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

APPELLANT'S REPLY BRIEF

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ARGUMENTS

In their Brief, Respondents make several claims that are unsupported by the factual evidence and South Carolina law. First, Respondents misconstrue that South Carolina law is absolute in that an issue is unpreserved when it has not been argued by the appellant prior to a motion for reconsideration, when the cited authority stands for the proposition that an issue is preserved as long as it has been raised to the trial court by the appellant and ruled upon by the court prior to appeal. Second, Respondents incorrectly maintain that there is no evidence Briana Cohen was carrying out Respondents' business and acting within the course of her employment at the time of the theft, and that even if she was, they cannot be liable under a theory of *respondeat superior* for the criminal acts of their employees. Third, Respondents claim that the exception to the Innkeeper Statute which permits liability against an "innkeeper" for the willful theft of a guest's property is realistically never applicable in the modern context of a corporate-owned hotel. For the following reasons, the Court should reverse the Circuit Court's Order and remand this action to the Beaufort County Court of Common Pleas.

I. THE ISSUES OF WHETHER RESPONDENTS ARE LIABLE UNDER A THEORY OF *RESPONDEAT SUPERIOR* AND THE INNKEEPER STATUTE ARE PRESERVED FOR APPEAL BECAUSE THEY WERE RAISED TO AND RULED UPON BY THE CIRCUIT COURT.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants," and so long as the core preservation requirements have been met, there is no procedural bar to the Court's review. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285-86 (2012). The purpose of the issue preservation

requirement is to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). An issue properly made by the pleadings is preserved for appeal. *See McNeely v. S.C. Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 41, 190 S.E.2d 499 (1972). So long as an issue is raised to the trial court, and the court had an opportunity to rule on the issue and did so, the issue is preserved for review. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995). Doubts as to the question of preservation should be resolved in favor of appeal. *Lewis*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, J., concurring).

Appellant's arguments are preserved for review. First, Appellant raised the issue of *respondeat superior* in her Complaint, alleging that "at all times relevant herein Briana Cohen was an employee, agent, servant, and/or representative of the [Respondents]." (R. p. 25). Additionally, in its Order granting summary judgment to Respondents, the Circuit Court noted that "[Appellant] has also alleged a cause of action against [Respondents] under a theory of *respondeat superior*, and contend[s] that [Respondents] are liable to [Appellant] for [their] employee's purported acts." (R. p. 12). The Circuit Court incorrectly ruled on this issue in finding that there was not a mere scintilla of evidence that Respondents could be liable for the conduct of their employee under a theory of *respondeat superior*. (R. pp. 12-14).

Second, Appellant never waived her argument that Respondents are liable under the Innkeeper Statute and raised it to the Circuit Court in her Motion for Reconsideration, and the Circuit Court ruled on this issue. (R. pp. 19, 99). In their Motion for Summary Judgment, Respondents noted that the "parties disagree about the applicability of the Innkeeper statute in limiting liability in this case." (R. p. 40). Respondents argued in their motion that the statute limited their liability for the theft of Appellant's property, and the Circuit Court ruled in their favor,

observing that Appellant had taken the opposite stance and was contending that Respondents could be liable for their employee's purported acts. (R. p. 12). In erroneously finding that summary judgment was appropriate because Respondents could not be liable under the Innkeeper Statute, the Circuit Court necessarily considered the arguments in favor of and against limiting liability in circumstances where a hotel employee willfully steals the property of a hotel guest. The Circuit Court also necessarily considered these arguments in denying Appellant's Motion for Reconsideration. (R. p. 19).

Respondents assert that an appellant does not preserve an issue for review when she raises an argument for the first time in a motion for reconsideration. However, several of the precedents cited by Respondents involved instances where a legal issue did not appear to have been before the lower court at all until it was raised in a motion for reconsideration, whereas here the issues of *respondeat superior* and whether or not the Innkeeper Statute affords Respondents limited liability were before the Circuit Court on Respondents' Motion for Summary Judgment as well as Appellant's Motion for Reconsideration. *See Com. Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 128-29 (Ct. App. 1999) (finding that the issue of whether a statute tolled the statute of limitations was not preserved when it was not presented to the circuit court until a Rule 59(e) motion for reconsideration); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (questioning whether the issue of waiver was preserved for review when it was not raised to the circuit court prior to a Rule 59(e) motion). The other cases cited by Respondents merely affirm that an issue is preserved for review when it is raised to the circuit court in a dispositive motion and a motion for reconsideration. *See Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) ("[A] properly requested ruling under Rule 59 is sufficient without a specific judicial decision on the matter."); *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C.

