ENGLER V. GULF INTERSTATE ENGINEERING, INC. AND THE ROLE OF CONTROL IN VICARIOUS LIABILITY

David Potts*

In Engler v. Gulf Interstate Engineering, Inc., *the Arizona Supreme Court adopted the* Restatement (Third) of Agency *as the test for whether an employer is vicariously liable for the torts of its employee. This Case Note examines the development of Arizona vicarious liability law, and discusses the inconsistencies in how Arizona courts incorporated "control" in their vicarious liability analysis. With* Engler, *the Court's adoption of the* Restatement (Third) *resolves these inconsistencies by adopting control as the primary test for whether an employer is vicariously liable. This clarifies Arizona law while still honoring the policy justifications that underlie vicarious liability.*

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INTRODUCTION

What truly justifies imposing liability on an employer for the negligence of an employee? Generally, courts hope to prevent future injuries, compensate victims, and equitably spread losses across an enterprise.[1] But on a more fundamental level, we recognize that businesses profit from the activity of their employees and rationally believe they should also bear the burden of their negligent acts.[2] But not all acts of an employee can be attributed to an enterprise. When an employee has committed a tort, could the employer have actually deterred the act?[3] Because of these concerns, vicarious liability has always rested on two policy justifications: (1) the employer's business interest and (2) its control over an employee. Previously in Arizona, the roles of these two justifications have been unclear. Now, the Arizona Supreme Court's recent decision in *Engler v. Gulf Interstate Engineering, Inc.* will likely resolve this dispute.[4]

Arizona holds employers liable for the torts of their employees when those torts are committed within the "course and scope of employment."[5] Through this determination, Arizona courts have acknowledged the two primary

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1. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 624 (5th ed. 2005).

2. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 cmt. b (2000) ("Perhaps the most popular justification for vicarious liability is that the costs of an agent's torts should be borne by the enterprise."); RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958) ("[W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit.").

3. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a ("The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant.").

4. Engler v. Gulf Interstate Eng'g, Inc., 280 P.3d 599 (Ariz. 2012).

5. Engler v. Gulf Interstate Eng'g, Inc., 258 P.3d 304, 309 (Ariz. Ct. App. 2011).

justifications for holding employers vicariously liable stated above.[6] But the courts have had difficulty incorporating the "control" justification—sometimes using it as part of the reasoning, sometimes as a threshold test, and occasionally as a nominal policy justification separate from the analysis.[7] The courts only sporadically used control as an explicit and dispositive factor.[8]

In *Engler*, the Arizona Supreme Court recently untangled the knot of inconsistency that plagued this control analysis.[9] Control is now the sole test for vicarious liability.[10] The remaining pieces of other tests are only factors that help guide the courts in looking for circumstantial evidence of control, including whether the employee's actions furthered the employer's business interest.[11] Thus, the Court clarifies and defines the role of control. The Court's decision also positions control as the primary policy justification for vicarious liability: Except in circumstances completely unrelated to employment, an employer who controls an employee should be liable for the torts committed by the employee.

I. HISTORY OF "COURSE AND SCOPE" LAW IN ARIZONA

A. Origins of the *Respondeat Superior* Doctrine

Vicarious liability for the torts of an employee is based on two principles: the employer's control over the employee's actions, and the employee's furtherance of the employer's business. By only holding employers liable when they control their employee's actions, employers are properly incentivized to deter the tortious conduct of their employees.[12] In addition, by only holding employers liable when employees act in pursuit of their employer's interest, courts ensure that wholly self-interested or rogue employee acts do not burden the business.[13]

Early in this state's history, Arizona courts adopted the common law doctrine of *respondeat superior*. Under the doctrine, courts held employers liable for the torts of their employees if a master–servant relationship existed at the time of the tort and the employee acted in furtherance of the employer's business.[14] A master–servant relationship existed only if the servant ("employee") was subject to

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6. *See* Robarge v. Bechtel Power Corp., 640 P.2d 211 (Ariz. Ct. App. 1982).
7. *See* Part I.B.
8. *See* Part I.B.
9. *Engler*, 280 P.3d 599.
10. *Id.* at 602.
11. *Id.*
12. RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) ("Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct. This incentive may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on an individual tortfeasor.").
13. *See, e.g.*, *id* § 7.07 illus. 7.
14. Inspiration Consol. Copper Co. v. Mendez, 166 P. 278, 284 (Ariz. 1917) ("[H]e who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." (quoting Hall v. Smith, 2 Bing. 156, 160 (1824))).

the control or right of control of the master ("employer").[15] This meant employers were only liable for torts committed by those they could generally control—where the employer presumably could have prevented the tort from occurring.

