Franchisor Liability Issues

March 2013

United States

ALABAMA

Under Alabama law, a franchise agreement, without more, does not make the franchisee an agent of the franchisor. *Carlton v. Alabama Dairy Queen, Inc.*, 529 So. 2d 921, 924 (Ala. 1988). If a claim is made against a franchisor based on the doctrine of *respondeat superior*, the test for determining whether an agency relationship exists is "whether the alleged principal reserved a right of control over the manner of the alleged agent's performance." *Wood v. Shell Oil*, 495 So. 2d 1034, 1036 (Ala. 1986). However, "the retained right to supervise the alleged agent to determine if that person performs to the performance required by a contract with the asserted principal does not, itself, establish control." *Id*.

I. Direct Franchisor Liability

The Alabama Supreme court has never recognized the right to make a "direct-negligence claim" against a franchisor. However, in the case of *Kennedy v. The Western Sizzlin Corp.*, 857 So. 2d 71 (Ala. 2003), the Alabama Supreme Court affirmed summary judgment in favor of the franchisor, concluding that an agency relationship did not exist between the franchisor and the franchisee under a theory of apparent authority. However, the Court reversed summary judgment on the direct-negligence claims, because the franchisor had simply failed to carry its burden to prove that it was entitled to summary judgment as to that claim. The direct negligence claim asserted in the complaint was simply not addressed in the franchisor's motion for summary judgment. Thus, while summary judgment was affirmed in favor of the franchisor on the issue of apparent agency for acts of the franchisee, the summary judgment on the direct negligence claim was reversed, simply because the franchisor failed to rebut the allegations of direct negligence. This leaves open the possibility that if an injured party can show direct acts of negligence on the part of the franchisor, so that there is proof of a duty owed by the franchisor and a breach of that duty, then Alabama law would likely permit a direct negligence claim.

II. Vicarious Liability

A franchise agreement, without more, is insufficient to establish vicarious liability on the part of a franchisor. In the case of *Wood v. Shell Oil Co***.**, 495 So. 2d 1034 (Ala. 1986), the Alabama supreme Court rejected the argument that the franchisor's logo on the franchisee's premises and on the uniforms on its employees was sufficient evidence to infer an agency relationship based on "apparent authority" or "agency by estoppel." The proper test under Alabama law for determining whether an agency relationship exits is "whether the alleged principal reserved a right of control over the manner of the alleged agent's performance." *Wood v. Shell Oil*, 495 So. 2d 1034, 1036 (Ala. 1986). Thus, in order to establish an agency relationship sufficient to hold the franchisor liable, there must be evidence that the franchisor reserved the right to control the franchisee's performance. It is not enough that the franchisor maintains the right to inspect the premises and operations of the franchisee or the right to assure compliance with the franchise agreement. Absent the reserved right of control over the work of the franchisee, there is no vicarious liability on the part of the franchisor or liability under an apparent agency theory.

ARKANSAS

Currently, there is no specific theory of franchisor liability in **Arkansas**. *Jones v. Filler, Inc.,* 43 F. Supp. 2d 1052 (1999). When issues in franchisor liability transpire, Arkansas courts rely on general theories of agency and tort where "a principal or master may be vicariously liable for the tortious acts of its agent or servant within the scope of the agency or employment." *Id.*

I. Direct Franchisor Liability

A franchisor will not be held directly liable for injury unless the plaintiff can demonstrate that the franchisor owed a duty of care to the injured party. *Young v. Paxton,* 316 Ark. 655, 873 S.W.2d 546 (1994) (the law of **negligence** requires that the plaintiff show a **duty** of **care** was owed.); *See also Lacy v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 367, 235 S.W.3d 894, 896 (2006) (the issue of whether a duty exists is a question of law); *See also Francis v. Francis,* 343 Ark. 104, 31 S.W.3d 841 (2000); (summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law).

In general, a franchisor does not owe a duty of care to its franchisee, nor does it owe a duty to the guests or customers the franchisee. However, a duty may arise if the franchisor has substantial control over the daily operations of its franchises. *Jones*, 43 F. Supp. 2d. at 1057. Additionally, a duty can occur from the relationship between the claimant and the franchisor defendant. *Indus. Park Businessmen's Club, Inc. v. Buck*, 479 S.W.2d 842, 848 (Ark. 1972) ("We have said that no distinction exists between hotels and places of public amusement in the matter of precautions to be taken for persons invited to enjoy the facilities furnished. We there recognized that neither are insurers of the safety of their guests, but that both are charged with the duty of taking all precautions for the protection of their guests which reasonable prudence and ordinary care would suggest").

II. Vicarious Liability

Vicarious liability occurs when a supervisory party is liable for the actions of a subordinate or associate based on the relationship between the two parties. Arkansas courts most frequently adhere to the principles of **vicarious liability** in the context where an agency relationship has been determined. *Lovell v. Brock*, 952 S.W.2d 161, 165 (Ark. 1997). Decisions pertaining to franchisor liability have applied the vicarious liability doctrine under two different theories of agency law: actual authority and apparent authority.

A. Vicarious Liability: Actual Authority

Under the theory of actual authority, a franchisor may be held liable for the acts of his franchisee when the actual relationship between them is that of principal and agent, or master and servant. *Jones*, 43 F. Supp. 2d. at 1055. The two essential elements of an agency relationship are (1) that an agent has the authority to act for the principal, and (2) that the agent act on the principal's behalf and be subject to the principal's control. *McMahan v. Berry*, 319 Ark. 99, 90, 890 S.W.2d 242 (1994). (the burden of proving an agency relationship lies with the party asserting its existence); *See also Howard v. Dallas Morning News, Inc.* 324 Ark. 91, 103, 918, S.W.2d 178 (1996) (agency is a question of fact ordinarily determined by the trier of fact; however, if the facts are undisputed, the question of agency is one of law).

