2d Amd. Compl. ¶ 16). Anderson went outside and waited in the parking lot for Westervelt and Larsen. (2d Amd. Compl. ¶ 17). Respondents' security personnel observed Anderson and were aware he was waiting for Westervelt and Larsen in the parking lot. (2d Amd. Compl. ¶ 18). Shortly thereafter, Respondents' security personnel ordered Larsen and Westervelt to leave, aware they would have to pass Anderson. (2d Amd. Compl. ¶ 19).

As Respondents' security personnel watched, Anderson provoked an argument with Westervelt as Westervelt and Larsen were leaving. (2d Amd. Compl. ¶ 20). Anderson fell to the ground and Larsen and Westervelt walked on. (2d Amd. Compl. ¶ 21). An angry and rowdy crowd formed around Anderson, Westervelt, and Larsen. (2d Amd. Compl. ¶ 21). Security personnel made no effort to stop Anderson or stop the crowd from forming around Anderson. (2d

Amd. Compl. ¶ 22). Larsen, standing nearby, was knocked to the ground, striking his head and causing a serious brain injury, including an occipital fracture, a bilateral fracture of the orbital roof, a right mandibular ramus fracture, a bilateral subdural hematoma, a subarachnoid, bilateral frontal intra-parenchyma and Potine hemorrhage and accompanying brain injury, among other injuries. (2d Amd. Compl. ¶¶ 23; 25). In addition to his action, Larsen's wife, Marie, filed a loss of consortium action pursuant to South Carolina law. (2d Amd. Compl. ¶ 22, g; h).

II. THE INTERCONNECTED ENTITIES AND CONTROL BY FOGLE

To understand the events giving rise to this action and argument regarding summary judgment to Destaso and Fine Housing, it is necessary to understand the relationship between the Defendants. Multiple businesses were established under one roof for the purpose of the businesses avoiding laws by doing indirectly what they could not do directly. Nudo Nympha operates as an adult entertainment venue in Charleston. It does business as Thee Southern Belle and Gentleman's Club and Wet and Wild ("Thee Southern Belle"). (2d Amd. Compl. ¶ 2). The property where Thee Southern Belle is located consists of one large building separated into three businesses. (Fogle Depo. p. 18, ll. 9-14). In addition to Thee Southern Belle, there is the Beverage Station and Gentleman's Quarters. (Fogle Depo. p. 16, l. 19 – p. 17, l. 7). Gentleman's Quarters is a fully operational bar that serves beer, wine, and liquor. (Fogle Depo. p. 17, ll. 8-14; p. 21, ll. 5-14). Beverage Station sold only beer and wine, in addition to snacks. (Fogle Depo. p. 20, ll. 29-21). Customers could bring their own beer and wine into Thee Southern Belle or purchase it and bring it from Beverage Station. (Fogle Depo. p. 19, ll. 19-15; p. 21, ll. 5-14). The Beverage Station stayed open until a half hour before The Southern Belle closed at 5:00 AM. (Fogle Depo. p. 25, ll. 17-20; p. 32, ll. 9-14). These three entities shared a common parking lot and were part of the same building with the businesses being separated by a wall. (Fogle Depo.

p. 16, ll. 3-8; p. 18, ll. 1-24; p. 57, ll. 9-11). The Second Amended Complaint alleged that Respondents (collectively) operated as a joint venture where Beverage Station provided the alcohol to Thee Southern Belle's patrons. (2d Amd. Compl. ¶ 10). All three clubs had common security for the parking lot and used the same personnel. (Fogle Depo. p. 58, l. 21 – p. 59, l. 7).

At one time, the property and all three businesses were owned by Robin Robinson. (Fogle Depo. p. 21, ll. 18-20). Robinson experienced financial difficulties and was going to lose her house due to foreclosure. (Fogle Depo. p. 6, ll. 2-9). Fogle reached out to several lenders in the Charleston area on her behalf. (Fogle Depo. p. 6, ll. 10-16). After no success in finding a lender, Fogle reached out to a friend with a Chicago brokerage firm who put him in touch with Vincent Destaso. (Fogle Depo. p. 6, ll. 10-16). Destaso, from Philadelphia, spoke with Fogle and flew to Charleston on Friday ahead of the impending Monday foreclosure sale. (Fogle Depo. p. 6, l. 24 – p. 7, l. 19; p. 14, l. 25 – p. 15, l. 1). Destaso wanted to review the bank statements for the clubs – Beverage Station, Gentleman's Quarters, and Thee Southern Belle – for the previous year. (Fogle Depo. p. 16, ll. 1-8). Destaso agreed to lend Robinson $850,000.00 on the condition that Fogle stay on as operations manager of all three entities and Robinson gave the deeds to her house and the property where the Thee Southern Belle, Gentleman's Quarters, and Beverage Station are located. (Fogle Depo. p. 8, ll. 4-21). Destaso mandated Fogle's involvement as operations manager to make sure Destaso got paid since Robinson had issues paying previous lenders. (Fogle Depo. p. 22, l. 12 – p. 23, l. 8; p. 56, ll. 2-5). Fogle is listed as a tenant on the lease even though he is only the operations manager and has no ownership of the clubs. (Lease). After this transaction, Destaso formed Fine Housing to own the property. (Fogle Depo. p. 6, ll. 15-16). Destaso is the sole shareholder of Fine Housing. (Destaso Aff. ¶ 3).