In contrast, independent contractors were not employees; the courts reasoned that while an employer could hire an independent contractor to perform a task, an employer could not control the precise means used to accomplish that task beyond the terms of their contract.[16] Excluding vicarious liability here makes sense: It would be unjust to hold employers vicariously liable for actions when they could not have actually deterred the tortuous conduct.[17] Thus, under common law, control has typically been the primary justification for vicarious liability.[18]

In addition to the control requirement, an employee must have acted to further the employer's business interest before a court would hold an employer vicariously liable for the employee's tortious conduct.[19] Given that employers seek to profit from the activities of an employee, courts reasoned, the employer should be held liable for the damage caused by the employee's business-related acts as well.[20] In contrast, where an employee acts in a self-interested way when committing a tort, this requirement further limits an employer's liability beyond the bounds of the control requirement.

Both the control and business-interest requirements had to be satisfied under the *respondeat superior* doctrine. In practice, however, courts typically

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15. Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 37 (Ariz. 1937). The master–servant relationship concept stems from attempts by pre-industrial courts to impose "a set of paternalistic and very personal obligations" between an employer and employee, similar to a family relationship. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001).

16. *Lee Moor Contracting Co.*, 65 P.2d at 37 ("Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both 'independent contractors' and do not cause the person for whom the enterprise is undertaken to be responsible.").

17. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958) ("The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm.").

18. RESTATEMENT (FIRST) OF AGENCY § 220(1) (1933) ("A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."); *Id.* § 219(1) ("[A] master is subject to liability for injuries caused by the tortious conduct of *servants* within the scope of their employment." (emphasis added)).

19. *Inspiration Consol. Copper Co.*, 166 P. at 284.

20. *See id.*

chose to build upon the *respondeat superior* framework by expanding either the control or business-interest prongs of the doctrine without actually determining if both were satisfied. For example, during this early development of the doctrine, the Arizona Supreme Court further defined the concept of control by requiring that the employee act within the scope of his authority at the time and place of the tortious act.[21] By looking at the employer's control at the time of the tort instead of the general master–servant relationship, the Court diverges form the original *respondeat superior* theory.

Arizona courts expanded liability to include cases where the employee was not controlled by the employer, but still engaged in conduct "reasonably and necessarily in the furtherance of the business of the employer."[22] While the Arizona Supreme Court might have recognized that an employee's tortious conduct departed from his or her normal employment duties (a departure from the normal scope of authorized time and place of employment, or in other words, the specific control of the employer), it was willing to expand vicarious liability where the employee's conduct would have ultimately furthered the employer's business.[23] By recognizing that unusual acts by an employee may still advance the employer's interests, the Court placed more emphasis on the business-interest justification at the expense of the newly defined control requirement.

These early cases attempted to flesh-out the *respondeat superior* test. Occasionally, they justified a decision by saying the employer authorized or would have authorized the action.[24] Such a justification built on the concept of the employer's control over the employee. Other cases, in contrast, seemingly ignored the analysis of control and instead focused on whether the employee's activities furthered the employer's business interest in any tangential way.[25] These disparate approaches quickly led to confusion in the courts and tension among the policy justifications of vicarious liability.

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21. Brooks v. Neer, 47 P.2d 452, 454–55 (Ariz. 1935) (holding that an auto shop may be vicariously liable when one of its mechanics is involved in an accident while test driving a vehicle, because although test-driving vehicles was not part of his normal duties, test-driving could be reasonably inferred from his employment).

22. Cox v. Enloe, 70 P.2d 331, 332 (Ariz. 1937).

23. In *Cox v. Enloe*, the Court noted that a truck driver that caused an auto collision when he deviated from his normal route to go home and get a jacket could still implicate vicarious liability because the employee's well-being (his warmth) would further the employer's interests. *Id.* at 332–33 ("Further, we know that even in the warm climate of southern Arizona, the temperature in the early hours of the morning, especially on a desert trip, frequently drops to such an extent that a coat, unnecessary and useless during the hours of the day, is necessary for the reasonable comfort and efficiency of the driver of an automobile at night. We think that under the circumstances of the present case, a jury might well find that it was just as necessary for a successful trip to Phoenix and back that night that [the employee] should secure his coat and his dinner as that the truck should secure its oil and gasoline.").