> To determine the existence of an agency relationship between a franchisor and a franchisee, Arkansas courts follow the approach taken by the Third Circuit Court of Appeals where "the mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such a relationship. Whether the control retained by the franchisor is also sufficient to establish a master-servant relationship depends in each case upon the nature and extent of such control as defined by the franchise agreement or by the practice of the parties." *Drexel v. Union Prescription Centers, Inc*., 582 F.2d 781 (3rd Cir. 1978).

Using this approach, the *Jones* court first looked to the language of the Franchise Agreement. 43 F. Supp. 2d at 1057. However, the court cautioned that although franchise agreements are important elements in the evaluation of agency, they are not determinative of the issue. *Id*. Additionally, the court considered the following 10 factors taken from §220 of the Restatement (Second) of Agency: "(1) the extent of control which, by agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business." *Id.* at 1056.

The court found that the franchise agreement specifically stated "This agreement does not in any way create the relationship of principal and agent between [franchisor] and franchisee, and in no circumstances shall franchisee be considered an agent of [the franchisor]." *Id.* at 1055. Furthermore, the court explained that even though the franchisor did exert slight control over the franchisee through requiring the franchisee to be open during certain hours, and to maintain the interior and exterior painting and décor in a manner determined by the franchisor, the franchisor did not exercise control over the operations of the franchisee to a *substantial degree*. *Id.* at 1057 (emphasis added). The court reasoned that the franchisee hires and fires its own employees, trains and supervises its employees, and performs its own services. *Id.* Therefore, through this analysis, the *Jones* court held that an agency relationship did not exist between the franchisor and franchisee, and thus, the franchisor was not liable for the negligent acts of its franchisee. *Id*.

B. Vicarious Liability: Apparent Authority

Even where no actual agency relationship is found, a franchisor may still be vicariously liable for acts of a franchisee under a theory of apparent authority or **apparent agency**. *Miles v. Century 21 Real Estate LLC*, 4:05-CV-1088 GTE, 2007 WL 92795 (E.D. Ark. Jan. 11, 2007). To recover under the theory of apparent agency in a franchisor/franchisee situation, plaintiff must demonstrate: (1) that the franchisor acted in a manner that would lead a reasonable person to conclude that the operator and/or employees of the franchise were employees or agents of the defendant; (2) that the plaintiff actually believed the operator and/or employees of the franchise were agents or servants of the franchisor; and (3) that the plaintiff thereby relied to his or her detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise. *Id.* at 9.

In *Miles*, the court listed examples of a franchisor's behavior that could lead a reasonable person to believe that a franchisee is an agent of the franchisor. These included all means and methods that would maintain an image of uniformity among all of the franchises, including national advertising, common signs and uniforms, common menus, common appearance, and common standards. *Id*.

ARIZONA

Generally, claims against a franchisor may take two forms: either a vicarious liability claim for the acts of a franchisee or a direct liability claim for acts of the franchisor under some tort theory (e.g., negligence, assault, strict products liability, negligent retention, etc.) More and more, direct liability claims for negligent retention or training are being brought against franchisors, whereas vicarious liability claims would have been primarily made in the past.

Unfortunately, Arizona law is particularly undeveloped when it comes to a franchisor's liability to consumers, under either a vicarious or direct liability claim. There is only one Arizona case directly addressing a franchisor liability, Papastathis v. Beall, 150 Ariz. 279, 723 P.2d 97 (App. 1986), and it is best read as a case imposing direct liability upon the franchisor, although at times the court discussed the issue as one of vicarious liability. Papastathis imposed liability on the franchisor under the theory that it voluntarily undertook a duty of reasonable care to franchisees' customers when the franchisor inspected, suggested, and endorsed a defective soft drink storage rack to its franchisees for use in their stores, thus allowing an action against the franchisor for its own negligence. Papasthasis, 150 Ariz. at 282, 723 P.2d at 99.

While other states have addressed franchisor vicarious liability in the context of apparent agency, principal-agent relationships, and the franchisor's right to control the franchisee, and the Lanham Act, Arizona courts have yet to consider any of these theories supporting vicarious liability. But, given Arizona's general recognition of vicarious liability and apparent agency principles, it seems likely that Arizona courts would recognize vicarious liability claims against a franchisor. See Goodman v. Physical Resource Engineering, Inc., 229 Ariz. 25,29, n 4, 270 P.3d 852, 856 (App. 2011) (recognizing apparent agency as a theory supporting vicarious liability); Quieroz v. Harvey, 220 Ariz. 273, 275, ¶ 8, 205 P.3d 1120, 1122 (2009) (recognizing that an agent's acts ordinarily bind his principal).

CALIFORNIA

A franchisor, like any other entity, may be held liable for its own direct negligence. (For general principles regarding the formation of franchise agreements see California Corporations Code 31000, et seq.) In addition, the franchisor may be vicariously liable for the actions of the franchisee if the plaintiff can establish an agency relationship. California Civil Code section 2298 provides: "An agency is either actual or ostensible."

I. Vicarious Liability

A. Actual Agency

Whether a franchisor is vicariously liable for the actions of the franchisee depends on the nature of the franchise relationship. "A franchisee may be deemed to be the agent of the franchisor." (Kuchta v. Allied Builders Corp., 21 Cal.App.3d 541, 547 (1971).) The general rule is where a franchise agreement gives the franchisor the right of complete or substantial control over the franchisee, an agency relationship exists. See, Cislaw v. Southland Corp., 4 Cal.App.4th 1284, 1288 (1992). "It is the right to control the means and manner in which the result is achieved that is significant in determining whether a principal-agency relationship exists." (Ibid.) Consequently, a franchisee may be found to be an agent of the franchisor even where the franchise agreement states it is an independent contractor. (Kuchta, at p. 548.) If the franchisor has substantial control over the local operations of the franchisee, it may potentially face liability for the actions of the franchisee's employees. See also Nichols v. Arthur Murray, Inc., 248 Cal.App.2d 610 (1967).

However, and most significantly, the franchisor's interest in the reputation of its entire system, allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent. (Cislaw, at p. 1292.) Consequently, the franchisor may control its trademarks, products and the quality of its services. But, the franchisor may be subject to vicarious liability where it assumes substantial control over the franchisee's local operation, its management-employee relations, or employee discipline. (Cislaw, at p. 1296; Kuchta, at p. 547; and Nichols, at p. 615.)

