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ARTICLE

WHEN AGENTS ATTACK: JUDICIAL MISINTERPRETATION OF VICARIOUS LIABILITY UNDER "AIDED IN ACCOMPLISHING THE TORT BY THE EXISTENCE OF THE AGENCY RELATION" AND RESTATEMENT 3RD'S FAILURE TO PROPERLY "RESTATE" THE ILL-FATED SECTION 219(2)(d) PROVISION

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I think I need a root canal. I definitely need a long, slow root canal.
– *LITTLE SHOP OF HORRORS*, Arthur Denton (played by Bill Murray).[1]

I. INTRODUCTION

The sharp, stinging, sometimes throbbing, chewing pain reminds you of the high price you must now pay for the pleasure of that cinnamon hard candy. Today the pain is bearable; who knows what tomorrow brings? You simply cannot let such problems interfere with your trial preparation.

Sitting in the dentist's chair is never comfortable, even though the chair is well cushioned, it reclines, and there is a television mounted in front of you. The weatherman predicts a pleasant day, but he is there in the studio, and you are here in the torture chair. The dentist appears, seeming to confirm your root canal fears. "Just give me something for the pain so I can think about this," you say to yourself, as if there were any other choice but to accept your dental fate. Your regular dentist is on vacation this week. Convinced it would be impossible to wait for his return, you feel lucky to have found anyone at all to take you on such short notice.

"You may feel a little pinch, a little sting, as I numb the area here," the dentist says as he raises the syringe to your mouth. You don't know what kind of painkiller is in the syringe, but, whatever it is, it cannot possibly be enough to calm your fear; enough to dry your sweating palms; enough to relax your body, tense from the feeling of needles driven into your lower jaw. "A little pinch?" you think as the needle pierces your gum line and again in the back of your jaw. "No pain, no gain; now that is just stupid," you think to yourself.

"There. Let's let that work, and I'll be back to start," the dentist concludes as he walks away to other patients. As the pain subsides, your body remains tense, and your palms remain sweaty. You begin to realize you recognize this dentist, but you do not know from where. The dentist practices with other dentists here as part of an incorporated professional group. You could not get in to see the dentist your law partner recommended, but this one was available. "I know I know this guy," you

1. LITTLE SHOP OF HORRORS (The Geffen Company 1986) (quoting the masochistic patient, Arthur Denton (played by Bill Murray), speaking to the sadistic dentist, Orin Scrivello, D.D.S. (played by Steve Martin)).

continue to think as the newscast takes control of your thoughts until the dentist returns.

Without saying a word, the dentist begins preparing the drill. As he reaches toward your mouth, you instinctively open. Without even a "how do you feel?" he begins, first with the high-speed drill that lifts the foul aroma of burning teeth. It is the slow-moving, grinding drill you can't stand; the one that vibrates and shakes your skull as if the wings on the headrest were there to keep your head attached to your neck. As you begin to think you'll live through it, a bolt of pain sears through your jaw, causing your body to convulse. "That's okay; we're into the nerve now. It might hurt a little, but we have to clean out the root," the dentist calmly comments.

"No, wait," you try to say, but with your mouth open and the drill spinning, you only hear a caveman's grunt of "aoh aee." You'd like to pry your hands from the armrests, but your hands have strapped themselves in and do not obey.

When the dentist stops for a moment to suction out the debris, you take the opportunity to comment about the pain and ask for another shot. Your body relaxes a moment, and you feel your muscles twitching inside your now-muggy clothes. "We can't completely numb the root; it will just hurt. We could have sedated you, but we're almost done now." Before you can protest, he reaches for your mouth, and your hands reach for and tear into the armrests.

Like one of Pavlov's dogs, you take the sound of the slowing drill to relax a moment, breathe, and bat the moisture from your eyes. It is not until the dentist moves from the drill to applying sealant and filling to your tooth that your hands loosen their vice-like grip on the armrests. You are relieved when you hear the dentist say, with a tap on your shoulder, "That's it."

"'That's it.'" The dentist's statement echoes in your mind as your brain begins returning to normal function. "That *is* it; that's how I know this guy." You are appalled that you did not recognize him sooner. He is your client's husband; no, not just your client's husband but your client's poorer *ex*-husband, thanks to you.

You return to your regular dentist the following week with continuing pain. A review of your prior x-rays discloses that your pain was not attributable to an abscessed tooth but to an inflammation in the

tooth's periodontal ligaments,[2] likely caused by grinding your teeth and clenching your jaw. Your jaw tightens further—you did not need last week's root canal. Someone, everyone, is going to pay.[3]

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If the dentist negligently misread the x-rays in deciding to give you a root canal, vicarious liability clearly attaches to the professional corporation employing the dentist because the dentist acted within the scope of employment as an agent for the corporation.[4] If the dentist gave you the unneeded root canal in retribution for representing his ex-wife, the employing corporation is also likely vicariously liable because you reasonably believed the dentist acted with apparent authority.[5]

While the dentist's assault seems to fit nicely in either actual-authority or apparent-authority doctrines, what if the dentist assaults you in an otherwise not-so-easily-categorized fashion? Suppose instead of the vindictive dentist you waited to visit your regular dentist who recognized the periodontal ligament inflammation and additionally determined that your teeth grinding caused temporomandibular joint (TMJ) disorder (TMD).[6] Your dentist fits you for the traditionally prescribed mouthpiece to stop the nighttime grinding.[7] In addition, your regular dentist

2. The periodontal ligament is "[t]he connective tissue that surrounds the tooth . . . and connects the tooth to the jawbone, holding [the tooth] in place." *Glossary of Dental Health Terms*, WEBMD, http://www.webmd.com/oral-health/dental-health-glossary ?page=6 (last visited June 14, 2012).

3. This account and its participants are fictional, and any similarity to any persons is purely coincidental, fortunately.

4. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). While the "aided in accomplishing the tort by the existence of the agency relation" of § 219(2)(d) is the focus of this paper, *id.*, it only makes sense to begin somewhat cursorily with acts within the scope of employment and apparent authority. This paper focuses on the § 219(2)(d) provision with respect to an agent's intentional physical torts against third parties; however, the paper intentionally does not address circumstances where the injured party may also be an agent of the principal, *id.* § 359B(a), where liability may not attach because of sovereign immunity, *id.* § 217, or where the principal is independently liable because of the principal's action or inaction, *id.* § 218. Finally, this paper does not address the agent's liability for the agent's own tort. *Id.* § 343.

5. *See id.* § 27.

6. *Temporomandibular Disorders (TMD)*, WEBMD, http://www.webmd.com/oral-health/guide/temporomandibular-disorders (last visited June 14, 2012). The TMJ is the joint connecting your jaw to your skull. *Id.* Clenching and grinding your teeth can cause injury to the muscles and ligaments that hold the TMJ in place, resulting in TMD. *Id.*

7. See *id.* for a brief discussion of splints and night guards used to prevent grinding (browse to page 2 near bottom of webpage).

prescribes you dental chair massage therapy that includes the dentist massaging not only your jaw and neck but also your chest or breasts under your T-shirt or bra.[8] While massaging your pectoral muscles might—somehow—seem remotely related to easing TMJ stress, consider whether your dentist stroking your inner thighs is logically part of treatment in adjusting your braces.[9] Suppose instead of sexually assaulting you, your dentist strikes you in the head with his hand or a dental tool to keep you quiet while he drills.[10]

8. A Yolo County, California, superior court judge sentenced Mark Kevin Anderson to six years in prison after a jury convicted Dr. Anderson of eleven felony charges and one misdemeanor count of sexual battery on his female patients for "groping their breasts during dental examinations." Lynsey Paulo, *Dentist Gets 6 Years For Sexual Battery*, KCRA (Apr. 24, 2009), http://www.kcra.com/news/19272195/detail.html (on file with the Oklahoma City University Law Review). Dr. Anderson fondled his patients' breasts under the guise of massaging their pectoral muscles to relieve tension affecting their TMJ. *Embattled Calif. Dentist Says Breast Rubs Necessary*, FOX NEWS (Oct. 15, 2007), http://www.foxnews.com/story/0,2933,301710,00.html. In a police-recorded telephone conversation transcript with the victim's name redacted, Dr. Anderson expounded upon his intent:

> C[redacted] B.: What was your intention then by doing that? I mean, you know that --
>
> Dr. Mark Anderson: M -- massaging your sore muscles. (Indiscernible) --
>
> C[redacted] B.: In my breasts?
>
> Dr. Mark Anderson: Under the breasts. That's where your muscles are. But I never wanted it to seem like I was doing something worse or beyond that.
>
> You have muscles all over your chest. That's where they are. And so I try and push things out of the way so I can massage the muscles -- that you said were sore. And I just -- I -- I -- I must have done it wrong.

Documents Offer Insight into Case of Accused Dentist, KCRA (Oct. 17, 2007), http://www.kcra.com/news/14358287/detail.html (relevant language on page 8 of the telephone transcript) (redaction in original) (on file with the Oklahoma City University Law Review). The author is unaware of any news stories reflecting whether Dr. Anderson massaged the pectoral muscles of his male patients.

9. A Howard County, Maryland, circuit court judge sentenced Dr. Evan C. DePadua to five years' probation after conviction "for misdemeanor assault and fourth-degree sexual offense." Lisa Goldberg, *Dentist is Sentenced to 5 Years' Probation*, THE SUN (Baltimore), Nov. 2, 2002, at 2B. During a visit to adjust the twenty-two-year-old woman's braces, Dr. DePadua stated that he needed to "perform a jaw test and needed to 'check the muscles of her thighs, stomach, arms, neck and jaw.'" Jennifer Vick, *Dentist Charged with Sex Offense*, HOWARD COUNTY TIMES, Jan. 31, 2002, at 6. When he could not pull down her pants with her sedated and seated, Dr. DePadua had the patient stand against the wall under the effects of nitrous oxide, pulled down her pants, and rubbed her "inner thighs 'in an up and down fashion.'" *Id.*

10. A Carroll County, Georgia, grand jury indicted Dr. Gordon Trent Austin of

In such instances, the dentist's employer is not liable for the sexual assault based upon agency principles of actual authority because the professional corporation did not expressly authorize your dentist's assault.[11] Because the dentist fondled you with intent to satisfy his own base desires, his lack of intent to serve his employer will place such TMD treatment outside the scope of employment. Unless the sign on the door also identified your dentist as a massage therapist, it may be difficult for you to show that you had a reasonable belief that the dentist acted with apparent authority.

Suppose instead of your dentist asserting that a massage eased tension on your TMJ, your dentist, without warning or explanation, fondles you with his left hand while drilling on your tooth with his right hand. Or, worse, your after-hours emergency appointment places you in the office alone with the dentist, who then rapes you.[12]

These introductory examples bring into focus the somewhat degrading degrees of a principal's vicarious liability: from what appears to be fairly clear vicarious liability when the dentist erroneously provides a root canal, to what should be no vicarious liability when the dentist rapes his client. There can be little doubt that when the dentist assaults you, wholly unrelated to his dental obligations, he does so without any intent to serve the principal and outside the scope of employment. Further, you likely could not have a reasonable belief that your dentist's sexual assault was an act of his employer, a predicate for vicarious liability to attach under doctrines of apparent authority.

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twelve counts of physically assaulting his patients. Meghann Ackerman, *Carrollton Oral Surgeon Sued, Criminally Charged*, TIMES-GEORGIAN, http://www.times-georgian.com/view/full_story/3280225/article-Carrollton-oral-surgeon-sued--criminally-charged (last visited June 14, 2012); Kathy Jefcoats & David Pendered, *Oral Surgeon Indicted for Assault*, ATLANTA J.-CONST., Apr. 4, 2008, at D4. Dr. Austin allegedly gave patients an inadequate amount of sedation, and when they moaned or tried to complain, Dr. Austin allegedly struck his patients with a dental tool or his hand. Ackerman, *supra*. A plea agreement resulted in Dr. Austin pleading guilty to Medicaid fraud and surrendering his dental license in exchange for prosecutors dropping the assault charges. Amanda Kramer, *Austin Pleads Guilty to Six Theft Counts; Other Criminal Charges Against Oral Surgeon Dropped in Plea Deal*, TIMES-GEORGIAN, http://times-georgian.com/view/full_story/3114770/article-Austin-pleads-guilty-to-six-theft-counts--other-criminal-charges-against-oral-surgeon-dropped-in-plea-deal (last visited June 14, 2012).

11. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

12. A Montgomery County, Maryland, circuit court judge sentenced David E. Fuster to twenty years for raping his fifteen-year-old patient while she was under the effects of laughing gas. Ernesto Londono, *Fugitive Dentist Sentenced in Rape Case*, WASH. POST, Nov. 15, 2007, at B3.

You should not be able to recover from an employer or principal simply because the principal exists; however, the dental professional corporation's vicarious liability may nonetheless precariously hinge on judicial misinterpretation of "aided in accomplishing the tort by the existence of the agency relation" (Aided in Accomplishing) as ill-defined in Restatement (Second) of Agency (Restatement 2nd) section 219(2)(d) (§ 219(2)(d)).[13] Misguided judicial interpretations of § 219(2)(d), including from the United States Supreme Court,[14] might result in the dental corporation's liability when the dentist massages your breast, when the dentist sexually assaults you while legitimately drilling in your mouth, when the dentist stands you against the wall under nitrous oxide and strokes your thighs, and even when the dentist rapes you in the dental office with or without sedation. Clearly the dentist is liable for his own intentional torts; however, vicarious liability is not and should not become strict liability. While vicarious liability may depend upon which judicial interpretation the court chooses to rely upon, § 219(2)(d) intended liability to extend only to an act appearing regular on its face.

The Restatement (Third) of Agency (Restatement 3rd) fails to adequately address the illegitimate distortion of § 219(2)(d)'s Aided in Accomplishing language, neither adopting nor refuting it.[15] Instead, Restatement 3rd provides a broad statement that the Restatement no longer needs the language because "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents."[16]

While possibly correct, Restatement 3rd disserves attorneys and judges—the predominant, if not the overwhelming majority of, Restatement users—by failing to include the Aided in Accomplishing language in the blackletter with properly limiting language reflecting Restatement 2nd's intended use of the provision. While not the fault of Restatement 3rd, Restatement 2nd failed to adequately explain Aided in Accomplishing, which led to the language's present misinterpretation. The distortion of the Aided in Accomplishing language by some courts

13. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

14. *See infra* Part IV.C.

15. *Compare* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (adopting the Aided in Accomplishing language), *with* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (mentioning nowhere in the blackletter the Aided in Accomplishing language).

16. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b.

led other courts to wholly reject § 219(2)(d) without consideration of the provision's valid uses. The U.S. Supreme Court recognized Aided in Accomplishing as part of agency common law but failed to properly limit the language's scope.[17] After promulgation of Restatement 3rd, the Alaska Supreme Court identified that Restatement 3rd rejected Aided in Accomplishing but nonetheless adopted the language in yet another corrupted version.[18]

Aided in Accomplishing's original definition properly exists in agency common law notwithstanding subsequent judicial distortion. Ignoring Aided in Accomplishing has not and will not make the language disappear from the common law. Restatement 3rd had an obligation to affirmatively address the actual meaning and definition of Aided in Accomplishing so that practitioners and judges can properly identify Aided in Accomplishing's place in agency common law rather than continue the provision's distorted and inconsistent application.