24. *Brooks*, 47 P.2d at 458.

25. *Cox*, 70 P.2d at 332–33.

B. The Second Restatement *Approach*

Arizona courts failed to resolve the tension among vicarious liability policy justifications when they adopted the *Restatement (Second) of Agency*. The *Restatement (Second) of Agency* incorporated many of the same elements that Arizona courts previously used for determining whether an employer was vicariously liable.[26] Just as before, whether the employer had general control of the employee was still the first test for establishing vicarious liability (the master–servant test).[27] Second, whether an employee furthered his employer's business interests was still a necessary requirement for vicarious liability.[28] Yet, this *Restatement* also melded the control and business-interest justifications within the second inquiry and required that the employee's tort occur within "the scope of . . . employment" before extending liability.[29] For the employee to act within the course and scope of employment under the *Second Restatement*, three elements must be met: (1) the employee's act must be of the type the employee was authorized to perform (control); (2) the act must occur substantially within the time and space limits authorized by the employer (control); and (3) the act must be motivated by a purpose to serve the employer (business interest).[30] Thus, the *Restatement* drafted the vicarious liability test as: First, an employee must be in a master–servant relationship with his or her employer, and second, the employee must be within the course and scope of employment.

Despite the new terminology, these criteria still mirrored the previous regime. The *respondeat superior* doctrine's "in furtherance of" requirement survived, as employee's actions still had to be "motivated by a purpose to serve the employer."[31] Control, on the other hand, was used in two different ways, the first of which can be thought of as "general" control and the second as "specific" control. General control, found in the *Second Restatement* master–servant analysis, required that the employee be "subject to the employer's control or right of

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26. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219(1), 228 (1958).

27. *Id.* § 219(1).

28. *Id.* § 228.

29. *Id.* § 219(1) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). Arizona courts have traditionally referred to "scope of employment" as "course and scope" of employment. *See, e.g.*, Engler v. Gulf Interstate Eng'g, Inc., 280 P.3d 599, 601 (Ariz. 2012); Smith v. Am. Express Travel Related Servs. Co., 876 P.2d 1166, 1170 (Ariz. Ct. App. 1994).

30. Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814, 818 (Ariz. Ct. App. 1969) (quoting RESTATEMENT (SECOND) OF AGENCY § 228). The *Restatement (Second) of Agency* test for scope of employment also had a fourth prong that dealt with situations where the employee committed an intentional tort. However, this fourth element is not relevant to the analysis in this Note. RESTATEMENT (SECOND) OF AGENCY § 228(1)(d).

31. *Compare* Inspiration Consol. Copper Co. v. Mendez, 166 P. 278, 284 (Ariz. 1917) ("[H]e who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." (quoting Hall v. Smith, 2 Bing. 156, 160 (1824))), *with* RESTATEMENT (SECOND) OF AGENCY § 228(c) (requiring that an action be "actuated, at least in part, by a purpose to serve the master" to be within the course and scope of employment).

control."[32] Specific control, found within its scope of employment analysis, required that the act be something the employee was "authorized to perform" and "within authorized time and space limits."[33] While the word "control" is not used, the underlying concept is the same: The employee who is authorized to act in a particular way at a particular time and place is within the employer's specific control precisely at the time of the tort.

Given how control was bifurcated into two different concepts within both the master–servant test and the course-and-scope test of the Second Restatement, it is no surprise that the tests quickly became muddled. A seemingly rhetorical conflict over how to handle both general and specific control ensued.

