Restatement (Second) of Agency § 226 (1958)

Restatement of the Law - Agency | May 2022 Update

Restatement (Second) of Agency

Chapter 7. Liability of Principal to Third Person; Torts

Topic 2. Liability for Authorized Conduct or Conduct Incidental Thereto

Title B. Torts of Servants

Who Is A Servant

§ 226 Servant Acting for Two Masters

A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.

Comment:

a. *Independent service for two masters.* Since one can perform two acts at the same time, it is possible for each act to be performed in the service of a different master, although ordinarily the control which a master can properly exercise over the conduct of the servant would prevent simultaneous service for two independent persons. Likewise, a single act may be done to effect the purposes of two independent employers. Since, however, the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them. A person, however, may cause both employers to be responsible for an act which is a breach of duty to one or both of them. He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both (see § 236); he cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other. A subservant necessarily acts both for his immediate employer and the latter's master, who is also his own master. See § 5.

Illustrations:

1. P employs A to drive P's truck, directing him to obey the orders of B, who has hired the truck by the hour for advertising purposes, in the management of colored lights used upon the truck for lighting the display installed thereon. In the driving of the truck, A is P's servant; in the management of the colored lights, A is B's servant. If A injures T by negligently running into him because he dims the headlights in order to make the colored lights more conspicuous, both B and P are subject to liability to T. If A injures T as a result of an explosion caused by the materials used in producing the colored lights, B alone is subject to liability.

2. P employs A by the day as a messenger boy, authorizing him to use a bicycle in performing his duties. B also employs A on the same terms. Neither knows of the employment by the other. A, having packages to deliver to the same destination for both P and B, places them on his bicycle and negligently runs into T while on the way to deliver them. Both P and B are subject to liability to T.

3. P engages B to build a house for him for a fixed sum, B to employ his own servants. A is employed by B as a carpenter and also (with B's consent or without it) by P as a general inspector on a fixed salary, to inspect the work as it progresses. While A is measuring a cupboard which he has just built to be sure that the measurements are as specified, he negligently injures T. In doing this, A is the servant of P or B, but not of both.

Comment:

b. *Where two masters share services.* Two persons may agree to employ a servant together or to share the services of a servant. If there is one agreement with both of them, the actor is the servant of both at such times as the servant is subject to joint control. If, however, it is agreed that control shall alternate, the actor is the servant only of the one for whom he is acting at the moment.

Illustrations:

4. P and B set up a bachelor apartment and employ a chauffeur, A, it being understood that A is to receive half his wages from each of them, and is at all times to obey the orders of either of them. A, while driving negligently in a borrowed automobile to deliver P's suit to the tailor, injures T. A is the servant of P and of B at the time.

5. A railroad agrees with a telegraph company that each will separately pay A, one for his work as station agent, the other for his service as telegram dispatcher. While A is selling tickets, he is the servant of the railroad; while he is sending commercial telegrams he is the servant of the telegraph company.

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U.S.

U.S.1995. Quot. in disc., com. (a) quot. in disc. Union members filed a complaint with the National Labor Relations Board (NLRB), alleging that a company and an employment agency had refused to interview them or retain them because of their union membership. NLRB held that the company committed unfair labor practices and that plaintiffs were protected employees under the National Labor Relations Act. The Eighth Circuit reversed, holding that the statutory word "employee" did not cover those who work for a company while a union simultaneously pays them to organize that company. This court vacated and remanded, holding that a worker may be a company's employee, within the terms of the National Labor Relations Act, even if, at the same time, a union pays that worker to help the union organize the company. The court noted that the Board's interpretation of the term "employee" was consistent with the common law. N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 92, 94, 116 S.Ct. 450, 455, 456, 133 L.Ed.2d 371.

U.S.1974. Cit. in op. in disc., cit. in conc. op. in disc., cit. in diss. op. in disc. This was an action brought under the Federal Employers' Liability Act (FELA) against a railroad to recover for injuries sustained by plaintiff workman while unloading automobiles from a railroad car. Plaintiff, an employee of a trucking company (PMT) which unloaded the cars under a contract with the railroad company, alleged that he was sufficiently under the railroad's control to bring him under coverage of the FELA, even though PMT supervisors controlled the day-to-day unloading process. The District Court held that PMT was serving generally as the railroad's agent, that PMT's employees were the railroad's agents for purposes of the unloading operation, that the work performed by plaintiff fulfilled the nondelegable duty of the railroad, and, therefore, that the relationship between plaintiff and the railroad sufficed to make the FELA apply. The Court of Appeals reversed on the ground that the District Court's test for FELA liability was too broad. Held: Case remanded with instructions. For the purposes of the FELA the question of employment, or master-servant status, is to be determined by reference to common-law principles. Under common-law principles, there are three methods by which a plaintiff can establish his employment with a rail carrier for FELA purposes even while he is nominally employed by another, i.e., (1) the employee could be serving as the borrowed servant of the railroad at the time of his injury, (2) he could be deemed to be acting for two masters simultaneously, (3) he could be a subservant of a company that was, in turn, a servant of the railroad. Nothing in the District Court's findings suggest that plaintiff was sufficiently under the railroad's control to be either a borrowed servant of the railroad or a dual servant of PMT and the railroad. Even the theory of a subservant relationship between plaintiff and the railroad fails, since the District Court's findings did not establish the master-servant relationship between the railroad and PMT necessary to render plaintiff a subservant of the railroad. Although the District Court was correct in concluding that PMT was an agent of the railroad, a finding of agency is not tantamount to a finding of a master-servant relationship. The District Court's conclusion that the railroad was "responsible" for the unloading operation is not tantamount to a finding that the railroad controlled or had the right to control the physical conduct of PMT employees, like the plaintiff, in the unloading operation. The District Court's findings clearly fail to establish that plaintiff was "employed" by the railroad. The concurring Justice felt that the Majority's detailed discussion of the evidence was unnecessary, that the case should be remanded to the District Court with instructions to apply the correct principles of Master-servant law in

determining plaintiff's status under the FELA, and that whether the railroad controlled, or had the right to control, plaintiff's work was "for the original factfinder to determine." The Dissent felt that the District Court had found that the requisite relationship was present to permit a recovery under the FELA, that the findings of fact made by the District Court were not clearly erroneous and supported its conclusion that FELA was applicable. The Dissent held that the District Court "made findings of fact easily sufficient to support the existence of an employment relationship under the correct substantive test, and he in fact found that the requisite relationship existed." Kelley v. Southern Pacific Co., 419 U.S. 318, 95 S.Ct. 472, 476, 480, 483, 42 L.Ed.2d 498.

C.A.1

C.A.1, 1997. Cit. in disc. Purchasers of distribution company that was owned by four corporate entities sued entities and entities' officers and directors for, inter alia, fraud, alleging that defendants failed to disclose that company's chief customer was planning to take its business elsewhere. The district court entered judgment on a jury verdict for plaintiffs. Vacating and remanding, this court held that the lower court committed reversible error when it instructed the jury on partnership liability; however, defendants were not entitled to judgment as a matter of law, since there existed some evidence from which a finder of fact could conclude that officers and directors made misrepresentations about the sale, liability for which attached also to entities as principals of officers and directors. Dinco v. Dylex Ltd., 111 F.3d 964, 972.

C.A.2

C.A.2, 1973. Cit. in sup. in diss. op. A hairdresser brought this action against a concessionaire and a shipowner seeking damages under the Jones Act and under general maritime law for unseaworthiness maintenance and cure, and negligence. The court affirmed dismissal of the action against the shipowner, holding that since plaintiff was directly employed by the concessionaire the shipowner was not a proper party. The court also affirmed summary judgment in favor of the concessionaire on the ground that, since plaintiff's injuries were alleged to have occurred as a result of a fall in her stateroom and the concessionaire was not responsible for the condition of the stateroom, plaintiff had not made a showing of negligence on the part of the concessionaire. The dissent was of the opinion that the majority's construction of the Jones Act left unprotected those who, like plaintiff, are concededly seamen but hired by a concessionaire, since they would have claims neither against the shipowner nor generally against the concessionaire. The dissent emphasized that a person may be the servant of two masters, and argued that the shipowner should not be relieved of responsibility by what it perceived as a technical determination that no employer-employee relationship existed. Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 175.

C.A.2, 1963. Cit. in sup. Crane operator in general employment of defendant-owner of hoister scow remained defendant's employee when hoister helped stevedore to unload barge in course of which plaintiff-employee of stevedore sustained injuries caused by operator's negligence in obeying imprudent signal by stevedore's foreman, notwithstanding that stevedore's foreman hired and paid operator and gave signal which operator followed, where operator was also paid by defendant and such use of hoister served business purpose of defendant and operator had by no means surrendered control over hoister. Williams v. Penna. Railroad Company, 313 F.2d 203, 209.

C.A.3

C.A.3, 1991. Cit. generally in sup., quot. in disc. An employee on the payroll of a railroad's subsidiary sued the railroad for damages pursuant to the Federal Employers' Liability Act after he was injured while operating a forklift at one of the railroad's freight terminals. After the jury returned a verdict for the plaintiff, finding that he was the defendant's employee at the time of his injury, the district court granted the defendant's motion for a judgment n.o.v. Reversing and remanding, this court held that the evidence was sufficient to support the jury's finding that the plaintiff was the defendant's employee within the meaning of the Act as either a borrowed servant or a dual servant because he was subject to the defendant's control at the time of his injury. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1349, 1352, appeal after remand 947 F.2d 936 (3d Cir.1991).

C.A.3, 1973. Cit. but dist. The plaintiff's bus was damaged while being driven in the franchise area of the defendant. The court held that the contract between the parties governed their respective liabilities and not general agency principles. The bus driver was the plaintiff's employee, but the defendant received all revenue benefits of the bus' operations in the area in which it had been damaged. After considering the contract as a whole and interpreting it in light of the parties' own interpretation of it, the court held that the defendant was to be deemed the "operating carrier" under the contract and, therefore, it was liable for the damages. Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 558.

C.A.3, 1966. Cit. in sup. Plaintiff's decedent died as the result of the wrong type of blood administered by the third-party defendant, a blood bank technician, during an operation conducted by the defendant. The court held that a release of the hospital and its employees of claims arising from the incident did not bar this action, since the technician was the agent of the surgeon as well during the operation. It was also held that the amount paid for the release was not deductible under the state tortfeasors' contribution statute from the verdict against the physician since the hospital was not a party to the action and had not been adjudged negligent. Mazer v. Lipshutz, 360 F.2d 275, 278, certiorari denied 385 U.S. 833, 87 S.Ct. 72, 17 L.Ed.2d 68.

