STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ANOKA | TENTH JUDICIAL DISTRICT

Doe 600,

Plaintiff,

v.

Circle R. Ranch,

Defendant.

Case Type: Personal Injury
Hon. Jonathan N. Jasper
Court File Number: 02-CV-20-2671

CIRCLE R RANCH'S MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Circle R Ranch is a summer camp for children that provides opportunities for campers to have a camp experience focused on horseback riding. (See Complaint ¶ 2). Plaintiff Doe 600 brings claims against Circle R Ranch alleging that she was sexually abused by Scott Fortier, a former friend of the Ranch's owner, Jack McCoy. (See generally Complaint). Plaintiff's complaint alleges that: "From approximately 2015-2016, when Doe 600 was approximately 16 to 17 years old, Fortier engaged in unpermitted sexual contact with her. Doe 600 was a minor at the time of the unpermitted sexual contact." (Id. ¶ 14).

Plaintiff's claims against Circle R Ranch fail because, by Plaintiff's own admission, she was sixteen and seventeen years old at the time of her sexual encounters with Fortier. Subject to certain exceptions that do not apply in this case, the age of consent in Minnesota is sixteen years old. As such, Plaintiff was not sexually assaulted by Fortier as a matter of law, and all of her claims are fatally flawed and fail.

Further, Fortier was not an employee or agent of Circle R Ranch in 2015 or 2016, the years of Plaintiff's sexual encounters with Fortier. As such, Plaintiff's claims based upon negligent

hiring, retention, and supervision and based upon respondeat superior fail as a matter of law. Plaintiff's claims of respondeat superior also fail because the alleged sexual contact occurred outside of the scope of any *alleged* employment or agency relationship.

Finally, Plaintiff's negligence claim fails because Plaintiff was not a counselor at any of the times she had sexual contact with Fortier, and as such, Circle R Ranch owed her no duties of protection. Circle R Ranch is entitled to summary judgment.

DOCUMENTS RELIED UPON

Declaration of Jason M. Stoffel with attached exhibits.

STATEMENT OF UNDISPUTED FACTS

A. Scott Fortier's relationship with Circle R Ranch

Scott Fortier had long been a friend of Circle R Ranch. He became a camper there in 1988 when he was nine years old and returned to Circle R Ranch every year through 1995. (Ex. A, p. 6). Fortier became a junior counselor in 1996 and was a program director in 1997. (Id. p. 7). In 1999, Fortier became an entertainment director, (Id. p. 120), and remained in a director position at the Ranch through the 2001 season. (Id. p. 210). After that, other than a brief, one-week stint as a part-time employee in 2005, Fortier found full-time employment elsewhere, and was never re-hired as an employee of Circle R Ranch. (Id., pp. 26, 210).

Nonetheless, Fortier remained friends with Jack McCoy and explained, "I was friends with...his daughter Adrianne and his son Ethan, you know. They were like siblings to me. I knew them their whole lives." (Id., pp. 56-58).

After 2008, Fortier explained that "I was more of a consultant" to the Ranch. (Id., p. 38). He elaborated:

> I was available if they called me. You know, I always told – you know, there was a few of us that had worked the past that always said, you know, 'The door's open

> if you have any questions, you know, if you're wondering what to do or, you know, it's raining five days in a row and you're running out of stuff, give me a call.' And, you know, there was -- part of -- part of the emergency plan, too, there were former staff that were on there. These are people that could come help out in a pinch if a tragedy happened or something.

(Id.)

Jack McCoy described Fortier's relationship to at Circle R Ranch over the 2000s:

> Yeah, he enjoyed [helping out], loved it. I mean, hey can I go jump in with the horses? Can I sing, you know, dance night? Can I do this and that? Can I train a horse?...[A]nd then later on he had a girlfriend up there, so he would come up until different situations, ...I never had to ask him to do anything. I – he just did it. He knew it, he loved it, and jumped right in if we had any – needed anything.

(Ex, B, p. 33). Mr. McCoy noted that, "It's just like -- he was an older counselor," who would "hang out and help out." (Id.) But Mr. McCoy made clear that there was no formal employment relationship. "I never, [asked] where is Scott? He'd pop in wherever..." (Id.)

By 2011, Fortier explained: "At that point, it was DJing the dance – the dances on Fridays was pretty much what I did." (Ex A, p. 39).

As for Fortier's relationship with the Ranch in 2015 and 2016, the years Plaintiff had her sexual contacts with him, Fortier testified: "Yeah, after 2014, I wasn't there anymore." (Id. p. 40).

Plaintiff similarly testified:

> Q. You would agree with me that Mr. Fortier was not technically employed at Circle R Ranch during 2015 and 2016?
>
> A. Yes.
>
> Q. Okay. And when you say technically, what do you mean technically?
>
> A. Obviously I don't have any knowledge of whether or not he was being paid for his time there. But as I had said earlier, when he comes back, everybody views him as an authority figure, regardless of if he has an official position or if he is on the payroll.
>
> Q. Okay. But at least when you gave this testimony [in Mr. Fortier's criminal trial] you meant legally he wasn't an employee as far as you knew?
>
> A. Yes.
>
> Q. And you still believe that today?

A. Yes.

(Ex. C, pp. 215-216). Plaintiff confirmed that in the 2015-2016 timeframe, she had the same understanding. (Id., pp. 216-217).

Plaintiff testified that she remembers Mr. Fortier's presence at the camp as "sporadic" in the years 2015 and 2016, and that when he did visit, it would usually be on Thursdays, Fridays, Saturdays, and Sundays. (Id. p. 217). Further, Plaintiff confirmed that it is her understanding that Fortier was not welcome at Circle R Ranch during the year 2016 because Jack McCoy's son, Ethan, who had started managing that camp around that time, did not want Fortier at the camp. (Id., p. 218).