Sometimes courts claimed to rely on one form of analysis but apply another. For example, in *Burns v. Wheeler*, the Arizona Supreme Court relied on factors indicating general control, but still came to the conclusion that the employee was not in the course and scope of employment.[34] In that case, the plaintiff contended that the employee was acting in the course and scope of his employment while on his lunch break.[35] The judge, however, directed a verdict for the defendant employer, finding that because the employee was "in his own car at his own expense and during time for which he was not being paid," the employer did not have control over the employee's actions.[36] The Court analyzed these circumstances the same way they would determine whether the employee was an independent contractor (an independent contract uses his own property, such as a car, and is not paid hourly, such as an individual off the clock).[37] Rather than hold that the employee was therefore not a "servant" for vicarious liability purposes, however, the Court held that the employee was not within the course and scope of his employment.[38]

A later case solidified this analysis and held that an employer cannot be liable for the tortious acts of an employee while the employee is going to or returning from his place of employment.[39] This has been called the "coming and going" rule. But even under this rule, courts had difficulty articulating the basis of vicarious liability. In the coming-and-going context, courts sometimes retreated to the older and simpler pre-Second Restatement analysis. In *Robarge v. Bechtel Power Corp.*, an employee on his way home from work was involved in an accident.[40] The plaintiff sued both the employee and the employer, but the court

32. Throop v. F.E. Young & Co., 382 P.2d 560, 562–63 (Ariz. 1963).
33. RESTATEMENT (SECOND) OF AGENCY § 228(1)(a)–(b).
34. 446 P.2d 925 (Ariz. 1968).
35. *Id.* at 926.
36. *Id.* at 927.
37. *Compare id.*, *with* RESTATEMENT (FIRST) OF AGENCY § 220(2) (1933) ("In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: . . . (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work . . . (g) the method of payment, whether by the time or by the job[.]").
38. *Burns*, 446 P.2d at 927.
39. State v. Superior Court, 524 P.2d 951, 953 (Ariz. 1974).
40. 640 P.2d 211, 212 (Ariz. Ct. App. 1982).

blocked any vicarious liability of the employer, holding that "in order to hold an employer vicariously liable for the negligent acts of his employee: (1) the employee must be subject to the employer's control or right of control; [and] (2) the employee must be acting in furtherance of the employer's business."[41] The court's formulation ignored the complex analysis of the *Second Restatement* and instead focused solely on the underlying policy justifications of vicarious liability. This is perhaps because the more nuanced control analysis was too unwieldy compared to the relatively straightforward application of the coming-and-going rule.[42]

In contrast to these coming-and-going cases, courts in some instances ignored the concept of general control entirely; they instead relied solely on the course-and-scope test to look for indicia of specific control. In *Smith v. American Express Travel Related Services, Co.*, a supervisor sexually harassed an employee that worked in another division, and in response, the employee sued both the supervisor and their employer for assault and battery, alleging that the supervisor had acted within the course and scope of his employment when committing the tort.[43] In holding that the conduct fell outside the supervisor's course and scope of employment, the Arizona Court of Appeals noted that the supervisor's conduct was not an authorized job duty and that sexual harassment was not "necessarily or probably incidental to his employment."[44] In this case the court returned to the course-and-scope test, and did not address how the employer held general control or right of control over the employee.[45] Of course, the master–servant relationship itself may not have been an issue in the case, but that does not necessarily imply that the employer's general control over the employee should be ignored. Regardless, cases such as *Smith*, which handle instances of serious misconduct by employees, instead talk about whether the conduct was "authorized," addressing control only through elements that may indicate specific control. These elements

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41. *Id.* at 214.

42. *Compare id.* at 214 ("[C]ertain specific facts must be present at the time of injury in order to hold an employer vicariously liable for the negligent acts of his employee: (1) the employee must be subject to the employer's control or right of control; (2) the employee must be acting in furtherance of the employer's business."), *with* RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958) ("Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.").

43. 876 P.2d 1166, 1169–70 (Ariz. Ct. App. 1994).

44. *Id.* at 1171. *But see* State v. Schallock, 941 P.2d 1275, 1283 (Ariz. 1997) (holding that an employer can be vicariously liable for the sexual harassment perpetuated by an employee when the employee is furthering the employer's business not through the tort itself, but through conduct related to the tort, like running an office).