C.A.4

C.A.4, 1971. Cit. in sup. Plaintiff was severely injured in a collision involving her automobile and a truck owned by the defendant trucking company being used in the services of defendant lumber company. At trial the plaintiffs obtained a verdict against the trucking company and the driver; the case against the lumber company was dismissed. The plaintiff appealed, contending that the driver was also an employee of the lumber company. The Court held that since the lumber company carried the driver on its payroll, reported him as an employee to the United States Internal Revenue Service, included him in its group hospitalization plan, and carried him as an employee for unemployment and workman's compensation purposes, the driver was an employee of the company. Sharpe v. Bradley Lumber Company, 446 F.2d 152, 155, cert. denied, 405 U.S. 919, 92 S.Ct. 946, 30 L.Ed.2d 789 (1972).

C.A.5

C.A.5, 1992. Cit. in ftn. Pursuant to the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (AWPA), migrant agricultural workers sued labor contractors and farmers who contracted to have the workers harvest crops. The federal district court awarded damages against labor contractor and farmers but found other farmers exempt under the small business exception to the FLSA. The Fifth Circuit vacated and remanded in part. This court denied petition for rehearing, holding that worker days of labor used by one farmer were not attributed to other farmers for purposes of statutory liability solely because the workers were supplied by the same third-party contractor. Absent a clear indication that two or more separate and distinct farmers joined together in some form of common enterprise, they must be regarded as separate employers, and hours worked for one were not to be deemed hours worked for the other. Salinas v. Rodriguez, 978 F.2d 187, 189.

C.A.5, 1980. Com. (a) cit. in sup. Defendant barge owner employed plaintiff as a cook on the vessel. Defendant contractors had a contract to build a large pond. The barge carried a large dragline which contractors arranged to rent from owner to do the job. Plaintiff asked, and was assigned, to work as an oiler on the dragline. While at work on the land job, plaintiff received his orders from the dragline operator who had been the captain of the barge and who also had been assigned by the barge owner to the contractors for the work on land building the pond. While he worked as oiler on the dragline, plaintiff's wages were paid by the contractor. However, owner continued to pay the captain of the barge who acted as the dragline operator and to look to him to supervise the employees who remained on the barge. Owner furnished dragline operator with a truck and paid him for his travel to and from the job being doing by contractors. Owner continued to carry both plaintiff and dragline operator an owner's pension and hospitalization plans. Contractor's job superintendent directed all the dragline operations and gave orders to dragline operator who in turn directed the members of this crew. There was evidence that contractor could not discharge any member of the dragline crew without owner's permission. Plaintiff was injured about two weeks after starting the job. The accident was allegedly caused by dragline operator's negligence. Contractor began to pay plaintiff compensation under the Louisiana Workmen's Compensation Act. Plaintiff then sued both owner and contractor under the Jones Act, contending he was

a seaman employed by owner but working under contractor's control and entitled to recover from both for negligence. Before trial, plaintiff settled his claim against contractor for $75,000. Contractor then counterclaimed in suit for indemnity against owner, while owner contended that if plaintiff recovered against it, it was entitled to indemnity from contractor or a credit on the judgment for plaintiff for the amount plaintiff had received from contractor in the settlement prior to trial. The district court returned a verdict for plaintiff awarding plaintiff $150,000 in damages and denied cross-claims of owner and contractors for indemnity and claim by owner for credit for the $75,000 settlement received by plaintiff from contractor. On appeal, the court affirmed the district court's dismissal of the various claims and cross claims for contribution and indemnity because of the facts presented which showed that if there were negligence, as found by the jury, it was attributed to the dragline operator. If the dragline operator was at fault, either owner or contractor was liable. While there might be instances of joint control of one person by two operators giving rise to both becoming vicariously liable for his actions, in this case the one employer who was vicariously liable for the dragline operator's actions has no right to claim indemnity from anyone but the dragline operator and there can be no contribution between the employers because there was no joint fault in the situation actually presented. Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452, rehearing denied 616 F.2d 568 (1980).

C.A.6

C.A.6, 1998. Cit. in sup., com. (a) quot. in disc. National Labor Relations Board moved to enforce judgment against employer found by administrative law judge to have violated various sections of the National Labor Relations Act in connection with its actions vis-à-vis certain job applicants who were also union organizers. Remanding for further factfinding, the court held, in part, that applicants were “employees” within the meaning of the Act, and that material factual issues existed as to whether defendant committed unfair labor practices when it failed to hire them. N.L.R.B. v. Fluor Daniel, Inc., 161 F.3d 953, 962.

C.A.6, 1996. Cit. in case cit. in disc., com. (a) quot. in disc. The National Labor Relations Board (NLRB) petitioned for enforcement of its order finding a construction contractor to have committed various unfair labor practices against job applicants who were also union organizers and against an employee sympathetic to the union involved. This court granted the NLRB's petition for enforcement in part and remanded, rejecting, inter alia, the contractor's argument that the unpaid volunteer union organizers in this case were not “employees” within the meaning of the National Labor Relations Act. N.L.R.B. v. Fluor Daniel, Inc., 102 F.3d 818, 828, amended and superseded 161 F.3d 953 (6th Cir.1998). See case below.

C.A.7

C.A.7, 1990. Cit. in case quot. in disc. A steel works facility employee who was injured while working in a steelyard sued a railroad that was a subsidiary of the steel company and that performed transportation functions at the facility, claiming that he was an employee of the railroad for the purpose of establishing liability under the Federal Employers' Liability Act (FELA). The district court granted the defendant's motion for a directed verdict on the ground that the plaintiff was not the defendant's employee under the FELA. Affirming, this court rejected the plaintiff's argument that the plaintiff was a subservant of the steel company, which was in turn a servant of the defendant, holding that the evidence showed that the defendant exercised no control over the steel company at the time of the accident. Warrington v. Elgin, Joliet & Eastern Ry. Co., 901 F.2d 88, 90.

C.A.8

C.A.8, 1994. Cit. in sup., com. (a) cit. in sup. Employer petitioned for review of National Labor Relations Board's finding that employer had violated the National Labor Relations Act by discriminating against two full-time union organizers and nine other union members who applied for jobs. Denying the Board's cross-petition for enforcement of its decision and order, this court held that employer did not commit an unfair labor practice by refusing to interview the union organizers and members, since they were not “employees” under the Act and therefore were not entitled to the Act's protection. The court stated that, because the union organizers and members were under the union's control and applied for the positions to organize employer's work force rather than to obtain gainful employment, an inherent conflict of interest existed, precluding an employer-employee

relationship. Town & Country Elec., Inc. v. N.L.R.B., 34 F.3d 625, 628, cert. granted 513 U.S. 1125, 115 S.Ct. 933, 130 L.Ed.2d 879 (1995), vacated 516 U.S. 85, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995).

C.A.8, 1982. Cit. in sup., quot. and cit. in ftn. in sup. The plaintiffs brought an action for damages suffered while the defendant's employee was operating a construction crane owned by a third party. The other party had originally been a named defendant, but settled with the plaintiff prior to the trial. The trial court refused to give the defendant's requested instruction on the borrowed servant doctrine, and later entered the judgment against the defendant. The court vacated the judgment and remanded for a partial new trial to determine whether the borrowed servant doctrine applied. The court indicated that an act could simultaneously fall within the scope of employment of the employee and the borrowed servant doctrine, so the defendant can still be liable even if the employee is a borrowed servant. Minnkota Power Co-op., Inc. v. Manitowoc Co., Inc., 669 F.2d 525, 531-533.

C.A.9

C.A.9, 2002. Cit. in disc., cit. in conc. and diss. op. Airline passenger whose carry-on baggage was stolen from an airport security checkpoint sued security company and three airlines. The trial court dismissed. On rehearing, this court reversed and remanded, holding that, in operating the security checkpoint, security company was the agent of all three airlines, not solely of the carrier-principal that was entitled to the Warsaw Convention's limitation of liability as provider of plaintiff's international carriage; thus, security company should be held accountable without regard to the Convention's limitation of liability. The concurring and dissenting opinion argued that security company was subject to the Convention's protection, because its service to the non-Warsaw Convention carriers did not destroy its agency relationship with the carrier-principal. Dazo v. Globe Airport Security Services, 295 F.3d 934, 939.

C.A.9, 2001. Cit. in ftn., quot. in diss. op. Airline passenger whose carry-on baggage was stolen from an airport security checkpoint sued security company and three airlines for, in part, negligence. Affirming the district court's grant of defendants' motion to dismiss, this court held that the Warsaw Convention, which capped the liability of “carriers,” applied to security company, which was functioning as airlines' agent at the time of the theft. The court noted that security company's association with non-Warsaw Convention carriers did not destroy its “carrier” status. The dissent argued that security company, as agent of the non-Warsaw Convention carriers, and the non-Warsaw Convention carriers themselves should be held accountable for any loss proven without regard to the Convention's limitation of liability. Dazo v. Globe Airport Sec. Services, 268 F.3d 671, 677, 682.

C.A.9, 1999. Cit. in headnote, quot. in sup., cit. in disc. Workers who met the common-law definition of employee but were denied certain benefits because employer considered them independent contractors or employees of third-party temporary agency sought writ of mandate compelling the district court to issue an order certifying them as members of a class entitled to participate in a tax-qualified employee stock purchase plan (ESPP). Granting plaintiffs' request for relief and remanding, the court held, in part, that, in its previous order, the district court had erroneously redefined “common-law employee” for purposes of participation in the ESPP, that plaintiffs' status as employees of temporary agency did not preclude them from simultaneously being common-law employees of defendant, and that an Internal Revenue Service classification of plaintiffs as common-law employees should also be considered. Vizcaino v. U.S. Dist. Court for W. D. of Wash., 173 F.3d 713, 715, 723, 724, amended 184 F.3d 1070 (9th Cir.1999).

C.A.9, 1993. Quot. in sup., com. (a) quot. in part in sup. The mother of a child allegedly injured as a result of medical malpractice in a private hospital sued the military physician who treated him and the United States as the physician's employer. This court, vacating denial of the government's motion to be substituted for the doctor as defendant and remanding, held, inter alia, that the fact that the doctor, who was enrolled in a resident program, was a “borrowed servant” of the hospital did not preclude a finding that he was acting within the scope of his government employment or that the United States was liable for his alleged malpractice. Ward v. Gordon, 999 F.2d 1399, 1404.

C.A.9, 1970. Cit. but dist. The plaintiff insured brought an action against the defendant insurer to recover the amount of judgment which the plaintiff, a helicopter seller, had paid to a helicopter buyer for the destruction of a helicopter in an accident. The liability policy provided coverage for damage to goods sold after title had passed to the buyer "except aircraft in flight in charge of the insured." The plaintiff and the buyer agreed that plaintiff's vice-president would fly the helicopter with the buyer aboard to the buyer's place of business immediately after the passing of title. The accident occurred enroute. The court held that the plaintiff was "in charge of" the helicopter, rejecting plaintiff's contention that its vice-president was a servant acting for two masters. Columbia Helicopters, Inc. v. Transport Indemnity Co., 428 F.2d 1385, 1388.

