STATE OF MICHIGAN

COURT OF APPEALS

MARIAN T. ZSIGO,

Plaintiff-Appellee,

V

HURLEY MEDICAL CENTER,

Defendant-Appellant.

UNPUBLISHED
May 4, 2004

No. 240155
Genesee Circuit Court
LC No. 99-066504-CL

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial on claims for battery and intentional infliction of emotional distress against defendant on a theory of respondeat superior, the trial court entered a judgment for plaintiff. Defendant now appeals as of right. Because we find defendant not liable under a theory of respondeat superior, the trial court erred in denying defendant's motions for summary disposition and directed verdict with regard to plaintiff's claims of battery and intentional infliction of emotional distress. Our resolution of this issue is dispositive of the appeal and we do not reach the other raised assignments of error. Reversed and remanded.

Basic Facts and Procedural History

This case arises from plaintiff's allegation that defendant's employee, a nursing assistant, sexually assaulted her in the emergency room at Hurley Medical Center on July 9, 1998. On that date, plaintiff was suffering a manic depressive episode when she was brought to defendant's emergency department by police and placed in a treatment room. Because plaintiff was belligerent, yelling, swearing, and kicking, she was placed in restraints and administered treatment. Eventually she was left alone in the room with a nursing assistant assigned to clean the room. Plaintiff begged him to release her from the restraints.

While the aide was alone in the room with plaintiff, she continued to make sexually explicit remarks, enticing him to engage in sexual activity with her. According to plaintiff, she made these remarks "[a]t first to get him out of the room like the other nurses," but when he went to her, she "suddenly thought he was a very powerful person in the hospital" and "would release [her.]" The aide engaged, without resistance, in digital and oral sex with plaintiff, but he did not release her and left. One of the nurses came back into the room right after the aide left. Plaintiff did not say anything because she was scared.

Plaintiff reported the incident three days later to a social worker, police were notified, and an investigation commenced. Plaintiff believed the employee might have been a janitor because he was cleaning and she provided a general description of the employee. Through the hospital's efforts, the nursing assistant was identified approximately three months later. Neither criminal nor civil process has been commenced against the aide.

Plaintiff instituted a four-count complaint against the hospital alone. Counts I and II allege negligence in the hiring of the nursing assistant/aide and a negligent breach of duty in providing safe treatment and monitoring of a vulnerable patient respectively. Counts III and IV allege assault and battery and intentional infliction of emotional distress respectively. After discovery, and on defendant's motion for summary disposition, plaintiff stipulated to dismissal of the negligence counts. The trial court denied summary disposition on the remaining counts relying on *Champion v Nation Wide Security*, 450 Mich 702; 545 NW2d 596 (1996). The trial court found questions of fact on the theory that the existence of the agency relationship aided the employee in committing the tort.

Plaintiff proceeded to jury trial on the remaining counts claiming that defendant should be held liable for the sexual assault committed during the course of employment by defendant's employee. Plaintiff conceded that the employee aide committed the intentional torts outside the scope of his employment. The action was predicated on a theory of vicarious liability only, since plaintiff dismissed all theories of direct liability against defendant.

.At the close of plaintiff's proofs, defendant moved for directed verdict. Defendant made several arguments, most significantly that defendant employer is not subject to liability for the torts of its employee acting outside the scope of the employment stressing that plaintiff conceded the nursing assistant's sexual assault was outside the scope of his employment. Plaintiff argued that the employer remained subject to liability for the torts of its employee when the existence of the agency relation aided the employee in accomplishing the tort and that sufficient evidence had been presented to raise a question of fact in support of the aid in accomplishing the tort theory. The trial court accepted the "aided by the agency relationship" theory as an exception to the general rule of nonliability of the employer for outside the scope of employment torts committed by its employees. The trial court further ruled that a question of fact existed regarding whether the accomplishment of the tort was aided by the agency relationship. The jury rendered a verdict for plaintiff from which defendant now appeals.