The application of the above factors was discussed in Cislaw v. Southland Corporation, 4 Cal.App.4th 1284 (1992) (a wrongful death case against a 7-Eleven franchisee and franchisor) where the court granted summary judgment when plaintiffs were unable to establish sufficient franchisor control. The requirements of the franchise agreement in Cislaw focused primarily on the right to use the 7-Eleven system, trade name and service mark and required the franchisee to comply with certain standards. (at 1294). Further, in Cislaw, the franchise agreement specified the franchisee was an independent contractor and the franchisee submitted a declaration that established the franchisor had no control over the day-to-day operations of the store and the franchisee had the right and actually exercised full and complete control over all employment, inventory and marketing decisions. (At 1295).

It is significant that California's Supreme Court recently accepted for review an Appellate Court decision out of the second district, Patterson v. Domino's Pizza, LLC, 207 Cal.App.4th 385 (2012). This case, which cannot be cited due to the grant of a review, involves the degree of control that Domino's Pizza exercised over the operations of its franchisee, specifically the firing and disciplining of employees. Although the franchisor obtained summary judgment at the trial court level, the Court of Appeal reversed the judgment concluding that there was sufficient dispute as to the facts regarding the extent of control asserted over the operations of the franchisee. We look forward to review and clarification of these significant legal issues by the Supreme Court sometime in 2013.

I. The Role of the Franchise Agreement in Determining the Extent of Control

Under California Law, irrespective of whether the Franchise agreement states that the franchisee is an independent contractor, the franchisor's actions speak louder than the words in the franchise agreement.

Although franchisors will argue that the language of the franchise agreement should be dispositive as to the issue of control, California courts have concluded that the provisions of the agreement are relevant, but not the exclusive evidence of the relationship. Consequently, "the provisions of franchise agreements are not necessarily controlling . . . ." (Wickham v. Southland Corp., 168 Cal.App.3d 49,59 (1995).) Instead, the court will look to the totality of the circumstances to determine who actually exercises the ultimate control. (Kuchta, at p. 547.) The question of whether the franchisee is an independent contractor or an agent is ordinarily one of fact.

II. Ostensible Agency

The decisions above are also in line with the general theory of ostensible agency which a plaintiff may rely upon to establish liability against the franchisor. Ostensible authority arises as a result of conduct of the principal which causes the third party reasonably to believe that the agent possesses the authority to act on the principal's behalf. Ostensible authority may be established by proof that the principal approved prior similar acts of the agent. "Where the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability." (Chicago Title Ins. Co. v. ANZ Ins. Services, Inc., 188 Cal.App.4th 401, 426-427 (2010).)

The "liability of the principal for the acts of an ostensible agent rests on the doctrine of estoppel, the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury. (Preis v. American Indemnity Co., 220 Cal. App.3d 752, 761 (1990)). Whether an ostensible agency exists is a question of fact for the jury and may be implied from the circumstances. (Yanchor v. Kagan, 22 Cal. App.3d 544, 550 (1971)). See also, California Civil Jury Instruction 3709.

"Ostensible authority of an agent cannot be based on the agent's conduct alone, there must be evidence of conduct by the principal which causes a third party reasonably to believe the agent has authority. (Lindsay-Field v. Friendly, 36 Cal.App.4th 1728, 1734 (1995)). An ostensible agency may be "implied from the circumstances and conduct of the parties." (Michelson v. Hamada, 29 Cal. App. 4th 1566, 1579 (1994)).

To establish ostensible agency, the plaintiff must prove all of the following:

(1) That the franchisor intentionally or carelessly created the impression that the franchisee was the franchisor's employee/agent;

(2) That Plaintiff reasonably believed that the franchisee was the franchisor's employee/agent; and

(3) That the plaintiff was harmed because he/she reasonably relied on his/her belief.

COLORADO

There are few cases analyzing franchisor liability in Colorado, but the Colorado Supreme Court has indicated that whether a franchisor will be liable for the acts of its franchisee will be determined by analyzing whether there is a principal-agent relationship. *Butler v. Colorado Int'l Pancakes, Inc.*, 510 P.2d 443, 445 (Colo. Ct. App. 1973). In determining whether this relationship exists, courts "will look at the conduct and factual relationship rather than the intent or words of [any] agreement." *Id.* An agency relationship will exist if the supposed agent is acting on behalf of the principal and subject to the principal's control. *Villalpando Denver Health & Hosp. Auth.*, 181 P.3d 357, 362 (Colo. App. 2007).

I. Direct Liability

A franchisor may be directly liable for the actions of a franchisee under several different scenarios. *Corrales v. Days Inn Worldwide, Inc.*, No. 04-CV-149, 2005 WL 4655135 (Colo. Dist. Ct. Dec. 5, 2005) (unpublished) (indicating that direct liability could be imposed against franchisors, although finding no directly liability in the case at hand). First, if the franchisor is negligent or reckless in the supervision of the franchisee's activity. *Destefano v. Grabrian*, 763 P.3d 275, 287-88 (Colo. 1988). This would require that the franchisor knew or should have known that the franchisee's "conduct would subject third parties to an unreasonable risk of harm." *See id.* at 288. Second, if a franchisor granted a franchise to "improper persons or instrumentalities in work involving risk of harm to others." *See Connes v. Molalla Transport Sys., Inc.*¸831 P.2d 1316, 1320 (Colo. 1992). This would require antecedent circumstances that give the franchisor reason to believe that "some attribute of character or prior conduct" of a franchisee "would constitute an undue risk of harm to members of the public." *See id.* at 1323.

Moreover, the Colorado Supreme Court has relied on the Restatement (Second) of Agency § 213 (1958), which indicates that a franchisor may also incur direct liability if the franchisor is negligent or reckless "in giving improper or ambiguous orders [or] in failing to make proper regulations," or "in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." *Id.*; *see Destefano*, 763 P.3d at 287-88.