The lease mandated payments of $12,750.00 per month/$153,000.00 per year to Destaso and Fine Housing. (Lease; Fogle Depo. p. 24, l. 5 – p. 25, l. 2). The club typically generated between $80,000.00 to $100,000.00 per month in revenue. (Fogle Depo. p. 24, l. 5 – p. 25, l. 2). The payment was not separated between the businesses but made as one payment. (Lease). As operations manager, Fogle hired and fired employees. (Fogle Depo. p. 29, ll. 8-11). Once Destaso took over, Fogle told him he would get the club running the proper way and got rid of the Hell's Angels, a motorcycle club previously in charge of security, at Destaso's request. (Fogle Depo. p. 37, l. 24 – p. 41, l. 24). Fogle brought in people that had professional backgrounds in security. (Fogle Depo. p. 41, ll. 18-24). Fogle testified his responsibilities were to protect Destaso's investment. (Fogle Depo. p. 46, ll. 11-16; p. 85, ll. 4-17). Fogle reported to Destaso weekly even though not mandated in the lease and reporting is not standard in a lessor-lessee relationship. (Fogle Depo. p. 46, ll. 18-20; p. 89, ll. 9-13). Fogle supervised the operations of all three entities – Gentleman's Quarters, Southern Belle, and the Beverage Station. (Fogle Depo. p. 47, ll. 4-7). Fogle also assisted in the purchase of the insurance that insured Destaso and Fine Housing. (Fogle Depo. p. 87, ll. 9-24).

In March or April 2014, Charleston County Council put in place a measure that required Thee Southern Belle to close at 2:00 AM. (Fogle Depo. p. 48, ll. 5-15). This curfew impacted the Club's income "majorly." (Fogle Depo. p. 48, ll. 18-25). About thirty days after the passing of the 2:00 closing time, Robinson did not get paid and the employees barely got paid. (Fogle Depo. p. 49, ll. 3-11). However, Fogle continued making sure Destaso got paid. (Fogle Depo. p. 49, ll. 3-15). Unhappy, Robinson hired a lawyer that brought an action barring Fogle from the Club. (Fogle Depo. p. 49, l. 16 – p. 50, l. 21). Fogle was told that he was barred from the Club because he was not a member of the LLC and was merely a guarantor on Robinson's loan.

(Fogle Depo. p. 50, ll. 12-21). Destaso told Fogle that he needed to hire an attorney because Fogle could not be responsible for what's going on at the Club. (Fogle Depo. p. 50, l. 22 – p. 51, l. 1). Fogle testified about his significance to Destaso:

> The only thing he, Vincent, really was very adamant about, Mr. Destaso, was that (a) that he gets paid, that's the bottom line. He said that every time we talked, I just want to get paid. (b) is that I don't want to be in the strip club business. I have no desire to be in the strip club business. And (c) ***I need to be sure you're there so I get paid. That's the only reason why I'm doing this.***

(Fogle Depo. p. 86, ll. 5-13) (emphasis added). After the financial troubles following the earlier closing time, Destaso released Fogle from his obligations as guarantor on Robinson's loan. (Fogle Depo. p. 52, ll. 1-8; p. 88, ll. 14-17).

In the Order granting summary judgment to Destaso and Fine Housing, the lower court found that "Destaso never hired or fired any employees and never told Anthony Fogle how to operate the club." (Order p. 8). Furthermore, Destaso "did not have any control over anything related to the operation of Ms. Robinson's business." (Order p. 3). As a result of no agency relationship between Destaso/Fine Housing and Fogle, no duty was owed Larsen. (Order pp. 8-9).

