

FILED

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

2024 OCT -1 P 2:00

SUHAIL NAJIM ABDULLAH AL SHIMARI
et al.,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant.

Civil No. 1:08-cv-827 (LMB/JFA)

**[PROPOSED] BRIEF OF *AMICA CURIAE* PROFESSOR DEBORAH DEMOTT IN
SUPPORT OF PLAINTIFFS' MOTION IN LIMINE CONCERNING JURY
INSTRUCTION ON "BORROWED SERVANT" DOCTRINE**

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INTEREST OF AMICA CURIAE

Deborah A. DeMott¹ is the David F. Cavers Distinguished Professor of Law at Duke University, where she has been a member of the law faculty since 1975. A member of the New York bar, she clerked for the Hon. Arnold Bauman of the United States District Court for the Southern District of New York and worked as an associate at Simpson Thacher & Bartlett before her academic career. She is a graduate of Swarthmore College and New York University School of Law. Professor DeMott served as the sole Reporter for the American Law Institute’s Restatement (Third) of Agency, published in 2006. She also served as an Adviser to the American Law Institute’s Restatement of Employment Law from 2004 to 2014. The Reporters’ Preface to the Restatement of Employment Law, published in 2015, accords her “special recognition.” Professor DeMott is also the author or editor of many scholarly publications, including (among other works) *Fiduciary Obligation, Agency and Partnership: Duties in Ongoing Business Relationships* (1991). She has held appointment as the Centennial Professor in the Law Department of the London School of Economics and has served as a Fulbright Senior Scholar at the University of Sydney and Monash University in Australia, in addition to teaching and lecturing at other universities in the United States and abroad.²

Amica has no stake in the outcome of this case other than her academic interest in the logically coherent development of the law. *Amica* is filing this brief because the case implicates recurrent and fundamental issues in the application of the common law of agency in a contemporary economy. *Amica* believes her unique perspective may assist the Court in

¹ *Amica* and her counsel have authored the entirety of this brief, and no person other than *amica* or her counsel has made a monetary contribution to the preparation or submission of this brief. Plaintiffs consent to the filing of this brief, whereas Defendant does not consent.

² Institutional affiliations are listed for identification purposes only.

determining its instructions to the jury concerning the “borrowed servant” doctrine and related doctrines.

SUMMARY OF ARGUMENT

Agency law recognizes the reality of relationships in which the same employee, by simultaneously performing work on behalf of multiple employers, can subject *each of the employers* to liability for tortious acts committed within the scope of employment. The Court’s April 2024 instructions to the jury, which *amica* has reviewed, may have led the jury to believe that agency law requires that only *one employer* can be subject to liability even when an employee’s conduct serves multiple employers. This is inconsistent with agency law as articulated by the American Law Institute (“ALI”) in multiple Restatements of the relevant law.

At the next trial in this action, if the Court instructs the jury on the “borrowed servant” doctrine, it should also instruct the jury that if an employee worked for multiple employers, each employer is liable if the employee was simultaneously acting on each employers’ behalf at the time the employee committed the tortious conduct.³

ARGUMENT

Since its founding in 1923, the ALI has worked “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” Am. Law Inst., *Certificate of Incorporation* (1923), available at <https://www.ali.org/about-ali/governance/>. The successive Restatements of the law, primarily directed to courts, “aim at clear formulations of

³ Where the government or military is one of the multiple employers at issue, immunities or other considerations may potentially apply. However, as with any dual-agency situation, even if one employer cannot ultimately be held liable, the other employer’s (or employers’) liability must be assessed on its own terms, as it otherwise would be.

common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.” Am. Law Inst., *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 4 (rev. ed. 2015). Restatements “scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed.” *Id.* at 5. Although aspiring to the precision of statutory language, Restatements “are also intended to reflect the flexibility and capacity for development and growth of the common law” and thus are “phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.” *Id.* In the ALI’s own evaluation, “[a] significant contribution of the Restatements has . . . been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.” *Id.* A Restatement’s black-letter statements of doctrine are official statements of the ALI, which is their author; the Reporter is the author of the Reporter’s Notes and any Statutory Notes. *Id.* at 19.