II. Vicarious Liability

A franchisor may be vicariously liable for the acts of its franchisee if the franchisee's acts are within the franchisee's actual authority or where the franchisee acts with apparent authority. *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 473 (1995). A franchisee's scope of authority will be established "by written or spoken words or conduct of the [franchisor] which, reasonably interpreted causes the [franchisee] to believe that the [franchisor] wants him to act on the franchisor's account." *Butler*, 510 P.2d at 445. In *Butler* the court determined a franchisee was acting within the scope of its authority when it followed the specific direction of the franchisor.

Apparent authority of a franchisee may be "established by evidence of written or spoken word or other conduct of the [franchisor] which, reasonably interpreted, causes a person to believe the [franchisor] consents to have the act done on his behalf by" the franchisee. *See Rush Creek Solutions, Inc. v. Ute Mountain Tribe*, 107 P.3d 402, 407 (Colo. App. 2004).

CONNECTICUT

Franchisor liability can arise under several different theories in Connecticut. To establish franchisor liability the plaintiff must demonstrate that the franchisor's direct negligence led to the injury or that the franchisor is vicariously liable for the alleged negligence of the franchisee.

I. Direct Franchisor liability

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Citations omitted; internal quotation marks omitted.) *Utica Mut. Ins. Co. v. Precision Mech. Servs., Inc.,* 122 Conn. App. 448, 454, 998 A.2d 1228, *cert. denied*, 298 Conn. 926, 5 A.3d 487 (2010). To establish that the franchisor is directly liable for the injury, a plaintiff first must demonstrate that the franchisor owed the injured party a duty of care. The existence of a duty of care is a prerequisite to a finding of negligence. *Gomes v. Commercial Union Ins.*, 258 Conn. 603, 614, 783 A.2d 462 (2001). "A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." (Citations omitted; internal quotation marks omitted.) *Sevigny v. Dibble Hollow Condo. Ass'n*, 76 Conn. App. 306, 318, 819 A.2d 844 (2003).

Connecticut's Supreme Court has held that "the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Citations omitted; internal quotation marks omitted.) *Lodge v. Arett Sales Corp*., 246 Conn. 563, 572, 717 A.2d 215 (1998).

Generally, a franchisor does not have a duty to either its franchisee or its customer, but a duty could arise if the franchisor has sufficient control over the daily operations of its franchisee. The court will examine the relationship of the parties as well as the degree of control retained by the franchisor. *Oquendo v. G. V. L. Inc.*, Superior Court of Connecticut, Judicial District of New Haven, Docket No. CV 075011963S, 2008 Conn. Super. LEXIS 518 at *10-11 (March 5, 2008)(*Bellis, J.*).

II. Vicarious liability

The doctrine of vicarious liability imposes on a principal liability for the wrongful conduct of its agent. Courts have applied the vicarious liability doctrine under two different theories of agency law: actual authority and apparent authority.

A. Vicarious liability: actual authority

Under the theory of actual authority, to hold a franchisor responsible for the acts of a franchisee under vicarious liability, there must be a principal-agent relationship between franchisor and franchisee at the time of the injury. The burden of proving agency is on the party asserting its existence. *Lee v. Duncan*, 88 Conn. App. 319, 324, 870 A.2d 1 (2005).

"Under § 1 of 1 Restatement (Second) of Agency (1958), [a]gency is defined as the fiduciary relationship which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . .Thus, the three elements required to show the existence of an agency relationship include: (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." (Citations omitted; internal quotation marks omitted.) *Hollister v. Thomas*, 110 Conn. App. 692, 706, 955 A.2d 1212 (2008). The essential element is control. *McLaughlin v. Chicken Delight, Inc*., 164 Conn. 317, 322, 321 A.2d 456 (1973). The court has defined control as "the power or authority to manage, superintend, direct or oversee." (Citations omitted; internal quotation marks omitted.) *Doty v. Shawmut Bank*, 58 Conn. App. 427, 432, 755 A.2d 219 (2000).

Some of the factors listed by the Second Restatement of Agency include "whether the alleged principal has the right to direct and control the work of the agent; whether the agent is engaged in a distinct occupation; whether the principal or the agent supplies the instrumentalities, tools and the place of work; and the method of paying agent . . . . In addition an essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal . . . . Finally the labels used by the parties in referring their relationship are not determinative; rather, a court must look to the operating terms of their agreement or understanding.")(Citations omitted; internal quotation marks omitted.) *Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 543-44, 893 A.2d 389 (2006).

The Connecticut Supreme Court in analyzing whether a franchise existed between the parties under an integral part of Connecticut Franchise Act[1] noted that the relationship between the parties "is not governed solely by the parties' main written agreement. Rather its legal significance is fixed by reality, not by what defendants or plaintiffs call it, though descriptive language may be relevant." (Citations omitted; internal quotation marks omitted.) *Hartford Elec. Supply Co. v. Allen-Bradley Co*., 250 Conn. 334, 348, 736 A.2d 824 (1999). The court further indicated that "[t]here is no precise formula as to how many or which factors create the level of control indicative of a franchise, pursuant to the franchise act." (Citations omitted; internal quotation marks omitted.) *Id*. at 350. Some factors to consider, however, are "whether the franchisor had control over: (1) hours and days of operation; (2) advertising; (3) lighting; (4) employee uniforms; (5) prices; (6) trading stamps; (7) hiring; (8) sales quotas; and (9) management training." *Id*. The court also looked at whether "the franchisor provided the franchisee with financial support, audited its books, or inspected its premises." *Id*. While *Hartford Elec. Supply Co*. did not pertain to a negligence claim, it set out factors that the courts may look to in determining the element of "control."

"Actual authority exists when [an agent's] action [is] expressly authorized . . . or . . . although not authorized, [is] subsequently ratified by the [principal]" (Citations omitted: internal quotation marks omitted.) *Maharishi Sch. of Vedic Scis., Inc. (Connecticut) v. Connecticut Constitution Assocs. Ltd. P'ship*, 260 Conn. 598, 606-607, 799 A.2d 1027 (2002).

