COSTOS v. COCONUT ISLAND CORP.: CREATING A VICARIOUS LIABILITY CATCHALL UNDER THE AIDED-BY-AGENCY-RELATION THEORY

DANIEL M. COMBS*

INTRODUCTION

Allen, a plumber driving in his employer's company van, is speeding, swerving in and out of lanes, and generally driving aggressively in hopes of keeping to his busy schedule. Soon, another aggressive driver, Paul, cuts Allen off. The two continue to drive dangerously, cutting each other off and yelling at each other through their windows. After several blocks, they pull over, get out of their cars, and begin a heated argument. Eventually, Allen stops arguing, runs to the rear of his van, yanks open the door, and grabs a monkey wrench. He races toward Paul and hits him in the ribs with the wrench. After healing from his broken ribs, Paul sues Allen for damages sustained from the assault and battery. Additionally, Paul sues Allen's employer, Ethan Plumbing, under *respondeat superior* principles.

Under traditional agency principles, a court would likely view Allen's assault and battery as falling outside the scope of his employment, thus precluding the employer's liability for Allen's intentional tort.[1] Additionally, a claim against Allen's

---

* Candidate for Juris Doctor, University of Colorado School of Law, 2002; B.A., University of Virginia, 1999. The author thanks Professor Melissa Hart and Professor J. Dennis Hynes for their valuable suggestions.

1. RESTATEMENT (SECOND) OF AGENCY § 228 (1957) defines "scope of employment" as follows:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and

employer would most likely fail under *apparent authority* standards.[2] In general, no vicarious liability would fall on Allen's employer unless Allen intended to act on behalf of Ethan Plumbing, at least in part, or his use of force was "not unexpect[ed]."[3] Additionally, Ethan Plumbing would incur no *direct* liability absent negligence in hiring Allen,[4] or unless Ethan Plumbing actually intended for Allen to attack Paul.[5]

Although Paul could not recover under traditional agency law, he could very well recover under the First Circuit's expansive reading of the "aided-by-agency-relation" basis for recovery.[6] Under the rule recently established in *Costos v. Coconut*

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

2. Apparent authority liability stems from the third party's view of the agent's position, "in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982) (citing RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (1957)); RESTATEMENT (SECOND) OF AGENCY § 8 (1957) (defining apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons"). Use of apparent authority is typically confined to contract situations and fraud. *See* RESTATEMENT (SECOND) OF AGENCY § 8 cmt. d (1957) (stating that "[a]pparent authority is based upon the principle which has led to the objective theory of contracts"); RESTATEMENT (SECOND) OF AGENCY § 261 (1957) (providing that "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud").

3. RESTATEMENT (SECOND) OF AGENCY § 228(1)(d) (1957). Section 219 of the RESTATEMENT (SECOND) OF AGENCY describes "When Master is Liable for Torts of His Servants" as follows:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

4. *Id.* § 219(2)(b).

5. *Id.* § 219(2)(a).

6. *See* Costos v. Coconut Island Corp., 137 F.3d 46, 49–50 (1st Cir. 1998); RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957). In fact, a recent decision

Island Corp.,[7] section 219(2)(d) of the Restatement (Second) of Agency is applied in a manner that swallows traditional agency principles. Section 219(2)(d) provides that an employer may incur liability for an employee's torts committed outside the scope of employment when "the servant purported to act or to speak on behalf of the principal and there was reliance upon the apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[8] The second clause in section 219(2)(d), encompassing "aided-by-agency-relation" liability, was intended to apply, and has traditionally been applied, to cases of non-physical torts involving reliance and deceit.[9] In *Costos*, the First Circuit read the second prong of section 219(2)(d) to allow for an employer's liability when a hotel employee committed an intentional physical tort—the rape of a guest—with the "aid" of the agency relation.[10] *Costos* stands alone in applying aided-by-agency-relation liability to cases involving physical torts where reliance is not an element of the tort. This *Costos* court's interpretation of section 219(2)(d) conflicts with traditional agency principles. The decision is problematic, as employers stand vulnerable to almost limitless liability when reliance plays no role in section 219(2)(d) cases.

This Casenote discusses the *Costos* court's unprecedented application of aided-by-agency-relation vicarious liability when an employee commits an intentional physical tort not involving reliance. Part I provides a background of aided-by-agency-relation liability, discussing the comments to Restatement

---

by the United States District Court for the District of Maine indicated that under the *Costos* view, *respondeat superior* liability would apply under similar facts. Nichols v. Land Transp. Corp., 103 F. Supp. 2d 25, 28 (D. Me. 1999), *aff'd*, 223 F.3d 21 (1st Cir. 2000). In *Nichols*, the defendant's employee, a truck driver, stabbed another driver with a knife during a road rage fight. *Id.* at 26. The court did not impose vicarious liability on the defendant employer because the employer "did not provide [the employee] with the instrumentality, the knife, that aided him in the commission of the tort." *Id.* at 28.

7. 137 F.3d 46, 48–49 (1st Cir. 1998).

8. RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

9. *See* WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 91, at 162 (1964) (stating that situations of liability in which the "[a]gent's position enables him to commit the tort" typically involve deceit); *see, e.g.*, Borsuk v. Wheeler, 349 N.W.2d 522, 526 (Mich. Ct. App. 1984) (applying aided-by-agency-relation liability in a fraud case).

10. *Costos*, 137 F.3d at 50. The employee, Charles Bonney, knew where the victim was sleeping and used a spare key to break into her guest room. *Id.*; *see* discussion *infra* Part II.A.

(Second) section 219(2)(d), the case law applying this form of vicarious liability, and the Restatement drafters' intent to narrow aided-by-agency-relation liability to cases involving reliance and deceit. Part II details the *Costos* court's misapplication of aided-by-agency-relation liability in a case where an employee's intentional physical tort fell outside the scope of employment. Part III analyzes aided-by-agency-relation liability as applied in Title VII sexual harassment cases under the Civil Rights Act of 1964.[11] Because so few cases rely on section 219(2)(d), the Title VII cases provide valuable insight into the breadth of aided-by-agency-relation liability. These decisions indicate that it is improper to apply such liability in a case such as *Costos*. Finally, Part IV provides alternative theories of vicarious liability that could address the problems posed in a case like *Costos*.

I. BACKGROUND: AIDED-BY-AGENCY-RELATION VICARIOUS LIABILITY UNDER RESTATEMENT (SECOND) OF AGENCY § 219(2)(D)

Under common law agency principles, an innocent employer may incur vicarious liability for its employee's intentional torts only under limited circumstances. Courts may impose vicarious liability on an employer when its agent commits an intentional tort within the scope of employment[12] or when an agent misuses his or her apparent authority.[13] An employee acts within the scope of employment when the employee's conduct occurs "substantially within the authorized time and space limits," and is "actuated, at least in part, by a purpose to serve the master."[14]

---

11. 42 U.S.C. § 2000e-(2)(a)(1) (1994).

12. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998); *see also* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957).

13. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957) (discussing apparent authority). For a discussion on apparent authority, see *supra* note 2.

14. RESTATEMENT (SECOND) OF AGENCY § 228(1) (1957); *see also id.* § 235 (providing that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as part of or incident to a service on account of which he is employed"); PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 502 (5th ed. 1984) (referring to scope of employment as "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment").

Some courts have reasoned that "scope of employment" should include acts even beyond those traditionally viewed as falling within this category and have expanded their interpretation of "scope of employment" to encompass certain intentional torts.[15] Because many intentional torts simply do not fall within the scope of an employee's actions even under a broad view of "scope of employment," plaintiffs have looked to other sources of vicarious liability, including the aided-by-agency-relation prong of the Restatement (Second) of Agency section 219(2)(d).[16] An analysis of the text and drafting history of section 219(2)(d) indicates that despite its open-ended language, the aided-by-agency-relation basis for vicarious liability properly applies only in cases involving reliance and deceit.

A. Aided-by-Agency-Relation Liability Overview

Section 219(2)(d) provides that an employer may incur liability for a servant's tort if "the [employee] purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or [the employee] was aided in accomplishing the tort by the existence of the agency relation."[17] Given the limitations of *respondeat superior* liability, an expansive view of the latter prong of section 219(2)(d), or aided-by-agency-relation liability, is a potentially powerful, yet largely untouched tool for plaintiffs' lawyers.[18]

The clauses making up section 219(2)(d) represent two related, yet technically distinct, bases for vicarious liability. In general, "apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as dis-

---

15. *See, e.g.*, Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (including within the scope of employment acts "not so unforeseeable as to make it unfair to charge [an employer] with responsibility"); *see also Faragher*, 524 U.S. at 795 (listing several other cases where courts expanded "scope of employment" to include acts of sexual assault and sexual harassment).

16. *See Faragher*, 524 U.S. at 801–02 (holding that § 219(2)(d), rather than scope of employment reasoning, provides an "appropriate starting point" for determining whether an employer is liable for sexual harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)(a)(1) (1994)).

17. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

18. Before plaintiffs in Title VII sexual harassment cases began relying on section 219(2)(d) for employer liability, very few reported cases discussed or applied aided-by-agency-relation under section 219(2)(d). For examples of non-sexual harassment aided-by-agency-relation liability cases, see *infra* note 66.

tinct from where the agent threatens to misuse actual power."[19] Courts analyze cases in which an agent "misuse[s] . . . delegated authority" under section 219(2)(d)'s aided-by-agency-relation clause.[20] As properly applied, both theories of vicarious liability apply only to cases involving reliance and deceit.

Although technically separate from apparent authority,[21] the aided-by-agency-relation basis for vicarious liability was intended to apply to similar cases—those involving deceit or misrepresentation, which involve reliance by the plaintiff on the agency relationship.[22] In his *Handbook of the Law of Agency*, Warren Seavey analyzed vicarious liability flowing from an agent's misuse of apparent authority separately from liability incurred by a principal because an "[a]gent's position enables [the agent] to commit the tort."[23] Seavey stated that the cases in which liability stems from the existence of the agency relation "normally involve deceit," and discussed such cases in detail in the treatise's section on misrepresentation.[24]

---

19. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998); *see also* RESTATEMENT (SECOND) OF AGENCY § 8 (1957). Comment c to Restatement (Second) of Agency section 8 notes that "[a]pparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Further, the third person must believe the agent to be authorized."