1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999). Here, the issues of *respondeat superior* and liability under the Innkeeper's Statute were both raised to, considered, and ruled upon by the Circuit Court on Respondents' Motion for Summary Judgment and Appellant's Motion for Reconsideration. None of the cited cases precisely conform with Respondents' position that Appellant must have initially made specific arguments concerning the two issues in opposition to Respondents' Motion for Summary Judgment in order to assert them on appeal.

Respondents also contend that the issues must have been initially raised by Appellant, and not Respondents, prior to her Motion for Reconsideration in order to have been preserved for appellate review. The source for Respondents' proposition appears to be two cases cited by Justice Toal in her treatise *Appellate Practice in South Carolina*. Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 193 (3rd ed. 2016). However, both cases were based on circumstances in which the appellant never raised the relevant issue before the lower court at all. *See Tupper v. Dorchester Cnty.*, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997); *State v. Ward*, 370 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007). Here, Appellant's arguments were raised to and ruled upon by the Circuit Court in her Motion for Reconsideration.

As a final consideration, "[t]he failure to preserve an issue for appeal does not deprive an appellate court of jurisdiction to hear the appeal." *Hill v. S.C. Dept. of Health and Env'tal Control*, 389 S.C. 1, 21-22, 698 S.E.2d 612, 623 (2010). This notion is deferential to the idea that "behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests." *Lewis*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, J., concurring). When there are multiple interpretations as to the question of preservation, all doubts should be resolved in favor of preservation. *Id.* In this case, the two issues

before the Court were both raised to and ruled upon by the Circuit Court in two separate Orders. The issues are preserved and should be reviewed by the Court.

II. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THERE IS A SCINTILLA OF EVIDENCE IN THE RECORD THAT BRIANA COHEN STOLE MS. SMITH'S PROPERTY BY VIRTUE OF HER AUTHORITY AS AN AGENT OF RESPONDENTS.

Since there is at least a mere scintilla of evidence in the record demonstrating that Respondents' agent, Brianna Cohen, engaged in the subject theft during the course of her employment and by virtue of her authority as a member of Respondents' housekeeping staff, the Circuit Court's summary judgment Order should be reversed. Respondents appear to argue that an employer can never be liable for employee theft because whenever an employee steals, she is engaging in activities that are "clearly of a personal nature, indulged in for her own personal amusement." (Resp'ts' Brief at 22). Respondents' argument ignores the longstanding common law of South Carolina, which holds that an employer may be liable for the criminal acts of its employees even if it has forbidden or condemned the conduct.

> It is a general doctrine of law that, although the principal is not ordinarily liable (for sometimes he is) in a ***criminal suit*** for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a ***civil suit*** for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances, misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him, ***through the instrumentality of agents***. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.

Williams v. Com. Cas. Ins. Co., 159 S.C. 301, 156 S.E. 871, 873 (1931) (emphasis added); *Reynolds v. Witte*, 13 S.C. 5, 18, 36 Am. Rep. 678 (1880). Properly stated, the rule is that an

employer is liable for an employee's tortious or criminal act if it is done during the course of employment and by virtue of the employee's authority as agent. *Williams,* 156 S.E. at 872. The issues of agency relationship and scope of employment are generally for the jury, and if there is any doubt as to whether the employee was acting within the scope of her authority it should be resolved against the employer. *See Murphy v. Jefferson Pilot Com. Co.*, 364 S.C. 453, 463, 613 S.E.2d 808, 813 (Ct. App. 2005); *Jones v. Elbert*, 211 S.C. 553, 559, 34 S.E.2d 796, 799 (1945).

Respondents cite several cases to support their argument that Ms. Cohen's actions were outside the course of employment. However, these cases are easily distinguishable from the facts currently before the Court. In *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006), several employees of Food Lion attacked a customer while he was visiting one of its stores. The court held that Food Lion was not liable for the acts of the employees under a theory of *respondeat superior*, as the evidence conclusively established, and the plaintiff conceded, that the employees were not working and were "goofing off" at the time the attack occurred. *Id.* at 275, 639 S.E.2d at 52.

In *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964), a plaintiff brought an action against a business for the acts of its employee after she was injured by a prank instigated by the employee. The evidence showed that the employee carried out the prank away from the employer's offices after the employee had completed his work for the day, using a device that was not provided by the employer. *Id.* at 304, 136 S.E.2d at 716. The court found that the act was not carried out in the course of employment, as it did not have "any connection whatsoever with his duties concerning his master's business." *Id.* at 305-06, 136 S.E.2d at 716.

