IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas



J. Cordell Maddox, Jr., Circuit Court Judge

---

Appellate Case No.: 2019-002099

---

Machelle Smith.....Appellant,

-v-

Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts and Spa;
Columbia Sussex Management, LLC; and,
Columbia Properties Hilton Head, LLC.....Respondents

---

**RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL**

---

Respondents Columbia Sussex Corp. d/b/a Hilton Head Marriott Resorts and Spa, Columbia Sussex Management, LLC, and Columbia Properties Hilton Head, LLC ("Respondents") have moved the Court pursuant to Rule 240, SCACR, for an Order dismissing the above-captioned appeal. In doing so, Respondents maintain that the issue of whether the Innkeeper Statute, S.C. Code Ann. § 45-1-40, provides immunity to an innkeeper when one of its employees steals a guest's possessions has not been preserved for review, despite the fact that the issue was raised by Respondents and ruled upon by the trial court in their motion for summary judgment. For the foregoing and following reasons, the Respondents' motion should be dismissed.

## COUNTER STATEMENT OF FACTUAL/PROCEDURAL BACKGROUND

The events giving rise to this action relate to the theft of jewelry from Appellant while she was a guest at Respondents' hotel property on Hilton Head, South Carolina. (Ex. A, Compl. ¶¶ 1-6). After checking into her room, Appellant visited the hotel's spa. (*Id.* at ¶ 6). Upon returning, she found that her jewelry had been stolen from her suitcase. (*Id.*). Later, Appellant learned that an employee of Respondents, Briana Cohen, had stolen the jewelry after gaining access to the room with an employee key issued to her by Respondents. (*Id.* at ¶¶ 7-8). Appellant filed this action against Respondents in the Beaufort County Court of Common Pleas on March 31, 2016, alleging theories of negligence and negligent supervision, hiring, and retention. (*Id.* at ¶¶ 9-17).

Respondents moved for summary judgment on August 28, 2018, noting in their motion that the "parties disagree about the applicability of the Innkeeper statute in limiting liability in this case." (Ex. B, Defs.' Mot. for Summ. J.). In the accompanying memorandum, Respondents raised the issue of the applicability of the Innkeeper Statute's limitation of liability, arguing that the limitation should apply even if the theft is perpetuated by one of the innkeeper's own employees.[1] (Ex. C, Defs.' Mem. in Supp. of Mot. for Summ. J. at 6-10) Under Respondents' reasoning, the statute absolved them of any liability for the theft of jewelry by an employee, as opposed to the "innkeeper" itself, making dismissal of the action through summary judgment appropriate. Respondents also argued that the acts of Ms. Cohen were outside the scope of the master-servant relationship and that they were not negligent in her hiring, supervision, or retention. (*Id.* at 10-14).

[1] The statute provides that "any innkeeper who by his own willfulness contributes to the loss or damage to the personal property of a guest shall not have his liability limited in any manner by the provisions of this section." S.C. Code Ann. § 45-1-40.

Due to a conflict with Appellant's counsel, the court agreed to resolve the motion for summary judgment on the briefs. (Ex. D, Email Correspondence). The court subsequently granted Respondents' motion. In its order, the court found that the language of the Innkeeper Statute mandates limited liability for innkeepers, even if the loss was caused by the wrongful acts of the innkeeper's employee. (Ex. E, Feb. 5, 2019 Order at 10). The court also found that Respondents were not liable for the acts of their employee under a theory of respondeat superior, and that they were not negligent in the hiring, supervision, and retention of Ms. Cohen. (*Id.*).

On February 15, 2019, Appellant filed a motion for reconsideration pursuant to Rule 59(e), SCRCP. (Ex. F, Pl.'s Mot. for Reconsideration). In her motion, Appellant responded to the issues raised by Respondents in their previously filed motion for summary judgment. In particular, Appellant waived her claims of negligent supervision, hiring, and retention and countered the court's finding that the Innkeeper Statute's limitation of liability applied to the willful acts of the "innkeeper's" employees. Appellant also contested that Respondents were liable for the acts of their employee under the doctrine of respondeat superior, as originally set forth in Appellant's complaint. The court denied Appellant's motion on November 18, 2019. (Ex. G, Nov. 18, 2019 Order).

The Notice of Appeal was filed on December 23, 2019. On January 23, 2020, Appellant filed a Motion for Extension of Time, which was granted by the Court. On February 24, 2020, Appellant's Initial Brief was filed with the Court. After the filing of Appellant's Initial Brief, Respondents moved to dismiss the Appeal on March 19, 2020, maintaining that the issue of whether the Innkeeper Statute's limitation of liability absolves the innkeeper of the wrongful acts of its employees was not preserved for review, despite being raised by its motion for summary

judgment, analyzed by the court's February 5, 2019 order, and initially briefed by Appellant before this Court.

## ARGUMENT

The issue of whether the Innkeeper Statute limits the liability of an innkeeper for the acts of its employees was raised for the first time in Respondents' motion for summary judgment. Since the issue was raised by Respondents and ruled upon by the trial court in its order, it is preserved for review. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (emphasis added). Furthermore, a party cannot use a motion to reconsider a judgment to present an issue that could have been raised prior to judgment but was not. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).

The facts presently before the Court distinguish this appeal from the precedents cited by Respondents in their motion. In all four cases cited by Respondents, the courts addressed issues, or questions of law, that had not been preserved for review or ruled upon by the trial court. None of the cited cases found that a particular viewpoint regarding one side of an issue that had previously been raised must have been presented to the trial court in order for the issue to be considered on appeal. And South Carolina law has never held that a party must effectively argue one side of an issue for it to be preserved for review. If the procedural posture of this case had been different in the trial court, and Respondents' motion had been denied, Respondents without question could have appealed the court's decision, as the limitation of liability issue had been raised and ruled upon by the trial court. The fact that Appellant's counsel did not brief the issue does not mean the issue itself was not preserved for review. In a converse analogy, if

Respondents' counsel failed to respond to a motion to alter/amend, Respondents would not be deemed to have waived or consented to any arguments raised in the motion by failing to file a reply memorandum, and the issues raised in the motion would be preserved for review.

In fact, the trial court's opinion did not rule or find that the issue was not briefed by Appellant, nor did the opinion find that Appellant consented to Respondents' arguments or waived her arguments regarding the Innkeeper Statute. There was no finding by the trial court that Appellant consented to Respondents' arguments through silence. In its summary judgment order, the trial court engaged in a lengthy analysis of the legal basis for its decision, including its finding that the Innkeeper Statute protects "innkeepers" from liability for the thefts of their employees. (Ex. E, Feb. 5, 2019 Order at 6-10). In their Motion to Dismiss, Respondents state that the trial court order was drafted by Respondents themselves, yet they did not include findings that Appellant had waived her arguments or consented to Respondents' arguments. Instead, Respondents have chosen to wait until after Appellant has filed her Initial Brief to file their Motion, claiming that an issue that was argued by Respondents and ruled on and analyzed by the trial court, in an order drafted by Respondents themselves, is now unpreserved for review by the Court.

Additionally, Appellant's argument that the Innkeeper Statue does not limit an innkeeper's liability for the theft of guest property by an employee was raised by Appellant and ruled upon by the trial court in its denial of Appellant's motion for reconsideration. South Carolina precedents hold that an issue cannot be presented for the first time in a motion for reconsideration; however, it does not prevent Appellant from taking a counter-position on an issue Respondents admitted "was in dispute" in a motion for reconsideration, especially when the very same issue was previously raised by Respondents and ruled upon by the trial court.

Respondents cite to *Pye* for the proposition that an argument must have been presented in opposition to summary judgment and in a motion for reconsideration for it to have been preserved for review. However, "[t]he purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Pye*, 369 S.C. at 565, 633 S.E.2d at 510. In order to properly make a decision that the Innkeeper Statute limits liability for the thefts of an innkeeper's employees, the trial court must have considered the issue in dispute. Thus, Appellant's argument should have been properly encompassed by the trial court's decision to grant summary judgment and was suitable for reconsideration by the trial judge. Regardless, since the issue of whether the Innkeeper Statute's protections extend to instances where an employee steals a guest's property was raised by Respondents and ruled upon in the initial summary judgment opinion, the issue has been preserved for the Court's review.

## CONCLUSION

The issue of whether the Innkeeper Statute's limitation of liability extends to the wrongful acts of an innkeeper's employees was raised and ruled upon by the trial court and is preserved for review. For the foregoing reasons, Appellant respectfully requests that the Court deny Respondents' Motion to Dismiss Appeal.

Respectfully submitted,

**[SIGNATURE TO FOLLOW ON NEXT PAGE]**

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

May 7, 2020
Hampton, South Carolina

BY: _____

John E. Parker, Jr.
101 Mulberry St. East
P.O. Box 457
Hampton, SC 29924
Phone: (803) 943-2111
jayparker@pmped.com
ATTORNEY FOR THE APPELLANT

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF BEAUFORT | ) | CIVIL ACTION NO.: 2016-CP-07-_____ |
| | ) | |
| Machelle Smith, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | **COMPLAINT** |
| v. | ) | *(Jury Trial Requested)* |
| | ) | |
| Columbia Sussex Corporation d/b/a Hilton Head Marriott Resort & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC, | ) | |
| | ) | |
| Defendants. | ) | |



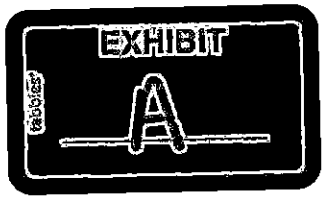
The Plaintiff alleges and would show unto this honorable Court as follows:

1. That the Plaintiff is a citizen and resident of Florence County, South Carolina.

2. That the Defendant Columbia Sussex Corporation d/b/a Hilton Head Marriott Resort & Spa (hereinafter, "the Marriott") is a corporation organized and existing under the laws of the state of Kentucky, but which owns property and operates a business within Beaufort. More specifically, Defendant Marriott owns, operates, manages, and controls the Hilton Head Marriott Resort located at One Hotel Circle, Hilton Head Island, S.C.