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is

only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

ARGUMENT

The central issue in this case is whether there's any evidence, when viewed in a light most favorable to Larsen as the non-moving party, that creates the inference of an agency relationship between Destaso/Fine Housing and Fogle. Based on the evidence before the Court, the trial court erred in granting summary judgment to Destaso/Fine Housing.

I. THE EVIDENCE SUPPORTS AN INFERENCE THAT DESTASO/FINE HOUSING EXERCISED CONTROL OVER FOGLE

"Generally, agency is a question of fact." Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 650, 748 S.E.2d 801, 804 (Ct. App. 2013). The South Carolina Supreme Court has clearly stated that "[q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." Fernander v. Thigpen, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (emphasis in original) (quoting Reid v. Kelly & Play Air, Inc., 274 S.C. 171, 174, 262 S.E.2d 24 (1980)). "The existence of an agency relationship is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." Langdale v. Carpets, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011).

"Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." Fernander, at 143, 293 S.E.2d at 426. Furthermore, "[a] true agency

relationship may be established by showing evidence of apparent or implied authority, ***even where the parties have entered an agreement to the contrary***." Id. (emphasis added) (citing Burris v. Texaco, Inc., 361 F.2d 169 (4th Cir. 1966); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939)). "The test to determine agency is whether or not the purported principal has the right to control the conduct of his alleged agent." Id. at 144, 293 S.E.2d at 426.

The evidence in this case shows this is not the typical landlord-tenant relationship where the landlord has no involvement with the operation of the tenant's business. To the contrary, Destaso and Fine Housing exercised enough control over Fogle, their agent, to warrant the denial of summary judgment as the Court cannot find, based on the evidence, that Destaso and Fine Housing exercised no control over Fogle. Id. at 143, 293 S.E.2d at 426. The description of the landlord-tenant relationship in the lease is not determinative of the agency issue because the evidence shows Destaso/Fine Housing exercised control over Fogle. Destaso mandated the use of Fogle as the operations manager of the business as a condition of loaning Robinson money. (Fogle Depo. p. 8, ll. 4-21). Passive landlords do not mandate the tenant's operations manager. In addition, Fogle "reported" to Destaso on a weekly basis regarding the Club's operations. (Fogle Depo. p. 32, ll. 21-23; p. 46, ll. 18-20; p. 89, ll. 9-13). Passive landlords are not "reported" to on a weekly basis regarding the tenant's operations.

Destaso also mandated getting rid of the Hell's Angels Motorcycle Club that previously provided security at the Club after he became involved:

> Q. But ***once Vincent (Destaso) took over***, you told him that you would get these bikers out?
>
> A. I told him we would get the club running the proper way. He said: Well, can you get the bikers out, ***was one of the questions he has, can you get the bikers out, number one***, can you pay me, number two, because you can't pay me if you can't get the bikers out. I said yes.

(Fogle Depo. p. 39, ll. 15-22) (emphasis added). Passive landlords do not mandate the personnel used by the tenant. Destaso's demand that the bikers be removed supports an inference that Destaso and Fine Housing exercised control over the Club's operations.

When the Club experienced financial difficulty following the passage of the 2:00 AM closing time, Fogle, acting as Destaso/Fine Housing's agent, paid Destaso and Fine Housing first. (Fogle Depo. p. 49, ll. 3-15). Fogle, the operations manager, took the business's money and paid Destaso and Fine Housing to the detriment of the employees and owners. Fogle preferring Destaso/Fine Housing to the detriment of others is clearly acting in the best interest of Destaso/Fine Housing, his principal, rather than in the best interest of the business. Finally, Fogle testified that Destaso told him that Destaso needed Fogle to be there "to be sure I get paid." Passive landlords do not need specific individuals to operate the tenant's business to make sure they get paid.

Collectively, this evidence supports an inference, when viewed in a light most favorable to Larsen as the non-moving party, that Destaso/Fine Housing was not a passive landlord but instead exercised control over Fogle and Club's operations. Fogle exercised authority with Destaso's knowledge. Fernander, 278 S.C. at 143, 293 S.E.2d at 426 (noting agency can be proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal). Despite this evidence, the lower court improperly weighed and ignored the evidence, to conclude that Destaso "had no authority regarding the operation or security of the property and thus no duty." (Order p. 8). In support of its grant of summary judgment, the lower court relied on an actual agency case, Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168, 171 (2009). (Order p. 7). Neither in his memorandum in opposition nor at the hearing did Larsen argue exclusively that an actual agency relationship existed between Fogle

and Destaso/Fine Housing. In this case, any type of agency relationship – actual, apparent, or implied – between Fogle and Destaso/Fine Housing warrants the denial of summary judgment. Even if relying on the quote from Jamison, however, regarding whether the principal exercised control, the evidence set forth above regarding security, mandating use of an operations manager, and weekly "report[s]" is sufficient to create an inference of control warranting denial of the summary judgment motion. In addition to relying on Jamison, the lower court stated that "Plaintiffs apparently concede that if Fine Housing, Inc. and Vincent Destaso are considered to be landlords only that no duty is owed . . . ." (Order p. 7). Larsen did not concede this in his memorandum in opposition or at the hearing. (Memo. in Opp.; Tr. pp. 9-12; p. 14)