II. ALTHOUGH A RESTATEMENT SHOULD NOT INVENT THE RECIPE, IT SHOULD CLEAN UP THE MESS IT LEAVES BEHIND

The primary purpose of the American Law Institute (ALI) Restatements is to "identify, simplify and clarify selected common-law norms" and provide "a material source for tracking or monitoring the development and growth" of these norms.[19] Restatements are also "'a major force in the sound development of American Law . . . [and] . . . have greatly influenced the advancement and unification of legal principles.'"[20] Arguably, the ALI's primary role in producing

17. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998). *See infra* Part IV.C.

18. Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 & n.40 (Alaska 2009).

19. Gomes v. Hameed, 2008 OK 3, ¶ 3, 184 P.3d 479, 491–92 (Opala, J., dissenting) (citing Shirley S. Abrahamson, Address, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, The Fairchild Lecture, 1995 WIS. L. REV. 1, 3).

20. *Id.* ¶ 3 n.3 (Opala, J., dissenting) (quoting Herbert P. Wilkins, *Symposium On the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567, 567 (1998)). Justice Opala's dissent discusses the great pains and lengths involved in the ALI's development of Restatements and criticizes that the court's "hasty recognition of a new state common-law norm shortcuts severely the accepted restatement process by adopting into Oklahoma law a new legal norm on the basis of a single state's jurisprudential development of very recent vintage." *Id.* ¶ 3 (Opala, J., dissenting). Although critical of the ALI for not including a properly limited Aided in Accomplishing in Restatement 3rd, the author's criticism herein should in no way be construed as disparaging or discounting the unnatural amount of time and effort the

Restatements should not be to create new law but rather to report on—or "restate"—the law as it exists; however, Restatement 3rd cannot completely ignore Aided in Accomplishing's misguided effect on judges and practitioners who consider the language's existence as restated common law, especially when the U.S. Supreme Court overstated the authenticity of this errantly interpreted agency doctrine.

Section 219(2)(d) creates vicarious liability for an agent's intentional physical torts committed outside the scope of employment.[21] This Section provides that liability may attach if the agent "was aided in accomplishing the tort by the existence of the agency relation."[22] Courts adopting § 219(2)(d) tend to adopt an overreaching interpretation of the Section far beyond Restatement 2nd's intent and the established common law.[23]

Aided in Accomplishing has a proper place in agency law; however, Restatement 3rd's problem is that, on one hand, the Aided in Accomplishing language, as it illegitimately evolved, should not exist in Restatement 3rd or even Restatement 2nd. On the other hand, Restatement 3rd carries an obligation to identify and provide guidance on the common law developments of agency law, including the proper application of the Aided in Accomplishing language, especially since the U.S. Supreme Court acknowledged the language as part of the common law. In promulgating Restatement 3rd, the ALI faced the difficult dilemma of either acknowledging the errant common law or completely ignoring the Aided in Accomplishing language, neither of which was an adequate alternative. The ALI chose to ignore the language, and neither Aided in Accomplishing nor its clear equivalent appears in Restatement 3rd.

Instead of cutting itself on the sharpened edge of ignoring the Aided in Accomplishing language, the ALI held an obligation to place the Aided in Accomplishing language in the blackletter; however, rather than cut itself on the other side of the sword because of Aided in Accomplishing's prior illegitimate applications, the ALI held a further obligation to dull the sword by appropriately defining and limiting such language's scope and applicability in agency common law. Failure of the

Reporter, Professor Deborah A. DeMott, and the members of the ALI devoted to development of Restatement 3rd.

21. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

22. *Id.*

23. *See infra* Part IV.A–B, D.

ALI to acknowledge and limit Aided in Accomplishing's application disserves Restatement 2nd and Restatement 3rd users, leaving courts to continue to struggle with the previously adopted § 219(2)(d) language, prior judicial interpretation of the Aided in Accomplishing language, and the U.S. Supreme Court's recognition of the Aided in Accomplishing language in agency common law.

III. ALTHOUGH LEGITIMATELY CONCEIVED, RESTATEMENT 2ND'S FAILURE TO PROPERLY DEFINE *AIDED IN ACCOMPLISHING* LED TO SECTION 219(2)(d)'S JUDICIAL DISTORTION INSTEAD OF PROPER APPLICATION

The Aided in Accomplishing language does not appear in the common law until promulgation of § 219(2)(d).[24] Many years after § 219(2)(d)'s adoption in Restatement 2nd, misapplication of § 219(2)(d) began, at worst, a downward spiral of vicarious liability for intentional physical torts and, at best, confusion as to when a principal should be called to answer for its agent. Although some courts embraced a distorted interpretation of § 219(2)(d), many courts rejected § 219(2)(d) in the sexual assault example or refused to adopt § 219(2)(d) entirely notwithstanding its legitimate application.[25] Notwithstanding many courts' rejections of Aided in Accomplishing, the U.S. Supreme Court subsequently recognized the language as part of agency common law by applying the provision to certain cases of employment sexual harassment.[26] At a minimum, the Supreme Court's resulting adoption of an illegitimate definition of Aided in Accomplishing required that Restatement 3rd clarify the circumstances under which a principal could be liable for an agent's acts under such doctrine; however, Restatement 3rd appears to all but ignore the damage left by misapplication of § 219(2)(d).[27]

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

25. *See infra* Part IV.B.

26. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–64 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 801–07 (1998).

27. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006).

A. Agency Common Law Roots a Principal's Vicarious Liability in the Agent's Intent to Serve

In 1698, Lord Chief Justice Holt, in *Jones v. Hart*, created vicarious liability where none previously existed.[28] Sir Holt ruled that the servant's act is that of his master "where he acts *by authority of the master*";[29] this statement is credited as the birth of vicarious liability.[30] In the struggle to define "authority of the master," Baron Parke, in *Joel v. Morison*, identified that an agent might depart from the scope of employment onto a "frolic of his own," relieving his principal from vicarious liability.[31]

Following the then-developed agency law, the Restatement (First) of Agency (Restatement 1st) provided that a principal's liability hinged upon whether the agent acted with the intent to serve the principal.[32] A principal may be vicariously liable even if the agent's intent to serve himself is greater than the agent's intent to serve the principal as long as there remains some intent to serve the principal's purpose.[33]

Agency law then measures vicarious liability by examining whether the agent negligently acted within the scope of employment with, at least in part, an intent to serve the principal, or whether the agent departed from the scope of employment on a frolic solely and completely for the agent's own purposes.[34] When instead of committing a negligent act, the agent intentionally acts against a third party, the issue becomes whether the agent's unauthorized intentional physical tort can ever be actuated at least in part by the agent's intent to serve the principal or whether an unauthorized intentional tort is always the product of the agent's frolic—

28. Jones v. Hart, (1698) 90 Eng. Rep. 1255 (K.B.); 2 Salk. 441.

29. *Id.* (emphasis added).

30. *See, e.g.*, J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES: CASES, MATERIALS, AND PROBLEMS 128 (6th ed. 2003).

31. Joel v. Morison, (1834) 172 Eng. Rep. 1338 (N.P.) 1339; 6 Car. & P. 501. Authorities credit this decision with introducing the concepts of "frolic and detour," where an agent on a detour remains within the scope of employment but an agent on a frolic leaves the scope of employment. HYNES & LOEWENSTEIN, *supra* note 30, at 191.

32. *See* RESTATEMENT (FIRST) OF AGENCY § 219(2) (1933) ("[A] master is not liable for the tortious conduct of servants acting *outside the scope of employment*.") (emphasis added); *see also id.* § 235 ("An act of a servant is *not within the scope of employment* if it is done with *no intention to perform* it as a part of or incident to a service on account of which he is employed.") (emphasis added).

33. *Id.* § 236 ("An act may be within the scope of employment, although *done in part to serve* the purposes of the servant or of a third person.") (emphasis added).

34. *Id.* §§ 235, 282.

the agent's intent to solely serve his own purpose.[35]

When a principal hires an agent, the principal does so reasonably expecting the agent to perform within the accepted bounds of social civility. Unauthorized intentional physical torts committed outside these social norms are inherently beyond the scope of the implied terms of the employment agreement; however, agency law's development of "intention to serve the master" clearly establishes a principal's liability with respect to both negligence and intentional torts where that intent exists.[36] This vicarious liability exists solely because the agent acted with some intent to serve the principal, regardless of the principal's intent and regardless of the principal's expectations.[37]

B. Restatement 2nd Coaxed Aided in Accomplishing*'s Roots Precariously into Agency Common Law's Main Thoroughfare*

Sometimes an agent harms a third party through an act committed without any intent to serve the principal. At times, public policy stands against relieving the principal of liability, especially since the principal put the agent in the position to deal with the injured third party. In defining the extent of a principal's vicarious liability, Restatement 2nd produced the Aided in Accomplishing language[38] where such language did not previously exist in the common law.[39] The proceedings leading up to the ALI's promulgation of Restatement 2nd reflect that, while the Restatement 2nd Reporter apparently intended an expansion of vicarious liability, the ALI generally opposed such expansion.[40] Section 219(2)(d) as promulgated included the Reporter's Aided in Accomplishing language;[41] however, the comments reflected a less offensive and more

35. *Id.* §§ 228, 245 cmt. f; *see also* Nelson v. American-West African Line, 86 F.2d 730, 731 (2d Cir. 1936).

36. Gibson v. Kennedy, 128 A.2d 480, 484–85 (N.J. 1957) ("Assaults and batteries rarely, if ever, redound to the economic advantage of the employer, and it may readily be assumed the employer would not wish them. The outrageous quality of an employee's act may well be persuasive in considering whether his motivation was purely personal . . . but if the employee is within the scope of employment and intends to further the employer's business, the employer is chargeable even though the employee's conduct be 'imbecilic.'").

37. *Id.* at 485.

38. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

39. *See supra* Part III.A.

40. *See Discussion of Restatement of the Law, Second, Agency (Tentative Draft No. 4)*, 33 A.L.I. PROC. 314, 372–83 (1956) [hereinafter *Proceedings*].

41. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

acceptable application of the provision.[42]

Section 219(2) provides that a principal is not liable for an agent's intentional torts while:

> acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation*.[43]

Section 219(2)(d) presupposes that the principal is not already independently liable under the circumstances of subsections (a)–(c); the principal cannot escape its own culpability in such circumstances. An injured third party must clear a much higher hurdle, though, in establishing principal liability when the principal has no independent culpability and the agent acts outside of the scope of employment.

1. Section 219(2)(d)'s Sentence Structure Indicates an Intent that *Aided in Accomplishing* Stand Alone

Contrary to the position that vicarious liability under the Aided in Accomplishing language requires incidents of apparent authority, Restatement 2nd intended that Aided in Accomplishing stand alone. The semantics of § 219(2)(d)'s sentence structure requires segregation of the subsection into two parts because the drafters separated the two qualifications by a comma and the word "or" as such: "the servant purported to act or to speak on behalf of the *principal and* there was reliance upon *apparent authority, or he* was aided in accomplishing the tort by the existence of the agency relation."[44] Under subsection (d),

42. *See id.* § 219 cmts. a–e; *see also infra* Part III.D.

43. RESTATEMENT (SECOND) OF AGENCY § 219(2) (emphasis added). Restatement 3rd §§ 7.04, 7.05, and 7.06 embody Restatement 2nd § 219(2)(a)–(c), respectively. *See* RESTATEMENT (THIRD) OF AGENCY §§ 7.04, 7.05, 7.06 (2006). Although not in the blackletter, the Restatement 3rd § 7.07 Comments address Restatement 2nd § 219(2)(d), discussed more fully *infra* Part V.

44. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (emphasis added).

principal liability first attaches if the agent purports to act on behalf of the principal, and the third party relied on the apparent authority of the agent.[45] Use of the comma and the "or" requires the second clause of subsection (d) to be interpreted as an alternative to the first clause.[46]

This semantic interpretation defines Aided in Accomplishing as a stand-alone basis for vicarious liability; however, creating common law based only upon such semantics might be misplaced, especially in light of Restatement 2nd section 228 (§ 228) Comment (a), which provides the alternate semantic approach: "In addition, a master may be liable if a servant speaks or acts, purporting to do so on behalf of his *principal, and* there is reliance upon his *apparent authority or he* is aided in accomplishing the tort by the existence of the agency relation."[47] The language is substantially the same as § 219(2)(d);[48] however, the critical comma is after the agent's assertion of apparent authority language, and there is no comma before the Aided in Accomplishing language.[49] This § 228 Comment (a) language then requires that the agent always assert his apparent authority in his words or actions in addition to either (1) the third party's reliance on the agent's assertion, or (2) the agency relationship aiding the agent in accomplishing the tort.[50] In either case, the vicarious liability only attaches if the agent "speaks or acts, purporting to do so on behalf of his principal."[51]

While § 219(2)(d) and § 228 Comment (a) semantically conflict, reliance on a comma to create stand-alone Aided in Accomplishing vicarious liability is misplaced unless you conclude the blackletter controls over the Comment; however, the danger of relying on semantics or the superseding blackletter is that such reliance must be based upon whether the Restatement drafters intended the comma to have the presumed effect. Determining drafters' intent requires examining the discussions leading up to Restatement 2nd's promulgation (1956 Proceedings).[52] This examination supports the premise that the Reporter

45. *Id.*
46. *Id.*
47. *Id.* § 228 cmt. a (emphasis added). The Comment follows this language with "See Comment *e* on Section 219 for illustrations," specifically connecting the Comment (a) language with that of § 219. *Id.*
48. *Compare* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d), *with* RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a.
49. RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a.
50. *Id.*
51. *Id.*
52. *See Proceedings*, *supra* note 40, at 372–85 (the 1956 Proceedings were part of the

intended the comma placement and intentionally drafted the Aided in Accomplishing language to stand alone.[53]

2. The Restatement 2nd Reporter Intended that *Aided in Accomplishing* Stand Alone

The Restatement 2nd Reporter presented a version of the Aided in Accomplishing language in the 1956 Proceedings;[54] however, the ALI struggled with whether the language could stand alone, as well as the extent of vicarious liability such language encompassed.[55] Nevertheless, it appears clear the ALI intended that Aided in Accomplishing stand alone as an avenue for determining vicarious liability.

The version of § 219(2)(d) presented to the ALI at the 1956 Proceedings reads in its entirety: "The servant is aided in committing the tort by an agent-owner relation."[56] The ALI adopted § 219(2)(d) as follows: "[T]he servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[57] Indisputably, "[t]he servant is aided in committing the tort by an agent-owner relation" contains the same meaning as "the servant . . . was aided in accomplishing the tort by the existence of the agency relation."[58] The difference in the proposed language and the adopted language is the incidence of apparent authority present in the adoption.

Where two statutes of substantially identical language exist, rules of statutory construction permit courts to infer that where one statute fails to include a word or phrase appearing in the other, the legislature intended that omission in one statute and inclusion in the other.[59] When the

Thirty-third Annual Meeting of the ALI). Professor Warren A. Seavey, Harvard Law School, served as the Reporter for the Restatement (Second) of Agency. RESTATEMENT (SECOND) OF AGENCY, at III.

