IN THE SUPREME COURT OF THE STATE OF OREGON

DAVID EADS and DIANE EADS, individually and as husband and wife,

Plaintiffs – Appellants – Petitioners on Review,

v.

TIMOTHY R. BORMAN, D.O.; SALEM HOSPITAL, a registered Oregon non-profit corporation; MICHAEL J. GEORGE, M.D.; and SALEM RADIOLOGY CONSULTANTS, P.C., an Oregon professional corporation,

Defendants,

and

WILLAMETTE SPINE CENTER, LLC, an Oregon corporation,

Defendant – Respondent – Respondent on Review.

SC No. S058445

CA No. A137410

TC No. 05C18610

Brief of *Amicus Curiae* Oregon Association of Defense Counsel

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Review of the opinion of the Court of Appeals,
on appeal from the judgment of the Marion County Circuit Court
by the Honorable Don Dickey, Judge

Date of Opinion:	March 17, 2010
Author:	Wollheim, P.J.
Concurring:	Brewer, C.J, and Sercombe J.

January 2011

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I. Introduction

The Oregon Association of Defense Counsel (OADC), a private association of Oregon lawyers who mostly represent defendants in civil cases, submits this friend-of-the-court brief in hope of clarifying the key issue – which is not the issue plaintiff[1] presents. Plaintiff argues on review, as he argued below, that there is evidence to support a finding that Dr. Borman was an agent, real or apparent, of defendant Willamette Spine Center LLC. The unstated assumption behind that argument is that, if there was an agency relationship between them, then defendant would be vicariously liable for Borman's alleged negligence in causing plaintiff's injuries. As explained below, that assumption, which the Court of Appeals seems to share, is mistaken. An agency relationship alone is not enough to impose vicarious liability. More than that is required, and this court should be careful not to suggest otherwise in the course of deciding this case.

II. Discussion

At common law, an "[a]gency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

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[1] In this brief, as in the Court of Appeals opinion, "plaintiff" is used, for ease of reference to mean both David Eads and his wife, Diane Eads.

Kantola v. Lovell Auto. Co., 157 Or 534, 537, 71 P2d 61 (1937) (adopting definition in *Restatement (First) of Agency* § 1); *see also Ruddy v. Ore. Auto. Credit Corp.*, 179 Or 688, 702, 174 P2d 603 (1946) (following *Kantola*). The concept is important mostly for contract purposes, not tort purposes, because an agent can bind the principal to agreements with third parties.

An agent should be distinguished from an employee, and a principal from an employer. An employer-employee relationship – or master-servant relationship, as it is sometime called, *see Jensen v. Medley*, 336 Or 222, 229, 82 P3d 149 (2003) (recognizing the usage) – is a type of agency in which the principal has the right to control not just the agent's work, but also the "physical details" of how the work is performed. *See Kowaleski v. Kowaleski*, 235 Or 454, 457-58, 385 P2d 611 (1963) (explaining that a master-servant relationship is created "only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance") (internal quotations and citations omitted); *see also Schaff v. Ray's Land & Sea Food Co., Inc.*, 334 Or 94, 101-05, 45 P3d 936 (2002) (defining a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to

control") (internal quotations and citations omitted); *Jensen*, 336 Or at 230 (same). Thus, the key to distinguishing agents and employees is the degree of control over the details of the work. Simply put, a principal may have the right to tell its agent *what* to do, but a principal that is also an employer has the right to tell an employee – who is also an agent – *how* to do it. In that regard, "[a]ll servants are agents and all masters, principals. However, all principals and agents are not also masters and servants." *Kowaleski*, 235 Or at 457.

The distinction is important for tort purposes, because vicarious liability applies only to master-servant relationships. "Under the doctrine of *respondeat superior*, an employer is liable for the torts of his employee when the employee is acting within the scope of his employment." *Stanfield v. Laccoarce*, 284 Or 651, 654, 588 P2d 1271 (1978). But there is no similar doctrine for principals and agents. On the contrary, a principal "ordinarily is *not* liable for [physical] injuries caused by the negligence of a nonservant agent, unless the principal had a specific duty to the third party." *Jensen*, 336 Or at 230. Thus, in *Wilken v. Freightliner*, 265 Or 42, 507 P2d 1150 (1973), this court held that a principal was not liable for an auto accident caused by the negligence of its agent, even though the accident occurred in the course of the agent's activities on behalf of the principal –

delivering papers to and from a clinic where he had gone for a medical examination. The court explained that the principal "defendant had no right to control the physical movements of Van Sickle in going to or returning from the clinic." 265 Or at 47.

A recent case further illustrates these points. The plaintiff in *Vaughn v. First Transit, Inc.*, 346 Or 128, 206 P3d 181 (2009), was injured while riding on a shuttle bus at the Portland airport. She sued the bus driver and the company that employed him under its contract with the Port of Portland, which owns and operates the airport. The bus company moved for summary judgment on the ground it was an "agent" of the Port within the meaning of the Oregon Tort Claims Act, which provides that a public body is liable for the torts of its employees and agents committed within the scope of their duties, but which also provides that a claim against the public body is the tort victim's "sole cause of action." ORS 30.265(1). The bus company thus argued that, as an agent of the Port, the plaintiff had no cause of action against it, but only against the Port itself. The trial court granted the motion, and the Court of Appeals affirmed, *Vaughn v. First Transit, Inc.*, 218 Or App 375, 180 P3d 185 (2008), but this court reversed.