In its order, the lower court notes that Fogle was an agent for Robinson and guarantor on the loan. (Order p. 7). In addition, according to the order, he was paid for his work by the Club and never received compensation from Destaso or Fine Housing. (Order p. 8). However, this ignores the undisputed fact that Fogle's employment was mandated by Destaso/Fine Housing. The lower court improperly weighed the evidence to hold Fogle was an agent of Robinson, not Destaso or Fine Housing. Fogle may be an agent of Robinson but this does not preclude him from also being an agent of Destaso and Fine Housing. See Roberts v. Case Pro, Inc., 9:13-cv-3394-DCN (Mar. 31, 2016 D.S.C.) (reversing the granting of summary judgment on the basis of dual agency)[2]. The sole issue before the Court was whether Destaso and Fine Housing exercised any control over Fogle, and if not, were they entitled to summary judgment. The evidence set forth above indicates Destaso/Fine Housing exercised considerable control over Fogle that warrants the denial of summary judgment.

[2] A copy of Judge Norton's Order in the case is attached to the Brief as Exhibit 1 as it could not be found on Lexis or Westlaw. (Ex. 1).

"If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury[,] and the grant of summary judgment is inappropriate. Froneberger v. Smith, 406 S.C. 37, 50, 748 S.E.2d 625, 631 (Ct. App. 2013) (reversing the trial court's granting of summary judgment on agency). Given the directive from the Supreme Court that "[q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship," Fernander, 278 S.C. at 142, 293 S.E.2d at 425, the evidence in this case warrants reversal of the lower court's granting of summary judgment.

II. DESTASO AND FINE HOUSING EXERCISED CONTROL OVER THE SECURITY AND AS A RESULT HAD A DUTY TO EXERCISE DUE CARE

Although finding that Destaso/Fine Housing were entitled to summary judgment on the issue of agency, the lower court also held that Destaso and Fine Housing do not have a duty of care as neither had "possession nor control over the activities occurring inside or outside the club."[3] (Order p. 8). As has already been noted, there is evidence, when viewed in a light most favorable to Larsen, that Destaso and Fine Housing exercised control over Fogle and the security. A duty under these facts is supported by South Carolina law.

A. South Carolina Law Supports a Duty to Larsen

In Jackson v. Swordfish Investments, L.L.C., 365 S.C. 608, 620 S.E.2d 54 (2005), the Supreme Court considered a negligence action filed by a nightclub attendee against the commercial landlord for the shopping center property after an assailant entered the nightclub and shot patrons, including the plaintiff. Id. at 611, 620 S.E.2d at 55. The nightclub lessee requested the landlord provide security after numerous crimes occurred in the shopping center property. Id.

[3] Contrary to the lower court's language on page seven (7) of the Order, Larsen does not concede that if Fine Housing and Destaso are landlords then no duty is owed.

at 610, 620 S.E.2d at 55. The defendant-landlord provided security for the common areas and charged the lessee for the cost of security. Id. at 611, 620 S.E.2d at 55. Before the plaintiff's injuries occurred, the defendant stopped providing security because the lessee failed to pay for it. Id. A majority of the Supreme Court held the defendant, a commercial landlord, did not owe a duty to protect the plaintiff from criminal acts occurring inside the premises, "an area which [the defendant] did not control or possess." Id. at 612, 620 S.E.2d at 56.

The Court held that "[a] duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties." Id. at 613, 620 S.E.2d at 56 (citing Cramer I, 312 S.C. at 443, 441 S.E.2d at 319). However, it found the affirmative acts/voluntary undertaking and common areas exceptions did not apply to the facts of the case because the defendant "never agreed to provide security inside the club", an area over which it did not have control or possession, and the plaintiff presented no proof of a breach in the absence of any evidence showing prior criminal activity inside the club rather than on the property common areas. Id. at 613-14, 620 S.E.2d at 56-57. Justice Pleicones dissented, with then-Chief Justice Toal concurring, on the basis that the defendant had a duty to provide reasonable security in the common areas and there is evidence that its "failure to do so allowed the assailant to return to the club and injure" the plaintiff. Id. at 614, 620 S.E.2d at 57. Jackson, which involved a commercial landlord, is significant because it holds that a duty may arise under particular circumstances and the Supreme Court analyzes the exceptions to the general rule. The particular facts of this case are one such example of when a duty arises due to Destaso and Fine Housing's control over Fogle and the security personnel.