Fortier confirmed in his testimony:

Q. Let's talk about 2015.

A. Okay.

Q. And at some point I understand you had a falling out with Ethan McCoy –

A. I did.

* * *

Q. I had my snowmobiles up there in the winter. He told me in February that, you know he wanted to do a summer without me there, and that I was a distraction to him. And that was the end of it. I – I – of course, I contacted Jack and talked to him about it and Jack said, "You know, he's – it's his decision"..."I'm going to stand by him."...[A]nd that was the end of it."

(Ex. A, p. 139-140).

As a result of Fortier's falling out with Ethan McCoy, Fortier explained, "So I was there for that riding weekend in May, I think it was Memorial weekend. And...there was one horse show at some point in 2015 that I dropped somebody off there...I was only there for about ten minutes." (Id., p. 140). When asked: "Did you conduct any training in 2015?" Fortier responded, "No." (Id., p. 141).

Camp owner Jack McCoy's recollection about the years 2015 and 2016 was not as specific, as Plaintiff's and Fortier's. When asked if he was at the Ranch for "a good number of weekends that summer, 2015?" Mr. McCoy testified, "It could be. I don't remember." (Ex. B, p. 88). As he tried to remember, Mr. McCoy explained that Fortier would have been around, "Not most of the summer. Maybe pop in on the weekends or something." (Id., p. 101). McCoy believed Fortier may have DJed some dances, and explained, "He would just be like a friend popping in now and then." (Id., pp. 102, 104, 108-109).

Ethan McCoy testified that in 2015, Fortier "was there at the beginning of the year, towards the middle of the year. I believe it was towards the end of summer, August, I was trying not to have him there as much* * *Towards the end of the – yeah, most—the whole entire summer of 2015, he was hardly there. But some weekends when myself wasn't there on a Friday, he would come up and deejay." (Ex. D, pp. 54, 56)

As for 2016, Fortier testified that he only went to Circle R Ranch for the annual alumni riding weekend in the spring, went to a horse show in August of that year, and then visited the following weekend to visit Jack McCoy's nephew. (Ex. A, pp. , 90-91, 167, 169-170). Fortier further explained that Plaintiff was not present when he went to visit Jack's nephew, and that, "I don't remember doing anything involved with like camp activities during that time." (Id. pp. 168-169). Ethan McCoy confirmed, that other than the last week in August, "Scott did not come up at all 2016." (Ex. D, p. 57, 62).

B. Off-Season Social Gatherings at Circle R Ranch.

Plaintiff testified that although social gatherings occurred on camp property during the off-season, such gatherings were merely social, not related to employment at the camp, and not related

to any official or sanctioned camp activities. When asked about gatherings held during the fall and winter of the 2014-2015 off-season, Plaintiff testified:

Q. This was just a social get-together then?

A. Yes.

Q. Just a chance for friends to hang out?

A. Yes.

Q. Kind of like if you are in high school and you want to get together with friends, if you have a place to get together…It's not necessarily a school event, but it's just people you know form school that you're getting together with?

A. Yes.

Q. So this wasn't a camp event? It was just a get-together of people that either worked or had worked at the camp and knew each other or knew people who knew each other?

A. Yes.

(Ex. C, p. 184).

As to the nature of such gatherings, Plaintiff testified that:

Q. And you weren't paid to be there that weekend?

A. No.

Q. And you didn't pay anybody to be there that weekend?

A. No.

Q. It was just Jack [McCoy] letting you use his property?

A. Yes.

Q. And you weren't expecting Jack to be your boss at that time to direct you and instruct you on what to do?

A. No.

Q. This was your free recreation time, and he was simply letting you to spend the night on his property?

A. Yes.

* * *

Q. You weren't looking for Jack to provide you any kind of food or clothing or security in any way, were you?

A. Besides a place to sleep, no.

(Id., p. 201-202).

Plaintiff explained that before one of the social gatherings, somebody would be in touch with Jack McCoy to get his permission to socialize on his property. (Id., pp. 179, 182). Nonetheless, Jack McCoy never participated in these gatherings. (Id., pp. 186-187). Plaintiff confirmed that while drinking did occur at these social gatherings, she never made any efforts to inform Jack McCoy about this, and confirmed that as far as Mr. McCoy could tell, it was just counselors coming up and enjoying the horses and spending some time together. (Id., pp. 199-200).

C. Plaintiff's First Sexual Contact with Fortier.

Plaintiff testified that her first sexual encounter with Fortier took place on April 10, 2015. (Id., p. 227). Plaintiff confirmed although this encounter took place during one of the social gatherings held on Jack McCoy's property, it was not related to any Ranch sanctioned or employment related events:

> Q. Okay. April 10, 2015, that was another social get-together for counselors and alumni counselors and – and friends?
>
> A. Yes.

(Id., p. 228).

Plaintiff reported to the police that: "...the very first time we ever had sex, he had, it was part of the deal and he had a rule that I had to ask him three times to have sex with me, otherwise he wouldn't, like the first time he wouldn't do it and then the second time and then on the third time he would." (Ex. F, at CJ000071). Also: "I can remember from that night is him like saying like I had to take my own clothes off otherwise like it looks bad on him or whatever." (Ex. E at CJ000016).

D. Plaintiff's Second Sexual Contact with Fortier.

As for the second sexual encounter, which occurred on April 18, 2021, (Ex. C, p. 227), Plaintiff testified that this encounter again occurred at a social gathering at the Ranch:

> Q. Okay. And April 18, same question, that was just another recreational, fun time get-together of ex-counselors and campers? I mean—
>
> A. Yes.

