THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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.

RESPONDENTS' INITIAL BRIEF

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ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE FACTS

Appellant Machelle Smith ("Appellant"), a hotel guest of Respondents, avers that her jewelry and cash were stolen from her hotel room by hotel housekeeper Briana Cohen,[1] an employee of Respondents, on April 26, 2013, at the Hilton Head Marriott. She alleges Respondents were negligent in hiring, supervising, and retaining employee Cohen and alleges vicarious liability and *respondeat superior*. [Complaint ¶ 10, 11, 12]. Respondents asserted immunity from liability for the theft under the Innkeeper Statute because Appellant failed to place her valuables in the room safe. [Answer ¶ 30, 31]. Respondents further asserted that they were not liable for the alleged criminal acts of its employees.

On or about April 26, 2013, Appellant and her husband checked into room 618. [Complaint ¶ 6; Appellant'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. [Photographs]. Prior to attending a spa treatment, Appellant removed her jewelry. [Complaint ¶ 6; Appellant's Deposition Transcript, p. 26, lines 11-13]. Appellant stated her jewelry included her diamond band wedding ring, diamond engagement ring, emerald and diamond ring, and a diamond pendant. [Appellant's Deposition Transcript, p. 17,

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

lines 12-14]. She could not locate the safe; rather, Appellant decided to hide her jewelry in the pockets of her suitcase. [Appellant's Deposition Transcript, p. 27, line 19 – p. 28, line 6; Guest Statement Report]. During Appellant's spa appointment, her husband attended meetings at a medical conference. [Appellant's Deposition Transcript, p. 26, lines 8-14; p. 29 lines 6-7]. When Appellate 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]. Appellant avers that she immediately realized her jewelry—which was stored in her suitcase—was missing upon her return to the room. [Appellant's Deposition Transcript, p. 30, lines 5-7].

After discovering that her jewelry was missing, Appellant's husband contacted an employee, who returned to Appellant's room with her husband, and reported to the employee what happened. [Appellant's Deposition Transcript, p. 33, line 4-9]. Law enforcement subsequently arrived and placed the hotel on lockdown. [Appellant's Deposition Transcript, p. 33, line 21 – p. 34, line 18]. Law enforcement advised Appellant 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. [Appellant's Deposition Transcript, p. 35, line 9-15].

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

Respondents 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].

STATEMENT OF THE CASE

This action arises out of the purported theft of Appellant's jewelry and cash from her hotel room by a hotel housekeeper/employee of Respondents. Appellant filed her Complaint, alleging Respondents were negligent in hiring, supervising and retaining the employee and alleged vicarious liability and *respondeat superior*. (Pl. Compl. ¶ 10, 11, 12) Respondents asserted immunity from liability for the alleged theft under the Innkeeper Statute because Appellant failed to place her valuables in the room safe. (Answer ¶ 30, 31). Appellant's further asserted that to the extent the allegations were true regarding the theft of jewelry, Respondents were not liable for the alleged criminal acts of Cohen.

Following discovery, Respondents moved for summary judgment, requesting the Court expressly rule on the applicability of the Innkeeper Statute. (Respondents' Motion for Summary Judgment). A hearing on the motion was scheduled for September 26, 2018. However, due to a scheduling conflict, counsel to the parties agreed, upon the Court's consent, to have the motion considered solely on the briefs. (October 5, 2018 Email with Court). Respondents subsequently submitted their memorandum in support of motion for summary judgment. (Id.). Appellant did not file a memorandum in opposition of the motion for summary judgment. Succinctly stated, Appellant failed to raise any arguments before the Circuit Court opposing Respondents' motion for summary judgment.

Counsel received notice from the Court on December 10, 2018, that the Circuit Court granted Respondents' motion for summary judgment and directed Respondents' counsel to draft the order. (December 10, 2018 Email Correspondence from Judge Maddox). The Order granting summary judgment was subsequently entered by the Court.[2] (February 5, 2019, Order).

