

**IN THE MISSOURI SUPREME COURT  
SUPREME COURT NO. SC93379**

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**ANDRO TOLENTINO,**

**Appellant**

**v.**

**STARWOOD HOTELS & RESORTS WORLDWIDE, et al.,**

**Respondents**

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**Appeal from the Circuit Court of Jackson County, Missouri  
16th Judicial Circuit  
Case No. 1016-CV12176  
The Honorable W. Brent Powell, Judge**

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## THE WESTIN'S STATEMENT OF FACTS

The factual record in this case unquestionably establishes that the Westin was Tolentino's joint, if not primary employer. The Westin's statement of facts does nothing to undermine this conclusion, particularly given that the record must be viewed in a light most favorable to Tolentino. *See ITT Comm. Fin. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc. 1993). Because the Westin's statement of facts presents an inaccurate and incomplete picture of its role as Tolentino's joint employer, it is necessary to correct the record.

Although the Westin contends that it did not participate in hiring Tolentino, the factual record indicates that the Westin, not GLS, made the final decision to hire Tolentino. (LF1026-27, ¶ 130.) And contrary to the Westin's assertion, it did discuss Tolentino's pay with him during his initial interview, where he was told by Westin's Director of Housekeeping that he would be paid by the number of rooms he cleaned. (LF1027, ¶ 132.)

The Westin's assertion that it did not supervise Tolentino or maintain documents or records relating to performance of GLS employees is unpersuasive. Rather than supervise his work, it contends that it performed "quality-control inspections" of his work. This is Orwellian doublespeak at its finest. "Quality control inspections" is simply a euphemism for supervision. The record evidence indicates that Westin's supervisors used a checklist for inspecting guest rooms that included approximately 28 items that Room Attendants were required to complete in course of cleaning a room. (LF1029, ¶¶ 141-144.) Using this checklist as a measure of performance, Tolentino was required to

meet a 90 percent cleanliness standard. (LF1029, ¶¶ 144-45.) If he fell below 80 percent, supervisors were required to report him to management, in which case he might be subject to retraining. (LF1030, ¶ 148.) The Westin' supervisors regularly discussed the performance of Room Attendants hired through GLS with their Director of Housekeeping and also gave her completed evaluations of their job performance. (LF1031-31, ¶¶ 153, 156.) In fact, the Westin confirmed that Tolentino was fired because he was unable to clean guest rooms fast enough. (LF1019, ¶ 97.) Thus, it is inaccurate to say that the Westin never kept any documents or records of the performance of GLS employees or that the Westin never exercised direct supervisory control over Tolentino.

The Westin also maintains that Tolentino testified he was not trained. His testimony, however, plainly indicates that he was given two weeks of training. (LF1028, ¶ 140.) That he did not consider it particularly helpful is beside the point. The joint employer doctrine does not ask whether the employer provided useful or helpful training, just that it provided training. That such training was provided by the Westin was confirmed by its corporate representative who testified that job training of Room Attendants included watching the ABC's of Housekeeping video, being paired with a more experienced associate to follow their work for a couple of days, and then given between five or six of their own rooms to clean for a time, which were then inspected by a supervisor or manager. (LF1028, ¶ 139.)

Remarkably, the Westin contends that it did not terminate Tolentino's employment and in the same breath admits it told GLS it no longer wanted him at the Westin. The record indicates the Westin ended Tolentino's employment because the

Westin was displeased with his performance. (LF1019, ¶ 97; LF1027, ¶134; LF0406, 77:7-9.) This is termination. To hold otherwise is to believe that either Tolentino or GLS had the power to force the Westin to employ Tolentino, an absurdity this Court should not indulge.

The Westin is correct that Tolentino was awarded restitution by the United States District Court for the Westin District of Missouri. He has not, however, received any payment on the judgment. (LF1026, ¶ 128.)

