No. 25-1043

In the United States Court of Appeals for the Fourth Circuit

Suhail Al Shimari, *et al.*,
Plaintiffs-Appellees,

v.

CACI Premier Technology, Inc.
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division
(No. 1:08-cv-00827) (The Hon. Leonie M. Brinkema)

BRIEF OF *AMICA CURIAE* PROFESSOR DEBORAH A. DEMOTT IN SUPPORT OF PLAINTIFFS-APPELLEES

Agnieszka M. Fryszman
Nicholas Jacques
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005
Telephone: 202-408-4600
[redacted]

Attorneys for Amica Curiae *Prof. Deborah A. DeMott*

Benjamin F. Jackson
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212-838-7797
[redacted]

Adnan Toric
COHEN MILSTEIN SELLERS & TOLL PLLC
100 N. 18th Street, Suite 1820
Philadelphia, PA 19103
Telephone: 267-479-5700
[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF *AMICA CURIAE*

Deborah A. DeMott[1] 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 leading scholar in agency law and fiduciary duties, she served as the sole Reporter for the Restatement (Third) of Agency, published by the American Law Institute ("ALI") in 2006. In addition, she also served as an Adviser to the ALI'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" for her contributions.

Beyond her work with the ALI, Professor DeMott has authored or edited many scholarly publications, including *Fiduciary Obligation, Agency and Partnership: Duties in Ongoing Business Relationships* (1991), among other works. She has lectured and taught at institutions worldwide, and has held prestigious international academic appointments, including as Centennial Professor in the Law Department of the London School of Economics and as a Fulbright Senior Scholar at the University of Sydney and Monash University in Australia.[2]

---

[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. The parties have consented to this filing.

[2] Institutional affiliations are listed for identification purposes only.

Professor DeMott is a graduate of Swarthmore College and New York University School of Law. Before entering academia, 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. She remains a member of the New York bar.

Professor DeMott 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 this case implicates recurrent and fundamental issues in the application of the common law of agency in a contemporary economy. Given her expertise, Professor DeMott believes her unique perspective will assist the Court in analyzing the "borrowed servant" doctrine and related legal principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

Agency law has long recognized 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 employee's scope of employment. The District Court's instructions to the jury on retrial, which *amica* has reviewed, are consistent with these traditional agency and employment law principles, as articulated by the ALI in multiple Restatements.[3]

BACKGROUND

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/governance/. A central component of this mission is the ALI's Restatements of the law, which are primarily directed to courts. The Restatements "aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated

[3] When the government or military is one of the employers at issue, immunities or other considerations may potentially apply. However, as with any multiple-agency situation, even if one employer cannot ultimately be subject to liability, the other employer's (or employers') liability must be assessed on its own terms, as it otherwise would be. That is, one employer's potential immunity from liability does not eliminate the need to assess the other employer's (or employers') liability.

by a court." *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 Advisors appointed by the ALI for the project and discussions with the Reporter, followed by reflection and reconsideration by the Reporter. This process typically also involves review by a Members Consultative Group drawn 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 and reiterative process is integral to the ALI's authorship of Restatements and to their widespread acceptance.

The Restatement (Third) of Agency was the product of this meticulous process. It is now widely regarded as the leading authority on the law of agency in the United Sates. As of May 8, 2025, the Restatement (Third) of Agency has been cited in 3,784 opinions from courts in the United States,[4] including seven opinions from the United States Supreme Court.

ARGUMENT

A. Restatements of Agency and Employment Law Recognize That Multiple Employers May Each Be Liable for a Shared Employee's Tortious Conduct.

Section 7.03 of the Restatement (Third) of Agency addresses the legal consequences of situations in which a tortfeasor is an employee who renders service

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

to multiple employers at the same time. Comment d(2) of that section states that "some cases allocate liability to both [the] 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." The research underlying Section 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-specific nature of the cases. This research correctly confirmed the pervasive presence of joint employment in the modern economy, as the Restatement of Employment Law also recognizes. *See* Restatement of Employment Law §1.04, Reporters' Notes to cmt. a (Am. L. Inst. 2015) ("Restatement Third, Agency, § 7.03, Comment d(2), acknowledges the presence of joint employment in the modern economy.").