The Appellate Court of Connecticut issued an important decision regarding franchisor liability on July 10, 2012. In *L and V Contrs., LLC v. Heritage Warranty Ins. Risk Retention Grp., Inc*., 136 Conn. App. 662, 47 A.3d 887 (2012), the Appellate Court reversed a judgment against AAMCO Transmission, a franchisor of automotive repair centers. The lawsuit involved a dispute between Drive Train, which operated an AAMCO repair center, and Drive Train's customer. The customer alleged that an employee of Drive Train, which had been asked to repair the customer's vehicle, had driven the vehicle for personal use and refused to return it to the customer. AAMCO was sued (as well as Drive Train and the company that provided the extended warranty on the vehicle) by the customer for statutory theft, conversion, misrepresentation and violation of the Connecticut Unfair Trade Practices Act.

The trial court concluded that AAMCO was vicariously liable for Drive Train's actions on the basis that the torts occurred within the scope of the AAMCO's employment of Drive Train and were done in furtherance of AAMCO's business. The trial court, after a one day trial, found that Drive Train had actual authority to act on AAMCO's behalf as Drive Train's agreement with AAMCO required it to pay 7 % of revenue for advertising and other expenses and it was authorized to use

[1] Connecticut General Statutes §§ 42-133e - h. The Connecticut Franchise Act was enacted to prevent a franchisor from taking unfair advantage of the relative economic weakness of a franchisee.

AAMCO's name. *Id*. at 666. In addition, many of the trial exhibits of Drive Train were on AAMCO's letterhead, which demonstrated that Drive Train was permitted to the use AAMCO's name. *Id*.

AAMCO appealed on the basis that the court erred in finding that: 1) that Drive Train was AAMCO's agent; and 2) Drive Train had apparent authority to bind AAMCO for its actions. The Appellate Court reversed the trial court's decision, and held that the plaintiff did not sustain its burden of proving an agency relationship. The plaintiff argued that AAMCO did not produce either the agreement or produce a company representative to testify about such agreement. *Id*. at 668. The Appellate Court held that there was no evidence that AAMCO "controlled" any part of Drive Train's business. The fact that Drive Train could use the AAMCO name in exchange for 7% of its sales was insufficient to show "control" over Drive Train's operations. *Id.* at 667. Since "there was no evidence presented by the plaintiff to provide a sufficient basis from which an inference of control could be derived, the [trial] court's finding of agency and the nature and scope of said agency was clearly erroneous." *Id*. at 669.

The Appellate Court further noted that the plaintiff failed to meet its burden to prove an agency relationship between AAMCO and Drive Train, but even if it had, there was "no evidence adduced at trial that the tortious conduct alleged in this matter fell within the purported relationship [of repairing vehicles]." *Id*. at 671, n.8.

The *L and V* court cited *McLaughlin v. Chicken Delights, Inc*, 164 Conn. 317, 324, 321 A.2d 456 (1973), which held that a franchise agreement alone is insufficient to sustain the plaintiff's burden of establishing that a driver of a vehicle owned by the franchisee was an agent of franchisor.

The *McLaughlin* case was an action to recover damages for the death of the plaintiff's decedent alleged to have been struck and killed by the driver of a motor vehicle delivering food. The defendant, Chicken Delight, was the franchisor and Food Caterers, Inc. was the franchisee. The franchisee hired the driver and owned the car that struck the plaintiff's decedent. The plaintiff claimed that the trial court erred in finding that the operator of the car was "not the agent" of Chicken Delight acting within the scope of his employment at the time and place of the accident. *McLaughlin*, 164 Conn. at 319-20.

The *McLaughlin* trial court considered all the evidence bearing on the finding of an agency relationship, including the franchise agreement, and found in favor of the franchisor on the issue. The Connecticut Supreme Court agreed and noted in the *McLaughlin* decision that "an essential factor in an agency relationship is the right of the principal to direct and control the performance of the work by the agent." (Citations omitted). *Id*. at 322. The Connecticut Supreme Court held that the franchise agreement was relevant to whether an agency relationship exists, but the plaintiff failed to point to any portion of the agreement or any other evidence establishing that the driver was in fact an agent of the franchisor. *Id.*

In *Snowberger v. Henriques*, Superior Court of Connecticut, Judicial District of Waterbury, Complex Litigation Docket at Waterbury, Docket No. X 06 CV 010167144S, 2002 Conn. Super. LEXIS 3109 (Sept. 18, 2002)(*McWeeny, J.),* the plaintiffs alleged that the defendant franchisor was liable for the negligence and nuisance of a retail petroleum station. The suit resulted from an explosion which caused death, personal injuries and property damage. The plaintiffs alleged that gas products migrated from the franchisee's gas station, causing the explosion. The plaintiffs sued the franchisors as well as the franchisees of several different service stations. Exxon Mobil Corporation ("EMC"), a franchisor, moved for summary judgment. The plaintiffs did not dispute that EMC had no ownership interest in either the station or the storage tanks. It was also undisputed that the franchisee made all hiring, firing, and employment related decisions. The plaintiffs asserted that the franchisor, EMC, was vicariously liable for the franchisee. The court, considering the factors listed in the Second Restatement of Agency granted the franchisor's motion for summary judgment. Recognizing that the *McLaughlin* case went to trial, the *Snowberger* court granted the motion for summary judgment in favor of the franchisor after a careful review of the franchise agreement and thorough analysis of the alleged agency relationship, including the ability of the franchisor to control the work of the franchisee.