3. That the Defendant Columbia Sussex Management, LLC (hereinafter, "Columbia Management") is a corporation organized and existing under the laws of the state of Kentucky, but which operates as a business within Beaufort. More specifically, upon information and belief, Defendant Columbia Management operates, manages, and controls the Hilton Head Marriott Resort located at One Hotel Circle, Hilton Head Island, S.C.

4. That the Defendant Columbia Properties Hilton Head, LLC d/b/a Hilton Head Marriott Resort and Spa (hereinafter, "Columbia Properties") is a corporation organized and existing under the laws of the state of Delaware, but which owns property and operates a business within Beaufort. More



specifically, Defendant Columbia Properties owns, operates, manages, and controls the Hilton Head Marriott Resort located at One Hotel Circle, Hilton Head Island, S.C.

5. That the above named Defendants shall hereinafter be referred to collectively as "Defendants" and/or "Hilton Head Marriott."

6. That on or about April 26, 2013, the Plaintiff Machelle Smith and her husband were paying guests and customers at the Defendants' hotel property located on Hilton Head Island, S.C., while her husband attended a medical convention. After checking in to Room 618, the Plaintiff attended a spa treatment. Upon return to her room, she found that her jewelry, which had been tucked deep inside her suitcase within the room, had been stolen.

7. Upon reporting the theft to the Defendants, it was learned that an employee, agent, servant, and/or representative of the hotel, Briana Cohen, had utilized her employee room key to gain access to the room, thereby stealing the Plaintiff's jewelry.

8. That at all times relevant herein Briana Cohen was an employee, agent, servant, and/or representative of the Defendants. Furthermore, at all times described herein, Cohen was at the time on the clock, under the actual control, custody and supervision of the Defendants. Additionally, the means of access was a room key issued to her by the Defendants and for which the Defendants were responsible for the key's use.

9. At all times in the hiring, retention, and supervision of Cohen, the Defendants had a duty and responsibility to exercise care and caution in the hiring, supervision, and retention of Cohen as an employee who as part of job was given access to the hotel rooms occupied by the Defendants' guests.

10. But for the Defendants' negligent hiring, supervision, and retention of Cohen and providing her with access cards/keys to guests' rooms, the theft of the Plaintiff's personal items and jewelry would not have occurred.

11. Defendants owed to the Plaintiff duties arising out of contract; duties by undertaking; legal duties; non-delegable duties; and/or vicarious duties, one or more of which were breached by the Defendants.

12. Defendants are responsible for the acts and omissions of its agents and/or employees under the doctrine of *respondeat superior.*

13. Prior to April 26, 2013, the Defendants either knew or should have known that its employee/servant/agent/representative Cohen had, or was capable of, and had the criminal propensities, ideations, and proclivities to engage in activities and actions that would result in harm to the Plaintiff and other guests, and furthermore that such criminal proclivities and propensities should have precluded her from being employed by the Defendants and being entrusted with room keys that would provide access to guests' rooms and their personal belongings stored therein.

14. As a result of the acts and omissions of its employee/agent/servant/representative under the theory of *respondeat superior*, as well as through the acts and omissions of the Defendants themselves in negligently, recklessly, willfully, and wantonly hiring, supervising and retaining its agent Cohen, the Plaintiff suffered damages in the theft of her personal property of jewelry, such damages being comprised of the actual value of the items, as well as sentimental and personal values attached to the jewelry.

**FOR A FIRST CAUSE OF ACTION**
**(Negligence)**

15. Plaintiff realleges each and every allegation of the Complaint as if stated within this cause of action herein verbatim.

16. Plaintiff Machelle Smith is informed and believes that the Defendants Hilton Head Marriott were negligent, careless, reckless, willful, wanton, and grossly negligent in at least one of the following ways:

a. In failing to use that degree of care and caution that an ordinarily prudent corporation or person would have exercised under the same or similar circumstances;

b. In entrusting to its employee/agent/servant/representative a room key or access card to access guests' rooms and personal belongings when the Defendants knew, or should have known, of Cohen's proclivities to engage in criminal acts similar to the conduct causing injury to the Plaintiff;

c. In failing to properly perform employment or background checks and hiring Cohen, when cursory inspection of public records would have shown criminal proclivities.

d. In failing to properly perform and adequately supervise and train Cohen.

e. In failing to adequately maintain control over its employees.

f. In failing to adequately prevent the use of its room keys and access cards to prevent their use in theft;

g. In such other and further ways as the evidence at trial will prove.

17. As a direct and proximate result of the negligence of the Defendants, whether under a theory of *respondeat superior* or through independent acts and omissions of the Defendants' own negligent, reckless, willful, wanton, and grossly negligent conduct, the plaintiff Machelles Williams is informed and believes that she is entitled to fair and just compensation for the actual damages sustained as a result of the loss of her personal property, and requests an award of damages against the Defendants, plus punitive damages, in amount to be determined by the jury.

WHEREFORE, Plaintiff requests a jury trial, and prays for the award of actual and punitive damages, plus the costs of this action, and for such other and further relief as the Court deems appropriate, the sum total of any and all such damages not to exceed Seventy Four Thousand – Five Hundred and no/100 ($74,500.00) Dollars.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____

Matthew V. Creech
690 North Green Street
Post Office Box 2500
Ridgeland, SC 29936

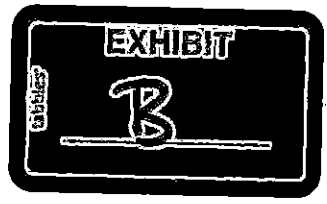
(843) 726-6131

ATTORNEYS FOR PLAINTIFF

March 31, 2016

Ridgeland, S.C.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF BEAUFORT | ) | FOURTEENTH JUDICIAL CIRCUIT |
| Machelle Smith, | ) | Civil Action No.: 2016-CP-07-0777 |
| Plaintiff, | ) | |
| vs. | ) | **MOTION FOR SUMMARY JUDGMENT** |
| Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC, | ) | |
| Defendants. | ) | |




Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Columbia Sussex Management, LLC (the real party in interest), on behalf of itself and Defendants Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; and Columbia Properties Hilton Head, LLC ("Defendants") moves this Court for an order granting summary judgment in favor of Defendants in the above-captioned matter upon the grounds that there exists no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law in its favor. Summary judgment is appropriate where it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

The parties disagree about the applicability of the Innkeeper statute in limiting liability in this case.

Defendants would argue that they are immune from liability because, inter alia, they complied with the Innkeeper Statute and provided written notice to guests that a safe was available to secure valuables. Plaintiff's failure to avail herself of that safe was the proximate cause of the loss. The Innkeeper Statute shields Defendants from liability where notice is properly posted, and negligent hiring and supervision are not applicable where the legislature has

enacted the Innkeeper statute with the express purpose of limiting common law liability.

There is only one South Carolina case interpreting the statute. As such, to facilitate resolution of this case, Defendants would respectfully request the Court to rule expressly on the applicability of that statute.

Additionally, Defendants aver Plaintiff has not demonstrated the existence of a colorable duty of law as it pertains to any duty relating to pre-employment background checks.

This motion is based upon the pleadings, the affidavits attached hereto or which will be served prior to the hearing, memoranda of law in support of this motion and attachments thereto, Rule 56 of the South Carolina Rules of Civil Procedure, and any such additional law and argument as shall be appropriate.

Defendants respectfully request arguments on their Motion. Defendants reserve the right to amend this Motion and the attached Memorandum prior to argument and disposition of the motion. Further, Defendants reserve the right to supplement its arguments by a written memorandum of law, affidavits, and other materials permitted under Rule 56 of the South Carolina Rules of Civil Procedure.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

By: */s Christian Stegmaier*
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
KELSEY J. BRUDVIG
SC Bar No. 101680
kbrudvig@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR COLUMBIA SUSSEX MANAGEMENT, LLC (THE REAL PARTY IN INTEREST) AND COLUMBIA SUSSEX CORPORATION D/B/A HILTON HEAD MARRIOTT RESORTS & SPA AND COLUMBIA PROPERTIES HILTON HEAD, LLC

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Columbia, South Carolina
August 27, 2018

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF BEAUFORT | ) | FOURTEENTH JUDICIAL CIRCUIT |
| | ) | |
| Machelle Smith, | ) | Civil Action No.: 2016-CP-07-0777 |
| | ) | |
| Plaintiff, | ) | |
| | ) | **DEFENDANTS' MEMORANDUM IN** |
| vs. | ) | **SUPPORT OF MOTION FOR SUMMARY** |
| | ) | **JUDGMENT** |
| Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

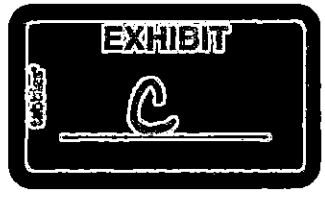
TO: MATTHEW V. CREECH, ESQUIRE, COUNSEL TO PLAINTIFF:

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Columbia Sussex Management, LLC (the real party in interest), on behalf of itself and Defendants Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; and Columbia Properties Hilton Head, LLC ("Defendants") move this Court for an order granting summary judgment in the above-referenced case.

