UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	
Plaintiffs,	Case No. 1:08-CV-00827-GBL-JFA
v.	
CACI PREMIER TECHNOLOGY, INC.,	
Defendant.	

REPLY IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFF AL SHIMARI'S COMMON-LAW CLAIMS FOR FAILURE TO STATE A CLAIM

I. INTRODUCTION

With respect to the applicable law for Plaintiff Al Shimari's common-law claims, the parties agree on at least three threshold points. *First*, the parties agree that Ohio's choice of law rules apply (*see* Pl. Opp. at 7). *Second*, the parties agree that Ohio substantive law cannot be applied to Plaintiff Al Shimari's claims (*see* Pl. Opp. at 10). *Third*, the parties agree that Iraq is the place of alleged injury and that CACI PT is immune under applicable Iraqi law (*see* Pl. Opp. at 2-3.[1] *Fourth*, the parties appear to agree that CPA Order 17 establishes the regime for claims

[1] Plaintiffs also explicitly agreed that CACI PT was immune from Iraqi law in its opposition to CACI PT's motion to dismiss Plaintiffs' Alien Tort Statute Claims. Dkt. #399 at 20 ("CPA Order 17, immunized U.S. personnel and U.S. contractors from the application of Iraqi law, and specifically stipulated that contractors are subject to liability under U.S. domestic law."); *id.* at 14 n.10 ("[CPA Order 17] also reaffirmed the inapplicability of Iraqi law to U.S. contractors or U.S. forces . . . .").

arising out of the Coalition occupation of Iraq (*see* Pl. Opp. at 3). From there, the parties diverge significantly.

Plaintiff Al Shimari argues that CPA Order 17, which immunizes CACI PT from Iraqi law, somehow allows for the application of *Virginia law* to his common law claims, but the language on which he relies provides for no claims arising out of military combat operations, and for other claims to be submitted *to the Parent State* for resolution pursuant to the Parent State's *national* laws. As CACI PT explained in moving to dismiss, this language calls for submission of claims to the United States administratively, where they can be considered by the United States under the available claims regime. By contrast, Plaintiff Al Shimari reads submission to "the Parent State" to mean "filed in court," and reads "national laws" to means the laws of a state as opposed to, well, the *national* laws. Plaintiff Al Shimari's twisted reading of CPA Order 17 cannot save his common law claims, and the Court should dismiss those claims.

II. ANALYSIS

A. Plaintiff Al Shimari Misapplies Ohio's Choice of Law Rules

Plaintiff Al Shimari argues that "the choice-of-law analysis in this case begins with Ohio and ends with Virginia, but is informed by Order 17 of the CPA." CACI PT agrees that the analysis begins with Ohio law and is heavily informed by CPA Order 17, but fails to see how this inquiry ends in Virginia. Ohio's choice of law rules begin, as Plaintiff Al Shimari concedes, with the presumption that the law of the place of injury will ordinarily govern personal injury actions, unless some other jurisdiction has a more significant relationship to the matter. Pl. Opp. at 7. But Plaintiff Al Shimari then defines a jurisdiction's "interest" in terms of whether that jurisdiction will provide recovery for the plaintiff. CACI PT noted in moving to dismiss that Ohio choice of law rules do not place a thumb on the scale in favor of the plaintiff and cast about

looking for a jurisdiction whose laws will permit recovery. Rather, citing a multitude of cases, CACI PT noted that Ohio courts apply Ohio's choice of law rules evenhandedly, and if the governing law provides a threshold defense, the inquiry is over and the claim is resolved in favor of the defendant. CACI PT Mem. at 14-16. Plaintiff Al Shimari does not deal with these cases *at all*, because there is no good response to them. Instead, Plaintiff Al Shimari buries his head in the sand and just argues that Iraq has no interest at stake here because there is no recovery available under Iraqi law. Pl. Opp. at 9. That argument misses the point entirely.