In *Wunder v. Mobil Oil Corp*., Superior Court of Connecticut, Judicial District of New London, Complex Litigation Docket at Norwich, Docket No. X 04 CV000120525S, 2002 Conn. Super. LEXIS 3456 (Oct. 24, 2002)(*McLachlan, J.*), the plaintiff filed a wrongful death action against Mobil Oil for damages sustained as a result of Mobil's alleged failure to provide a safe working environment for the plaintiff who was killed during a robbery while working as a cashier at a gas station's snack shop. Mobil was the franchisor and Ronald Miceli was the franchisee. The court denied the motion for summary judgment finding a triable issue of fact as to whether Mobil exercised control over the security at the snack shop. This is significant in that courts may be hesitant to dispose of these types of cases at the summary judgment stage. "Even where a trial court finds that the evidence strongly favors one party, the court may not arrogate to itself the role of the trier of fact and, thus, decide issues of material fact as a matter of law. A party has the same right to submit a weak case [to the jury] as he has to submit a strong one." (Internal quotation marks omitted.) *Wunder*, 2002 Conn. Super. LEXIS 3456 at * 3-4.; citing *Mafucci v. Royal Park Ltd., P'ship*, 42 Conn. App. 563, 572, 680 A.2d 333 (1996).

B. Vicarious Liability: Apparent Authority

A party can be held liable to a third party if its actions caused a third party to believe that there was a principal and agent relationship between it and another. "Apparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses." (Citations omitted; internal quotations omitted.) *Beckenstein v. Potter & Carrier, Inc.*, 191 Conn. 120, 140, 464 A.2d 6 (1983)(although no finding of a principal/agent relationship, the court must consider apparent authority).

Apparent authority must satisfy two factors. "First, it must appear from the acts of the principal that the principal held out the agent as possessing sufficient authority to embrace the act in question, or knowingly permitted him to act as having such authority. . . . Second, the party seeking to bind the principal must have acted in good faith reliance on that appearance of such authority. (Citations omitted; internal quotation marks omitted.) *111 Whitney Ave. Inc. v. Comm'r of Mental Retardation*, 70 Conn. App. 692, 703-704, 802 A.2d 117 (2002).

The recent decision issued by the Appellate Court of Connecticut in *L and V Contrs., LLC* addressed the issue of apparent authority. The Connecticut Appellate Court held that the trial court erred in holding that Drive Train had apparent authority to act for AAMCO. *L and V Contrs., LLC*, 136 Conn. App. at 670. The Appellate Court held that Connecticut has yet to apply the doctrine of apparent authority to allow for a principal to be held liable to a third person who has been harmed by the tortious act of another held out as the principal's agent. *See also Mullen v. Horton*, 46 Conn. App. 759, 771-72, 700 A.2d 1377 (1997); *Davies v. Gen. Tours, Inc*., 63 Conn. App. 17, 30-31, 774 A.2d 1063 (2001) *cert. granted on other grounds*, 256 Conn. 926, 776 A.2d 1143 (2001), *appeal withdrawn* Oct. 18, 2001, (citing *Mullen* for the general proposition that apparent authority is not an available ground to premise liability in Connecticut).

DELAWARE

Under Delaware law, the liability of franchisors for the acts of franchisees is analyzed pursuant to an agency framework. *Cumpston v. McShane*, 2009 WL 1566484 at *2 (Del. Super. June 4, 2009), *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160, 162 (Del. Super. 1975) *citing* 62 Am.Jur.2d 772. An agency relationship exists if the franchisor has actual or apparent authority over the franchisee. *Cumpston*, 2009 WL 1566484 at *2.

<u>Actual Authority</u>

"Actual authority is that authority which a principal expressly or implicitly grants to an agent." *Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. Supr. 1978). A "franchisor may be held to have an actual agency relationship with its franchisee when the former controls, or has the right to control the latter's business." *Id*. An agency relationship exists when the control of the franchisor over the franchisee is excessive. *Singleton*, 332 A.2d at 162. Courts have looked to the franchise agreement to determine the scope of the relationship. For example, in *Cumpston* and *Singleton*, the Court denied a motion to dismiss holding, in each case, that the agreement created a material issue of fact which required that the question of actual agency be resolved at trial. In fact, *Singleton* looked beyond the labels set forth in the franchise agreement and instead evaluated the scope of control given to the franchisor. Thus, despite the fact that the franchise agreement stated that the franchisor was not responsible for the business operations of the franchisee, the Court denied the motion for summary judgment.

On the other hand, in *Hoover v. Sun Oil Co.*, 212 A.2d 214, 216 (Del. Super. 1965), the Court granted a motion for summary judgment to the franchisor because neither the agreements in place nor the conduct of the individuals supported an agency relationship. This Court found that the franchisor had no control over the day-to-day operations of the franchisee. Despite weekly visits of the franchisor and a competitive allowance system, the franchisee was under no obligation to follow the franchisor's advice. Furthermore, in this case, the franchisee set his own hours of operation, pay scale and the working conditions of his employees.

Apparent Authority

Apparent authority depends on manifestations by one party which lead third parties to believe another is his agent. *Singleton*, 332 A.2d at 163. "[O]ne who represents through apparent authority that another is his servant and causes a third person to justifiably and reasonably rely upon the care and skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant as if her were such." *Id*. *citing* Re. of Agency 2d. Sect. 267. In *Billops*, the plaintiff relied on the Hilton brand as "`quality enterprise.`" *Billops*, 391 A.2d at 199. "Questions of apparent authority are questions of fact and are, therefore, for the jury to determine." *Id*. Thus, in *Billops*, the Supreme Court reversed and remanded the Superior Court's grant of summary judgment.

FLORIDA

A franchisor may be liable for the acts of its franchisee under theories of negligence, strict liability and vicarious liability. *See Estate of Miller v. Thrifty Rent-A-Car System, Inc.*, 637 F. Supp. 2d 1029, 1035–36 (M.D. Fla. 2009).