Defendants assert that they are immune from liability. Defendants specifically aver that they complied with the Innkeeper Statute and provided written notice to guests that a safe was available to secure valuables. Plaintiff's failure to avail herself of the in-room safe was the proximate cause of the loss.

Further, there is no evidence that the alleged conduct of Defendants' employee was in furtherance of Defendants practice or for the benefit of Defendants and, therefore, Defendants are not liable under the theory of *respondeat superior.*

Finally, Plaintiffs have failed to establish an affirmative duty owed by Defendants to Plaintiff and a breach of any alleged duty that proximately caused Plaintiff's damages.



Accordingly, Plaintiff's claim for negligent hiring, supervision, and retention fails as a matter of law.

Defendants submit the following memorandum of law in support of their motion.

## FACTS/ PROCEDURAL BACKGROUND

Plaintiff Machelle Smith ("Plaintiff"), a hotel guest of Defendants, avers that her jewelry and cash were stolen from her hotel room by hotel housekeeper Briana Cohen,[1] an employee of Defendants, on April 26, 2013, at the Hilton Head Marriott. She alleges Defendants were negligent in hiring, supervising, and retaining employee Cohen and alleges vicarious liability and *respondeat superior*. [Complaint ¶ 10, 11, 12]. Defendants assert immunity from liability for the theft under the Innkeeper Statute because Plaintiff failed to place her valuables in the room safe. [Answer ¶ 30, 31].

On or about April 26, 2013, Plaintiff and her husband checked into room 618. [Complaint ¶ 6; **Exhibit A**, Plaintiff's Deposition Transcript, p.16, line 22]. Each room has a sign on the back of the door that a safe is provided for valuable items and that, should guests not utilize the safe, the hotel is not liable for any loss. [**Exhibit B**, Photographs]. Prior to attending a spa treatment, Plaintiff removed her jewelry. [Complaint ¶ 6; **Exhibit A**, p. 26, lines 11-13]. Plaintiff stated her jewelry included her diamond band wedding ring, diamond engagement ring, emerald and diamond ring, and a diamond pendant. [**Exhibit A**, p. 17, lines 12-14]. She could not locate the safe; rather, Plaintiff decided to hide her jewelry in the pockets of her suitcase. [**Exhibit A**, p. 27, line 19 – p. 28, line 6; **Exhibit C**, Guest Statement Report]. During Plaintiff's spa appointment, her husband attended meetings at a medical conference. [**Exhibit A**, p. 26, lines 8-14; p. 29 lines 6-7]. When Plaintiff and her husband returned to the room, they noted the

[1] Cohen was neither charged with a property offense, such as larceny, nor were Plaintiff's alleged stolen jewelry or cash recovered from Cohen.

deadbolt was in the door as if to keep the door ajar but did not think anything of it because the housekeeping cart was on the floor, and they assumed the room was being cleaned. [**Exhibit D**, Police Report, Interview with Machelle Smith]. Plaintiff avers that she immediately realized her jewelry—which was stored in her suitcase—was missing upon her return to the room. (**Exhibit A**, p. 30, lines 5-7).

After discovering that her jewelry was missing, Plaintiff's husband contacted an employee, who returned to Plaintiff's room with her husband, and reported to the employee what happened. (**Exhibit A**, p. 33, line 4-9). Law enforcement subsequently arrived and placed the hotel on lockdown. (**Exhibit A**, p. 33, line 21 – p. 34, line 18). Law enforcement advised Plaintiff that an employee, Cohen, ran out of the hotel and that law enforcement were completing a search of Cohen's vehicle, cart, and other parts of the premises. (**Exhibit A**, p. 35, line 9-15).

During law enforcement's investigation, it was discovered that Cohen used a housekeeping key to enter Plaintiff's room. [**Exhibit D**, Police Report, Interview with General Manager; **Exhibit E**, Hotel Incident Report]. However, Cohen denied entering Plaintiff's room and stated that someone must have taken her key from her cart. While Cohen's belongings were searched, Plaintiff's jewelry was never recovered. [**Exhibit D**, Police Report, Interview with Briana Cohen]. Cohen was ultimately terminated.

Defendants were never aware that Cohen had a criminal history. She was hired on April 16, 2013, and indicated she had never been convicted of a felony or misdemeanor. [**Exhibit F**, Payroll Employee Master Inquiry; **Exhibit G**, Briana Cohen Application]

## STANDARD OF REVIEW

A court will grant a moving party's motion for summary judgment when there exists no genuine issue of material fact, and that party is entitled to judgment as a matter of law. Rule

56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, a court, "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001).[2] With respect to an issue on

---

[2] In Bass v. Gopal, Inc., 384 S.C. 238, 247 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), the Court of Appeals addressed the recent change in summary judgment standard. In granting the summary judgment motion, the South Carolina Court of Appeals noted:

> [I]n Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), our Supreme Court stated that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in footnote 3 of the opinion, the Court was careful to point out that its pronouncement concerning a mere scintilla of evidence was not necessary for its determination of the outcome in the Hancock case. In any event, we must assume any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.

The Hancock Court also cited McDowell v. Stilley Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947), for the proposition "that although there was a scintilla of testimony that could be used to support the claimants' position, when the entire testimony of the witnesses was viewed as a whole, it was obvious the testimony in support of claimants' position rested on speculation and thus had no probative value." Id.

which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then "do more than simply show that there is some metaphysical doubt as to the materials facts[,]" but "must come forward with specific facts showing that there is a genuine issue for trial." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

## LAW/ANALYSIS

The Court must grant summary judgment in favor of Defendants because Defendants are immune from liability under the Innkeeper Statute where Mrs. Smith did not use the safe; *respondeat superior* does not apply where the employee acted with criminal intent for her own purposes outside the scope of employment; and negligent supervision and hiring does not apply where the hotel had no reason to know of Cohen's criminal history.

### I. Law of Negligence in South Carolina

Plaintiff's claim sounds in negligence. In South Carolina, to establish a cause of action for negligence, a plaintiff must prove the following four elements:

(1) a duty of care owed by defendant to plaintiff;

(2) breach of that duty by a negligent act or omission;

(3) resulting in damages to the plaintiff; and

(4) damages proximately resulted from the breach of duty.

E.g., Fettler v. Gentner, 396 S.C. 461, 466-67, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); see also Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000)). Plaintiff bears the burden of proving these elements

by the preponderance of the evidence. A duty is defined as "the obligation to conform to a particular standard of conduct toward another." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549 552 (Ct. App. 2000). If there is no legal duty, then the defendant is entitled to summary judgment as a matter of law. Singleton, 377 S.C. at 200, 659 S.E.2d at 204.

Furthermore, the party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); see also Hunter v. Dixie Home Stores, 232 S.C. 139, 141, 101 S.E.2d 262, 265 (1957) (stating "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State.").

## II. Defendants Are Immune From Liability Pursuant to the Innkeeper Statute

In South Carolina,

> [w]henever an innkeeper shall post and keep posted in a conspicuous manner in the room occupied by any guest a notice requiring such guest . . . to deposit such money and jewels as are not ordinarily carried upon the person[3] in the office safe, and the guest shall neglect to comply with the requirements of such notice, the innkeeper shall not be liable for the loss of any baggage of such guest which may be lost or stolen from his room or for the loss of any money or jewels not deposited in the safe.

S.C. Code Ann. § 45-1-40 (2015). The statute continues, "*Provided*, however, that notwithstanding the provisions of this section, any innkeeper who by his own willfulness contributes to the loss or damage to the personal property of a guest shall not have his liability

[3] For purposes of this statute, diamond rings have been held to be jewels that are not ordinarily carried upon a person. See Bischoff v. Days Inn of America, Inc., 568 F. Supp. 1065 (D.C.S. 1983).

limited in any manner by the provisions of this section. Id. (Emphasis in original). "[E]ven if an innkeeper is negligent, so long as the innkeeper properly posts notice, the innkeeper will not be liable for any money or jewelry left in the guest's room." Ippolito v. Hospitality Mgmt. Assoc., 352 S.C. 563, 575 S.E.2d 562 (Ct. App. 2003) (interpreting the Innkeeper statute as a matter of first impression).

South Carolina Courts have not had much opportunity to interpret the Innkeeper Statute, which provides protection to innkeepers for theft of guest's personal property if they fail to put valuables in safe provided by innkeeper. Further, neither the statute, nor case law, provides guidance whether an innkeeper is afforded the same protections under the Statute when Plaintiff alleges theft or negligence on the part of the innkeeper or employee.