The evidence in this case is that Fogle, Destaso and Fine Housing's agent, undertook to provide security for the premises. As to Destaso and Fine Housing specifically, Destaso told Fogle to get rid of the Hell's Angels Motorcycle Club as the Club's security after Destaso became involved. Based on Destaso's instructions, Fogle hired new security at the Club. Eliminating the Hell's Angels as security was Destaso's first priority according to Fogle. (Fogle Depo. p. 39, ll. 15-22). As a result of his involvement in exercising control of the Club's security, Destaso and Fine Housing had an obligation to exercise due care. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("Under common law, even where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care."). Viewing this evidence in a light most favorable to Larsen as the non-moving party, Destaso and Fine Housing were involved with the security and as a result had a duty to Larsen to exercise due care.

B. On the Night of Larsen's Injuries Security Had an Obligation to Keep the Parties Safe

The events of this care are similar to Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996) where this Court affirmed the trial court's denial of Golden Lanes' directed verdict motion. Dalon involved a business invitee at Golden Lanes that was attacked and stabbed by Tommy Carroll, another Golden Lanes patron. Id. at 536, 466 S.E.2d at 370. After presentation of the evidence, Golden Lanes moved for directed verdict on the basis that it "had no reason to foresee that there would be a stabbing on its premises and that its security guard would have prevented the assault if Dalon had not left the security guard's presence." Id. at 537, 466 S.E.2d at 370. Dalon was outside in the parking area when Carroll and some of his friends made vulgar remarks to young women. Id. at 538, 466 S.E.2d at 370. Carroll went up to Dalon, verbally challenged him, and head-butted Dalon in the nose. Id. Dalon could smell

alcohol on Carroll. Id. A fight ensued between two, and during the fight Carroll told Dalon he was going to cut his throat. Id. A security guard from Golden Lanes came outside and broke up the fight. Id. In the presence of the security guard, Carroll again threatened Dalon with cutting his throat. Id. Carroll went inside after being told by the security guard to do so. Id. Carroll came back outside, pulled out a knife, and charged at Dalon. Id. at 538, 466 S.E.2d at 371. At that time, Dalon ran from the security guard into the bowling alley. Id. Carroll followed him and stabbed him. Id.

This Court noted that a business owner "is generally not charged with the duty to protect his customers against criminal attacks by third parties ***unless he knows or has reason to know that criminal acts were occurring or about to occur.***" Id. at 539, 466 S.E.2d at 371 (emphasis added). In affirming the trial court's denial of Golden Lanes' directed verdict motion, this Court noted that "[r]ather than escort Carroll from the scene, the officer sent him back inside the bowling alley and began to question Dalon." Id. The Court held there "is more than one reasonable inference to be drawn from the evidence in this case as to whether Golden Lanes exercised reasonable care in providing security under the circumstances. . . ." Id. at 540, 466 S.E.2d at 371.

A similar holding is warranted here as Respondents had reason to know a criminal act was about to occur. In this case, Respondents' security personnel, mandated by Destaso and Fine Housing, took control of the situation following the initial scuffle and ordered Anderson to leave. (2d Amd. Compl. ¶ 16). Anderson went outside and waited in the parking lot for Westervelt and Larsen. (2d Amd. Compl. ¶ 17). Respondents' security personnel observed Anderson and were aware he was waiting for Westervelt and Larsen in the parking lot. (2d Amd.

Compl. ¶ 18). Shortly thereafter, Respondents' security personnel ordered Larsen and Westervelt to leave, aware they would have to encounter Anderson. (2d Amd. Compl. ¶ 19).

As Respondents' security personnel watched, Anderson provoked an argument with Westervelt as he and Larsen were leaving. (2d Amd. Compl. ¶ 20). Anderson fell to the ground and Larsen and Westervelt walked on. (2d Amd. Compl. ¶ 21). An angry and rowdy crowd formed around Anderson, Westervelt, and Larsen. (2d Amd. Compl. ¶ 21). Security personnel made no effort to stop Anderson or stop the crowd from forming around Anderson. (2d Amd. Compl. ¶ 22). The security personnel had an obligation to exercise due care and escort Larsen from their premises. They did not do so, which resulted in Larsen's serious brain injury. The lower court's finding that no duty was owed should be reversed.