45. *See Smith*, 876 P.2d at 1171 ("Nally's actions were not expressly or impliedly authorized as part of his job duties. Nor could his conduct have been reasonably contemplated as being necessarily or probably incidental to his employment. Clearly, Nally did not perform a service in furtherance of TRS's business when he harassed and assaulted Smith.").

include whether the conduct was authorized by the employer and performed within authorized time and space limits.[46]

Recent cases demonstrate the culmination of this confusion. One case comments that control is "arguably" a fourth factor in the course-and-scope analysis along with whether: (1) the work was the type of work the employee was employed to perform; (2) the employee acted within authorized time and space limits; and (3) the employee acted for a purpose to serve the employer.[47] Another case also wraps control into the course-and-scope test, but only in the context of the first element (whether the work was the type of work the employee was employed to perform).[48] At the same time, some cases treat control as a separate but necessary test that a plaintiff must satisfy in order for there to be vicarious liability.[49] Others treat control as an ancillary issue, noting only that course and scope of employment "is related to the employer's right to control the employee's conduct at the time the tortious conduct occurs."[50]

Simply put, during this second era of vicarious liability law, courts employed different rules and tests for determining whether an employer was vicariously liable, even though the *Restatement (Second) of Agency* offered a relatively clear test for determining employer liability. At first glance, this appears to be a rhetorical conflict, but these rhetorical differences have serious consequences. Certainly, cases before the *Second Restatement* modified the *respondeat superior* test as well.[51] But they did so by treating specific control or the employer's business interest as *factors*, at times weighing one more heavily than the other. In contrast, the *Second Restatement* cases treated these considerations as necessary elements. The effect was the creation of complete exceptions or bars to vicarious liability that did not reflect the realities of employment.

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46. Baker *ex rel.* Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc., 5 P.3d 249, 254 (Ariz. Ct. App. 2000) ("Conduct falls within the scope if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it.").

47. Montoya v. Banner Health Sys., 2008 WL 4133931, at *4 (Ariz. Ct. App.).

48. Higginbotham v. AN Motors of Scottsdale, 269 P.3d 726, 728 (Ariz. Ct. App. 2012) ("Several factors are relevant to the determination of whether an employee's conduct falls within the course and scope of employment: (1) *whether the conduct is the kind the employee is employed to perform or that the employer had the right to control at the time of the employee's conduct*; (2) whether the conduct occurs within the authorized time and space limits; and (3) whether the conduct furthers the employer's business, even if the employer has expressly forbidden it." (emphasis added)).

49. Faraci v. Mayo Clinic Arizona, 2010 WL 98600, at *3–4 (Ariz. Ct. App.) (requiring that the employee's actions be within the scope of employment, that the act be in furtherance of the employer's business, and that the employee be subject to the employer's control or right of control to hold the employer vicariously liable for the employee's torts).

50. McIntosh v. Achen-Gardner Eng'g, L.L.C., 2011 WL 1434842, at *3 (Ariz. Ct. App.).

51. *See supra* notes 18–23.

For example, consider a gun dealer who takes a gun home at the end of the day to show a potential purchaser. On the way home, the gun dealer hits a speed bump while travelling too fast. The gun, which is sitting in the trunk, accidentally discharges and hits a pedestrian. Under the *Second Restatement*, the gun dealer's employer may not be liable for the injury to the pedestrian because he was not going-and-coming from work (even though the gun dealer was acting in furtherance of his employer's business and the employer is able to generally exercise control over the employee through company policies). Similarly, if the gun dealer is in violation of his employer's policy, testing the guns for fun behind the shop when he accidentally shoots a neighbor, the employer may not be vicariously liable despite the control the employer exercises over the employee simply because the gun dealer was not acting in furtherance of the employer's business.

As the courts continued to further define this *Second Restatement* test, which treated each consideration as a necessary element, the courts lost flexibility in applying the vicarious liability doctrine. And the rhetorical changes made by Arizona courts created deeper exceptions to liability. This caused courts to struggle to strike the right cord in formulating the vicarious liability test and, in turn, to inconsistently actuate the control justification of vicarious liability.

II. THE EMERGENCE OF CONTROL AND THE *RESTATEMENT (THIRD) OF AGENCY*

A. An Introduction to Engler

The Arizona Supreme Court, in *Engler v. Gulf Interstate Engineering, Inc.*, adopted the *Restatement (Third) of Agency*.[52] The *Restatement (Third) of Agency* explicitly adopts control as the primary factor for determining whether or not an employee is within the scope of his or her employment.[53] The decision to adopt this test resolves the previous ambiguity in Arizona's vicarious liability law during the *Second Restatement* era. While Arizona courts had inconsistently applied control in analyzing whether to apply vicarious liability,[54] the *Engler* decision does exactly the opposite by placing the focus on control and deterrence.[55] Adopting control as the test for vicarious liability is beneficial for a number of reasons. First, it clarifies the role of control in the vicarious liability analysis, reconciling the courts' conflicting approaches to the *Second Restatement*. Second, with control as the primary focus, control and deterrence become a greater justification than whether the employee is acting to further the employer's business interest.