In addition, both the Restatement (Third) of Agency and the Restatement of Employment Law explicitly acknowledge that multiple employers may be liable for torts committed by a jointly employed actor who, by definition, is subject to the control of more than one employer. *See* Restatement (Third) of Agency § 7.03 cmt. d(2) (Am. L. Inst. 2006); Restatement of Employment Law § 1.04 Reporters' Notes to cmt. a ("An individual may be an employee of two or more employers, both for purposes of imposing duties of care to protect employees, and for imposing vicarious liability on employers." (citation omitted)). The idea that multiple employers who

share control over an employee may be liable for the same tortious act committed by the 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. Imposing r*espondeat superior* liability in these circumstances 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 carry liability insurance. *Id.*

The Restatement (Third) of Agency's approach is consistent with the Restatement (Second) of Agency and the Restatement of Employment Law. All three Restatements acknowledge that two or more employers may supervise or control employees they share in common—with the implication that two or more employers may be liable for the same tortious act committed by that employee. *See* Restatement (Second) of Agency § 226 (Am. L. Inst. 1958) ("A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other."); *id*. § 226 cmt. a ("A person, however, may cause both employers to be responsible for an act which is a breach of duty to one or both of them. He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment

for both[.]"); *id*. § 226 cmt. b ("Two persons may agree to employ a servant together or to share the services of a servant."); *id*. § 227 cmt. d ("If the employee does the very act directed by the temporary employer, the latter is responsible for having directed it, and the first employer is responsible as a master if the act is within the scope of his general employment."); Restatement of Employment Law § 1.04 cmt. c ("Employees can serve two or more employers who jointly or in tandem control their rendering of services . . . .").[5]

Thus, as acknowledged in the Restatements (Second) and (Third) of Agency and the Restatement of Employment Law, courts have long recognized that when two or more employers have control of a shared employee, they may each be liable for a tortious act committed by that employee.

[5] The doctrinal formulations in the Restatement (Second) of Agency, although consistent with recognizing a relationship as one of dual or multiple 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, either-or scenario in which only one employer is subject to liability, but also a scenario in which an employee's act 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. *See* Restatement (Second) of Agency § 226 cmt. a; *see also id*. § 227 cmt. d.

The Restatements also confirm the longstanding rule that it is a question of fact whether one or multiple employers have the right to control an employee's conduct and are therefore liable for that employee's tortious conduct. *See, e.g.*, Restatement (Third) of Agency § 7.03 cmt. d(2) ("It is a question of fact whether a general or a special employer, or both, have the right to control an employee's conduct.").

B. The District Court's Jury Instructions on the "Borrowed Servant" Defense Are Consistent with the Agency and Employment Law Principles Articulated in Multiple Restatements.

The district court correctly instructed the jury on CACI's "borrowed servant" defense in light of the employment and agency law principles discussed above.

The district court first provided the following jury instruction:

> A person can be in the general employ of one company while at the same time being the employee of another company. In other words, an employee who commits a wrongful act may have more than one employer at the time the wrongful act is committed. In determining the liability of a company for acts performed by one of its employees who is also working for another company, you must consider who controlled the work of the employee when the alleged misconduct occurred. In this case, CACI employees were performing work on a government contract with the United States military at Abu Ghraib. Therefore, the issue you must determine is under whose direction and control were the employees when they engaged in the alleged misconduct. In other words, when an employee has been lent by one employer to perform the services of another employer you have to consider who was controlling the employee's work at the time of the alleged misconduct. In making this decision, you should consider all the facts in evidence. CACI has the burden to prove the borrowed servant defense by a

> preponderance of the evidence. If it fails to do so, then it can be held liable for the conduct of its interrogators.

JA6383 (Jury Instruction No. 20).

The district court next provided a supplemental jury instruction on this issue, after the jurors requested additional clarification:

> It is a question of fact that the jury must decide whether CACI had the power to control the interrogation work being performed by CACI employees at Abu Ghraib when the alleged torture or cruel, inhuman, or degrading treatment occurred. Whether the Army alone or both the Army and CACI had this power to control is a factual question that you must decide.

JA6398 (Supplemental Jury Instruction No. 1).

These instructions were entirely appropriate and consistent with the standards set forth in the Restatements.

First, consistent with the Restatements, the district court correctly instructed the jury that an employee may have more than one employer at any given point in time: "A person can be in the general employ of one company while at the same time being the employee of another company. In other words, an employee who commits a wrongful act may have more than one employer at the time the wrongful act is committed." This portion of the instruction reflects well-established legal principles, as discussed above, and is not challenged on appeal.

Second, the district court correctly instructed the jury that "CACI employees were performing work on a government contract with the United States military at Abu Ghraib" and therefore, to determine whether the initial employer (CACI) was liable for the employee's torts, the jury should evaluate "who controlled the work of the employee when the alleged misconduct occurred"—CACI, the Army, or both. Specifically, the district court repeatedly emphasized that the jury must consider:

- "who controlled the work of the employee when the alleged misconduct occurred";
- "under whose direction and control were the employees when they engaged in the alleged misconduct";
- "who was controlling the employee's work at the time of the alleged misconduct"; and
- "whether CACI had the power to control the interrogation work being performed by CACI employees at Abu Ghraib when the alleged torture or cruel, inhuman, or degrading treatment occurred."

These instructions are consistent with the Restatements, which make clear that an employer is liable for tortious acts committed by its employees whom it had the power to control at the time of the misconduct.