## ARGUMENT

The Westin has failed to address the central issue in this case: Why an exception to liability used in the common law of torts should apply to a statutory remedy that has its roots in contract law? The failure to address this issue is especially problematic given that the Missouri Minimum Wage Law (“MMWL”) and its regulations provide that it is to be interpreted according to the Fair Labor Standards Act (“FLSA”). In arguing that the MMWL is intended to protect employers, the Westin ignores the remedial purpose of the law and instead confuses its secondary effect for its intended purpose. Cut loose from the moorings of the MMWL’s employee-centered remedial purpose, the Westin’s argument drifts into multiple areas of the common law having nothing to do with the terms and conditions of the employment relationship. In applying principles of liability from other areas of law, the Westin ignores those in the employment context, namely workers’ compensation law, which provides for strict liability against joint employers for the injuries suffered by workers.

In the Westin’s employer-centered vision of the MMWL, there is no need to even address the risks associated with paying employees through third parties like GLS. Tolentino must bear the burden of this risk despite being the party least capable of shouldering it. Similarly, there is no need to address why one class of workers is entitled to a paycheck because a joint employer withheld their wages while another class of workers is not, simply because the other joint employer’s wage deductions were so egregious they were considered criminal. The Westin ignores these points in its brief,

presumably because it believes the MMWL was designed to protect employers, not workers.

The Westin's brief also fails to distinguish the unbroken line of cases holding that one joint employer will be liable for the other joint employer's failure to pay an employee's wages. These cases provide compelling evidence that because the joint employer doctrine holds joint employers responsible for each other's unlawful conduct (*e.g.*, not paying employees), actions by one joint employer resulting in employees' non-compensation are foreseeable as a matter of law.

As an alternative justification for the trial court's holding, the Westin attempts to rely on agency law principals, using two cases that did not address the joint employer doctrine. The majority of courts, including the United States Supreme Court, have squarely rejected the use of agency law when interpreting the scope of the employment relationship under the FLSA, including in the joint employer context. In short, agency law can cannot salvage the Westin's proposed exception to the joint employer doctrine.

Failing to rebut Tolentino's substantive arguments, the Westin complains that some of Tolentino's arguments have not been properly raised. Conveniently, the Westin ignores its own failure to raise its unforeseeable criminal activity exception argument at the trial court until its reply brief, leaving Tolentino to reply on appeal. The Westin further ignores the fact that two of the "improperly raised arguments" were in fact made by Tolentino at the trial level. The remaining arguments do not alter any "claim" under Missouri Rule of Civil Procedure 83.08 that was raised in Tolentino's court of appeals brief, and as such the arguments were properly raised. Finally, the Westin has opened the

door to Tolentino’s workers’ compensation argument by arguing that strict liability principles support the trial court’s decision.

**I. The MMWL should be interpreted according to the FLSA, not the common law.**

The MMWL explicitly provides that it is to be interpreted according to the FLSA. R.S.Mo. § 290.505.4. The regulations promulgated by the Missouri Department of Labor state that the MMWL is to be interpreted according to the FLSA’s regulations. 8 CSR § 30.4.010(1) (2010). Yet, the Westin still maintains that the MMWL should be interpreted according to the common law. In support, it cites to a principle of federal law stating that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, *except when a statutory purpose to the contrary is evident.*” *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779, 783 (1952) (emphasis added).<sup>1</sup> Here, that contrary purpose is plainly evident.

Early on, the Supreme Court rejected the notion of reading common law principles into the FLSA when determining the scope of the employer-employee relationship, noting that “in determining who are ‘employees’ under the [FLSA], *common law*

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<sup>1</sup> Significantly, the interpretive presumption of legislating against the common law background “*is not . . . one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption’s application to a given statutory scheme.*” *Astoria Fed. Savings and Loan Assoc. v. Solimino*, 501 U.S. 104, 109 (1991) (emphasis added).

*employee categories . . . are not of controlling significance.” Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947) (emphasis added). The Court in *Walling* further recognized the break with the past common law understanding of the employer-employee relationship, observing that the FLSA “contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.” *Id.* at 150-51.<sup>2</sup>

More recently, the Seventh Circuit Court of Appeals reaffirmed this long-held understanding, observing that “[b]ecause we deal with a statutory construction of the FLSA, our determination of [joint employer] status is *not limited by the previous common law notion of ‘joint employer’* . . . and we need to give this concept an expansive interpretation in order to effectuate Congress’ remedial intent in enacting the FLSA.” *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1207 (7<sup>th</sup> Cir. 1985) (internal citations omitted) (emphasis added); *see also McLaughlin v. Seafood, Inc.*, 867 F.2d 875,

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<sup>2</sup> Two years prior to *Walling*, the Supreme Court had already remarked that “[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.” *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The Court also cited to remarks on the Senate floor by the FLSA’s primary sponsor, Senator (later Justice) Hugo Black, that “the term ‘employee’ had been given ‘the broadest definition that has ever been included in any one act.’” *Id.* at 363, fn.3 (citing 81 Cong. Rec. 7657).

877 (5<sup>th</sup> Cir. 1989) (“The remedial purposes of the FLSA require the courts to define ‘employer’ more broadly than the term would be interpreted in traditional common law applications.”). Thus, the FLSA’s joint employer regulation, which has its statutory roots in the definitions for “employers” and “employees,” was clearly intended to displace common law definitions of the employer-employee relationship in the wage and hour context.

Even assuming such a contrary statutory purpose was not entirely evident, it would not follow that the “presumption favoring the retention of long-established and familiar principles” of tort law should be applied in the wage and hour context. That is because wage and hour law in this country is understood as an outgrowth and rejection of the common law of contract. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706-07 (1945) (“The legislative history of the [FLSA] shows an intent on the part of Congress . . . to *prevent private contracts* on their part which endangered national health and efficiency . . .”) (emphasis added). The Westin still has not explained why tort law—the law of personal injury—should apply to a field of law that essentially deals with the terms and conditions of a *contractual* relationship.

The Westin’s reliance on Missouri case law is equally unconvincing as the cited cases stand only for the proposition that common law *rights and remedies*, not common law defenses, must be clearly abrogated by statute. In *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855 (Mo. App. W.D. 2002), the court held that the statutory right of a shareholder to inspect books and records did not preempt the common law right of inspection. In so doing, it noted that “a statutory right of action shall not be deemed to

supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes the *remedies provided by common law.*” *Id.* at 860 (quoting *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. 1999) (emphasis added)). In holding that the elements of a statutory right of conversion preempted elements of the common law right of conversion, the court in *In re Estate of Parker*, 25 S.W.3d 611 (Mo. App. W.D. 2000), stated that “we strictly construe a statute when existing common law *rights* are affected . . . .” *Id.* at 860 (emphasis added.) These cases speak only of common law rights and remedies, not common law defenses.

That this rule of construction is limited to preserving common law rights and not defenses is confirmed by *Pollock v. Wetterau Food Distribution Group*, which dismissed “estoppel” and “*Faragher*” affirmative defenses under the Missouri Human Rights Act (“MHRA”), noting that “[a]ny judicially created affirmative defenses would usurp the legislature’s grant of authority to the MCHR to carry out the policies of the MHRA.” 11 S.W.3d 754, 767-68 (Mo. App. E.D. 1999). Under the Westin’s analysis, the common law estoppel defense should have been read into the MHRA. Instead, the court rejected the defense as a usurpation of legislative authority.<sup>3</sup> The same can be said of the trial

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<sup>3</sup> The United States Supreme Court has taken the same approach to implied affirmative defenses in the FLSA as the court in *Pollack*, observing that “[t]he details with which the exemptions in this Act have been made preclude their enlargement by implication.” *Addison v. Holly Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944). It went on to

court's adoption of the unforeseeable criminal activity defense, which appears nowhere in the MMWL or the FLSA. In any event, as *Walling* and *Karr* indicate, the FLSA was a clear abrogation of the common law employer-employee relationship.

The Westin's misreading of the canon of construction regarding statutory preemption of common law rights is also in direct conflict with the interpretive canon for remedial statutes, which provides they "should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case." *MCHR v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999) (citing *State ex rel. Ford v. Wenskay*, 824 S.W.2d 99, 100 (Mo. App. E.D. 1992)). Remedial statutes such as the MMWL cannot be both strictly construed in favor of the common law and liberally construed in favor of applicability to the case. Simply put, the two approaches are irreconcilable.

**II. The MMWL is intended to raise wages and improve working conditions for employees, not absolve employers of liability for unpaid wages.**

The Westin fundamentally misapprehends the purpose of wage and hour laws like the MMWL, arguing that it be read as a protection for employers. It is well-established that employees, not employers, are the intended beneficiaries of wage and hour

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warn against such exceptions as the one advanced by the Westin, noting that "[c]onstruction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'" *Id.*

legislation, whose purpose is to raise employee wages and rectify the unequal bargaining power possessed by employers. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (“The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, ‘labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.’”); *Brooklyn Sav. Bank*, 324 U.S. at 706-07 (“The legislative history of the [FLSA] shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours . . .”).

But even assuming the MMWL, the FLSA, or the joint employer doctrine offer some protection to employers, that protection is a secondary effect that prevents unfair competition by employers, as noted in the law review article relied upon by the Westin: “[T]he joint employer liability protects legitimate businesses from unfair competition by *businesses that use substandard labor obtained from fly-by-night contractors.*” Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L.J. 393, 405 (2002) (emphasis added). In the principal case cited by the Westin for its employer-centered view of the FLSA, it also reiterated this secondary effect of protecting employers in competition with wage and hour violators: “These competitors are entitled to be protected from those who—*intentionally or not*—would secure a competitive advantage by violating the overtime provisions of the Fair Labor Standards Act.” *Lerwill v. Inflight Servs., Inc.*, 379 F. Supp. 690, 696 (N.D. Calif. 1974) (emphasis added). Hence, the MMWL, the FLSA, and the joint employer doctrine were

designed to prevent businesses like the Westin from obtaining an unfair competitive advantage by using disreputable contractors like GLS who ensure a cheap supply of labor because they underpay workers.

In short, the primary purpose of the joint employer doctrine is to hold employers like the Westin accountable for the payment of their employees' wages regardless of the actions of their business partners. Although the secondary effect of the MMWL will be to provide protection to competitors of companies like the Westin that don't pay substandard wages, that effect should not be confused with the law's intended purpose. In any event, that secondary effect should not serve to absolve companies like the Westin that do business with companies like GLS of liability.

### **III. Common law tort principles do not support the trial court's decision.**

Even assuming that principles of tort law should apply in the wage and hour setting, Missouri law holds that a party can be liable for the criminal acts of an unknown third party if a special relationship exists between the plaintiff and the defendant. *See Virginia D., v. Madesco Investment Corp.*, 648 S.W.2d 881 (Mo. 1983). Although the Westin now contends that this case supports the trial court's decision because it requires the crime be foreseeable, it ignores the most relevant language of the opinion, namely that "[a]ny suggestion that crime is not foreseeable is particularly inappropriate when a downtown metropolitan area is involved, especially when *the case involves a hotel.*" *Id.* at 887 (emphasis added). As a downtown metropolitan hotel, the Westin cannot argue that criminal wage deductions were not foreseeable.

The Westin also relies heavily on *Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit, Co.*, to argue that even if a defendant is strictly liable for damages, it will not be held liable for damages caused by unforeseeable criminal acts. 573 S.W.2d 431 (Mo. App. 1978). As indicated in Appellant's Substitute Brief (p.38), although the land owner in *Pecan Shoppe* was not entitled to recovery for the tractor-trailer explosion caused by a third party, the driver killed in the explosion caused by a fellow employee would have been entitled to workers' compensation under a no-fault or strict liability theory even if he and his fellow employee were employed by separate, but joint employers.

The Westin cannot simply discuss tort principles in a vacuum, it must do so in the context of the employer-employee relationship. In that context, there is no doubt that the Westin would be liable under the workers' compensation statute for the injuries caused by GLS's agents, whether foreseeable or not.

#### **IV. Wage deductions by joint employers are foreseeable as a matter of law.**

Both sides have now cited *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 405 (7<sup>th</sup> Cir. 2007), and *Barfield v. New York City Health & Hosp. 's Corp.*, 537 F.3d 132 (2d Cir. 2008), in support of their respective positions that wage deductions by a joint employer are either foreseeable or unforeseeable as a matter of law. In fairness, neither decision actually uses the terms foreseeable or unforeseeable. Those omissions, however, inure to the benefit of Tolentino, as it is the Westin that seeks to carve out a new exception to the joint employer doctrine.

By omitting any discussion of foreseeability as an element of the joint employer doctrine, it follows that foreseeability is either irrelevant to joint employer analysis or simply that wage deductions are foreseeable as a matter of law. Although the former is undoubtedly the case, assuming the latter is true, *Reyes*'s discussion of the practice of holdbacks in the construction industry, due to the failure of subcontractors to pay wages being so commonplace, indicates the court believed such deductions to be foreseeable. 495 F.3d at 409.

Tellingly, the Westin states that the recruiter in *Reyes* failed to pay the workers “[p]resumably without Remington’s knowledge.” (Respondents’ Substitute Br. at 24). Yet, despite this lack of knowledge, the court held Remington liable under the joint employer doctrine. If foreseeability was an element of the joint employer doctrine—as the Westin claims—surely Remington’s lack of knowledge would absolve it of liability. It did not.

The Westin also contends that *Reyes* is distinguishable from the facts here because 1) Remington hired a single person to supply a labor force; 2) the recruiter had put together a crew for Remington alone; 3) the recruiter had no business organization he could shift from one place to another; and 4) Remington supplied the tools. The first two facts do not implicate any of the elements used to determine joint employer status under the formal or functional factors and are therefore irrelevant. Regarding the third factor, the contract between the Westin and GLS prevented GLS from shifting its business as a unit from the Westin to another hotel because either party had to provide the other with 30-days’ written notice before terminating the contract. (LF0979-0980.) As to the fourth

factor, the record here indicates that the Westin, not GLS, supplied the equipment used by Tolentino during his work for the Westin. (LF1013, ¶ 79; LF1272, ¶ 169.)

The Westin also misreads the analysis in *Barfield*. The discussion in *Barfield* referred to by the Westin concerned whether the employer had “actual or imputed knowledge” of the hours of overtime worked by the employee, not actual or imputed knowledge of whether a joint employer deducted or withheld wages. 537 F.3d at 148. It was only after the court held that the defendant hospital was a joint employer “as a matter of law,” did it address the separate and distinct defense regarding the hospital’s actual or imputed knowledge of hours worked. *Id.* Indeed, the court noted that the employee’s conduct regarding her hours worked “does not alter the economic reality that, for whatever hours she worked, Bellevue qualified as her joint employer.” *Id.*

Finally, the Westin contends that the cases cited by Tolentino contain “no discussion of the scope or extent of one joint employer’s liability for the other joint employer’s conduct.” The reason is simple: when a joint employer relationship is found, it is the end of the inquiry. Both joint employers are jointly and severally liable for the payment of the employee’s wages. *See Karr*, 787 F.2d at 1207 (citing 29 C.F.R. § 791.2(a)) (“[a]ll joint employers are individually responsible for compliance with the FLSA”). The “scope or extent” of liability is irrelevant, both joint employers are responsible for the employee’s wages.

#### **V. The joint employer doctrine supersedes agency law.**

The Westin’s reliance on agency principles to relieve it of joint employer liability is likewise untenable. In support, the Westin relies on two cases, *Ramos-Barrientos v.*

*Bland*, 661 F.3d 587 (11<sup>th</sup> Cir. 2011), and *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11<sup>th</sup> Cir. 2002), neither of which were decided in the joint employer context or make any reference to the joint employer doctrine or 29 C.F.R. § 791.2(a). In *Arriaga*, the recruiters that the plaintiffs were trying to recover recruitment fees from were not considered joint employers. Unlike the recruiters in *Arriaga*, GLS was a joint employer. As a joint employer, GLS is not simply an agent acting at the behest of a principal, it is a corporation that is jointly and severally liable for the actions taken by the other joint employer, in this case, the Westin and vice versa.

In *Ramos*, the court held that because the outside agency was not given authority by the employer to collect fees from its H-2A workers, the employer was not responsible for paying those fees. 661 F.3d at 602. In so doing, the court relied on agency principles to reach its conclusion. *Id.* at 600-02. The holding in *Ramos*, however, cannot be squared with the holding in *Reyes*, which actually addressed the joint employer doctrine. If the Westin and the court in *Ramos* are correct, agency law should have prevented the plaintiffs in *Reyes* from recovering against their joint employer. 495 F.3d 403. There was nothing in the record indicating that the subcontractor would not pay the workers who performed work for the general contractor. Under the Westin's rationale, this fact or omission should be sufficient to relieve the general contractor of its obligation to pay its employees, even though it was a joint employer.

The use of agency principles to interpret the FLSA, moreover, has been soundly rejected by most courts, including the United States Supreme Court. In *Nationwide Mutual Ins. Co. v. Darden*, which directly references *Rutherford Food Corp. v. McComb*,

331 U.S. 722 (1947), the first case establishing the joint employer doctrine,<sup>4</sup> the Court rejected agency law principles, noting that the FLSA: “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under strict application of traditional agency law principles.” 503 U.S. 318 (1992); *see also Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (“*Darden* specifically excepted the FLSA from the application of the agency test based on this statute’s expansive definition of the term ‘employ’ to mean ‘suffer or permit to work.’”). In short, the statement in *Darden* rejecting agency principles did so with the joint employer doctrine in mind.

Other courts also have taken this approach in deciding the joint employer issue. In *Dole v. Elliott Travel & Tours, Inc.*, where the court held that the president of a company was an “employer” under the FLSA, it stated that “[i]n deciding whether a party is an employer, ‘economic reality’ controls rather than common law concepts of agency.” 942 F.2d 962, 965 (6<sup>th</sup> Cir. 1991). Similarly, in the context of holding that a president was a joint employer under the FLSA, the court in *Cruz v. Vel-A-Da, Inc.*, noted that “[t]he FLSA eschews the traditional common law notions of agency in favor of an approach which reflects the ‘economic reality’ of contemporary employment arrangements.” No. 90-7087, 1993 WL 658968, \*1 (N.D. Oh. June 9, 1993). Under the common law, the presidents in *Dole* and *Cruz* are undoubtedly agents of their respective companies. *See Bent v. Priest*, 80 Mo. 475, 1885 WL 7351, \*4 (Mo. 1885) (“directors of a

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<sup>4</sup> *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72-76 (2d Cir. 2003) (using six-factor joint employer test first used in *Rutherford*).

corporation . . . are trustees and agents of the corporation and stockholders”). But in the context of the FLSA, they are joint employers and responsible for ensuring that their employees are paid their wages. These cases demonstrate a clear rejection of agency law in the joint employer context.

Applying such principles here, both the Westin and GLS had a shared responsibility to ensure that Tolentino received the wages he was owed for the work he provided. In the wage and hour context, GLS is not an agent of the Westin, it is a joint employer. The Westin cannot discharge its duty to Tolentino by simply paying GLS the amount owed to him. The joint employer doctrine ensures the Westin must pay his wages regardless of the actions of GLS.

#### **VI. Tolentino’s arguments are properly preserved.**

The Westin complains that some of the points raised by Tolentino were not raised in either the trial court or the court of appeals. Absent from its discussion regarding procedural impropriety, is the rule providing that “[a]ppellate courts are generally precluded from addressing assertions made for the first time in a reply brief because a respondent has no opportunity to address the argument.” *Russell v. Division of Employment Sec.*, 43 S.W.3d 442, 443 (Mo. App. S.D. 2001) (citing *Coyne v. Coyne*, 17 S.W.3d 904, 906 (Mo. App. E.D. 2000)). Here, the Westin raised the argument for an unforeseeable criminal activity exception to the joint employer doctrine for the first time in its reply brief in the trial court (LF1197), leaving Tolentino with no opportunity to respond. In complaining that Tolentino has made new arguments at the appellate level that were not made at the trial level, the Westin conveniently omits this critical fact. The

Westin cannot get in the parting shot and then complain that responsive arguments at the appellate level were not made at the trial level when there was no opportunity to do so.

Notably, two of the arguments that the Westin contends were never made at the trial court are contained in Tolentino's Memorandum in Opposition to Defendants' Motion for Summary Judgment. The Westin's claim that Tolentino "for the first time improperly references the Family and Medical Leave Act regulation regarding employee staffing agencies" is simply false. Tolentino first raised this argument in his opposition to the Westin's motion for summary judgment, stating:

The Family and Medical Leave Act ("FMLA"), which mirrors the FLSA's joint employer regulations, specifically provides in its regulations that "joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer." 29 C.F.R. § 825.106(b)(1); *see also Bastian*, 2008 WL 4671763 at \*3 (noting significance of FMLA regulation regarding employee staffing agencies for FLSA joint employment).

(LF0968.)

The Westin also contends that Tolentino has failed to preserve his argument that the Westin was Tolentino's "primary employer." In his opposition to the Westin motion for summary judgment, Tolentino argued that "[b]oth the formal and functional factors, viewed through the lens of the economic realities test, confirm that the Westin was Tolentino's joint, if not *primary*, employer." (LF0990) (emphasis added). *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7<sup>th</sup> Cir. 1987), was also cited for the

proposition that “[t]he FLSA is designed to defeat rather than implement contractual arrangements.” (LF0968.)

In addition to these arguments made at the trial level, the other arguments identified by the Westin that were made at court of appeals to do not violate the rule cited by the Westin, Missouri Rule of Civil Procedure 83.08, which provides that a substitute brief “shall not alter the basis of *any claim* that was raised in the court of appeals brief . . .” *Id.* (emphasis added). Tolentino’s claim that the trial court erred by reading an exception into the joint employer doctrine has remained a constant at the court of appeals and in this Court. Additional arguments supporting this claim are not prohibited by Rule 83.08. If such arguments were barred, the rule permitting substitute briefing would be largely superfluous, as the court of appeals briefs would encompass the entire universe of arguments that could be considered by the Supreme Court.

Like “claims,” “issues and questions may include multiple legal arguments, contentions, theories, grounds, or bases.” *United States v. Joseph*, No. 12-3808, 2013 WL 5273120, \*3 (3d Cir. Sept. 19, 2013). “A legal challenge that presents multiple avenues for granting relief is a broad issue. But if the legal challenge presents a single point of contention, which may not be recast or reframed to address a conceptually distinct contention, then what has been advanced is an argument.” *Id.* at \*5. On appeal, “[p]arties are free . . . to place greater emphasis and more fully explain an argument on appeal than they did in the District Court. They may even, within the bounds of reason, reframe their argument.” *Id.* With respect to the remaining arguments cited by the Westin, Tolentino

either raised them in the court of appeals or has merely reframed them or placed more emphasis on them.

Simply by noting that the existing criminal penalties for wage deductions have never been interpreted to preclude civil remedies for the same deductions, Tolentino is not raising a new claim, but simply emphasizing the fact that an exception to the joint employer doctrine for unforeseeable criminal activity could not have been intended. In his brief at the court of appeals, Tolentino argued that if the exception was recognized, “the joint employer doctrine would be a dead letter because a joint employer could always argue that it was unforeseeable that the other joint employer would fail to pay the employee because *such nonpayment is a criminal act.*” (Appellant’s Br. at 20) (emphasis added). By identifying the criminal penalty contained within the FLSA that makes such nonpayment a criminal act, Tolentino has not raised a new claim, but merely elaborated on the argument made in the court of appeals.

According to the Westin, Tolentino did not argue “that the criminal scheme was, or should have been, foreseeable.” (Respondents’ Substitute Br. at 26.) To the contrary, Tolentino made this point in the court of appeals, arguing that “[t]he joint employer doctrine holds joint employers are responsible for each other’s unlawful conduct (*e.g.*, not paying employees), and therefore actions which result in employees’ non-compensation should be *foreseeable as a matter of law.*” (Appellant’s Br. at 21) (emphasis added).

The Westin also objects to Tolentino’s argument regarding liability under workers’ compensation laws. As with his other arguments, the workers’ compensation

argument is not a new *claim* under Rule 83.08, but merely a reframing of, and elaboration on, the same argument that the unforeseeable criminal activity exception should not apply in the joint employer context. Moreover, to the extent it was not preserved at the court of appeals, it is certainly permissible as rebuttal argument to the Westin contention that joint employer liability here would violate principles of strict liability. (Westin Br. at 21-22.) Indeed, the Westin relies primarily on *Pecan Shoppe*, 573 S.W.2d 431, to argue that under strict liability law, a joint employer should not be liable for another employer's unforeseeable criminal acts. Tolentino is certainly not precluded from rebutting that argument by pointing out that under Missouri's workers' compensation statute that the result of *Pecan Shoppe* would be entirely different if the tractor-trailer's driver had been killed by a fellow employee and that joint employers would also be strictly liable.

The Westin's argument that workers' compensation statute has "its own unique liability system" only underscores the point that applying tort law principles, which also have a "unique liability system," to wage and hour law is entirely inappropriate. Simply put, there is no limiting principle to cabin analogies to certain areas of law that bear on employer liability. Not having provided any normative reason for adopting tort law principles in the wage and hour context, the Westin cannot restrict arguments by analogy to other areas of law just because those areas of law support Tolentino.

Finally, the Westin complains about Tolentino's arguments regarding the practical implications of recognizing a new exception for unforeseeable criminal activity. Contrary to the Westin's suggestion, this argument was raised in the court of appeals.

After noting that “GLS was never actually convicted of a crime and, in fact, the charges against it were dismissed. (LF0074.)” Tolentino argued:

In terms of formulating a rule for future cases, Respondents offer no workable standard to determine when a joint employer should be excused from paying the wages of its workers because its joint employer company is alleged to have violated a criminal statute, but has not been convicted.

Appellant’s Reply Br. at 12. This argument essentially mirrors the practicality argument made in Tolentino’s Substitute Brief. The Westin believes the conviction of GLS’s principals relieves it of addressing the practical considerations raised by Tolentino. To the contrary, it only muddies the waters because there was nothing in the record evidence that GLS’s principals were convicted of failing to pay Tolentino’s wages. Nevertheless, these arguments regarding the impracticality of the unforeseeable criminal activity exception have been properly raised.

In short, nothing in Tolentino’s Substitute Brief has altered the basis of its claim that the joint employer doctrine does not contain an exception for unforeseeable criminal acts.

### **CONCLUSION**

For the foregoing reasons, Tolentino respectfully requests that this Court reverse the trial court’s March 8, 2012 Order and Judgment granting the Westin’s Motion for Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, as required by Missouri Supreme Court Rule 84.06(c), that the foregoing Appellant’s Substitute Brief fully complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Westin’s Statement of Facts and concluding with the last sentence before the signature block, Appellant’s Substitute Reply Brief contains 6,336 words, less than 7,750 words or 25 percent of the 31,000 words permitted for Appellant’s Substitute Brief under Rule 84.06(b)(1). The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b).

*/s/ Matt J. O’Laughlin* \_\_\_\_\_  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Appellant's Substitute Reply Brief was served, via the Missouri Casenet Electronic Filing System, this 7<sup>th</sup> day of October 2013 to:

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