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52. 280 P.3d 599 (Ariz. 2012).

53. RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

54. *See supra* Part I.B.

55. *Engler*, 280 P.3d at 601–02.

In *Engler*, Gulf Interstate Engineering sent an employee, Ian Gray, on an out-of-town trip to work on the design and construction of a natural gas compressor in Mexico.[56] While staying in nearby Yuma and driving to dinner after work, Gray hit Engler, who was riding a motorcycle, and injured him.[57] Engler sued both Gray and Gulf, alleging that Gray had driven negligently and acted within the course and scope of his employment during the tort because he was on an out-of-town business trip.[58] Gulf moved for summary judgment, arguing that it could not be vicariously liable for the torts of off-duty employees.[59]

Under the *Second Restatement*, it is unclear how this case would turn out because the Arizona Court of Appeals failed to consistently apply it. Under a similar set of facts, one Arizona appellate court held that an out-of-town employee was within the course and scope of employment when travelling to eat a regular meal because the employee was:

> traveling on an assignment of the kind he was employed to perform; was within the authorized time and space limits of his temporary assignment in southern Arizona; and was acting, at least in part, by a purpose to serve his employer, because eating is necessarily incidental to a multiple-day assignment.[60]

Conversely, the Court of Appeals in *Engler*, while focusing in part on control, held that the employee was not acting in furtherance of the employer's business and was not acting within authorized time and space limits at the time of the accident.[61]

The Arizona Supreme Court declined to extend vicarious liability, stressing the absence of control in this case.[62] In cases such as this, the Court reasoned, the employer does not have the requisite control "when the employee maintained the right to choose where, when, and how to travel, and by what route."[63] While focusing on the control issue though, the Court did not repeat one of the previous Arizona tests, but instead relied on the *Third Restatement* test for course and scope.[64]

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56. *Id.* at 601.
57. *Id.*
58. *Id.*
59. *Id.*
60. McCloud v. Kimbro, 228 P.3d 113, 117 (Ariz. Ct. App. 2010).
61. Engler v. Gulf Interstate Eng'g, Inc., 258 P.3d 304, 313 (Ariz. Ct. App. 2011).
62. *Engler*, 280 P.3d at 602 ("Although this case presents a fact pattern not confronted in our previous cases—negligent driving by an employee on out-of-town travel status—the same analysis applies: An employee's tortious conduct falls outside the scope of employment when the employee engages in an independent course of action that does not further the employer's purposes and is not within the control or right of control of the employer.").
63. *Id.* at 601 (citing State v. Superior Court, 524 P.2d 951, 953–54 (Ariz. 1974)).
64. *Id.* at 602 ("We agree with the court of appeals that the Restatement (Third) § 7.07 sets forth the appropriate test for evaluating whether an employee is acting within the scope of employment, and we adopt it here.").

B. How Engler *Clarifies Arizona Law*

The new test in Arizona shifts away from the bifurcated control analysis found in the previous master–servant and course-and-scope tests. The new test asserts that control is the definitive source or justification for vicarious liability, alleviating much of the prior confusion under the *Second Restatement*. Prior to *Engler*, it was unclear how exactly control factored into the analysis. While it was at one point a threshold test to determine whether the employee was a "servant" for purposes of *respondeat superior*,[65] courts inconsistently used control in the Second Restatement analysis, occasionally considering it only as an ancillary issue[66] and occasionally incorporating it into the course-and-scope test.[67] *Engler* clarifies the issue by only focusing on whether an employer had "actual or potential control" over an employee at the time of the injury to create vicarious liability.

Under this regime, judges have more discretion to better balance the facts of the case and apply a clearly defined test that has one determinative factor. The course-and-scope elements remain relevant, but only as factors that help courts look for signs of control.[68] Instead of having to satisfy all of the elements of the course-and-scope test, as was required under the *Second Restatement*, the alleging party now only has to show that the *factors* are sufficient to warrant a finding that the employee was within the course and scope of employment.[69]

Substituting the rigid elements test of the *Second Restatement* with a factor analysis reframes the focus of vicarious liability cases. For example, the employer of the aforementioned gun dealer whose gun accidentally shot a pedestrian may now be vicariously liable for the gun dealer's torts even if the gun dealer was not strictly within authorized time and space limits. The question under the new test is whether the employer could control the employee, not whether the

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65. *See supra* Part I.A.