CONCLUSION

The evidence in this case, when viewed in a light most favorable to Larsen as the non-moving party, supports an inference that Destaso and Fine Housing exercised control over Fogle. Destaso mandated Fogle serving as the operations manager as a condition of his loan. Fogle reported to Destaso weekly regarding the operations, and getting rid of the Hell's Angels as security was Destaso's number one priority. By exercising control over the security, Destaso and Fine Housing had an obligation to exercise due care. For these reasons, the lower court's granting of summary judgment should be reversed.

[SIGNATURE PAGE TO FOLLOW]

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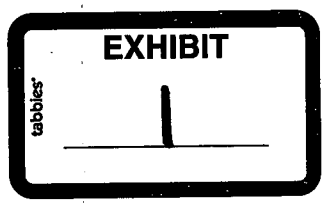
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

LATTANNISHA ROBERTS Plaintiff, vs. CASE PRO INCORPORATED, THE UNITED STATES OF AMERICA, and THE UNITED STATES NAVAL HOSPITAL, Defendants.	)	No. 9:13-cv-3394-DCN
CHRISTOPHER D. MILLER, Plaintiff, v. CASE PRO INCORPORATED, THE UNITED STATES OF AMERICA, and THE UNITED STATES NAVAL HOSPITAL, Defendants.	)	No. 9:13-cv-3395-DCN **ORDER**



This matter is before the court on plaintiffs Lattannisha Roberts and Christopher D. Miller's ("plaintiffs") identical motions to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). For the reasons set forth below, the court grants plaintiffs' motions.

I. BACKGROUND

On February 24, 2012, Kalvin Hunt ("Hunt") was accompanied to the Beaufort Naval Hospital (the "naval hospital") by Edward Ray ("Ray"), an employee

of the Beaufort County Office of Veteran's Affairs. While Hunt was being interviewed by Nurse Saundra Smith ("Smith"), he indicated that he wanted to hurt himself, at which point Smith took Hunt and Ray to the emergency department. In the emergency department, Nurse Janice McDonald ("Janice") again asked Hunt if he had thoughts about hurting himself, to which he responded that he did. Janice turned Hunt over to Nurse Joe McDonald ("Joe") who took Hunt to be evaluated by Dr. Christian Jansen ("Jansen"). During the course of his evaluation, Jansen noted that Hunt had suicidal thoughts and thoughts of hurting others and called for a psychiatric technician to evaluate Hunt. Psychiatric technician Arthur Manning ("Manning") evaluated Hunt and recommended he be admitted, at which point Dr. Beverley Hendelman, the on-duty psychiatrist, accepted the recommendation and relayed the decision to Jansen.

While Jansen was making arrangements for Hunt's admission, Ray asked Joe if he and Hunt could go outside for some fresh air, and Joe said that they could. Once outside, Hunt ran from Ray towards the front gate and took control of an unattended fire truck that was being used in a response to a nearby emergency call. Hunt drove the fire truck down Ribault Road at a high speed, colliding with many cars, including one driven by plaintiff Lattannisha Roberts. Hunt also struck and killed pedestrian Justin Miller, whose brother, plaintiff Christopher D. Miller, was nearby.

On December 4, 2013, plaintiffs filed the instant actions against defendant CasePro, Inc. ("CasePro"), an employment agency that hired Jansen, Joe, and Janice to work at the naval hospital and paid their wages. Plaintiffs brought claims against CasePro for negligence and negligent undertaking of a duty. CasePro moved for

summary judgment in both cases on January 6, 2015 and filed a supplemental motion for summary judgment on May 5, 2015. Plaintiffs each responded on May 12, 2015, and CasePro filed a reply on May 22, 2015.

On July 23, 2015, the court issued an order granting CasePro's motions for summary judgment. In its summary judgment order, the court found that CasePro could not be responsible under the doctrine of respondeat superior because CasePro did not control any aspect of Jansen, Joe, or Janice's work. ECF No. 82 in 9:13-cv-03394; ECF No. 77 in 9:13-cv-03395, Summary Judgment Order at 7. On August 20, 2015, plaintiffs filed the instant motions to alter or amend the judgment. CasePro responded on September 4, 2015. The matter is now ripe for the court's review.