The government for Iraq at the time of the events at issue in this action was the CPA. The CPA had a sufficiently-acute interest in the resolution of claims arising out of occupation activities that it (as Plaintiffs admit) provided immunity to contractors and created a specific claims process that required submission of claims to the Parent State for resolution under the Parent State's *national* laws. Thus, Iraq had a paramount interest in the manner of resolving occupation-related claims because, as Plaintiff Al Shimari acknowledges, CPA Order 17 "is effectively a choice of law by the CPA as the entity in control of the place where the injury occurred." Pl. Opp. at 9. The CPA also had an interest in having claims resolved administratively, without the distraction of tort suits, and with some degree of uniformity by requiring claims to be resolved under the Parent State's *national laws*. CPA Order 17, § 6. Plaintiff Al Shimari misses all of these interests in making the shallow argument that Iraq has no interest here because it would not allow recovery.

By contrast, as CACI PT had noted (and as Plaintiff Al Shimari has not disputed), even Virginia courts would not apply Virginia law to Plaintiff Al Shimari's claims because they involve allegations of tortious conduct and injury in Iraq. Plaintiff Al Shimari tries to brush off this inconvenient fact by arguing that Virginia's *lex loci* choice of law rule is simply "one of

judicial administration." Pl. Opp. at 12. But that is the point. Virginia has so little cognizable interest in Plaintiff Al Shimari's claims that issues of judicial administration outweigh any interest Virginia might have in applying Virginia law to claims arising in Iraq out of the federal government's conduct of war.[2]

The best argument Plaintiff Al Shimari could make, though he does not appear to make it, is that Ohio choice of law rules point to application of Iraqi law, and the Iraqi law at the relevant time displaced Iraqi law with a claims regime as set forth in CPA Order 17. But even that argument is a road to nowhere. For the reasons addressed below, CPA Order 17's claims regime does not allow a tort action under the law of a state. It allows claims to be submitted to the United States so that they can be dealt with under the "national laws" of the United States.

B. CPA Order 17 Provides Contractor Immunity from Iraqi law and Permits a Limited Claims Regime for Claims Arising Out of the Coalition Occupation of Iraq

As noted above, Plaintiff Al Shimari agrees with CACI PT that CPA Order 17 provides CACI PT with immunity from Iraqi law. *See* note 1 and accompanying text, *supra*. Plaintiff Al

[2] Plaintiff Al Shimari relies on *Harris v. Kellogg, Brown & Root Services*, 796 F. Supp. 2d 642 (W.D. Pa. 20110, but even Plaintiffs admit some (but not all) of the problems with relying on *Harris*. In *Harris*, rather than asserting that Iraqi law could not be applied against it, KBR's motion sought a court order ruling that three provisions of the Iraqi Civil Code applied to the plaintiff's claims. *Id.* at 672. On reconsideration, the district court held that KBR had not adequately briefed the relevant sections of CPA Order 17, and therefore failed to meet its burden under Federal Rule of Civil Procedure 44.1 to prove the content of foreign law. *Id.* at 673. In addition, as Plaintiff Al Shimari is constrained to admit, the *Harris* court relied heavily on the fact that the case before it did *not* involve Iraqi plaintiffs. *Id.* at 662 ("None of the parties to this dispute are from Iraq . . . ."); *id.* at 678 ("This conviction is particularly appropriate given that the third parties who were allegedly injured in this case by KBR were American (indeed an American serviceman and his parents) rather than Iraqis – who arguably may have expected Iraqi law to apply."). Finally, the *Harris* court distinguished decisions from other courts suggesting that Iraqi law might apply to occupation-related tort claims on the grounds that Pennsylvania's choice-of-law rules are unique and such that decisions from other jurisdictions are of limited use. *Id.* at 653. That notion works in reverse as well.

Shimari also agrees that Section 6 of CPA Order 17 establishes the regime for claims arising out of the Coalition occupation. Pl. Opp. at 3. Section 6 of CPA Order 17 provides as follows:

> Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

CPA Order 17, § 6. "Parent State" is defined in CPA Order 17 as "the state providing Coalition Personnel as part of the Coalition in Iraq or the state providing Foreign Liaison Mission Personnel." *Id.* § 1.4.