I. Direct Franchisor liability

Florida state courts have not specifically addressed direct liability in the franchisor-franchisee context. Federal case law, however, has established that direct liability on the franchisor may be imposed through traditional concepts of negligence and strict liability. *See Estate of Miller*, 637 F. Supp. 2d at 1036. Under a negligence theory, the plaintiff must prove that the franchisor owed a duty to the plaintiff, that the franchisor breached that duty, and that some or all of the franchisor's actions directly and proximately caused the harm. *See id.* Alternatively, a plaintiff may argue that the Franchisor created and breached an express or implied warranty and recover under a strict liability theory. *See id.*

II. Vicarious Franchisor Liability

In order for a franchisor to be vicariously liable for the acts of its franchisee, an agency relationship must be proven in which the franchisor is the "principal" and the franchisee its "agent." *See* 27 Fla. Jur 2d, Franchise Contracts sec. 16 (2012). The agency relationship is created when the franchisor "by contract or action or representation . . . has directly or apparently participated in some substantial way in managing the acts of the franchisee, beyond the mere fact of providing contractual franchise support activities." *Font v. Stanley Steemer Intern., Inc.*, 849 So. 2d 1214, 1217–18 (Fla. 5th DCA 2003). The vicarious liability doctrine has been applied to franchisers under two different theories of agency law: actual authority and apparent authority. *See id.*

A. Vicarious Liability: Actual Authority

The elements needed to establish actual authority are: (1) acknowledgment by the principal that the agent will act for him or her; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *Font*, 849 So. 2d at 1216. Because the first two factors are often blurred by the unique nature of the franchisor-franchisee relationship, Florida case law suggests that the third factor is the most determinative — the extent to which the franchisor may exercise control over the franchisee in its daily operations. *Compare Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026, 1029 (Fla. 4th DCA 1993) (noting that the manual provided by Domino's to its franchisees dictated "every conceivable facet of the business" and thus the Domino's franchise was liable), *with Madison v. Hollywood Subs, Inc.*, 997 So. 2d 1270 (Fla. 4th DCA 2009) (holding that the franchisor was not liable because its only control over the franchisee was to "insure uniformity in the standardization of products and services offered by the restaurant," while the day to day operations were under the sole control of the franchisee).

The courts often begin the analysis of control by looking at the franchise agreement to determine whether the franchisee is labeled an "independent contractor." *See, e.g., Madison*, 997 So. 2d at 1270. Yet even if the franchisee is an "independent contractor" under the agreement, the franchisor may still be liable if its right to exercise control over the franchisee is significant. *See Parker*, 629 So. 2d at 1027 (noting that it is the *right* to control, not the actual control, by the franchisor that makes the franchisee its agent).

Thus, actual authority must be determined on a case to case basis. *Font*, 849 So. 2d at 1219 (stating that there is no "bright line" rule for determining when the franchise relationship creates liability between the franchisor and franchisee). The more control that may be exerted by the franchisor over the daily activities of the franchisee, the more likely a court will find vicarious liability due to actual authority.

B. Vicarious Liability: Apparent Authority

The elements needed to establish apparent authority are: (1) a representation by the principal; (2) reliance on that representation by a third person; and (3) a change of position by the third person in reliance upon such representation to his or her detriment. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995). Apparent authority is generally a mixed question of law and fact which should be submitted for the jury's determination under the appropriate instructions. *Taco Bell of California v. Zappone*, 324 So. 2d 121, 123 (Fla. 2d DCA 1975).

It is important to note that apparent authority rises from appearances created by the *principal*, not the agent. *Taco Bell*, 324 So. 2d at 124. Ultimately, the facts must support the finding that the franchisor communicated to the plaintiff the "idea that the franchisor was exercising substantial control" over the franchisee. *Mobil Oil Corp.*, 648 So. 2d at 121. The Florida Supreme Court has emphasized, however, that simply displaying the franchisor's name or logo is not sufficient to create vicarious liability, as it is common knowledge that franchisees often operate independently. *Id.* at 120.

For example, in *Muminov v. Muniraj Enterprises, Inc.*, the plaintiff argued that Muniraj (d/b/a Hawthorn Suites) was an agent of Wyndham Hotels and presented evidence which included:

> (1) the official Hotel website which lists the Hotel as being "part of Wyndham's Hotel Group"; (2) a sign leading into the Hotel which says "Hawthorn Suites by Wyndham"; (3) Wyndham's website which advertises the Hotel as part of Wyndham's hotel group and allows customers to make reservations for the Hotel online; and (4) a brochure in the Hotel lobby which is labeled "Hawthorn Suites by Wyndham."

No. 6:11–cv–969–Orl–31GJK, 2012 WL 760638 at *2 (M.D. Fla. Mar. 8, 2012). The court held that the evidence was insufficient to hold Wyndham responsible under the theory of apparent authority, as there was no apparent control or misrepresentation made by Wyndham, and the evidence pointed to mere advertisements using the franchisor's name. *Id.*

Similarly in *Mobil Oil Corp. v. Bransford*, the plaintiff was assaulted in Mobil's Mini-Mart and alleged Mobil was vicariously liable because:

> Mobil owned the property . . . Mobil products were sold in the station . . . Mobil trademarks and logos were used throughout the premises, and . . . the franchise agreement with Mobil required the use of Mobil symbols and the selling of Mobil products.

648 So. 2d at 120. The Court held that ownership by Mobil was irrelevant as they had leased the premises, and that simply displaying Mobil signs throughout the store was insufficient for Mobil to be vicariously liable. *Id.* at 121–22. Thus, the plaintiff must prove facts beyond the franchisor's displays of logos and propaganda for a court to hold that apparent authority was created by the franchisor.

GEORGIA

"A franchisor does not become liable for the acts of its franchisee merely because of the franchisor/franchisee relationship. Rather, to establish a claim against the franchisor for the acts of the franchisee and its employees, [a plaintiff] must present evidence establishing a claim through some other theory of vicarious or direct liability." Summit Automotive Group v. Clark, 298 Ga. App. 875, 681 S.E.2d 681 (2009).

Direct Liability
A survey of Georgia cases on franchisor liability indicates plaintiffs generally plead direct liability claims against franchisors under theories of negligence, conspiracy, and fraud. See e.g., Summit Automotive v. Clark, 298 Ga. App. at 881 (alleging civil conspiracy); DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008) (alleging negligence, fraud and negligent misrepresentations, and tortuous interference with contract). The existence of a franchise relationship does not add any different or unique elements for such tort claims.