II. STANDARD

While Rule 59(e) does not provide a standard under which a district court may alter or amend a judgment, the Fourth Circuit has recognized that a court may grant a Rule 59(e) motion "only in very narrow circumstances: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law or prevent manifest injustice." Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002). Rule 59(e) motions may not be used, however, to make arguments that could have been made before the judgment was entered. See Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Moreover, "[a] party's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion, and such a motion should not be used to rehash arguments previously presented or to submit evidence which should have been

previously submitted." Sams v. Heritage Transp., Inc., No. 2:12-cv-0462, 2013 WL 4441949, at *1 (D.S.C. August 15, 2013).

Rule 59(e) provides an "extraordinary remedy that should be used sparingly." Pac. Ins. Co., 148 F.3d at 403 (internal citation omitted); Wright v. Conley, No. 10-cv-2444, 2013 WL 314749, at *1 (D.S.C. Jan. 28, 2013). Whether to alter or amend a judgment under Rule 59(e) is within the sound discretion of the district court. See, e.g., Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005).

III. DISCUSSION

Plaintiffs argue that the court erred in applying the "loaned employee doctrine" and in subsequently finding that CasePro was not responsible for Jansen, Joe, or Janice's actions because it did not have the right to control "any aspect of Dr. Jansen, Joe, or Janice's work." Pl.'s Mot. 2–3. In granting CasePro's motions for summary judgment, the court relied on the South Carolina Supreme Court's decision in Parker v. Williams & Madanick, Inc., 239 S.E.2d 487, 489 (S.C. 1977). In Parker, the court stated:

> While it is clear an employer may lend his employee to another so as to be relieved from liability for an injury caused by the negligence of the employee in performing work for the other, . . . , it is equally true that an employer may direct his employee to go upon the premises of another and perform work there under the general supervision of the other person without severing the employment relation between the employer and the employee.

Id. The court next observed that to resolve this distinction, one must determine which employer controls the employee "with regard not only to the work to be done but also the manner of performing it." Id. (quoting Parker, 239 S.E.2d at 489). The court observed that the contract between CasePro and the government gave the government "nearly exclusive control" over the employees. Id. at 6–7. The court then determined

that, because "there is no indication in the record that CasePro can control any aspect of Dr. Jansen, Joe, or Janice's work," there was no basis for finding CasePro liable. Id. at 7.

In Williams v. Grimes Aerospace Co., the court explained that:

> Under the common law, "[a] dual employment relationship may exist if more than one individual or company has the right to control or direct an employee in the performance of the work.' [] Such a relationship "may exist if two employers exercise substantial control over the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties."

988 F. Supp. 925, 936–37 (D.S.C. 1997) (quoting 27 Am. Jur. 2d Employment Relationship § 5 (1996)). Because the dual employment doctrine requires both "the power to discharge the employee" and the power to "control[] the employee in the performance of his or her duties," id., it might be argued that this court disposed of plaintiffs' dual employment theory by finding there was no evidence that CasePro controlled any aspect of Jansen, Joe, or Janice's work. Summary Judgment Order at 7.

However, upon closer inspection, it is apparent that the court did not consider the "dual employment" doctrine. As an initial matter, the court did not discuss the doctrine or cite any case law that did so. See id. at 5–6 (citing Parker, 239 S.E.2d at 489; Foreman v. Atl. Land Corp., 245 S.E.2d 609, 611 (S.C. 1978); Allen v. Greenville Hotel Partners, Inc., No. 6:04-1260, 2006 WL 1817804, at *4 (D.S.C. June 30, 2006)). Additionally, the court's analysis focused almost exclusively on the government's ability to control Jansen, Joe, and Janice, relegating its discussion of CasePro's control to a single paragraph, in which it effectively determined that, because CasePro had less control than the government, it had no control at all. Id. at

7. This analysis does not suggest that the court considered the possibility that both the government and CasePro might be vicariously liable.

Even if the court's analysis were read to address the dual employment theory, the court now finds that such analysis was in error. Control can be exercised in many forms, and as the Grimes court recognized, the control exercised by a "temporary service agency" over the workers it supplies may be sufficient to constitute "employment" under South Carolina law.[1] Grimes, 988 F. Supp. at 937 (citing Kilgore Grp., Inc. v. S. Carolina Employment Sec. Comm'n, 437 S.E.2d 48, 49 (1993)). In Kilgore, as in this case, "[t]he client[] controlled the day-to-day activities of the workers," while the staffing company paid the workers' wages. Kilgore, 437 S.E.2d at 49. Thus, the fact that the contract between CasePro and the government subjected the workers to the government's "day-to-day supervision and control" does not prevent a finding that CasePro was a dual employer. See CasePro's Mot. Ex. B at 21.