In reversing, this court explained that "when the OTCA makes a public body liable for tort claims based on the conduct of an 'agent' of the

public body, it does not mean all tort claims involving *any* agent of the public body, but only those for which the agent's principal would be liable under common-law standards of vicarious liability." 346 Or at 140 (emphasis in original). The court also explained that, under common-law standards, a principal is not vicariously liable for the torts of its agent unless the principal has the same degree of control over the agent as an employer has over an employee or servant. *Id.* at 139. Finally, the court explained that the degree of control required to impose such liability is control over "*the physical details of the manner of performance of the conduct that is the basis for the tort claim.*" *Id.* (emphasis in original). The court then concluded that, even though the contract between the Port and the bus company gave the Port substantial control over the company's operations, *id.* at 132-33, it did "not provide that the Port has the right to control the physical manner in which [bus company] employees carried out their driving duties" and, therefore, did not impose vicarious liability on the Port for the alleged negligence of the bus company employees while driving. *Id.* at 142. To the same effect, see *Schaff*, 334 Or at 104 (as a matter of law, food supplier was not liable for negligent operation of vehicle by food dealer, where there was no dispute that supplier had no control over the manner in

which dealer conducted his business, other than the requirement that he not sell competing products).

The usual rules of vicarious liability apply here. There is no exception for landlords, nor one for physicians. There is no case holding otherwise,[2] and no principled basis for drawing such distinctions.

In sum, under well-settled law, the issue whether defendant is liable for the alleged negligence of Dr. Borman does not depend, as plaintiff seems to believe, on whether Borman was its agent, real or apparent. It depends, instead, on whether defendant had the right to control the physical details of Borman's treatment of plaintiff – in particular, the back surgeries he performed on plaintiff.

Rights of that sort are usually set out in a contract. In this case, no contract gives defendant the right to control the physical details of Dr. Borman's practice. In fact, there is no contract between the two of them. They are connected indirectly – defendant subleased a part of its premises to

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[2] In the Court of Appeals, plaintiff relied on *Guisti v. Weston Company*, 165 Or 525, 108 P2d 1010 (1941), but that reliance was misplaced. In *Guisti*, this court said that a hospital could be vicariously liable under *respondeat superior* for the negligence of physicians in treating a patient. *Guisti*, 165 Or at 529-30. But the physicians were "regular employees" of the hospital, and the hospital was under contract to provide services to the patient. *Id.* at 529. The court described the "legal relationship" between the hospital and physicians "as that of master and servant," *id.* at 529-30, not that of mere principal and agent.

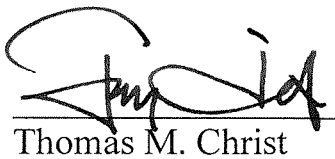
Dr. Tiley, *see* Freeman Decl (OJIN no. 137) at Ex B, and he, in turn, had an "association agreement" with Borman, under which Tiley shared space with Borman and collected rent from him. *Id.* at Ex C. The sublease did not give defendant control of Tiley's work, and the association agreement did not give Tiley control of Borman's work. Contracts aside, there is no evidence that defendant ever asserted any right to control how Borman performed back surgeries, or that it ever attempted to exercise such control. Plaintiff does not contend otherwise. Thus, no matter whether Borman was defendant's agent, real or apparent, defendant still is not liable for his negligence, if any, in causing injury to plaintiff.

III. Conclusion

It's not unusual for litigants to equate agents and employees for tort purposes – to assume that a principal is liable for physical injuries caused by the negligence of an agent, the same way an employer is liable for similar injuries caused by the negligence of an employee. Plaintiff makes that very mistake in confining his arguments on review whether Dr. Borman is defendant's agent. However this court decides that issue, it should be careful not to perpetuate plaintiff's misunderstanding of the consequences.

It should take care to explain that proof of agency will not, by itself, establish liability.

Respectfully submitted,



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Certificate of Compliance with ORAP 5.02(2)(d)

Brief length

I certify that this brief complies with the 5,000 word limit for responses to petitions for review in ORAP 9.10(3), and that the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,699 words.

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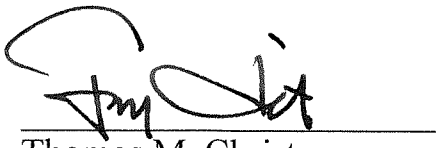

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Certificate of Service

I certify that I mailed two copies of the attached brief to each of the following lawyers, by first class mail, with postage pre-paid, on January 27, 2011:

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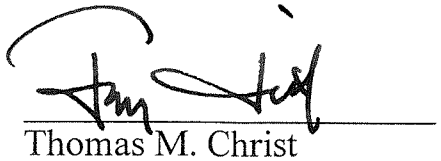

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