

2023 WL 3480781 (E.D.La.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, E.D. Louisiana.

Frances TAPPS,

v.

Randolph MCCLENDON, in his Individual Capacity; Joseph P. Lopinto, III, in his  
Official Capacity as Sheriff of Jefferson Parish, Louisiana; and Hum Management, LLC.

No. 2:22-CV-00013-MVL-KWR.  
January 12, 2023.

Jury Trial Requested

### **Memorandum in Support of Motion for Summary Judgment**

Plauché Maselli Parkerson LLP, G. Bruce Parkerson (#1118), Lauren B. Dietzen (#31444), Katherine H. Amoss (#38277), 701 Poydras Street, Suite 3800, New Orleans, Louisiana 70139, Telephone: (504) 582-1142, Telefax: (504) 582-1172, Email: bparkerson@pmp LLP.com, ldietzen@pmp LLP.com, kamoss@pmp LLP.com, for Hum Management, LLC.

Judge Mary Ann Vial Lemmon.

Magistrate Judge Karen Wells Roby.

MAY IT PLEASE THE COURT:

Defendant, Hum Management, LLC (“Hum”), moves for summary judgment as a matter of law dismissing all claims of plaintiff against it because Hum did not employ or have direct control or supervision over Randolph McClendon (“McClendon”). Further, there was no principal-agent relationship between Hum and McClendon. Therefore, plaintiff cannot establish a vicarious liability claim against Hum for the alleged tortious conduct of McClendon.

### **FACTUAL BACKGROUND**

Plaintiff, Frances Tapps, filed suit against several defendants, including Hum, regarding an alleged incident that occurred with a Jefferson Parish Sheriff's Office Deputy on January 7, 2021, at a residential property rented by plaintiff and owned by Hum.<sup>1</sup> Plaintiff's sole claim against Hum is vicarious liability for the actions of Randolph McClendon.<sup>2</sup>

### **LAW AND ARGUMENT**

#### **I. Summary Judgment Standard**

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment. Specifically, it states, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>3</sup> Summary judgment is proper “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.”<sup>4</sup> The moving party must clearly demonstrate that there is no genuine issue of fact.<sup>5</sup>

“When the nonmovant would bear the burden of proof at trial, the moving party can make a proper summary judgment motion in reliance on the pleadings and the allegation that the nonmovant has failed to establish an element essential to that party's case.”<sup>6</sup> Then, the nonmoving party must go beyond the pleadings and designate specific facts showing there is a genuine issue for trial to defeat summary judgment.<sup>7</sup> If no reasonable juror could find for the nonmovant, summary judgment should be granted to the moving party.

## **II. Hum Management, LLC Is Not Vicariously Liable for the Alleged Tortious Conduct of Randolph McClendon.**

It is undisputed that Hum Management, LLC, was not present at the time of the subject incident.<sup>8</sup> It is also undisputed that no employee of Hum was present during the subject incident.<sup>9</sup> Thus, the only way that Hum can be liable for any alleged damages is if it was responsible through vicarious liability for the actions of Randolph McClendon. Vicarious liability only arises out of a direct employment relationship or a principal-agent relationship, neither of which exist here.

Plaintiff's vicarious liability claim fails because McClendon was not an employee or agent of Hum, at the time of the alleged incident. Hum did not control nor supervise McClendon during the subject incident.<sup>10</sup> Therefore, Hum cannot be held liable for the alleged tortious conduct of McClendon, including false imprisonment and intentional and negligent infliction of emotional distress.

### **A. No Employment Relationship Existed Between McClendon and Hum.**

The legal theory of vicarious liability provides that an employer is vicariously liable for the tortious conduct of his employee while in the course and scope of employment.<sup>11</sup> An employee's conduct is within the course and scope of his employment if the conduct is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer.<sup>12</sup> Before vicarious liability can apply, the party claiming vicarious liability must show the existence of an employment relationship.<sup>13</sup>

The employer-employee relationship is a contractual relationship.<sup>14</sup> Further, in determining whether an employment relationship exists, Louisiana jurisprudence has uniformly held that the most important element to be considered is the right of control and supervision over an individual.<sup>15</sup> In applying this test, it is not the supervision and control actually exercised which is significant; the important question is whether, from the nature of the relationship, the right to do so exists.<sup>16</sup> The four primary factors that evidence the right to control are selection and engagement, payment of wages, power of dismissal, and power of control, none of which exist here.<sup>17</sup>

It is undisputed that an employment relationship did not exist between Hum and McClendon.<sup>18</sup> A contractual relationship did not exist between Hum and McClendon.<sup>19</sup> At no time relevant was McClendon employed or hired by Hum.<sup>20</sup> McClendon was not paid by Hum. McClendon, at no time relevant, performed any services for Hum.<sup>21</sup> In fact, McClendon never knew of Hum Management.<sup>22</sup>

Accordingly, Hum had no right of control or supervision over McClendon. Hum did not provide McClendon with any instructions, suggestions, or requests.<sup>23</sup> McClendon was simply doing a favor for a friend, Mr. Siddiqui, when the subject incident occurred.<sup>24</sup> As such, McClendon was free to perform the favor in the method and manner of his choice, and McClendon controlled the time for performing the favor. McClendon received no compensation from Hum for the favor performed on behalf of Mr. Siddiqui.<sup>25</sup> Therefore, there is no genuine issue of material fact that an employment relationship did not exist between Hum and McClendon.