Third, the district court correctly instructed the jury that the determination of whether one or both employers had the power to control the work was a question of fact, stating that "[w]hether the Army alone or both the Army and CACI had this power to control is a factual question that you

must decide." As noted above, the Restatements confirm that this determination is a question of fact for the jury.

Further, under Restatement (Second) of Agency § 227, the inference or default position is that the original employment continues while the employee is borrowed. Restatement (Second) of Agency § 227 cmt. b ("In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer."). The mere fact that there is a "division of control" does not mean the original employer has surrendered control. *Id*. Further, Restatement (Second) of Agency § 226 explains that an employee's act falls within the scope of employment for ***both*** employers ***unless*** the intent "to serve one necessarily excludes an intent to serve the other." *Id*. § 226 cmt. a. Thus, the Restatement (Second) of Agency articulates a strong inference that service to the original employer continues, and that the original employer may continue to exercise some degree of control even when the employee is temporarily lent to another.

The Fourth Circuit echoed these longstanding principles in *Estate of Alvarez v. The Rockefeller Foundation*, 96 F.4th 686 (4th Cir. 2024). CACI's assertions that the district court's supplemental instruction conflicts with *Alvarez* and that control "is a binary determination," Appellant's Opening Br.

at 48–49, are simply incorrect. In *Alvarez*, this Court of Appeals expressly stated that control is ***not*** a binary determination, explaining that "[i]t is possible for an individual to be the agent of two principals at the same time." 96 F.4th 686 at 693. Citing Restatement (Second) of Agency § 226, the Court explained that a "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id.* (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94–95 (1995) (in turn quoting Restatement (Second) of Agency § 226)).

The Court then concluded that the evidence presented did not support a finding of dual employment in that case. *See id.* at 695 ("[T]here is insufficient evidence to support Appellants' argument that Dr. Soper was a dual agent . . . ."). The Court affirmed the district court's finding that there was no evidence that the original employer, the Rockefeller Foundation ("TRF"), directed or controlled Dr. Soper's work for a second employer, the Pan-American Safety Board ("PASB"), noting that he neither regularly communicated with TRF nor took direction from it, and had testified he was "no longer with the Foundation," *id.* at 691, confirming he had severed ties with TRF. The Court also found no evidence that TRF had the ability to control Dr. Soper. To the contrary, the PASB's constitution "prohibited Dr. Soper from taking outside direction." *Id.* at 695. As a result, the Court

concluded that the summary judgment record lacked any evidence that TRF "had the ability to exercise control over" the alleged tortfeasor Dr. Soper, and affirmed summary judgment in TRF's favor. *Id.*

Here, consistent with *Alvarez*, the district court instructed the jury to focus on "the act in question," *id.* at 694, including instructing the jury that "when an employee has been lent by one employer to perform the services of another employer you have to consider who was controlling the employee's work at the time of the alleged misconduct." The district court also instructed the jury to consider "whether CACI had the power to control the interrogation work being performed by CACI employees at Abu Ghraib when the alleged torture or cruel, inhuman, or degrading treatment occurred" and "[w]hether the Army alone or both the Army and CACI had this power to control." The district court rightly emphasized that these determinations are questions of fact, and CACI does not challenge the sufficiency of the evidence supporting the jury's finding. In *amica*'s view, the district court committed no error in its handling of these instructions.

CONCLUSION

For the above reasons, the district court's borrowed servant instruction was consistent with well-established and longstanding agency and employment law principles, as articulated by the ALI in multiple Restatements.

May 8, 2025

Respectfully submitted,

/s/ Agnieszka M. Fryszman
Agnieszka M. Fryszman
Nicholas Jacques
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005
Telephone: 202-408-4600
[redacted]

Benjamin F. Jackson
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212-838-7797
[redacted]

Adnan Toric
COHEN MILSTEIN SELLERS & TOLL PLLC
100 N. 18th Street, Suite 1820
Philadelphia, PA 19103
Telephone: 267-479-5700
[redacted]

Attorneys for Amica Curiae *Prof. Deborah A. DeMott*

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, Agnieszka M. Fryszman , counsel for *amica curiae* Professor Deborah A. DeMott and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3386 words.

Dated: May 8, 2025

/s/ Agnieszka M. Fryszman
Agnieszka M. Fryszman

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 25-01043 as

☐ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☑ Pro Bono ☐ Government

COUNSEL FOR: Deborah A. Demott

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Agnieszka M. Fryszman
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Agnieszka M. Fryszman
Name (printed or typed)

[redacted]
Voice Phone

Firm Name (if applicable)

202-408-4699
Fax Number

1100 New York Ave Floor 8

Washington, DC 20005
Address

[redacted]
E-mail address (print or type)

CERTIFICATE OF SERVICE *(required for parties served outside CM/ECF)*: I certify that this document was served on _____ by ☐ personal delivery; ☐ mail; ☐ third-party commercial carrier; or ☐ email (with written consent) on the following persons at the addresses or email addresses shown:

_____ _____
Signature Date