66. McIntosh v. Achen-Gardner Eng'g, L.L.C., 2011 WL 1434842, at *3 (Ariz. Ct. App.).

67. *See, e.g.*, Montoya v. Banner Health Sys, 2008 WL 4133931, at *4 (Ariz. Ct. App.) ("An employee's conduct falls within the scope and course of employment if: (1) the conduct is the kind the employee is employed to perform, (2) the conduct occurs within the authorized time and space limits, and (3) the conduct furthers the employer's business even if the employer has expressly forbidden it. In addition to these factors, a fourth factor has arguably been added to the scope and course of employment test in Arizona cases, but it is not necessarily consistently applied. That fourth factor, which we will apply here, is 'the employer's right to control the employee's activity at the time of his tortious conduct.'" (citations omitted)).

68. *Engler*, 280 P.3d at 602 ("Several sections of the Restatement (Second) identify relevant factors for determining whether the employer exercised actual control or retained the right to control the employee's conduct when the negligent act occurred."); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006) ("The formulation of the scope-of-employment doctrine in subsection (2) differs from its counterparts in Restatement Second, Agency §§ 228 and 229 because it is phrased in more general terms.").

69. *Engler*, 280 P.3d at 602; RESTATEMENT (THIRD) OF AGENCY § 7.07(2) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.").

action was at a particular time or place. Similarly, the employer could now be vicariously liable for an employee who accidentally shot someone while firing a gun at the workplace, even if the action was not in furtherance of the employer's business, so long as the employer could control the employee. This shift to an emphasis on control makes the analysis more focused, though still flexible, as opposed to the scattered and inconsistent *Second Restatement* approach.

C. Rearranging Policy Justifications

The new emphasis on control stays true to the policy justifications behind vicarious liability, but reorders their importance. By focusing on control, the test only holds employers liable when they actually can prevent or minimize the likelihood of the tortious conduct. If an employer has no control over the employee for a particular action, the employer cannot have prevented the resulting tort from occurring. Certainly this analysis reduces the role of the business-interest requirement from a necessary element to a factor that indicates control. But it does so while recognizing that whenever an employee acts to advance a business's interest (even if that act is unauthorized), the business likely had the chance to prevent or control the employee's impulse beforehand.[70]

In fact, the *Third Restatement* even contemplates the unusual circumstance where an employee acts in a completely self-interested, unauthorized, and therefore, arguably uncontrollable manner, leaving courts an escape valve to avoid applying vicarious liability.[71] This utilizes the business-interest language as an exception to the *Third Restatement* control test. If an employee engages in a course of *independent* conduct not intended to serve *any* purpose of the employer when committing the tort, then the employer is not vicariously liable.[72] For example, if the aforementioned gun dealer, while at work, took a gun out of the case and intentionally shot a customer, the employer would not be liable because the gun dealer's conduct was entirely independent of his employer and not intended to serve any purpose of the employer. In such circumstances, the employee is arguably uncontrollable. Placing control at the head of this analysis, then, allows courts to rationally approach the deterrence and business-interest justifications in a more realistic manner.

CONCLUSION

Arizona courts have struggled with a relatively simple question: When do we hold employers responsible for the torts of their employees? *Engler* offers a clear answer: when the employer could control the employee. By adopting the *Restatement (Third) of Agency*, the Arizona Supreme Court has clarified previously opaque Arizona law. This issue of vicarious liability may still be complex, requiring a thoughtful analysis of the factual circumstances, but the test itself is clear and holds employers liable for torts that they could have prevented or minimized. In addition, this test better reflects the policy goals of vicarious

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70. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b.
71. *Id.*
72. *Id.*

liability. It holds employers responsible for preventable torts, while still recognizing the relevance the employee's intent to either further the business's interests or act in a completely self-interested way. This new test may disrupt the status quo in Arizona law, but does so in a way that clarifies the issue for courts while staying true to the policy goals of vicarious liability.