### **B. No Principal-Agent Relationship Existed Between McClendon and Hum.**

To the extent that plaintiff and or McClendon asserts a principal-agent relationship, liability for the negligent and tortious acts of another does not flow simply because of a principal-agent relationship.<sup>26</sup> Only when the relationship of the parties includes the principal's right to control physical details of the actor as to the manner of his performance does the person in whose service the act is done become subject to liability for the physical tortious conduct of the actor.<sup>27</sup>

An agent is one who acts for or in place of another, the principal, by authority from the latter.<sup>28</sup> An agency relationship can only be created by express appointment of a mandatary or by implied appointment arising from apparent authority.<sup>29</sup> Implied or apparent agency exists if the principal has the right to control the conduct of the agent and the agent has the authority to bind the principal.<sup>30</sup> Apparent agency arises when the principal has acted so as to give an innocent third party a reasonable belief that the agent had the authority to act for the principal, and the third party reasonably relies on the manifested authority of the agent.<sup>31</sup>

At no time relevant was McClendon acting as an agent on behalf of Hum. There was no express appointment of McClendon as Hum's mandatary. Further, Hum did not have the right to control the conduct of McClendon, and McClendon did not have the authority to bind Hum. As previously stated herein, Hum did not have the right of control or supervision over McClendon's conduct during the subject incident. As such, there was no implied agency.

It is undisputed that Hum did not act in a way such as to give plaintiff a reasonable belief that McClendon had the authority to act on behalf of Hum, and plaintiff did not reasonably rely on any such authority. At all times relevant, plaintiff acknowledged Mr. Siddiqui, or Hum Management, as her landlord.<sup>32</sup> Plaintiff knew that McClendon was not her landlord, and therefore, had no authority to demand a key from her.<sup>33</sup>

Prior to the subject incident, plaintiff and McClendon had a similar interaction whereby plaintiff was behind on rent and McClendon, as a favor to Mr. Siddiqui, met with her to inquire about the late payment.<sup>34</sup> In her deposition, regarding the prior interaction with McClendon, plaintiff testified as follows:

**Q.** Okay. And what happened during that meeting?

**A.** I just told him he wasn't my landlord and I had already talked to Sid, so what he was coming over here for and I closed the door.<sup>35</sup>

Similarly, regarding the subject incident, plaintiff testified as follows:

**Q.** Now, when you called the Kenner Police did you tell them that your landlord had left?

**A.** That my landlord had left?

**Q.** Had left that day?

**A.** No.

**Q.** Was Mr. McClendon your landlord?

**A.** No.<sup>36</sup>

Accordingly, plaintiff did not have any reasonable belief that McClendon had the authority to act on behalf of Hum and demand her keys or rent payment, and there is no genuine issue of material fact that no principal-agency relationship, implied or apparent, existed between Hum and McClendon.

### **C. No Independent Contractor Relationship Existed Between McClendon and Hum.**

To the extent plaintiff asserts an independent contractor relationship, the same basic rule applies to independent contractors as to agents.<sup>37</sup> A principal is not liable for the offenses committed by an independent contractor unless the principal reserves the right to supervise or control the work of the independent contractor.<sup>38</sup> For the reasons previously stated herein, Hum did not have the right to control or supervise McClendon and cannot be held vicariously liable for the alleged conduct of McClendon.

Further, there was no independent contractor relationship between McClendon and Hum.<sup>39</sup> As previously stated herein, there was no contract between Hum and McClendon.<sup>40</sup> McClendon did not perform any services for Hum or receive any compensation from Hum.<sup>41</sup> Finally, as he received no instructions from Hum, the time and manner of McClendon's performance was decided solely by McClendon.<sup>42</sup>

As the above evidence makes clear, plaintiff cannot prove the essential elements of a vicarious liability claim against Hum. For Hum to be held liable, McClendon must have been an employee or agent of the company. Absent proof of an employment or principal-agent relationship, plaintiff cannot make a vicarious liability claim, or any claim with regard to the alleged incident, against Hum Management, entitling Hum to summary judgment as a matter of law.