Standard of Review

Summary disposition of all or part of a claim or defense may be granted pursuant to MCR 2.116(C)(10) when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). We review de novo a trial court's decision on a motion for summary

disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court must review the record in the same manner, as must the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Analysis

The general principle that an employer cannot be held liable for the torts intentionally or recklessly committed by an employee that are outside the scope of employment was reaffirmed in *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951) ("Under the doctrine of respondeat superior there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master's business."), citing *Martin v Jones*, 302 Mich at 355, 358; 4 NW2d 686 (1942). Our Supreme Court in *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976) recited the general principle and introduced The Restatement of Agency § 219 (2)(d), that provides,

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon the apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

The Restatement sets forth an exception to the general doctrine by stating that the employer is liable for the torts of his employee if "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." While *McCann* recognized that an employer is not liable for the torts committed by an employee that are not within the scope of employment under the doctrine of respondeat superior, a majority of the Court did not adopt 1 Restatement Agency, 2d, § 219(2)(d). , "[A] plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis." *Burns v Olde Discount*, 212 Mich App 576, 582; 538 NW2d 686 (1995).

Further, the Supreme Court has never issued a majority opinion applying § 219(2)(d) in a tort action.[1]

As defendant points out, this Court in *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351,353-355; 288 NW2d 424 (1979), applied the principle that an employer cannot be held vicariously liable for the torts intentionally or recklessly committed by an employee that are beyond the scope of employment. In *Bozarth*, the plaintiff's mother filed suit against the defendant board of education, individually and on behalf of her son, arising out of alleged homosexual assaults upon her son by his sixth-grade teacher. The plaintiff alleged both negligent hiring and supervision and vicarious liability under the doctrine of respondeat superior, claiming the teacher was acting within the scope of his employment and in furtherance of the school board's business when the sexual assaults occurred. In *Bozarth*, the trial court found that the defense of governmental immunity barred the negligent hiring and supervision claims and that the plaintiff had not stated a claim under the doctrine of respondeat superior.

Affirming the trial court's grant of summary judgment regarding the plaintiff's claim of vicarious liability under the doctrine of respondeat superior, this Court in *Bozarth, supra*, 94 Mich App at 353-355, stated:

> A homosexual assault by a teacher on a student is clearly outside the scope of the teacher's employment. See *Galli v Kirkeby*, [398 Mich 527,] 542-543; 248 NW2d 149 (dissenting opinion of Coleman, J). The *respondeat superior doctrine*, therefore, does not apply in such a situation to subject the governing school board to liability. 1 Restatement Agency, 2d, § 219, p 481. *McCann v State of Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976) (opinion of Kavanagh, CJ).
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> By brief and oral argument, plaintiff has focused on the following language, taken from the Restatement on Agency, and found in Justice Kavanagh's opinion in *McCann, supra*, 71:
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> "The employer is also liable for the torts of his employee if 'the servant purported to act or to speak on behalf of the principal and there was reliance upon

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[1] Although a majority of the Court in *McCann* did not adopt 1 Restatement Agency, 2d, §219(2)(d), this Court has referenced § 219(d)(2) in tort actions. See *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351,353-355; 288 NW2d 424 (1979) ; *McIntosh v Becker*, 111 Mich App 692; 314 NW2d 728 (1982) (J. Holbrook concurring) (noting that "[*Bozarth*] stated that the proper application of the principle of liability enunciated in 1 Restatement Agency, 2d, § 219(2)(d), cited in *McCann*, is limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment."); *Graves v Wayne Co*, 124 Mich App 36, 41-42; 333 NW2d 740 (1983), quoting Justice's Kavanagh's opinion in *McCann, supra*, 398 Mich at 71; *Borsuk v Wheeler*, 133 Mich App 403, 411; 349 NW2d 522 (1984) ("The principal is liable if the agent was aided in accomplishing the tort by the existence of the agency relationship."); *Bozarth, supra*, 94 Mich App at 351; and *Rushing v Wayne Co*, 138 Mich App 121, 136-137; 358 NW2d 904 (1984) , quoting Justice Kavanagh's opinion in *McCann, supra*, 398 Mich at 71.

apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation*'. 1 Restatement Agency, 2d, § 219(2)(d), p 481." (Emphasis added.)