Innkeeper statutes in other jurisdictions, such as Ohio[4] and Michigan,[5] have provisions expressly eliminating any protection afforded under the statutes to innkeepers for alleged theft of negligence by an innkeeper or employee. See, e.g., Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); World Diamond, Inc. v. Hyatt Corp., 121 Ohio App. 3d 297, 699 N.E.2d 980 (Ct. App. 1997); Busley v. Hotel Wisconsin Realty Co., 166 Wis. 294, 164 N.W. 826 (1917). "The minority view appears to be that the innkeeper, while not held as an insurer, is liable for the negligence or wrongful act of himself or his servants and may escape liability by showing that the loss was not attributable to his or his servants' or agents' fault. It would seem that the standard of care in most of the jurisdictions which base an innkeeper's liability on

[4] The Ohio Innkeeper statute provides: "An innkeeper shall be liable for a loss of any such property of a guest in his inn caused by the theft or negligence of the innkeeper or his servant." R.C. 4721.02.

[5] Michigan's Innkeeper Statute provides: "[E]very innkeeper shall be liable for any loss of the articles of a guest enumerated in this section in the inn, which loss was caused by the theft or negligence of the innkeeper or any of the innkeeper's servants." M.C.L.A. 427.102.

negligence is more than that of ordinary care. . . ." 9 A.L.R.2d 818, Effect of Notice Limiting Liability for Valuables or Effects of Guest in Hotel (emphasis added).

Other jurisdictions unequivocally limit liability and contain no exceptions for loss caused by employee dishonesty or for losses caused by negligence by the innkeeper or employee. See Duvall v. Ritz Carlton Hotel Co., 946 F.2d 418, 421 (5th Cir. 1991) (applying California law) ("These code sections limit the liability of the innkeeper to the statutory amount even if the loss results from theft or intentional tort committed by one of its hotel employees."); Taylor v. Forte Hotels Int'l, 235 Cal. App. 3d 1119, 1 Cal. Rptr. 2d 189 (4th Dist. 1991) ("That limitation on liability applies to losses resulting from theft by employees and to losses from negligence."); Associated Mills, Inc. v. Drake Hotel, Inc., 31 Ill. App. 3d 304, 309-310, 334 N.E.2d 746, 750 (1st Dist. 1975) (legislative intent to cap maximum liability even when loss of "property is the result of theft or the fault or negligence of the proprietor or manager or of his agents or employees. . . ."); Nova Stylings, Inc. v. Red Roof Inns, Inc., 242 Kan. 318, 747 P.2d 107 (1987); Kahn v. Hotel Ramada of Nevada, 799 F.2d 199 (5th Cir. 1986) (applying Nevada law); Goodwin v. Georgian Hotel Co., 197 Wash. 173, 187, 84 P.2d 681, 687 (1938) ("[I]t intended that the limitation of liability should apply to losses occasioned by the theft of an employee or by the gross negligence of the hotelkeeper or his, or its, employees.").

> The reason for providing a hotel safe in compliance with § 200 and the reason for limiting a hotel's liability under § 201 is to protect against just such situations. When a hotel room is let to a guest, the innkeeper has lost a large measure of control and supervision over the hotel room and its contents. While housekeeping and security staff can enter the room at reasonable hours and on notice to any persons present therein, essentially, for most of the time at least, property of a guest which is present in a hotel room can be said to be under the exclusive dominion and control of the hotel guest, rather than the innkeeper.
>
> We have been cited to no case extending the limited immunity provided by statute against the common law liability of innkeepers,

> where the liability sought to be founded on the innkeeper was based on the exercise of unlawful dominion and control by the innkeeper himself, or his agents and employees acting in the course of their employment; as contrasted with mysterious disappearances due to causes unknown, or criminal acts of third parties or employees acting for themselves rather than for the employer. As noted above, it was only for the latter class of cases that the statutes granted immunity.

Bhattal v. Grand Hyatt-New York, 563 F.Supp. 277 (S.D.N.Y. 1983) (emphasis added). New York cases have consistently held that employee theft was a wrongful act outside the scope of employment and for his own enrichment. See, e.g., Millhiser v. Beau Site Co., 251 N.Y. 290, 295, 167 N.E. 447, 447 (1929). The Georgia courts have likewise held that if an innkeeper posts notice, "it is not liable for articles stolen from a guest's room even if its own employees were negligent in preventing the theft or were actually parties to the theft." Gooden v. Day's Inn, 196 Ga. App. 324, 325, 395 S.E.2d 876, 878 (Ct. App. 1990). The Georgia court favorably cited Millhiser, and quoted:

> During the many years that a statute has been in existence in this state limiting the liability of a hotel to a guest, no case has been decided by this court indicating that such limited liability did not exist in case the property of a guest deposited for safe-keeping was stolen from a hotel by an employee thereof. Such a holding by this court would nullify the purpose of the statute and be in conflict with the spirit and intent thereof.

Millhiser, 251 N.Y. 290, 167 N.E. 447, 448 (1929). Some courts have held that the legislature's failure to carve out an exception for negligence is enough to find the immunity under statute is absolute. See, e.g., Ely v. Charellen Corp., 120 F.2d 984 (5th Cir. 1941) ("Had the legislature intended to make an exception to the proprietor's freedom from liability in circumstances where the loss of jewelry proximately resulting from his negligence, whether or not a deposit with the hotel had been made, we think the legislature would have framed the statute so as to evidence such fact.")

Courts generally place liability with the party best positioned to avoid the loss. The economic loss doctrine in tort law holds that the objective of the law is to reduce the incidence of loss by placing it on the party in the best position to efficiently avoid it. The "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault or to one who is better able to bear the loss and prevent its occurrence." Sidney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C.L.REV. 891, 935 (1989). The purpose of a duty in tort is to protect society's interest in being free from harm, and the cost of protecting society from harm is borne by society in general. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985).

South Carolina Courts have not previously addressed whether the Innkeeper Statute provides for immunity without exception for a guest's loss. However, the Innkeeper Statute does not contain explicated exception language that the minority of jurisdictions' legislatures have included. See, e.g., Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); World Diamond, Inc. v. Hyatt Corp., 121 Ohio App. 3d 297, 699 N.E.2d 980 (Ct. App. 1997); Busley v. Hotel Wisconsin Realty Co., 166 Wis. 294, 164 N.W. 826 (1917). The language of South Carolina's Statute is more in line with the statutes provided for exclusive limited liability for innkeepers. Here, Plaintiff could best avoid the loss by placing valuables in the safe provided in the room for that express purpose. If she had, Plaintiff's jewelry and cash would have been safe. To hold otherwise renders Defendants to be Plaintiff's insurer, in direct contravention of the Innkeeper Statute.

### III. Defendants Are Not Liable for the Alleged Conduct of its Employee

While South Carolina courts have not interpreted the extent of the limitations of liability afforded under the Innkeeper Statute, Defendants are not liable for the alleged conduct of Cohen.

"The doctrine of *respondeat superior* rests upon the relation of master and servant." Armstrong v. Food Lion, Inc., 371 S.C. 271, 275, 639 S.E.2d 50, 52 (2006); see also Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff who seeks to recover from an employer (a master) for injuries sustained by the acts of an employee (servant) must establish that the relationship between the master and servant existed at the time of the injuries, and that the employee was "then about his master's business and acting within the scope of his employment." Armstrong, 371 S.C. at 275, 639 S.E.2d at 52. "An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." Id. "If ... the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority. Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945).

On the other hand, if the servant acts for some independent purpose of his own, his conduct falls outside the scope of his employment. Crittenden v. Thompson Walker Co., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time." Lane, 244 S.C. at 305, 136 S.E.2d at 716.

To survive a motion for summary judgment, plaintiff, who seeks to recover from the employer under the doctrine of *respondeat superior*, must present at least a scintilla of evidence from which it could be inferred that the employee who was responsible for the plaintiff's injury was carrying out his employer's business and acting within the scope of employment at the time the plaintiff was injured. Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d

801, 803 (2009).

As an initial matter, the alleged jewelry and cash were never recovered from Defendants' premises nor from Cohen's person or areas within her control. Regardless, even taking the facts in the light most favorable to Plaintiff as the nonmoving party, to the extent Plaintiff is able to establish Cohen stole Plaintiff's jewelry and cash, Defendants are not liable for Cohen's conduct. Plaintiffs have alleged that Cohen, an employee of Defendants, accessed Plaintiff's room using her keycard, and while in the room, stole Plaintiff's jewelry and cash. However, the only competent evidence in this matter shows Cohen (whether she entered the room or not) was not scheduled to clean Plaintiff's room. Cohen, to the extent she entered the room, exceeded the scope of work.

Moreover, assuming Cohen committed the alleged act, Cohen's action were clearly of a personal nature, indulged in for her own personal amusement. See Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990) (affirming grant of summary judgment in favor of master where servant momentarily stepped away from master's business and committed assault on plaintiff, which was "clearly of a personal nature, indulged in for his own personal amusement."). There is no evidence in the record that Cohen's alleged conduct was in furtherance of Defendants' business or for the benefit of Defendants. Accordingly, Defendants cannot be liable for the alleged conduct of Cohen.

## IV. Defendants Were Not Negligence in the Hiring, Supervisor, or Retention of Their Employee

"Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew 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, supervising, or training the

employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330-31 (2008) (citing Restatement (Second) of Torts § 317 (1965) (cited with approval in Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992))). Negligent hiring cases generally turn on two elements—knowledge of the employer and foreseeability of harm to third parties. Although foreseeability is usually an issue of fact, the court may dispose of the matter on a dispositive motion when no reasonable fact finder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard. Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011). To prevail on a negligent supervision claim, plaintiff must necessarily show the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent or unfit manner, and that the employer, armed with this actual or constructive knowledge, failed to adequately supervise the employee.