53. *See Proceedings*, *supra* note 40, at 372–85.

54. *See id.* at 373.

55. *See id.* at 373–83.

56. *Id.* at 373.

57. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). Clearly the final version is a much catchier phrasing of the Aided in Accomplishing provision.

58. *Compare Proceedings*, *supra* note 40, at 373, *with* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

59. Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006). "A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Id.* (internal citation omitted). "'[W]here Congress includes particular language

legislature makes material changes to a statute's language, such changes create a presumption that the legislature intended "a departure from the old law."[60] Additionally, rather than a substantive change, the legislature might simply change language in a statute "to clarify that which was previously doubtful."[61] But even rules "of statutory construction must yield to clear contrary evidence of legislative intent."[62]

Perhaps these rules of statutory construction support a conclusion that Aided in Accomplishing requires incidents of apparent authority because the final draft includes apparent authority language where such is absent in the original draft.[63] Equally plausible is the position that the ALI did not intend to limit Aided in Accomplishing by inclusion of apparent authority but included apparent authority in recognition that in some instances apparent authority is relevant, but in others, apparent authority might not be applicable. This position led one ALI member to comment that perhaps Restatement 2nd should address the Aided in Accomplishing in two subsections:

> Mr. [James Alan] Montgomery [Jr.]: . . . [B]ut perhaps, when you are considering the restatement of 219(2)(d), you might consider making it two statements instead of one, because apparently part of it relates to cases of apparent authority. *If I understand Mr. Seavey, there are other cases where it is not apparent authority*, but where the opportunity given by the principal is of such a nature that there is a liability, even though the agent is not doing the exact thing he was authorized to do.
>
> It seems to me those are two different things; and perhaps you will end up with (d) and (e).[64]

in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

60. 73 AM. JUR. 2D *Statutes* § 132 (2001).

61. *Id.*

62. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). The Court followed this statement with "[a]ccordingly, we turn to the legislative history." *Id.*

63. Clearly, Restatements are not statutes, but there is no reason the same analysis could not apply here.

64. *Proceedings*, *supra* note 40, at 385 (emphasis added). References to parts (d) and (e) have been enclosed in parentheses.

Arguably then, adding apparent authority indicia in the same provision as Aided in Accomplishing might only reflect the ALI's benign motive of preventing the inclusion in section 219 of part (d) and an additional part (e).

The rules of statutory construction may not be enough to resolve whether the Restatement drafters intended Aided in Accomplishing to stand alone in creating vicarious liability; however, an examination of the legislative history behind the Restatement's adoption clearly shows the Restatement 2nd Reporter intended that a principal's vicarious liability attach by sole application of the Aided in Accomplishing provision. When the ALI considered the originally drafted Aided in Accomplishing provision as it stood alone as § 219(2)(d), an ALI member moved to strike the language completely; however, the Reporter objected to doing so:

> Mr. [Laurence H.] Eldredge: Mr. Chairman, unless the Reporter can provide a form of wording which is within decided law—and I have great doubt that he can—I would like to move to strike out this Clause (d) completely.
>
> Mr. [Warren A.] Seavey: I cannot strike it out; and I would resist that with my dying breath. (Laughter)[65]

In closing the discussion of § 219(2)(d), the Chairman and another member again addressed the deletion of the Aided in Accomplishing language with a request that the Reporter review cases where vicarious liability under Aided in Accomplishing exists without apparent authority:

> Chairman [John G.] Buchanan: Well, Mr. Eldredge, would you not be reasonable enough to say that the thing shall be stricken out as it is written in its terribly shocking form, but that the Reporter may be free to substitute statements with regard to *actual cases which he thinks are not within either authority or apparent authority*. I have had the idea that I would like to see it confined (if nothing better can be had) to cases which are not criminal.

65. *Id.* at 383. Reference to part (d) has been enclosed in parentheses. Brackets around "Laughter" have been changed to parentheses.

> Mr. Eldredge: I will move that this clause, as it now reads, be stricken, and the matter be referred back to the Reporter to see if he can produce something which is satisfactory. (Laughter)
>
> . . . .
>
> Mr. Seavey: What you are doing is the same old thing of telling me to dig up something I probably cannot do; but I will try it. It is interesting.[66]

It seems clear that the Restatement 2nd Reporter intended that the Aided in Accomplishing language stand alone. The language appeared alone in the presentation draft. The Reporter wrote the Aided in Accomplishing language in a manner that semantically placed the language as a stand-alone provision. When challenged to remove the language entirely, the Reporter objected. Presumably, the adopted version of Aided in Accomplishing became the satisfactory version by virtue of its inclusion in § 219(2)(d). Perhaps the Reporter satisfied the ALI by including the requested Comment examples that support vicarious liability without indicia of apparent authority.[67]

Regardless, it appears clear that the Reporter accomplished his goal of creating language that stood alone. The issue remains how to define the Aided in Accomplishing language and its scope in establishing vicarious liability.

C. Although Never Defining Aided in Accomplishing*, the 1956 Proceedings Do Identify Where* Aided in Accomplishing *May Not Tread*

In all situations where the agency relationship places the agent in contact with the third party, the relationship itself aids the agent in committing the tort; however, vicarious liability under the Aided in Accomplishing language cannot be absolute liability.[68] To prevent imposition of strict liability, Aided in Accomplishing requires

66. *Id.* at 383–84 (emphasis added). Brackets around "Laughter" have been changed to parentheses. The motion was seconded and approved. *Id.* at 383.

67. Examples discussed *infra* Part IV.D.

68. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998) (recognizing that the misconduct of a supervisor is always assisted by the employment status but the mere existence of such relationship cannot automatically create vicarious liability).

distinguishable vicarious liability boundaries.[69]

Accepting that the Restatement 2nd Reporter intended Aided in Accomplishing to stand alone, vicarious liability attaches under the Aided in Accomplishing language irrespective of the preceding apparent authority provisions, or more accurately stated, in the absence of apparent authority indicia. Aided in Accomplishing cannot create liability where liability already exists under apparent authority. Aided in Accomplishing also cannot encompass all situations where apparent authority does not exist, or together apparent authority and Aided in Accomplishing create absolute liability. If Restatement 2nd intended that vicarious liability be strict liability, then there would be no need to distinguish between acts within or outside the scope of employment. Accordingly, if Aided in Accomplishing stands alone, it must create principal vicarious liability for agent acts that are outside apparent authority, but that also fall short of creating strict liability.[70]

Vicarious liability's boundary in Restatement 2nd's definition of Aided in Accomplishing is, perhaps intentionally, vague.[71] In the 1956 Proceedings, Edwin Leard Mechem offered the first explanation of the Aided in Accomplishing language by referring to Reporter Seavey's example of a personnel officer that gives an intentionally libelous reference for a former employee.[72] Mr. Mechem objected to the Aided in Accomplishing language's broad and vague nature, and he requested that the provision be less objectionable by clearly stating that liability hinged on fraud principals:

69. *See id.*

70. "Courts have criticized § 219(2)(d) primarily because the exception swallows the rule and amounts to an imposition of strict liability upon employers." Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006) (criticizing Restatement 2nd's failure to appropriately define Aided in Accomplishing and its legal boundaries).

71. *See Proceedings*, *supra* note 40, at 374–75.

> Mr. [Edwin Leard] Mechem: . . . You think that, in Section (d) a little more frankness would help.
>
> . . . .
>
> Mr. [Warren A.] Seavey: That is in the comment. You see, we expand all these things into the comments.
>
> Mr. Mechem: I have been fighting all along here to have the substance all in the black letter and not in the comment.

Id.

72. *Id.*

> Mr. Mechem: Oh, no. I think it would be more of some nonoffensive version of straightforward (more illuminating, yes), if Section (d) were to say that the master is also liable, on contractual or agency principles, for the deceit of the servant. There you say what you are talking about . . . .[73]

Without objecting to the substance of the language, Mr. Seavey commented that Mr. Mechem's language was too long.[74]

More importantly, Laurence H. Eldredge presented the next objection to the Aided in Accomplishing language by stating that the common law did not support such a broad statement of liability: "I object to Clause (d), because I do not think it is an accurate statement of the law. It may be accurate in applying to certain specific situations . . . ."[75]

Mr. Eldredge presented an example where a utility worker entered a house purportedly representing the utility company and then, after entry, raped the housewife.[76] Initially, the Reporter agreed that no vicarious liability attaches because "[t]here you would have no causation."[77] Mr. Eldredge described that even though there should be no liability, such situation fits "squarely within that language."[78] Reporter Seavey then questioned whether liability might not attach after all if the only way the utility worker gained access was by showing his company badge.[79] This exchange began a discussion that in such a case the utility worker would be on a frolic, outside the scope of employment, but Reporter Seavey pressed that liability might still exist:

> Mr. Seavey: Yes; but we are saying that, even though the agent is on a frolic, the master is liable, provided the agent's frolic is aided substantially or principally by the appearance of agency on which the housewife relied.
>
> Mr. Bunn: Most of the cases reported to NDR, I think, are not those cases.

73. *Id.* at 375.
74. *Id.*
75. *Id.* at 376. Reference to part (d) has been enclosed in parentheses.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

Mr. Seavey: Most of them, but not all; that is the trouble.[80]

Reporter Seavey then justified the Aided in Accomplishing language by referring to language that courts use to describe vicarious liability:

> Mr. Seavey: But the courts have used this language sometimes, that we are forced to submit it.
>
> A principal puts an agent in a position which enables the agent, while apparently acting within his authority-- We have a lot of cases where the principal is made liable, under that section.
>
> Mr. Eldredge: If the principal puts him in that position, doesn't he have apparent authority?
>
> Mr. Seavey: I do not know that he does.[81]
>
> Well, look; take this case. The agent is authorized to collect towels and other things used; he is the agent of a cleaning establishment, is authorized to collect the towels and everything every week, deliver new ones, and get the money which the debtor owes. The agent might represent to the debtor the amount which is owed. Is there apparent authority?
>
> . . . .
>
> Mr. Eldredge: I do not think that justifies your Clause (d).
>
> Mr. Seavey: It is the same area; is it not? There is reliance here upon the factual relationship.

80. *Id.* at 377. When previously asked during the Eldridge exchange about identifying a case, Reporter Seavey did not name one:

> Mr. Eldridge: Show me a case.
>
> . . . .
>
> [Mr. Seavey:] I do not know; but it is difficult to phrase this stuff, you know. You come up with an idea--

Id. at 376–77. Mr. Seavey later identified a case purportedly involving Western Union and "Carter against the bank"; however, Mr. Seavey gave no further identifying information that helps locate the case or define its applicability. *See id.* at 380.

81. *Id.* at 380–81. It seems clear that Reporter Seavey intended the phrase "apparently acting within his authority" to mean something other than "apparent authority." *Id.* at 381.

. . . .

> [Mr. Seavey:] The nearest case which I have in mind, the nearest recent case, is one where the Court held that the principal was liable because the agent's duty required him to be behind the counter in a bank; and, while he was behind the counter in a bank, he swiped some money. The Court held the principal liable because the outer defenses of the bank were destroyed by the privilege which the agent had to be behind the counter.
> I do not know what that has to do with rape . . . .[82]

As well as being vague in its final form, the ALI and Reporter Seavey found it difficult to even define the Aided in Accomplishing language during the 1956 Proceedings.[83] It appears the Reporter wanted to create liability where the victim "reli[ed] . . . upon the factual [agency] relationship,"[84] but found it difficult to not only describe how such vicarious liability did not attach because of already existing principles of apparent authority but also how the common law supported such vicarious liability in the absence of apparent authority.[85] Without such a definition or concrete boundaries, the ALI expressly rejected the Aided in Accomplishing language as it originally stood alone and charged the Reporter with either deleting the language or appropriately defining Aided in Accomplishing within the common law.[86]

What is clear from the 1956 Proceedings is that the ALI showed great hesitancy in extending vicarious liability to the case where the utility worker rapes the homeowner, even if he gained access into the home by showing his employer-issued badge.[87] In addressing this

82. *Id.* at 381–82. Reference to part (d) has been enclosed in parentheses.
83. *Id.* at 379–83.
84. *Id.* at 381.
85. *See id.* at 380–82.
86. *Id.* at 383.
87. *Id.* at 379–80.

> Mr. James Alan Montgomery, Jr.: . . . [A]nd I was wondering what the law is which we are now restating. Is it the law that, if a man gains admittance to a house and therefore has a little easier opportunity to commit rape, he is therefore in a situation to commit--
>
> Chairman [John G.] Buchanan: I want the women of the country to be safe, too; and I do not want them to recover from the gas companies when they have such a misfortune.

example, the 1956 Proceedings take the position that no vicarious liability could attach and that no liability is intended by § 219(2)(d).[88] It is also clear that the ALI rejected liability under the Aided in Accomplishing language for theft, libel, and other "crimes":

> Chairman Buchanan: I suppose Mr. Eldredge will improve on this point, if he can--and I hope he will--but Mr. Eldredge's point would be made by a motion that Section 219(2)(d) be substituted by a narrower statement of actual cases, instead of saying that the servant is able to accomplish the tort whether it is rape or murder, if that is worse, or stealing silver, which I suppose is not so bad, but which look like transactions which a master would not normally be held liable for. Say "crimes."[89]

If dentists made house calls, presumably the same position applies: that the dentist's professional corporation would not be vicariously liable for the dentist's rape of the homeowner simply because the dentist appeared at the door wearing a lab coat displaying the corporation's name.[90] While the utility-worker rape example[91] perhaps defines the outer limit over which vicarious liability may not cross, the 1956 Proceedings do not quite answer the question of whether vicarious liability attaches to the dental corporation when the dentist rapes a patient in the principal's office. Perhaps Aided in Accomplishing would include none of the dentist's actions because, arguably, all of the dentist's actions could be considered "crimes." While the 1956 Proceedings confirm what Aided in Accomplishing does not mean, the § 219(2)(d) Comments help provide a better understanding of when the

> Mr. Montgomery [Jr.]: The reason I ask the question, sir, is that it seems to me there must be cases on it. I am simply asking as a question of information.

Id. at 379.

> Mr. [Laurence H.] Eldredge: . . . I think you are getting yourself out on a very long limb if you cover anything which is not included in either actual employment or apparent authority, when you are dealing with these tort liabilities.

Id. at 380.

88. *Id.* at 376–77, 379, 380, 385.

89. *Id.* at 382. Reference to part (d) has been enclosed in parentheses.

90. Of course, home dental visits may not be practical today unless it is a pediatric dentist carrying a ball of string looking for a sturdy doorknob and a willing patient.

91. *See supra* notes 76–79 and accompanying text.

language creates vicarious liability.