Plaintiff Al Shimari characterizes Section 6 of CPA Order 17 as follows: "Taken as a whole, Order 17 creates a system where claims against Coalition personnel for conduct during the occupation period are to be handled by the courts of the personnel's home country pursuant to that country's laws, and not in Iraqi courts or under Iraqi law." Pl. Opp. at 3. Contrary to Plaintiff Al Shimari's characterization, there is no place in Section 6 that references a claim being filed in a court or that such a claim would be subject to the substantive law of the subdivision of a Parent State providing Coalition personnel.[3] Rather, Section 6 of CPA Order 17 provides for the filing of *administrative claims* that would be decided in whatever manner the Parent State has put in place for evaluating such administrative claims under its *national laws*. This is clear from several elements of Section 6.

First, Section 6 provides that third party claims "shall be submitted and dealt with by the Parent State . . . ." CPA Order 17, § 6. A "Parent State" is the nation that provided the Coalition

[3] Nor could CPA Order 17 amend the Constitution's allocation of war powers exclusively to the federal government. U.S. Const. art. I, §8, cls. 1, 11-15; art. II, §2, cls. 1, 2.

Personnel," here the United States. Plaintiffs have not submitted a claim to the United States nor is the United States dealing with the claim. The United States is not a party to this action. And notably, Section 6 speaks of "submitting" (and not "filing") a claim, and that the Parent State will "deal" with the claim (as opposed to "adjudicating" the claim).

Second, Section 6 specifically provides that the Parent State will deal with claims "in a manner consistent with the *national laws* of the Parent State." CPA Order 17, § 6 (emphasis added). "National laws" does not mean the laws of one of the fifty states. Indeed, when the Supreme Court and the Fourth Circuit discuss "national laws," they do in order to distinguish between the laws of the United States – the national laws – and state law. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) ("The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property."); *New York v. United States*, 505 U.S. 144, 16 (1992) ("Then we are brought to this dilemma – either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." (quoting Alexander Hamilton)) ; *Brzonkala v. Va. Polytechnic & State Univ.*, 169 F.3d 820, 864 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).[4]

"General principles of statutory construction require a court to construe all parts to have meaning and to reject constructions that render a term redundant." *PSINet, INc. v. Chapman*, 362 F.3d 27, 232 (4th Cir. 2004); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (a

[4] By contrast, Plaintiff Al Shimari relies on *dicta* in an unpublished order in which the magistrate judge recommended denial of a *pro se* litigant's *habeas corpus* petition asserting rights under the U.N. Declaration of Rights for lack of jurisdiction. *Raskiewicz v. United States*, No. 10-civ-86, 2010 U.S. Dist. LEXIS 9322, at *2 (D. Mont. Aug. 12, 2010).

court is "obliged to give effect, if possible, to every word"); *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 254 (4th Cir. 2013) ("In construing a statute, to the extent possible, we seek to give meaning to every word and reject constructions that render a term redundant." (quotation omitted); *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir.1996) (a court should not "construe a statute in a manner that reduces some of its terms to mere surplusage"); *United States v. Snider*, 502 F.2d 645, 652 (4th Cir.1974) (all parts of a statute must be construed so that each part has meaning). The word "national" in CPA Order 17 is entirely redundant if it is not construed to modify the rest of the sentence to specify that claims shall be submitted to the extent allowable under *national* law and not pursuant to the law of a state. Thus, the only permissible reading of Section 6 of CPA Order 17 is that it means what it says, and provides for claims being dealt with under United States law but not under state law.

Third, the dichotomy between Section 6's treatment of claims arising "in connection with military combat operations" and other claims further demonstrates that what CPA Order 17 permits *in lieu* of application of Iraqi law is an administrative claim as permitted by the Parent State. The CPA administrator did not pull the distinction between combat and noncombat activities out of thin air. That is the exact distinction drawn in the Foreign Claims Act, which provides for claims submitted to the United States (*i.e.*, the Parent State here) so that the United States can deal with such claims under its national laws. The Foreign Claims Act provides as follows:

> To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned . . . may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for--
>
> . . . .

> (3) personal injury to, or death of, any inhabitant of a foreign country;
>
> if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions, and is caused by, ***or is otherwise incident to noncombat activities*** of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. . . .

Foreign Claims Act, 10 U.S.C. § 2734(a) (emphasis added).

