PUBLIC REDACTED VERSION

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al.*,	)	
Plaintiffs,	)	
v.	)	C.A. No. 08-cv-0827 GBL-JFA
CACI PREMIER TECHNOLOGY, INC.	)	
Defendants	)	

PLAINTIFF AL SHIMARI'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMMON-LAW CLAIMS

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INTRODUCTION

This action involves acts of torture, war crimes, assault and battery, sexual assault, infliction of emotional distress, and negligence committed in occupied Iraq against plaintiff Suhail Najim Abdullah Al Shimari, an Iraqi citizen, for which defendant CACI Premier Technology, Inc ("CACI") is responsible. CACI is a Delaware corporation with its principal place of business in Virginia. CACI's latest attempt to avoid acknowledging any liability for its employees' actions in Iraq is to argue that this case is governed by Iraqi law, and that under Iraqi law CACI has no liability at all. In CACI's view, a law issued by the Coalition Provision Authority ("CPA") to govern claims against civilian contractors like CACI results in a situation in which CACI, conveniently, is governed by no law at all and cannot successfully be sued anywhere.

CACI cannot avoid responsibility for its actions by engaging in such legal sleight of hand. Under the applicable interest analysis test of the Restatement (Second) of Conflicts of Law, the law of the state with the most significant relationship to the action will be applied to the issues in this case. The CPA law relied upon by CACI is indeed central to this analysis because it displaces local Iraqi law and directs the application of United States law. It makes clear that, because it was occupied territory at the time the torts were committed, Iraq has no legally cognizable interest in applying its substantive laws to this case despite being the site of injury and tortious conduct. Instead, Virginia has the more significant relationship to this case, and its substantive laws provide Mr. Al Shimari with the ability to recover on his common-law claims.[1]

[1] This brief does not address the Plaintiffs' claims under the Alien Tort Statute, 28 U.S.C. § 1350.

ANALYSIS

A. CPA Order 17 Directs the Application of United States Law, and Does Not Provide CACI with Immunity

Properly applied, the choice-of-law analysis in this case begins with Ohio and ends with Virginia, but is informed by Order 17 of the CPA. Mr. Al Shimari agrees with CACI that Ohio choice-of-law rules apply in the first instance, and that Ohio follows the Restatement (Second) of Conflict of Laws in applying the law of the state with the most significant relationship. CACI, however, misconstrues CPA Order Number 17 ("Order 17"), which leads it to misapply Ohio's choice-of-law analysis.

Order 17 established a framework for the liability of Coalition personnel, including contractors assisting the U.S. military, in occupied Iraq. The Order, titled "Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors," was enacted by Paul Bremer, Administrator of the CPA, on June 26, 2003.[2] (O'Connor Decl. (Dkt. No. 365), Ex. 1). Order 17 provides that Coalition personnel are "subject to the exclusive jurisdiction of their Parent States," § 2(4), and that contractors "shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts" and shall not be subject to Iraqi legal process, § 3(1-2). Order 17 also provides, however, that third party claims for personal injury:

> arising from or attributed to Coalition personnel or any persons employed by them … that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State … in a manner consistent with ***the national laws of the Parent State***. (CPA order 17 § 6(1) (emphasis added)).

[2] Order 17 was revised on June 27, 2004, days before the end of the CPA. The relevant provisions are not materially different. *See* Order 17 (June 27, 2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf. The relevant actions alleged in Plaintiffs' Third Amended Complaint occurred from fall 2003 through spring of 2004.

CACI argues that it and its employees are "Coalition Personnel" within the meaning of Order 17 (See Def. Br. at 15, 21-22).[3] Order 17 authorizes tort suits against such persons to be brought in and under the laws of CACI's Parent State, here the United States. CACI has not argued that it is exempt from Order 17 because its employees were engaged in "military combat activities." Nor could it. [redacted][4] Nor do the pleadings in the Third Amended Complaint ("Complaint") support CACI's contention that the claims involve "military combat operations."