D. Although Never Precisely Defining Aided in Accomplishing, *the Section 219(2)(d) Comments Show the ALI's Intent that Any Extension of Vicarious Liability Requires a Nexus Between the Act Authorized and the Act Committed*

While Reporter Seavey perhaps envisioned vicarious liability extending to the principal when the utility worker enters the home and rapes the homeowner, the ALI clearly rejected this extension of vicarious liability.[92] Although denying liability in this case of rape, neither the 1956 Proceedings nor the resulting § 219(2)(d) Comments clearly define vicarious liability under Aided in Accomplishing; however, the § 219(2)(d) Comments illuminate the ALI's intent that Aided in Accomplishing apply only to those cases where by all appearances the agent acts for the principal but acts without any indicia of apparent authority.[93]

None of the cases addressed in the 1956 Proceedings supported the position that the Aided in Accomplishing language applied to physical torts. Notwithstanding Reporter Seavey's rape discussion, the adopted § 219(2)(d) Comments provide no examples of Aided in Accomplishing creating vicarious liability for intentional physical torts.[94] The absence of examples does not preclude such liability, but the Comment's reference to vicarious liability for physical torts under the apparent authority doctrine further supports the position that the ALI did not anticipate vicarious liability for physical torts under the Aided in Accomplishing language.

Section 219 Comment (e) expounds upon all of § 219(2)(d).[95] Comment (e) states that subsection (d) "*primarily*" includes acts within the agent's apparent authority and follows this definition with a defamation example where the agent purports to act on the principal's

92. *Proceedings*, *supra* note 40, at 376–77.

93. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).

94. The author refers to the 1956 Proceedings example as "Reporter Seavey's rape discussion" because although Laurence H. Eldredge presented the example, Reporter Seavey appeared to be the only member willing to extend vicarious liability in such case.

95. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e. Because Comment (e) does not specifically identify which portion of the Comment refers to which phrase of § 219(2)(d), we must analyze all of Comment (e) to determine which parts of the Comment help define Aided in Accomplishing and which parts apply to apparent authority.

behalf.[96] Comment (e) also refers to the existence of apparent authority in an "action of deceit" with further reference to Restatement 2nd sections 257–264.[97] Such vicarious liability clearly falls within the first provision of § 219(2)(d) because of the agent's purported apparent authority and the third party's reasonable reliance creating the deceit.

Comment (e) expressly provides that apparent authority may also create vicarious liability for "physical harm," referencing Restatement 2nd sections 265–267, which address vicarious liability where apparent authority exists.[98] Comment (e) draws no distinction between negligent and intentional "physical harm," and when both are outside the scope of employment, both require an apparent authority relationship.[99] More importantly, neither the Restatement 2nd Comments nor the 1956 Proceedings establish that liability for physical torts exists under § 219(2)(d) in the absence of apparent authority.[100]

After addressing apparent authority, Comment (e) concludes the discussion of § 219(2)(d) with "[*i*]*n other situations*, the servant may be able to cause harm because of his position as agent."[101] The Comment follows with an example of a telegraph operator sending a fraudulent telegram "purporting to come from third persons" and an example of an agent for an undisclosed principal cheating the store's customers.[102]

No doubt the Reporter specifically intended that this portion of the Comment relate to the Aided in Accomplishing language. First, the Comments sequentially follow the blackletter, and this Comment follows the Comments relating to the apparent authority provisions in the first clause of § 219(2)(d).[103] Second, the Reporter uses the phrase "because of his position as agent" in describing when liability "may" attach, which appears to refer to his 1956 Proceedings language that "[a] principal puts an agent in a *position which enables the agent*" to commit a tort against a third party without apparent authority indicia.[104]

96. *Id.* (emphasis added).
97. *Id.*
98. *Id.*
99. *See id.*; *see also id.* § 219(2)(d).
100. *See generally id.* § 219 cmt. e; *Proceedings*, *supra* note 40, at 372–83.
101. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (emphasis added). Comment (e) does conclude stating the list of examples is not exhaustive; however, this concluding provision is not specific to the Aided in Accomplishing language but to § 219(2)(d) as a whole. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* ("In other situations, the servant may be able to cause harm because of his

Recognizing that "in other situations" elaborates on the Aided in Accomplishing phrase, its placement immediately following the discussion of the link between apparent authority and physical torts either relates to situations other than "physical harm" or situations other than those involving apparent authority. If the Comment's intent is to present examples of vicarious liability other than "physical harm," then by implication no physical tort creates vicarious liability under Aided in Accomplishing. More likely, "other situations" intends to address those cases where vicarious liability may attach absent apparent authority.

Comment (e) uses two examples to explain Aided in Accomplishing. First, the Comment presents the example of a telegraph operator sending a fraudulent telegram purportedly from a third party.[105] Second, the Comment discusses the situation where a store manager acting as the agent of an undisclosed principal cheats the store's customers.[106] The Comment does not provide examples involving physical harm; however, it clearly anticipates vicarious liability without apparent authority indicia.

These two Comment examples provide a better interpretation of Aided in Accomplishing's meaning in § 219(2)(d). When a telegraph operator sends a false message, the telegraph operator is doing the very job to which he is assigned—that of sending telegrams. Because the telegraph operator's job is to send messages, this "position as an agent" permitted and facilitated the false message. The principal is vicariously liable in such a case not because the agent struck someone in the head with a full spittoon but because the agent performed the telegraphing task, albeit in a particularly defective and injurious manner.[107] It is evident the Reporter intended this distinction by his further reference to Restatement section 261 following the telegraph operator example.[108] Section 261 deals with a principal's liability for an agent's fraud committed against a third party.[109] Comment (a) explains that liability

position as agent . . . .").

> [Mr. Seavey:] A principal puts an agent in a *position which enables the agent*, while apparently acting within his authority-- We have a lot of cases where the principal is made liable, under that section.

Proceeding, *supra* note 40, at 381 (emphasis added).

105. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e.

106. *Id.*

107. He's a telegraph operator; what else would you expect him to use besides a spittoon?

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

109. *Id.* § 261.

exists because "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction *seems regular on its face* and the agent *appears to be acting in the ordinary course of the business confided to him*."[110]

The Reporter's next example of vicarious liability under the Aided in Accomplishing provision involves a store manager cheating customers.[111] The Comment does not specifically state it, but presumably the store manager is able to cheat customers because, in running the register, he either charges too much or returns the incorrect amount of change.[112] Just as in the prior example, the store manager is able to cheat customers because the manager is performing the exact task to which he is assigned—that of charging customers and giving change—and in doing so "appears to be acting in the ordinary course of the business confided to him."[113]

In both of these examples, vicarious liability attaches not because either agent "purported to act or to speak on behalf of the principal" and not because the injured party reasonably "reli[ed] upon apparent authority."[114] Vicarious liability attaches because, by all appearances to not only the third party but also to the principal and all disinterested observers, the telegraph operator's action appears "regular on its face"; by all appearances, the store manager "appears to be acting in the ordinary course" of the task the principal assigned.

Both examples remove apparent authority from consideration. The undisclosed principal example of the cheating store manager is significant because the example expressly removes all apparent authority indicia: If the principal is not disclosed, the agent cannot "purport[] to act or to speak on behalf of the principal";[115] if the principal is not disclosed, the third party could not possibly rely upon apparent authority when the agency relationship is unknown to the third party.

Presumably, when the telegraph operator sends the false message "purporting to come from third persons," the "third persons" are the

110. *Id.* § 261 cmt. a (emphasis added).
111. *Id.* § 219 cmt. e.
112. *See id.* Comment (e) does refer to Restatement (Second) of Agency § 222. *Id.* However, § 222 addresses the issue of an undisclosed principal rather than providing insight on how the principal might be liable other than through conduct which looks "regular on its face." *Id.* § 222.
113. *Id.* § 261 cmt. a.
114. *Id.* § 219(2)(d).
115. *Id.*

injured parties because the telegraph operator attributes the false message to the "third persons."[116] The third persons' lack of knowledge of the telegram's existence obviates any reasonable reliance upon apparent authority.

It is much easier to apply the apparent authority doctrine to the recipient of the telegram who, upon receiving the telegram, necessarily believes that the operator sent the message as instructed. As for the recipient, it is the agent's position and conduct that creates the reasonable belief of authority. Apparent authority does not apply with respect to the purported sender who does not even know the telegraph operator sent the message; the purported sender could not possibly form a reasonable belief of the agent's authority if the purported sender does not know the telegraph operator sent such a telegraph.[117]

If a principal employs an agent to serve as a telegraph operator, and if that agent actually performs the duties of a telegraph operator, the purported sender—as well as the rest of the world—should be entitled to a reasonable belief that any telegraph messages sent from the telegraph office are legitimate. Because the store manager's assigned duty is to correctly charge customers and to correctly make change at the register, the world should be entitled to rely upon the agent's representation of the price of the purchased goods and return of the correct change. The unknown or undisclosed principal should not be able to escape liability simply because the injured third party did not know of the existence of the agency relationship at the time of the agent's tortious conduct.

For vicarious liability to attach to the principal, Aided in Accomplishing requires something more than the mere "existence of the agency relation."[118] The examples make clear that there must be a nexus

116. *See id.* § 219 cmt. e. Arguably, if the recipient of the telegram is the injured party, the example falls squarely in apparent authority because the recipient reasonably relied upon the truth of the telegram and in sending the telegram the operator purported to act on the principal's behalf.

117. Presumably, this is the situation anticipated in Comment (e) because the Reporter structured the telegraph as "false messages purporting to come from third persons." *Id.* The Reporter's use of "third persons" necessarily means injured third parties and not the "third person['s]" role as a principal with the telegraph operator serving as the "third person['s]" agent. The illustration would be misplaced in § 219(2)(d) if the Reporter's intent was to describe liability from the agent to the principal, which would occur if the purported sender was the party responsible for the harm. Accordingly, this discussion follows the presumption that the telegraph operator is the agent for the telegraph office and that both the purported sender and the recipient are third parties.

118. *Id.* § 219(2)(d).

between the act authorized and the act committed such that to the principal and to the casual observer it appears that the agent acts within the scope of employment when the agent does not—that to all, including the principal, the agent's act appears "regular on its face."

When a dentist rapes or sexually assaults his patients, neither the principal nor the victim reasonably believes the dentist does so for any purpose other than the dentist's own. No one can look at such an assault and view the assault as within the scope for which the dental corporation employed the dentist. Regardless of Reporter Seavey's rape discussion, the ALI never intended that Aided in Accomplishing create vicarious liability for such sexual assaults. In no way does the sexual assault "appear regular on its face" or appear to be "an act in the ordinary course of business." If a physical therapist stroked the inner thighs of a hip-injury patient, the casual observer might consider the act appropriate for the therapist to perform; however, if the dentist gives you a pectoral massage to relieve your TMD, such a massage likely remains irregular on its face, even if you could recover under apparent authority. Vicarious liability attaches to the principal under Aided in Accomplishing even when the third party has no reasonable belief of apparent authority, but only if a nexus exists between the act authorized *and* act committed and if the act committed appeared regular on its face.

IV. JUDICIAL ACCEPTANCE AND MISINTERPRETATION OF *AIDED IN ACCOMPLISHING* DISTORTED RESTATEMENT 2ND'S ORIGINAL INTENT

Although the 1956 Proceedings and the § 219(2)(d) Comments reflect the ALI's attitude that vicarious liability should only attach under Aided in Accomplishing if the agent's acts appear on their face to be the same type of act the principal authorized, Restatement 2nd failed to clearly delineate this definition.[119] As a result, courts struggle to determine Aided in Accomplishing's meaning, resulting in a variety of outcomes and many courts refusing to adopt the provision.[120] Eventually, the U.S. Supreme Court examined Aided in Accomplishing in the context of employment harassment.[121] Although not quite in line with Restatement 2nd's intent, the Court did return the primary focus to the nexus between the act the principal authorized and the act the agent

119. *See supra* Part III.C–D.
120. *See infra* Part IV.A–B.
121. *See infra* Part IV.C.

committed.

A. Early Application of Aided in Accomplishing *to Physical Torts Resulted in Section 219(2)(d)'s Offensive Corruption*

Perhaps the most infamous and highly criticized Aided in Accomplishing aberration occurred in *Costos v. Coconut Island Corp.*[122] The *Costos* court held Aided in Accomplishing applicable in a rape case because of the agent's relationship with the principal.[123]

In *Costos*, the plaintiff and her friend were patrons at an inn managed by the defendant's agent.[124] The plaintiff's friend and the manager were friends.[125] That evening the plaintiff socialized with her friend, the agent, and two of the agent's male friends.[126] Plaintiff and her friend returned to their room.[127] The plaintiff's friend left with the room key after locking the room door while plaintiff stayed in the room and went to bed.[128] Later that evening the agent returned to the inn, let himself into the plaintiff's room, and raped the plaintiff.[129]

The defendants argued that the Aided in Accomplishing language only reiterated the apparent authority language immediately preceding; that if intended to be an independent source of vicarious liability, Aided in Accomplishing would appear separately.[130] The court rejected this interpretation, and asserted instead that Aided in Accomplishing applies when the employment "ma[kes] possible the tortious assault and battery."[131] The court found that because the principal entrusted the agent with the keys to rooms and because as manager the agent knew in which room to find plaintiff, the principal's entrustment aided the agent in accomplishing the rape.[132]

The *Costos* court also examined another court's decision that limited Aided in Accomplishing liability to cases where the tort "'was accomplished by an instrumentality, or through conduct associated with

122. Costos v. Coconut Island Corp., 137 F.3d 46 (1st Cir. 1998).
123. *Id.* at 50.
124. *Id.* at 47.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 48.
130. *Id.*
131. *Id.* at 48–49.
132. *Id.* at 50.

the agency status.'"[133] The court did not explain the applicability of this limitation but held that even under this "narrower focus" the defendant could be vicariously liable.[134]

Vicarious liability attached in *Costos* because the agent knew the room number in which plaintiff slept and also possessed the room key.[135] Presumably, possession of the key was the "instrumentality" meeting the "narrower" interpretation of Aided in Accomplishing because rape could not possibly be "conduct associated with the agency status."[136]

The "instrumentality" qualification presumably originated in *Barnes v. Costle*.[137] The *Barnes* court used this term to identify the physical telegraph message used by the telegraph operator in the § 219(2)(d) Comment (e) example.[138]

Without further information, the *Barnes* court appeared to examine Aided in Accomplishing liability by the incidents of employment the principal entrusts to the agent. While it is valid to consider the principal's entrustment of the telegraph machine to the agent, such entrustment alone is not enough. To fall within Restatement 2nd's intent, the agent must also use the instrumentality in a manner which appears to be within the scope of employment—proper on its face.[139]

The *Costos* court incorrectly applied even the "instrumentality" qualification. In the Restatement 2nd Comment (e) example, the telegraph operator perpetrated the tort because the operator used the telegraph machine in a proper manner to produce an improper telegraph message—a fraudulent message. The telegraph operator's action of operating the telegraph machine appeared proper on its face. Arguably, the *Costos* principal would be liable for the agent's improper use of the

133. *Id.* at 49 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958)).

134. *Id.* at 50.

135. *Id.*

136. Although the *Costos* court does not so state, it seems apparent the key satisfied this "instrumentality" qualification. "Specifically, the key was the 'instrumentality' that provided the manager with the opportunity to accomplish the rape." Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 225 (Mich. 2006).

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

138. *Id.* ("The telegraph operator commits the tort *via* a telegraph message . . . .").