20. *Burlington Indus.*, 524 U.S. at 759–60.

21. *See Faragher*, 524 U.S. at 801–02 (stating in a Title VII sexual harassment case that section 219(2)(d)'s illustrations "make clear that [section 219(2)(d)] covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship"); *see also Discussion of Restatement of the Law, Second, Agency (Tentative Draft No. 4)*, 33 A.L.I. PROC. 314, 385 (1956) [hereinafter *Proceedings*] (suggesting that section 219(2)(d) be separated into "two statements," because in some cases of deceit apparent authority does not apply). *But see* Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (holding that in aided-by-agency-relation cases, the third person views the transaction as "regular on its face and the agent appears to be acting in the ordinary course of" his employment).

22. WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 162 (1964) (addressing the "ambit of liability" for apparent authority separately, but stating that situations of liability where the "[a]gent's position enables him to commit the tort" typically involve deceit).

23. *Id.*

24. *See id.* at 162–65. When discussing cases "[w]here [an] agent's position enables him to deceive," Seavey referred to cases also suggested in comment e of section 219 of the Restatement. *Id.* at 164–65. Seavey noted that "[i]n some cases the liability is clear, since the fraud could be committed only because of the agent's position, as where a telegraph agent forges the name of a friend of the plaintiff to a telegram asking for money and intercepts the favorable telegraphic reply." *Id.* at 165. Again, Seavey referred to this section when discussing cases where the "[a]gent's position enables him to commit the tort." *Id.* at 162.

Additionally, comment e to section 219(2) demonstrates that both parts of that section properly apply to cases involving misrepresentation or deceit. The comment lists situations in which an agency relation enables a servant to cause harm, such as when (a) a telegraph operator commits a tort by sending a false message or (b) a store manager cheats his customers.[25] These hypotheticals illustrate situations where a tortfeasor accomplishes a tort "by an instrumentality, or through conduct associated with the agency status."[26] Both situations also involve deceit, which the agent achieved in part by the plaintiff's reliance on the agency relationship. The plain language of section 219(2)(d) neither contains the "instrumentality" limitation nor confines the section to cases involving reliance and deceit. The limitations contained in comment e, however, prevent the aided-by-agency-relation basis for liability from potentially swallowing agency law's general scope of employment rule.

Viewed in isolation, the aided-by-agency-relation basis for liability in section 219(2)(d) could embrace a wide array of cases. As courts have noted, in almost all vicarious liability cases the mere "existence of the agency relation" aids the employee in accomplishing the tort because the agent often would not have committed the tort but for the responsibilities, duties, and knowledge gained from the existence of the agency relationship.[27] Courts, however, typically explain that such a reading goes too far.[28] The agency relation by itself could expose the employer to nearly limitless liability, involving situations that fall well beyond a fair assessment of the employer's responsibility.

Some courts have taken a very narrow view of section 219(2)(d) liability. These courts hold that an employer will incur liability under section 219(2)(d)'s aided-by-agency-relation

---

25. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. 3 (1957).

26. Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring).

27. *See id.*; *see also* Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (stating that "[i]n a sense, a supervisor is always 'aided in accomplishing the tort by existence of the agency' because his responsibilities provide proximity to, and regular contact with, the victim"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998) (stating that "[i]n a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims").

28. *See, e.g., Gary*, 59 F.3d at 1397 (explaining that such a broad reading of aided-by-agency-relation liability "argue[s] too much").

rule only where (1) the agent committed a tort through the use of an "instrumentality" provided by the agency relation *and* (2) from the viewpoint of the victim, the agent's actions appeared ordinary on their face, and generally, the agent appeared to be acting within the scope of authority.[29] This view essentially merges the aided-by-agency-relation theory with apparent authority in assessing when an employer will be found liable for the acts of its agents. Other courts, including the United States Supreme Court, apply aided-by-agency-relation liability in situations that lack elements of apparent authority.[30] Under both views, and as originally explained by the drafters of section 219(2)(d), aided-by-agency-relation liability is limited to cases involving reliance or deceit.

B. The American Law Institute's View of Aided-by-Agency-Relation Liability

The 1956 Proceedings of the American Law Institute ("Proceedings") illustrate that the drafters of section 219(2)(d) did not intend the aided-by-agency-relation rule to apply to cases lacking reliance or deceit, or to cases involving intentional physical torts. In 1956, a year before the American Law Institute (ALI) promulgated its final version of the Restatement (Second) of Agency, the members of the Agency Group could not unanimously agree to the proper breadth of section 219(2)(d). Nevertheless, the Proceedings show that no one involved in promulgating the Restatement believed that aided-by-agency-relation liability would apply in cases that did not involve apparent authority, reliance, or deceit.[31]

---

29. *Id.* at 1397–98. See discussion *supra* Part II.B. for a summary of *Gary*. *See also* Smith v. Metro. Sch. Dist., 128 F.3d 1014, 1029 (7th Cir. 1997) (refusing to apply aided-by-agency-relation liability in a Title IX sex discrimination case because the offending conduct "could hardly 'seem regular on its face,' nor could [the offending party] appear to be acting in the ordinary course of the business confided to him").

30. *See Burlington*, 524 U.S. at 769–70 (applying aided-by-agency-relation liability under Restatement section 219(2)(d) for a supervisor's acts of sexual harassment, conduct "neither within the scope of [the employee's] employment, nor part of his apparent authority"); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 801–02 (1998) (noting that the aided-by-agency-relation prong of section 219(2)(d) "covers not only cases involving the abuse of apparent authority, but also to cases [sic] in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship").

31. *Proceedings, supra* note 21, at 373.

At the ALI's thirty-third Annual Meeting, Warren Seavey, the Reporter, and the Agency Group discussed, among other topics, the meaning and scope of section 219(2)(d).[32] In this meeting, the Agency Group reviewed section 219 of Tentative Draft Four, which provided that a master is liable for a servant's torts performed outside the scope of employment when "[t]he servant is aided in accomplishing the tort by the existence of the known agency relation (§§ 246–249)."[33] Seavey initially explained that, "where the agent, for his own purposes, *deceives* a person, the principal is liable there for the deceit, even though the agent acts for his own purposes."[34] Seavey noted that such a case would allow for an employer's vicarious liability without forcing courts to stretch the meaning of "scope of employment."[35] Some in the Agency Group, however, expressed concern about the expansive breadth of the section as it appeared in the tentative draft.

For example, when discussing section 219(2)(d)'s general structure, Philip Mechem sought to insert straightforward and detailed language into the text of the Restatement section itself, rather than merely providing clarifying language in the commentary.[36] Mechem wanted to narrow subsection (d) by stating simply that a master may incur liability for a servant's *deceit*.[37] For the sake of brevity,[38] Seavey preferred to keep the section short, and "expand all these things into comments."[39]

Others agreed that the broad language of Tentative Draft Four brought too many inappropriate cases into section 219(2)(d)'s scope. Concerned that subsection (d) did not accurately state the law, Laurence Eldredge raised a hypothetical: "A reader of a gas meter obtains access to a house by showing his badge and identifying himself; thus he gets in by the known agency relationship being shown. After he gets in the house,

---

32. *Id.*
33. RESTATEMENT (SECOND) OF AGENCY § 219 (Tentative Draft No. 4, 1956).
34. *Proceedings*, *supra* note 21, at 373 (emphasis added).
35. *Id.*
36. *Proceedings*, *supra* note 21, at 374–75.
37. *See id.* at 375.
38. *See id.* Mechem recommended that section (d) provide "that the master is also liable, on contractual or agency principles, for the deceit of the servant. There you say what you are talking about . . . ." *Id.* Seavey interrupted, explaining that "[i]t is pretty long; that is all." *Id.*
39. *Id.*

he rapes the housewife."[40] Because this hypothetical came "squarely within the language" of subsection d, it sparked a lengthy debate.[41] Seavey, concerned about causation in such a case, would hold the employer liable under section 219(2)(d) "if the *only* way [the gas meter reader] could have committed [the rape] is by showing his credentials."[42] Apparently concerned about adhering to traditional agency principles,[43] several others explained that they "want[ed] the women of the country to be safe . . . [but did] not want [plaintiffs] to recover from the gas companies when they have such a misfortune."[44]

Although the Agency Group did not agree on a final version in the 1956 Proceedings,[45] the debate over Eldredge's rape hypothetical yielded two conclusions regarding section 219(2)(d). First, the discussion showed that aided-by-agency-relation liability could exist outside the context of apparent authority.[46] Second, the debate implied that section 219(2)(d) aided-by-agency-relation cases must involve both reliance and deceit.

While the Agency Group disagreed as to whether an employer would incur liability under Eldredge's rape hypothetical,[47] the 1956 Proceedings illustrate that aided-by-agency-relation liability could apply outside the apparent authority context. Some in the Agency Group doubted whether aided-by-agency-relation liability was distinguishable from apparent authority. At the close of the discussion, Chairman John Buchanan asked whether, "when you aid [an employee] enough, you do not give him apparent authority."[48] Charles Bunn sug-

---

40. *Id.* at 376. *But cf. Costos*, 137 F.3d at 47–48 (providing facts in a rape case where the employee's crime did not depend on the victim's reliance on the existence of an agency relationship).

41. *Id.*

42. *Id.* (emphasis added).

43. *See id.* at 379 (Chairman Buchanan expressed concern about holding a "principal responsible for [a servant's] doing a thing in a way which is not the way it ought to be done . . . . the case put by Mr. Eldredge was such a case; and I very much fear that [such a case] is plainly covered by Section [219(2)(d)].").

44. *Id.* at 379.

45. *See id.* at 383. The Agency Group voted to refer the section to the Reporter for clarification. *Id.*

46. *See id.* at 377.

