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Analysis

As of: Feb 02, 2009

ELSIE MARIE ALLEN, as Personal Representative of the Estate of Donna Lea Swaim; KEITH BARFIELD, as Personal Representative of the Estate of Allison Barfield; WILLIAM E. HARRELL, JR.; NICHOLAS R. WILKERSON, Plaintiffs - Appellants, versus CHOICE HOTELS INTERNATIONAL, INCORPORATED, Defendant - Appellee, and GREENVILLE HOTEL PARTNERS, INCORPORATED; R.G. HOSPITALITY, LLC; RONALD GEDDA; R.G. PROPERTIES, LLC, Defendants.

No. 07-1409

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

276 Fed. Appx. 339; 2008 U.S. App. LEXIS 9461

March 20, 2008, Argued
May 1, 2008, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., District Judge. (6:04-cv-02327-HMH). *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 2006 U.S. Dist. LEXIS 1855 (D.S.C., 2006)

DISPOSITION: AFFIRMED.**CASE SUMMARY:**

PROCEDURAL POSTURE: Appellants, hotel guests and their estates, sought review of a decision of the U.S. District Court for the District of South Carolina, which granted summary judgment to appellee hotel franchisor in their wrongful death and personal injury claims based on injuries from a hotel fire. Appellants appealed the district court's ruling that the franchisor was not directly liable for the alleged negligent acts and also sought certification of this issue.

OVERVIEW: On appeal, the court denied the motion for certification because the case did not present a novel question of law. The court also upheld the district court's ruling, finding that appellants failed to establish that the franchisor owed a duty to hotel guests by failing to require the franchisee to retrofit the hotel facility with a sprinkler system before opening the facility. In particular, the franchise agreement did not establish that the franchisor exerted sufficient control over the hotel's operations to create a duty, but only showed that the franchisee operated and controlled the hotel under general guidelines intended to foster consistency throughout the hotel system. The franchisor also did not owe appellants a common law duty of care to foreseeable persons since the franchisor did not create a risk or in any way make injury to the hotel guests more likely. Further, the franchisor did not have a common law duty of care based on a voluntarily undertaken act. By requiring the franchisee to install fire safety systems and recommending installation of sprinklers, the franchisor did not voluntarily undertake the control or regulation of the hotel's life safety systems.

OUTCOME: The court denied appellants' request for certification and affirmed the district court's decision.

CORE TERMS: hotel, franchisor, owed, franchisee's, guest, certification, franchise agreement, sprinkler, duty of care, summary judgment, contractor, undertaken, breached, shoulder, certify, retrofit, case law, negligent acts, negligence claims, vicarious liability, foreseeable, appearance, undertook, trademark, install, robbery, driver, cases arising, vicariously liable, sprinkler system

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

[HN1] Only if the available state law is clearly insufficient should a court certify an issue to the state court. In addition, there is no need to certify an unresolved question of state law to state court where the state of the law is clear in every other jurisdiction that has addressed the issue.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

[HN2] Certification requests that bear a resemblance to forum shopping are generally discouraged. Certification is inappropriate after removal to federal court following an adverse ruling in state court. Certification is inappropriate where plaintiffs, who sought certification, had initially filed suit in state court but then elected to take a nonsuit and refile in federal court.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

[HN3] An appellate court reviews de novo a district court's grant of summary judgment.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

[HN4] Federal courts in diversity cases apply the law of the forum state.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Negligence > Proof > Elements

[HN5] To prevail on a negligence claim in South Carolina, plaintiffs must show that (1) the defendant owed them a duty of care; (2) defendant breached its duty by a negligent act or omission; (3) defendant's breach was the proximate cause of their injuries; and (4) they suffered injury or damages. Whether the law recognizes a particular duty is an issue of law to be determined by a court.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Torts > Vicarious Liability > Franchisees

[HN6] The quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Torts > Vicarious Liability > Franchisees

[HN7] Like the vicarious liability analysis, direct liability cases also look to a franchisor's actual control or retained right of control to determine the presence of a duty for purposes of evaluating whether the franchisor was itself negligent.