Conversely, the issue of *respondeat superior* should go to the jury when there is some evidence establishing that an employee was about the business of the employer when he engaged

in tortious conduct that injured a third party. An employer may be liable for an employee's tortious acts, even if they are incidental and contrary to the employee's duties, if the opportunity to act is created by, in connection to, and arises during the course of employment. *See Jones v. Elbert,* 211 S.C. 553, 34 S.E.2d 796 (1945).

There is evidence in the record that the theft occurred both during the course of Ms. Cohen's employment and by virtue of her actual authority as a member of the Respondents' housekeeping staff. During the law enforcement investigation, it was discovered that Ms. Cohen worked at the hotel as a housekeeper. (R. p. 154). The room was entered at approximately 11:23 a.m. on the day the theft occurred using a numbered key card issued to Ms. Cohen, and she stated that she had the key card in her possession for the entire day. (R. p. 154). Appellant described that upon returning to the room at approximately 12:10 p.m. she discovered that her property was missing. (R. p. 154). Appellant also stated that upon her return, the door to the room was partially held open by the deadbolt. (R. p. 154).

When all inferences are made from the facts in the light most favorable to Appellant, there is a triable issue as to whether Ms. Cohen was acting within the scope of her employment at the time of the theft. Appellant did not leave a do-no-disturb sign on her door prior to leaving the room on the morning of the theft, indicating that the room was to be cleaned by the housekeeping staff. (R. p. 131, lines 5-13). Upon returning, Appellant discovered that the door to her room was held open by the deadbolt as if an employee had entered with the intent of cleaning the room. The evidence shows that Ms. Cohen entered the room using an instrumentality of her employment, a key card issued and authorized by Respondents, and stole Appellant's property while in the room and during the course of her workday as an employee of Respondents.

Appellant is only required to point to a mere scintilla of evidence demonstrating that Ms. Cohen was about Respondents' business and acting within the scope of her employment when the theft occurred. *See Armstrong*, 371 S.C. at 277 n.2, 639 S.E.2d at 53 n.2. Thus, it was error for the Circuit Court to conclude that there was not a genuine dispute of material fact as to whether Ms. Cohen was acting in the course of her employment and by virtue of her authority as an agent for Respondents when the theft occurred. The Circuit Court's decision on the issue of *respondeat superior* should be reversed and left to the factfinder.

III. THE CIRCUIT COURT'S INTERPRETATION OF THE INNKEEPER STATUTE CREATES AN ABSURD RESULT AND DEFEATS THE GENERAL ASSEMBLY'S INTENTIONS IN CREATING AN EXCEPTION TO THE STATUTE.

While the rule in South Carolina is that generally an innkeeper is not the insurer of the safety of its guests, this was not always the case. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011).

> At common law an innkeeper was practically an insurer of the goods of a guest lost in the inn . . . . To recover, all the guest had to prove was that his property was lost while in the inn. It made no difference that the innkeeper may have used the greatest care to protect the guest's property. The innkeeper's liability was absolute and no defense was available to him . . . . The imposition of strict liability on the innkeeper found its origin in the conditions existing in England in the fourteenth and fifteenth centuries. Inadequate means of travel, the sparsely settled country and the constant exposure to robbers left the traveler with the inn practically his only hope for protection. Innkeepers themselves, ***and their servants***, were often as dishonest as the highwaymen roaming the countryside and were not beyond joining forces with the outlaws to relieve travelers and guests, by connivance or force, of their valuables and goods. Under such conditions it was purely a matter of necessity and policy for the law to require the innkeeper to exert his utmost efforts to protect his guests' property and to assure results by imposing legal liability for loss without regard to fault.

Minneapolis Fire & Marine Ins. Co. v. Matson Nav. Co., 44 Haw. 59, 61, 352 P.2d 335, 337 (Haw. 1960) (emphasis added). Recognizing that circumstances have changed, and that we no longer

have highwaymen roaming the countryside, the General Assembly passed the Innkeeper's Statute, S.C. Code Ann. § 45-1-40, in derogation of the above described common law principles.