47. *See id.* at 376. "A reader of a gas meter obtains access to a house by showing his badge and identifying himself; thus he gets in by the known agency relationship being shown. After he gets in the house, he rapes the housewife." *Id.*

48. *Id.* at 385.

gested that subsection (d) should simply state that an employer could incur liability when "[t]he servant's act is within his apparent authority."[49] Seavey, however, viewed such a change as "too limited" because "in some of these cases no one would think that the servant was acting within his authority when he raped the housemaid."[50]

The illustrations demonstrate that some aided-by-agency-relation cases do not involve apparent authority. The drafters, however, viewed such cases as very closely related to apparent authority. Even where apparent authority was absent, no one in the Agency Group envisioned aided-by-agency-relation liability applying in cases lacking reliance and deceit.[51] The Agency Group scattered themes of reliance throughout the discussion on section 219(2)(d). Several times, Seavey stressed that aided-by-agency-relation liability involved "a reliance by the other party, something connected with the agency."[52] Seavey, perhaps the only member in the Agency Group who would have applied aided-by-agency-relation liability in the rape hypothetical,[53] would only have done so when "the agent's frolic [was] aided substantially or principally by the appearance of agency *on which the housewife relied.*"[54] Seeking to get past the rape hypothetical, Seavey pressed another aided-by-agency-relation illustration:

---

49. *Id.* at 377.

50. *Id.* Later in the discussion, James Montgomery, Jr. suggested splitting section 219(2)(d) into two clauses, "because apparently part of it relates to cases of apparent authority . . . . [and] there are other cases where it is not apparent authority, but where the opportunity given by the principal is of such a nature that there is a liability, even though the agent is not doing the exact thing he was authorized to do." *Id.* at 385.

51. *See id.* at 378. Seavey insisted section 219(2)(d) did not involve inherent agency power, but instead involved "a reliance by the other party, something connected with the agency; it is not an agency power." *Id.* Seavey also noted that in cases of aided-by-agency-relation liability, the principal may incur liability, "provided the agent's frolic is aided substantially or principally by the appearance of agency on which the [victim] relied." *Id.* at 377.

52. *Id.* at 378; *see also id.* at 381 (Seavey explained that liability would apply in cases not involving apparent authority when "[t]here is reliance . . . upon the factual relationship.").

53. *See id.* at 385. After Chairman Buchanan asserted that "the rape case is sunk by this meeting," Montgomery responded that there was a "technical division: On one side, Mr. Seavey; and, on the other side, the rest of [the Agency Group]." *Id.* Chairman Buchanan added, "[i]t is almost an equal contest." *Id.*

54. *Id.* at 377 (emphasis added).

> [T]ake this case. The agent is authorized to collect towels and other things used; he is the agent of a cleaning establishment, is authorized to collect the towels . . . every week, deliver new ones, and get the money which the debtor owes. The agent might [mis]represent to the debtor the amount which is owed.[55]

Seavey urged that such a case justified section 219(2)(d) because "[t]here is reliance here upon the factual relationship."[56] For Seavey, reliance underlay all section 219(2)(d) cases.

A few in the Agency Group took a different view than Seavey, suggesting that section 219(2)(d) should not apply when an employee committed a crime.[57] Chairman Buchanan, for example, suggested "confin[ing] [section 219(2)(d)] (if nothing better can be had) to cases which are not criminal."[58] Buchanan's suggestion did not surface in section 219 of the Restatement (Second) of Agency. However, the Agency Group's sharp focus on reliance,[59] its distaste for liability in cases where an employee commits crimes such as "rape or murder,"[60] and the section's comments[61] suggest that the types of cases properly brought under section 219(2)(d) should be strongly limited.

The 1956 ALI Proceedings illustrate the narrow scope intended for the aided-by-agency-relation basis for vicarious liability. The drafters' concerns reflected traditional principles of agency law, especially the general requirement that an employer can only incur vicarious liability for an employee's acts if those acts fall within the scope of his employment.[62] Most of the Agency Group would not have extended liability to any

---

55. *Id.* at 381.

56. *Id.*

57. *See id.* at 382.

58. *Id.* at 383.

59. *See Proceedings*, *supra* note 21, at 378.

60. *Id.* at 382. Chairman Buchanan suggested revising section 219(2)(d) to prohibit liability for employee crimes "which look like transactions which a master would not normally be held liable for." *Id.*

61. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1957) (stating that in some situations, liability may apply when a servant "cause[s] harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. . . . [or where] the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position").

62. *See Proceedings*, *supra* note 21, at 377 (acknowledging that the law still will generally not allow for an employer to incur liability when its employee is "on a frolic of his own").

cases involving crimes committed by employees.[63] More importantly, every member discussed section 219(2)(d) in the context of reliance and deceit.[64] Courts, too, have followed this reasoning. Indeed, until the First Circuit's decision in *Costos v. Coconut Island Corp.*,[65] the few non-Title VII decisions applying aided-by-agency-relation liability involved *both* reliance and deceit.[66] The First Circuit's novel approach, extending aided-by-agency-relation liability beyond cases of deceit and reliance, nullifies the traditional principles of agency law that the drafters sought to protect.

II. AIDED-BY-AGENCY-RELATION LIABILITY UNDER *COSTOS V. COCONUT ISLAND CORP.*

In *Costos v. Coconut Island Corp.*, the First Circuit Court of Appeals held that an agent's tortious use of an instrumentality provided by the agency relationship would support a claim for vicarious liability.[67] As previously discussed, the aided-by-agency-relation basis for vicarious liability has traditionally been applied only when the agent's transaction "seems regular on its face and the agent appears to be acting in the ordinary course of [employment],"[68] or otherwise involves reliance and deceit.[69] In *Costos*, however, the First Circuit applied section 219(2)(d) as a basis for liability when the agent, an inn man-

63. *See id.* at 382.

64. *See, e.g., id.* at 381; *see also* SEAVEY, *supra* note 22, at 162 (stating that "the situations in which an agent has taken advantage of his position to commit a tort normally involve deceit").

65. *See* discussion *infra* Part II.

66. Very few non-Title VII decisions have imposed vicarious liability under the aided-by-agency-relation rule. These cases typically involve fraud or misrepresentation or other torts involving reliance and deceit. For an example, see Borsuk v. Wheeler, 349 N.W.2d 522, 523 (Mich. App. 1984), a case applying the aided-by-agency-relation rule where the defendant mortgage company's employees "allegedly falsified earnings and savings records in order to qualify [the purchaser of a home] . . . for [a] mortgage." *See also* McCann v. State Dept. of Mental Health, 247 N.W.2d 521, 526 (Mich. 1976) (holding, in a case involving tortious interference with a contract, that the plaintiffs properly alleged aided-by-agency-relation liability because apparent authority likely existed); Grover v. Minette-Mills, Inc., 638 A.2d 712, 717 (Me. 1994) (holding that because an employment relationship existed, two employees' tortious interference with the plaintiff's employment contract "was aided by their employment relationship").

67. 137 F.3d 46, 49–50 (1st Cir. 1998).

68. Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995).

69. *See, e.g., Proceedings, supra* note 21, at 378.

ager, raped an unconscious guest, an act clearly falling outside any actual or apparent authority and not involving either reliance or deceit.[70] Although the First Circuit purported to rely heavily on the reasoning behind cases such as the D.C. Circuit's decision in *Gary v. Long*,[71] the court charted a new course by viewing aided-by-agency-relation liability in complete isolation from other agency law concepts.[72] By ignoring the properly narrow scope of aided-by-agency-relation liability, the *Costos* court eroded traditional principles of agency law.

A. Background

In August 1993, Patricia Costos and her friend, Lynn Tierney, traveled to Maine for a weekend vacation.[73] The two stayed at a small inn called the Bernard House, where Charles Bonney, an acquaintance of Tierney's, worked as a manager.[74] After checking in, Costos, Tierney, Bonney, and two of Bonney's friends socialized at the inn and then at a club.[75] Later that night, Costos and Tierney returned to their room at the inn and Costos went to bed. Tierney decided to go out again and locked the door, taking the room key with her.[76]

When Costos woke up, Bonney was in her bed, having sexual intercourse with her.[77] Costos threw Bonney out of the bed, and Bonney left the room and subsequently fled the jurisdiction.[78] At the time of the First Circuit Court of Appeals' decision, Bonney remained at large.[79] Costos sued the corporation managing the Bernard House and Neil Weinstein, the inn's

---

70. *Costos*, 137 F.3d at 50.

71. 59 F.3d at 1397; *see also* discussion *infra* Part II.B.

72. *Costos*, 137 F.3d at 49.

73. *Id.* at 47.

74. *Id.*; *see also* Costos v. Coconut Island Corp., 959 F. Supp. 25, 25–26 (D. Me. 1997) (district court decision with full recitation of facts). Bonney apparently checked in Tierney and Costos when the two arrived at the inn. *Id.* at 47. Bonney took Tierney and Costos's money for the accommodation, provided them with "a master key," and told them that "he was the manager and future owner of the Bernard House." *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 48.

78. *Id.* While Costos punched and kicked Bonney, trying to get him out of her bed, Bonney "stood over her, laughing." *Id.*

79. *Id.*

owner, alleging negligence and vicarious liability for Bonney's torts.[80]

At trial, a jury found the defendants vicariously liable for the rape committed by Charles Bonney.[81] On appeal, the defendants argued that a court could only impose vicarious liability under section 219(2)(d) when "the employee has acted with apparent authority or deceit," which was not the case with the rape Bonney committed.[82] The First Circuit stated that Costos's case did not provide the opportunity to decide whether "some limiting principles should evolve to prevent section 219(2)(d) from being used to erode the distinction between acts committed within the scope of employment and those [committed] outside the scope."[83] The court affirmed the denial of the defendant's motion for summary judgment, based on the district court's determination that the case represented a proper application of the aided-by-agency-relation basis for liability.[84] Specifically, the First Circuit held that under Maine law, the second prong of section 219(2)(d) stood on its own and did not require apparent agency or deceit.[85]

In making this determination, the court looked first to Maine law, citing *McLain v. Training and Development Corp.*[86] for the proposition that Maine courts "follow[] the plain meaning of [section] 219(2)(d)" and therefore do not consider apparent authority a necessary element of vicarious liability under section 219(2)(d).[87] Because *McLain* did not explicitly hold that apparent authority is a required element of aided-by-agency-relation liability, the *Costos* court held that no such requirement existed.[88] Additionally, the court stated that an interpre-

---

80. *Id.* at 47–48.