Business & Corporate Law > Distributorships & Franchises > General Overview

Torts > Negligence > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

[HN8] South Carolina common law recognizes a separate duty to use due care where an act is voluntarily undertaken for the benefit of a third party. Even where there is no duty to act but an act is voluntarily undertaken, an actor assumes the duty to use due care. A convenience store franchisor owes a duty of reasonable care to a franchisee's employee who was injured during a robbery attempt because the franchisor had voluntarily undertaken to establish a security program to deter robberies and protect store employees from harm in the event of a robbery. A convenience store franchisor owes a duty of reasonable care to a store customer who was injured when a soda can fell from a defective rack because the franchisor had undertaken to perform the service of inspecting, endorsing, and recommending the rack.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

[HN9] Simply providing a list of suggested-but not required-security items does not support the contention that a franchisor retains or assumes control of the security of its franchisees. A showing of control over a franchisee's security measures beyond merely offering recommendations about security and imposing standards related to

appearance and services is required to establish a franchisor's liability.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

[HN10] The protection of its trademark and service mark is a necessary duty of a franchisor; to interfere with this duty would unfairly impose liability on the basis of a necessary duty.

COUNSEL: ARGUED: Robert Paul Foster, FOSTER LAW FIRM, L.L.P., Greenville, South Carolina; Laurel Payne Landon, KILPATRICK & STOCKTON, L.L.P., Augusta, Georgia, for Appellants.

James Thomas Hewitt, LEATHERWOOD, WALKER, TODD & MANN, Greenville, South Carolina, for Appellee.

ON BRIEF: Raymond G. Chadwick, Jr., KILPATRICK & STOCKTON, L.L.P., Augusta, Georgia, for Appellants.

John R. Crockett, III, Jeremiah A. Byrne, FROST, BROWN, TODD, L.L.C., Louisville, Kentucky; Stanley T. Case, BUTLER, MEANS, EVINS & BROWNE, P.A., Spartanburg, South Carolina, for Appellee.

JUDGES: Before WILLIAMS, Chief Judge, and NIE-MEYER and DUNCAN, Circuit Judges.

OPINION

[*340] PER CURIAM:

This case arises out of a fire at a **Comfort Inn** and Suites (the "**Comfort Inn**") which killed six hotel guests and injured twelve others. Appellants, guests who were injured in the fire and personal representatives of those who perished, brought wrongful death and personal injury claims against Ron Gedda ("Gedda") and his company, R.G. Hospitality, LLC ("RGH") (together "RGH/Gedda"), the hotel owners/franchisees, [**2] and Choice Hotels International, Inc. ("Choice"), the hotel franchisor. As relevant here, the district court granted summary judgment to Choice, concluding that, as franchisor, Choice was neither directly nor vicariously liable for the alleged negligent acts. Appellants only appeal the district court's ruling as to Choice's direct liability. Appellants also request that this court certify the issue of franchisor liability to the South Carolina Supreme Court.

Because this case does not present a novel question of law that justifies certification, and because we agree that Choice breached no duty of care on these facts, we affirm.

I.

In January 2004, six hotel guests were killed and twelve others were injured in a fire at the **Comfort Inn** and Suites in Greenville, South Carolina.¹ Following the fire, Appellants filed suit against Choice on theories that Choice was vicariously liable for the acts of the franchisee RGH/Gedda based on actual and apparent agency, and directly liable for alleged negligent acts of its own. Specifically, they allege that Choice is directly liable to Appellants because it failed to require RGH/Gedda to retrofit the hotel with sprinklers.

1 A federal jury convicted [**3] Eric Preston Hans for igniting the fire that caused the injuries and deaths at the hotel. *United States v. Hans*, 6:05-cr-01227 (D.S.C. Nov. 16, 2005).