Although foreseeability is usually an issue of fact, "the court should dispose of the matter on a dispositive motion when no reasonable fact finder could find that risk foreseeable or the employer's conduct to have fallen below the acceptable standard." Id. at 207, 624 S.E.2d at 451. "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, 377 S.C. at 661 S.E.2d at 330.

While Plaintiff has not pled a separate cause of action for negligent hiring, supervision and retention, Plaintiff has alleged negligence on these grounds. However, to hold that liability exists under this common law cause of action would eviscerate the protections afforded by the

Innkeeper Statute. See Argument, Section II, *supra*. The Innkeeper statute and others like it nationwide were passed to limit common law liability that would otherwise attach in recognition of the fact that the guest, not the innkeeper, is best positioned to avoid the loss and that the innkeeper is largely unable to control what happens within the rooms. The legislature has evinced a clear intent to replace common law liability.[6]

Further, "an affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Hendricks v. Clemson Univ., 353 S.C. 449, 456 S.E.2d 711, 714 (2013). "There is no statute or common law precedent in South Carolina that requires employers to conduct background checks on employees[.]" Kirk v. Mumford. Inc., 20016 WL 7285832, n.2 (S.C. Ct. App. April 4, 2006). Plaintiff has not presented any evidence to establish a separate standard of care that would have made Defendants aware of any prior criminal acts or conduct of Cohen, nor is there any evidence in the record that Cohen committed any improper acts during her employment prior to the alleged incident. In short, there is no evidence that Defendants knew or should have known, by way of an affirmative legal duty to discover, that would have put Defendants on notice of Cohen's alleged criminal background. Accordingly, Plaintiff's claims for negligence hiring, supervision, and retention must fail as a matter of law.

[6] Statutes must be interpreted in such a way as to effectuate the legislature's intention. It is well established in South Carolina that the legislature must be presumed to have meant to do something by passing a law and did not intend a futile act. See, e.g., Bruning v. SCDHEC, 418 S.C. 537, 545, 795 S.E.2d 290, 295 (Ct. App. 2016); State v. Sweat, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008).

## CONCLUSION

Here, Defendants are immune from liability because it complied with the Innkeeper Statute and provided written notice to guests that a safe was available to secure valuables. Plaintiff's failure to avail herself of the safe provided in her room was the proximate cause of the loss.

Further, Respondeat superior/vicarious liability does not apply because the alleged conduct of Cohen was outside her scope of employment. Negligent hiring and supervision is not applicable where the legislature has enacted the Innkeeper Statute with the express purpose of limiting common law liability and there is no evidence of an affirmative duty or other standard of care regarding the alleged criminal background of Cohen.

Based on the aforementioned, Defendants respectfully request the Court enter judgment in favor of Defendants.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

By: *s/ Christian Stegmaier*

CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
KELSEY J. BRUDVIG
SC Bar No. 101680
kbrudvig@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR COLUMBIA SUSSEX MANAGEMENT, LLC (THE REAL PARTY IN INTEREST) AND COLUMBIA SUSSEX CORPORATION D/B/A HILTON HEAD MARRIOTT RESORTS & SPA AND COLUMBIA PROPERTIES HILTON HEAD, LLC

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Columbia, South Carolina
October 5, 2018

## Kelsey J. Brudvig

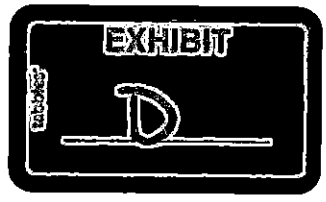
| | |
|---|---|
| **From:** | Kelsey J. Brudvig |
| **Sent:** | Friday, October 5, 2018 3:15 PM |
| **To:** | 'cmaddoxj@sccourts.org'; 'cmaddoxlc@sccourts.org' |
| **Cc:** | Christian Stegmaier; 'mcreech@pmped.com'; Natalia V. Ertseva-Thomas |
| **Subject:** | 2016-CP-07-0777 Smith v. Columbia Sussex |
| **Attachments:** | M4SJ (with exhibits).pdf |

Judge Maddox,

Defendants' motion for summary judgment in the above-referenced matter was on last week's motions docket in Beaufort County Court of Common Pleas. Due to Plaintiff's counsel's conflict, the Court agreed to resolve Defendants' motion via briefing. Attached, please find Defendants' memorandum of law and exhibits in support of their motion for summary judgment. The same has been e-filed with the Court.

Please let us know if the Court needs anything further.

Opposing counsel is copied on this correspondence.




Respectfully,

Kelsey Brudvig
Counsel for Defendants

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF BEAUFORT | ) | FOURTEENTH JUDICIAL CIRCUIT |
| Machelle Smith,<br><br>Plaintiff,<br><br>vs.<br><br>Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC,<br><br>Defendants. | ) | Civil Action No.: 2016-CP-07-0777<br><br>**ORDER** |

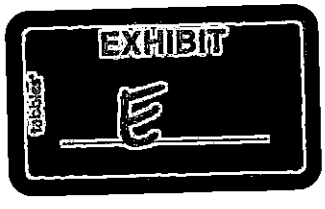
This matter comes before the Court pursuant to Defendants Columbia Sussex Management, LLC, Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; and Columbia Properties Hilton Head, LLC's ("Defendants") Motion for Summary Judgment, which was filed on August 27, 2018. After consideration of the motion, written memorandum of law, and other materials submitted to the Court, the Court makes the following findings of fact and conclusions of law.

## FACTS/PROCEDURAL BACKGROUND

Plaintiff Machelle Smith, a hotel guest of Defendants, avers that her jewelry and cash were stolen from her hotel room by hotel housekeeper Briana Cohen,[1] an employee of Defendants, on April 26, 2013, at the Hilton Head Marriott. She alleges Defendants were negligent in hiring, supervising, and retaining employee Cohen and alleges vicarious liability and *respondeat superior*. [Complaint □ 10, 11, 12]. Defendants assert immunity from liability for the theft under the Innkeeper Statute because Plaintiff failed to place her valuables in the room safe. [Answer □ 30,

[1] Cohen was neither charged with a property offense, such as larceny, nor were Plaintiff's alleged stolen jewelry or cash recovered from Cohen.





31].

On or about April 26, 2013, Plaintiff and her husband checked into room 618. [Complaint □ 6; Plaintiff's Dep., p.16, line 22]. Each room has a sign on the back of the door that a safe is provided for valuable items and that, should guests not utilize the safe, the hotel is not liable for any loss. [Photographs]. Prior to attending a spa treatment, Plaintiff removed her jewelry. [Complaint □ 6; Plaintiff's Dep., p. 26, lines 11-13]. Plaintiff stated her jewelry included her diamond band wedding ring, diamond engagement ring, emerald and diamond ring, and a diamond pendant. [Plaintiff's Dep., p. 17, lines 12-14]. She could not locate the safe; rather, Plaintiff decided to hide her jewelry in the pockets of her suitcase. [Plaintiff's Dep., p. 27, line 19 – p. 28, line 6; Guest Statement Report]. During Plaintiff's spa appointment, her husband attended meetings at a medical conference. [Plaintiff's Dep., p. 26, lines 8-14; p. 29 lines 6-7]. When Plaintiff and her husband returned to the room, they noted the deadbolt was in the door as if to keep the door ajar but did not think anything of it because the housekeeping cart was on the floor, and they assumed the room was being cleaned. [Police Report, Interview with Machelle Smith]. Plaintiff avers that she immediately realized her jewelry—which was stored in her suitcase—was missing upon her return to the room. (Plaintiff's Dep., p. 30, lines 5-7).

After discovering that her jewelry was missing, Plaintiff's husband contacted an employee, who returned to Plaintiff's room with her husband, and reported to the employee what happened. (Plaintiff's Dep., p. 33, line 4-9). Law enforcement subsequently arrived and placed the hotel on lockdown. (Plaintiff's Dep., p. 33, line 21 – p. 34, line 18). Law enforcement advised Plaintiff that an employee, Cohen, ran out of the hotel and that law enforcement were completing a search of Cohen's vehicle, cart, and other parts of the premises. (Plaintiff's Dep., p. 35, line 9-15).

During law enforcement's investigation, it was discovered that Cohen used a housekeeping key to enter Plaintiff's room. [Police Report, Interview with General Manager; Hotel Incident Report]. However, Cohen denied entering Plaintiff's room and stated that someone must have taken her key from her cart. While Cohen's belongings were searched, Plaintiff's jewelry was never recovered. [Police Report, Interview with Briana Cohen]. Cohen was ultimately terminated.

Defendants were never aware that Cohen had a criminal history. She was hired on April 16, 2013, and indicated she had never been convicted of a felony or misdemeanor. [Payroll Employee Master Inquiry; Briana Cohen Application].

Defendants moved for summary judgment on several grounds. First, Defendants argue that that the South Carolina Innkeeper Statute provides complete immunity to Defendants for any alleged act of its employee Cohen. Second, Defendants contend that they are not liable to Plaintiff under a theory of *respondeat superior* because the employee acted outside the scope of employment.[2] Finally, Defendants aver that Plaintiff has failed to present a scintilla of evidence that Defendants knew or should have known of any alleged criminal propensities of its employees and, therefore, Defendants are not liable to Plaintiff under a claim for negligent hiring, supervision, or retention. For the reasons articulated in this Order, Defendants motion is hereby granted.