On February 15, 2019, Appellant filed her Motion to Alter, Amend, and/or reconsider Pursuant to Rule 59(e), SCRCP. (Motion to Alter or Amend). For the first time, Appellant argued that Respondents were not immune from liability pursuant to the Innkeeper Statute. (Id.). The Circuit Court denied Appellant's motion, by order dated November 18, 2019.

Appellant filed her Notice of Appeal on December 18, 2019.

[2] Appellant has appealed only two of the three rulings from the Circuit Court's Order Granting Summary Judgment. Appellant has explicitly abandoned her claims for negligent hiring, training, and retention. Accordingly, the only two rulings from the Circuit Court at issue on appeal are the applicability of the Innkeeper Statute and vicarious liability.

STANDARD OF REVIEW

In Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003), our Court of Appeals articulated the proper standard of review concerning summary judgment in a negligence case:

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Id. at 200-01, 544 S.E.2d at 41; see also Glenn v. School Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988) (stating during a review of a grant of summary judgment on appeal, the appellate court's focus is driven by its reading of the complaint).

Our appellate courts have further stated that when a plaintiff is faced with a motion for summary judgment, the plaintiff cannot defeat the motion by relying

upon the mere allegations of her complaint, but must disclose the facts the plaintiff intends to rely on by affidavit or other proof. Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the Circuit Court is required under Rule 56 to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (citing Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974)).

In reviewing a grant of summary judgment, the appellate court must apply the same standard as the trial court under Rule 56(c), SCRCP. Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010).

LAW/ANALYSIS

Appellant failed to submit any memorandum, law, or argument at the summary judgment phase of this case. Appellant first raised the issues now raised on appeal in a Rule 59(e), SCRCP, motion. Accordingly, Appellant's arguments are

not preserved for review.

Alternatively, to the extent the arguments are preserved for review, the Circuit Court did not err in holding Respondents were immune from liability under the Innkeeper Statute where Appellant did not use the designated in-room safe. Additionally, *respondeat superior* does not apply where the employee acted with criminal intent for her own purposes outside the scope of employment. Accordingly, Respondents cannot be held liable for the alleged criminal acts of Cohen.

I. Appellant's Arguments Are Not Preserved for Review

"There are four basic requirements to preserving issues at trial for appellant review. The issue must have been (1) raised to and ruled upon by the trial court, (2) **raised by the appellant**, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018).

An issue may not be raised for the first time in a motion to reconsider. Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("Further, because the transcript of the proceedings below is omitted from the record, it appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not preserved for our review."); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (holding that a party cannot use a motion to reconsider, alter, or amend

a judgment to present an issue that could have been raised prior to the judgment but was not).

Further, "[g]enerally, an issue must be raised to and ruled upon by the circuit court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). An exception to the rule exists **only** when "the issue has been **properly raised by a Rule 59(e) motion**, and it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." Coward Hunt Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting James F. Flanagan *South Carolina Civil Procedure* 475 (2d ed. 1996)) (emphasis added). Notably, the Court in Pye, in relying upon the exception articulated in Coward Hunt Const., stated: "The Pyes asserted this theory **both** at the summary judgment hearing and the Rule 59(e) hearing. Consequently, this issue is preserved for our review[.]" Pye, 369 S.C. at 566, 633 S.E.2d at 511 (emphasis added).

Appellant's arguments are unpreserved for appeal. As an initial matter, Appellant failed to raise any arguments in opposition of Respondents' motion for summary judgment prior to the Circuit Court's entry of judgment in favor of Respondents. Appellant, for the first time, contested the applicability of the Innkeeper Statute, in her Rule 59(e), SCRCP motion. Because Appellant's arguments were improperly raised for the first time on a motion to reconsider,

Appellant's arguments are unpreserved. See Commercial Credit Loans, Inc., 334 S.C. at 186, 512 S.E.2d at 129.

Further, the exception articulated in Coward Hund Const. Co., and discussed in Pye, is inapplicable to the subject case. Specifically, Appellant has failed to satisfy the two prongs: (1) Appellant failed to raise her arguments opposing summary judgment **prior to** the issuance of the order granting summary judgment; and (2) Appellant failed to "properly raise" the issues by a Rule 59(e) motion. See Coward Hund Const. Co., 336 S.C. at 4, 518 S.E.2d at 58.