[*341] Choice filed motions for summary judgment on the negligence claims, arguing that it was not liable on the Appellants' theories of negligence for either direct liability or vicarious liability. The district court granted Choice's motion, finding that Choice was not directly liable because it had no duty to retrofit the hotel with sprinklers, nor was Choice vicariously liable because Appellants failed to show that RGH/Gedda were either Choice's actual or apparent agents.

Appellants twice moved for reconsideration and requested certification of particular questions to the Supreme Court of South Carolina. The district court denied these requests. In yet another motion to reconsider, Appellants submitted an order from the South Carolina Court of Common Pleas for Greenville County ("State Court Order"), denying Choice's motion for summary judgment in a number of related cases arising from the same incident. The state court found that the question of whether Choice owed the plaintiffs a duty of care presented a mixed question of law and fact [**4] to be resolved by the fact finder. Nonetheless, the district court held that the State Court Order did not alter the district court's analysis with respect to the relationship between Choice and its franchisees and that the district court was not bound by a state trial court's decisions on a matter of law. The district court again denied Appellants' motion to reconsider. Appellants timely filed this appeal.

II.

A.

Appellants maintain that certification is appropriate due to the absence of controlling South Carolina precedent on franchisor liability and because this case presents a novel issue of South Carolina law.² This court has held that[HN1] "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state

court." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). In addition, there is no need to certify an unresolved question of state law to state court where the "state of the law [is clear] in every other jurisdiction that has addressed the issue." *Powell v. United States Fid. & Guar. Co.*, 88 F.3d 271, 273 (4th Cir. 1996). As demonstrated by the district court, there is sufficient South Carolina case law to resolve the issue before us, and where the [**5] South Carolina case law is lacking, other jurisdictions that have directly addressed this issue provide appropriate instruction.

2 Appellants also argue that this court should reconsider certification in light of pending cases arising out of the same incident. Appellants cite to no authority, nor have we found any, requiring certification where a case arising from the incident is pending in state court. In any event, the pending cases have all been settled or dismissed, with the exception of one case that is in pre-discovery.

We note as well that the circumstances of Appellants' request render it somewhat suspect. Appellants elected to bring suit in federal court, and pursued the alternative of certification only after receiving an adverse decision by the district court. [HN2] Certification requests that bear a resemblance to forum shopping are generally discouraged. See *National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (finding certification inappropriate after removal to federal court following an adverse ruling in state court); see also *Powell*, 88 F.3d at 273 (finding certification inappropriate where plaintiffs, who sought certification, had initially filed suit [**6] in state court but then elected to take non-suit and re-file in federal court). For these reasons, we decline to certify the issue presented by this case to the Supreme Court of South Carolina.

[*342] B.

[HN3] We review de novo the district court's grant of summary judgment, *Long v. Dunlop Sports Group Ams., Inc.*, 506 F.3d 299, 301 (4th Cir. 2007). *Fed. R. Civ. P. 56(c)*. Because this is a negligence claim based on diversity jurisdiction, we apply South Carolina law. See *Roe*, 28 F.3d at 407 ([HN4] "Federal courts in diversity cases apply the law of the forum state.").

[HN5] To prevail on a negligence claim in South Carolina, Appellants must show that (1) Choice owed them a duty of care; (2) Choice breached its duty by a negligent act or omission; (3) Choice's breach was the proximate cause of their injuries; and (4) they suffered injury or damages. *Dorrell v. S.C. DOT*, 605 S.E.2d 12, 15, 361 S.C. 312 (S.C. 2004). "Whether the law recognizes a particular duty is an issue of law to be determined

by the court." *Jackson v. Swordfish Inv., L.L.C.*, 620 S.E.2d 54, 56, 365 S.C. 608 (S.C. 2005). The district court granted summary judgment to Choice because Appellants failed to establish the first element--that Choice owed them [**7] a duty--and we agree.

Appellants assert three bases for finding that Choice owed a duty to **Comfort Inn** guests that it breached by failing to require RGH/Gedda to retrofit the hotel facility with a sprinkler system before opening the facility.³ We consider each in turn.