(Id., p. 229).

As to the sexual contact, Plaintiff reported to police:

> Q: Okay. Did he, he said, we should have sex again?
>
> A: Yea.
>
> * * *
>
> Q: Can you recall if he told you again that you had to take your own clothes off?
>
> A: Yea he did.

(Ex. E at CJ000020-21). In this regard, Plaintiff testified:

> Q. It does appear that you guys are drinking on those occasions. And then it appears that he has some kind of rule where you actually have to ask him three times. And then it appears like he also has a rule that you have to take off your own clothes so he's not taking off your own clothes. Did I get that right? Is that how those occasions with Scott occurred?
>
> A. Yes.

(Ex. C, p. 275).

E. Plaintiff's Third Sexual Contact with Fortier.

The third encounter occurred on April 30, 2015, at Circle R Ranch. (Id., p. 227). Plaintiff explained to the police that it occurred during the spring "riding weekend" where alumni counselors were invited back to the Ranch to take the horses for a ride in preparation of the summer camper season:

> So May 30 was riding weekend that year, um, and there was a ton of people up there too for that because it is like there is like a whole alumni page for like anybody from camp that wants to come to riding weekend can. Um, and it happened that

> weekend, it was late at night I guess like, um, I remember, I remember this actually kind of like too clearly.

(Ex. E at CJ000026). Fortier confirmed these circumstances: "[E]very spring there was an alumni riding weekend. That was the only thing that I went up for in [ ] 2015. And that was for anybody that had worked up there could go. We signed waivers and basically just got the horses through their first ride of the spring and wrote our reports on 'em." (Ex. A, p. 71). Fortier further described, "...it differed from year to year, but there were usually between 20 and 40 people there [for riding weekend]...[M]ostly former counselors." (Id., p. 140).

As for the sexual encounter, Plaintiff described to the police that earlier in the day she felt rebuffed because Fortier had not been paying much attention to her: "I was like what the heck, like what haven't you been talking to me and trying to get him interested in me again..." (Ex. E at CJ000026). Plaintiff continued:

> I remember going over to like talking to him and like going over like sitting on the floor by him, next to his bed, and I'm like...like where is my attention I guess.* * * I got into his bed and then like, like, we like laid down* * *[H]e like pulled my pants down and like, well he was like still behind me, like laying on his side, that's when like we had sex the third time I guess.* * * I was kind of just like really? I didn't say stop. I didn't yes, I didn't say no, but I was just, I looked at him, I was like really? Cause like I, I don't know, he was like, what, do you want me to stop and I am just like, I was like whatever...

(Id. at CJ000027) (emphasis added).

F. Plaintiff's Fourth Sexual Contact with Fortier.

The fourth sexual encounter occurred on July 31, 2016, at Fortier's residence in Blaine, Minnesota. (Id. at CJ000027). Plaintiff called Fortier spontaneously because she was driving up to the Ranch for a visit, but wanted to spend the night at Fortier's house before heading up in the morning. (Ex. A, pp. 247-248); Ex. E at CJ000030). Plaintiff described to the police what transpired after she arrived at Fortier's house:

> He makes this cheese dip I would always ask him to make it…So he made a deal with me about that time, he's like well I will make the cheese dip for you if you like agree to like you know, suck my dick or whatever…I am just like, definitely no…He's like oh well I made it, so now you owe me something.* * * And so like I don't owe you anything but I am going to eat this and so and then he was like well, and then at that point when things had escalated well I guess you can have sex with me it makes up for you breaking the deal. I am like, so then it just ended up happening because I had already had a beer and a lot of cheese dip."

(Ex. E at CJ000031) (emphasis added).

In this regard, Plaintiff testified:

Q. Nevertheless, he made you the cheese dip?

A. Yes.

Q. And then, that ultimately ended up being a bargaining chip he used later that evening or later that day, and the two of you had sexual contact again?

A. Correct.

Q. This was in no way related to your employment at camp in any way, was it?

A. Correct.

(Ex. C, pp. 281-282).

When describing why she had sexual contact with Fortier on this occasion Plaintiff explained, "Because as a 16- and 17-year-old, I – you know, I was like, he's cool, he's the cool guy, if I'm fiends with him, if he likes me, I'll be cool." (Id. p. 284).

G. Plaintiff's Fifth Sexual Contact with Fortier.

The fifth encounter occurred on September 9, 2016; again, at Fortier's residence in Blaine. (Ex. E at CJ000033). Plaintiff drove herself and another friend to Fortier's residence after receiving an invite from Fortier to hang out there. (Id. at CJ000033; Ex. C, pp. 290-291). In describing this encounter to the police, Plaintiff stated: "And then um, but then me and him ended up downstairs in his room and then we ended up having sex again, but I was like, I don't remember much about it." (Ex. E at CJ000036). In her deposition, Plaintiff testified that earlier that evening,

when Fortier suggested being nude in his hot tub, she "tried to make [her]self the target," so as to keep attention off of the friend she brought to Fortier's house. (Ex. C, p. 291).

As for any relation to Circle R Ranch at the time of these 2016 encounters, Plaintiff testified:

Q. And this was the year that he wasn't even welcome back at camp, right?
A. Correct.
Q. And you understood that he wasn't even welcome back at camp?
A. Correct.

(Id., p. 297).