81. *Id.* at 48.

82. *Id.* at 47. The appeal before the First Circuit arose from the district court's denial of the defendant's motion for a directed verdict. *Id.; see also* Costos v. Coconut Island Corp., 959 F. Supp. 25, 27 (D. Me. 1997) (denying the defendant's motion of summary judgment because "[a] jury could find Coconut Island . . . liable for Mr. Bonney's actions on the ground that Bonney was 'aided in accomplishing the tort' by virtue of his employment").

83. *Costos*, 137 F.3d at 47.

84. *Id.* at 49–50.

85. *Id.* at 48–49.

86. 572 A.2d 494, 498 (Me. 1990). The United States District Court for the District of Maine, "sitting in diversity, applied the substantive law of Maine." *Costos*, 137 F.3d at 48.

87. *Costos*, 137 F.3d at 49.

88. *Id.*

tation of the second clause in section 219(2)(d) requiring apparent authority would render that clause "superfluous."[89]

The court then discussed the defendant's policy concerns, namely, that the "plain meaning" of section 219(2)(d) would greatly expand employers' liability for agents' intentional torts clearly committed outside the scope of their employment duties.[90] In an attempt to curtail such consequences, the court cited *Gary v. Long*,[91] in which the D.C. Circuit, interpreting section 219(2)(d), held that an employer would incur liability only if the agent's tort "was accomplished by an instrumentality, or through conduct associated with the agency status."[92] Overlooking the actual two-pronged rule provided in *Gary*,[93] the *Costos* court held that the instrumentality limitation alone provided adequate protection against a vicarious liability principle that would essentially swallow the general scope of employment rule.[94]

Reading section 219(2)(d)'s aided-by-agency-relation rule and *Gary v. Long* as imposing vicarious liability when an agent commits any tort by using an instrumentality provided by the agency relationship, the court found that sufficient evidence existed for Coconut Island Corporation to incur vicarious liability for the rape Bonney committed.[95] Because of his position as manager of the Bernard House, Bonney had knowledge that Costos was staying at the inn, information on how to find his victim, and a duplicate key to the room.[96] Therefore, Bonney was able to let himself into Costos's room and rape her.[97] The First Circuit reasoned that Bonney's knowledge of Costos's

---

89. *Id.* (quoting Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979) (holding that "[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible")).

90. *Id.*

91. 59 F.3d 1391 (D.C. Cir. 1995).

92. *Costos*, 137 F.3d at 49 (quoting *Gary*, 59 F.3d at 1397).

93. As further explained in Part II.B., *infra*, under the court's reasoning in *Gary*, an employer will incur liability under the aided-by-agency-relation prong of section 219(2)(d) if (1) the agent used an instrumentality "associated with the agency status" *and*, (2) from a third person's point of view, the agent's tortious act appeared "regular on its face." *Gary*, 59 F.3d at 1397 (quoting RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (1957)); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1957) (discussing section 261 in the context of section 219).

94. *See Costos*, 137 F.3d at 49–50.

95. *Id.* at 50.

96. *Id.*

97. *Id.*

whereabouts and his access to the room key constituted instrumentalities that aided Bonney in raping Costos.[98] In committing this crime, however, Bonney neither acted under the color of his authority nor deceived Costos, as required by section 219(2)(d).[99]

Although the *Costos* court recognized the policy implications of expanding the scope of the aided-by-agency-relation doctrine, it nevertheless took this step and in effect diminished the distinction between torts occurring within and those occurring outside the scope of employment.[100] The court examined the comments to Restatement section 219 and cited cases such as *Gary v. Long*, which require either apparent authority or deceit as elements of section 219(2)(d) liability.[101] By misconstruing and misapplying its cited authority, however, the court in *Costos* set precedent allowing the aided-by-agency-relation exception to swallow general agency rules.

B. *The* Costos *Court Misconstrued* Gary v. Long

Although the *Costos* court relied heavily on the *Gary* court's analysis of section 219(2)(d),[102] it extended that court's holding far beyond its original, more reasonable, boundaries. In *Gary*, the Court of Appeals for the District of Columbia determined that aided-by-agency-relation liability did not exist independently from apparent authority.[103] For an employer to incur liability under section 219(2)(d)'s aided-by-agency-relation rule, *Gary* required (1) the presence of "an instrumentality or . . . conduct associated with the agency status" *and* (2) the *appearance*, from the third person's point of view, that the agent's unlawful act was "regular on its face."[104]

---

98. *Id.* at 49–50. Immediately after discussing the *Gary v. Long* instrumentality requirement, the First Circuit detailed how Bonney's employment relationship enabled him to assault Costos. *Id.*

99. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

100. *See Costos*, 137 F.3d at 49 (approving the "narrowing principle" of *Gary*, 59 F.3d at 1397).

101. *Id.* at 49–50. *See Gary*, 59 F.3d at 1397–98 (denying liability because the victim in that case "could not have believed . . . that [the defendant] was acting within the color of his authority").

102. *Costos*, 137 F.3d at 49–50 (discussing *Gary*, 59 F.3d at 1397).

103. *Gary*, 59 F.3d at 1397–98.

104. *Id.* at 1397. Under the second element, the agent's acts must have appeared ordinary, or within the scope of his or her employment. *Id.*

In *Gary*, a Title VII sexual harassment case, the court rejected the plaintiff's aided-by-agency-relation allegation when a Washington Metropolitan Area Transit Authority supervisor sexually harassed and raped a subordinate employee.[105] Citing the comments to sections 219(2)(d) and 261, the court held that the aided-by-agency-relation exception only applies when the agent commits the tort through the use of "an instrumentality, or through conduct associated with the agency status."[106] The court explained that an employer could incur vicarious liability under the second prong of section 219(2)(d) only when the existence of the agency relation "facilitate[s] the consummation of [the agent's tort] in that from the point of view of the third person the transaction *seems regular on its face and the agent appear[s] to be acting in the ordinary course of the business* confided to him."[107] Unlike a victim deceived by a false telegram or a cheating store manager,[108] the plaintiff in *Gary* "could not have believed . . . that [her supervisor] was acting within the color of his authority," thereby precluding liability under section 219(2)(d).[109]

The *Gary* court essentially treated the aided-by-agency-relation theory as a method of establishing apparent authority.[110] The use of an "instrumentality" provided by the agency relation, such as a telegraph message,[111] could support a third party's reasonable belief that the agent was acting within the scope of his employment. Under the *Gary* court's analysis, the aided-by-agency-relation principle cannot exist outside the apparent authority context.

---

105. *Id.* at 1394. The plaintiff's supervisor in *Gary* verbally and physically abused the plaintiff at work, and "repeatedly threatened [her] with adverse employment consequences, including termination of employment, if she did not submit to his advances." *Id.* at 1393–94.

106. *Id.* at 1397.

107. *Id.* (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (1957)); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1957) (citing section 261 in section 219(2)(d) analysis); Smith v. Metro. Sch. Dist., 128 F.3d 1014, 1029 (7th Cir. 1997) (citing *Gary*, 59 F.3d at 1397, with approval). *But see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998) (analyzing a Title VII sexual harassment case under the second prong of § 219(2)(d)).

108. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1957).

109. *Gary*, 59 F.3d at 1397–98.

110. *See id.* at 1397.

111. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1957).

In *Costos*, the offending agent's actions did not involve elements of apparent authority or deceit.[112] Despite *Costos*'s heavy reliance on the *Gary* decision, the First Circuit Court of Appeals ignored a crucial element of the *Gary* court's section 219(2)(d) analysis. By requiring only that the agent commit a tort through the use of an instrumentality provided by the agency relation, the court failed to address the defendants' concerns that, in the future, courts will treat "every intentional tort committed outside the scope of employment" the same as those committed within the scope of employment.[113]

C. *The* Costos *Court Misinterpreted and Misapplied* McLain v. Training and Development Corp.

The *Costos* court's loose reading of *McLain v. Training and Development Corp.*,[114] a decision of Maine's Supreme Judicial Court, similarly illustrates the questionable grounds on which *Costos* rests. The *Costos* court, sitting in diversity, had a duty to "apply [Maine] decisional law in defining state-created rights, obligations, and liabilities."[115] The court, however, incorrectly cited *McLain* as holding that "the use of apparent authority is [not] required for vicarious liability under section 219(2)(d),"[116] and also misapplied *McLain* to a case lacking reliance or deceit. In fact, the *McLain* opinion does not support the weight the First Circuit asked it to bear.

In *McLain*, a twenty-one year-old man enrolled in the Jobs Corps Program, run by the Training and Development Corporation (TDC), to improve his academic skills for the United States Marine Corps entrance exam.[117] McLain's Job Training Counselor, Thomas Hebert, told McClain that performing certain physical "tests" would assure McClain admission into the Marines.[118] Relying on these statements, McLain performed a number of "bizarre physical activities [that] inflicted upon him

112. *Costos*, 137 F.3d at 48 (describing how Bonney broke into Costos's room while Costos was asleep).

113. *Id.*

114. 572 A.2d 494 (Me. 1990).

115. Commissioner of Internal Revenue v. Stern, 357 U.S. 39, 45 (1958) (stating duties of federal courts trying diversity actions).

116. *Costos*, 137 F.3d at 49.

117. *McLain*, 572 A.2d at 495.