139. The court in *Nichols v. Land Transport Corp.* denied Aided in Accomplishing vicarious liability in part because where one truck driver stabbed another, the principal "did not provide . . . the instrumentality, the knife." Nichols v. Land Transp. Corp., 103 F. Supp. 2d 25, 28 (D. Me. 1999). The court's language appears to leave open the erroneous possibility that this instrumentality qualification would be met if the stabbing occurred with the hubcap-removing end of an employer-provided tire iron.

key because such use in opening the door would appear proper on its face—no one but the agent would know that he entered the room improperly. Vicarious liability might attach under Aided in Accomplishing for the agent's trespass into the rented room; however, vicarious liability does not attach for the resulting rape, an act no one would believe proper on its face.

Costos creates near-absolute liability. Arguably, if the dental corporation gives building keys to the dentist and gives the dentist access to the building after hours, then the *Costos* definition of Aided in Accomplishing supports the after-hours rape victim's recovery against the dental corporation. The § 219(2)(d) Comments do not support such liability absent the required nexus. Clearly, the 1956 Proceedings' rejection of Aided in Accomplishing vicarious liability for the utility worker's rape of the housewife precludes charging the dental corporation with such broad, sweeping liability.

B. Because of Aided in Accomplishing*'s Judicial Corruption, Many Courts Rejected Section 219(2)(d) Without Considering the Language's Purpose*

The *Costos* line of cases poisoned Aided in Accomplishing, causing many courts to hazardously reject § 219(2)(d) without addressing Restatement 2nd's intended, legitimate use for the provision. Without overruling the *Costos* decision, the Maine Supreme Judicial Court stated that it did not "expressly adopt" § 219(2)(d).[140] The Michigan Supreme Court declined to adopt § 219(2)(d) because of the fear that doing so would subject employers to strict liability.[141] The Fifth Circuit also rejected the Aided in Accomplishing language because to do so would create strict liability in every case involving "teacher-student harassment."[142] In New York, the appellate court stated that "it is far from clear" whether § 219(2)(d) exists in the state's agency law.[143]

A Pennsylvania appellate court stated that the Pennsylvania Supreme Court history only permits vicarious liability for physical torts if

140. Mahar v. StoneWood Transp., 2003 ME 63, ¶ 20, 823 A.2d 540, 545.

141. *Zsigo*, 716 N.W.2d at 227.

142. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997).

143. Bowman v. State, 781 N.Y.S.2d 103, 105 (N.Y. App. Div. 2004). While not identifying whether its decision relates to the Aided in Accomplishing portion of § 219(2)(d), the decision identifies that the victim could not reasonably believe the rape occurred as part of the agent's duties on the principal's behalf. *Id.* at 104–05.

committed within the scope of employment.[144] The court discussed this position existing both before and after § 219(2)(d)'s promulgation.[145] Because Pennsylvania precedent conflicts with § 219(2)(d), the appellate court refused to recognize § 219(2)(d) "absent a clear adoption" by its supreme court or legislature.[146]

Although not expressly rejecting § 219(2)(d), an Ohio federal district court held that Ohio courts do not extend vicarious liability to unauthorized physical torts.[147] In a Wisconsin appellate court decision, the parties disputed whether the state adopted § 219(2)(d); however, the appellate court refused to determine its applicability because, even if adopted, § 219(2)(d) would not apply to the facts.[148] An Arkansas federal district court also held that plaintiffs recited insufficient facts to fall under § 219(2)(d), without rejecting or adopting the provision.[149]

There is no reason to reject § 219(2)(d)'s Aided in Accomplishing language.[150] Rarely will a court face the facts of the telegraph operator sending a fraudulent telegram; however, courts should not reject Aided in Accomplishing simply because it does not fit squarely in the court's physical tort facts. If courts addressed the language's intended definition instead of expressly rejecting Aided in Accomplishing, they would only hold the provision inapplicable to the case at hand. While difficult to imagine when a sexual assault might appear regular on its face, a full rejection of the provision only confuses Aided in Accomplishing's true definition and proper application.

144. Dee v. Marriott Int'l, Inc., No. Civ.A. 99-2459, 1999 WL 975125, at *3 (E.D. Pa. Oct. 6, 1999).

145. *Id.*

146. *Id.* at *4.

147. Hart v. Paint Valley Local Sch. Dist., No. C2-01-004, 2002 WL 31951264, at *14 (S.D. Ohio Nov. 15, 2002).

148. S.J.A.J. v. First Things First, Ltd., No. 99-2037, 2000 WL 1254149, at *8 n.15 (Wis. Ct. App. Sept. 6, 2000).

149. Davis v. Fulton Cnty., Ark., 884 F. Supp. 1245, 1263 (E.D. Ark. 1995).

150. It is barely worth noting that completely rejecting § 219(2)(d) removes all of the opening examples, including the dentist's sexual assaults, from Aided in Accomplishing vicarious liability.

C. The U.S. Supreme Court Recognized and Adopted Aided in Accomplishing *as a Part of Agency Common Law; However, the Court Failed to Follow Restatement 2nd's Original Intent*

The U.S. Supreme Court defined Aided in Accomplishing and, in one respect, helped place the derailed train back on the tracks by requiring liability only where there existed an act "'regular on its face.'"[151] The problem with the Court's definition is that it only places one set of the train's wheels on the tracks because the Court also permitted liability for acts clearly not appearing to be "in the ordinary course of business" as long as the agent also commits acts that are.[152]

The U.S. Supreme Court adopted the Aided in Accomplishing language as standing alone in creating vicarious liability in two companion cases involving workplace sexual harassment.[153] The Supreme Court held that the Aided in Accomplishing language stood alone, separate from the preceding apparent authority language, and that to hold otherwise would make the second phrase of § 219(2)(d), requiring reliance on an agent's apparent authority, "superfluous."[154]

In *Faragher v. City of Boca Raton*, the plaintiff, an ocean lifeguard, alleged that her immediate superiors created a "sexually hostile" work environment involving "uninvited and offensive touching" and inappropriate sexually aggressive advances, abuses, and job-related threats.[155] In *Burlington Industries, Inc. v. Ellerth*, the plaintiff

151. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 772 & n.4 (1998) (Ginsburg, J., concurring) (quoting RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e. (1958)).

152. *Id.* at 772–73.

153. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998); *Ellerth*, 524 U.S. at 759–60. The Supreme Court used § 219(2)(d) as a "'starting point'" because the Court was not trying to define agency principals as much as it was trying to "adapt agency concepts to the practical objectives of Title VII" of the Civil Rights Act of 1964. *Faragher*, 524 U.S. at 802 n.3. The plaintiff brought her action under 42 U.S.C. § 2000e-2(a)(1). *Id.* at 780. These two Supreme Court cases do not reflect a discussion of § 219(2)(d)'s development through the 1956 Proceedings nor any cases prior to the Restatement supporting that Aided in Accomplishing standing alone was ever a part of the common law. Perhaps the Supreme Court, as do other courts and practitioners, relies on the Restatement to actually *restate* the common law. "While following our admonition to find *guidance in the common law of agency, as embodied in the Restatement*, the Courts of Appeals have adopted different approaches." *Id.* at 785 (emphasis added). It seems impossible to follow such an "admonition" when the Supreme Court also acknowledges that "[t]he aided in the agency relation standard . . . is a developing feature of agency law." *Ellerth*, 524 U.S. at 763.

154. *Faragher*, 524 U.S. at 801–02.

155. *Id.* at 780 (internal quotation marks omitted). With respect to acts against

salesperson alleged that she quit her employment because one of her immediate supervisors constantly sexually harassed her with "boorish and offensive remarks and gestures," with some advances containing employment-related threats.[156]

In its analysis of the Aided in Accomplishing language, the Court referenced Comment (e)'s examples of the telegraph operator and the store manager as support for why the Aided in Accomplishing language stood alone, without addressing how these two examples do not contain elements of apparent authority.[157] Excusing apparent authority from the equation, though, does not mean that a principal is liable for all torts occurring at the workplace simply because of the common thread of the workplace agency relationship; the Aided in Accomplishing language "requires the existence of something more."[158] The Supreme Court held that the "correct application of the aided in the agency relation standard" in the employment context also included a "tangible employment action" against the victim.[159] The Court hesitated to specifically limit the Aided in Accomplishing language to a "tangible employment action" but held that where such action exists, "there is assurance the injury could not have been inflicted absent the agency relation."[160] Where there is no "tangible employment action," the Court recognized that determining vicarious liability "is less obvious."[161] The problem of not requiring a "tangible employment action" is that the supervisor may conduct acts of harassment no different than could any other employee.[162] In such acts, the agent's "status makes little difference."[163] It is because the supervisor

plaintiff, it appears that the "touching" included one of the supervisors putting his arm around plaintiff such that his hand rested on her buttocks and an instance of tackling her followed by suggestive remarks about having sex with her. *Id.* at 782. The supervisor "repeatedly touched the bodies of female employees," and in one instance, the supervisor made physical contact with another female employee simulating sex. *Id.*

156. *Ellerth*, 524 U.S. at 747–48. While there does not appear to be "unwanted physical contact" as appeared in *Faragher*, the lack of such contact does not have a bearing on the Supreme Court's analysis. *See Faragher*, 524 U.S. at 780; *see also Ellerth*, 524 U.S. 754–65.

157. *Faragher*, 524 U.S. at 802; RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).

158. *Ellerth*, 524 U.S. at 760. "Proximity and regular contact may afford a captive pool of potential victims." *Id.*

159. *Id.* at 761.

160. *Id.* at 761–63.

161. *Id.* at 763.

162. *Id.* at 762–63.

163. *Id.* at 763.

has employer-authorized power to affect the employee's employment relationship and benefits that adverse decisions related to such become actionable under the Aided in Accomplishing language.[164] Vicarious liability attaches in such cases because the employment decision is an "official act" attributable to the employer.[165]

In deciding *Faragher* and *Ellerth*, the Supreme Court sought to harmonize the Aided in Accomplishing language and Title VII's policies of encouraging employers to take preventive steps and create viable complaint policies.[166] Accordingly, and consistent with its position that Aided in Accomplishing requires something more than the mere employment relation, the Court held that an employer can be vicariously liable for an "actionable hostile environment" accompanied by a "tangible employment action" such as firing, demotion, lack of promotion, or an "undesirable reassignment."[167] Absent a "tangible employment action," the employer may resort to defenses related to its "reasonable care" in preventing or correcting such harassment.[168]

The *Faragher* and *Ellerth* decisions are important in the context of agency law and the § 219(2)(d) Aided in Accomplishing language.[169] The Supreme Court's decision recognized that for the employer to be vicariously liable, the Aided in Accomplishing language requires "something more" than the mere existence of the agency relationship.[170] In dealing with the agency portion of its holding, the Supreme Court created vicarious liability where there was a nexus between the act the employer authorized the supervisor to perform and the act the supervisor did perform; where the supervisor did not take an employment-related action such as firing or demoting, the Aided in Accomplishing language did not automatically create vicarious liability simply because of the existence of the agency relationship.[171] For vicarious liability to attach,

164. *Id.* at 762–63. "Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762.

165. *Id.*

166. *See id.* at 764–65.

167. *Id.* at 765.

168. *Id.*

169. While important to agency law, it is also fair to recognize that the Supreme Court qualified its Aided in Accomplishing definition to how Title VII actions apply agency law principles: "[W]e hesitate to render a definitive explanation of our understanding of [Aided in Accomplishing] in [agency law] where other important considerations must affect our judgment." *Id.* at 763.

170. *Id.* at 760.

171. *Id.* at 765.

the supervisors must take some action consistent with the duties which the principal expressly charged the agents.[172] Without this nexus, liability might still attach in the supervisor/employee context under Title VII principles because of the employer's actions or inactions related to protecting the employees from such harassment.[173]

The Supreme Court is partially correct in its application of the Aided in Accomplishing language: Restatement 2nd intended that Aided in Accomplishing stand alone as a source of vicarious liability.[174] The Court's decision is consistent with Reporter Seavey's example of the utility worker entering a third party's home and raping the mistress[175] because the Court created vicarious liability for the irregular action when the agent committed an action regular on its face. The Supreme Court is incorrect, though, because it is clear the ALI did not intend to extend vicarious liability under the Aided in Accomplishing language as far as Reporter Seavey's rape example even though the agent's entry into the home appeared regular.

The Supreme Court's decision is partially consistent with the Comment (e) example of the telegraph operator sending an unauthorized message. In this example, the operator performs the task assigned—that of operating the telegraph machine—and vicarious liability attaches because the act committed, though not specifically authorized, is the same type of act authorized.[176] From all appearances the message is legitimate because it came from the telegraph operator who is authorized to send such messages.[177] In *Faragher* and *Ellerth*, vicarious liability under the Aided in Accomplishing language did not attach unless the supervisor "defectively" committed an act for which the employer engaged him; that is, unless the employer fired, demoted, or otherwise affected the employee's employment relationship—the act itself being an "official act" of the employer.[178] The Supreme Court was correct to the extent liability attaches for the agent's act that appears to be the apparent act of the employer; however, the Court was not correct when it also held the principal liable under the Aided in Accomplishing language for the sexual harassment precipitating the "tangible employment action."

172. *Id.* at 762.
173. *Id.* at 764.
174. *See supra* Part III.B.1.
175. *See Proceedings*, *supra* note 40, at 376.
176. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).
177. *See id.*
178. *See supra* notes 155–62 and accompanying text.

While Aided in Accomplishing creates liability for the employment-related decisions of firing and promotion, the language does not create liability for the sexual harassment. To argue that the two torts are connected is also to argue that because the utility worker gained access to the home by showing his badge that liability for the trespass is also liability for the rape. Because the ALI rejected vicarious liability under Aided in Accomplishing for the rape, liability likewise cannot attach for the harassment under the language.

If a principal is to be vicariously liable for an agent's act without any indicia of apparent authority, without any third party's reasonable reliance of apparent authority, then it is only reasonable to require an extension of such liability only where there is a direct nexus between the act authorized and the act committed. Vicarious liability cannot be conditioned upon apparent authority on the one hand and strictly exist if there is an absence of apparent authority on the other; however, while the agent performs the act for which the principal specifically employs the agent, and the agent intentionally causes harm by performing that specifically authorized act, liability should attach if there is an existing nexus between the act authorized and the act performed, irrespective of an apparent authority examination.

The Supreme Court's definition of the Aided in Accomplishing language creating vicarious liability for the tangible employment action is also consistent with § 219(2)(d) Comment (e) when viewed through the eyes of the victim, the principal, and all other outside observers. Both situations lack the victim's reasonable belief of apparent authority; however, since the act committed "appears regular on its face," the principal and all others reasonably believe that the act is proper, notwithstanding that the agent acts solely for his own purposes. Without an intent to serve the principal, the agent's act is not within the scope of employment. Without the victim's reasonable belief that the act is that of the principal, the act is not within the dictates of apparent authority. The Court's hybrid then permits vicarious liability when in the absence of the victim's reasonable reliance, the agent's act—the tangible employment action—from all appearances is the official act of the principal.