The process leading to a new Restatement consists of a series of drafts prepared by a Reporter (or Reporters), followed by close review by the expert Advisers appointed by the ALI for the project and discussions with the Reporter, followed by reflection and reconsideration by the Reporter. The process, as was true for the Restatement (Third) of Agency, also typically includes review by a self-selected Members Consultative Group from the ALI’s membership. When the ALI’s director determines that the substance of a draft is ready, the Reporter prepares a draft for presentation to the ALI’s governing body, its Council. With the Council’s approval, that draft, as revised by the Reporter, may be submitted to the ALI’s Annual Meeting for discussion and amendment; subject to any changes resulting from this meeting, the draft may be approved in

whole or in part or resubmitted to the Reporter for further revision. This deliberative process is integral to the ALI's authorship of Restatements and to their widespread acceptance. As of September 30, 2024, the Restatement (Third) of Agency has been cited in 3,642 opinions from courts in the United States,⁴ including seven opinions from the United States Supreme Court.

The Restatement (Third) of Agency, like the Restatement (Second) of Agency and the Restatement of Employment Law, addresses the legal consequences of situations in which a tortfeasor is an employee who renders services to multiple employers at the same time. All three Restatements acknowledge that two or more employers may jointly supervise or control employees that they share in common—with the implication being that two or more employers may be liable for the same tortious act committed by their joint employee. Restatement (Third) of Agency § 7.03 cmt. d(2) (noting that “[s]ome cases allocate liability to both general and special employer on the basis that both exercised control over the employee and both benefited to some degree from the employee’s work”); Restatement (Second) of Agency § 226 cmt. b (“Two persons may agree to employ a servant together or to share the services of a servant.”); Restatement of Employment Law § 1.04 cmt. c (“[e]mployees can serve two or more employers who jointly or in tandem control their rendering of services”).

The research that underlies the relevant section of the Restatement (Third) of Agency, § 7.03, scanned the case law stemming from the “borrowed servant” doctrine, and found settled bodies of doctrine that varied across states, as summarized in Comment d(2), with further variation stemming from the fact-specificity of cases. Additionally, the black-letter formulations in the relevant sections of the Restatement (Second) of Agency, §§ 226 and 227, could be read to conflict

⁴ Based on a Westlaw search using the search terms “restatement +4 third +4 agency & DA(after 1999)”.

with each other in some applications. The tactic taken in Restatement (Third) of Agency § 7.03 is more descriptive and arguably pitched at a higher level than the more prescriptive style of Restatement (Second) of Agency §§ 226 and 227. The research underlying Restatement (Third) § 7.03 correctly revealed the pervasive presence of joint employment in the modern economy, as the Restatement of Employment Law acknowledges. *See* Restatement of Employment Law § 1.04, Reporters' Notes to cmt. a, at 44 (“Restatement Third, Agency § 7.03, Comment d(2), acknowledges the presence of joint employment in the modern economy”).

The doctrinal formulations in the Restatement (Second) of Agency, although consistent with recognizing a relationship as one of joint employment, are at times confusingly illustrated with material reflecting outdated assumptions about the structure of work relationships. For example, Illustration 4 to Restatement (Second) of Agency § 226 comment b (quoted above) posits two individuals who “set up a bachelor apartment and employ a chauffeur.” Driving negligently in a borrowed automobile on a mission to deliver one employer’s suit to a tailor, the chauffeur injures a third party. The apparent anachronism of the Illustration should not distract from its stated conclusion, which is that, at the time of the accident, the chauffeur acted as the servant of *both* employers. Agency law has thus long contemplated not only a binary or either-or scenario in which only one employer is subject to liability, but also a scenario in which an employee’s work may fall within multiple scopes of employment on behalf of multiple employers, and thus multiple employers may be subject to liability for the same conduct.

In addition, both the Restatement (Third) of Agency and the Restatement of Employment Law *explicitly* acknowledge that multiple employers may be subject to liability stemming from torts committed by a jointly employed actor who, by definition, is subject to the control of more than one employer. The idea that multiple employers who share control over an employee may be

liable for the same tortious act committed by that employee is consistent with the fundamental rationale underpinning the doctrine of *respondeat superior*: it creates incentives for employers “to choose employees and structure work . . . so as to reduce the incidence of tortious conduct.” Restatement (Third) of Agency § 2.04 cmt. b. *Respondeat superior* also increases the likelihood of just compensation for persons injured by torts committed by employees acting within the scope of their employment, in part because an employer is more likely than its employees to insure against liability. *Id.*

CONCLUSION

If the Court instructs the jury on the “borrowed servant” doctrine, it should also instruct the jury that if it finds that if an employee performed work for multiple employers, each employer is liable if the employee simultaneously acted on each employer’s behalf at the time of the employee’s tortious conduct.

October 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing (NEF) to all counsel of record.

Dated: October 1, 2024

/s/ Alison Deich
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