C.A.10

C.A.10, 1998. Cit. and quot. in conc. op. A nurse who was employed by a private corporation that provided medical services to a Kansas state prison administered by the Kansas Department of Corrections sued the Department of Corrections, among others, for discrimination and retaliation in violation of Title VII and Kansas law protecting whistleblowers. The district court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held, inter alia, that plaintiff was not an employee of the Department of Corrections for purposes of her Title VII and state-law claims. The concurring opinion argued that plaintiff made a sufficient showing of a dual employer relationship to survive summary judgment, asserting that the private corporation and defendant split the right to control plaintiff's work, but would have affirmed on the ground that plaintiff failed to prove that she was engaged in activity protected by Title VII or that she was fired in retaliation for reporting serious violations. Zinn v. McKune, 143 F.3d 1353, 1361, 1363.

C.A.10, 1974. Cit. in sup. Plaintiffs, Finnerman, Sparr, and Schenck Enterprises, sued a deceased pilot's estate and his permanent employer, Sunset Drive In Theatre, for the death of Sparr, injuries to Finnerman, and the disruption caused to Schenck Enterprises by the delay of the motion picture being filmed. Prior to this case the widow of the pilot had successfully won a case for workmen's compensation against Schenck Enterprises. The defendant was claiming that this prior judgment acted as res judicata or collateral estoppel against the plaintiffs' claims. The court held that different parties and issues were involved, so that neither doctrine applied. The present claim is a simple tort action, as contrasted to the prior claim for workmen's compensation. It was determined that the pilot could be employed by two masters if by serving the one he did not abandon the other. In any event, Sunset Drive In Theatre was in no way involved in the prior suit and could clearly be proceeded against even if the collateral estoppel doctrine had been upheld. Finnerman v. McCormich, 499 F.2d 212, 215, cert. denied 419 U.S. 1049, 95 S.Ct. 624, 42 L.Ed.2d 644 (1974).

C.A.11

C.A.11, 1991. Cit. in disc., com. (a) cit. in disc. A widow sued the United States under the Federal Tort Claims Act, alleging that two military physicians completing their residencies at a civilian hospital committed medical malpractice resulting in her husband's death. The district court granted summary judgment for the United States. Reversing and remanding, this court held that the government was not conclusively relieved of liability for the negligence of its servants by their service to the hospital, since the factfinder could conclude that the government did not overcome the presumption that a borrowed servant remains in his general employ. This did not preclude a finding that the hospital also was liable for the physicians' actions, because a single act may be done with the purpose of benefiting two masters and both may then be liable for the servant's negligence. Abraham v. U.S., 932 F.2d 900, 903.

C.A.D.C.

C.A.D.C.2018. Quot. in disc.; com. (a) quot. in disc. After the National Labor Relations Board ruled that recycling-plant operator and staffing agency were joint employers for union-representation purposes, operator filed a petition for review. This court granted in part operator's petition, holding, inter alia, that, although the Board correctly stated the common law that the mere presence of an intermediary did not prevent an employer from being the master of its servants, it failed to correctly apply the

facts of the case to the stated law. The court cited Restatement Second of Agency § 226 in explaining that a subordinate could be the servant of two different masters, as long as the subordinate did not abandon his or her service to either master and the two masters both had the right to exercise control over the subordinate; the court also noted that, although the Restatement did not explicitly address joint employers, it was reasonable to refer to § 226 when examining whether both entities had a right to control the subordinate. Browning-Ferris Industries of California, Inc. v. National Labor Relations Board, 911 F.3d 1195, 1211, 1218.

C.A.D.C.2014. Quot. in case quot. in sup. Insurer of a nurse-staffing agency sued hospital and hospital's insurer, among others, alleging that defendants owed a duty under hospital's insurance policy to provide primary insurance coverage in a medical-malpractice case against a nurse assigned by the agency to work at the hospital on a temporary basis. The district court granted partial summary judgment for plaintiff. Affirming, this court held, inter alia, that the nurse qualified as an "employee" of the hospital, and thus was an insured under the hospital's policy, implicating the primary coverage under the policy. Citing Restatement Second of Agency § 226 for support, the court stated that, generally, a person could be the employee of two employers as long as the service to one did not involve abandonment of the service to the other. Interstate Fire & Cas. Co. v. Washington Hosp. Center Corp., 758 F.3d 378, 383.

C.A.D.C.2003. Quot. in case quot. in sup. Employer sought review of the decision and order of the National Labor Relations Board (NLRB) finding that employer committed unfair labor practices by refusing to hire two union organizers and failing to assign work to a third. Denying the petition for review, and granting the NLRB's application for enforcement, the court held, inter alia, that the NLRB properly rejected employer's affirmative defense that the union organizers were properly denied work because of their disabling conflicts, stating that a worker could be an "employee," within the terms of the National Labor Relations Act, even if, at the same time, a union paid that worker to help the union organize the company. Casino Ready Mix, Inc. v. N.L.R.B., 321 F.3d 1190, 1197.

C.A.D.C.1992. Quot. in sup. A journeyman electrician, who was working as a field organizer for a local union, contacted a company about the possibility of using unionized labor for electrical work at a construction project. Electrician subsequently submitted an application on his own behalf, in which he listed the union as his present employer. The NLRB affirmed an ALJ's ruling that company had violated the National Labor Relations Act (NLRA) by failing to hire electrician and by engaging in other discriminatory acts. Denying company's petition for review, this court held that NLRB could reasonably determine that plaintiff or anyone else who was employed simultaneously by a union and a company was an "employee" under the NLRA. In determining that plaintiff's employment ties to the union did not disqualify him from being defendant's employee enjoying full protection of the NLRA, the court noted that a servant could have two masters, but it declined to resolve whether plaintiff's employment relation to the union would subject the company to intolerable risks of disloyalty. Willmar Elec. Service, Inc. v. N.L.R.B., 968 F.2d 1327, 1329-1330, cert. denied 507 U.S. 909, 113 S.Ct. 1252, 122 L.Ed.2d 651 (1993).

C.A.D.C.1977. Cit. in ftn. in sup. People who were arrested while participating in a demonstration at the United States Capitol brought an action against the District of Columbia and the chief of the metropolitan police department, among others. The lower court entered judgment in favor of the arrestees, holding the chief liable for false arrest, malicious prosecution, and violation of the arrestees' First Amendment rights. The District of Columbia was held liable on a respondeat superior theory for all acts for which the chief was liable and also, as custodian, for violation of the arrestees' Eighth Amendment rights. On appeal, the court affirmed the lower court's decision in part and reversed and remanded the case in part. The court held, inter alia, that the chief could be held liable for false arrest and the First Amendment violations, but could not be held liable for malicious prosecution. The court also held that the District of Columbia could be held liable under the doctrine of respondeat superior. The court found the law of agency to be clear that a person who is generally the servant of one master can become a borrowed servant of another, and, if he commits a tort while carrying out the bidding of the borrower, vicarious liability for that tort attaches to the borrower and not to the general master. However, the court noted that there is a presumption that a servant remains in his general employment rather than entering a borrowed employment, and concluded that the chief of the metropolitan police department had not become a borrowed servant of the United States at the time of the arrests to such a degree as to preclude the imposition of liability on the District of Columbia. Dellums v. Powell, 566 F.2d 216, 222, cert. denied 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978), rehear. denied 439 U.S. 886, 99 S.Ct. 234, 58 L.Ed.2d 201 (1978).

S.D.Ala.

S.D.Ala.1978. Cit. in sup. Plaintiff, the South Korean captain of a shrimp trawler, brought this action against the American builder of the vessel, the American loader, and the Nigerian owner for injuries sustained during the loading process. Suit was brought under the Jones Act and United States general maritime law. The court granted the defendant owner's motion to dismiss and denied the builder's and the loader's motions to dismiss. As to the loader, the court noted that by the express terms of the Jones Act, an employer-employee relationship is essential to recovery. The employer need not be the owner or operator of the vessel, and the employment relationship may be implied from the facts. The court held that although the complaint alleged that the Nigerian owner was plaintiff's immediate employer, the complaint also suggested that plaintiff was the borrowed servant of the loader and entitled to assert a Jones Act claim. Kwak Hyung Rok v. Continental Seafoods, Inc., 462 F.Supp. 894, 897, affirmed 614 F.2d 292 (1980).

E.D.Ark.

E.D.Ark.1964. Cit. in sup. Plaintiff is the liability insurer of Superior Forwarding Company. Defendant is the insurer of Russell, who was engaged in the business of leasing trucks with drivers. Russell leased a truck and driver to Superior, and due to the driver's negligence, one of Superior's employees was injured during a loading operation. The employee recovered from Superior in a state court, and the plaintiff, as insurer, paid the judgment. Now plaintiff seeks to recover from the defendant, as a subrogee to Superior's claim. The court held that the truck driver was an employee of both Superior and Russell at the time of the accident. Since Superior was only liable on a theory of respondeat superior, it could proceed against its agent, and plaintiff is subrogated to this same right. Defendant company is liable to plaintiff since its liability is direct, not vicarious, by virtue of a policy it issued to Russell which agreed to liability for permissive users of the vehicle. Transport Ins. Co. v. Manufacturer's Cas. Ins. Co., 226 F.Supp. 251, 255.

D.D.C.

D.D.C.2020. Cit. in case cit. in sup.; com. (a) quot. in sup. Student athlete brought state-court actions against, among others, the United States and private medical practice, alleging, inter alia, that the government was vicariously liable for the medical malpractice of military fellow who, while he was employed by private practice, misdiagnosed her concussion. After consolidation and removal, this court denied in part the government's motion for summary judgment, holding that there was a genuine issue of material fact as to whether private practice was solely and vicariously liable for fellow's malpractice, because a reasonable jury could find that fellow remained the government's employee during his employment with private practice. The court observed that a memorandum of understanding entered into between private practice and the military hospital that employed fellow stated that fellow was an employee of the government at all times during his employment at private practice, and explained that, under Restatement Second of Agency § 226, fellow could be the agent of two, non-joint principals and could impart vicarious liability onto both. Bradley v. National Collegiate Athletic Association, 464 F.Supp.3d 273, 288.

D.D.C.2017. Cit. in case quot. in sup.; com. (a) quot. in sup. Patient sued, among others, United States, private medical practice, and federal employee who worked at practice as a military fellow, alleging that employee failed to provide her with proper medical care. This court denied the government's motion to dismiss based on the borrowed-servant doctrine, holding that questions of fact remained as to whether employee was a borrowed servant of private medical practice, such that practice was solely liable for tortious conduct committed by employee while working under its control and supervision. The court cited Restatement Second of Agency §§ 226 and 227 in explaining that a person could be the employee of two different employers at one time as to one act, if the service to one did not involve the abandonment of service to the other, and that, if the employee acted within the scope of employment for both employers, both could be responsible for an act that was a breach of duty to one or both of them. Bradley v. National Collegiate Athletic Association, 249 F.Supp.3d 149, 165, 166.