Taken as a whole, Order 17 creates a system where claims against Coalition personnel for conduct during the occupation period are to be handled by the courts of the personnel's home country pursuant to that country's laws, and not in Iraqi courts or under Iraqi law. Order 17 does *not* immunize Coalition personnel from tort suits; it just states where claims should be brought and what law applies. This intent was made even clearer by the Public Notice issued by Ambassador Bremer in conjunction with Order 17. (Annexed as LoBue Decl., Ex. B). The Notice states that Coalition personnel "are not subject to local law or the jurisdiction of local courts," but that this "will not prevent legal proceedings against Coalition personnel for unlawful acts they may commit. It simply ensures that such proceedings will be undertaken in accordance

[3] "Coalition Personnel" are defined as "all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA." Order 17 §1.1.

[4] CACI's Statement of Work is incorporated by reference into Plaintiffs' Third Amended Complaint, and appropriately considered on a motion to dismiss as part of the pleadings.

with the laws of the State that contributed the personnel to the Coalition" (emphasis in original). Those are precisely the steps taken by Mr. Al Shimari to prosecute his claims.

Order 17, which was issued by an agency (i.e., the CPA) created by the U.S. Government to rule and administer Iraq, sought to redirect venue for victims of tort claims to the jurisdictions of the home countries of the contractors.[5] As such, Iraqi citizens (as well as others) could only file claims against U.S.-based contractors in the United States. When the nominal transfer of sovereignty from the United States to Iraq occurred in June, 2004, the Interim Iraqi government agreed to uphold all of the Orders and decrees by the CPA, including Order 17. As a result, the only forums available for the victims of tortuous acts by U.S.-based contractors were ones in the United States. Therefore the aim of Order 17 was not blanket immunity for all contractors, but rather a redirection of venue to the United States (as the home country of U.S. contractors) instead of Iraq.[6]

CACI also misreads Order 17 as requiring the application of United States federal law to cases where the United States is the Parent state. Order 17 section 6(1) states that claims will be prosecuted "in a manner consistent with the national laws of the Parent State." A plain reading of "national laws" in this context serves to reference the internal laws of the Parent State (as opposed to, say, international law). This reading is reinforced by the Public Notice, which construes the order as requiring only that such claims be "undertaken in accordance with the

[5] The CPA was formed in May 2003. Its Administrator, Ambassador Bremer, was appointed by the U.S. Secretary of Defense. The CPA exercised "powers of government" in Iraq, with "all executive, legislative and judicial authority necessary to achieve its objectives." CPA Reg. No. 1 § 1 (May 16, 2003) (annexed as LoBue Decl., Ex. C). The CPA's Regulations and Orders "shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent." *Id*. at § 3(1).

[6] By directing tort claims against contractors to be brought in the United States, Order 17 is also further evidence of the interest of the United States in trying such claims under the Alien Tort Statute, 28 U.S.C. § 1350.

laws of the State that contributed the personnel," without any reference to "national" law. There is no indication that by use of the phrase "national law," the order intended to point specifically to federal law of any parent State—especially considering that the Order would also apply to contractors whose Parent State was other than the United States and did not have a federal system**.** *See Raskiewicz v. United States*, No. 10-Civ-86, 2010 U.S. Dist. LEXIS 93322, at *2 (D. Mont. Aug. 12, 2010) ("Montana law is part of the national law of the United States because Montana is part of the United States.").