H. Fortier's criminal convictions.

Ultimately, Mr. Fortier was convicted of sex offenses in Minnesota State File 02-CR-16-8338 and Federal District of Minnesota file 17-CR-96 (PJS/DTS). Fortier was sentenced to prison for having sexual contact with a minor below the age of sixteen (not Plaintiff herein), for taking video of his sexual contacts with Plaintiff and another individual who was under the age of eighteen, and for having child pornography on his computer. (See respective court files noted above). While Fortier was convicted in Federal Court for *filming* his sexual contact with Plaintiff, he was not charged with any crimes related to the fact of his having sexual contact with Plaintiff because of her age. As is described further below, while Plaintiff, as a seventeen-year-old, was above Minnesota's age of consent for sexual contact, it was nonetheless illegal to have filmed sexual contact with an individual below the age of eighteen.

Upon learning of Mr. Fortier's arrest, Jack McCoy explained, "I was blown away. I was shocked…I dropped to the floor. I couldn't believe it. (Ex. B, p. 54). When asked about facts learned through the law enforcement investigation, Mr. McCoy explained, "I trusted him. You know, I've known him ever since he was seven…" (Id., p. 57).

Because of her sexual contact with Fortier, Plaintiff now brings claims against Circle R Ranch for negligence, negligent supervision, negligent hiring, negligent retention, and respondeat superior. (Complaint).

STATEMENT OF THE ISSUES

I. Whether this case should be dismissed because Plaintiff was not sexually assaulted as defined by Minnesota law.

II. Whether Plaintiff's claims of negligent hiring, retention, and supervision as well as respondeat superior should be dismissed because Fortier was not an employee or agent of Circle R Ranch in 2015 or 2016.

III. Whether Plaintiff's claims of respondeat superior fail because the alleged sexual contact occurred outside of the scope of any *alleged* employment or agency relationship.

IV. Whether Plaintiff's claim of negligence should be dismissed because Circle R Ranch owed Plaintiff no duty of protection at any of times she had sexual encounters with Fortier.

SUMMARY JUDGMENT STANDARD

The court shall grant summary judgment if the movant shows that "there is no genuine issue as to any material fact" and the movant is "entitled to judgment as a matter of law." Zappa v. Fahey, 245 N.W.2d 258, 259 (Minn. 1976) (citation omitted). If the non-moving party fails to meet the burden of producing facts that could create a genuine issue, summary judgment is proper. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995)

(citation omitted). "The mere existence of a "scintilla of evidence"' in support of the non-moving party's position will be insufficient to overcome a motion for summary judgment; there must be evidence on which the jury could reasonably find for the non-moving party. DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). Moreover, "the court is not required to save the non-moving party by drawing unreasonable inferences." City of Savage v. Varey,358 N.W.2d 102, 105 (Minn. Ct. App. 1984).

ARGUMENT

I. Plaintiff's claims fail because she was not sexually assaulted as defined by Minnesota law.

All of Plaintiff's claims against Circle R Ranch are based upon the premise that she was sexually assaulted. Pursuant to Minnesota law, however, Plaintiff engaged in legal, consensual, sexual encounters with Fortier.

The statutory age of consent in Minnesota is sixteen years old. See generally Minn. Stat. §§ 609.344-.351[1]. The exception to the sixteen-year-old age of consent involves instances where the complainant is under eighteen years old and the actor is in a "position of authority" over the complainant. See Minn. Stat. §§ 609.344 & .345. The reason this exception does not apply herein is addressed at greater length below. In this case, Plaintiff, by her own account, consented to each of the five sexual encounters she had with Fortier. Plaintiff also explained that there was no coercion involved in the sexual encounters, whether through physical force, or through threat of some kind of employment consequence. Plaintiff testified: "He didn't physically force me." (Ex. C, p. 241). Further: "I mean, I didn't sustain any injuries, physically." (Id. p. 351).

Plaintiff further testified:

[1] As explained further below, the text of Minn. Stat. §§ 609.344-.351 has changed between 2015 and 2022; but suffice it to recognize at this point that the 16-year-old age of consent has remained consistent over the years.

Q. Did he ever tell you that you needed to have sex with him because it was a part of your job?

A. No.

Q. Did he ever tell you you needed to have sex with him if you wanted to get a job or keep a job at the ranch?

A. No.

Q. Did anybody ever tell you that?

A. No.

Q. ...At that time, did you have an understanding that you didn't need to have sex with somebody to have a job?

A. Yes.

(Ex. C, p. 243).

There being no coercion, Plaintiff testified that Fortier "manipulated" her into have sex with him: "At times he would make comments like I owed him or that – I mean, he started grooming me by telling me that I would be like the rest of the cool kids if I let him – if I did whatever he asked of me, and just things like that. I don't really remember a whole lot of the details anymore." (Id. 242). She further elaborated: "He said, if you do the things that I tell you to do, then, you know – then I – if I like you, then everybody else will like you too. And if you do these things, then I will like you." (Id. p. 242).

Plaintiff's entire lawsuit against Circle R Ranch is founded on the premise that she was sexually assaulted. She describes, however, no coercion, no force, no personal injury, and no bodily harm. Plaintiff feels she was manipulated by Fortier into having sexual contact with him because she wanted him to like her, because she wanted to be cool, and because she wanted her peers to like her. Pursuant to the laws of Minnesota, these motivations, even if manipulated by Fortier, do not make the sexual contact illegal. Plaintiff may feel that she was taken advantage of by an older man, may regret what occurred, and may have emotional struggles arising out of her encounters with Mr. Fortier. Plaintiff, nonetheless, consented to each sexual encounter with Mr.