## STANDARD OF REVIEW

A court will grant a moving party's motion for summary judgment when there exists no genuine issue of material fact, and that party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32,

[2] Defendants do not concede that employee Cohen committed the purported theft.

533 S.E.2d 312 (2000). Nonetheless, a court, "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001).[3] With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then "do more

[3] In Bass v. Gopal, Inc., 384 S.C. 238, 247 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), the Court of Appeals addressed the recent change in summary judgment standard. In granting the summary judgment motion, the South Carolina Court of Appeals noted:

> [I]n Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), our Supreme Court stated that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in footnote 3 of the opinion, the Court was careful to point out that its pronouncement concerning a mere scintilla of evidence was not necessary for its determination of the outcome in the Hancock case. In any event, we must assume any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.

The Hancock Court also cited McDowell v. Stilley Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947), for the proposition "that although there was a scintilla of testimony that could be used to support the claimants' position, when the entire testimony of the witnesses was viewed as a whole, it was obvious the testimony in support of claimants' position rested on speculation and thus had no probative value." Id.

than simply show that there is some metaphysical doubt as to the materials facts[,]" but "must come forward with specific facts showing that there is a genuine issue for trial." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

## LAW/ANALYSIS

### I. Law of Negligence in South Carolina

Plaintiff's claim sounds in negligence. In South Carolina, to establish a cause of action for negligence, a plaintiff must prove the following four elements:

(1) a duty of care owed by defendant to plaintiff;

(2) breach of that duty by a negligent act or omission;

(3) resulting in damages to the plaintiff; and

(4) damages proximately resulted from the breach of duty.

E.g., Fettler v. Gentner, 396 S.C. 461, 466-67, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); see also Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000)).

Plaintiff bears the burden of proving these elements by the preponderance of the evidence. A duty is defined as "the obligation to conform to a particular standard of conduct toward another." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549 552 (Ct. App. 2000). If there is no legal duty, then the defendant is entitled to summary judgment as a matter of law. Singleton, 377 S.C. at 200, 659 S.E.2d at 204.

Furthermore, the party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d

229 (1961); see also Hunter v. Dixie Home Stores, 232 S.C. 139, 141, 101 S.E.2d 262, 265 (1957) (stating "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State.").

## II. Defendants Are Immune From Liability Pursuant to the Innkeeper Statute

In South Carolina,

> [w]henever an innkeeper shall post and keep posted in a conspicuous manner in the room occupied by any guest a notice requiring such guest . . . to deposit such money and jewels as are not ordinarily carried upon the person[4] in the office safe, and the guest shall neglect to comply with the requirements of such notice, the innkeeper shall not be liable for the loss of any baggage of such guest which may be lost or stolen from his room or for the loss of any money or jewels not deposited in the safe.

S.C. Code Ann. § 45-1-40 (2015).

The statute continues, "*Provided*, however, that notwithstanding the provisions of this section, any innkeeper who by his own willfulness contributes to the loss or damage to the personal property of a guest shall not have his liability limited in any manner by the provisions of this section." Id. (Emphasis in original). "[E]ven if an innkeeper is negligent, so long as the innkeeper properly posts notice, the innkeeper will not be liable for any money or jewelry left in the guest's room." Ippolito v. Hospitality Mgmt. Assoc., 352 S.C. 563, 575 S.E.2d 562 (Ct. App. 2003) (interpreting the Innkeeper statute as a matter of first impression).

South Carolina Courts have not had much opportunity to interpret the Innkeeper Statute, which provides protection to innkeepers for theft of guest's personal property if they fail to put

[4] For purposes of this statute, diamond rings have been held to be jewels that are not ordinarily carried upon a person. See Bischoff v. Days Inn of America, Inc., 568 F. Supp. 1065 (D.C.S. 1983).

valuables in safe provided by innkeeper. Further, neither the statute, nor case law, provides guidance whether an innkeeper is afforded the same protections under the Statute when Plaintiff alleges theft or negligence on the part of the innkeeper or employee. Accordingly, this Court looks to other jurisdictions and whether these Courts have provided protection to an Innkeeper.

Innkeeper statutes in other jurisdictions, such as Ohio[5] and Michigan,[6] have provisions expressly eliminating any protection afforded under the statutes to innkeepers for alleged theft of negligence by an innkeeper or employee. See, e.g., Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); World Diamond, Inc. v. Hyatt Corp., 121 Ohio App. 3d 297, 699 N.E.2d 980 (Ct. App. 1997); Busley v. Hotel Wisconsin Realty Co., 166 Wis. 294, 164 N.W. 826 (1917). "The minority view appears to be that the innkeeper, while not held as an insurer, is liable for the negligence or wrongful act of himself or his servants and may escape liability by showing that the loss was not attributable to his or his servants' or agents' fault. It would seem that the standard of care in most of the jurisdictions which base an innkeeper's liability on negligence is more than that of ordinary care ...." 9 A.L.R.2d 818, Effect of Notice Limiting Liability for Valuables or Effects of Guest in Hotel (emphasis added).

Other jurisdictions unequivocally limit liability and contain no exceptions for loss caused by employee dishonesty or for losses caused by negligence by the innkeeper or employee. See Duvall v. Ritz Carlton Hotel Co., 946 F.2d 418, 421 (5th Cir. 1991) (applying California law) ("These code sections limit the liability of the innkeeper to the statutory amount even if the loss

[5] The Ohio Innkeeper statute provides: "An innkeeper shall be liable for a loss of any such property of a guest in his inn caused by the theft or negligence of the innkeeper or his servant." R.C. 4721.02.

[6] Michigan's Innkeeper Statute provides: "[E]very innkeeper shall be liable for any loss of the articles of a guest enumerated in this section in the inn, which loss was caused by the theft or negligence of the innkeeper or any of the innkeeper's servants." M.C.L.A. 427.102.

results from theft or intentional tort committed by one of its hotel employees."); Taylor v. Forte Hotels Int'l, 235 Cal. App. 3d 1119, 1 Cal. Rptr. 2d 189 (4th Dist. 1991) ("That limitation on liability applies to losses resulting from theft by employees and to losses from negligence."); Associated Mills, Inc. v. Drake Hotel, Inc., 31 Ill. App. 3d 304, 309-310, 334 N.E.2d 746, 750 (1st Dist. 1975) (legislative intent to cap maximum liability even when loss of "property is the result of theft or the fault or negligence of the proprietor or manager or of his agents or employees ...."); Nova Stylings, Inc. v. Red Roof Inns, Inc., 242 Kan. 318, 747 P.2d 107 (1987); Kahn v. Hotel Ramada of Nevada, 799 F.2d 199 (5th Cir. 1986) (applying Nevada law); Goodwin v. Georgian Hotel Co., 197 Wash. 173, 187, 84 P.2d 681, 687 (1938) ("[I]t intended that the limitation of liability should apply to losses occasioned by the theft of an employee or by the gross negligence of the hotelkeeper or his, or its, employees.").

> The reason for providing a hotel safe in compliance with § 200 and the reason for limiting a hotel's liability under § 201 is to protect against just such situations. When a hotel room is let to a guest, the innkeeper has lost a large measure of control and supervision over the hotel room and its contents. While housekeeping and security staff can enter the room at reasonable hours and on notice to any persons present therein, essentially, for most of the time at least, property of a guest which is present in a hotel room can be said to be under the exclusive dominion and control of the hotel guest, rather than the innkeeper.
>
> We have been cited to no case extending the limited immunity provided by statute against the common law liability of innkeepers, where the liability sought to be founded on the innkeeper was based on the exercise of unlawful dominion and control by the innkeeper himself, or his agents and employees acting in the course of their employment; as contrasted with mysterious disappearances due to causes unknown, or criminal acts of third parties or employees acting for themselves rather than for the employer. As noted above, it was only for the latter class of cases that the statutes granted immunity.

Bhattal v. Grand Hyatt-New York, 563 F.Supp. 277 (S.D.N.Y. 1983) (emphasis added).

New York cases have consistently held that employee theft was a wrongful act outside the scope of employment and for his own enrichment. See, e.g., Millhiser v. Beau Site Co., 251 N.Y. 290, 295, 167 N.E. 447, 447 (1929). The Georgia courts have likewise held that if an innkeeper posts notice, "it is not liable for articles stolen from a guest's room even if its own employees were negligent in preventing the theft or were actually parties to the theft." Gooden v. Day's Inn, 196 Ga. App. 324, 325, 395 S.E.2d 876, 878 (Ct. App. 1990). The Georgia court favorably cited Millhiser, and quoted:

> During the many years that a statute has been in existence in this state limiting the liability of a hotel to a guest, no case has been decided by this court indicating that such limited liability did not exist in case the property of a guest deposited for safe-keeping was stolen from a hotel by an employee thereof. Such a holding by this court would nullify the purpose of the statute and be in conflict with the spirit and intent thereof.

Millhiser, 251 N.Y. 290, 167 N.E. 447, 448 (1929).