In opposition to the motion to dismiss, Appellant argued that because the issue of applicability of the Innkeeper Statute was before the Circuit Court by way of Respondents' motion for summary judgment any arguments in opposition of Respondents' position were preserved. However, Appellant failed to cite any case law or other authority providing that an issue raised by one party preserves the arguments in opposition without any arguments or written materials submitted by the party. Indeed, the presumption is in contraction to this Court's rulings regarding preservation. The issue and arguments of the "inapplicability" of the Innkeeper Statute were not considered by the Circuit Court. See Simmons 423 S.C. 552, 816 S.E.2d 566. Further, it is apparent Appellant is attempting to contend that one or both exceptions to the immunity provision of the Innkeeper Statute apply; whether the exceptions apply was not explicitly before the Circuit Court and arguments

(whether oral, written, or other evidence submitted) were not considered by the Circuit Court.

Appellant's opposition to the motion to dismiss further only addresses one ruling of the Circuit Court: Applicability of the Innkeeper Statute. To the extent the simple presentation of applicability of the Innkeeper Statute to be considered by the Circuit Court is sufficient to preserve arguments opposing the applicability of the statute to the facts of this case, Appellant's arguments in opposition of issue preservation do not address the Circuit Court's second ruling: Plaintiff failed to present sufficient evidence creating a question of fact that Respondents are liable for the alleged criminal acts of its employees. For the same reasons articulated supra, Plaintiff failed to present any arguments, facts, evidence, or other materials in opposition of Respondent's arguments for the Circuit Court's consideration of Respondents' motion for summary judgment on this alternative ground.

Accordingly, because Appellant failed to raise or assert any arguments in opposition of the motion for summary judgment, Appellant's appeal must be dismissed or, alternatively, the Circuit Court's Order affirmed.

II. Respondents 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 provides for limited liability if the loss is caused by the negligence of the Innkeeper. Id. 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).

Appellant summarily states that because Respondents can only act through their employees, the acts as described in the statute which would either limit liability or exclude immunity could only be referring to the acts of the employees. Appellant states—for the first time in her motion for reconsideration and reasserted in her

[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).

briefing before this Court—the evidence is clear employee Cohen acted negligently or willfully, and, therefore, the Circuit Court erred in ruling that the Innkeeper Statute provided immunity to Respondents. However, even to the extent Appellant's reading and applicability of the statute is accepted by this Court, as articulated in Section I, supra, Appellant failed to present to the Circuit Court any arguments or evidence that create a question of fact regarding Respondents negligence or willful conduct. However, Respondents maintain that the plain reading of the statute provides for immunity to Respondents and the alleged acts of Cohen do not limit or eliminate immunity. Indeed, the legislature did not include language within the statute addressing the acts of employees, servants, or agents.

Further, Appellant contends that Respondents could only act through its employees and therefore the negligence referenced in the exception for immunity could only refer to that of its employee (i.e., employee Cohen's negligence or willful conduct in committing the alleged theft). However, Appellant's contention fails to consider independent causes of action against the Innkeeper—i.e., negligent hiring, supervision, and training. Appellant has voluntarily abandoned such claims of negligence against Respondents—the Innkeeper. Accordingly, without the clear legislative intent to or language contained within to limit or exclude immunity based on the negligent or willful acts of **its employees**, Respondents are entitled to the immunity afforded by the Innkeeper Statute.

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). This view by limited States explicitly reference theft or negligence of employees or agents. The South Carolina Innkeeper Statute does not contain language limiting immunity based on the negligence or thefts of employees or agents.

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[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. (emphasis added).

[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.

Other jurisdictions unequivocally limit liability or contain no exceptions for loss caused by employee dishonesty or for the employee's acts, including alleged theft. 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.").

Importantly, based on the language of innkeeper statutes in states limiting liability in cases of employee theft, the statutes contain explicit language that provide for either limited liability due to employee theft. The Statutes discuss and explicitly

address the situation involving employee theft. Again, the South Carolina legislature failed to include language regarding the acts of employees—language explicitly included in certain states' innkeeper statutes limiting liability or limiting immunity. See Timmons v. S.C Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970) ("[B]ut where language is clear and explicit, courts cannot rewrite statute and inject matters into statute which are not in legislature's language[.]").