N.D.Ill.

N.D.Ill.1997. Cit. in case quot. in disc. Railroad employee who allegedly slipped, fell, and sustained serious injuries while walking across an icy railcar exchange yard sued yard and railroad for negligence under the Federal Employers Liability Act (FELA). Plaintiff maintained that, at the time of the accident, he was employed by both defendants. Defendants moved for summary judgment. Denying the motions, the court held that material factual issues existed as to whether there was any theory under which plaintiff could be considered a dual employee for purposes of FELA. Wallenberg v. Burlington Northern R.R. Co., 974 F.Supp. 660, 665.

S.D.Ind.

S.D.Ind.1996. Quot. and cit. in sup., cit. in disc.,, cit. in case cit. in sup. City police officer who was injured while receiving SWAT instruction at a training center owned by the United States but licensed to the state of Indiana for use by the Indiana National Guard sued federal government pursuant to the Federal Tort Claims Act (FTCA), alleging that it was liable for Guard technicians' negligent maintenance of the site. Government moved for summary judgment, arguing that, under the borrowed-servant doctrine, it was not liable for the tortious conduct of technicians who were considered federal employees for purposes of the FTCA, but who were under the direction of the Indiana National Guard at the time in question. Denying the motion, the court held that liability could be imposed upon both employers where, as here, it was not necessary for the borrowed servant to abandon his service to the lending employer in order to provide service to the borrower. Yeary v. U.S., 921 F.Supp. 549, 555, 557, 558.

D.Kan.

D.Kan.1999. Quot. in case quot. in disc. An employee of an insurance company's special agent sued the insurance company for violations of Title VII and the state statute against discrimination as well as breach of implied contract of employment, alleging pregnancy discrimination. This court granted the insurance company's motion for summary judgment, holding, inter alia, that plaintiff failed to show under the dual employer theory that the insurance company was plaintiff's employer. Plaintiff failed to establish that the insurance company controlled any terms or conditions of her employment. Nixon v. Northwestern Mutual Life Insurance Company, 58 F.Supp.2d 1269, 1275.

E.D.La.

E.D.La.2010. Cit. in case quot. in disc. Temporary worker for independent contractor that contracted with railroad to upgrade its rail yard sued railroad, among others, seeking to recover damages under the Federal Employers' Liability Act (FELA) for injuries he sustained while working on the job site. Granting defendant's motion for partial summary judgment, this court held that plaintiff was not an employee of railroad for purposes of the FELA under a subservant theory of employment, i.e., that he was a subservant of contractor, which was in turn a servant of railroad. The court cited testimony suggesting that railroad did not play a significant supervisory role over, and thus did not control, the work of plaintiff or other employees of contractor; further, the contract between railroad and contractor did not grant railroad the right to supervise or direct contractor's employees. Morris v. Gulf Coast Rail Group, Inc., 829 F.Supp.2d 418, 423.

W.D.La.

W.D.La.2008. Cit. in ftn. Contractor's equipment operator, who was injured after he fell from a truck while working on railroad's track maintenance project, brought personal-injury action under the Federal Employer's Liability Act (FELA) against railroad, alleging that he was employed by both contractor and railroad at the time of the accident. Denying summary judgment for railroad, this court held that, while employee was working with a senior employee of contractor and using contractor's equipment on a contracted task when the incident occurred, genuine issues of material fact remained as to whether employee was a

"borrowed employee" of railroad pursuant to FELA, in light of plaintiff's testimony that at the specific time of his injury, he was acting on a direct order from railroad's supervisor to get water for railroad's track crew out of the back of the truck. Haymon v. Union Pacific R. Co., 547 F.Supp.2d 594, 596.

W.D.La.1967. Cit. in sup. The plaintiff was the chief steward of a crew hired by the defendant boat owner from the plaintiff's employer, a catering company, to supply services to a drilling company. The plaintiff, who was in effect a borrowed servant, was injured while moving frozen meat into the boat's cramped freezer compartment. After the boat owner settled with the plaintiff, he sued the plaintiff's employer for indemnification, which this court granted. Apart from a contractual obligation between the parties that the catering company would be liable for injuries resulting from the operations in the boat's galley, it also appeared that the company was negligent in sending aboard more supplies than could be efficiently handled. Hanks v. California Co., 280 F.Supp. 730, 737.

D.Md.

D.Md.2004. Com. (a) cit. in disc. Diver injured while working on government contract at Naval air station filed action for damages pursuant to the Jones Act against, among others, federal government and government contractor and subcontractor. Denying contractor's motion for summary judgment and granting subcontractor's motion for summary judgment, the court held, inter alia, that only one employer could be liable under the Jones Act, and although diver was formally employed by subcontractor, a reasonable juror could conclude that diver was contractor's "borrowed servant," as contractor exercised control over and directly supervised the day-to-day activities during which diver was injured. Ryan v. U.S., 331 F.Supp.2d 371, 379.

S.D.Miss.

S.D.Miss.1996. Cit. in case quot. in disc. Employee of contractor that was retained to do track-grinding work for railroad brought negligence action against railroad, alleging that it was liable for his back injury under the theory that he was a subservant of railroad's servant or agent. Granting railroad's motion for summary judgment, the court held that contractor, plaintiff's employer, was not a servant or agent of railroad because, among other things, railroad did not control or have the right to control contractor or its workers. Plaintiff did not attempt to prove either that he was a borrowed servant or that he was working for two masters simultaneously when he sustained his injury. Dominics v. Illinois Central Railroad Co., 934 F.Supp. 223, 225.

E.D.N.Y.

E.D.N.Y.2000. Quot. in disc. Seamen brought negligence and Jones Act action against president of their corporate employer and gasoline buyer, among others, seeking recovery for injuries they sustained from a fire while transferring gasoline from employer's vessel into a fuel truck. This court, inter alia, granted president's motion for summary judgment, holding that plaintiffs could not recover for president's negligence except through a suit against their employer under the Jones Act, regardless of whether plaintiffs were actually employed by corporate employer or by an affiliate; either plaintiffs and president were fellow servants, or president was agent of plaintiffs' employer. Jurgens v. Poling Transp. Corp., 113 F.Supp.2d 388, 391, 403.

N.D.N.Y.

N.D.N.Y.1989. Cit. in case quot. in disc. An employee of a general contractor involved in a railroad rehabilitation project was injured when he jumped from a ballast regulator, which he operated, just before it collided with a stone train. The employee sued the railroad under the Federal Employers' Liability Act (FELA) to recover for his personal injuries. Denying the defendant's motion for summary judgment, the district court held that there was substantial evidence of the railroad's supervision and control of the plaintiff's work and that the ballast regulator belonged to the railroad and was being used for railroad purposes at the time of the accident, which could establish the railroad as the plaintiff's "employer." The court stated that a plaintiff can establish his

employment with a rail carrier, subject to FELA, if he acted for two masters simultaneously. Smoot v. New York Susquehanna and Western Ry. Corp., 707 F.Supp. 629, 631.

M.D.N.C.

M.D.N.C.1996. Quot. in disc. Supermarket chain sued television network and two of its employees for unfair trade practices and for breach of fiduciary duty. Employees, who were preparing an expose to be broadcast on one of network's prime-time news programs, accepted positions with two of plaintiff's stores in order to gain access to store areas that were generally off-limits to the public. Once inside, plaintiff alleged, employees wore hidden cameras and microphones and recorded footage that was later used in the expose. Defendants filed a motion to dismiss or, alternatively, for summary judgment. Denying the motion, the court held that plaintiff's facts were sufficient to support a claim for unfair trade practices, and that material factual issues existed as to whether employees, as agents serving both plaintiff and network simultaneously, adequately performed their duties for plaintiff; however, the court refused to find employees liable for breach of fiduciary duty simply because they disclosed information that plaintiff preferred not to have revealed. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F.Supp. 1224, 1229.

S.D.Ohio

S.D.Ohio, 1988. Quot. in case cit. in disc. After a motorist was killed in a collision with a tractor-trailer, the executrix of the decedent's estate sued the lessor and lessee of the tractor-trailer for wrongful death. Holding that, because the driver of the tractor-trailer was within the right of control of the lessor at the time of the accident, the doctrine of respondeat superior applied and that the defendant lessee was vicariously liable for the negligence of the driver, the court entered judgment for damages for the plaintiff and against the defendants, jointly and severally. The court also entered judgment for the lessee against the lessor for indemnification. Laux v. Juillerat, 680 F.Supp. 1131, 1138, affirmed 860 F.2d 1079.

D.Or.

D.Or.1969. Cit. in sup. This was an action wherein the state sought to recover for damages to a bridge which was struck by a barge. The court held that the master's employer was vicariously liable to the state for the master's negligence during towing operations which resulted in the barge striking and damaging the bridge, even though, in operating the tug's controls at the request of the tug owner, the master was also serving the tug owner. State of Oregon v. Tug Go-Getter, 299 F.Supp. 269, 276.

E.D.Pa.

E.D.Pa.1975. Cit. in disc. Plaintiff brought an action against the trustees of a railroad to recover for injuries sustained while moving a gondola railroad car loaded with steel plates. Plaintiff was employed by a stevedore company which was under contract with the railroad to load and unload railroad cars on piers. The court granted defendants' motion for summary judgment on the ground that plaintiff was not an employee of the railroad under the “borrowed servant” doctrine since the railroad did not control and direct plaintiff in the act of moving the gondola, and thus the railroad was not liable for plaintiff's injuries under the Federal Employers' Liability Act. Taras v. Baker, 411 F.Supp. 426, 428.

M.D.Pa.

M.D.Pa.1980. Cit. in sup. The parents of an injured child brought this action against the head of the laboratory at the defendant hospital based upon negligence and breach of warranty. The child's injuries were allegedly caused by a blood disease which was caused by incorrect blood typing by an employee in the laboratory. The individual defendant filed a motion for partial summary judgment on the grounds that he was an employee of the defendant hospital and could not be held liable. However, the court denied the employee's motion because it found that in similar cases concerning surgeons and staff members, the surgeon had been held liable along with the hospital for the negligence of a staff member, finding that if a staff member is the servant of two

masters then both masters could be held liable. Although this case involved a laboratory, the court found that, as a department of the hospital and because the defendant was the supervisor of that department, the defendant's liability depended upon a jury determination as to the degree of control which the defendant had over the negligent employee. Because there was a genuine issue of fact as to the control which the defendant manifested over his employees, the court denied the defendant's motion for partial summary judgment. Lazevnick v. General Hospital of Monroe County, 499 F.Supp. 146, 148, 149.