The court recognizes that there is certainly more evidence of the government's control than of CasePro's control. Nevertheless, plaintiffs have highlighted language in CasePro's employee offer letters stating that "[b]y accepting employment with CasePro, Inc. you will be subject to the Company's policies as set out in its Employee

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[1] While CasePro points out that Grimes involved questions of federal employment law, it ignores the fact that Grimes also involved statutory and common law claims. Grimes, 988 F. Supp. at 930 (noting claims for breach of contract, breach of implied covenant of good faith and fair dealing, violation of wage payment statute, unjust enrichment, and personal injury). In addressing these claims, the Grimes court explicitly recognized the dual employment doctrine "under the common law." Id. at 936. Thus, plaintiffs have pointed to at least one court applying the dual employment doctrine under South Carolina law.

The court recognizes that the South Carolina courts have not offered a great deal of guidance on the dual employment doctrine. Nevertheless, in an effort to allow the parties to further develop the issue, the court finds it appropriate to follow Grimes and assume the doctrine is viable under South Carolina law for the time being.

Manual and the requirements of the subject contract." Pls.' Resp. Exs. O, P. As the court noted in its Summary Judgment Order, plaintiffs have not provided the Employee Manual itself, but it is not necessary for plaintiffs to prove their entire case at this juncture. All that is necessary is sufficient evidence by which "the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court finds that such evidence exists here. CasePro clearly had the power to impose policies and conditions through its Employee Manual. Pls.' Resp. Exs. O, P. Whether it chose to micromanage its employees or not is simply a question of the type of control it chose to exercise. That question is secondary to the fact that it had the power to make such a choice in the first place.

While CasePro may have ceded some of this power through its contract with the government, it is not as if this arrangement granted the government unlimited control over either CasePro or the employees. On the contrary, the government was necessarily constrained by the language of the contract and could not unilaterally expand the control it exercised over the employees. Thus, CasePro retained whatever residual control was not accounted for by the contract. It is also undisputed that CasePro retained the ability to terminate Jansen, Joe, and Janice, which further suggests that CasePro was acting as a dual employer. See Grimes, 988 F.Supp. at 937 (recognizing the "power to discharge" as one component of the "substantial control" required under the dual employment doctrine). Because plaintiffs have produced at least some evidence of their control over Jansen, Joe, and Janice, and because the court is not permitted to weigh the evidence at this stage in the proceedings, the court finds that it committed a clear error by failing to conduct a proper analysis of the dual

employment doctrine and failing to credit the above described evidence in its July 23, 2015 order.

Finally, the court notes that it finds 10 U.S.C. § 1089 to be of little value here. That section does limit the causes of action available in personal injury actions involving healthcare workers like Jansen, Joe, and Janice, who work under a personal services contract entered into pursuant to 10 U.S.C. § 1091. However, § 1089 does not apply to the cause of action against CasePro. The operative language of § 1089 provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces [or] the Department of Defense . . . in the performance of medical, dental, or related health care functions . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

10 U.S.C. § 1091(a) (emphasis added). As the plain language suggests, and this court has explained, § 1091 simply "limits remedies against individual healthcare providers"—i.e. Jansen, Joe, and Janice. Roberts v. United States, No. 9:13-CV-3394, 2015 WL 4546038, at *4 (D.S.C. July 28, 2015). The section says nothing about an individual healthcare provider's dual employers, and granting such employers protection would appear unrelated to the statutory purpose of "shield[ing]

[a] precisely drawn class[] of employees from the threat of personal liability." Id. (quoting Levin v. United States, 133 S. Ct. 1224, 1228 (2013)).

IV. CONCLUSION

For the foregoing reasons, the court **GRANTS** plaintiffs' motions to alter or amend the court's prior grant of summary judgment, and **DENIES** CasePro's motion for summary judgment.[2]

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March 31, 2016
Charleston, South Carolina

[2] The court notes that CasePro's response to the instant motion ignored a number of alternative arguments that it originally advanced in connection with its original motion for summary judgment. While the court did not consider such arguments in deciding the instant motion, it finds that they are preserved for the purposes of any future summary judgment motion CasePro may wish to bring.

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Re: ***Robert Larsen and Marie Larsen v. Nudo Nympha, et al.***
Civil Action No.: 2015-CP-10-02050
Appellate Case No. 2017-000988

Dear Ms. Kitchings:

Please find enclosed the original and two copies of ***Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal,*** and ***Certificates of Service*** in the above referenced matter. Please file the originals and return clocked-in copies of each in the envelope provided.

By copy of this letter, Appellants' Initial Brief and Designation of Matter are being served on all counsel of record.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: J. Boone Aiken, III, Esquire
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