CACI's argument that *Coleman v. Tennessee*, 97 U.S. 509 (1879), *Dow v. Johnson*, 100 U.S. 158 (1880), or their progeny would provide it with a defense in the absence of Order 17 is both irrelevant and incorrect. Order 17, as promulgated by the American-led, internationally recognized occupying authority (the CPA), *did* exist and set forth the liability regime applied by the occupying forces to civilian contractors like CACI. A *Coleman* defense to application of Iraqi law is therefore not in issue because the procedures established in Order 17 were those of the occupying force put in place specifically to deal with claims against personnel of the occupying force. Indeed, Order 17 acknowledged the principles embodied in *Coleman*, and therefore confirmed that redress be available under the national laws of the Parent States ("Recalling that under international law occupying powers, including their … personnel … are not subject to the laws or jurisdiction of the occupied territory."). *Coleman*, like *Dow*, recognizes a jurisdictional rule limiting the power of foreign tribunals to adjudicated claims of the enemy—not a rule of immunity. 97 U.S. at 515 (Union soldiers during Civil War "were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished"); *see also Dow*, 100 U.S. at 165 ("[T]he tribunals of the enemy must be *without jurisdiction* to sit in judgment upon the military conduct of the officers and soldiers of

the invading army." (emphasis added)). Order 17 thus allayed the concerns of *Coleman* and *Dow* that occupying forces would face legal actions in tribunals of the occupied power.[7] *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (characterizing concern in *Coleman* and *Dow* as addressing jurisdiction of foreign courts over occupiers, not choice of law).

Order 17 sets out a framework for bringing a claim against a contractor like CACI—a framework that Mr. Al Shimari has followed by bringing suit in the United States. Order 17 also shows that, by refusing to apply its own laws to claims against contractors during the occupation, Iraq has no interest in its laws being applied to this case despite Iraq being the place of injury and conduct.

B. Virginia Substantive Law Applies to Mr. Al Shimari's Common-Law Claims

Ohio choice-of-law rules apply to Mr. Al Shimari's common-law claims. Generally, a federal district court sitting in diversity will apply the choice-of-law rules of the

[7] To the extent that CACI implies that it has a *Coleman* defense regardless of the choice of law, its argument should be rejected. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (distinguishing *Coleman* and *Dow* on grounds that they did not involve civilian employees). The case primarily cited by CACI to argue that *Coleman* applies to civilian contractors, *Ford v. Surget*, 97 U.S. 594, 607 (1878), is inapplicable to CACI's situation, as the civilian in that case "acted under duress or compulsion" after having been ordered to destroy property by the military authorities, and that the court could not assume from the evidence that "he was a mere volunteer to aid in its destruction." *Filarsky v. Delia*, also cited by CACI, involves the issue of qualified immunity under a 42 U.S.C. § 1983 suit. 132 S. Ct. 1657 (2012). The district court case relied upon by CACI, *United States v. Best*, 76 F. Supp. 857 (D. Mass. 1948), is likewise inapposite. The case involved an investigation by the United States Army into whether an American civilian living in occupied Austria had committed treason by engaging in propaganda on behalf of the Nazis. *Id.* at 859-60. In finding that the warrantless search conducted in the case was reasonable and constitutional, the court mentioned without discussion that "[t]he Austrian courts had no jurisdiction over American nationals" as one reason why the search was reasonable. *Id.* at 860. The court cited first for this proposition the Austrian Military Government Handbook , and then, without discussion, *Dow v. Johnson*, 100 U.S. 158 (1880). Finally, *Freeland v. Williams* only applies to "an act done in accordance with the usages of civilized warfare under and by military authority," and is therefore inapposite to the claims in this case. 131 U.S. 405, 416 (1889).

state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co*., 313 U.S. 487, 496 (1941). Mr. Al Shimari first filed his complaint against CACI in the Southern District of Ohio on June 30, 2008. In August 2008, upon CACI's motion, the action was transferred to this Court pursuant to 28 U.S.C. § 1404(a). As discussed in this Court's order dismissing common-law claims of the other plaintiffs on statute of limitations grounds (Dkt. No. 76), following a section 1404(a) transfer, the district court to which the case is transferred must apply the law that would be applied by the transferor court; the transfer should result merely in a change in courtroom, not a change in law. *Van Dusen v Barrack*, 376 U.S. 612, 639 (1964). Because the Southern District of Ohio would apply Ohio's choice-of-law rules, this Court, following the section 1404(a) transfer, would also look in the first instance to Ohio's choice-of-law rules.