Relying on the Supreme Court's interpretation of Aided in Accomplishing, vicarious liability attaches to the dental corporation if the victim shows a "tangible employment action" along with the sexual assault. Under this standard, if the dentist performs some "official act" attributable to the dental corporation, the principal becomes liable for

both the wrongful "official act" and the sexual assault. Raping the unsedated patient in the dental office would not be enough, just as creating an "actionable hostile environment" in *Faragher* and *Ellerth* was alone not enough; there must be "something more" than the mere connection between the dentist and his employment with the professional corporation. This test appears to be met when the dentist drills in your mouth with one hand and fondles you with the other hand because the dentist could not accomplish the assault without disabling you with the "official act." Vicarious liability also seems possible under the Court's test when the dentist strokes your thighs or possibly even rapes you while you are sedated—sedation alone being the official act of the principal.

The Supreme Court properly defined Aided in Accomplishing as requiring "something more" than a mere connection between the agent and principal. The problem is that the Court extended liability for acts not covered by traditional agency law simply because of the existence of a "tangible employment action" that satisfies the nexus requirement. Requiring this connection moves Aided in Accomplishing closer to the Restatement's true intent of creating vicarious liability only for an act "regular on its face"; however, the Court's definition does not comport with Restatement 2nd's original intent precluding vicarious liability for acts that are instead irregular. As a result, subsequent lower courts have examined the Supreme Court's position, continuing the Court's errant definition even outside Title VII cases.

D. The Supreme Court's Failure to Identify Restatement 2nd's Original Intent Resulted in Aided in Accomplishing*'s Continued Corruption*

In Vermont, an adult victim of a deputy sheriff's sexual assault would have a cause of action even if the victim possessed full knowledge that the deputy acted on his own behalf, whereas a child victim of a pastor's sexual assault would not have a cause of action even if the child lacked knowledge or perhaps an understanding of the pastor's authority.[179] The disparity exists because the sheriff's department issued the deputy a badge and a gun, and all the church issued the pastor was a

179. *Compare* Doe v. Forrest, 2004 VT 37, ¶¶ 56–58, 853 A.2d 48, 69, *with* Doe v. Newbury Bible Church, 2007 VT 72, ¶¶ 9, 13, 933 A.2d 196, 199–200. It is significant to note that Justice Marilyn S. Skoglund led the *Doe v. Forrest* dissent and thereafter led the *Doe v. Newbury Bible Church* majority. *Forrest*, 2004 VT 37, ¶ 59; *Newbury Bible Church*, 2007 VT 72, ¶ 1.

pulpit.[180]

Following the Supreme Court's lead in *Faragher*, the Vermont Supreme Court, in *Doe v. Forrest*, held that a sheriff's department could be vicariously liable for a sexual assault committed by one of its deputies even though the court found the victim could not rely upon a claim of apparent authority.[181] In reversing summary judgment, the court held that a fact finder could determine that indices of a deputy sheriff given by the sheriff's department "'aided [the deputy] in accomplishing the tort.'"[182]

In *Forrest*, an on-duty deputy sheriff entered a convenience store where he knew the twenty-year-old plaintiff worked.[183] The deputy regularly stopped by the store on behalf of the Sheriff's Department under the Department's contract with the municipalities "as part of his 'community policing function.'"[184] The deputy "developed something of a personal relationship" with the plaintiff resulting from these frequent visits.[185] On one of these on-duty visits, the deputy "coerced" the plaintiff into performing fellatio on him.[186] The deputy also "kissed and fondled [the plaintiff's] breasts."[187]

Shortly thereafter, the Vermont Supreme Court in *Doe v. Newbury Bible Church* refused to extend vicarious liability through the Aided in Accomplishing applicable in *Forrest* to a case where a pastor committed a sexual assault against a minor child.[188] The court re-examined the public policy considerations of its decision in *Forrest* and held that a pastor of a church does not possess the "extraordinary power" bestowed upon law enforcement over persons who are "particularly vulnerable and defenseless"—that a pastor's power over his parishioners is barely different from any other adult.[189]

In *Newbury Bible Church*, the pastor sexually assaulted a minor child

180. *Newbury Bible Church*, 2007 VT 72, ¶ 13.
181. *Forrest*, 2004 VT 37, ¶ 24.
182. *Id.* ¶ 58 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)). Section 219(2)(d)'s "aided in accomplishing the tort by the existence of the agency relation" discussed more fully *supra* Part III.
183. *Forrest*, 2004 VT 37, ¶ 2.
184. *Id.*
185. *Id.*
186. *Id.* ¶ 4.
187. *Id.*
188. Doe v. Newbury Bible Church, 2007 VT 72, ¶ 1, 933 A.2d 196, 197 (answering a certified question directly on this point from the United States Court of Appeals for the Second Circuit).
189. *Id.* ¶¶ 8–10.

by inappropriately fondling the child on at least four separate occasions occurring presumably when the child attended the third through the eighth grade.[190] The plaintiff minor child did not immediately tell anyone of the assaults because he allegedly feared he would get in trouble.[191]

Likely, a twenty-year-old convenience-store worker knows that a deputy has no express authority to commit a sexual assault and that the deputy's actions are in no way generated by the deputy's intent to serve the Sheriff's Department or committed on behalf of the Sheriff's Department. Consequently, the *Forrest* plaintiff could not prevail under express authority or apparent authority doctrines.[192] In *Newbury Bible Church*, the child victim was possibly as young as eight years old when the first sexual assault occurred.[193] While it may be within an eight-year-old child's understanding that neither his church nor God gives a pastor authority to sexually assault child parishioners, it seems difficult to say that a minor child is any less "vulnerable [or] defenseless"[194] than a twenty-year-old woman simply because the pastor carries neither badge nor gun.

In neither case did the agent act on express or implied directions of the respective principal.[195] In addition, neither party acted with intent to serve his principal, but acted out of his own self-interest.[196] Accordingly, both sexual assaults were outside the scope of employment.[197] If both the *Forrest* twenty-year-old plaintiff and the *Newbury Bible Church* minor child plaintiff understood that their attacker committed torts without acting on behalf of the respective principal—lacking the requisite

190. *Id.* ¶¶ 2–3. This case and its companions do not reflect when the four assaults occurred or the minor child's age or grade when any of the specific instances occurred.

191. Doe v. Newbury Bible Church, 445 F.3d 594, 595 (2d Cir. 2006). It seems somewhat appropriate to point out the trial court's finding that although one sexual assault occurred in the pastor's office, the pastor's opportunity to sexually assault Doe arose not only from his pastoral position but also because of his friendship with the family. Doe v. Newbury Bible Church, No. 1:03-CV-211, 2005 WL 1862118, at *4 (D. Vt. July 20, 2005). "Even if Doe's parents were more inclined to begin a friendship with Rinaldi because of his position as pastor, it was their personal relationship with him that gave him the opportunity to molest Doe." *Id.*

192. *Forrest*, 2004 VT 37, ¶ 18.

193. Doe's age at the time of assault is unknown and could possibly have occurred as late as "until the beginning of ninth grade." *Newbury Bible Church*, 2007 VT 72, ¶ 2.

194. *Id.* ¶ 8.

195. *See Forrest*, 2004 VT 37, ¶¶ 11–12, 18; *Newbury Bible Church*, 2007 VT 72, ¶¶ 2–3.

196. *See Forrest*, 2004 VT 37, ¶ 2; *Newbury Bible Church*, 2007 VT 72, ¶ 8.

197. *Forrest*, 2004 VT 37, ¶ 18; *Newbury Bible Church*, 2007 VT 72, ¶ 6.

reasonable belief of authority—then neither principal should be vicariously liable for their agent's intentional physical torts.[198]

Vicarious liability should not exist under the Aided in Accomplishing language in either case. The Supreme Court held that the Aided in Accomplishing language requires "something more" than the mere employment relationship,[199] that there must be a nexus between the act authorized and the act committed, that the act must be one that by all appearances is the act of the principal—an act that "'seems regular on its face.'"[200]

Part of the reasoning for Aided in Accomplishing's limited popularity is the idea that the vicariously liable principal "clothed [the bad actor] with the trappings of authority."[201] The *Forrest* employer clothed the deputy with the indicia of a law enforcement agent of the State coupled with the power of detention, making the victim defenseless against such an advance.[202] After analyzing that the deputy had neither actual nor apparent authority, the Vermont Supreme Court found vicarious liability in *Forrest* under the Aided in Accomplishing language because of the "extraordinary power that a law enforcement officer has over a citizen" and that the deputy was only able to accomplish the tort because of "the existence of the agency relationship."[203]

Although the *Forrest* court held that the principal could be liable for the sexual assault, this extension of the Aided in Accomplishing

198. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). The plaintiff in *Doe v. Newbury Bible Church* does not appear to argue a cause of action based upon apparent authority, but the "aided in accomplishing the tort by the existence of the agency relation" language of § 219(2)(d) was restrictively adopted by the Vermont Supreme Court in *Doe v. Forrest*. *Forrest*, 2004 VT 37, ¶ 22; *Newbury Bible Church*, 2007 VT 72, ¶ 7. Perhaps, the *Newbury Bible Church* minor child possesses a better apparent authority argument than does the *Forrest* adult woman. The *Forrest* adult woman could not have a reasonable belief that the deputy acted on behalf of his employer; however, it is conceivable that the *Newbury Bible Church* minor child was young enough that he did not know his attacker was not authorized to act on behalf of his employer; however, if he was too young to know the agent was not authorized, he was also probably too young to know that his attacker was an "agent" at all.

199. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998).

200. *Id.* at 772 n.4 (Ginsburg, J., concurring) (quoting RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a).

201. See RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (2006) for the phrase "clothed with the trappings of authority."

202. *Forrest*, 2004 VT 37, ¶¶ 23, 35. Presumably, the extent of Forrest's police power is somewhat greater than the "power of God" the priest might have "held" over the Newbury Bible Church minor child.

203. *Id.* ¶ 34.

language perhaps exceeds even the *Ellerth* Supreme Court limitation. Under the *Ellerth* analysis, there must be a "tangible employment action"—some nexus between the act committed and the act authorized.[204] Because of the deputy's possession of the "trappings of authority"[205] and the victim's apparent lack of freedom to escape detention, the *Forrest* court found that the employer could be liable.[206] Under the Supreme Court's analysis, though, vicarious liability might attach because of the deputy's right of detention but only if the exercise of this detention appeared to be within the scope of the deputy's employment when viewed by the principal and all other outside uninformed observers.

It seems clear that the victim did not believe the deputy had the authority to sexually assault her, thereby negating any claim of apparent authority. The questions then should be whether the deputy "detained" the victim in a manner the principal authorized and whether such detention would appear proper to the principal and outside observers.

Even if true, holding the principal liable for the sexual assault is beyond the Restatement's intent, just as holding the principal liable for the *Faragher* sexual harassment is beyond the Restatement's intent. Vicarious liability under Aided in Accomplishing's original intent extends only to the act appearing proper on its face.[207] Once the agent's acts cease to appear proper, vicarious liability ceases to exist under Aided in Accomplishing.

It is difficult to imagine the dental corporation manifesting in the dentist the power to affect the life of a patient in the same manner as a police officer; however, the dentist possesses the power to sedate and incapacitate the victim to aid in accomplishing the assault. *Newbury Bible Church* does not assert that the pastor molested the child by forcible restraint; however, the court's focus on the *Forrest* deputy's *legal* power negates liability under *Newbury Bible Church* even if the pastor restrained the child.[208] Like the pastor, the dentist does not possess the deputy's police powers. Although the dentist does not hold a legal power to detain, the dentist does hold the power of actual physical control in the ability to sedate.

204. *Ellerth*, 524 U.S. at 762.
205. *See* RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c.
206. *Forrest*, 2004 VT 37, ¶¶ 56, 58.
207. *See supra* Part III.D.
208. Doe v. Newbury Bible Church, 2007 VT 72, ¶¶ 8, 11, 933 A.2d 196, 199.

V. WHERE RESTATEMENT 3RD SHOULD CLEARLY DELINEATE *AIDED IN ACCOMPLISHING*'S BOUNDARIES, RESTATEMENT 3RD INSTEAD HIDES *AIDED IN ACCOMPLISHING* IN A BROADER DEFINITION OF APPARENT AUTHORITY

Restatement 2nd failed to adequately define Aided in Accomplishing, causing courts to misconstrue the ALI's intent in adopting the language. The Supreme Court adopted Aided in Accomplishing as a stand-alone basis for establishing vicarious liability; however, the Court failed to properly limit the language's scope to only an act appearing "regular on its face." Restatement 3rd had the opportunity—and the obligation—to establish Aided in Accomplishing's true meaning and the language's place in common law but failed to do so.

Restatement 3rd intentionally omits the Aided in Accomplishing language.[209] The Reporter's rationale is that the "purposes likely intended" by the Aided in Accomplishing language are met by a more thorough analysis of apparent authority and a principal's duty of reasonable care.[210] While the Reporter specifically intended to broadly state the blackletter and leave explanation to the Comments, that was also the Restatement 2nd Reporter's intention, which led to the aberrations of the Aided in Accomplishing language.[211]

209. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08. Restatement 3rd § 7.08 replaces § 219(2)(d).

210. *Id.* § 7.08 cmt. b ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability. The purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents."). Professor Deborah A. DeMott, Duke University School of Law, served as Reporter for Restatement 3rd. *Id.* at v.

211. *Proceedings of the 77th Annual Meeting of the American Law Institute*, 77 A.L.I. PROC. 335, 337 (2000) (Reporter DeMott: "My thought was that it would be helpful, to the extent possible, to try and articulate some fairly general principles and doctrines and concepts and do as much with them as possible in the Comments and by way of Illustration."); *Proceedings*, *supra* note 40, at 375.

> [Mr.Edwin Leard Mechem:] [T]he language of the black letter falls rather far short . . . .
>
> . . . .
>
> [Mr. Warren A. Seavey:] You see, we expand all these things into comments.
>
> Mr. Mechem: I have been fighting all along here to have the substance all in

Restatement 3rd addresses unauthorized intentional physical torts in section 7.07 (§ 7.07) when an agent acts within the scope of employment and in section 7.08 (§ 7.08) when an agent acts with apparent authority.[212] Section 7.07 provides that if the agent acts with any intent to serve the principal, the principal becomes vicariously liable for the agent's torts.[213] When the agent acts outside the scope of employment, § 7.08 provides that "[a] principal is subject to vicarious liability for a tort committed by an agent in dealing . . . with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort."[214] Because Restatement 3rd defines apparent authority as requiring that the third party "reasonably believe[] the actor has [actual] authority to act on behalf of the principal," § 7.08 effectively embodies Restatement 2nd § 219(2)(d), excepting the Aided in Accomplishing language.[215] Further, the third party's reasonable reliance must be "traceable to the principal's manifestations."[216]

Restatement 3rd defines "manifestation" broadly to encompass express statements to a third party through "written or spoken words" and also through "other conduct."[217] Restatement 3rd uses such broad language to encompass inherent agency power within the rubric of

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the black letter and not in the comment.

Id.

212. RESTATEMENT (THIRD) OF AGENCY §§ 7.07, 7.08.

213. *Id.* § 7.07.

214. *Id.* § 7.08 ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.").

215. *Id.* § 2.03 ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."); *see also id.* § 7.08; RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (providing vicarious liability where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation").