### **III. No False Imprisonment Occurred.**

False imprisonment consists of two essential elements: detention of the person and the unlawfulness of the detention.<sup>43</sup> False imprisonment occurs when one arrests and restrains another against his will without warrant or other statutory authority.<sup>44</sup>

In the instant matter, McClendon did not detain, arrest, or restrain plaintiff.<sup>45</sup> Plaintiff testified in her deposition taken on October 4, 2022, that at no point during the alleged course of events did McClendon place plaintiff in handcuffs or tell her that she was under arrest.<sup>46</sup> Plaintiff's interactions with McClendon were consensual, and plaintiff was free to end the encounter with McClendon at any time. There was nothing preventing plaintiff from returning into her home or walking to her mother's house which was only a short distance away.

Accordingly, there is no genuine issue of material fact that the alleged actions of McClendon do not constitute false imprisonment. Further, because Hum is not vicariously liable for the alleged tortious conduct of McClendon, plaintiff's claims against Hum for any alleged false imprisonment should be dismissed.

**IV. Plaintiff's Vicarious Liability Claims of Negligent and  
Intentional Infliction of Emotional Distress Must Be Dismissed.**

Plaintiff's only remaining claims against Hum are for intentional and negligent infliction of emotional distress, which have a necessary element of vicarious liability for the acts of McClendon to be imputed to Hum. For the reasons previously stated herein, Hum is not vicariously liable for the alleged tortious conduct of McClendon, including intentional and negligent infliction of emotional distress. Therefore, plaintiff's claims must be dismissed and summary judgment granted as a matter of law.

**CONCLUSION**

It is undisputed that plaintiff cannot prove a theory of vicarious liability against Hum stemming from the subject incident. Defendant, Randolph McClendon, was not an employee or agent of Hum Management, LLC, at any time relevant. Therefore, there is no genuine issue of material fact that Hum is not vicariously liable for the alleged tortious conduct of McClendon, including false imprisonment and intentional and negligent infliction of emotional distress. For these reasons, defendant, Hum Management, LLC, respectfully prays that this Honorable Court grant its Motion for Summary Judgment and dismiss Plaintiff's claims, with prejudice, at plaintiff's cost.

Respectfully submitted;

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### Footnotes

- 1 R. Doc. 1-3.
- 2 *Id.* at 22 ¶ 110-112.
- 3 Fed. R. Civ. P. 56(a).
- 4 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
- 5 *Id.* at 323.
- 6 *Swope v. Columbian Chems Co.*, 281 F.3d 185, 197 (5th Cir. 2002).
- 7 *Id.*
- 8 Exhibit C, Deposition of Frances Tapps, p. 197, lines 20-25; p. 198, lines 1-2.
- 9 Exhibit C, Deposition of Frances Tapps, p. 197, lines 20-25; p. 198, lines 1-2.
- 10 Exhibit A, Hum Management's Answer to Interrogatory No. 4; Exhibit B, McClendon's Answer to Interrogatory No. 1.
- 11 *Doe v. Louisiana Mun. Ass'n*, 99-539 (La.App. 5 Cir. 10/26/99); 746 So.2d 179, 182.
- 12 *Id.*
- 13 *Iteld v. Four Corners Const., L.P.*, 2012-1504 (La.App. 4 Cir. 6/5/13); 157 So.3d 702, 721.
- 14 *Preis, PLC v. Daily*, 2019-700 (La.App. 3 Cir. 3/25/20); 297 So.3d 853, 859.
- 15 *LeCroy v. Interim Health Care Staffing of N. Louisiana, Inc.*, 43,080 (La.App. 2 Cir. 4/2/08); 980 So. 2d 838, 842 (citing *Savoie v. Fireman's Fund Ins. Co.*, 347 So.2d 188 (La. 1977); *Clinton v. Reigel By-Products, Inc.*, 42,497 (La.App. 2 Cir. 09/19/07)).
- 16 *Id.* (citing *Ledent v. Guaranty National Ins. Co.*, 31,346 (La.App. 2 Cir. 12/28/98), 723 So.2d 531; *Slaughter v. Georgia Casualty & Surety Co.*, 415 So.2d 312 (La.App. 2 Cir. 1982), *writ denied*, 420 So. 2d 979 (La. 1982)).
- 17 *Hillman v. Comm-Care, Inc.*, 01-1140, p. 8 (La.1/15/02), 805 So.2d 1157, 1162 (quoting *Alexander v. J.E. Hixson & Sons Funeral Home*, 44 So.2d 487, 488 (La.App. 1 Cir.1950)).
- 18 Exhibit A, Hum Management's Answers to Interrogatories Nos. 4-7; Exhibit B, McClendon's Answers to Interrogatories Nos. 1, 6, and 8.
- 19 Exhibit A, Hum Management's Answer to Interrogatory No. 5; Exhibit B, McClendon's Answer to Interrogatory No. 6.