"A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent." *S.C. Dep't of Soc. Servs. v. Wheaton*, 323 S.C. 299, 302, 474 S.E.2d 156, 158 (Ct. App. 1996). Put another way, a statute must not be construed in derogation of common law rights if an alternative interpretation is reasonable. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992). Therefore, if the term "innkeeper" as used in the statute is ambiguous, its meaning within the construction of the statute must be resolved in favor of retaining Appellant's common law rights to pursue a cause of action against Respondents. The Innkeeper's Statute evinces an intent by the General Assembly to eliminate an innkeeper's common law strict liability for the safekeeping of a guest's property so long as the guest is provided with the means to safeguard his possessions, while leaving undisturbed the innkeeper's liability in cases where theft against the guest is perpetuated by the innkeeper itself or its employees.

While we may no longer live in medieval England, hotel proprietors and their employees are still entrusted with the reasonable safekeeping of guests and their possessions, and hotel employees are still in an especially advantageous position to have unlimited, undetected access to a guest's belongings. Within the context of modern society, where hotels and motels are almost exclusively owned by corporate entities who have legions of employees yet no physical presence within the hotel, it hardly makes sense that the General Assembly would have intended to relax liability such that a corporate innkeeper as a matter of law is immune to liability for the thefts of its employees while remaining liable for acts of theft carried out by the corporation itself. The possibility of theft by an innkeeper's "servants" has changed little since the origins of the common

law. Since the Innkeeper's Statute is in derogation of the common law and must be strictly construed, the Court should adopt Appellant's interpretation of the statute, which would provide immunity to an innkeeper only under circumstances in which the innkeeper or its employees have not willfully contributed to the loss of a guest's property. Appellant's interpretation is narrower, more reasonable, and provides a smaller deviation from the common law than Respondents' construction of the statute, which would in practice provide absolute immunity to corporate innkeepers for the loss of a guest's property at the hands of an employee, even if the employee is acting within the course of her employment.

Additionally, Respondents' argument that the term "innkeeper" as used within the statute cannot encompass a corporate innkeeper's employees leads to absurd results.

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possible have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cnty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). In construing statutory language the statute must be read as a whole. *State v. Sawyer*, 104 S.C. 342, 88 S.E.894 (1916). "Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010). "Where the same word is used more than once in a statute it is presumed to have the same meaning throughout unless a different meaning is necessary to avoid an absurd result." *Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 312 S.E.2d 716 (Ct. App. 1984).

Section 45-1-40 states that "[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 bolt the door of his room . . . 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 . . ." The statute also states that "an 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. § 45-1-40. Under Respondents' and the Circuit Court's reasoning, the word innkeeper under the latter passage of the statute does not encompass a corporate hotel's employees and presumably only the corporate entity itself. However, under the former passage, if the term innkeeper does not encompass a hotel proprietor ***and*** its employees, then the corporate innkeeper cannot avail itself of the protections of the statute at all, as how can the corporate innkeeper "post and keep posted" the requisite notice if not through the actions of its employees? A corporate entity does not have a physical presence within the "inn" and can only act through its own employees. In order to avoid absurd, contradicting results, the statute as a whole must be read to define the corporate "innkeeper" as the business entity and its agents.

Appellant's interpretation of the term innkeeper would not render Respondents the absolute insurer of their guests' safety and possessions, as any potential plaintiffs would still have to prevail under a theory of *respondeat superior* to prove that an innkeeper was liable for the theft of a guest's property by an employee. Under Appellant's proposed construction of the statute, if an employee was not acting within the course of her employment when she stole a guest's property, and a guest's possessions were not locked in the room safe, at most the innkeeper could only be liable for its own negligence in hiring the employee, and such liability is limited by the statute to $500 or $2,000, depending on the nature of the property. If an innkeeper's or its employee's acts do not

contribute to the loss of property, the innkeeper is not liable to the guest. The statute was clearly not intended to limit liability in scenarios where a hotel guest has her property willfully stolen by the innkeeper, whether that be a sole proprietor or a corporation and its agents, when the innkeeper and its employees have unlimited access to the guest's belongings and a common law duty to reasonably safeguard the guest's possessions. The Circuit Court's Order was in error in that its interpretation of the statute constitutes a broad and unnecessary derogation from the common law, while at the same time creating an absurd dichotomy between the term "innkeeper" in different passages of the statute.

CONCLUSION

For the foregoing reasons and those stated in Appellant's Final Brief, Appellant respectfully requests that the Court reverse the Circuit Court's Order granting summary judgment in favor of Respondents and remand this action to the Beaufort County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Reply Brief complies with Rule 211(b), SCACR.

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