Fortier, and the Minnesota Legislature has determined that as a sixteen-year-old, Plaintiff had the ability to consent. Having consented to each sexual encounter, and having not been sexually assaulted as a matter of law, the premise underlying Plaintiff's claims against Circle R Ranch is fatally flawed, and all claims should be dismissed with prejudice.

a. Scott Fortier was not in a "position of authority" in relation to Plaintiff.

Plaintiff may argue that she was sexually assaulted Fortier because he was in a "position of authority" over her. In 2014 and 2015, Minn. Stat. § 609.344, Subd. 1a(e) read:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:...[T]he complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

to Minn. Stat. § 609.344, Subd. 1a(e) (2018) (emphasis added). Mr. Fortier, however, was never in a *position of authority* over Plaintiff at the time of any sexual encounters with her.

In 2014 and 2015, Minn. Stat. § 609.341, Subd. 10 provided:

> "Position of authority" includes but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, **at the time of the act**. For the purposes of subdivision 11, "position of authority" includes a psychotherapist.

Minn. Stat. § 609.341, Subd. 10 (2018) (emphasis added). Put simply, at the time of each sexual encounter with Plaintiff, Fortier was not acting in the place of Plaintiff's parents, was not charged with any parental rights, duties, or responsibilities over Plaintiff, and was not charged with any duty or responsibility for Plaintiff's health, welfare, or supervision.

By Plaintiff's own testimony, her first two sexual encounters with Fortier took place at April 2015 social gatherings that incidentally took place at Circle R Ranch, but that had nothing

to do with any official employment activities. Plaintiff has presented no evidence demonstrating that Fortier could have had any parental or supervisory authority over her at these gatherings. Likewise, Fortier was not a in a position of authority over Plaintiff at the May 30, 2015 "riding weekend," as he was just one of the many camp counselor alumni that were welcome to participate in that weekend's activity of riding the horses and getting them ready for the summer camper season. There is no testimony or evidence demonstrating that Fortier was somehow charged with supervising or taking responsibility for any counselors that were under the age of 18 during that weekend. Finally, Plaintiff's last two encounters with Fortier took place at Fortier's private residence in 2016—a year during which Fortier was wholly disengaged from Circle R Ranch. Fortier could have had no colorable parental or supervisory authority over Plaintiff during these encounters.

Plaintiff testified that she believed the older counselors that she socialized with at the off-season gatherings were in a position of authority over her because she wanted to become a counselor and advance at Circle R Ranch. (Ex. C, p. 224). When asked, however, "Did anybody tell you that these individuals [older counselors and camp directors that were socializing during the off season] had any kind of authority over you outside of camp space, location, and time?" Plaintiff responded, "Nobody told me that, no." (Id., pp. 225-226). When asked, "Did anybody tell you that at these get-togethers that these counselors above you had any kind of authority over you?" Plaintiff responded, "No." (Id., p. 226). In any event, even if the older counselors did have some influence over Plaintiff's employment at the Ranch, they clearly were not in any parental or supervisory position over Plaintiff at the time of these gatherings. Minn. Stat. § 609.341, Subd. 10 clearly defines "position of authority," and being an older, influential counselor does not meet that definition.

When specifically questioned about what Fortier was to her, Plaintiff testified:

> Q. ...Did you ever consider Scott Fortier your boyfriend?
>
> A. No.
>
> Q. What – when you were in the relationship you were in with him, where you were texting him every day, had sexual contact with him, that kind of interaction, how do you describe the relationship?
>
> A. He was somebody that I looked up to, went to for advice. He helped me with a lot of, like, you know – to me at the time, obviously they were huge problems in my life, but obviously now looking back, it was just drama here and there that I would ask him to help me with. He was just somebody that I looked up to that gave me advice and would talk to me about things.

(Id., p. 441). Plaintiff may have looked up to Fortier, and she may have gone to him for advice. Fortier may have taken advantage of social influence he had over Plaintiff, but he was not in a legally and statutorily defined, "position of authority" over Plaintiff. Lacking a legally defined sexual assault, Plaintiff's claims against Circle R Ranch should be dismissed with prejudice.

b. Fortier's provision of alcohol to Plaintiff does not change the analysis.

Plaintiff has indicated that she believes she was sexually assaulted by Fortier by arguing that Fortier "plied her with alcohol" before their sexual encounters. The implication is that the influence of alcohol over Plaintiff impacted her ability to consent to the sexual contact. This circumstance, however, does not change the analysis for Plaintiff. The sexual encounters between Plaintiff and Fortier all occurred in either 2015 or 2016, and at that time, under Minnesota criminal law, sexual consent was more narrowly defined than it is now. In 2015 and 2016, the definition of "consent," under the criminal sexual conduct statutes, read:

> (a) "Consent" means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.
>
> (b) A person who is **mentally incapacitated** or physically helpless as defined by this section cannot consent to a sexual act.

Minn. Stat. § 609.341, Subd. 4 (2020). (Emphasis added). Mentally incapacitated, in turn, was defined as follows: "'Mentally incapacitated' means that a person under the influence of alcohol...administered to that person **without the person's agreement,** lacks the judgment to give a reasoned consent to sexual contact or sexual penetration." Minn. Stat. § 609.341, Subd. 7 (2020).

A recent case, State v. Khalil, 956 N.W.2d 627, 642 (Minn. 2021), interpreted this very definition of *mentally incapacitated*, and made clear that "section 609.341, subdivision 7, means that a person under the influence of alcohol is not mentally incapacitated unless the alcohol was administered to the person under its influence **without that person's agreement**...If the Legislature intended for the definition of mentally incapacitated to include voluntarily intoxicated persons, it is the Legislature's prerogative to reexamine the . . . statute and amend it accordingly." (emphasis added) (internal quotes omitted.)