3 Appellants offered no evidence to show that the hotel, at any time, failed to comply with all applicable fire codes and specifically acknowledged as much at oral argument. Furthermore, although asserting that sprinklers are rapidly becoming standard in the hospitality industry, Appellants have apprised us of no authority to support their assertion that a hotel franchisor has a duty to require a hotel, which complies with the relevant fire codes, to retrofit the building with sprinklers.

1.

Appellants first argue that Choice owed a duty of care to hotel guests because Choice operated the **Comfort Inn** and controlled its life safety systems as evinced by the Franchise Agreement and **Comfort Inn** Rules and Regulations Instructions ("Rules and Regulations"). See, e.g., *Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 995-96 (D.N.H. 1983) (holding that the defendant franchisor owed a duty to a franchisee's injured employee [**8] because the defendant retained the authority to select, approve, and recommend the cooking equipment responsible for the employee's injury). Therefore, we turn to the Franchise Agreement, the Rules and Regulations and Choice's interaction with the **Comfort Inn** pursuant to the Franchise Agreement to determine whether Choice exercised sufficient control over the **Comfort Inn** to establish such a duty.

Under both the Franchise Agreement and the Rules and Regulations, RGH/Gedda (1) owned the building, land, and hotel equipment; (2) held the operating licenses and permits; (3) hired, fired, supervised, and disciplined the franchisee's employees; (4) determined employee wages and room rates; (5) provided training for employees, and (6) provided insurance for the hotel. Furthermore, the Franchise Agreement specifically states that RGH/Gedda is "solely responsible for exercising ordinary business control over the Hotel." J.A. 117.

Choice's Rules and Regulations required RGH/Gedda to have life safety systems, which included smoke and fire detection, fire extinguishing equipment, emergency exits, and emergency lighting that "meet or

exceed prevailing federal, state or local codes." J.A. 444. The [**9] Rules and Regulations also recommended an emergency power generator and sprinkler system. [*343] Gedda testified, however, that Choice did not participate in the selection of fire or safety equipment installed at the hotel, and that RGH/Gedda did not need Choice's approval to make any changes to safety and security systems at the hotel; nor did Choice have a role in RGH/Gedda's decision regarding whether or not to install fire sprinklers.

The mere terms of the Franchise Agreement do not establish that Choice exerted sufficient control over the operations of the hotel to create a duty. *See Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, 273 Wis. 2d 106, 682 N.W.2d 328, 338 (Wis. 2004) ("[T]he clear trend in the case law in other jurisdictions is that [HN6] the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability.").⁴ And, the Rules and Regulations simply ensure uniformity at all **Comfort Inn** franchise locations. *See Hayman v. Ramada Inn, Inc.* 86 N.C. App. 274, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987). At best, taken together, the Franchise Agreement and Rules and Regulations show [**10] that RGH/Gedda operated and controlled the **Comfort Inn** under general guidelines intended to foster consistency throughout the Choice system. Therefore, Appellants have failed to establish that Choice owed a duty to **Comfort Inn** guests under this theory.

4 [HN7] Like the vicarious liability analysis, the "[d]irect liability cases [also] look to the franchisor's actual control or retained right of control to determine the presence of a duty for purposes of evaluating whether the franchisor was itself negligent." *Kerl*, 682 N.W.2d at 334 n. 3.

2.

The second basis for finding a duty, Appellants argue, is that Choice owed a common law duty of care to foreseeable persons. Citing to the South Carolina Supreme Court's decision in *Dorrell*, Appellants argue that since their injuries were foreseeable, Choice owed a duty to prevent the injuries and that it breached that duty by not requiring the installation of sprinklers. A review of the facts of *Dorrell*, however, reflects the extent to which the decision is inapposite. The defendant was a contractor hired by the South Carolina Department of Transportation to pave a shoulder on a road. 605 S.E.2d at 13-14. When a driver was injured as a result of the paving [**11] job, the contractor argued that he owed no legal duty to the injured driver because the shoulder was paved pursuant to his contract with the Department of Transportation. *Id.* at 13-14. The South Carolina Supreme

Court stated that a "tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care," and the "common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs." *Id.* at 15.