E.D.Tenn.

E.D.Tenn.2015. Quot. in sup., com. (b) quot. in case quot. in sup. Former maintenance and housekeeping supervisors for rental chalets sued manager of the chalets, owner of the chalets, and employee-leasing company, alleging improper business practices and retaliatory firing in violation of Tennessee statutes. This court granted defendants' motion to dismiss plaintiffs' state-law claims against chalets' owner and employee-leasing company, holding that neither of those defendants employed plaintiffs for purposes of those claims. While Tennessee law on multiple employers and Restatement Second of Agency § 26 indicated that a person could be the servant of more than one employer, and plaintiffs claimed they were servants of all three defendants, they failed to provide sufficient factual allegations showing a master—servant relationship between each plaintiff and each defendant. Merritt v. Mountain Laurel Chalets, Inc., 96 F.Supp.3d 801, 819.

D.V.I.

D.V.I.2002. Quot. in ftn. in sup. Former employee of Virgin Islands police department brought, in part, various common-law tort claims, including defamation and invasion of privacy, against territorial police commissioner, among others. Granting motion of defendant commissioner and United States to substitute United States as defendant and dismissing the common-law tort claims, the court held that, under Virgin Islands law, defendant's allegedly tortious acts, committed during his assignment as territorial police commissioner, were within the scope of his employment with the United States Customs Service. Anderson v. Government of the Virgin Islands, 199 F.Supp.2d 269, 276.

Alaska

Alaska, 1980. Cit. in disc. The plaintiff, an employee of a drilling company, was injured when a ditch caved in. The drilling company had leased a backhoe from the defendant company which had also furnished the backhoe operator who had dug the ditch. The plaintiff sued the defendant for the injuries he had sustained. The lower court granted the defendant's motion for a summary judgment based upon the doctrine of borrowed servants and the plaintiff appealed. This court rejected the borrowed servant rule, that a servant who is loaned by one master to another is regarded as acting for the borrowing master and the loaning master is not held responsible for the servant's negligent acts, and adopted a dual liability rule instead. The court's major objection to the borrowed servant doctrine was that the doctrine focused on whether a master-servant relationship existed rather than focusing on which of the two masters should be liable for the servant's tort. The court held that the question of how to distribute the loss caused by the borrowed servant, as between the lending and borrowing masters, should be determined in accordance with the principles of contribution and indemnity. The court therefore reversed and remanded the lower court's decision. Kastner v. Toombs, 611 P.2d 62, 64.

Cal.

Cal.1982. Cit. in disc., com. (a) cit. in disc. The plaintiff, a shipowner, paid a pilotage fee to the city (the defendant) to have a local pilot provided to guide the ship within the harbor. Due to the pilot's guidance the ship hit and damaged a dock. The plaintiff filed an action for declaratory relief to determine the extent of each party's liability arising out of the collision. The lower court assigned 75 percent of the responsibility to the pilot and 25 percent to the ship's crew. The court further found that the city alone was liable for the negligence of its pilot-employee. Both parties appealed. The city contended that the common law “borrowed servant” doctrine made the shipowner liable for the pilot who committed the tort while carrying out the shipowner's bidding.

The appellate court concluded that the shipowner should be liable for the pilot's torts, because the services of the pilot were for the shipowner's benefit, and the shipowner had limited control over the pilot so that the pilot was not an independent contractor. However, the court further concluded that the city was also liable for the pilot's torts because the pilot was performing the city's business, and the city had control over the pilot. Accordingly, the court concluded that under the doctrine of respondeat superior, both masters would be jointly and severally liable. The case was reversed and remanded to apportion the damages between both parties. Societa Per Azioni v. City of Los Angeles, 31 Cal.3d 446, 183 Cal.Rptr. 51, 59, 645 P.2d 102, 110, certiorari denied 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982).

Cal.App.

Cal.App.1972. Cit. in sup. This action concerned the liability of the general and special employers for injuries that resulted from an accident between an earthmoving tractor and a truck. The earthmover was owned by a farmer who provided the vehicle and an operator to a road construction company. The farmer was paid a daily rental for the rig and he in turn paid the operator an hourly rate for working the vehicle. The contractor directed the operation of the rig. While working on the road construction, the earthmover collided with a truck. A jury held for the truck driver and each of the defendants appealed on the ground that the other was the controlling principal at the time of the accident. This court held that both defendants were the employers of the operator and were simultaneously liable for the negligent act of their employee, because each of the defendants had exercised some control over the employee and both were profiting from the employment. Strait v. Hale Construction Company, 26 Cal.App.3d 941, 103 Cal.Rptr. 487, 493.

Cal.App.1964. Cit. in sup. Plaintiff, an employee of a cement company, sued for injuries sustained while working on a special project at the cement company's plant site under direction of a machinery seller's employee, who was conducting tests for the benefit of the machinery buyer. The court held that a directed verdict was improper because a jury could have found that the cement company and machinery seller were independent contractors or that the machinery buyer had temporarily borrowed the cement company's facilities and employees and that the agency relationship existed between them and the buyer. Housewright v. Pacific Far East Line, Inc., 229 Cal.App. 259, 40 Cal.Rptr. 208, 213.

Conn.

Conn.2018. Quot. in sup., cit. in ftn. Patient brought a medical-malpractice claim against hospital and resident, alleging that resident negligently perforated patient's colon during hernia-repair surgery under the supervision of patient's private physician, who had staff privileges at hospital. After patient settled with physician, the trial court entered judgment on a jury verdict finding that resident and hospital were both liable for resident's negligence. The court of appeals reversed as to hospital on the ground that it did not control resident's performance of the surgery. Reversing that portion of the decision and remanding, this court held that there was sufficient evidence that hospital had a general right to control resident, such that resident was hospital's agent. The court reasoned, in part, that to the extent that hospital's manual suggested that the chief surgical resident who assigned resident to patient's surgery was also working for a separate medical facility, the goals of both facilities appeared to be squarely aligned such that the chief surgical resident could act for both under Restatement Second of Agency §§ 226 and 236. Gagliano v. Advanced Specialty Care, P.C., 189 A.3d 587, 597, 598.

Ga.App.

Ga.App.2021. Quot. in ftn. Worker who slipped and fell in a rail yard and was injured while working for contractor that provided transport services to railway sued railway, alleging, among other things, a claim under the Federal Employers' Liability Act. The trial court granted summary judgment for railway, finding that worker was not railway's employee for purposes of the Act. This court affirmed that portion of the decision, holding, as a matter of law, that contractor, and not railway, was worker's employer under the Act. The court rejected worker's argument that her claim under the Act survived because she was either a borrowed servant under Restatement Second of Agency § 227 or a dual servant under § 226, noting that worker failed to

show that railway had a significant supervisory role over the course of her work. Fross v. Norfolk Southern Railway Company, 863 S.E.2d 714, 718.

Ga.App.1961. Cit. in sup. In wrongful death action against highway contractor, subcontractor and driver of earthmover, and employee of subcontractor, the petition was sufficient to state a cause of action against all three defendants and the statutes governing traffic regulations were applicable to highway contractor's vehicles traveling upon the highway. Ed Smith and Sons, Inc. v. D.T. Mathis, 103 Ga.App. 661, 120 S.E.2d 646, 648, reversed 217 Ga. 354, 122 S.E.2d 97, conformed to 104 Ga.App. 774, 122 S.E.2d 593.

Ill.App.

Ill.App.2005. Cit. in case quot. in disc. Employee of refrigerated railroad-car-service provider brought action under the Federal Employers' Liability Act (FELA) against a railroad-transportation company that used provider's services, claiming, in part, that, because his direct employer was company's servant, he was an employee of company for FELA purposes, and, therefore, company was liable for his carpal-tunnel syndrome that allegedly resulted from the company's negligence. The trial court granted summary judgment for company. Affirming, this court held, inter alia, that employee failed to show that company had any control over the means and manner of employee's performance. The court said that borrowed or dual-servant status arose when two employers shared equally in the direct supervision and control of an employee. Larson v. CSX Trans., Inc., 359 Ill.App.3d 830, 296 Ill.Dec. 283, 835 N.E.2d 138, 142.

Ill.App.1992. Cit. in disc. A laborer supplied by a labor-leasing firm was seriously injured while working at a railroad yard. The laborer sued the railroad for his personal injuries, pursuant to the Federal Employers Liability Act, alleging that he was an employee of the railroad at the time of the injury, thus within the ambit of the statute. The trial court entered summary judgment for defendant. Reversing and remanding, this court held that plaintiff presented evidence raising a factual question as to whether defendant controlled or had the right to control plaintiff's activities to render him an employee of defendant for purposes of the statute. The court noted that there were three methods by which plaintiff could have established his employee status with defendant, although nominally employed by another: the borrowed, dual, and subservant theories. Buccieri v. Illinois Cent. Gulf R.R., 235 Ill.App.3d 191, 176 Ill.Dec. 142, 146, 601 N.E.2d 840, 844.

Ind.App.

Ind.App.1994. Cit. in headnotes, cit. in case cit. in sup. A truck driver sued a manufacturer of engine component parts for negligence after she fell from a crate while checking erratic readings on the truck's external temperature monitoring device. The trial court granted manufacturer summary judgment. Reversing, this court held that manufacturer owed plaintiff a duty of care because, for the purposes of this action, plaintiff was the employee of both manufacturer and the company that supplied manufacturer with drivers. Plaintiff drove the truck to locations dictated by manufacturer, manufacturer supplied plaintiff with a portable printer as a part of the internal monitoring device, and manufacturer instructed plaintiff to periodically check the temperature on the external as well as the internal monitoring devices; furthermore, there was no indication that plaintiff's service to trucking company involved the abandonment of her service to manufacturer. Mannon v. Howmet Transport Service, Inc., 641 N.E.2d 70, 73, rehearing denied 645 N.E.2d 1135 (1995).

Ind.App.1977. Quot. in disc. A motorcyclist, injured in a collision between his motorcycle and a tractor-trailer, brought an action against the owner of the tractor-trailer, the company leasing it from the owner, the lessee under a trip-lease agreement, and the driver. After the trial court entered summary judgment in favor of the owner and the company leasing the tractor-trailer, the plaintiff appealed. The court held that whether both the company and the lessee under the trip lease were the driver's masters according to the lease agreement, and whether the driver was acting within the scope of his employment were genuine issues of material fact which precluded summary judgment. The court also held that the responsibility for a driver's negligence imposed on a lessee by Interstate Commerce Commission regulations does not absolve a lessor, under state law, from responsibility for

negligent acts of his servant, but that where the owner had no right to control the driver at the time of the collision, the owner was not liable to the plaintiff for injuries sustained. Johnson v. Motors Dispatch, Inc., 172 Ind.App. 285, 360 N.E.2d 224, 228.