- 20 Exhibit A, Hum Management's Answer to Interrogatory No. 10; Exhibit B, McClendon's Answer to Interrogatory No. 8.
- 21 Exhibit A, Hum Management's Answer to Interrogatory No. 6; Exhibit B, McClendon's Answer to Interrogatory No. 7.
- 22 Exhibit B, McClendon's Answer to Interrogatory No. 9.
- 23 Exhibit A, Hum Management's Answer to Interrogatory No. 11; Exhibit B, McClendon's Supplemental Answer to Interrogatory No. 11.
- 24 Exhibit B, McClendon's Second Supplemental Answer to Interrogatory No. 11.
- 25 Exhibit A, Hum Management's Answer to Interrogatory No. 12; Exhibit B, McClendon's Supplemental Answer to Interrogatory No. 7.
- 26 *James v. Ernest N. Morial New Orleans Exhibition Hall Auth.*, 2018-0198 (La.App. 4 Cir. 12/26/18); 262 So.3d 958, 964 (citing *Rowell v. Carter Mobile Homes, Inc.*, 500 So.2d 748, 751 (La. 1987) (citation omitted)).
- 27 *Id.*; *Daniels v. Dauphine*, 557 So.2d 1062, 1065 (La.App. 2 Cir. 1990).
- 28 *McCray v. S. Aggregates, LLC*, 2018-1545 (La.App. 1 Cir. 8/29/19); 282 So.3d 262, 267.
- 29 *Id.* (citing *Duplessis Cadillac, Inc. v. Creative Credit Services, Inc.*, 564 So.2d 336, 338-39 (La.App. 1 Cir. 1990)).
- 30 *McCray*, 282 So.3d at 268.
- 31 *Id.* (citing *Duplessis Cadillac, Inc. v. Creative Credit Services, Inc.*, 564 So.2d 336, 338-39 (La.App. 1 Cir. 1990)).
- 32 Exhibit C, Deposition of Frances Tapps, p. 201, lines 15-22.
- 33 Exhibit C, Deposition of Frances Tapps, p. 201, lines 15-22.
- 34 Exhibit C, Deposition of Frances Tapps, p. 24-27; p. 68-69.
- 35 Exhibit C, Deposition of Frances Tapps, p. 26, lines 3-7.
- 36 Exhibit C, Deposition of Frances Tapps, p. 198, lines 23-23; p. 199, lines 1-4.
- 37 *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-1249 (La.App. 1 Cir. 12/30/20); 317 So.3d 715, 751, *reh'g denied* (Feb. 10, 2021), *writ denied*, 2021-00382 (La. 6/8/21); 317 So.3d 323, *reconsideration denied*, 2021-00382 (La. 10/12/21); 325 So.3d 1071, and *writ denied*, 2021-00386 (La. 6/8/21); 317 So.3d 323.
- 38 *Id.*
- 39 An independent contractor relationship exists when: (1) there is a valid contract between the parties; (2) the work being done is of an independent nature such that the contractor may employ nonexclusive means in accomplishing it; (3) the contract calls for specific piecework as a unit to be done according to the independent contractor's own methods without being subject to the control and direction of the principal, except as to the result of the services to be rendered; (4) there is a specific price for the overall undertaking; and (5) a specific time or duration is agreed upon and not subject to termination at the will of either side without liability for breach. *Hickman v. S. Pac. Transp. Co.*, 262 So.2d 385, 390-91 (La. 1972). The most important factor is "the degree of control which the owner can exercise over the contractor's performance." *Davenport v. Amax Nickel, Inc.*, 569 So.2d 23, 27-28 (La. App. 4th Cir. 1990) (citing *Hickman v. S. Pac. Transp. Co.*, 262 So.2d 385 (La. 1972)). Specifically, the question is, "whether, from the nature of the relationship, the

right to do so exists, not whether supervision and control was actually exercised.” *Arroyo v. E. Jefferson Gen. Hosp.*, 06-799 (La. App. 5th Cir. 3/13/07), 956 So. 2d 661, 664 (citing *Hickman v. S. Pac. Trans. Co.*, 262 So.2d 385 (La. 1972)).

40 Exhibit A, Hum Management's Answer to Interrogatory No. 5; Exhibit B, McClendon's Answer to Interrogatory No. 6.

41 Exhibit A, Hum Management's Answer to Interrogatory No. 12; Exhibit B, McClendon's Supplemental Answer to Interrogatory No. 7.

42 Exhibit A, Hum Management's Answer to Interrogatory No. 11.

43 *Waguespack v. Judge*, 04-137 (La.App. 5 Cir. 6/29/04); 877 So.2d 1090, 1093.

44 *Id.*

45 Exhibit C, Deposition of Frances Tapps, p. 128, lines 17-19; p. 129, lines 20-22.

46 Exhibit C, Deposition of Frances Tapps, p. 129, lines 20-24.

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