118. *Id.* at 495–96.

substantial pain and humiliation."[119] After failing the Marines' written entrance exam, McLain sued TDC for personal injuries arising from the employee's tortious conduct.[120] Although the suit included claims of negligence and assault and battery,[121] McLain "premised his entire case on the theory that Hebert was acting within the scope of his employment."[122] To determine "whether Hebert had acted within the scope of his employment," the trial court allowed the jury to consider if he had been "aided in accomplishing what he did because of the fact that he bore the employee relationship with the employer."[123] The jury found TDC liable for negligence and for assault and battery.[124] TDC appealed the decision, in part challenging the trial court's explanation of aided-by-agency-relation liability in its jury instruction.[125]

On appeal, the Supreme Judicial Court of Maine acknowledged that the lower court committed a technical, but harmless, error by infusing a section 219(2)(d) analysis into a scope of employment determination.[126] The Supreme Judicial Court held that a jury could find TDC vicariously liable, which would constitute "the same result as flows from a finding that [the employee] acted within the scope of his employment."[127] Because no party had presented evidence on apparent authority, the reviewing court found that the trial court did not err in refusing to give an apparent authority instruction.[128]

The court additionally held that a jury could "rationally find from the evidence that Hebert's employment made possible the tortious assault and battery he imposed on McLain, rendering TDC liable for all of McLain's injuries at Hebert's hand."[129] In *McLain*, the intentional torts did not fall within the scope of employment.[130] The court, however, appeared to combine the

---

119. *Id.* at 495. The court did not indicate what activities the "tests" included. *See id.* at 495–96.

120. *Id.* at 496.

121. *Id.*

122. *Id.* at 498.

123. *Id.* at 497.

124. *Id.* at 496.

125. *Id.* at 497.

126. *Id.* at 498.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* at 497 (referring to the employee's intentional tort).

analysis of scope of employment liability, apparently under section 219(1), and the aided-by-agency-relation principle.

By finding that *McLain* "does not say that the use of apparent authority is required for vicarious liability under [section] 219(2)(d)," the *Costos* court inferred that Maine courts follow a "plain meaning" interpretation of the aided-by-agency-relation section.[131] The *McLain* decision does not warrant such a conclusion, even though it technically permits a finding of vicarious liability under the aided-by-agency-relation doctrine in the absence of apparent authority.[132] *McLain* permitted, as harmless error, the trial court's instruction to consider section 219(2)(d) as evidence of whether Hebert's "action came within the scope of [his] employment."[133] The court did not discuss the substantive merits of an apparent authority claim, but instead held that the trial court made no error in excluding an apparent authority instruction, as neither party presented that issue at trial.[134]

More importantly, *McLain* is best read as retaining the requirement that an employer cannot incur aided-by-agency-relation liability in the absence of reliance.[135] McLain performed the humiliating "tests" after Hebert convinced him that these tests constituted a "secret way into the Marines."[136] Although *McLain* involved assault and battery, no liability likely would have attached to Hebert's employer absent McLain's reliance on Hebert's employment status.[137] The *McLain* case ultimately provides shallow authority to support the *Costos* holding that the aided-by-agency-relation doctrine allows an employer to incur vicarious liability in the absence of reliance and deceit.

---

131. *Costos*, 137 F.3d at 49.

132. *McLain*, 572 A.2d at 498.

133. *Id.* Specifically, the trial court treated 219(2)(d) "*as a factor* in determining whether" the employee's conduct came within the scope of employment. *Id.* (emphasis added).

134. *Id.*

135. *See id.* at 495 (describing how McLain underwent the physical "tests" at Hebert's insistence).

136. *Id.* at 495–96.

137. *Id.* at 495.

D. *The* Costos *Court's Reliance on* Grover v. Minette-Mills, Inc., *Further Illustrates Its Misapplication of Aided-by-Agency-Relation Liability*

In *Costos*, the First Circuit additionally cited *Grover v. Minette-Mills, Inc.*[138] as authority that "vicarious liability is proper where the employment relationship [by itself] 'made possible' the commission of the tort."[139] Although *Grover* did not explicitly address the necessity of apparent authority,[140] the facts of the case involve the use of the aided-by-agency-relation doctrine within the context of apparent authority and in a case involving deceit.[141] In *Grover*, the Supreme Judicial Court of Maine properly applied aided-by-agency-relation liability.[142] Nevertheless, by applying *Grover* to a physical intentional tort not involving deceit or apparent authority,[143] the *Costos* court again ignored the principles underlying the precedent on which it relied and misapplied Maine law.

In *Grover*, Robert Grover, a former employee of the Bates Textile Company, sued Bates's parent corporation for its employees' tortious interference with Grover's employment contract.[144] Grover claimed that two Bates employees falsely represented that he had performed his work negligently and had uttered racist comments.[145] For twenty years, Grover had held several sales positions with Bates, where he supervised John Pollack and Gary Goldfarb. Grover eventually fired Pollack.[146] Pollack, who began working for another Bates company,[147] sought to "get rid of" Grover by making erroneous comments about Grover's service and purportedly racist utterances.[148] The Tang family, which owned Bates Textile Company, subse-

---

138. 638 A.2d 712 (Me. 1994).

139. *Costos*, 137 F.3d at 49.

140. *See* 638 A.2d at 717.

141. *See id.* (finding liability under section 219(2)(d) in a tortious interference case involving deceit and misrepresentation).

142. *Id.* at 717.

143. *See Costos*, 137 F.3d at 49.

144. *Grover*, 638 A.2d at 714.

145. *Id.*

146. *Id.*

147. *Id.* (stating that "[a]t the relevant time, Pollack and Goldfarb were employed by Minette," a company owned in common with Bates).

148. *Id.* Goldfarb also "falsely reported to the Tangs that Grover had uttered ethnic slurs about the Tangs." *Id.*

quently terminated Grover.[149] A jury found Pollack and Goldfarb liable for tortious interference with the Grover-Bates contract.[150]

The Supreme Judicial Court of Maine found that the trial court did not err in denying the defendants' motions for judgment as a matter of law due to insufficient evidence of tortious interference with a contractual relationship.[151] Without elaborating, the court held that because of Goldfarb's and Pollack's indirect employment relationship with Grover's employer, their tortious interference "was aided by their employment relationship."[152]

Consistent with the illustrations of aided-by-agency-relation liability in the comments to section 219, Goldfarb's and Pollack's tortious interference with the Grover-Bates contract involved deceit.[153] The tort-committing employees in *Grover* more closely resembled the telegraph operator who knowingly sends a false message, or the store manager who cheats his customers,[154] than the manager of an inn who breaks into a room and rapes a guest. Like *Gary v. Long* and *McLain v. Training and Development Corp.*, *Grover* does not provide for aided-by-agency-relation liability in cases of physical torts lacking deceit. Because the First Circuit in *Costos* misapplied *Gary*, *McLain*, and *Grover*, its expansion of aided-by-agency-relation vicarious liability under section 219(2)(d) lacks legal support.

The *Costos* court correctly stated that aided-by-agency-relation liability need not always involve apparent authority.[155] The court, however, never explained its jump from cases involving reliance and deceit to one involving a violent crime lacking reliance. Although *Costos* rests on the most untenable of

149. *Id.*
150. *Id.*
151. *Id.* at 716.
152. *Id.* at 717.
153. *Id.* (noting that Goldfarb and Pollack made false statements about Grover "for the purpose of inducing the Tangs in their capacity as officers of Bates to terminate the Grover-Bates contract").
154. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1957); *see also Gary v. Long*, 59 F.3d at 1397–98 (comparing the tort at issue to the examples listed in section 219 comment e).
155. *See Costos*, 137 F.3d at 48–49 (rejecting the defendants' argument that the aided-by-agency-relation form of liability "was meant to be independent of an apparent authority analysis").

grounds, the case potentially provides an important link between traditional aided-by-agency-relation liability cases and those lacking deceit or reliance.[156]

The *Costos* court greatly expanded the common law of agency by providing a cause of action under section 219(2)(d) for cases lacking reliance or deceit. In no case cited by *Costos*, and indeed in no other reported case, does aided-by-agency-relation liability go so far. The rule established in *Costos* may serve to swallow the traditional scope of employment requirement for *respondeat superior* liability.

III. THE SUPREME COURT'S TITLE VII SEXUAL HARASSMENT DECISIONS PROVIDE NO BASIS FOR AIDED-BY-AGENCY-RELATION LIABILITY IN CASES OF INTENTIONAL PHYSICAL TORTS LACKING DECEIT OR RELIANCE

In general, the aided-by-agency-relation prong of section 219(2)(d) has played a very small role in vicarious liability litigation.[157] Due to the lack of case law concerning that basis for liability, courts largely rely on the comments to the Restatement.[158] The aided-by-agency-relation approach to vicarious liability, however, has recently assumed a prominent role in the area of Title VII sexual harassment litigation. The *Costos* decision preceded two groundbreaking sexual harassment cases, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc.*

---

156. In at least one decision, a court has indicated that under *Costos*, an employer may incur vicarious liability for its employee's assault and battery, so long as the weapon used was an "instrumentality" provided by the employment relationship. *See* Nichols v. Land Transport Corp., 103 F. Supp. 2d 25, 28 (D. Me. 1999), *aff'd*, 223 F.3d 21 (1st Cir. 2000). In *Nichols*, the United States District Court for the District of Maine declined to impose liability under section 219(2)(d) because the employer "did not provide [the employee] with the instrumentality, the knife, that aided him in the commission of the tort." *Id.* Unlike *Costos*, the court cited comment a to section 231, noting that brandishing a knife and stabbing the plaintiff, a "serious crime," was neither appropriate or foreseeable "in the accomplishment of the authorized conduct [of employment]." *Id.*; *cf.* Laroche v. Denny's, Inc., 62 F. Supp. 2d 1366, 1373–74 (S.D. Fl. 1999) (relying on *Costos* but emphasizing that the employee's apparent authority enabled the employee to engage in racial discrimination).