Under Ohio choice-of-law analysis, the substantive law of the state with the most significant relationship to a tort action is applied. In *Morgan v. Biro Manufacturing Co.*, the Ohio Supreme Court adopted the choice-of-law analysis of the Restatement (Second) of Conflict of Laws (1971) ("Restatement"). 474 N.E.2d 286, 288-89 (Ohio 1984). The court referenced section 146, the section dealing with personal injury torts, as the starting point for analysis. *Id*. at 289. This section states:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and to the parties, in which event the local law of the other state will be applied.

Restatement § 146. Under section 146, the laws of the state with the most significant relationship will apply even if it is not the place of injury. *See, e.g. Callis v. Zilba*, 737 N.E.2d 974, 975 (Ohio Ct. App. 2000). The Restatement explains that "[i]n large part, the answer to this question [of which state has the more significant relationship] will depend upon whether some

other state has a greater interest in the determination of the particular issue than the state where the injury occurred." Rest. §146 cmt c. Although the law of the state of injury is usually applied when the conduct and injury occur in the same state, that is not always the case and another state may still have a more significant relationship. *Id*. cmt d.

The *Morgan* court also looked to factors in section 145, which sets forth the general rule for torts, to determine which state has the more significant relationship:

> To determine the state with the most significant relationship, a court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which the court may deem relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case.

Morgan, 474 N.E.2d at 289.

Both sections 146 and 145 reference the factors listed in section 6 of the Restatement, which lists choice-of-law principles to be considered. Comment b of section 145 states that for tort law, the important section 6 factors are: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, and the ease in the determination and application of the law to be applied.[8]

The first factor, the needs of the interstate and international system, "should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies

[8] The remaining factors listed in section 6(2) are: the protection of justified expectations, the basic policies underlying the particular field of law, and certainty, predictability and uniformity of result.

of other states and of the community of states." Restatement § 6 cmt d. The second factor, relevant policies of the state of the forum, will not generally be applicable to a choice of substantive law if the forum has no interest in the case apart from being where the case was brought: "Here the only relevant policies of the state of the forum will be embodied in its rules relating to trial administration." *Id*. cmt e. The third factor, relevant policies of other interested states, should lead a court to "reach a result that will achieve the best possible accommodation of these policies. The forum should also apprise the relative interests of the states involved in the determination of the particular issue." *Id*. cmt f. The final factor, ease in the determination and application of the law to be applied, strives for a rule that is simple and easy to apply, though this policy "should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results." *Id*. cmt j.

In this case, the "needs of the . . . international system" loom paramount. Although Iraq is the place of injury, Iraq was under occupation and its laws were displaced by the laws of the CPA at the time the tortious conduct occurred. Those laws expressly directed application of the laws of the Parent State from which the contractors haled to govern claims against those contractors. That is effectively a choice of law by the CPA as the entity in control of the place where the injury occurred. It is also a declaration that Iraq had no cognizable interest in applying its own national law.

In the absence of demonstrated conflict with the law another jurisdiction, the forum court will apply its own law. *See Glidden Co. v. Lumbermens Mut. Cas. Co.*, 861 N.E.2d 109, 115 (Ohio 2006) ("[A]n actual conflict between Ohio law and the law of another jurisdiction must exist for a choice-of-law analysis to be undertaken."); *see also Irondale Indus. Contrs. v. Va. Sur. Co.*, 754 F. Supp. 2d 927, 931 (N.D. Ohio 2010). Here (with one possible

exception discussed below), CACI has pointed to no conflict in the tort laws of Ohio and Virginia. The common-law causes of action asserted by Mr. Al Shimari, such as assault and battery, are familiar claims recognized in all U.S. jurisdictions. CACI argues, however, that Ohio cannot apply its substantive law to this case because Ohio has no interest in the case. For that reason, there is only one jurisdiction—Virginia—that has an interest, because CACI is based here and supervised the conduct of its personnel at Abu Ghraib from here.[9]