216. RESTATEMENT (THIRD) OF AGENCY § 2.03. "Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation." *Id.* § 3.03.

217. *Id.* § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct.").

apparent authority.[218] The consequence, though, may be for courts to find that assent by "other conduct" may include the very conduct expressed by the Aided in Accomplishing language. Although the Comments appropriately identify that a manifestation of assent to act *exists* where a principal places an agent in a position that customarily includes certain powers to act, as long as the agent's action falls "within that scope," the Comments do not expressly provide that manifestation *does not exist* when that position permits the agent to act outside that scope.[219]

In discussing tortious conduct within the scope of employment, Restatement 3rd identifies that a principal is not strictly liable simply because of the agency relationship.[220] Consistent with the common law intent to serve doctrine, the § 7.07 Comments identify that an agent leaves the scope of employment when the agent "engage[s] in an independent course of conduct not intended to further any purpose of the employer."[221] While § 7.07 covers the "scope of employment" portions of § 219, § 7.08 replaces § 219(2)(d) as long as the agent's acts qualify under apparent authority.[222]

Users of Restatement 3rd looking for modern treatment of Aided in Accomplishing with respect to physical torts will read through the blackletter and not find "Aided in Accomplishing."[223] Users will then pour over the Comments to find that the Illustrations for § 7.08 do not

218. *Id.* § 1.03 reporter's note a ("The definition of manifestation in this section is intended to be broader than that assumed to be operative at points in the Restatement Second of Agency. One consequence of this breadth is *to eliminate the rationale for a distinct doctrine of inherent-agency power* applicable to disclosed principals when an agent disregards instructions or oversteps actual authority." (emphasis added)).

219. Comment (b) states:

> If the principal places a person in a position or office with specific functions or responsibilities, from which third parties will infer that the principal assents to acts by the person requisite to fulfilling the specific functions or responsibilities, the principal has manifested such assent to third parties. . . .
>
> Moreover, an agent is sometimes placed in a position in an industry or setting in which holders of the position customarily have authority of a specific scope. Absent notice to third parties to the contrary, placing the agent in such a position constitutes a manifestation that the principal assents to be bound by actions by the agent that fall within that scope.

Id. § 1.03 cmt. b.

220. *Id.* § 7.07 cmt. b ("This fact alone is insufficient to justify subjecting the employer to vicarious liability. An employer does not assume the role of insurer against all harm suffered by third parties with whom its employees may interact.").

221. *Id.*

222. *See id.* § 7.07 reporter's note a; *see id.* § 7.08 reporter's note a.

223. *See id.* § 7.08.

include examples of intentional physical torts.[224] Instead, such examples appear in § 7.07, defining when such actions are within the scope of employment.[225] Perhaps the lack of intentional physical tort examples in § 7.08 stems from the Reporter's position that while § 7.08 focuses on apparent authority, such "authority rarely serves as a basis for liability" in such intentional physical tort cases.[226] The Reporter's position is consistent with the tenor of § 7.08, creating vicarious liability only where the third party reasonably believes that the agent committed the intentional physical tort under a traceable manifestation of actual authority.[227] The intended distinction, then, is that a principal can only be vicariously liable for an agent's unauthorized intentional physical tort if the third party can prove the agent committed the tort in the scope of employment or under apparent authority.

Restatement 3rd disserves users by not placing Aided in Accomplishing in the blackletter with its properly limited definition. In Restatement 2nd, Aided in Accomplishing is an alternative to apparent authority. By including Aided in Accomplishing within the apparent authority rubric, Restatement 3rd confuses users, at best, and frustrates users, at worst, who can neither locate Aided in Accomplishing within Restatement 3rd nor identify how Aided in Accomplishing can be explained within apparent authority principles. Because Aided in Accomplishing is absent from the blackletter, users must look to the Restatement 3rd Comments to ascertain how the Restatement treats Aided in Accomplishing; failing to find an adequate explanation, some users will dismiss Restatement 3rd and fall back to a corrupted interpretation of Aided in Accomplishing.

224. *See id.* § 7.08 cmt. b–d.
225. *See id.* § 7.07 cmt. b–e.
226. *Id.* § 7.08 reporter's note b.
227. Comment (b) of § 7.08 provides:

> If a third party knows or has reason to know that an agent lacks authority to take a particular action, the agent does not act with apparent authority.
>
> . . . .
>
> A principal is not subject to liability on the basis that an agent . . . took action with apparent authority unless the third party reasonably believed that the agent acted with actual authority and that belief is traceable to a manifestation made by the principal. . . . Thus, the rule stated in this section is inapplicable when a third party does not reasonably believe that an agent's action has been authorized by the principal.

Id. § 7.08 cmt. b.

A. The Restatement 3rd Illustrations Fail to Properly Identify Aided in Accomplishing's *Place in Agency Common Law*

Restatement Comments give Illustrations on how to apply the blackletter. The examples should aid the Restatement user in identifying situations that fall within and outside the blackletter. Not only does Restatement 3rd fail to adequately address Aided in Accomplishing, but the Illustrations offer the user little express help.

1. Section 7.07's Scope-of-Employment Illustrations Examine Intentional Physical Torts but Not with Respect to *Aided in Accomplishing*

Section 7.07 examines a series of Illustrations in explaining when intentional physical torts are within the scope of employment.[228] Illustrations 5–7 involve variations of a fast-food restaurant employee in an argument with a customer.[229] In Illustration 5, the principal charges the employee with resolving customer complaints.[230] When the customer cusses at the employee, the employee "slams [his] fist into a nearby stack of plastic trays."[231] One of the trays hits and injures the customer.[232] Section 7.07 provides that where the employee's conduct was tortious, the employer is liable because "slamming the trays was incidental to performing work" for which the employer engaged the employee.[233] Under Illustration 6, the principal remains liable even if the employee slammed the trays after the customer made to the employee additional comments of a personal nature and not related to the employer's business or the task of handling customer complaints.[234] If instead of banging the plastic trays or punching the customer in the nose, the employee pulled out a personally owned handgun and shot the customer, even if related to his position of resolving customer complaints, the "extreme quality" of

228. *See id.* § 7.07 illus. 1–15. The truck driver Illustrations 8 and 9 only involve assault and not a physical tort. *Id.* § 7.07 cmt. b, illus. 8–9. In Illustrations 8 and 9, the truck driver did not actually make "offensive contact" with the third party but intended to either make such contact or create an "imminent apprehension of such a contact." *See id.*; RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (1965).

229. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. c, illus. 5–7.

230. *Id.* § 7.07 cmt. c, illus. 5.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* § 7.07 cmt. c, illus. 6.

the employee's action places the action outside the scope of employment.[235] In Illustration 7, the employer is not liable when the employee chases the customer out of the store and assaults the customer because the employee "cannot allow [the customer's] accusation to go unanswered"; in Illustration 7, the employee "engaged in an independent course of conduct not intended to further [the employer's] interests."[236]

While Illustrations 5 and 6 both involve the employee's intent to strike the plastic trays,[237] the customer's injury appears more related to the unfortunate consequence of the employee's action rather than the employee's actual intent to hit the customer with a plastic tray. In both these examples, the principal is liable because the relationship between the employee's action and the customer's injury is related to a purpose to serve the employer.[238] Employer liability exists if the employee intentionally hits the plastic trays, or, if instead, while the employee is negligently stacking them, one falls on the customer causing the same injury.[239]

It is just as clear from the Comments that if the employee brandishes a gun and shoots the customer, the employee's extreme action was too far departed from the scope of employment.[240] The gray area between a plastic tray consequently hitting the customer and the employee shooting the customer is not as clear. Presumably, if instead of hitting the plastic trays that then accidently hit the customer the employee directly punches the customer in the nose, such contact remains in the scope of employment as not too extreme but still a part of the argument involved in resolving the customer's complaint. The employer's vicarious liability hinges upon a finding of the employee's motive: whether the employee acted with any measure of settling the customer's complaint or whether the employee acted solely to defend the employee's honor from the otherwise unanswered allegation.[241]

235. *Id.* § 7.07 cmt. c.
236. *Id.* § 7.07 cmt. c, illus. 7.
237. *See id.* § 7.07 cmt. c, illus. 5–6.
238. *Id.*
239. *Id.* § 7.07(1) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.").
240. *See id.* § 7.07 cmt. b–c.
241. The Illustrations appear to exhibit the extreme examples, presumably leaving the gray areas for fact finder interpretation; perhaps other factors such as the age and size of the parties as well as the manner of the customer's aggression, or lack thereof, affect whether the agent's punching the customer in the nose is an extreme or reasonable extension of the party's argument.

Pursuant to Restatement 3rd, when an agent commits a tort against a third party, one should first look to whether the employee had any intent to serve the employer.[242] On finding such intent, one should then ask a second question of whether the employee's intentional physical tort was too extreme to attribute the act to the employer.[243] Finding that the employee's actions were outside the scope of employment, we next look to whether the agent's act qualifies under apparent authority.[244] Exhausting these tests, Restatement 3rd provides that the employer is not vicariously liable for the employee's actions.[245]

Limiting vicarious liability to this approach is facially inconsistent with the Restatement 2nd example of the telegraph operator sending a fraudulent telegram.[246] In that example, the injured party cannot stand on apparent authority because the party lacks a reasonable reliance on the agent's authority.[247] It is not the injured third party that relies upon the operator's authority but the unrelated recipient of the telegram.[248] The Restatement 3rd § 7.08 Comments only implicitly resolve the inconsistency by redefining apparent authority to include the reasonable belief of unrelated third parties.[249]

2. Section 7.08's Outside-the-Scope-of-Employment Illustrations Do Not Examine Intentional Physical Torts but Implicitly Touch *Aided in Accomplishing*

Illustration 17 of § 7.08 creates principal vicarious liability because a security guard makes an intentionally false shoplifting allegation against someone with whom the security guard "has a private feud."[250] The Illustration does not speak of the injured party's belief but rather of the arresting officer's belief relying upon the security guard's allegation.[251]

242. RESTATEMENT (THIRD) OF AGENCY § 7.07(2).

243. Examining the extreme nature of the agent's act does not appear in the blackletter of § 7.07 but in the Comments. *Id.* § 7.07 cmt. c. This of course ignores that the Restatement 3rd Comments state that apparent authority analysis "rarely serves as a basis for liability" when examining intentional physical torts. *Id.* § 7.08 reporter's note b.

244. *Id.* § 7.08.

245. *See id.* § 7.03.

246. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).

247. *See id.*; *see also supra* Part III.D.

248. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e; *see also supra* Part III.D.

249. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b.

250. *Id.* § 7.08 cmt. d, illus. 17.

251. *Id.*

The Restatement 3rd Comments include in apparent authority "those to whom [the defamation] is published."[252]

In the Illustration, the victim clearly knows he did not shoplift and, having had the feud with the security guard, understands that the security guard makes the allegation falsely.[253] Because the victim cannot have a reasonable belief as to the truth of the allegation, there can be no apparent authority as far as the victim is concerned.[254] The apparent authority then lies solely in the arresting officer's reasonable belief of the security guard's truthfulness and that the security guard acts with authority.[255]

This Illustration is perhaps the modern version of the telegraph operator example of Restatement 2nd. In both examples, the third party cannot recover under traditional apparent authority because the injured party in each lacks a reasonable reliance upon the agent's authority to act—the telegraph operator victim is unaware of the tort and perhaps unaware of the agency relationship, and the security guard victim is aware that the security guard acts improperly and outside the scope of employment.

Restatement 3rd's broadening of the scope of apparent authority to include not only the victim's reasonable belief of the agent's authority but also the outside observer's reasonable belief of authority appears to be Restatement 3rd's integration of the Aided in Accomplishing language into apparent authority—the "more fully elaborated treatment of apparent authority" to which Restatement 3rd refers in eliminating the Aided in Accomplishing language.[256] Aided in Accomplishing applies to the security guard example because, although the victim lacks a reasonable belief of authority, the security guard's action appears proper on its face when viewed by the outside observer and specifically by the police officer to whom the security guard makes the false allegation.

While consistent with Aided in Accomplishing, Restatement 3rd never expressly ties Aided in Accomplishing with the security guard Illustration. While expanding the definition of apparent authority to include not only the victim's reasonable belief but also the reasonable belief of the recipient of the defamatory remark, Restatement 3rd does

252. *Id.* § 7.08 cmt. d.
253. *Id.* § 7.08 cmt. d, illus. 17.
254. *See id.*
255. *See id.*
256. *Id.* § 7.08 cmt. b; *see also supra* Part V.

not explain how the unrelated recipient relates to Aided in Accomplishing—the police officer recipient is not the principal, the agent, or the third party victim used in traditional apparent authority analysis. Restatement 3rd also does not address that the security guard's detention and defamation meets the "regular on its face" requirement.

Restatement 3rd is devoid of any explanation as to how the expanded definition of apparent authority includes Aided in Accomplishing and does not provide any example to help the user find that connection. While the security guard Illustration helps show that, under the Restatement 3rd expansion, apparent authority does not limit the reasonable belief to the victim alone, the Illustration does not point out that Aided in Accomplishing would cover the security guard's false detention, even absent the false allegation, if the casual observer would view the false detention by a store security guard as an act regular on its face.

Prior to Restatement 3rd, Aided in Accomplishing stood alone in agency common law, separate from apparent authority analysis. Instead of placing Aided in Accomplishing in the blackletter, Restatement 3rd merged Aided in Accomplishing into apparent authority without explaining the merger or the one Illustration that touches on the Aided in Accomplishing doctrine, while relegating the expansion to a vague apparent authority Comment. Restatement 3rd's intent to merge Aided in Accomplishing into apparent authority doctrine without fully explaining Aided in Accomplishing's place in apparent authority will force the average practitioner to spend countless hours looking for but never locating the proper treatment of Aided in Accomplishing.

B. Restatement 3rd Fails Users by Not Defining Aided in Accomplishing*'s Position in the Common Law or Even* Aided in Accomplishing*'s New Position Within Apparent Authority*

Perhaps Restatement 3rd substantially reflects the common law as the drafters of the Restatement 2nd intended; however, there is no dispute that because of § 219(2)(d) the Aided in Accomplishing language now holds a precarious place in the common law, especially since its recognition as a "developing feature of agency law" by the U.S. Supreme Court in *Faragher* and *Ellerth*.[257]

257. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

Even without the Supreme Court's adoption, Restatement 3rd has an obligation to address and present users with the common law's development and growth, even if that growth results in a twisted branch in need of pruning. The Restatement should not create common law: It should define the common law. The Aided in Accomplishing language is now part of the common law. Instead of ignoring the language and potentially allowing the branch to grow and distort the appearance of the vicarious liability tree, Restatement 3rd should specifically identify the language in the blackletter and prune it consistent with Restatement 2nd's original intent. Restatement 3rd should not encourage practitioners to look to Restatement 2nd since Restatement 3rd is void of Aided in Accomplishing's proper application and place in agency common law.

Restatement 3rd's position is essentially that the Aided in Accomplishing language is not needed because the language is adequately encompassed in other Restatement provisions dealing with apparent authority.[258] This position is true only if the end user can ascertain how the Restatement 2nd's Aided in Accomplishing language—previously understood to stand alone, separate from indicia of apparent authority—is now included within Restatement 3rd's broader definition of apparent authority. While Restatement 3rd may accurately state the common law without the aberration of the Aided in Accomplishing language, Restatement 3rd does not clearly explain the Restatement 2nd transformation. While Aided in Accomplishing exists in present agency jurisprudence, Restatement 3rd does nothing to aid the user in identifying or limiting the language's application.