Ind.App.1966. Quot. in sup. The plaintiff railroad company owned a set of tracks over which the appellee obtained a right to erect power lines. One of plaintiff's employees was electrocuted during the erection when a crane struck the power lines; this court held that the crane operator could be the agent or employee of both parties at the same time as long as service to one does not entail abandonment to the other. Thus, the crane operator was also the employee of the plaintiff which precluded its recovery against the defendant crane rental and public service company pursuant to the parties' agreement. New York Cent. R.R. Co. v. Northern Indiana Public Serv. Co., 221 N.E.2d 442, 446.

Kan.

Kan.1992. Quot. in sup., cit. in disc. Worker injured in grain elevator by employee on assignment from temporary agency sued agency and elevator operator for negligence. The jury returned a verdict for worker after the trial court denied agency's motion for directed verdict. Affirming in part, this court held that enterprise justification for vicarious liability required that agency be held liable unless it relinquished sufficient control over employee to establish abandonment. It held that the trial court did not err in submitting the issue of abandonment to the jury, since borrowed employee could be employee of both operator and agency concurrently where agency did not abandon employee's services to operator. Bright v. Cargill, 251 Kan. 387, 837 P.2d 348, 363, appeal after remand 254 Kan. 853, 869 P.2d 686 (1994).

Kan.1961. Cit. in sup. Where patient brought a malpractice action against a surgeon, an anesthesiologist and a resident physician who administered anesthesia, court held that patient had good claim and cause of action against all since the surgeon had general responsibility for the operation. Voss v. Bridwell, 188 Kan. 643, 364 P.2d 955, 967.

Ky.

Ky.1977. Cit. in sup. A patient brought a malpractice action against a surgeon, a city, and a city hospital for injuries resulting from the failure to remove a scalpel blade from the patient's bladder following an operation to remove a kidney stone. The lower court entered judgment in favor of the patient and apportioned recovery 40% against the operating surgeon and 60% against the hospital and city. After the surgeon paid his share of the damages, the hospital and the city appealed. The hospital contended that the operating room staff were the borrowed servants of the surgeon and that the hospital as their general employer was not liable for their negligence. The court held that where accurate accounting for scalpel blades was of mutual interest to both surgeon and hospital, where such an accounting affected their common purpose in curing the patient, and where the surgeon issued no orders to the operating room staff in regard to accounting for scalpel blades which conflicted with those of the hospital, the operating room staff acted as the servants of both the surgeon and the hospital. The court noted that although the hospital employees are primarily servants of the hospital and not the doctor, the rule of agency law that a servant may serve two masters simultaneously and, at times, only voluntarily, comes into play when interns, nurses, or other hospital personnel assist a surgeon as he treats a patient. Therefore, the court found that the negligence of the operating room staff, inferable upon the application of the doctrine of res ipsa loquitur, in failing to accurately account for scalpel blades was chargeable to both the hospital and the surgeon. The lower court's judgment was affirmed. City of Somerset v. Hart, 549 S.W.2d 814, 816, 817.

La.

La.1998. Quot. in ftn. A construction company iron cutter was struck by a piece of scrap iron that was negligently hooked to a crane by an employee of a temporary services provider who was working that day as an industrial laborer for the construction company. The injured employee sued the temporary services provider for negligence. Trial court entered judgment on jury verdict for defendant and the appellate court affirmed. This court reversed and remanded, holding that where, as here, a general employer was in the business of hiring its employees out under the supervision of others, the general employer remained liable

for the borrowed employees' torts. Accordingly, the trial court erred in instructing the jury that a finding that the negligent temporary employee was the construction company's borrowed employee would relieve defendant of liability for his torts. Morgan v. ABC Manufacturer, 710 So.2d 1077, 1081.

La.1976. Cit. in ftn. and coms. cit. in ftn. Suit by widow of workman for wrongful death that resulted when a truck backed into him as he was walking on the shoulder of the road. The truck created a blind spot directly to its rear when it was backed up. The court found no negligence on the part of the work supervisor for not having a flagman direct the truck as evidence was presented that this practice was not customary and that there was a comparatively slight likelihood of injury resulting from such backing up without a flagman. The truckdriver, however, was found to be negligent for not maintaining an adequate lookout for people who might pass behind him. While deceased was contributorily negligent in walking on the shoulder, the driver was found to have the last clear chance to avoid the accident and this barred his use of such a defense. As the driver was employed by one company and leased to another, plaintiff was allowed to recover from the insurer of the general employer due to an omnibus clause in his policy. The issue of recovery under certain other insurance policies alleged to cover the driver's negligence was remanded for consideration. Guilbeau v. Liberty Mutual Insurance Co., 338 So.2d 600, 604.

Md.

Md.1982. Cit. in sup. For four years, a corporate taxpayer reported its entire income but paid the state only the amount the taxpayer considered due after apportioning. The state's comptroller assessed additional taxes on the ground that the taxpayer's entire income was derived from business conducted within the state. The taxpayer was one of numerous wholly-owned subsidiaries of a vast, multi-state corporation engaged in the retail sale of food and beverages through vending machines. The taxpayer was incorporated solely to benefit the parent and subsidiary branches by enabling them to vicariously purchase goods at wholesale prices. It had no employees of its own, operating solely through parent and branch employees, and could not function without funds from the parent corporation and without the branches as captive customers. Income was created for the taxpaying corporation through a system of internal billing whereby the parent corporation paid for the taxpayer's wholesale orders, taking advantage of a 2% discount for prompt payment. The discount was credited to the taxpayer but did not pass to the branches, which were billed by the taxpayer. The comptroller's assessed increase was affirmed by the state's tax court, but reversed and vacated by the city court. This court affirmed the city court's judgment. Employees of the parent and branches acted as agents for the taxpaying corporation also, and, as such, generated a portion of the taxpayer's income outside the state. Thus apportionment was permitted. Comptroller of Treasury v. Atlantic Supply, 448 A.2d 955, 960.

Mass.

Mass.2001. Quot. in ftn. Patient of a city hospital's emergency room sued company that managed the hospital, alleging negligent treatment by a nurse who was a city employee. Jury awarded plaintiff damages, but trial court granted company's motion for judgment n.o.v. This court affirmed, holding, inter alia, that company was not vicariously liable for nurse's negligence. Although company had right to exercise discretion and supervision over nursing staff's activities, patient-care issues were left to the medical staff and hospital board members, who acted for the city. Hohenleitner v. Quorum Health Resources, Inc., 435 Mass. 424, 434, 758 N.E.2d 616, 624.

Mich.

Mich.1998. Cit. in headnotes, quot. in disc., cit. in ftn., coms. cit. in disc., com. (b) cit. in ftn. When a woman died after she gave birth to her son at a hospital, her estate sued the university medical professor who instructed medical residents and treated patients, alleging that the professor negligently caused the woman's death. Trial court dismissed on the basis of governmental immunity, and the intermediate appellate court affirmed. This court reversed and remanded, holding, inter alia, that irrespective of defendant's performance of a governmental function, a fact issue existed as to whether defendant was simultaneously operating as an agent of the hospital. The court stated that agency rules should be applied to the hospital setting

and that they also applied to individuals such as faculty members providing instruction and treatment in a hospital. Vargo v. Sauer, 457 Mich. 49, 576 N.W.2d 656, 657, 665.

Mich.App.

Mich.App.1968. Quot. in part in conc.-diss. op. in sup. The plaintiffs, husband and wife, sought to recover for injuries received by the plaintiff wife after a department store guard assaulted her on the walks outside of the store when she attempted to avoid him after he accused her of shoplifting in the store against three defendants: (1) the guard; (2) the store's owners; and (3) the protective service for the store, which had hired the guard. The store cross-claimed against the protective service on the grounds that the guard had acted without seeing the plaintiff's alleged larceny in violation of their contract that no arrests should be made unless the guard in question witnessed the transaction. The majority, after affirming a judgment for the plaintiff, also affirmed a judgment adverse to the store on its crossclaim because it found that the store had a nondelegable duty to protect its invitees from intentional torts by the employees of its independent contractor. Another opinion concurred with the judgment for the plaintiff, but rejected the majority's reasoning on the crossclaim. It felt that the liability of the store arose only from the fact that, since the guard was performing services for it without abandoning his services for the protective service, he was their employee as well as that of the service, and that the case should be remanded to determine whether the service had breached its duty to appoint a proper agent-guard. Nash v. Sears, Roebuck & Co., 12 Mich.App. 553, 163 N.W.2d 471, 478.

Mo.App.

Mo.App.1988. Quot. in sup. A decedent's wife and daughter sued a hospital and doctors for wrongful death as a result of their failure to diagnose the decedent's testicular cancer. The jury found for the hospital and against one of the doctors but on retrial found against the hospital also, and the trial court entered judgment against the hospital for damages. Affirming, this court held that the hospital was vicariously liable for the negligence of an employee under the direction and control of an independent physician in charge of a surgical procedure, because the hospital did not relinquish control over the employee. Brickner v. Normandy Osteopathic Hosp., 746 S.W.2d 108, 113.

Mo.App.1987. Cit. in case quot. in disc. An injured worker sued a railroad company with which the plaintiff's employer had contracted to supply services. The plaintiff alleged, inter alia, that at the time of his injury he was working under the direction and control of the defendant and that the defendant had the right to supervise and control his work, thereby making the plaintiff the defendant's employee. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that the defendant was not liable for the plaintiff's injury. The court reasoned that the plaintiff had not demonstrated that he was an employee of the defendant because there was no evidence that the defendant directly controlled or had the right to directly control the plaintiff in the daily performance of his work. Bailey v. Missouri-Kansas-Texas R.R., 732 S.W.2d 248, 250.

Mont.

Mont.1999. Cit. in case quot. in disc. Employees of company that provided repair services to railroad carrier sustained on-the-job injuries; employees sued company and carrier for violations of the Federal Employers Liability Act (FELA). Defendants argued that, because company was not a railroad, plaintiffs could not recover FELA benefits against it, and because carrier was not their employer, plaintiffs were not entitled to damages from it. The trial court entered judgment for defendants. Reversing, this court held that the evidence supported the finding that a master-servant relationship existed between defendants, that plaintiffs were subservants of a company that was a servant of a railroad, and that plaintiffs could invoke FELA's protections. Watts v. Montana Rail Link, Inc., 975 P.2d 283, 285.

N.H.

N.H.1979. Cit. in disc. A commercial apple grower brought suit against the owner of an airplane and its pilot to recover for the destruction of eleven trees and damage to four others, arising from the pilot's negligently failing to engage the auxiliary fuel tanks in a timely manner and crash landing the plane in the plaintiff's orchard. The lower court held the owner liable and, on appeal, the court affirmed. The court held that where the owner of the airplane controlled its destination, and told the pilot what to do with the plane at the conclusion of the flight, the owner retained elements of control, and a master-servant relationship was created rather than a bailment. As such, the negligent act of the pilot which occurred in the context of performance of an act for the owner gave rise to the owner's liability. Elwood v. Bolte, 119 N.H. 508, 403 A.2d 869, 871.