157. For examples of non-Title VII aided-by-agency-relation decisions, see *supra* note 66.

158. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977); Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) (relying on Restatement § 219 comments in finding that aided-by-agency-relation liability applies to supervisor's acts of sexual harassment).

v. Ellerth,[159] and the First Circuit in *Costos* expressly chose not to rely on the reasoning of lower courts in other sexual harassment cases.[160] While the First Circuit did not rely on the reasoning laid out in prior sexual harassment cases, the analysis of the aided-by-agency-relation standard in Title VII cases provides useful insight into the potential scope of section 219(2)(d) in cases involving physical intentional torts. The application of the aided-by-agency-relation strand of vicarious liability in Title VII cases illustrates the potential limits of that standard.

Under Title VII of the Civil Rights Act of 1964, an employer may not "fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[161] Sexual harassment "is a form of sex discrimination prohibited under Title VII."[162] Sexual misconduct linked to a tangible employment action such as firing or failing to hire someone constitutes actionable sexual harassment under Title VII.[163] Additionally, sexual harassment that "alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment" violates Title VII.[164]

---

159. The Supreme Court decided *Faragher*, 524 U.S. 775, and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, on June 26, 1998, while the First Circuit Court of Appeals decided *Costos*, 137 F.3d at 46, on March 2, 1998.

160. *Costos*, 137 F.3d at 49 (stating that "[w]e need not speculate whether Maine courts would follow [the Title VII line of cases]"). Although courts have applied agency principles, including the aided-by-agency-relation prong of section 219(2)(d), in Title VII cases, such cases are statutory in nature and thus provide only persuasive authority for common law agency decisions. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998) (relying on the policies underlying section 219(2)(d), but stating that "[t]he aided in the agency relation standard . . . is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment").

161. 42 U.S.C. § 2000e-2(a)(1) (1994).

162. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* (quoting 29 C.F.R. § 1604.11(a) (1985)).

163. *Id.* Such claims are labeled "quid pro quo" sexual harassment claims. *Id.*; *Burlington*, 524 U.S. at 752.

164. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see Faragher*, 524 U.S. at 786 (stating that the scope of Title VII's prohibition extends beyond "economic" or "tangible discrimination," and encompasses more than "terms" or "conditions" in the confined contractual sense) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Courts refer to Title

In determining whether vicarious liability exists under Title VII, courts have examined traditional principles of tort and agency law.[165] The nature of sexual harassment, however, precludes liability under traditional agency approaches.[166] Most courts, including the United States Supreme Court, agree that sexual harassment constitutes a "frolic" not serving any purpose of the employer.[167] Thus, Restatement (Second) of Agency section 219(1), which provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment,"[168] does not properly apply to Title VII sexual harassment cases.[169] Apparent authority principles also do not apply, because typically harassment "involves misuse of actual power, not the false impression of its existence."[170] Instead, courts view the aided-by-agency-relation principle in section 219(2)(d) as "an appropriate starting point."[171] In two recent cases, the United States Supreme Court used this principle as the basis for an employer's liability for a supervising employee's acts of sexual harassment.[172] In

---

VII sexual harassment claims alleging pervasive changes in the "terms or conditions of employment" as "hostile work environment" claims. *Burlington*, 524 U.S. at 752.

165. *Faragher*, 524 U.S. at 791–92. Courts have interpreted Congress's inclusion of "agents" in the Title VII definition of "employer" as "an explicit instruction" to decide Title VII cases "based on agency principles." *Burlington*, 524 U.S. at 754; *Meritor*, 477 U.S. at 72; *see* 42 U.S.C. § 2000e(b) (1994).

166. *Faragher*, 524 U.S. at 791 (analyzing traditional agency approaches as applied to the Title VII cases).

167. *See Faragher*, 524 U.S. at 794 (listing courts of appeals' sexual harassment cases). Courts have applied the terms "frolic and detour" to indicate when an employee has acted outside the scope of employment. *See id.* An employee engages in a "frolic," and thus acts outside the scope of employment, when he "steps outside of his employment to do some act for himself, . . . [and] has no intention, not even in part, to perform any service for the employer." PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 503 (5th ed. 1984). "Detours" involve temporary deviations from the employee's work, such as when an employee runs a personal errand while engaged in a business venture. *Id.* at 504. If a detour is at least somewhat foreseeable, most courts will find that the employee's actions fall under the scope of employment. *Id.* at 504–05. Other activities, such as using the restroom or even smoking on the job, may be "so necessary, usual, and closely tied in with the work, that they are held not to constitute deviations from the employment." *Id.* In such situations, the employee acts with at least some intent to serve the employer. *Id.* at 503.

168. RESTATEMENT (SECOND) OF AGENCY § 219 (1) (1957).

169. *Burlington*, 524 U.S. at 757.

170. *Id.* at 759.

171. *Faragher*, 524 U.S. at 802.

172. *Burlington*, 524 U.S. at 761–62; *Faragher*, 524 U.S. at 802.

neither of these cases did the Court interpret aided-by-agency-relation liability broadly enough to permit the result in *Costos v. Coconut Island Corp.*

A. *Aided-by-Agency-Relation Liability Under* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton

In *Burlington*,[173] Justice Kennedy, writing for the majority, stated that the aided-by-agency-relation principle subjected an employer to vicarious liability when a supervisor created a hostile working environment through acts of sexual harassment.[174] In this case, Ted Slowik, a supervisor at Burlington Industries, repeatedly harassed Kimberly Ellerth, an employee.[175] Slowik made several "boorish and offensive remarks"[176] and unwelcome advances,[177] but took no tangible adverse job measures against Ellerth.[178] The Court examined Slowik's conduct in light of the aided-by-agency-relation clause in section 219(2)(d).

The Court acknowledged that "[i]n a sense, most workplace tortfeasers are aided in accomplishing their tortious objective by the existence of the agency relation."[179] However, because the aided-by-agency-relation standard involves more than the mere existence of the agency relation itself, the Court narrowed its focus to provide for vicarious liability only for a *supervisor's*

---

173. 524 U.S. at 759–60. Like *Faragher*, 524 U.S. at 779–780, seven Justices voted with the majority in *Burlington*, 524 U.S. at 2261–62. Justice Thomas and Justice Scalia dissented in both cases. *Burlington*, 524 U.S. at 766; *Faragher*, 524 U.S. at 810.

174. *Burlington*, 524 U.S. at 759–60.

175. *Id.* at 748–49.

176. *Id.* at 748. Among other comments, Slowik told Ellerth that "I don't have time for you right now, Kim . . . unless you want to tell me what you're wearing," and "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*

177. *Id.* After telling Ellerth that she was not "loose enough" during a promotion interview, he "reach[ed] over and rubb[ed] her knee." *Id.*

178. *Id.* at 748–49. Ellerth quit her job—Slowik did not fire or threaten to fire her. *Id.* at 748. As explained above, the Court in *Burlington* noted that, as a general rule, a supervisor's acts of sexual harassment do not fall within the scope of employment. *Id.* at 757. Additionally, because typically such harassment involved a supervisor's abuse of actual power, apparent authority principles did not apply to sexual harassment cases. *Id.* at 759.

179. *Id.* at 760.

acts.[180] When a supervisor takes a tangible employment action against a subordinate employee, the agency relationship clearly aids in the commission of the harassment.[181] The Court's requirement of supervisory authority narrowed the scope of aided-by-agency-relation liability, preventing vicarious liability under section 219(2)(d) for mere *physical* torts that *any* employee could commit.[182]

Additionally, to prevent unlimited exposure to vicarious liability for an employee's workplace torts, the Court emphasized that the economic nature of the harm resulting from sexual harassment limited the application of aided-by-agency-relation liability. As opposed to injury from physical torts, which may result from either a co-worker's or a supervisor's negligence, economic injury resulting from tangible employment action results only from the misuse of supervisory power.[183] An employer would face undue hardship if confronted with vicarious liability for all intentional physical torts, regardless of their nature or of who committed them. As the Court noted, "[a] co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct."[184] Only supervisors, however, can cause economic injury or threaten adverse employment actions. While the harm in sexual harassment is less clear when a supervisor does not take tangible employment action against a subordinate, the Court did not preclude applying the aided-by-agency-relation category of vicarious liability to such actions.[185]

---

180. *Id.* at 761. Justice Kennedy did not refer to the "instrumentality" limitation explained in *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995), and *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring). *Burlington*, 524 U.S. at 762. The restriction to cases of sexual harassment by supervisors, however, essentially served the same purpose. *See id.* (distinguishing the economic harm that a supervisor may inflict on a subordinate employee from a co-worker's inability to make economic decisions).

181. *Id.* at 760–61.

182. *Burlington*, 524 U.S. at 762 (apparently seeking to narrow the scope of aided-by-agency-relation liability, stating that a "co-worker can break a co-worker's arm as easily as a supervisor . . . [b]ut one co-worker . . . cannot dock another's pay, nor can one co-worker demote another").

183. *Id.*

184. *Id.*

185. *Id.* at 763 (noting the existence of certain acts of harassment that "might be the same acts a coemployee would commit").

Examining the application of section 219(2)(d) to cases where no tangible employment action occurs, the Court noted that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation."[186] However, because other considerations would influence the "developing" aided-by-agency-relation standard, the Court declined to "render a definitive explanation of [its] understanding" of section 219(2)(d) liability.[187] The Court did not expressly state whether section 219(2)(d) underlay its decision to hold an employer vicariously liable to victimized employees for non-tangible employment actions.[188] The majority, though, recognized aided-by-agency-relation vicarious liability in such cases,[189] as further illustrated in *Burlington*'s companion case, *Faragher v. City of Boca Raton*.

In *Faragher*, Justice Souter, writing for the majority, also looked to the aided-by-agency-relation clause in section 219(2)(d) to hold that an employer may incur vicarious liability for a supervisor's sexual harassment of an employee.[190] The plaintiff in this case, Beth Ann Faragher, sued her former employer, the City of Boca Raton, alleging that during her time working as a lifeguard, her supervisors created a hostile working environment by subjecting her to unwanted advances and

---

186. *Id.* at 763.