It is plaintiff's argument that a jury must be allowed to determine whether Mixson "was aided in accomplishing the tort by the existence of the agency relation."

Plaintiff has cited no cases in which this subsection of the Restatement has been applied as now urged by plaintiff. In our view, proper application of the principle of liability enunciated in the subsection is limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment. Justice Kavanagh so framed the issue in *McCann*:

"The issue in this case thus becomes whether these employees of the State of Michigan were acting within the *apparent scope* of their employment." (Emphasis added.) 398 Mich 65, 71-72.

"The complaint in this case alleges that the tortious conduct of the individual defendants was '*made possible by their positions* with the State Hospital, which parties purportedly acted on behalf of said hospital, vested with Apparent authority to do so * * * '. * * * I am satisfied that as a matter of law the complaint in this case contains allegations which, if proven, would properly allow the fact finder to determine that the torts were committed by employees of the State of Michigan who were acting within the *apparent scope of their authority*." (Emphasis added.) 398 Mich 65, 72.

We are not persuaded that any factual development of plaintiff's allegations under count II could justify recovery against defendant school board under the doctrine of *respondeat superior*. A teacher's homosexual assaults on his student constitute conduct clearly outside the scope of the teacher's employment and outside the teacher's apparent authority. The mere fact that an employee's employment situation may offer an opportunity for tortious activity does not make the employer liable to the victim of that activity. [Emphasis in original, footnotes omitted.]

On appeal, defendant maintains that the trial court erred in denying its motions for summary disposition and directed verdict because it failed to follow *Bozarth*, misapplied *Champion, supra*, 450 Mich 702, and misinterpreted Restatement Agency, 2d, § 219(2)(d).

In *Champion*, *supra*, 450 Mich at 712-714, the Court adopted Restatement Agency, 2d, §219(2)(d) in a case involving whether the defendant was liable for quid pro quo sexual harassment under MCL 37.2103(1) when its supervisor raped a subordinate employee, causing

her constructive discharge.[2] In *Champion*, the Court rejected the defendant's claim that it could not be liable on the ground that the supervisor's rape of the plaintiff occurred outside the scope of employment:

> This construction of agency principles is far too narrow. It fails to recognize that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority. From his scheduling decisions that allowed him to work alone with Ms. Champion to his ordering of her into a remote part of the building, Mr. Fountain used his supervisory power to put Ms. Champion in the vulnerable position that led to her rape. In fact, there is little doubt that Mr. Fountain would have been unable to rape Ms. Champion but for his exercise of supervisory authority.
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> Therefore, we adopt the nearly unanimous view that imposes strict liability on employers for quid pro quo sexual harassment committed by supervisory personnel. The rationale supporting this rule recognizes that most employers are corporate entities that cannot function without delegating supervisory power. Allowing employers to hide behind a veil of individual employee action will do little, if anything, to eradicate discrimination in the workplace.
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> Indeed, immunizing an employer where it did not authorize the offending conduct would create an enormous loophole in the statute. Such a loophole would defeat the remedial purpose underlying this state's civil rights statute and would lead to a construction that is inconsistent with the well-established rule that remedial statutes are to be liberally construed.
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> In fact, under defendant's construction, an employer could avoid liability simply by showing that it did not authorize the sexually offensive conduct. Because employers rarely, if ever, authorize such conduct, employees would no longer have a remedy for quid pro quo sexual harassment. Furthermore, the party engaged in quid pro quo harassment is almost always, by definition, a supervisor. That is, quid pro quo harassment occurs only where an individual is in a position to offer tangible job benefits in exchange for sexual favors or, alternatively, threaten job injury for a failure to submit. That individual is most often a person with supervisory powers.
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[2] See also *McCalla v Ellis*, 180 Mich App 372, 379; 446 NW2d 904 (1989), a pre-*Champion* case in which this Court, quoting Restatement Agency, 2d, § 219(2)(d), affirmed a judgment that found an employer liable for workplace sexual harassment in violation of Michigan's Civil Rights Act.