N.J.Super.

N.J.Super.1976. Cit. in sup. An employee of a trucking company, which was a wholly owned subsidiary of defendant Penn Central Transportation Company, brought suit against Penn Central for negligence under the Federal Employers' Liability Act. The trial court dismissed the action, and this court affirmed, but the United States Supreme Court vacated the judgment and remanded for consideration in light of a similar United States case. That case noted that the requirement for recovery under the Act of a showing of a master servant relationship between a plaintiff and a firm could be met by a showing that plaintiff was the servant of a company which was, in turn, a servant of defendant. The court here held that there was sufficient evidence in the record for the jury to conclude that the subsidiary was organized for and continued to serve only the interests of the Penn Central Railroad, so that plaintiff might be found to be a subservant of Penn Central, and remanded for a new trial. Pelliccioni v. Schuyler Packing Company, 140 N.J.Super. 190, 356 A.2d 4, 8.

Ohio

Ohio, 2013. Com. (a) quot. in case quot. in sup. Estate of patient who died from an undiagnosed cerebral hemorrhage brought a wrongful-death action, inter alia, against physician/faculty member of state university's medical school who treated him at university's nonprofit medical clinic. The trial court found that it lacked jurisdiction over the action because physician, as a state employee, was immune from personal liability in a civil suit under Ohio law; the court of appeals affirmed. Affirming, this court held that physician was entitled to immunity even though his allegedly negligent care was rendered outside the presence of a medical student or resident and even though university organized its medical clinic as a private nonprofit corporation. The court reasoned that physician's contractual duties as a state-university employee included providing clinical care to patients, whether or not he was actively engaged in teaching at the time, and thus, in treating patient, he served the university's interests and acted within the scope of his employment with the state. Ries v. Ohio State Univ. Med. Ctr., 137 Ohio St.3d 151, 157, 2013-Ohio-4545, 998 N.E.2d 461, 467.

Ohio

Ohio, 2010. Quot. in sup., com. (a) quot. in sup. Patient brought a medical-malpractice action against medical-services corporation and its physician, who was also employed by a state hospital. The trial court dismissed the claims against physician on the ground that he was a state employee, and stayed the respondeat superior claim against corporation pending a ruling from the court of claims on whether physician was acting within the scope of his state employment during plaintiff's treatment. On remand, the court of appeals granted plaintiff's writ of procedendo to compel the trial court to proceed to judgment on the respondeat superior claim against corporation. Affirming, this court held that an employee's immunity from liability was no shield to the employer's liability for employee's acts under the doctrine of respondeat superior. The court noted, moreover, that physician in this case might have been acting as an agent of both the state hospital and his private employer while he was treating plaintiff. State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas, 126 Ohio St.3d 198, 201, 2010-Ohio-3299, 931 N.E.2d 1082, 1087.

Ohio, 1984. Cit. in disc. Plaintiff was employed by a trucking company that was a wholly-owned subsidiary of the defendant railroad. Plaintiff was seriously injured while loading trailer vans into a car owned by the defendant and brought this action under

the Federal Employers' Liability Act (FELA). The trial court granted summary judgment for the defendant, and the appellate court affirmed. This court affirmed as well, holding that the railroad was not liable under the FELA for injuries sustained by an employee of its wholly-owned subsidiary when the railroad did not possess the right to control the employee's actions, but did control other aspects of the subsidiary's business. Plaintiff did not come within the subservant category of liability under the FELA because, although the subsidiary was a servant of the railroad, plaintiff was not subject to the control of both the subsidiary and the railroad. Sullivan v. Consolidated Rail Corp., 9 Ohio St.3d 105, 459 N.E.2d 513, 515, certiorari dismissed 467 U.S. 1022, 104 S.Ct. 2671, 81 L.Ed.2d 886 (1984).

Or.

Or.1971. Cit. in op. of related case disc. in ftn. This was a declaratory judgment proceeding brought by a tug owner and its employee seeking a declaration that they were covered as additional insureds under the liability provisions of marine insurance policies issued to the defendant towing company by the defendant insurers. The plaintiffs claimed coverage for their liability resulting from the collision of a barge while under tow, with a bridge owned by the State of Oregon. On appeal from a lower court decision that the plaintiffs were not covered, the court held that the evidence supported the findings that, with respect to the insurance policy provisions to the effect that the liability of operators was covered, the term “operator” usually referred to a proprietary interest in the vessel and that neither plaintiff had such an interest. May v. Chicago Insurance Company, 260 Or. 285, 490 P.2d 150, 152.

Or.App.

Or.App.1982. Cit. in ftn. The plaintiff, a general contractor, was found liable in an earlier action to a subcontractor's employee for injuries the employee sustained at the work site. The plaintiff subsequently filed an action for indemnity against the construction consulting firm that had been retained to assist in the coordination of the various subcontractors and to ensure safety on the project in all areas not under the control of the subcontractors. The defendant joined one of the subcontractors as a third-party defendant. That subcontractor subsequently filed a complaint for indemnity against the defendant consulting firm for attorney's fees incurred in the previous litigation. Both defendants moved for summary judgment and the lower court concluded that the subcontractor was entitled to indemnity as a matter of law. The appellate court reversed and remanded, concluding that genuine issues of material fact remained as to whether the subcontractor had been negligent. Portland Gen. Elec. v. Const. Consulting, 57 Or.App. 116, 643 P.2d 1334, 1338.

Pa.

Pa.1978. Cit. in trial court's op. quot. in sup. The plaintiff was a file clerk in the office of the city's board of revision of taxes involved in the collection of taxes for the school district. Alleging wrongful dismissal, plaintiff brought this action in mandamus to compel the school district to reinstate her as its employee and compensate her for lost wages. Plaintiff's motion for summary judgment was granted but reversed on appeal. The Supreme Court vacated and remanded, holding, inter alia, that the evidence supported a finding that plaintiff was an employee of the district which had the right and power to control her employment whether or not that control had been exercised, and that plaintiff, having been dismissed without notice of cause, had a right to be reinstated. Coleman v. Board of Educ. of School Dist., Etc., 477 Pa. 414, 383 A.2d 1275, 1279.

Pa.1974. Com. (a) quot. in part in sup. and cit. in diss. op. in sup. Plaintiff brought suit against a surgeon and a hospital to recover for injuries sustained in the failure to remove a Kelly clamp from plaintiff's abdomen at the conclusion of a colectomy operation. Plaintiff appealed from a judgment for the hospital. The issue was whether the trial court erred in ruling as a matter of law that the appellee-hospital could not be liable for the negligence of its personnel during an operation. In reversing and ordering a new trial as to the hospital's liability, the court decided that a person may be at the same time the agent both of an operating surgeon and of a hospital, even though the employment is not joint. The court concluded that the plaintiff, having

secured a verdict against one of two alleged tortfeasors, should not be denied the verdict because a new trial is granted as to the other alleged tortfeasor. Tonsic v. Wagner, 329 A.2d 497, 500, 501.

Pa.Super.

Pa.Super.1986. Quot. in sup. A woman injured in a car collision sued a truck driver and his employers for damages. The trial court found for the woman and awarded damages. On appeal, this court affirmed, holding that the truck driver had more than one employer at the time of the accident. Not only could a person be the servant of two masters, the court reasoned, but both of those masters could be held liable for the conduct of the servant under appropriate circumstances. Mineo v. Tancini, 349 Pa.Super. 115, 502 A.2d 1300, 1306, appeal denied 515 Pa. 614, 530 A.2d 868 (1987).

Pa.Super.1975. Cit. in sup. Action by patient against a surgeon and a hospital for damages incurred when a hemostat was left in the plaintiff at the conclusion of an operation. The trial court entered judgment on a jury verdict for plaintiff against the surgeon, and the surgeon appealed alleging the trial court's instructions prevented the jury from finding the hospital jointly liable. In reversing and remanding with instructions, the court stated that the hospital exercised sufficient control over its personnel to be found negligent under respondeat superior, and that the trial court should have allowed the jury to determine if the hospital were negligent in its own right. Bilonoha v. Zubritzky, 233 Pa.Super. 136, 336 A.2d 351, 354.

Pa.Super.1972. Quot. and com. quot. in diss. op. but not fol. The plaintiff patient brought this action against defendant surgeon and defendant hospital where an operation took place in which a clamp was left in plaintiff's abdomen. On plaintiff's appeal from a denial of his motion for a new trial against defendant hospital, the court affirmed the denial. The court held that the surgeon, as the “Captain of the ship,” was solely liable for the negligence of any of the other persons in the operating room, even if they were employed by the hospital. The hospital could be held liable only if plaintiff proved it negligent in failing to establish institutional guidelines requiring an instrument count. Tonsic v. Wagner, 220 Pa.Super. 468, 289 A.2d 138, 142, 143.

R.I.

R.I.1982. Com. (a) cit. in sup. A leasing corporation leased a certain machine to a construction company. The leasing corporation's president was hired by the construction company to operate the machine. When the machine malfunctioned, a worker was injured and brought an action against the leasing corporation on the ground that the machine operator was its agent. The trial court instructed the jury that a finding that the operator was acting as an employee of the construction company would not preclude a concurrent finding that he was also acting as president of the defendant leasing company, and that the leasing company would be liable for the operator's alleged negligence if the jury found by a preponderance of the evidence that the operator functioned dually for the construction company and the leasing company. The jury returned a verdict for the plaintiff, and the defendant appealed, charging that the jury instructions required a finding that the operator was acting as the defendant's agent. The court rejected this contention and affirmed the judgment for the plaintiff. The court noted that the charge was an accurate statement of the law of agency, as one person may serve simultaneously as the agent of two independent principles. Brimbau v. Ausdale Equipment Rental Corp., _R.I. _, 440 A.2d 1292, 1296.

Tenn.

Tenn.2002. Quot. in sup., coms. (a) and (b) quot. in case quot. in sup. Mother whose son sustained neurological damage during surgery sued private hospital, alleging that defendant was vicariously liable under respondeat superior for the negligence of state-employed physician residents who performed the surgery. Trial court denied defendant's motion for partial summary judgment, and the court of appeal affirmed. Affirming, this court held that a physician resident could be the agent of both the state and a private hospital, and thus a private hospital could be vicariously liable for the negligence of a state-employed physician resident acting as its agent. Here, a fact issue existed as to whether the physician residents were acting as defendant's agents when they operated on plaintiff's son. Johnson v. LeBonheur Children's Medical Center, 74 S.W.3d 338, 692.