187. *Id.* The Court did not have to thoroughly explain section 219(2)(d), as agency principles merely guided its analysis of Title VII. *Id.* at 763–64; *see* discussion *infra* Part III.B.

188. *See id.* at 764–65 (subjecting supervising employers to vicarious liability based on "agency principles," tort law, and the avoidable consequences doctrine).

189. *Burlington*, 524 U.S. at 760 (discussing and applying the aided-by-agency-relation standard after rejecting apparent authority as a basis for liability in sexual harassment cases). In his dissent, however, Justice Thomas noted that as a rule, supervisors do not act for their employer when creating a hostile work environment. *Id.* at 769 (Thomas, J., dissenting). Thomas argued that an employer should incur liability only if the employer knew, or should have known, about the hostile work environment, and failed to take action. *Id.* Speaking of section 219(2)(d) as a unitary standard and referring to the Restatement's illustrations, Thomas stated that liability under section 219(2)(d) depends on the plaintiff's "*belief* that the agent acted in the ordinary course of business or within the scope of his apparent authority." *Id.* at 772 (Thomas, J., dissenting) (emphasis added).

190. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998). As in *Burlington*, aided-by-agency-relation liability served as the proper "starting point" for analyzing this type of vicarious claim. *Id.* at 802.

repeatedly speaking to her in a lewd and offensive manner.[191] The Court addressed and dismissed several standards for liability, including scope of authority[192] and foreseeability,[193] and ultimately relied upon the principles underlying aided-by-agency-relation liability to recognize vicarious liability for a supervising employee's sexual harassment.[194]

When discussing the second clause in section 219(2)(d), the Court first explained that this basis for liability did not necessarily involve apparent authority.[195] The Court held that the aided-by-agency-relation principle does not "merely 'refine'" the apparent authority basis for vicarious liability.[196] Because such an interpretation would "render the second qualification of [section] 219(2)(d) almost entirely superfluous," the Court viewed the aided-by-agency-relation standard as an independent basis for liability.[197] The Court's consistent reference to "misuse of supervisory authority," however, indicated that the mere existence of an agency relationship, without more, could not bring about aided-by-agency-relation liability.[198]

As in *Burlington*,[199] the Court in *Faragher* limited aided-by-agency-relation vicarious liability to cases involving a supervisor's harassing actions.[200] The Court reasoned that in

---

191. *Id.* at 780–81. Among other allegations, Faragher claimed that her supervisor "once said that he would never promote a woman to the rank of lieutenant, and that [another supervisor] had said to Faragher, 'Date me or clean the toilets for a year.'" *Id.* at 780. Faragher quit her job—her harassment did not involve any tangible employment actions. *See id.* at 782.

192. *Id.* at 794 (noting that "courts have likened hostile environment sexual harassment to the classic 'frolic and detour' for which an employer has no vicarious liability").

193. *Id.* at 798–99 (rejecting a standard based on whether the employer could "reasonably anticipate" sexual harassment occurring in the workplace).

194. *Id.* at 801–02.

195. *Faragher*, 524 U.S. at 801–02 (stating that section 219(2)(d)'s illustrations "make clear that [§ 219(2)(d)] covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship"). *Id.* at 802.

196. *Id.* at 801–02.

197. *Id.* at 802.

198. *Id.* at 804; *see also id.* at 802 (stating that "in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by his abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here").

199. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

200. *Faragher*, 524 U.S. at 807.

cases of sexual harassment, the "'aid' may be the unspoken suggestion of retaliation by misuse of supervisory authority."[201] Unlike a co-worker who creates a hostile working environment, a supervisor who harasses has power over the conditions of an employee's employment.[202] A supervisor's discriminatory acts "necessarily draw upon his superior position over the people who report to him."[203] A supervisor's power to fire, hire, and set pay rates can in effect prevent a victim of that supervisor's harassment from "walk[ing] away or tell[ing] the offender where to go."[204] A supervisor's harassing actions, then, are aided by an employee's hesitation to reject or report such acts, which in turn stems from the employee's reliance on the supervisor's ability to alter employment conditions.

Analyzing both policy and the language of section 219(2)(d), the Court in *Faragher* sought to ensure that employers would not be "'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination."[205] To prevent a strict liability regime of Title VII vicarious liability for a supervisor's sexual harassment, the Court created an affirmative defense for employers.[206] However, the Court's initial confinement of aided-by-agency-relation liability to cases involving a supervisor's harassment shows that such liability requires much more than physical harm resulting in part because a mere employment relationship existed.[207] Such a view does not suggest that aided-by-agency-relation liability could properly apply in a case like *Costos v. Coconut Island Corp.*, where the intentional tort involved no element of reliance, deceit, or misuse of supervisory authority.[208]

---

201. *Id.* at 804.
202. *Id.* at 803.
203. *Id.*
204. *Id.*
205. *Id.* at 804.
206. As in *Burlington*, 524 U.S. at 765, the Court in *Faragher* adopted an affirmative defense for employers in hostile work environment sexual harassment cases. *Faragher*, 524 U.S. at 807. An employer may "show . . . that [it] had exercised reasonable care to avoid harassment and to eliminate it when it might occur, *and* that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Id.* at 805 (emphasis added).
207. *See id.* at 803 (emphasizing the effect a supervisor's authority has over his subordinates).
208. 137 F.3d at 49–50.

B. *The Supreme Court's Reasoning in* Burlington *and* Faragher *Does Not Allow Vicarious Liability for Employees' Intentional Physical Torts in Cases Lacking Reliance or Deceit*

The Court's application of aided-by-agency-relation liability in Title VII sexual harassment cases does not control common law tort and agency cases.[209] Nevertheless, this area of law provides valuable insight into the proper scope of the second prong of section 219(2)(d), an often-ignored basis for vicarious liability.[210] The reasoning of the Court's Title VII cases indicates that aided-by-agency-relation liability does not properly apply in intentional physical tort cases that lack elements of reliance or deceit. Because the Court expressly rejected applying aided-by-agency-relation liability to intentional physical torts potentially committed by *any* employee,[211] it is unlikely that this form of liability properly applies in situations such as *Costos v. Coconut Island Corp.*

In interpreting and applying Title VII, courts have helped shape the federal rule for sexual harassment cases "based on a body of case law developed over time" and on "statutory interpretation pursuant to congressional direction."[212] In other words, courts deciding Title VII cases have used common law tort and agency principles for guidance, but ultimately have based their rulings on the statute itself.[213] As Judge MacKinnon explained in *Barnes v. Costle*, a 1977 Title VII sex-

---

209. *See Burlington*, 524 U.S. at 763 (stating that "[t]he aided in the agency relation standard . . . is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other considerations must affect our judgment"); *see also Costos*, 137 F.3d at 49 (refusing to "interpret § 219(2)(d) in light of the evolving rules for vicarious liability for sexual harassment in Title VII cases").

210. For examples of non-Title VII aided-by-agency-relation decisions, see *supra* note 66.

211. *Burlington*, 524 U.S. at 762.

212. *Id.* at 755.

213. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (noting that "common-law principles may not be transferable in all their particulars to Title VII"); *Burlington*, 524 U.S. at 763 (noting that "[t]he aided in the agency relation standard . . . is a developing feature in agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment"); *Faragher*, 524 U.S. at 802 (using section 219(2)(d) only as a "starting point"). Justice Thomas, on the other hand, argued that the Court's holdings in *Burlington* and *Faragher* constituted "willful policymaking, pure and simple." *Id.* at 772 (Thomas, J. dissenting).

ual harassment case, "if liability [for an employee's acts of sexual harassment] is to be placed upon an employer, it must be because of the wording and policy of the legislation."[214] Specifically, "[w]ithout the interposition of statutory law, the common law would impute no liability."[215] Thus, the respective employers in *Burlington* and *Faragher* likely would not have faced vicarious liability based solely on the common law aided-by-agency-relation principle. These decisions, however, provide persuasive authority for common law agency cases and demonstrate that section 219(2)(d) does not create liability in a case such as *Costos,* where the harm consists of physical damages resulting from a non-deceptive intentional tort.

When applying section 219(2)(d), most courts acknowledge that, "[i]n a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."[216] To limit vicarious liability, the United States Supreme Court and other courts require more than "but for" causation to satisfy the latter clause in section 219(2)(d).[217] Most courts require that a tortfeasor accomplish a wrongful act "by an instrumentality, or through conduct associated with the agency status."[218] In the context of an employer's liability for employees' acts of sexual harassment, aided-by-agency-relation liability applies only when the tortfeasor enjoys supervisory capacity and power. In such cases, the supervisor's ability to make tangible employment decisions often prevents a subordinate employee from blowing the whistle on the supervisor. Additionally, any resulting economic harm is made possible only through supervisory power to oversee, set pay rates, and fire employees.[219] As one commentator noted,

---

214. 561 F.2d 983, 996–97 (D.C. Cir. 1977) (MacKinnon, J., concurring).

215. *Id.* at 997.

216. *Burlington*, 524 U.S. at 760.

217. *See, e.g., id.* (explaining that if an employer could incur vicarious liability due to the mere existence of the agency relationship, "an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result [not] enforced by . . . any court of appeals to have considered the issue").

218. Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977).

219. Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

> from the employee's point of view, the supervisor's ability to harass her arises precisely because the agency relationship affords her supervisor the authority to call her into his presence, to retain her in his presence over her objections, to place her in a compromising position, and to a large extent encroach upon her personal privacy.[220]

As shown in *Burlington* and *Faragher*, the "trust and authority conferred upon the supervisor,"[221] and not the mere agency relationship, provides the basis for aided-by-agency-relation liability in sexual harassment cases.[222]

In *Burlington*, Justice Kennedy distinguished the economic harm that supervision may potentially cause from the physical harm that any co-worker may inflict.[223] The Court apparently rejected aided-by-agency-relation liability in the hypothetical case of an employee "break[ing] a co-worker's arm," because nothing more than the employment relation itself would impute such liability to an employer.[224] Although the Court did not expressly apply the "instrumentality" limitation to aided-by-agency-relation liability, it viewed *supervisory power* as an instrumentality that invokes economic harm.[225] Under the Court's view, applying aided-by-agency-relation liability for the damages resulting from a hotel manager's sexual assault of a guest goes too far.

