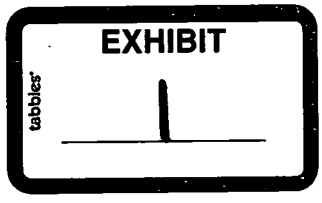
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

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

[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.

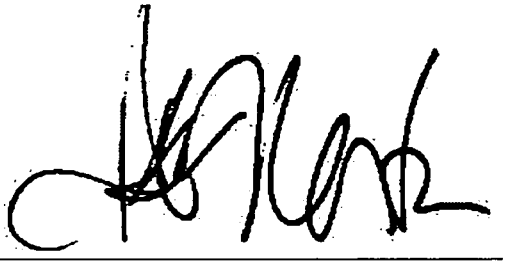
10 U.S.C. § 1091(a) (emphasis added). As the plain language suggests, and this court has explained, § 1091 simply "limits remedies against individual healthcare providers"—i.e. Jansen, Joe, and Janice. Roberts v. United States, No. 9:13-CV-3394, 2015 WL 4546038, at *4 (D.S.C. July 28, 2015). The section 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.