Some courts have held that the legislature's failure to carve out an exception for negligence is enough to find the immunity under statute is absolute. See, e.g., Ely v. Charellen Corp., 120 F.2d 984 (5th Cir. 1941) ("Had the legislature intended to make an exception to the proprietor's freedom from liability in circumstances where the loss of jewelry proximately resulting from his negligence, whether or not a deposit with the hotel had been made, we think the legislature would have framed the statute so as to evidence such fact.")

Other jurisdictions generally place liability with the party best positioned to avoid the loss. The economic loss doctrine in tort law holds that the objective of the law is to reduce the incidence of loss by placing it on the party in the best position to efficiently avoid it. The "basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault or to one who is better able to bear the loss and prevent its occurrence." Sidney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C.L.REV. 891, 935

(1989). The purpose of a duty in tort is to protect society's interest in being free from harm, and the cost of protecting society from harm is borne by society in general. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985).

South Carolina Courts have not previously addressed whether the Innkeeper Statute provides for immunity without exception for a guest's loss. However, the Innkeeper Statute does not contain explicit exception language that the minority of jurisdictions' legislatures have included. See, e.g., Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); World Diamond, Inc. v. Hyatt Corp., 121 Ohio App. 3d 297, 699 N.E.2d 980 (Ct. App. 1997); Busley v. Hotel Wisconsin Realty Co., 166 Wis. 294, 164 N.W. 826 (1917). The Court finds that the language of South Carolina's Statute is more in line with the statutes provided for exclusive limited liability for innkeepers. Here, Plaintiff could best avoid the loss by placing valuables in the safe provided in the room for that express purpose. If she had, Plaintiff's jewelry and cash would have been safe. To hold otherwise renders Defendants to be Plaintiff's insurer, in direct contravention of the Innkeeper Statute.

Additionally, to hold that an Innkeeper could be liable for its employee's theft of a guest's belongings would circumvent the well-established law regarding *respondeat superior* for an employee's criminal actions outside the scope of employment. See Section III.

Therefore, the Court finds that Defendants are immune from liability pursuant to the South Carolina Innkeeper Statute.

### III. Defendants Are Not Liable for the Alleged Conduct of its Employee

Plaintiff has also alleged a cause of action against Defendants under a theory of *respondeat superior*, and contend that Defendants are liable to Plaintiff for its employee's purported acts. The Court finds that Defendants are not liable for the alleged conduct of Cohen.

"The doctrine of *respondeat superior* rests upon the relation of master and servant." Armstrong v. Food Lion, Inc., 371 S.C. 271, 275, 639 S.E.2d 50, 52 (2006); see also Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff who seeks to recover from an employer (a master) for injuries sustained by the acts of an employee (servant) must establish that the relationship between the master and servant existed at the time of the injuries, and that the employee was "then about his master's business and acting within the scope of his employment." Armstrong, 371 S.C. at 275, 639 S.E.2d at 52. "An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." Id. "If ... the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority. Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945).

On the other hand, if the servant acts for some independent purpose of his own, his conduct falls outside the scope of his employment. Crittenden v. Thompson Walker Co., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time." Lane, 244 S.C. at 305, 136 S.E.2d at 716.

To survive a motion for summary judgment, plaintiff, who seeks to recover from the employer under the doctrine of *respondeat superior*, must present at least a scintilla of evidence from which it could be inferred that the employee who was responsible for the plaintiff's injury was carrying out his employer's business and acting within the scope of employment at the time the plaintiff was injured. Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

The Court notes as an initial matter, the alleged jewelry and cash were never recovered from Defendants' premises nor from Cohen's person or areas within her control. Regardless, even taking the facts in the light most favorable to Plaintiff as the nonmoving party, to the extent Plaintiff is able to establish Cohen stole Plaintiff's jewelry and cash, the Court finds that Defendants are not liable for Cohen's conduct.

Plaintiffs have alleged that Cohen, an employee of Defendants, accessed Plaintiff's room using her keycard, and while in the room, stole Plaintiff's jewelry and cash. However, the only competent evidence in this matter shows Cohen (whether she entered the room or not) was not scheduled to clean Plaintiff's room. Cohen, to the extent she entered the room, exceeded the scope of work.

Moreover, assuming Cohen committed the alleged act, Cohen's actions were clearly of a personal nature, indulged in for her own personal amusement. See Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990) (affirming grant of summary judgment in favor of master where servant momentarily stepped away from master's business and committed assault on plaintiff, which was "clearly of a personal nature, indulged in for his own personal amusement."). There is no evidence in the record that Cohen's alleged conduct was in furtherance of Defendants' business or for the benefit of Defendants. Accordingly, the Court finds that Defendants cannot be liable for the alleged conduct of Cohen.

## IV. Defendants Were Not Negligent in the Hiring, Supervisor, or Retention of Their Employee

"Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew 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, supervising, or training the

employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330-31 (2008) (citing Restatement (Second) of Torts § 317 (1965) (cited with approval in Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992))). Negligent hiring cases generally turn on two elements—knowledge of the employer and foreseeability of harm to third parties.

To prevail on a negligent supervision claim, plaintiff must necessarily show the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent or unfit manner, and that the employer, armed with this actual or constructive knowledge, failed to adequately supervise the employee.

Although foreseeability is usually an issue of fact, "the court should dispose of the matter on a dispositive motion when no reasonable fact finder could find that risk foreseeable or the employer's conduct to have fallen below the acceptable standard." Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011). "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, 377 S.C. at 661 S.E.2d at 330.

While Plaintiff has not pled a separate cause of action for negligent hiring, supervision and retention, Plaintiff has alleged negligence on these grounds. However, to hold that liability exists under this common law cause of action would eviscerate the protections afforded by the Innkeeper Statute. See Argument, Section II, *supra*. The Innkeeper statute and others like it nationwide were passed to limit common law liability that would otherwise attach in recognition of the fact that the guest, not the innkeeper, is best positioned to avoid the loss and that the innkeeper is largely unable

to control what happens within the rooms. The legislature has evinced a clear intent to replace common law liability.[7]

Further, "an affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Hendricks v. Clemson Univ., 353 S.C. 449, 456 S.E.2d 711, 714 (2013). "There is no statute or common law precedent in South Carolina that requires employers to conduct background checks on employees[.]" Kirk v. Mumford, Inc., 20016 WL 7285832, n.2 (S.C. Ct. App. April 4, 2006). Plaintiff has not presented any evidence to establish a separate standard of care that would have made Defendants aware of any prior criminal acts or conduct of Cohen, nor is there any evidence in the record that Cohen committed any improper acts during her employment prior to the alleged incident. In short, the Court finds that there is no evidence that Defendants knew or should have known, by way of an affirmative legal duty to discover, that would have put Defendants on notice of Cohen's alleged criminal background. Accordingly, Plaintiff's claims for negligence hiring, supervision, and retention fail as a matter of law.

[7] Statutes must be interpreted in such a way as to effectuate the legislature's intention. It is well established in South Carolina that the legislature must be presumed to have meant to do something by passing a law and did not intend a futile act. See, e.g., Bruning v. SCDHEC, 418 S.C. 537, 545, 795 S.E.2d 290, 295 (Ct. App. 2016); State v. Sweat, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008).

## CONCLUSION

Based on the findings of facts and conclusions of law contained herein, it is orders that Defendants' Motion for Summary Judgment be granted and Plaintiff's Complaint be dismissed with prejudice.

**AND IT IS SO ORDERED.**

_____

THE HONORABLE CORDELL MADDOX
Presiding Judge, Fourteenth Judicial Circuit

_____, South Carolina

_____, 201___

Beaufort Common Pleas

**Case Caption:** Machelle Smith VS Columbia Sussex Corporation , defendant, et al

**Case Number:** 2016CP0700777

**Type:** Order/Summary Judgment

So Ordered

s/ J. Cordell Maddox Jr.

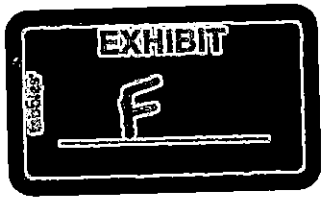
| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF BEAUFORT | ) | C/A No.: 2016-CP-07-0777 |
| | ) | |
| MACHELLE SMITH, | ) | |
| | ) | |
| Plaintiff, | ) | Plaintiff's Motion to Alter, Amend, and/or Reconsider Pursuant to Rule 59(e), SCRCP |
| | ) | |
| v. | ) | |
| | ) | |
| COLUMBIA SUSSEX CORPORATION d/b/a HILTON HEAD MARRIOTT RESORTS & SPA; COLUMBIA SUSSEX MANAGEMENT, LLC; and COLUMBIA PROPERTIES HILTON HEAD, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

TO: THE HONORABLE J. CORDELL MADDOX, JR., PRESIDING JUDGE, and CHRISTIAN STEGMAIER, ESQUIRE, COUNSEL FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through her undersigned counsel, respectfully moves pursuant to Rule 59 of the South Carolina Rules of Civil Procedure for an order altering, amending or reconsidering the Court's Order Granting Summary Judgment of February 5, 2019.

This motion is made pursuant to Rule 59, SCRCP. A Rule 59(e) motion is not only "a vehicle to request the trial court 'alter or amend the judgment,' but also a vehicle to seek 'reconsideration' of issues and arguments." *See, Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-779 (2004). Such a motion is due ten (10) days after receipt of the entry of the Order. This motion is timely filed, as the Court's Order granting summary judgment was filed February 5, 2019.