Notably, in 2021, the Legislature heeded the Supreme Court's admonition, and added the following verbiage to the current statutory definition of *mentally incapacitated*:

> that a person is under the influence of any substance or substances to a degree that renders them incapable of consenting or incapable of appreciating, understanding, or controlling the person's conduct.

See Minn. Session Laws, 2021 1st Special Session, Ch. 11, Art. 4, Sec. 7. The Defense would point out that even under this 2021 definition, Plaintiff's own rendition of the events demonstrates that notwithstanding her consumption of alcohol, she appreciated, understood, and controlled her conduct. Nonetheless, this analysis is not necessary. Plaintiff's *voluntary* consumption of alcohol in 2015 and 2016 meant that she was not mentally incapacitated as a matter of law. Plaintiff's claims against Circle R Ranch that are all premised upon an alleged sexual assault fail as a matter of law.

* * * *

Ultimately, Plaintiff testified that, "I don't really think that any 16-year-old can realistically consent to having sex with someone who's 20 years older than them." (Ex. C, pp. 257-258). This, essentially, is the heart of Plaintiff's claim against Circle R Ranch. Circle R Ranch may agree with this conclusion. The Court may even agree with this conclusion. But it is neither for Plaintiff, nor Circle R Ranch, nor the District Court to create new actions for, or legal definitions of, sexual assault that do not exist. It is the duty of the legislature to draw the reasoned lines related to how much bodily and sexual autonomy minors are granted. Indeed, Plaintiff testified as to her expectations related to her bodily and sexual autonomy:

> Q. ...did anybody at camp have the authority to tell you who you could or could not have a physical relationship with, a sexual relationship with?
>
> A. No.
>
> * * *
>
> Q. Would you have been comfortable with Jack [McCoy] telling you who you could or could not have a relationship with?
>
> A. No.
>
> Q. Would you have been comfortable with Jack telling you who you could and could not have sexual contact with?
>
> A. No.

(Ex. C, pp. 127. 255). In a similar regard, the Minnesota Legislature has drawn lines related to minor females' abilities to procure abortions in the State of Minnesota. While Minn. Stat. § 144.343, Subd. 2 requires that notice be provided to parents before a minor can have an abortion, the statute ultimately provides that: "...[T]he consent of no other person [other than the minor] is required." As to a minor's right to privacy and bodily autonomy, the United States Supreme Court explained decades ago that, "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right to of privacy of the competent

minor mature enough to have become pregnant." Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

Thus, while Plaintiff now takes the position that Jack McCoy or somebody at Circle R Ranch should have prevented her from having a consensual sexual encounter with Scott Fortier, Plaintiff, likewise, made clear that she had no expectation that Jack McCoy would dictate who her sexual partners could be. The balancing of the rights of bodily autonomy granted to sexually mature minors is ultimately within the prerogative of the Minnesota Legislature, and as the Supreme Court stated in State v. Khalil, 956 N.W.2d 627, 642 (Minn. 2021) if our current criminal sexual conduct statutes are failing to protect sixteen- and seventeen-year-olds, it is the Legislature's prerogative to reexamine the criminal sexual conduct statute and amend it accordingly. Until it does so, an individual in Plaintiff's situation will not be deemed to have been sexually assaulted as a matter of law.

II. Any claims based upon an alleged employment or agency relationship between Fortier and Circle R Ranch fail.

Alternatively, Plaintiff's claims based upon negligent hiring, negligent retention, negligent supervision and respondeat superior fail as a matter of law because they are premised on the existence of some sort of employment relationship between Fortier and Circle R Ranch that did not exist. The factual record makes clear that Fortier had no connection, whether formal or informal, to Circle R Ranch in 2016. In 2015—even when granting Plaintiff all factual inferences—, Fortier was only visiting the Ranch sporadically, and when Fortier did sporadically visit, he may have DJed a dance on a random Friday night. Jack McCoy and Circle R Ranch did not control any means and methods of Fortier's DJing and did not control when Fortier would "pop in" to the ranch. Fortier testified that when he did DJ a Friday dance, he would bring his own

computer and make his own play lists. (Ex. A, p. 118). There were no wages or salary, and Fortier was not on any payroll. See Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (Minn. 1964)[2].

Importantly, "[i]n determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance." Id. at 326. "The power of control is the test of liability under the maxim respondeat superior. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent." Saint Paul-Mercury Indem. Co. v. Saint Joseph's Hosp., 4 N.W.2d 637, 639 (Minn. 1942).

A DJ that is hired to play music for a high school dance or a wedding is uncontroversially an independent contractor and not an agent or employee of the respective bride and groom or school district. Likewise, in 2015, insofar as Fortier DJed some random Friday night dances, Fortier sat in the position of an independent contractor to Circle R Ranch. The law makes clear that "[t]he general rule is that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Anderson v. State, 693 N.W.2d 181, 189 (Minn. 2005); Conover v. Northern States Power, 313 N.W.2d 397, 403 (Minn. 1981).

Likewise, because Fortier was not an employee of Circle R Ranch, Plaintiff's claims for negligent hiring, retention, and supervision fail as a matter of law. These three claims are all premised on the existence of an employer-employee relationship. See:

---

[2] '[T]the factors applied in testing the [employment] relationship are: (1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (Minn. 1964)

- Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 910 (Minn. 1983) ("...in a tort action, a person may recover from an **employer** if the person was injured by a negligently hired **employee**...")

- L.M. v. Karlson, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002) ("Negligent retention occurs when, **during the course of employment,** the **employer** becomes aware or should have become aware of problems with an **employee** that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment.") (citations omitted).

- M.L. v. Magnuson, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995) "[N]egligent supervision is the failure of the employer to exercise ordinary care in supervising the **employment relationship,** so as to prevent the foreseeable misconduct of an **employee** from causing harm to other employees or third persons."

(Emphasis added).

In sum, Plaintiff's claims for negligent hiring, retention, and supervision, as well as Plaintiff's claims based upon respondeat superior are premised on the existence of an employment relationship between Fortier and Circle R Ranch. No such relationship existed in 2015 or 2016 and all of these claims should be dismissed as a matter of law.

III. Plaintiff's claims of respondeat superior fail because the alleged sexual contact occurred outside of the scope of any *alleged* employment or agency relationship.

In Fahrendorff by & Through Fahrendorff v. N. Homes, 597 N.W.2d 905, 910 (Minn. 1999) the Supreme Court explained that: "[A]n employer may be held liable for even the intentional misconduct of its employees when (1) the source of the attack is related to the duties of the employee, and (2) the assault occurs within **work-related limits of time and place.**" In Leaon v. Wash. Cty., 397 N.W.2d 867, 874 (Minn. 1986) the plaintiff brought claims against the Washington County Sheriff's Department for assaultive conduct that occurred at a bachelor party which was attended almost exclusively by county law enforcement personnel. The Supreme Court dismissed the respondeat superior claim holding, "although the sheriff was aware of the stag party, there is no evidence suggesting the party was sponsored or supervised by Washington County.

The party was not held at the employer's place of business, nor during normal working hours, nor did the employer furnish any of the refreshments. This was simply a private party by and for people who knew each other at work. An employer is not legally responsible for what his employees choose to do socially when off-duty." See also Wiita v. City of Minneapolis, C0-95-2609, 1996 Minn. App. LEXIS 579, at *6 (Ct. App. May 14, 1996).[3]

In this case, Plaintiff alleges that she had sexual contact with Fortier at two social gatherings held in April 2015 – two months before camp was in session. Plaintiff admitted that these gatherings—while they involved people that had met at Circle R Ranch—were not related to any employment at the Ranch. These two encounters did not occur within work-related limits of time and place and are not actionable.

The May 30, 2015, sexual contact took place at an optional riding weekend that was open to Ranch alumni. Fortier was participating as an alumnus, and there is no testimony that Fortier was acting as an employee, agent, or contractor of Circle R Ranch—whether as a DJ or otherwise—at this time of the sexual encounter. Indeed, Plaintiff explained to police that this encounter occurred, after "everybody went to bed." (Ex. E at CJ000027). Thus, this encounter, likewise, did not occur within work-related limits of time and place and is not actionable.

Finally, the two 2016 sexual encounters occurred at Fortier's private residence in 2016, when Fortier was fully disengaged from the Ranch. Neither of these encounters can sustain a respondeat superior claim against Circle R Ranch.

[3] Case wherein Minneapolis Police officers at a party were alleged to have assaulted the plaintiff. The Court dismissed the respondeat superior claim, holding, "the officers were not acting within the scope of employment. They attended a social party as private citizens, furthering no interests of the city. They were off-duty and not in uniform. They did not display badges or wear guns. The party was not organized or sponsored by the city. The assaults were not the type of conduct authorized by the city. Accordingly, the city cannot be liable under respondeat superior." Wiita at *6.

To the extent Plaintiff alleges that Fortier—although not an official employee of Circle R Rach—was somehow the Ranch's agent, her respondeat superior claims still fail. "A principal may be legally responsible for the actionable conduct of its agent committed in the course and within the scope of the agency...**A principal, however, is not liable for the unauthorized intentional tort of its agent.**" Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 614-15 (Minn. 2012) (emphasis added); Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 535 (Minn. 1992).

Agency theory analysis is even simpler than employer/employee respondeat superior analysis because the *foreseeable industry hazard* element found in employer-employee respondeat superior jurisprudence does not apply in agency jurisprudence. As explained by the Court of Appeals in All. Bank v. Dykes, Nos. A12-0455, A12-0485, A12-0486, 2012 Minn. App. Unpub. LEXIS 1253, at *51-53 (Dec. 31, 2012):

> Lecy claims that "[s]ince *Fahrendorff*, the Minnesota Supreme Court has held that it is error for a court to rely on whether an employee acted for personal benefit in determining whether respondeat superior applies." Lecy's reliance on *Fahrendorff* is misplaced because **that case addressed respondeat-superior liability in the context of an employer-employee relationship...The supreme court's decision in *Semrad v. Edina Realty, Inc.* is more applicable to these facts because it considered an agency relationship**...Thus, the district court **did not err in concluding that Perusse's personal motivation precluded Lecy's claims against Emigrant**...

The agency analysis in this case is very simple. Sexual assault is not authorized by Circle R Ranch, and acts of sexual assault are not in furtherance of the Ranch's business. Whether any alleged sexual contact between Fortier and Plaintiff was foreseeable to Circle R Ranch is irrelevant under agency theory. Any claim of respondeat superior based upon agency theory fails as a matter of law.

IV. Plaintiff's negligence claim fails because Circle R Ranch did not owe her a duty at the time of the alleged sexual contacts between Plaintiff and Fortier.

Finally, Plaintiff's claim fails for negligence fails as a matter of law because Circle R Ranch owed her no duty of care at any of the times that she engaged in sexual contact with Fortier. "In a negligence action, the defendant is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury." Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002). "Where a party has no duty, there can be no breach." Safeco Ins. Co. of Am. v. Dain Bosworth, Inc., 531 N.W.2d 867, 873 (Minn. Ct. App. 1995). "Generally, the existence of a legal duty is an issue for the court to determine as a matter of law." Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985).

In an illustrative case, Bjerke v. Johnson, 742 N.W.2d 660, 663 (Minn. 2007) the minor plaintiff, Bjerke, stayed at a horse farm owned by Johnson, for progressively longer periods. During this time, Bjerke entered into a sexual relationship with Johnson's adult live-in male friend who was eventually convicted of criminal sexual conduct. Id. Bjerke then sued Johnson for negligence, alleging that Johnson failed to protect her. Id.

In conducting its analysis, the Supreme Court recognized that, "[g]enerally, no duty is imposed on an individual to protect another from harm, even when she realizes or should realize that action on [her] part is necessary for another's aid or protection. A duty to protect will be found, however, if (1) there is a special relationship between the parties; and (2) the risk is foreseeable." Id. at 665 (internal quotations omitted) (citing Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1980); Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989).

Noting that a special relationship duty "arises when an individual, whether voluntarily or as required by law, has custody of another person under circumstances in which that other person

is deprived of normal opportunities of self-protection," the Supreme Court ultimately found that Johnson owed Bjerke a duty of protection. Id. (internal quotations omitted) (citing Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993); Restatement (Second) of Torts § 314A (1965). The Supreme Court explained that, "[a]lthough Johnson was never given legal custody of Bjerke... Johnson accepted entrustment of some level of care for Bjerke when Bjerke stayed at Johnson's home, at a location distant from her parents' home." The Court continued, "Johnson provided Bjerke with room and board and adopted rules for Bjerke's conduct. Johnson had a large degree of control over Bjerke's welfare, strongly indicating that there was a special relationship between the two." The Court further noted that although Bjerke could call her parents for aid or talk to them when she visited home, she was otherwise inhibited in her ability to seek help or support from them. Id. at 666.

In this case—distinct from the facts of Bjerke—Plaintiff was not entrusted to the care of Circle R Ranch at the time of any of her sexual encounters with Fortier. Again, the two April 2015 sexual encounters occurred during social gatherings, and Plaintiff testified that she was not looking to Jack McCoy to provide anything other than a place to sleep at these times. The riding weekend was somewhat more related to official camp activities, but Plaintiff's own testimony demonstrated that she was not required to be there noting that she was just "encouraged" to be there.[4] (Ex. C, p. 230). While Plaintiff may have looked to Circle R Ranch to provide her room, board, protection,

[4] While Plaintiff, in her deposition stated that May 30, 2015 "likely would have been a training weekend," (Ex. C, p. 230) as noted above, Plaintiff made clear in her statement to police that it was the alumni riding weekend, and this was confirmed by Fortier's testimony as well. Further, Plaintiff made clear in multiple points in her deposition testimony that given the passage of time, she would defer to her recollection in 2017 as she described incidents to the police, over her recollection in 2021 during her deposition. "If that's what the police record says, that's probably more accurate than my current recollection;" "...whatever it says in here is probably the most – probably the best recollection of it. Now of course, my memory is a big foggy about it when compared to these statements." (Ex. C, pp. 262; 278).

etc. once the camp season started, the expectations would be different during an optional alumni weekend to ride the horses.

Finally, the record makes clear that Plaintiff was in no way looking to Circle R Ranch for protection, shelter, or board in 2016 when she had her final two sexual encounters with Fortier. As she explained to the police regarding the July 31, 2016 encounter: "I went up to go visit camp a couple times and um, one of the times I ended up going to his house…I would go like I could probably just stay the night there and then go to camp the next day since it's on the way…" (Ex. E at CJ000030). Thus, on July 31, 2016, Plaintiff was no more than a visitor on her way to Circle R Ranch, and not under the Ranch's care. Indeed, Plaintiff had not yet even arrived at the Ranch. As for the final, September 9, 2016, encounter, this was after the close of the camp season, and Plaintiff was squarely under her own care at that time or under the care of her mother. Plaintiff certainly was not under Circle R Ranch's care.

Circle R Ranch will grant that during camp season, before Plaintiff turned eighteen, while she was a counselor, the Ranch would have owed Plaintiff certain duties of shelter, board, and protection. The Ranch, nonetheless, did not owe her those duties when she was merely gathering with friends to socialize on Jack McCoy's property outside of his presence or participation, or when neither she nor Fortier were employed by the Ranch and not on its premises. Because Plaintiff sexually engaged with Fortier at times when she was not entrusted to the care of Circle R Ranch, Plaintiff's negligence claim against the Ranch fails for lack of any duty and Circle R Ranch is entitled to summary judgment.

CONCLUSION

At the bottom of the analysis is the fact that Plaintiff legally consented to each of the sexual encounters she had with Scott Fortier, and she was not sexually assaulted as a matter of law. All

of Plaintiff's claims against Circle R Ranch fail for this reason. Further, each of Plaintiff's discrete causes of action against Circle R Ranch fail because Fortier was not an employee or agent of the Ranch, and all of Plaintiff's sexual encounters with Fortier occurred outside of the scope of any *alleged* employment or agency relationship with Fortier. Finally, all of the encounters occurred at periods of time when Plaintiff was not entrusted to the care of Circle R Ranch. None of Plaintiff's claims against Circle R Ranch are viable, and Circle R Ranch is entitled to summary judgment.

Dated: 1/25/22

WALDECK & WOODROW, P.A.

By: _____

Peter M. Waldeck (0306058)
Jason M. Stoffel (0391620)
121 South Eighth Street, Suite 1400
Minneapolis, MN 55402
Telephone: 612.375.1550
Attorneys for Defendant Circle R. Ranch
pwaldeck@waldeckpa.com
jstoffel@waldeckpa.com