The choice-of-law principles in section 6(2) indicate that Virginia is the only state with a legally cognizable interest in this case. The "relevant policies of other interested states and the relative interest of those states in the determination of the particular issue," Restatement section 6(2)(c), for Iraq would be Order 17, which directly addresses claims brought against Coalition personnel for conduct during the occupation of Iraq. Typically, the state of the place of injury or conduct will have an interest in having its laws apply because injury and conduct are the "two principal elements" of tort law. Restatement § 146 cmt d. By the terms of Order 17, however, Iraq has no interest in having its own substantive laws apply to these claims. Order 17 § 3, 6.

The same conclusion was reached by a federal district court in the case of *Harris v. Kellogg, Brown & Root Services.*, 796 F. Supp. 2d 642, 654 (W.D. Pa. 2011). That case involved a suit by the parents of a United States soldier against contractors who had allegedly negligently performed electrical services in Iraq, resulting in the fatal electrocution of the soldier.

[9] Like CACI, Mr. Al Shimari makes no claim that Delaware as the state of incorporation of CACI has a significant interest in this case. *See* Restatement § 145 cmt e ("At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.").

Id. at 647. In applying Pennsylvania's hybrid "governmental interest analysis"-and-Restatement approach to choice of law, the court found that Order 17:

> [U]ndermines Iraq's supposed interests in this litigation. Pursuant to the CPA, Iraq agreed that government contractors such as KBR would not be subject to Iraq's laws in relation to their contracts, were immune from Iraqi process and that third party claims for personal injury and death should be resolved under the laws of the Sending State, i.e., the laws of the United States of America.

Id. at 662-63 (citations omitted) (finding that either Pennsylvania or Tennessee causation law could apply to plaintiffs' state law claim); *see also Harris v. Kellogg, Brown & Root Servs*., No. 08-Civ-563, 2011 U.S. Dist. LEXIS 108930, at *31-32 (W.D. Pa. Sept. 23, 2011) (on motion for reconsideration, finding that the court "remains convinced that CPA Order 17 wholly undermines any tangential interest that Iraq may have had in its laws applying to government contractors such as KBR during the time in question.").[10] Order 17 undermines CACI's argument that Iraqi law applies in this case for the same reason.

Iraq's status as the site of injury and conduct therefore has little meaning to this case. Applying United States law to Mr. Al Shimari's claims is the result that best achieves the policies embodied in Order 17. Virginia, on the other hand, has an interest in this case because it is CACI's principal place of business. *See* Restatement § 145(2) (c), cmt e (calling the place of business a place of "enduring relationship" to the party). Virginia is also where CACI managed the hiring of the interrogation personnel it deployed to Iraq and the performance of the contract with the United States. *See* Def. Br. at 21-22. Applying Virginia law in this case would therefore "achieve the best possible accommodation of these policies." Restatement §6 cmt f.

[10] While the court noted that if the injured party had been an Iraqi citizen, that person "arguably may have expected Iraqi law to apply," *Harris*, 796 F. Supp. 2d at 678, under the Restatement's approach reasonable expectations for tort claims carry little weight, Restatement § 145 cmt. b, and in any case Order 17 made clear that Iraqi law did not apply at the time of the conduct.

Ease in the determination and application of the law to be applied also favors Virginia law as this Court sits in Virginia and routinely applies Virginia law in diversity actions.