The grant of summary judgment covers three grounds: (1) immunity under the Innkeeper Statute (S.C. Code Ann. Section 45-1-40 (2015)); (2) the acts of Defendant's employee falling



outside of the scope of employment and Defendants therefore not being liable under the doctrine of *respondeat superior*; and, (3) a finding that the defendants were not negligent in their hiring, firing, supervision or retention of its employee.

Plaintiff does not move for reconsideration of the finding concerning negligent hiring, supervision, or retention. Thus, to the extent that the Court allowed this case to move forward and granted reconsideration, Plaintiff waives all claims of negligent supervision, hiring and retention. However, as to the issues of immunity under the Innkeeper statute and claims of Defendants' liability through the doctrine of *respondeat superior*, Plaintiff respectfully seeks reconsideration. As to the Innkeeper's statute, the Order fails to recognize the entirety of the statute. The immunity offered by the statute is qualified as follows:

> Provided, however, that notwithstanding the provisions of this section any innkeeper who by his own negligence contributes to the loss or damage to baggage or personal property, other than money or jewelry, from guest rooms, or to the loss or damage to money or jewelry from his safe, may be liable to the guest for the actual value of such baggage or personal property or five hundred dollars, whichever is less, or the actual value of such money or jewelry or two thousand dollars, whichever is less. Provided, however, that, notwithstanding the provisions of this section, any innkeeper who by his own wilfulness contributes to the loss or damage to the personal property of a guest shall not have his liability limited in any manner by the provisions of this section.

S.C. Code Ann. Section 45-1-40. The statute at issue protects the "Innkeeper." While the term itself is perhaps antiquated, in this case, the "innkeeper" is the defendant corporation. Corporations can only act through their agents, here its employee. Thus, the employee's willful conduct of using the hotel issued master key to enter the room is the Innkeeper itself willfully contributing to the loss. The protection of the statute is therefore not available, or at least factual issues exist as to the element of willfulness. The same agency issues preclude the grant of summary judgment as to liability of Defendants under the doctrine of *respondeat superior*.

Plaintiff respectfully seeks reconsideration of these two issues and an opportunity to be heard.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY: /s Matthew V. Creech
Matthew V. Creech
Post Office Box 2500
Ridgeland, S.C. 29936
(843) 726-6131

February 15, 2019
Ridgeland, South Carolina

ATTORNEYS FOR THE PLAINTIFF

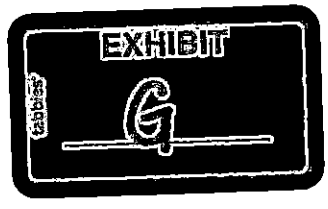
| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF BEAUFORT<br><br>Machelle Smith,<br><br>Plaintiff,<br>v.<br><br>Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC,<br><br>Defendant. | IN THE COURT OF COMMON PLEAS<br>FOURTEENTH JUDICIAL CIRCUIT<br><br>C.A. No. 2016-CP-07-00777<br><br>ORDER DENYING PLAINTIFF'S MOTION TO ALTER, AMEND, AND/OR RECONSIDER |

This matter came before the Court through the Plaintiff's Motion to Alter, Amend, and/or Reconsider. After careful consideration and review, the Court finds that Plaintiff's Motion to Alter, Amend, and/or Reconsider should be denied.

It is hereby ordered that Plaintiff's Motion to Alter, Amend, and/or Reconsider is denied.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.
South Carolina Tenth Judicial Circuit Court



Beaufort Common Pleas

**Case Caption:** Machelle Smith VS Columbia Sussex Corporation , defendant, et al

**Case Number:** 2016CP0700777

**Type:** Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas



J. Cordell Maddox, Jr., Circuit Court Judge

---

Appellate Case No.: 2019-002099

---

Machelle Smith.....Appellant,

-v-

Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts and Spa;
Columbia Sussex Management, LLC; and,
Columbia Properties Hilton Head, LLC.....Respondents

---

**CERTIFICATE OF SERVICE**

---

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorney for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Appellant's Return to Respondents' Motion to Dismiss Appeal*** to:

Christian Stegmaier, Esquire
COLLINS & LACY, P.C.
P.O. Box 12487
Columbia, S.C. 29211

May 7th, 2020
Hampton, South Carolina

Megan C. Davis
**Megan C. Davis**

# PMPED

PETERS | MURDAUGH | PARKER | ELTZROTH | DETRICK

May 7, 2020



John E. Parker, Jr.
Phone: (803) 943-2111
Email: jayparker@pmped.com

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

***Re:*** ***Machelle Smith v. Columbia Sussex Corporation d/b/a Hilton Head Marriott Resort & Spa; Columbia Sussex Management, LLC and Columbia Properties Hilton Head, LLC***
***Appellate Case No.: 2019-002099***

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellant's Return to Respondent's Motion to Dismiss Appeal in the above-referenced matter. Please file the original and return a clocked copy of same in the self-addressed stamped envelope provided.

If you have any questions, please let us know.

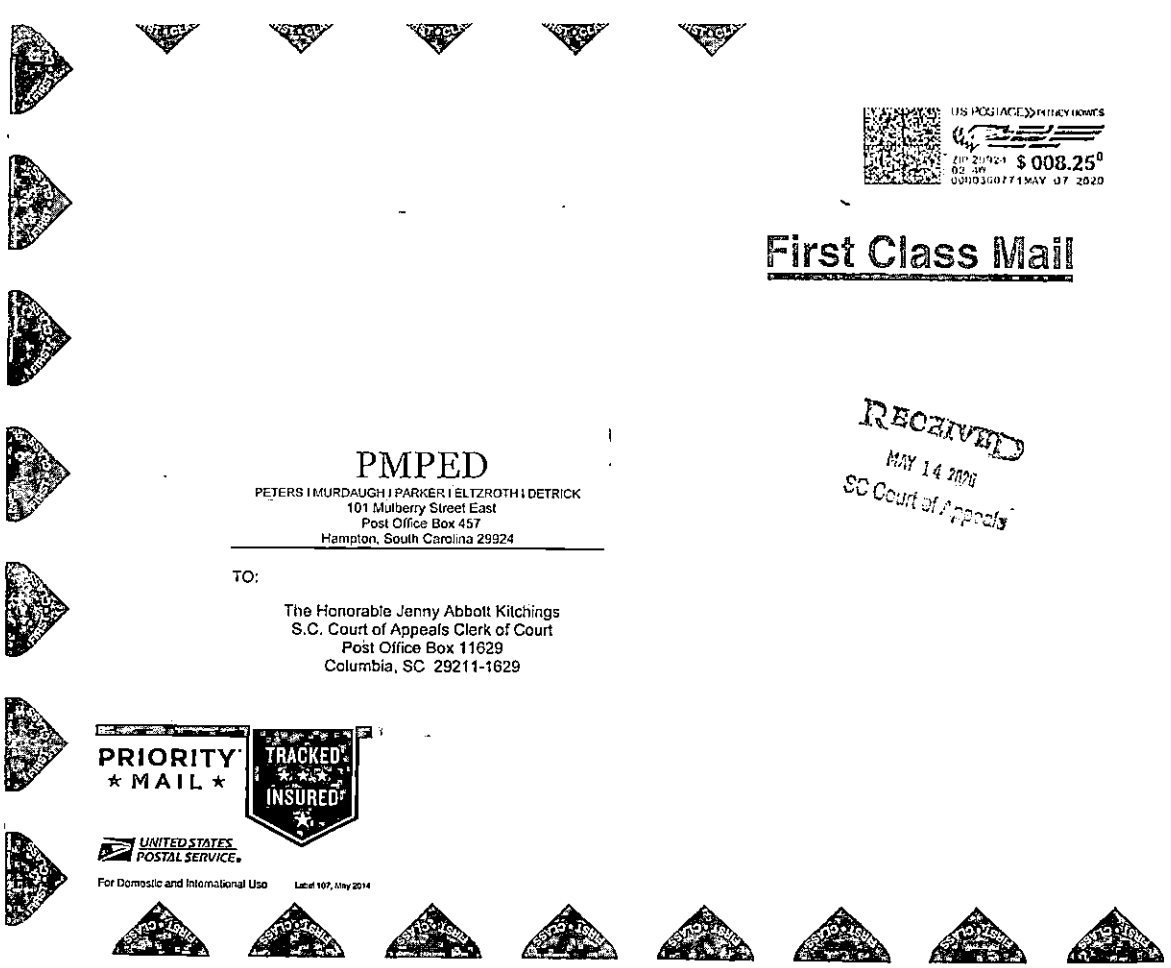
With kind regards, I am

Sincerely,

John E. Parker, Jr.

JEP2/mcd
Enclosures as stated

cc: Christian Stegmaier, Esquire



US POSTAGE PITNEY BOWES
ZIP 29401 $ 008.25⁰
02 4W
0000360771 MAY 07 2020

First Class Mail

RECEIVED
MAY 14 2020
SC Court of Appeals

PMPED
PETERS | MURDAUGH | PARKER | ELTZROTH | DETRICK
101 Mulberry Street East
Post Office Box 457
Hampton, South Carolina 29924

TO:

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

PRIORITY ★ MAIL ★
TRACKED INSURED
UNITED STATES POSTAL SERVICE.
For Domestic and International Use Label 107, May 2014