> Our ruling today does not extend unlimited liability to employers whose supervisors rape subordinates. However, we hold an employer strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim. The rule we fashion is fully consistent with the results reached by other courts addressing this issue and with the legislative intent that employers, not the victims of sexual harassment, bear the costs of remedying and eradicating discrimination. [450 Mich at 712-714 (citations and footnotes omitted).]

In the present case, the trial court denied defendant's motions for summary disposition and directed verdict as to plaintiff's claims, finding "the analysis set forth in *Champion* was applicable to the facts of this case."[3] Specifically, the trial court ruled:

> And the proper analysis to me, as I will hopefully demonstrate in the cases that I go through in a minute, would be that analysis is not on the conduct itself, but the analysis is on the nature of the relationship between the employer and the employee that created the access opportunity, et cetera, for the employee to commit the tort. We're talking about authority or power created by virtue of his or her job position, access created by his or her job position, access and power that the general public would not have.
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> The analysis has to be whether Mr. Powell was aided in committing the tort by the existence of the agency relationship.
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> In this case, I [the trial court] find that there are sufficient fact questions to deny Defendant's Motion for Summary Disposition on that issue, in that the assault occurred in a room in Hurley Medical Center where access was restricted, that Hurley Medical Center empowered Mr. Powell to have access to that room, that Hurley Medical Center restrained Plaintiff in such a way to make her extremely vulnerable, that they [sic] permitted Mr. Powell to have access to her when she was so restrained, and that under the facts of this case, summary disposition is not appropriate, and Defendant's motion is denied.

The trial court was confronted with an analytical predicament. The Supreme Court had not adopted the Restatement Agency, 2d § 219(2)(d), in a tort action. The concept of employer liability arising out of aid by the existence of the agency relationship was referenced in *Bozarth,* but the case was factually deficient. This Court in *Borsuk, , supra*, 133 Mich App 411, applied the aid by agency concept to a fraud action. *Champion* adopted § 219(2)(d) in the context of a civil rights action. If in fact the agency relationship factually aided in accomplishing the tort, the context of the action should be irrelevant in permitting employer liability. If the employer is

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[3] The trial court denied defendant's directed verdict motion by restating its decision denying defendant's motion for summary disposition].

liable for the sexual assault upon a supervisor's subordinate employee because the supervisor is vested with the mantle of authority and control over the victim employee, so too, when the nonemployee victim is so subjugated. We conclude that the Restatement of Agency, 2d § 219(2)(d) applies to actions in tort.

Defendant argues that *Bozarth* is dispositive of the issues before the Court. In *Bozarth*, this Court, without setting forth the facts with any specificity or analyzing § 219(2)(d) as applied to the facts of that case, concluded that the teacher's sexual assault was conduct clearly outside the scope of the teacher's employment and apparent authority, reasoning that "[t]he mere fact that an employee's employment situation may offer an opportunity for tortious activity does not make the employer liable to the victim of that activity." *Bozarth*, *supra*, at 355. However, *Bozarth's* conclusory analysis does not explain why there was no question of fact about whether the teacher in that case was aided in accomplishing the tort by the existence of the agency relationship. While *Bozarth* found that "mere opportunity" is not sufficient to raise a question of fact whether an employee "was aided in accomplishing the tort by the existence of the agency relation," it did not foreclose the possibility of a jury submissible issue being presented if a plaintiff set forth facts that went beyond "mere opportunity."

The principal question in this case is whether the facts present the circumstance where the employee was aided in accomplishing the tort by the existence of the agency relation under § 219(2)(d) by presenting facts that went beyond simply showing that he had a "mere opportunity" to commit the torts by virtue of his employment relationship with defendant. Thus, we must examine the facts in this case before it can be concluded whether defendant, as a matter of law, may be liable under a theory of respondeat superior. See *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989) ("While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own.")