The policies identified by CACI to argue that Virginia lacks an interest in this case sufficient to overcome the presumption that the law of the place of injury applies (lex loci delicti, federal war powers, and a presumption against extraterritoriality), even if applicable, do not alter the analysis. Section 146 of the Restatement does not require that another state have a "monumental, "overwhelming," or "weighty" interest to overcome the presumption as CACI implies, only that the other state has the "more significant relationship" than the place of injury as determined by the factors of section 6. In this case, the interests of both Virginia (as the principal place of defendant's business) and the CPA (as embodied in Order 17) are best served by applying Virginia law. As Iraq has no real interest in this case, Virginia's interests are sufficient to give it the "more significant" relationship.

CACI's reliance on these policies is, in any event, misplaced. Virginia's lex loci delicti choice of law rule is applied regardless of Virginia's true interest in the case. Unlike Order 17, which was passed specifically to address situations such as this case, Virginia's lex loci rule is applied automatically to torts, and to the extent it reflects a Virginia interest, it is one of judicial administration. *See McMillan v. McMillan*, 219 Va. 1127, 1131 (Va. 1979) (rejecting Restatement approach in favor of the "uniformity, predictability, and ease of application of the Virginia rule"). Nor is there any reason that federal war powers would diminish Virginia's interest in applying its substantive law to a company with its principal place of business in the state simply because CACI's conduct occurred during a time of war. Similarly, a presumption against extraterritorial application of a state's laws is, by CACI's own argument, not an issue unique to Virginia or that Virginia has some particular interest in enforcing. Def. Br. at 21.

Extraterritoriality is a neutral factor in this analysis, and it is nullified by Order 17's directive that some U.S. national law be applied to this case.

For the above reasons, Iraq has no cognizable interest in having Iraqi law apply to this case, and Ohio, the original forum state, has none, giving Virginia, CACI's principal place of business, the most significant relationship.[11] Under Ohio choice of law principles, the Court should therefore apply Virginia substantive law to Mr. Al Shimari's common-law claims.

C. Mr. Al Shimari States a Claim for Negligent Hiring, Training, and Supervision under Virginia Law

Count Nineteen of the Complaint, alleging negligent hiring, training and supervision, states a cognizable claim under Virginia law. Under Virginia law, "[l]iability for negligent hiring is based upon an employer's failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Interim Pers. of Cent. Va. v. Messer*, 263 Va. 435, 440 (Va. 2002). Virginia law does not require that a complaint individually name the employees to state a claim for negligent hiring against an employer. *See Dobson v. Cedar Fair Southwest, Inc.*, 84 Va. Cir. 323, 324 (Va. Cir. Ct. 2012). The "propensity" prong can be satisfied where an employer hires someone who is unqualified for the position. *See Anderson v. Wiggins*, No. 97-Civ-0015, 1997 U.S. Dist. LEXIS 11898 (W.D. Va. July 15, 1997) (refusing to dismiss claim where plaintiff alleged defendant

[11] CACI's discussion of available remedies under federal law is unnecessary and inaccurate. CACI states that Mr. Al Shimari's sole remedy is an administrative claims process. Def. Br. at 27. The process referenced by CACI, however, is governed by the Foreign Claims Act. 10 U.S.C. § 2734. Claims under the Act are limited to claims against military personnel and the military's civilian employees. *Id*. at §2734(a). The Act does not provide relief for claims against contractors.

hired inexperienced person and failed to perform an adequate interview); *Kohr v. Hostetter*, No. CL 10-1009, 2012 Va. Cir. LEXIS 66 (Va. Cir. Ct. Aug. 9, 2012) (denying demurrer in part because plaintiff alleged the defendant put the employee into an "employment position where he operated a 15,000-pound truck, for which he had no formal training."); *cf. Southeast Apts. Mgmt., Inc. v. Jackman*, 257 Va. 256, 260 (Va. 1999) ("The cause of action is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the employer is negligent in the hiring of an ***improper person*** in work involving an unreasonable risk of harm to others." (emphasis added)).