By providing an affirmative defense for employers,[226] and more importantly, by limiting liability to acts of supervisors causing economic harm,[227] the Court has prevented aided-by-agency-relation liability from supplying a catchall in Title VII

---

220. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 CORNELL L. REV. 66, 89 (1995).

221. *Id.* at 89–90.

222. *Faragher*, 524 U.S. at 804.

223. 524 U.S. at 761–62.

224. *Id.* at 762 (stating that "one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another").

225. *See Faragher*, 524 U.S. at 803 (emphasizing that when a supervisor discriminates, "his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker").

226. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

227. *See Burlington*, 524 U.S. at 762 (discussing the economic harm caused by misuse of supervisory authority); *Faragher*, 524 U.S. at 803 (listing the economic harm that may result from supervisor misconduct).

sexual harassment cases. The liability established in *Costos*, however, resembles the expansive brand of liability rejected in the Supreme Court's Title VII decisions.[228] As in the case of most employees, the employment relationship provides a hotel manager "[p]roximity and regular contact, [which tends to] afford a captive pool of potential victims."[229] Unless courts follow the reasoning underlying *Burlington* and *Faragher*, the second prong of section 219(2)(d) will become a catchall for liability when an employee's tort does not fall under any other *respondeat superior* category. Such a broad liability provision would place employers under increased risk for incurring strict liability.

IV. OTHER THEORIES OF VICARIOUS LIABILITY PROVIDE MORE PROPER GROUNDS FOR LIABILITY FOR INTENTIONAL PHYSICAL TORTS THAN SECTION 219(2)(D)

In lieu of stretching aided-by-agency-relation liability under section 219(2)(d) well past its intended limits, courts should consider alternate bases for vicarious liability in difficult cases like *Costos*. In *Costos*, a young woman awoke in her own hotel room to find herself being raped.[230] Because the rapist fled the jurisdiction, the rapist's employer was the only party available for potential criminal or civil liability.[231] In order to provide a remedy to the victim, the First Circuit permitted vicarious liability under the vague, overly broad, and seldom-used doctrine of aided-by-agency-relation liability.[232] The court should have restricted the plaintiff to narrower grounds for relief by focusing on the special responsibilities that an inn owner owes to its guests.

Most courts insist that innkeepers are not insurers of their guests for personal injuries inflicted by employees or third parties.[233] Some courts, however, have recognized a heightened

228. *See Burlington*, 524 U.S. at 760.
229. *Id.*
230. *Costos*, 137 F.3d at 48.
231. *Id.*
232. *Id.* at 49–50; *see also* discussion *supra* Part II.
233. Pittard v. Four Seasons Motor Inn, Inc., 688 P.2d 333, 339 (N.M. Ct. App. 1984) (declining to impose a higher standard of care on innkeepers where an on-duty motel employee sexually assaulted a child); *see also* Tobin v. Slutsky, 506 F.2d 1097, 1103 (2d Cir. 1974) (stating that "[n]o matter how strict the standard, . . . the hotel is not an insurer"). *But see* Crawford v. Hotel Essex Boston

standard of care for innkeepers. Under Massachusetts law, for example, courts look to contractual rights to hold a defendant hotel corporation liable for an employee's assault of a guest, even if such conduct is "entirely 'outside the scope of duties, or in a spirit of vindictiveness or to gratify personal animosity.'"[234] In *Crawford v. Hotel Essex Boston Corp.*, the United States District Court for the District of Massachusetts held that registered hotel guests enjoy contractual rights greater than those of common business invitees.[235] Specifically, the court held that:

> [A hotel] guest is entitled to respectful and considerate treatment at the hands of the innkeeper and his employees and servants, and this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort, or distress of mind, or imperil his safety.[236]

By creating an implied contractual right to protection from harm by hotel servants, Massachusetts courts recognize that traditional agency rules may come up short when a special relationship, like that of innkeeper and guest, is involved.

Several other courts, though not going as far as the Massachusetts courts, also recognize a higher standard of care in tort law for innkeepers. In *Tobin v. Slutsky*,[237] the Second Circuit, applying New York law, held that the standard of care that an innkeeper must exercise for its guests' safety varies depending on "the grade and quality of the accommodations that the innkeeper offers."[238] Although the court insisted that in no case

---

Corp., 143 F. Supp. 172, 174 (D. Mass. 1956) (holding that under Massachusetts law, registered guests enjoy a contractual right to be free from attacks by hotel employees, essentially making the defendant innkeeper the guests' insurer).

234. *Crawford*, 143 F. Supp. at 174 (quoting Genga v. New York, N.H. & H.R. Co., 137 N.E. 637, 639 (Mass. 1922)).

235. *Id.*; *see also* Frewen v. Page, 131 N.E. 475, 476 (Mass. 1921) (recognizing hotel guests' contractual right of "immunity from rudeness, personal abuse and unjustifiable interference, whether exerted by the defendant or his servants, or those under his control"). *Cf.* Marino v. Hyatt Corp., 793 F.2d 427, 430 (1st Cir. 1986) (distinguishing *Crawford*, 143 F. Supp. at 174, in a case not involving *intentional* interference with a guest's contractual right to enjoy his or her hotel room).

236. *Crawford*, 143 F. Supp. at 174 (quoting *Frewen*, 131 N.E. at 477).

237. 506 F.2d 1097, 1100–01 (2d Cir. 1974).

238. *Id.* at 1101.

would an innkeeper assume the role of insurer,[239] it stated that the operator of a resort hotel could not escape liability simply because an employee's sexual attack of a guest was outside the scope of employment.[240] Under this New York view, reasonable care often means "a high" or even "a severe" degree of care.[241] This standard stems from the analogy some courts have made between the duty that an innkeeper owes to its guests and the duty a common carrier owes to its passengers, both arising from an implied covenant of safety.[242] The high degree of care under New York law is based in tort law, however, and so does not create strict liability.[243] While yielding milder results for hotel defendants than the Massachusetts view, the New York approach similarly allows injured guests to recover in certain situations even when agency law by itself would preclude recovery.

Not all courts recognize a higher degree of care for innkeepers based simply on their relationship to hotel guests.[244] Such an approach, however, more properly addresses the concerns of *Costos*. Instead of narrowly focusing on what duties arise from the innkeeper-guest relationship, the *Costos* court spoke in broad terms of general vicarious liability under section 219(2)(d).[245] This view potentially creates limitless liability for *all* employers, so long as an employee was "'aided in some way in committing the tort by the position that he holds.'"[246] The Massachusetts and New York views recognize that agency

239. *Id.* at 1100.

240. *Id.* at 1101–02.

241. *Id.* at 1103 (stating that, at least for "first-class family resort[s]," only one reported case denied recovery from the establishment when a hotel employee injured a guest).

242. *Id.* at 1102; *see also* Mayo Hotel Co. v. Danciger, 288 P. 309, 312 (Okla. 1930) (stating that, as in the case of a common carrier, an implied contract exists between an innkeeper and his guest to exercise "a very high degree of care" protecting guests against employees' negligent acts) (disapproved on other grounds by Buck v. Del City Apartments, Inc., 431 P.2d 360, 364 (Okla. 1967)).

243. *Tobin*, 506 F.2d at 1102 (insisting that New York law requires that an innkeeper is not its guest's insurer, but must exercise reasonable care).

244. *See* Pittard v. Four Seasons Motor Inn, Inc., 688 P.2d 333, 338 (N.M. Ct. App. 1984) (denying recovery for a motel employee's sexual assault on a child under *respondeat superior* and business invitee theories).

245. 137 F.3d 46, 48–49 (1st Cir. 1998) (stating that "under Maine law . . . a master may be liable for the torts of . . . servants who are acting outside the scope of their employment when they are aided in accomplishing the tort by the existence of the agency relation").

246. *Id.* at 49 (quoting Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977)).

law's scope of employment limitation may provide inadequate protection for hotel guests, who are particularly vulnerable to employees' misconduct.[247] At the very least, courts faced with a hotel employee's assault on a guest should begin their analysis under theories creating heightened standards of care for innkeepers rather than under section 219(2)(d).[248]

CONCLUSION

Vicarious liability should not automatically follow from an employee's intentional physical torts, even in the most shocking and repugnant cases. In *Costos*, the offender fled the jurisdiction, leaving the victim unable to achieve closure through criminal prosecution or monetary damages. Undoubtedly the jury wanted someone to incur liability for such a heinous crime. The rapist's knowledge of the victim's whereabouts, and his access to the victim's room key, constituted "instrumentalities" in a narrow sense. The lack of reliance and the involvement of an intentional physical tort, however, should preclude aided-by-agency-relation vicarious liability in such a case. Even if the victim in *Costos* had relied on the rapist due to some instrumentality of the agency relation, the 1956 ALI Proceedings suggest that she could not have found refuge in section 219(2)(d).

The *Costos* decision could potentially expose employers to vicarious liability in situations where traditional agency principles would preclude such liability. An employer's liability for an employee's intentional physical tort, such as a personally motivated attack of someone not associated with the business, could depend on whether the employer provided the wrench, screwdriver, or vehicle with which the employee committed the tort. Fact-based questions of instrumentalities may replace analysis of an employee's motivation. In the process, applying aided-by-agency-relation liability in cases involving employees'

247. *See* Crawford v. Hotel Essex Boston Corp., 143 F. Supp. 172, 174 (D. Mass. 1956); Tobin v. Slutsky, 506 F.2d 1097, 1103 (2d Cir. 1974).

248. Alternatively, outside the innkeeper context, some courts have held that "scope of employment" should include acts "not so 'unforeseeable' as to make it unfair to charge [an employer] with responsibility," and have thus expanded their interpretation of "scope of employment" to encompass certain intentional torts. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968).

intentional physical torts may make section 219(2)(d) agency law's broadest and most threatening catchall.