The trial court, following *Bozarth* in this regard, ruled "the mere fact that there is a tort committed and that the employment situation offers an opportunity is not enough in and of itself". Curiously, the trial court refused defendant's request for a "mere opportunity" instruction. However, the trial court, rejecting *Bozarth*, considered other facts that raised a jury submissible issue about whether Powell "was aided in accomplishing the tort by the existence of the agency relation" so as to warrant the denial of defendant's motions for summary disposition and directed verdict. In its ruling, the trial court concluded that summary disposition in defendant's favor was improper because there was a question of fact about whether Powell "was aided in accomplishing the tort by the existence of the agency relation" since his employment with defendant allowed him access to, and power over, plaintiff, who was in an "extremely vulnerable" position, given that she had been placed in restraints by defendant's employees.

The trial court's recitation of facts in support of the denial of both the summary disposition motion and the directed verdict motion is insufficient as a matter of law to establish a question of fact on defendant's vicarious liability. The recited facts offer little more than an opportunity for tortious activity. Anyone employed by defendant in the emergency room had access to the treatment suite. The record evidence reveals that the room where plaintiff was treated was accessible by visitors, other employees, and even nonemployees from a common hallway door. Plaintiff's vulnerability was not as a result of any mischief or neglect of an

employee of defendant. The aide, Powell, himself exerted no power or control in influencing plaintiff's state, condition, or treatment so as to prepare the scene for his subsequent nefarious activity. Powell's assault upon plaintiff was simply a consequence of the fact that his employment relationship with defendant provided him with an opportunity for tortious activity.

Our analysis is consistent with *Champion, Costos v Coconut Island Corp,* 137 F3d 46 (CA 1, 1998), a case relied upon by the trial court, and *Burlington Industries v Ellerth,* 524 US 742: 118S Ct 2257; 141 L Ed 2d 633 (1998). The trial court relied upon *Champion* in denying defendant's motion for summary disposition and directed verdict. What distinguishes *Champion* from the present case is that, by virtue of the employment relationship, the supervisor in *Champion* had authority over subordinate employees. *Champion, supra*, 450 Mich at 702, 712. In contrast, by virtue of the employment relationship in this case, defendant gave no equivalent authority to Powell. Specifically, there is nothing inherent in Powell's employment relationship with defendant to indicate that defendant entrusted him with decision-making power, discretion, or authority over its patients or special access to patients so as to facilitate or aid him in committing the sexual assaults.

Champion limited its application of § 219(2)(d) to supervisor/subordinate employee relationships and did make an employer liable for subordinate-worker harassment under this rationale. This position is consistent with the United States Supreme Court's decision in *Burlington, supra,* where the Court held that it was proper to hold an employer liable for the sexual harassment of its supervisors. In analyzing the application of the "aided in the agency relation" language of § 219(2)(d), the Court in *Ellerth* stated:

> Section 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard) . . . .
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> When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.
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> We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. See *Gary v Long*, 59 F3d 1391, 1397 (CA DC, 1995). Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. (Citations omitted.) The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself. [*Id*. at 759-760.]

The "something more" that the Supreme Court refers to, is the supervisor's ability to make tangible employment decisions affecting the subordinate employee.

The trial court relied heavily on *Costos, supra*. In *Costos*, the plaintiff sued the owner of an inn for negligence and vicarious liability after the inn manager raped her at the inn. Applying Maine law, the federal district court entered judgment on a jury verdict for the plaintiff. Affirming the district court's denial of the defendant's motion for a judgment as a matter of law, the First Circuit found that there was sufficient evidence to hold the defendant vicariously liable.