Thus, the regime set up by the CPA administrator for claims connected with the activities of Coalition personnel from the United States is that (1) Coalition personnel are not subject to Iraqi law, (2) if a claimant's injury arises out of combat operations, there is no provision for recovery, (3) if a claimant's injury arises out of noncombat operations, the claimant may submit a claim to the Parent State (here, the United States) where it will be dealt with under national law (here, the Foreign Claims Act). CPA Order 17, § 6. Indeed, as the D.C. Circuit has acknowledged, the United States has confirmed its willingness to allow administrative claims involving bona fide instances of mistreatment of detainees in Iraq. *See Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009). There is no other common law or statutory cause of action available under the "national laws of the Parent State." Accordingly, Plaintiff Al Shimari's recourse, if he had a bona fide claim, was to assert an administrative claim to the United States. If the claim had any validity, the United States could have allowed it and then taken any appropriate action (such as seeking recovery or pursuing criminal prosecution) with respect to those responsible for any mistreatment Plaintiff Al Shimari may have suffered.

Plaintiff Al Shimari offers two arguments for avoiding the claims regime made available under CPA Order 17, but neither is availing. Plaintiff Al Shimari argues that the notice promulgated by Ambassador Bremer when he issued CPA Order 17 shows that the order "does *not* immunize Coalition personnel from tort suits." Pl. Opp. at 3. What the notice on which

Plaintiffs rely actually says is the following: "[Coalition personnel] are not subject to local law or the jurisdiction of local courts" but that this "will not prevent legal proceedings against Coalition personnel for ***unlawful*** acts they may commit." Pl. Opp. at 3 (emphasis added) (quoting LoBue Decl., Ex. B). But that language actually proves ***CACI PT's*** point. Ambassador Bremer used the word "unlawful." Not "tortious," but "unlawful." CACI PT has *always* asserted that coalition personnel, including contractors, are subject to criminal prosecution for any "unlawful" acts committed in the course of the Iraq occupation. The D.C. Circuit agreed with CACI PT on this point, noting that "[w]hile the federal government has jurisdiction to pursue criminal charges against the contractors should it deem such action appropriate, *see* 18 U.S.C. §§ 2340A, 2441, 3261, and although extensive investigations were pursued by the Department of Justice upon referral from the military investigator, no criminal charges eventuated against the contract employees." *Saleh*, 580 F.3d at 2; *see also Dow v. Johnson*, 100 U.S. 158, 166 (1879) (noting the availability of criminal prosecution, but not civil litigation, against occupation personnel). Nowhere does the notice accompanying issuance of CPA Order 17 indicate the availability of a tort action in court, and Section 6 of CPA Order 17 precludes that remedy in any event.

Plaintiff Al Shimari also contends that the Foreign Claims Act does not permit a recovery "for claims against contractors" (Pl. Opp. at 13), which is in one sense untrue and in another sense irrelevant. It is untrue because the Foreign Claims Act permits recovery for injuries that were "incident to" the noncombat activities of the armed forces. If interrogation activities at Abu Ghraib prison are noncombat activities, it is difficult to see how the Foreign Claims Act would not respond to a claim alleging injury caused by a contractor working in that Army-controlled facility, pursuant to federal contract, in order to collect intelligence in aid of the Army's mission

in Iraq. Moreover, whether Plaintiff Al Shimari would have had a valid claim under the Foreign Claims Act is irrelevant in the sense that CPA Order 17, as Plaintiffs acknowledge, immunizes CACI PT from Iraqi law. In conjunction with that immunity for Coalition personnel, CPA Order 17 establishes an exclusive process for considering claims. If Plaintiff Al Shimari were correct in his dubious contention that a bona fide claim of detainee abuse by a CACI PT employee would not have been cognizable under the Foreign Claims Act, that would not support ignoring the exclusive claims process established by the CPA.

C. Plaintiffs Cannot State a Claim for Negligent Hiring, Training, and Supervision Under Virginia Law

For the reasons stated above, Virginia law cannot be applied to Plaintiff Al Shimari's common law claims. Accordingly, his claims would be subject to dismissal even if Virginia law would recognize Plaintiff Al Shimari's claims as pleaded. However, Plaintiff Al Shimari has not come close to meeting the pleading requirements for a negligent hiring claim under Virginia law, and Virginia law does not recognize Plaintiff Al Shimari's negligent training and supervision claims. Therefore, even if Plaintiff Al Shimari could somehow take advantage of Virginia tort law, these claims would have to be dismissed anyway.