A New York court has addressed the New York Innkeeper Statute:

> 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).

Courts generally place liability with the party best positioned to avoid the loss. The economic loss doctrine in tort law holds 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, specifically involving the acts of employees. 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, Appellant could best avoid the loss by placing valuables in the safe provided in the room for that express purpose. If she had, Appellant's jewelry and cash would have been safe. To hold otherwise renders Respondents to be Appellant's insurer, which is in direct contravention of the Innkeeper Statute.

Further, even to the extent the two exceptions noted with the Innkeeper statute are considered to exclude or limit immunity to Respondents, Appellant failed to preserve for review arguments, issues, and/or presentation/consideration of evidence to create a question of fact that the two exceptions apply in this case. Indeed, Appellant readily admits that the Innkeeper Statute applies to Respondent. Accordingly, Appellant can only now argue that an exception to full immunity applies. However, Appellants failed to preserve for this Court's review such arguments since the arguments and issue regarding applicability of the exceptions for full immunity were not before or considered by the Circuit Court.

Accordingly, based on the aforementioned, the Circuit Court properly granted Respondents' motion for summary judgment in holding that Respondents were immune from liability pursuant to 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, regardless, Respondents 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, a 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).

Appellant summarily states that finding Respondents not liability for the acts of its employee—even the employee's alleged theft—"works against the language" of the Innkeeper Statute. Appellant does not contest that theft committed by an employee is outside the course and scope of employment and is not an act in furtherance of the employer's business. Appellant has cited to no case law or other authority that the well established law that an employer is not liable for the criminal acts of its employees outside the scope of employment is not applicable to innkeepers.

Further, the alleged jewelry and cash were never recovered from Respondents' 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—which was never presented to the Circuit Court at the summary judgment phase—Respondents are not liable for Cohen's conduct.

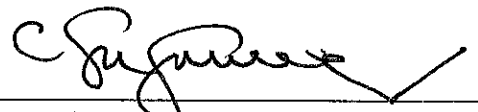
In her Complaint, Appellant alleged that Cohen, an employee of Respondents, accessed Appellant's room using her keycard, and while in the room, stole Appellant's jewelry and cash. However, the only competent evidence in this matter shows Cohen (whether she entered the room or not) was not scheduled to clean Appellant'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—or at a minimum any arguments preserved for review—that Cohen's alleged conduct was in furtherance of Respondents' business or for the benefit of Respondents. Accordingly, Respondents cannot be liable for the alleged conduct of Cohen.

CONCLUSION

Based on the foregoing, Respondents respectfully request the Court affirm the Circuit Court's Order granting summary judgment in favor of Respondents.

Respectfully Submitted,
COLLINS & LACY, PC



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PROOF OF SERVICE

I hereby certify that I served this **Initial Brief of Respondents and Designation of Matter** upon all parties, by placing a copy in the United States mail, postage prepaid, on August 28, 2020, addressed to the following:

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August 28, 2020

VIA U.S. MAIL AND EMAIL
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: ***Machelle Smith v. Columbia Sussex Corporation d/b/a Hilton Head Marriott Resorts & Spa; Columbia Sussex Management, LLC; and Columbia Properties Hilton Head, LLC***
Appellate Case No. 2019-002099
Claim No. 007164-006563-GD-01
C&L File No. 001831-00104

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and one (1) copy of the Initial Brief of Respondents, Designation of Matter, and Proof of Service in the above referenced matter. Please file the original and return a clocked copy of same to our office in the envelope provided for your convenience.

Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency" (2020-05-29-02, Appellate Case No. 2020-000447), we have not included any additional copies. If any additional copies are required, please let us know.

By copy of this letter to Appellant's counsel, we are serving same on them.

Thank you for your attention to this matter.

Respectfully.

Christian Stegmaier

CS/net
Encl.
cc (via U.S. Mail and email):
John E. Parker, Esquire, Peters Murdaugh Parker Eltzroth & Detrick