The First Circuit in *Costos* concluded that an employer might be liable for the tort of his employee who is acting outside the scope of his employment when he is aided in accomplishing the tort by the existence of an agency relation under Restatement of Agency, 2d, § 219(2)(d). *Costos, supra,*. at 48-49. In particular, *Costos* rejected the defendants' argument that the phrase in the restatement "or he was aided in accomplishing the tort by the existence of the agency relation" language of § 219(2)(d) was a reiteration of "the prior language in subpart (d) on apparent authority." *Id*. at 48. Under Maine law, the First Circuit concluded that the use of apparent authority is not required for vicarious liability under § 219(2)(d). Further, the Court noted that such a construal ignores "the plain meaning of § 219(2)(d)" and also "would violate another rule of statutory construction" by rendering "the second clause of subpart (d) superfluous." *Id*. at 49.

The *Costos* Court also rejected the defendants' contention that the court's reading of "§ 219(2)(d) will result in a vast expansion of employer liability in Maine and will render every intentional tort committed outside the scope of employment as equivalent to those committed within the scope of employment." *Id*. In response, the First Circuit noted that the DC Circuit Court in *Gary v Long*, 59 F3d 1391, 1397 (DC, 1995), citing Restatement of Agency, 2d § 219, comment e, sought to define "a narrowing principle" where "an employer is liable only if the tort 'was accomplished by an instrumentality, or through conduct associated with the agency status.'" Applying this "narrowing principle" to a reading of § 219(2)(d), the First Circuit in *Costos* nonetheless concluded there was sufficient evidence to hold the defendant vicariously liable under § 219(2)(d) for the inn manager's acts. Specifically, the First Circuit reasoned:

> By virtue of his agency relationship with the defendants, as manager of the inn, Bonney was entrusted with the keys to the rooms, including Costos' room, at the Bernard House. Because he was the manager of the inn, Bonney knew exactly where to find Costos. The jury could find that Bonney had responsibilities to be at the inn or to have others there late at night. In short, because he was the defendants' agent, Bonney knew that Costos was staying at the Bernard House, he was able to find Costos' room late at night, he had the key to the room and used the key to unlock the door, slip into bed beside her as she slept, and rape her. [*Id*. at 50.]

By requiring that the tort be "accomplished by an instrumentality, or through conduct associated with the agency status," *Costos* does identify a principle for limiting the reading of § 219(2)(d) to ensure that employers do not become liable simply because there was an agency relationship. Even so, *Costos* is factually distinguishable from the present case because there were sufficient facts to show that the inn manager's rape was accomplished by an instrumentality and through conduct associated with the agency status. Specifically, the inn entrusted the inn manager with the room keys, and through that instrumentality the manager was able to gain access to the plaintiff's locked room, that was not otherwise accessible. Further, the inn manager had the capacity and authority to select his victim's room, to isolate and find his victim, and

thereby accomplish the rape. In other words, the manager's relationship with the inn provided both the ways and means to enable him to commit the tort.

Unlike *Costos*, the employment relationship provided Powell with a mere opportunity for tortious activity in the present case. The employer supplied Powell neither specific access to, authority over, nor instrumentality for commission of the tort. Without proof that defendant supplied the employee with an instrumentality for commission of the tort or proof that the employee, through conduct associated with the agency status, committed the tort, insufficient facts or fact questions are presented to impute liability to defendant under the theory that its employee "was aided in accomplishing the tort by the existence of the agency relation" under § 219(2)(d).

Conclusion

In conclusion, the trial court erred in denying defendant's motions for summary disposition and directed verdict in this case because plaintiff failed to present a material question of fact regarding defendant's liability under the doctrine of respondeat superior. Specifically, because plaintiff did not show that Powell's sexual assaults were "accomplished by an instrumentality, or through conduct associated with the agency status," but merely showed that Powell's employment relationship with defendant provided him with an opportunity for tortious activity, she failed to raise a genuine issue of material fact that Powell "was aided in accomplishing the tort by the existence of the agency relation" with defendant under the Restatement of Agency, 2d, § 219(2)(d). Accordingly, we reverse the judgment in favor of plaintiff and remand for entry of judgment of dismissal.

Reversed and remanded for entry of judgment of dismissal. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio