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IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PHILLIP SHERMAN AND
TINA SHERMAN

PLAINTIFFS

VS. CASE NO. CV-2008-4379-4

MCDONALD'S CORPORATION;
MATHEWS MANAGEMENT COMPANY, AND
AARON BRUMMLEY

DEFENDANTS

PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANT MATHEWS MANAGEMENT COMPANY'S MOTION TO DISMISS

Now comes the Plaintiffs, Phillip Sherman and Tina Sherman (Hereinafter "the Shermans"), by and through their attorney, Tina M. Damron, of the Damron Law Firm, PLLC, pursuant to the Arkansas Rules of Civil Procedure and files this RESPONSE AND OBJECTION TO MATHEWS MANAGEMENT COMPANY'S MOTION TO DISMISS, and in support thereof states the following:

A. Introduction

Contrary to the assertions of Defendant Mathews Management Company (hereinafter "Mathews"), the Plaintiffs' claims and subsequent relief sought are damages as a result of outrage, public disclosure of private facts, false light in the public eye, and negligent supervision. Plaintiffs have not requested relief and reimbursement for damage to personal property and have not alleged a claim for recovery due to failure of a bailee to return personal property. As the allegations in the Shermans' complaint evidence, Defendant Mathews' liability and negligence is both direct and vicarious. Direct liability stems from Mathews' assumption of a duty and negligent supervision and vicarious liability is the result of the failure to act and actions taken by employees within the scope

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of their employment and as agents of Defendant Mathews through both actual and apparent authority.

B. Standard for Dismissal

Under Ark. R. Civ. P. 12(b)(6), the Court must treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. Martin v. Equitable Life Assurance Soc'y, 344 Ark. 177, 40 S.W.3d 733 (2001). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. Id. However, the Court also looks to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. Arkansas Dep't of Envtl. Quality v. Brighton Corp., 352 Ark. 396, 102 S.W.3d 458 (2003).

C. Plaintiffs' have sufficiently alleged the voluntary assumption of the duty and the duty of all employers to supervise and control employees and agents for the protection of third parties.

Defendant Mathews has made no argument addressing or requesting dismissal of Plaintiffs' negligent supervision claim and Plaintiffs will make no response concerning the same.

As it relates to Plaintiffs' additional direct negligence claim, the Arkansas Supreme Court in Haralson v. Jones Truck Line, 223 Ark. 813, 270 S.W. 2d 892 (1954) found a duty of reasonable care when no duty to act existed prior to the Defendant's assumption of the same and stated "Nor does it matter that [Defendant] Fulfer was under no legal duty to give any signal at all. As Judge Cardozo observed ..... 'it is ancient learning that one

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who assumes to act.....may thereby become subject to the duty of acting carefully, if he acts at all.'

The "ancient learning" identified by Justice Cardozo and the basis of the holding in Haralson above is the Restatement (Second) of Torts § 323, Negligent Performance of Undertaking to Render Services, which states that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

In the present case, the Plaintiffs have pled in paragraphs ten (10), Sixty-Five (65), and Sixty-Six (66) of their complaint that "Defendants", which includes Defendant Mathews, promised and under took to perform the services of turning the Plaintiffs' cellular telephone off, to place it in the office, and to keep it safe until the Plaintiffs returned for it the following day and assumed the duty to so perform such services. Further, Defendant Mathews stated it would protect the cellular telephone to such extent that the Plaintiffs would need to give their name and describe the telephone in order to retrieve it; such action evidences the fact that Defendant Mathews knew or should have known that failure to take sufficient steps to protect such cellular telephone would lead to injury and damage to plaintiffs. Additionally, in paragraph Forty-Nine (49) Plaintiffs alleged that the Defendants should have known that their intentional acts of not turning off the cellular telephone....would result in severe emotional distress, physical injury and other damages to the Plaintiffs. Further, in paragraphs Fifty-Two (52), Fifty-Seven (57), Sixty-Two (62), and Sixty-Seven (67) Plaintiffs allege that such conduct did in fact result

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in harm to Plaintiffs.

Thus, when applying the standard required by Arkansas Rules of Civil Procedure, Rule 12 (b)(6) and taking all allegations as true with all reasonable inferences from such allegations resolved in favor of the Plaintiff, the Plaintiffs' complaint states a claim upon which relief can be granted and Defendant Mathews Motion should be denied.

Additionally, in Keck v. American Employment Agency, Inc., 279 Ark. 294, 652 S.W.2d 2 (Ark.1983), the Arkansas Supreme Court found that the client plaintiff's complaint stated a cause of action for negligence against an employment agency and the employment agency had a "duty to client to assure that person seeking female employee through agency was bona fide employer which went beyond merely producing person who claimed to be employer" when the client plaintiff was sent to a prospective employer by the agency and was thereafter kidnapped and raped by the alleged employer. The Court reasoned that such duty of care arose out of contractual relationship with client, its ability to foresee some danger to her, and its control over employers.

The Arkansas Supreme Court cited and relied on two sections of the Restatement (Second) of Torts and persuasive authority applying the same in its holding and stated:

> **The employment agency created its relationship with Mrs. Keck by offering its services and *301 thereby put itself in the position of owing a duty to her; and that duty in this case went beyond merely producing a man who claimed to be an employer.**
>
> **The Restatement of Torts recognizes by two rules that simply because a third person commits a crime, that does not always exonerate one who created the situation which allowed the crime to occur. Restatement (Second) of Torts § 448 reads:**
>
> **Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence.**
>
> The act of a third person in committing an intentional tort or crime is a

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> superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. (Emphasis added.)
>
> Restatement (Second) of Torts § 449 reads:
>
> Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent.
>
> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.
>
> Keck v. American Employment Agency, Inc., 279 Ark. 294, 652 S.W.2d 2 (Ark.1983), citing also, O'Hara v. Western Seven Trees Corp. Intercoast, 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977);Holley v. Mt. Zion Terrace Apts. 382 So.2d 98 (Fla.App.1980); Butler v. Acme Markets, Inc., 177 N.J.Super. 279, 426 A.2d 521 (1981), aff'd 89 N.J. 270, 445 A.2d 1141 (1982),

Similarly, in the present case all Defendants, including Defendant Mathews, offered specific services to the Plaintiffs and created a duty to Plaintiffs by their voluntary assumption of the duty to turn off the cellular telephone, place it in the office, and keep it safe so much so as to require the Plaintiffs themselves to give their name and a description of the phone before the same would be released and turned on. Further, as Plaintiffs have alleged and pursuant to the Restatement (Second) of Torts sections 448 and 449 all Defendants, including Defendant Mathews, are liable for their own direct negligence in creating the situation which allowed the intentional torts to occur by its breach of the duty to turn off the cellular telephone, place it in the office and safeguard it to the extent that the anyone given access would have to describe the phone and claim to be Phillip and Tina Sherman.

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Therefore, while all Defendants, including Defendant Mathews, had no duty to take possession of Plaintiffs' cellular telephone, agree to turn it off, place it in the office, and keep it safe when Defendant Mathews, through its agent and employee acting within the scope of his employment, manager Aaron Brumley, agreed to do so the same created a duty on behalf of Defendant Mathews for which direct liability for breach of the same arises. The Plaintiffs' have sufficiently pled the same and this Honorable Court should deny Defendant Mathews Motion to Dismiss.

D. A claim based on bailment requires that the personal property at issue be damaged and a request for relief for the value of the damaged property and the Plaintiffs have not alleged any such claim.

As stated above, the Plaintiffs in this case have lawfully and sufficiently stated a claim for direct negligence based upon the Defendants, including Defendant Mathews, assumption of duty and negligent creation of a situation as a result of breach of that duty that allowed intentional torts to occur and have not alleged a claim in bailment. Further, in Christensen v. Dady, 238 Ark. 577, 383 S.W.2d 283 (Ark.1964) the Arkansas Supreme Court stated that a bailee's responsibility whether gratuitous or reciprocal is for goods entrusted to him when the goods entrusted to him are damaged or lost." Further, Courts have allowed the Plaintiff to determine the theory upon which the Plaintiff states a cause of action. Such was the case in St. Paul-Mercury Indem. Co. v. City of Hughes 231 Ark. 530, 331 S.W.2d 106 (Ark.1960), where the Court found the plaintiff was required to state whether he sued on contract, in bailment, or a tort and where the plaintiff stated he sued in bailment the Court held the action by the plaintiff was not on tort. Likewise, in Schaefer v. Grausmall Restaurant Corp., 196 A.D.2d 692, 693 (1993) when a

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customer sued for the value of coats stolen from a restaurant, the Court found that "since there was no attempt to prove a bailment, any recovery must be had on a theory of negligence."

In fact, relief as a result of damage to the subject of the bailment is so entrenched in the law that where a bailee returns goods in a damaged condition which were not so damaged when received, an inference of negligence applies. Ozark Auto Transp., Inc. v. Starkey, 327 Ark. 227, 232-233, 937 S.W.2d 175, 177 - 178 (Ark.,1997); Howard's Cleaners v. Munsey, 289 Ark. 22, 708 S.W.2d 628 (1986).

Additionally, it should be noted that the persuasive authority from New York cited by Defendants Mathews specifically states that "**no liability for failure to return the subject of the bailment** will attach in the absence of proof of gross negligence." Voorhis v. Consolidation Rail Corp., 92 A.D.2d 501, 504 (N.Y.App. 1983). Thus, the standard asserted is applicable only if the Plaintiff makes a claim for bailment and for the failure to return the subject property. However, regardless of the same Plaintiffs have in fact alleged in paragraphs Fifteen (15), Thirty-Four (34), Forty-Five (45), Forty-Nine (49), Fifty (50), Fifty-Five (55), Fifty-Six (56), Sixty (60), Sixty-One (61), and Sixty-Six (66) that Defendant Mathews intentionally failed to safeguard Plaintiffs cellular telephone.[1]

Therefore, while it may be advisable and appropriate for Plaintiff to allege a claim based on bailment in the future after discovery is completed Plaintiff has made no such claim at this time.

[1] Further it should be noted in response to the allegations in Defendant Mathews Motion to Dismiss that the term "Defendants" refers to all the Defendants in the action including Defendant Mathews.

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