JURY INSTRUCTION NO. 46

I will now instruct you how to determine if Red Oaks is legally responsible for the actions of Gary Austin. Under the law, the fact that Gary Austin's actions may have been intentional, criminal or sexual in nature does not absolve Red Oaks from legal responsibility for those actions. Furthermore, the fact that Gary Austin's actions may have been specifically prohibited by Red Oaks also does not absolve Red Oaks from legal responsibility for those actions. The law provides that Red Oaks is legally responsible for Gary Austin's actions if Gary Austin was aided in engaging in his sexual contacts with Ruth by his employment position within Red Oaks.

There are several factors you may consider in determining whether Austin's sexual contact with Ruth was made possible or facilitated by the existence of the employment relationship between Gary Austin and Red Oaks and the Reeves:

- 1. Did Gary Austin's employment relationship with Red Oaks and Reeves provide him with special access to Ruth?
- 2. Did that special access enable Gary Austin to engage in a sexual contact with Ruth?
- 3. Did Gary Austin's employment relationship with Red Oaks and Reeves provide Austin with the ability and opportunity to conceal his sexual contact with Ruth?
- 4. Did Gary Austin's employment relationship with Red Oaks and Reeves provide Austin with authority over Ruth?
 - 5. Was Ruth aware of that authority?

6. Did that authority aid or enable Austin to initiate and continue his sexual contact with Ruth?

These factors are again merely guidelines for your consideration. It is not necessary that every one be present for Gary Austin's sexual contact with Ruth to have been made possible or facilitated by the existence of the employment relationship between Gary Austin and Red Oaks. Furthermore, you are not to focus solely on the sexual acts between Gary Austin and Ruth. In determining whether Gary Austin's sexual contact with Ruth was made possible or facilitated by the existence of the employment relationship between Gary Austin and Red Oaks you are to consider the sexual acts as well as his conduct related to or leading up to those acts. You are to consider the totality of the circumstances, taking into account all of Gary Austin's actions, to determine if Gary Austin's sexual contact with Ruth was made possible or facilitated by the existence of the employment relationship between Gary Austin and Red Oaks.

Vicarious Liability Based On Aided-in-Agency: VECO, Inc. v. Rosebrock, 970 P.2d 906, 924 n.36 (Alaska 1999) (employer could be vicariously liable for acts of sexual harassment even where acts are outside the course and scope of employment; vicarious liability could be predicated on the "aided in agency theory like that contained in section 219(2)(d) of the Restatement (Second) of Agency" which provides that "vicarious liability may also be imposed based on apparent authority or where an employee is aided in accomplishing a tort by the employee's position with the employer"; tortfeasor's position of authority over plaintiff aided them to accomplish their tort, thus justifying vicarious liability; the court also recognized that the vicarious liability recognized in Doe v. Samaritan Counseling Center would "seem to be justified" under the "aidedin-agency" theory of § 219(2)(d)); Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) (Restatement (Second) of Agency § 219(2)(d) imposes vicarious liability in "not only cases involving the abuse of apparent authority, but also cases in which the tortious conduct is made possible or facilitated by the existence of the actual agency relationship."); Costos v. Coconut Island Corp., 137 F.3d 46, 49-50 (1st Cir. 1998) (affirming jury verdict finding that hotel was vicariously liable for rape of client by a manager of hotel; court applied Restatement (Second) of Agency § 219(2)(d) and found that jury could find vicarious liability because "[b]y 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, 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 a key to the room and used the key to unlock the door, slip into bed beside her as she slept, and rape her."); Doe v. Forrest, 853 A.2d 48, 56 (Vt. 2004) (deputy police officer raped plaintiff; court held that sheriff could be vicariously liable for deputy's rape pursuant to Restatement (Second) of Agency \$ 219(2)(d); officer was aided in accomplishing his tort by his position and authority as a police officer); Restatement (Second) of Agency \$ 219(2)(d) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . (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.")

Vicarious Liability Can Arise Where Conduct Arises Out of Or Is Reasonably Incidental To Legitimate Work Activities: Laidlaw Transit, Inc. v. Crouse ex. rel. Crouse, 53 P.3d 1093, 1099 (Alaska 2002) (citing to Doe for the proposition that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied"); Doe v. Samaritan Counseling Center, 791 P.2d 344, 348-49 (Alaska 1990) (refusing to strictly apply vicarious liability factors and recognizing that vicarious liability could attach for sexual contact between counselor and patient; holding that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied" and acknowledging that because "an employee is rarely authorized to commit a tort," the motivation to serve test, if strictly construed, would too significantly undercut the enterprise liability basis of the respondeat superior doctrine); Williams v. Alyeska Pipeline Services Co., 650 P.2d 343 (Alaska 1982) (liability found on respondeat superior grounds for a union whose steward incited a crowd to beat a coworker because the acts were "in a perverted sense" dealing with a grievance held by some union members, the acts occurred within the authorized time and space of the work, and the force was "not unexpectable."); Stropes v. Heritage House Childrens Center of Shelbyville, Inc., 547 N.E.2d 244, 249 (Ind. 1989) (refusing to adopt "[a] blanket rule holding all sexual attacks outside the scope of employment as a matter of law because they satisfy the perpetrators' personal desires would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other personal motivations, such as anger or financial pressures"; sexual assault by a nurse's aid could be within course and scope of employment if sexual assault began with the performance of an act within the course and scope of employment and proceeded to the sexual assault; "[a] jury presented with the facts of this case might find that Robert Griffen acted to an appreciable extent to further his master's business, that his actions were 'at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [his employer's] interests,' and that, therefore, his wrongful acts fell within the scope of his employment and Heritage should be accountable."); Fearing v. Bucher, 977

P.2d 1163, 1168 (Or. 1999) (sexual abuse by a priest could be within the course and scope of employment; priest's performance of his "pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment."); Lourim v. Swensen, 977 P.2d 1157, 1160 (Or. 1999) (sexual abuse by boy scout troop leader could be within course and scope of employment; jury could find that the sexual assaults "were merely the culmination of a progressive series of actions that involved the ordinary and authorized duties of a Boy Scout leader". . . and that "in cultivating a relationship with plaintiff and his family, [the troop leader], at least initially, was motivated by a desire to fulfill his duties as troop leader and that, over time, his motives became mixed"... and the troop leader's "performance of his duties as troop leader with respect to plaintiff and his family was a necessary precursor to the sexual abuse and that the assaults were a direct outgrowth of and were engendered by conduct that was within the scope of [the troop leader's] employment. Finally, a jury could infer that [the troop leader's] contact with plaintiff was a the direct result of the relationship sponsored and encouraged by the Boy Scouts, which invested [the troop leader] with authority to decide how to supervise minor boys under his care."); Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241 (Ok. 1993) (nurse's aid who slapped Alzheimer's patient in a nursing home was found to be acting within course and scope where assault was fairly and naturally incidental to business and stemmed from some impulsory emotion which naturally grows out of attempt to perform employer's business).

That The Employer Cannot Be Vicariously Liable For That Conduct: Laidlaw Transit, Inc. v. Crouse ex. rel. Crouse, 53 P.3d 1093, 1099 (Alaska 2002) ("A wrongful act committed by an employee while acting in his employer's business does not take the employee out of the scope of employment, even if the employer has expressly forbidden the act."); Ortiz v. Clinton, 928 P.2d 718, 723 (Ariz. App. Ct. 1996) (The employer cannot insulate itself from liability . . . by promulgating regulations prohibiting employees from drinking and driving.") (cited and quoted in Laidlaw Transit, Inc. v. Crouse ex. rel. Crouse, 53 P.3d 1093 (Alaska 2002)).