While some courts chose to define the Aided in Accomplishing language beyond the Restatement 2nd drafters' intent and the common law, Restatement 3rd should do more than relegate the discussion to one sentence in a Restatement Comment; Restatement 3rd should definitively provide blackletter law that resolves the confusion left by these errant positions. A Restatement disserves practitioners and judges when it hides too much of the law in the Comments instead of completely representing the law in the blackletter, especially when a prior Restatement's failure to define a provision resulted in distortion of the law.

By not clarifying and addressing the proper limitation of the Aided in Accomplishing language, Restatement 3rd leaves open the possibility that courts will continue to rely on a misinterpretation of that provision.

258. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b.

Not only might a court do so because it already adopted other portions of Restatement 2nd, or perhaps already adopted § 219(2)(d) in this or other contexts, but a court that has not specifically adopted § 219(2)(d) might rely on the Supreme Court's recognition of the Aided in Accomplishing language.[259] Those courts disposed to finding Aided in Accomplishing's applicability to intentional physical torts will find the language no longer present in Restatement 3rd, but will not find within Restatement 3rd proper boundaries of the Aided in Accomplishing language even as partially defined by the Supreme Court. Without Restatement 3rd's proper explanation of § 219(2)(d), some courts might ignore Restatement 3rd altogether and still adopt a distorted version of Aided in Accomplishing.

C. Restatement 3rd's Decision to Ignore and Not Properly Define Aided in Accomplishing *Does Not Remove* Aided in Accomplishing *from Agency Common Law or Preclude Subsequent Judicial Misapplication*

In *Ayuluk v. Red Oaks Assisted Living, Inc.*, the Alaska Supreme Court adopted Aided in Accomplishing as a stand-alone basis for vicarious liability, even after noting that Restatement 3rd "no longer endorse[d]" the language.[260] Recognizing that the language "risks an unjustified expansion" of vicarious liability, the court limited Aided in Accomplishing's scope to those situations in which an agent possesses "substantial power or authority to control" a vulnerable third party.[261]

In *Ayuluk*, the victim sustained a brain injury that impaired her mental capacity.[262] While a resident of an assisted-living care facility, the victim and an agent/caregiver engaged in both consensual and nonconsensual sex.[263] The victim knew having sex with the caregiver was not appropriate.[264] The jury awarded damages on what it determined

259. *See Faragher* and *Ellerth* discussion *supra* Part IV.C–D.

260. Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 & n.40 (Alaska 2009).

261. *Id.* at 1199.

262. *Id.* at 1188–89.

263. *Id.* at 1189–90. The jury determined that the victim "often consented" but in ten instances did not consent. *Id.* at 1189. "Ruth stated that some of the sex was consensual, but also that she sometimes engaged in sexual activity that she did not feel comfortable doing." *Id.* at 1190.

264. *Id.* at 1199 n.36. The victim testified, "'I knew that he was using me, but I was like—if he is going to use me, I might as well go for it because . . . he is going to get

to be nonconsensual sex.[265]

The *Ayuluk* court compared caregiver/ward cases to the supervisor/subordinate cases that accept the Aided in Accomplishing language.[266] The court stated that the supervisor's ability to create a hostile work environment stems from the supervisor being "clothed with the employer's authority."[267] The employer "clothes" the supervisor with the power to "punish resistance," making the supervisor "*particularly able to force subordinates to submit to sexual harassment*."[268] The court reasoned that there is no difference between the supervisor's power and the caregiver's power: The principal clothes the caregiver with the power to provide "food, comfort, hygiene, and medication" that the caregiver could subsequently use against the vulnerable adult who refuses the caregiver's sexual advances.[269]

Even in recognizing that Restatement 3rd omitted Aided in Accomplishing, the *Ayuluk* court adopted the language.[270] Although more restrictive than *Costos*,[271] the *Ayuluk* court still applied Aided in Accomplishing to circumstances beyond Restatement 2nd's original intent.[272] The victim could not prevail under apparent authority because the victim knew, even in her vulnerable state, that the agent did not act on behalf of the principal.[273] Neither would the principal or other outside observers believe that the sexual abuse was regular on its face to qualify under Aided in Accomplishing.[274] Even under the court's own limitation, the principal should not face vicarious liability absent proof that the agent used his power to withhold "food, comfort, hygiene, [or]

caught one of these days.'" *Id.*

265. *Id.* at 1191. The court determined the jury's reliance on the victim's prior sexual history in finding that some instances of sex were consensual was proper. *Id.* at 1196.

266. *Id.* at 1198–1200. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

267. *Ayuluk*, 201 P.3d at 1198 (internal quotation marks omitted).

268. *Id.* at 1199.

269. *Id.* at 1200.

270. *Id.* at 1199 & n.40.

271. Costos v. Coconut Island Corp., 137 F.3d 46 (1st Cir. 1998).

272. *See Ayuluk*, 201 P.3d. at 1199–1200.

273. *Id.* at 1198–1200.

274. The court appears to recognize the requirement that the offending act seems regular on its face; however, the court chooses not to bind itself by such definition: "While the sexual advances themselves may neither be authorized *nor reasonably appear to be authorized by the employer*, the caregiver's power that enables him to further his improper conduct is an inherent part of the employment relationship." *Id.* at 1200 (emphasis added).

medication" to aid him in accomplishing the sexual abuse.[275]

The *Ayuluk* court did not care that Restatement 3rd omitted Aided in Accomplishing, even after specifically recognizing and identifying Restatement 3rd's omission.[276] Restatement 3rd intended that courts look to apparent authority, but *Ayuluk* did not. Instead of applying Aided in Accomplishing's proper meaning, the *Ayuluk* court's definition continues the line of cases distorting Restatement 2nd's intent.[277] *Ayuluk* looked to Restatement 3rd for guidance.[278] When Aided in Accomplishing did not appear in Restatement 3rd, and when Restatement 3rd did not explain Aided in Accomplishing's new connection to apparent authority, the court fell back to corrupted definitions of Aided in Accomplishing.[279] Restatement 3rd failed the *Ayuluk* court—the Restatement user—by not properly explaining Aided in Accomplishing's role in agency common law, either newly within or traditionally outside of apparent authority.

D. Aided in Accomplishing*'s Corruption Deserves Restatement 3rd's Proper Blackletter Identification and Limitation*

Restatement 3rd's obligation is to present the state of the law, not to ignore the law. While the Restatement should not create law, it has an affirmative obligation to correct the erroneous interpretations caused by Restatement 2nd's failure to properly define Aided in Accomplishing.

Restatement 3rd should contain blackletter law including the Aided in Accomplishing language. Although the ALI takes the position that the rule should be explained in the comments, the blackletter should limit the rule consistent with Restatement 2nd's original intent to protect the rule from further corruption, but more importantly to reverse the damage that already exists. This blackletter should specifically limit the rule to situations where the appropriate nexus is present and where, by all appearances to the principal and other outside observers, authority for the act presumably exists. It is not enough to simply expand the definition of apparent authority to include the reasonable belief of the principal and outside parties without first explaining the position Aided in Accomplishing holds in modern agency law. If not in the blackletter, the Aided in Accomplishing language deserves more thorough treatment

275. *Id.*
276. *Id.* at 1199 & n.40.
277. *See id.* at 1198–1200.
278. *Id.* at 1199 n.40.
279. *Id.* at 1198–1200 & n.40.

than a passing comment of the language being "satisfied by a more fully elaborated treatment of apparent authority."[280] Such vague treatment leaves the practitioner wondering *how*, if the practitioner wonders at all.

By placing the language as properly limited in the blackletter, the ALI can correct its mistake in Restatement 2nd. Restatement 3rd appears to be a thorough and concise treatment of modern agency law; it should recognize the existence of the Aided in Accomplishing language now present in agency law and afford the language its proper limiting scope. To be effective, Restatement 3rd should be useable. Restatement 3rd should not force users to fall back on distorted interpretations of Aided in Accomplishing because the users cannot find proper treatment or explanation in Restatement 3rd.

VI. CONCLUSION

If your dentist fondles your chest or breasts as a part of his prescribed treatment for TMD, vicarious liability may hinge upon whether you had a reasonable belief that the dental corporation authorized the dentist to perform such massage therapy.[281] Whether you returned for subsequent treatments may be evidence that the assault was consensual or perhaps your actual belief that the treatment was proper.[282]

280. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006).

281. In a telephone conversation transcript with the victim's name redacted, one of Dr. Anderson's victims perhaps evidenced a lack of a reasonable belief by stating:

> C[redacted] B.: I w -- I was in shock, and I feel violated and --
>
> Dr. Mark Anderson: I wish you'd said something right then. I do -- I apologize. It was me. But I -- you know, I didn't do it to try and -- and -- I don't know -- and get away with anything or cop a feel. I wasn't -- that was never the intention.
> I just -- I feel horrible. I just -- I --
>
> C[redacted] B.: Well, I think –
>
> Dr. Mark Anderson: -- [Indiscernible] --
>
> C[redacted] B.: I think you were -- I think -- honestly, how I feel, Dr. Anderson, is that you were trying to do that, because as soon as -- uh, I'm not sure if it was Liz came in, you pulled your hands out. And that's what even made me feel more violated, like you did it and you knew you did it.

Documents Offer Insight into Case of Accused Dentist, *supra* note 8 (relevant language on page 7 of the telephone transcript) (redaction in original).

282. In the Anderson incident, one patient returned multiple times intentionally

If you visit your dentist's office after hours for emergency treatment and the dentist rapes you, the dental corporation would not be liable under § 219(2)(d)'s original intent. It is clear the ALI did not intend to extend vicarious liability to such sexual assaults, as evidenced by the ALI's discussion of Reporter Seavey's rape example. It also seems clear that in *Ellerth*, the Supreme Court required that vicarious liability only attach where there was a "tangible employment action."[283] The mere presence and opportunity to commit the assault without a connection to an act the dental corporation authorized would not create vicarious liability.

Your dentist's sexual assault with one hand while drilling in your mouth with the other would likely not create vicarious liability under apparent authority because a reasonable person would not believe the corporation authorized such an act. The Aided in Accomplishing language as originally intended would also not create vicarious liability because, while you could not reasonably believe the act committed was that of the employer, outside observers would also not believe the act was authorized. Extending Aided in Accomplishing beyond Restatement 2nd's intent, the Supreme Court might erroneously find liability under *Faragher* and *Ellerth* interpretations of the Aided in Accomplishing language because the drilling qualifies as a tangible employment action.

The *Newbury Bible Church* court distinguished the pastor's sexual assault of the minor from Forrest's assault of the convenience-store worker because the Newbury Bible Church's pastor did not have the "'extraordinary power'"[284] the *Forrest* deputy possessed over a "particularly vulnerable and defenseless" victim.[285] Arguably, the dentist has no power of detention over you; however, while you are in the chair with a drill in your mouth, you might be "particularly vulnerable and defenseless"[286] because there is virtually no physical means of escape. If the *Forrest* court views this physical detention in the same manner as the deputy's legal detention, then it might erroneously extend liability to the dental corporation.

The Supreme Court identified that Aided in Accomplishing required

wearing "tight shirts with high necklines," which did not prevent the assault. *Embattled Calif. Dentist Says Breast Rubs Necessary*, *supra* note 8.

283. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

284. Doe v. Newbury Bible Church, 2007 VT 72, ¶¶ 7–8, 933 A.2d 196, 198 (quoting Doe v. Forrest, 2004 VT 37, ¶ 34, 853 A.2d 48, 61).

285. *Forrest*, 2004 VT 37, ¶ 36.

286. *See id.*

something more than the mere employment and based vicarious liability on there being a "tangible employment action."[287] There is no question that the dentist drilling in your mouth is the task for which the principal engaged the dentist. When viewed in the same light as hiring and firing employees, the dental corporation would not dispute that the actual act of drilling teeth is an authorized act. It seems, then, that the Supreme Court's analysis would errantly extend liability to the dental corporation for the sexual assault committed while the dentist performed the task that the employer authorized, whether you are a prisoner of the drill or sedation.

Instead of focusing on the "tangible employment action"[288] of the Supreme Court, Restatement 2nd's intent was to focus on the tort itself. The issue is not whether the agent committed the tort in conjunction with an act that appears appropriate, but whether the tort committed appeared to be appropriate. Restatement 2nd finds liability for the telegraph operator sending the fraudulent message,[289] not for the telegraph operator hitting a passerby with a spittoon. While the dental corporation would believe the dentist's act of drilling teeth appropriate, as would other outside observers, the Aided in Accomplishing language extends only to that specific act. Aided in Accomplishing does not apply to acts lacking a sufficient nexus to those authorized and would not apply to the sexual assault.

"[A]ided in accomplishing the tort by the existence of the agency relation"[290] cannot create vicarious liability unless there exists a nexus between the act committed and the act the principal authorized. Standing alone, the Aided in Accomplishing language does not require the victimized third party's reasonable reliance on the agent's apparent authority; however, the Aided in Accomplishing language does require that the tort committed appear appropriate on its face such that the principal and other observers see the act as one the principal authorized. The language is now a part of agency parlance and must be addressed with these limitations.

By all appearances, Restatement 3rd agrees and does not create liability where it should not exist in such situations. The problem is not what the Restatement provides but what Restatement 3rd fails to address.

287. *See Ellerth*, 524 U.S. at 762.
288. *See id.*
289. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958).
290. *Id.* § 219(2)(d).

To ignore Aided in Accomplishing disserves judges and practitioners searching for the language's application in agency law, especially since the U.S. Supreme Court adopted it—albeit in a limited context. Ignoring Aided in Accomplishing does not make the language disappear from agency jurisprudence any more than ignoring a toothache will remove the infection. The *Ayuluk* decision evidences the judiciary's willingness to recognize Restatement 3rd's omission but also the judiciary's willingness to adopt the Aided in Accomplishing language nonetheless.[291] Restatement 3rd should acknowledge the language's existence and limit the language as originally intended.

The Restatement 3rd Reporter consolidated agency common law into fewer blackletter rules because Restatement 2nd contained many overlapping provisions.[292] While expanding the definition of apparent authority may be beneficial to agency law, Restatement 3rd fails to adequately explain Aided in Accomplishing's transition. Until agency law catches up with Restatement 3rd, users may be better served by a little more overlap of the blackletter that explains Aided in Accomplishing's limitations and merger with apparent authority, prior to the ALI's complete dissolution of the doctrine. Perhaps in future Restatements the ALI can completely ignore the language; however, fresh jurisprudence dictates that the ALI serve its users by expressly recognizing the "emerging common law" with its applicable and appropriate limitations.

291. *See* Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183 (Alaska 2009).

292. In her opening remarks to the ALI meeting on the Restatement 3rd Discussion Draft, Reporter DeMott stated that "many of [the Restatement 2nd sections] consist[ed] of very particularized variations on related but not necessarily identical material." *Proceedings of the 77th Annual Meeting of the American Law Institute*, *supra* note 211.