With respect to negligent hiring, that claim is recognized under Virginia law. But a plaintiff must show that the employer "fail[ed] to exercise reasonable care in placing an individual *with known propensities*, or propensities that *should have been discovered by reasonable investigation*, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Interim Personnel of Cent. Va., Inc. v. Messer*, 559 S.E.2d 704, 707 (Va. 2002) (emphasis added). Plaintiffs have alleged no *facts* in support of this claim, only labels and legal conclusions. Labels and legal conclusions are not sufficient.

CACI PT pointed out that one obvious flaw in Plaintiff Al Shimari's claim is that he does not identify any CACI PT employee who injured him *and* who had a known or reasonably knowable propensity that should have prevented his hire. That is important because a tavern owner can hire ninety-nine bouncers with known propensities for inappropriate violence, and one with no such history, and that tavern owner is not liable for negligent hiring if the one employee with no history of violence inappropriately assaulted a customer. The reason is that the tavern owner's hiring practices had no causative effect on the plaintiff's injuries. *Id.* at 707 (a negligent hiring claim requires a showing that the employer hired an improper person and that the plaintiff suffered harm *resulting from* the negligent hire). Similarly, Plaintiff Al Shimari must show that someone employed by CACI PT harmed him *and that* the employee had known or reasonably knowable dangerous propensities before being hired. Plaintiffs allege no *facts* concerning the known or reasonably knowable propensities about any CACI PT employee before he or she was hired, much less an employee who had anything to do with Plaintiff Al Shimari.

Plaintiffs rely on *Dobson v. Cedar Fair Southwest, Inc.*, 84 Va. Cir. 323, 324 (Va. Cir. Cr. 2012), for the principle that a plaintiff need not name the negligently-hired employee in order to proceed with a negligent hiring claim. However, in *Dobson*, the plaintiff had no discovery, and was able to describe the relationship between the carnival employee and the defendant. By overruling the demurrer, the court gave the plaintiff the opportunity to take discovery as to the identity of the employee. *Id.* Here, discovery has closed. Plaintiff Al Shimari has been permitted to take discovery (while not himself appearing for deposition or a medical examination). Plaintiff Al Shimari has not identified a known or reasonably knowable propensity that should have precluded hiring of someone who injured him. Just saying "I got

hurt by someone and whoever that was had some propensity that should have precluded his hire" is not a ticket past a motion to dismiss.

With respect to his claim of negligent supervision, Plaintiff is constrained to acknowledge, if only by his silence, that there does not appear to be a single case, in the history of the Commonwealth of Virginia, in which a court has entered a judgment in favor of a plaintiff on a negligent supervision claim or even done more than overruled a demurrer on the theory that there might be some set of facts that theoretically would allow a negligent supervision claim. Motions to dismiss are regularly granted and demurrers are regularly sustained on the grounds that Virginia does not recognize a tort of negligent supervision. *See* CACI Mem. at 23-25 (collecting cases). A claim arising in Iraq, at a prison facility under the control of the United States military would seem a poor candidate for recognizing a claim of negligent supervision for the first time in the history of the Commonwealth.

Even Plaintiff Al Shimari has little to say for his negligent training claim. Pl. Opp. at 14 n.12. The best case he has actually sustained a demurrer on a negligent training claim and noted that such a claim has never been recognized under Virginia law. *Id.* The most Plaintiff Al Shimari can say is that "[t]he Virginia Supreme Court has yet to consider the issue," *id.*, while all of the lower court decisions have held that no such tort exists. CACI PT Mem. at 25.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff Al Shimari's common law claims (Counts X through XX of the Third Amended Complaint).

Respectfully submitted,

/s/ J. William Koegel, Jr.

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor (admitted *pro hac vice*)
Counsel for CACI Premier Technology, Inc.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 - telephone
(202) 429-3902 – facsimile
wkoegel@steptoe.com
joconnor@steptoe.com

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

George Brent Mickum IV
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, Maryland 20816
gbmickum@gmail.com

/s/ J. William Koegel, Jr.

J. William Koegel, Jr.
Virginia Bar No. 38243
Attorney for CACI Premier Technology, Inc.,
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 - telephone
(202) 429-3902 – facsimile
wkoegel@steptoe.com