Tenn.2000. Quot. in disc., com. (a) quot. in disc. After police officers and a drug-store security guard shot and killed a man in his apartment while trying to execute a bench warrant for his arrest for trespassing at the store, victim's heirs brought a wrongful-death action against the store, among others. Trial court granted store's motion to dismiss, and the appellate court affirmed. This court reversed and remanded, holding that plaintiffs had a viable claim against store based on a tort committed by the guard while acting within the course and scope of his employment with store. Guard was acting under store's control, store employed guard to take advantage of his ability to make arrests, and guard's actions were taken with store's actual knowledge and consent and primarily for store's benefit. White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 724.

Tex.

Tex.2021. Cit. in case cit. in sup. After applying for workers' compensation with his employer, temporary worker sued, among others, waste-management company that worker was temporarily assigned to by his employer, alleging that the negligence of defendant's truck driver resulted in a truck reversing and injuring plaintiff. The trial court granted defendant's motion for summary judgment. The court of appeals reversed and remanded. This court reversed and rendered, holding that workers' compensation statutes barred plaintiff's tort-law claims against defendant, because the workers' compensation benefits was plaintiff's exclusive remedy, and defendant was plaintiff's joint employer. The court observed that Texas normally did not recognize dual employment under the common law set forth by Restatement Second of Agency § 226, but caselaw established that a worker could have two or more employers for the purpose of workers' compensation statutes. Waste Management of Texas, Inc. v. Stevenson, 622 S.W.3d 273, 281.

Tex.2007. Quot. in ftn. to conc. and diss. op. Clients who had agreed in their investment-account agreements to arbitrate any claims against broker, but not against broker's employee or its trust-and insurance-company affiliates, sued employee and affiliates for affiliates' alleged self-dealing in violation of state law. The trial court denied defendants' motion to stay the litigation and compel arbitration, and the court of appeals denied mandamus relief. Conditionally granting the writ of mandamus, this court held that, because plaintiffs' claims against employee were in substance against broker, those claims had to be arbitrated, but because there was no contract theory that tied affiliates to the same agreement, the claims against affiliates did not. A concurring and dissenting opinion argued that, since plaintiffs sued employee in his separate role as a licensed insurance agent acting on behalf of insurance affiliate, rather than as broker's employee, and disclaimed any liability on the part of broker, plaintiffs should have been allowed to sue him separately in that role, as well as the affiliates. In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185, 199.

Tex.App.

Tex.App.2017. Cit. in sup.; com. (a) quot. in sup. Family members of unauthorized truck driver and passenger who were killed in a commercial-trucking accident caused by driver's inattention brought a wrongful-death action against truck owner, owner's manager, and manager's trucking company that had engaged in unauthorized use of manager's employer's trucks and drivers, asserting, inter alia, that defendants were vicariously liable for decedents' actions. The trial court entered judgment on a jury verdict for plaintiffs. This court reversed, holding that defendants were not vicariously liable, because, while passenger was acting within the course and scope of his employment with both truck owner and trucking company at the time of the accident, passenger's acts in allowing unauthorized truck driver to drive were too remote to find that passenger proximately caused the accident. The court cited Restatement Second of Agency § 226 for the joint-employer doctrine, explaining that, despite the tension between passenger's duties to owner and his unauthorized service for manager's company, he was acting with the scope of his employment for both. Moore Freight Services, Inc. v. Munoz, 545 S.W.3d 85, 104.

Tex.App.2015. Cit. in sup., quot. in case quot. in sup. After patient's radiological study was misread by a resident at a hospital such that child-protective services were contacted, patient's parents brought a negligence claim against state-university professor who supervised the resident while working at the hospital pursuant to an agreement between the hospital and the university. The trial court denied defendant's motion for summary judgment. This court reversed in part and rendered, holding that, under the

Texas Tort Claims Act, defendant was entitled to dismissal of the negligence claim, because he was a governmental employee within the meaning of the Act. Relying on Restatement Second of Agency § 226, the court explained that a person could function as an employee of two employers at the same time and as to the same conduct, and determined that plaintiffs failed to raise a genuine issue of material fact as to whether the hospital controlled defendant to the exclusion of the university's right to control him. Powell v. Knipp, 479 S.W.3d 394, 401.

Tex.App.2003. Quot. and cit. in sup., cit. in ftn. Employee who sustained serious arm injury while working for employer on conveyor belt after co-worker allegedly failed to turn belt off sued distributor that shared same facility and was owned by same company as employer, asserting claims for negligence and gross negligence based on distributor's legal duties as employer. Trial court granted directed verdict for distributor. Affirming, this court held, inter alia, that Restatement Second of Agency § 226, providing that a person may serve two masters at once as to one act, applied only when a third party asserted vicarious liability against two or more employers. Coronado v. Schoenmann Produce Co., 99 S.W.3d 741, 747, 748, 755.

Tex.App.2002. Cit. and quot. in disc. Employee of a temporary employment agency who was injured while performing manual labor for one of the agency's clients sued the agency and the client for negligence. Trial court granted defendants summary judgment on the ground that defendants were joint employers, and that plaintiff's exclusive remedy was workers' compensation. This court affirmed, concluding that plaintiff could not recover for personal injuries against client. The court held, inter alia, that because the contract did not negate client's right to control the leased employees, it did not raise a fact question on the issue of dual employment. Garza v. Excel Logistics, Inc., 100 S.W.3d 280, 284, judgment affirmed in part, reversed in part 161 S.W.3d 473 (Tex.2005).

Tex.App.2001. Cit. in case quot. in sup., quot. in sup. Injured employee of limited liability company (LLC) brought negligence action against members of LLC, one of which acted as employer's management contractor. The trial court granted members summary judgment. Affirming in part, the appellate court held, inter alia, that evidence established that management contractor, pursuant to management agreement, had right to control details of plaintiff's work and thus had “co-employer” status under exclusive remedy provision of Workers' Compensation Act. Ingalls v. Standard Gypsum, L.L.C., 70 S.W.3d 252, 256, 258.

Tex.App.1998. Quot. in disc., cit. generally in case cit. but dist. After employee of staff-leasing contractor was injured while working on the premises of a company that had leased his services, he sued the company for negligence. The trial court granted summary judgment for defendant. Reversing and remanding, this court held, inter alia, that a genuine issue of material fact as to whether plaintiff was an employee of staff-leasing contractor alone, as provided by contract, or of contractor and defendant jointly precluded summary judgment for defendant under the dual or joint employer theory. Hoffman v. Trinity Industries, Inc., 979 S.W.2d 88, 90.

Tex.App.1996. Cit. in case quot. in disc. Individual was killed when he was struck by a car being test-driven by a mechanic who worked for an automobile dealer; his estate brought wrongful death action against the manufacturer of the automobile, alleging that manufacturer was vicariously liable for the harm sustained because mechanic was its servant, and because manufacturer was engaged in a joint enterprise with dealer. The trial court granted defendant's motion for summary judgment. Affirming, this court held that mechanic was not a servant of defendant, since defendant had no right to control mechanic's work. Plaintiff's joint-enterprise claim failed for the same reason. Finally, plaintiff was unable to establish a tort duty based on the franchise agreement executed by defendant and dealer. Ely v. General Motors Corp., 927 S.W.2d 774, 777.

Tex.App.1994. Cit. in sup. and in headnote. The family of a motorist injured when struck by a school bus driven by a teacher who also was employed as a school bus driver by the county school transportation department sued the school district for negligence. This court, reversing the trial court's entry of a take-nothing summary judgment and remanding, held that a fact issue existed over whether the school district and transportation department jointly controlled operation of the school bus, so that the teacher's alleged negligence in operating the bus could be imputed to the school district. White v. Liberty Eylau School Dist., 880 S.W.2d 156, 157, 159, appeal after remand 920 S.W.2d 809 (1996).

Tex.App.1993. Cit. in disc. The employee of a brush-clearing subcontractor that was hired by a cable-laying contractor to clear a railroad right-of-way leased to a telephone company for laying of cable sued the railroad under FELA for injuries suffered when he attempted to lift a railroad crosstie. Reversing an award of damages to the employee and rendering, this court held, inter alia, that the railroad could not be seen as the plaintiff's employer. Neither, said the court, was the plaintiff a borrowed servant, a dual servant, or a subservant of the railroad, as there was no evidence that the railroad exercised any control over the plaintiff other than that necessary to ensure the integrity of its own transportation functions. Missouri Pacific R. Co. v. Buenrostro, 853 S.W.2d 66, 71.

Tex.App.1982. Cit. in disc. A service station customer brought an action against the owner of the station, a security guard, and the guard's employer after the security guard shot the customer in the belief that he had robbed or was attempting to rob a cashier. The jury found that the security guard was the borrowed employee of the owner on loan from his employer. The trial court awarded damages against the guard, the employer, and the owner. This court affirmed. In response to the employer's argument that if the guard acted as the owner's employee, he could not also act as the employee of the employer, the court stated that there was evidence showing that both the employer and the owner exercised joint control over the security guard. The dissent argued that no damages should have been awarded against the owner of the service station because there was insufficient evidence, both legally and factually, to support a finding that the security guard was the borrowed employee of the owner. Gulf Oil Corporation v. Williams, 642 S.W.2d 270, 272.

Tex.Civ.App.

Tex.Civ.App.1975. Quot. in sup. The plaintiff patient brought an action against the defendant surgeon and the defendant hospital for damages resulting from a lapse sponge that was left in her abdomen when an incision was closed following surgery. The jury found that the assisting nurses were negligent in failing to make a correct lap pack count, and that the surgeon was not negligent in failing to see the sponge when he looked into the patient's abdomen. The trial court accordingly entered judgment in favor of the plaintiff against the hospital alone. The hospital appealed, claiming that the surgeon had such control over the nurses in the operating room as to render him liable for their negligence. The plaintiff also sought a judgment against the surgeon by cross point. The appellate court held that the surgeon was liable for the negligence of the nurses, but that his liability did not relieve the hospital of its liability. The court held that the nurses, who were paid and instructed by the hospital, were the servants of both the surgeon and the hospital in making the sponge count, and both masters were liable for their negligence. Worley Hospital, Inc. v. Caldwell, 529 S.W.2d 639, 642, granted.

Wash.

Wash.1966. Cit. in sup. Plaintiff, an employee of a pile driving company, was injured due to the operation of a crane which had been leased, along with defendant operator, from the defendant company. Whereas the plaintiff asserted his claim based on respondeat superior, the defendant company claimed that the operator was a “loaned servant,” thus relieving it of liability. In affirming the dismissal of the plaintiff's claim, the court held that the issue of the operator as a “loaned servant” was a proper one for the jury. Nyman v. MacRae Bros. Constr. Co., 69 Wash.2d 285, 418 P.2d 253, 255.

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