Appellants attempt to analogize the paving contractor's building of an unsafe shoulder to Choice's failure to require installation of an automatic sprinkler system. Such a comparison ignores the fact that while the contractor in *Dorrell* created the risk by building the shoulder in such a way that a driver could be injured, Choice did not create a risk or in any way make injury to the hotel guests more likely. Therefore, we cannot agree with Appellants that *Dorrell* compels the conclusion that Choice owed a duty to **Comfort Inn** guests.

3.

The third purported basis for a duty also arises under common law. [HN8] South Carolina common law recognizes a separate [*344] duty to use due care where an act is voluntarily undertaken for the benefit [**12] of a third party. *See Russel v. City of Columbia*, 406 S.E.2d 338, 339, 305 S.C. 86 (S.C. 1991) ("[E]ven where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care."). Appellants argue that Choice voluntarily undertook to regulate the life safety systems and address a security problem at the hotel for the benefit of hotel guests.⁵ *See generally Decker v. Domino's Pizza, Inc.*, 268 Ill. App. 3d 521, 644 N.E.2d 515, 205 Ill. Dec. 959 (Ill. App. Ct. 1994) (holding that a convenience store franchisor owed a duty of reasonable care to a franchisee's employee who was injured during a robbery attempt because the franchisor had voluntarily undertaken to establish a security program to deter robberies and protect store employees from harm in the event of a robbery); *Papastathis v. Beall*, 150 Ariz. 279, 723 P.2d 97 (Ariz. Ct. App. 1986) (holding that a convenience store franchisor owed a duty of reasonable care to a store customer who was injured when a soda can fell from a defective rack because the franchisor had undertaken to perform the service of inspecting, endorsing, and recommending the rack).

5 The security problem refers to a disabled third floor door lock that the arsonist used to enter the building [**13] to start the fire. Appellants presented evidence that a Choice representative assured a hotel guest who called to report the malfunctioning lock that Choice would address the issue. However, it is undisputed that when a complaint is received, Choice procedure is to forward it to the franchisee to address.

Despite Appellants' argument to the contrary, the fact that Choice required RGH/Gedda to install fire safe-

ty systems and made recommendations in its Rules and Regulations that RGH/Gedda install sprinklers does not establish that Choice voluntarily undertook to control or regulate the life safety systems. See *Wendy Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 93-94 (E.D.N.Y. 2000) ([HN9] "[S]imply providing a list of suggested-but not required-security items does not support . . . contention that [franchisor] retained or assumed control of the security of its franchisees."). Similarly, requiring renovations to the hotel and accepting and forwarding hotel-guest complaints to the franchisee does not indicate that Choice voluntarily undertook to regulate safety systems or make repairs to the hotel. *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997) (requiring [**14] a showing of control over a franchisee's security measures beyond merely offering recommendations about security and imposing standards related to appearance and services to establish a franchisor's liability). Instead, Choice merely guarded its trade-

mark by assuring uniform appearance and operations of hotels operating under the **Comfort Inn** mark. See *Helmchen*, 685 N.E.2d at 182 ("These mandatory procedures are intended to assure uniformity of operation and appearance, and to protect . . . trademark and the good will associated with it."); *Raines v. Shoney's Inc.*, 909 F. Supp. 1070, 1078 (E.D. Tenn. 1995) ([HN10] "The protection of its trademark and service mark is a necessary duty of a franchisor; to interfere with this duty would unfairly impose liability on the basis of a necessary duty.").

III.

For the foregoing reasons, Appellants have failed to establish that Choice owed a duty to hotel guests at the **Comfort Inn**. The order of the district court is therefore

AFFIRMED.