The Complaint states a claim for negligent hiring under the cited cases. As alleged in the Complaint, there was a foreseeable risk of injury to others from employing unqualified people in a situation like that at Abu Ghraib. Complaint ¶¶ 144-145, 161. The Complaint also alleges that CACI acted negligently by failing to take care to hire people who had sufficient experience or to properly train[12] those it did hire. Complaint ¶¶ 146-147, 199-200. An employee's qualifications should reasonably have been known to CACI. As stated in the Complaint, Abu Ghraib was a situation where even "good people" could go bad. Complaint ¶ 19. The Complaint's allegations that CACI hired inexperienced personnel and then put them into a situation where that lack of training could foreseeably lead to injury to others, and did cause such injury, are sufficient under Virginia law.

Virginia law would also likely recognize Mr. Al Shimari's negligent supervision claim on the facts of this case. The Virginia Supreme Court in *Chesapeake & Potomac*

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[12] Mr. Al Shimari's claim for negligent training is related to his claim for negligent hiring and supervision, which is why all three were plead as a single count. Even if plead as a distinct claim, Virginia law may recognize such a claim. *See, e.g.*, *Hernandez v. Lowe's Home Ctrs., Inc.*, 83 Va. Cir. 210, 215 (Va. Cir. Ct. 2011) (dismissing claim for negligent training without prejudice to replead). The Virginia Supreme Court has yet to consider the issue.

Telephone Co. v. Dowdy considered whether an employee could bring a suit against his former employer for negligent supervision. 365 S.E.2d 751 (Va. 1988). In denying plaintiff's claim, the court held that "[i]n Virginia, there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here." *Id.* at 754 (emphasis added). While some courts have interpreted *Dowdy* to indicate a categorical bar on negligent supervision cases, Def. Br. at 24, *Dowdy*'s actual holding is more limited. Nor has the Virginia Supreme Court itself revisited *Dowdy*. As noted by CACI, there are Virginia courts that have allowed claims for negligent supervision to proceed. *See Hernandez v. Lowe's Home Ctrs., Inc.*, 83 Va. Cir. 210, 215 (Va. Cir. Ct. 2011).

Here, CACI had a separate duty under the Geneva Conventions to properly treat detainees entrusted to its care. As alleged in the Complaint, CACI failed to properly train, supervise, or discipline its employees to ensure compliance with the Geneva Conventions. Complaint ¶ 20. The Geneva Convention creates a duty of care towards detainees. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]. Common Article 3, so called because it is found in all four Geneva Conventions, prohibits cruel treatment, torture, and outrages upon personal dignity against persons no longer taking active part in hostilities. It states:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> * * * *

> (c) outrages upon personal dignity, in particular humiliating and degrading treatment. . . .

Id. (emphasis added). In *Hamdan v. Rumsfeld*, the Court recognized that Common Article 3 establishes the minimum standard of humane treatment for all detainees held in any armed conflict. 548 U.S. 557, 629-31 (2006).

Dowdy is therefore distinguishable. Here, CACI had an independent duty to ensure that Mr. Al Shimari was treated humanely and in accordance with Common Article 3.

[redacted]

These circumstances support imposing a duty on CACI to assure that detainees were properly treated by its employees through adequate supervision.

CONCLUSION

Ohio choice-of-law rules apply to this case. Order 17, upon which CACI relies, shows that Iraq has no interest in this action and United States law governs. Under Ohio's choice-of-law analysis, Virginia has the most significant relationship and Virginia law therefore applies and provides grounds for recovery for each of Mr. Al Shimari's common-law claims. For the foregoing reasons, the Court should deny CACI's motion to dismiss.

Date: May 6, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, I electronically filed the Plaintiffs' PLAINTIFF AL SHIMARI'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMMON-LAW CLAIMS through the CM/ECF system, which sends notification to counsel for Defendants. I further certify that on May 6, 2013, I caused the Plaintiffs' PLAINTIFF AL SHIMARI'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMMON-LAW CLAIMS to be sent to the following counsel for Defendant via email:

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