Vicarious Liability
The Georgia courts generally recognize three scenarios under which a franchisor can be held vicariously liable for the actions or inactions of a franchisee: (1) the franchisor obligates itself to pay the debts of a franchisee (2) the franchisee is merely the alter ego of the franchisor; and (3) the franchisor ratifies the actions of the franchisee. See Summit Automotive v. Clark, 298 Ga. App. at 877 ("It is well settled that to impose liability on a franchisor for the acts of a franchisee, a plaintiff must show that the franchisor has obligated itself to pay the franchisee's debts or that the franchisee is not a franchisee in fact but a mere agent or alter ego of the franchisor. . . . For ratification to occur, the principal must accept and retain the benefits of the unauthorized act."), citing DaimlerChrysler Motors v. Clemente, 294 Ga. App. 38. The DaimlerChrysler Motors v. Clemente opinion also indicates possible vicarious liability under a joint venture theory, but this avenue is not addressed in the remaining decisions analyzing the issue. Id. at 46-47.

Obligation for Debt
There is little discussion in the relevant case law regarding the showing a plaintiff must make regarding a franchisor's alleged obligation to pay the debts of a franchisee, but it appears from the decisions such obligation need not be express and can be evinced by conduct. See e.g., DaimlerChrysler Motors v. Clemente, 294 Ga. App. at 46 ("Alternatively, a franchisor can be held liable for the acts and omissions of its franchisee if the franchisor has by some act or conduct obligated itself to pay the debts of the franchisee."); Schlotzsky's, Inc. v. Hyde, 245 Ga. App. 888, 888-89 (538 SE2d 561) (2000) (same).

Alter Ego
Regarding an alter ego theory, it is not enough for a plaintiff to show the franchisor has significant interest or involvement in insuring the franchisor conforms to the franchise agreement and protecting the uniformity and reputation of the franchise brand. Rather, a plaintiff must demonstrate the franchisor exercises some control over the day-to-day operations of the franchisee:

> The test to determine whether an agency relationship exists is whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. In the context of a franchise agreement, we are mindful that a franchisor is faced with the problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees.

Ellison v. Burger King Corp., 294 Ga. App. 814, 821, 670 S.E.2d 469 (2008) ("Here, the franchise agreement specified that [franchisee] SRH was an independent contractor and [franchisor] BKC was not an employer of SRH or its employees. SRH had the sole authority over employee hiring, working hours, benefits, wages, and employment policies."); Pizza K, Inc. v. Santagata, 294 Ga. App. 36, 547 S.E.2d 405 (2001)) ("[W]e cannot conclude that [franchisor] Pizza K's authority to require the use of certain bookkeeping forms, to conduct monthly inspections, and to require termination of employees causing the facility to fail the inspections amounted to day-to-day supervisory control over [franchisee] Brookhaven, for it seems clear that this authority simply served as a means of achieving a desired level of uniformity and quality within the system of Pizza K franchises.").

The broad authority for a franchisor to enforce the franchise agreement and insure uniformity is also discussed at length in Summit Automotive v. Clark, 298 Ga. App. at 883:

> The franchisor is permitted to exercise sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time forgoing such a degree of control that would make it vicariously liable for the acts of the franchisee. And, although the franchise agreement set forth general standards to maintain the franchise and provided for evaluations to ensure compliance, reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and to terminate the franchise for noncompliance is not the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law.

Id.; see also DaimlerChrysler Motors v. Clemente, 294 Ga. App. at 45 ("Given this special relationship, we have held that a franchisor may protect its franchise and its trade name by setting standards governing its franchisee's operations, and these standards may be quite detailed, specific, and strict."), citing Schlotzsky's v. Hyde, 245 Ga. App. at 890; Pizza K, Inc. v. Santagata, 249 Ga. App. at 38-39 (franchise agreement authorizing periodic inspections of the franchise and giving the franchisor the right to terminate for noncompliance is not enough to prove an agency relationship: "The agreement at issue here simply served as a means of ensuring conformance with a certain level of quality and protecting Pizza K's professional reputation, and the trial court erred in denying Pizza K's motion for summary judgment.").

Ratification

The law on ratification is straight-forward: a plaintiff must establish that the franchisor accepted and retained the benefits of an improper act by the franchisee to hold the franchisor vicariously liable under such theory. See DaimlerChrysler Motors v. Clemente, 294 Ga. App. at 46 ("There is no evidence that [franchisor] Chrysler Motors ever accepted and retained the benefits of [franchisee] Metro's alleged wrongdoing. Chrysler Motors was paid in full for vehicles when it initially shipped the vehicles to Metro and, therefore, did not receive any benefit at the time the vehicles were later sold at retail."); see also Reynolds v. L&L Mgmt., 228 Ga. App. 611, 614, 492 SE2d 347 (1997) (stating general rule regarding acceptance of benefit).

Joint Venture / Common Enterprise

As indicated above, there is some authority to support possible vicarious liability against a franchisor under a joint venture theory. In DaimlerChrysler Motors v. Clemente, 294 Ga. App. 38, the trial court granted summary judgment in the franchisor's favor for plaintiff's vicarious liability theories involving agency and ratification, but permitted plaintiff's claims to proceed on a joint venture theory. Id. at 46-47. The appellate court reversed, ruling that because plaintiff failed to present evidence of direct liability against the franchisee no vicarious liability could be assessed on the franchisor under any theory. Id. at 47. Nothing in the decision indicates a joint venture theory for vicarious liability is unavailable, however, so this may provide authority for a plaintiff to plead such a claim in Georgia.

Brief Overview of Representative Cases
A survey of the Georgia cases addressing vicarious liability indicate summary judgment is often granted for the franchisor, which cases comprise a number of different fact patterns and franchise operations. The following is a brief overview of the core cases for illustrative purposes:

- Summit Automotive Group v. Clark, 298 Ga. App. 875, 681 S.E.2d 681 (2009) (no vicarious liability for franchisee's failure to pay outstanding loans to third parties for customer trade-in vehicles);
- DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008) (no vicarious liability for franchisee's failure to pay outstanding loans on trade-ins and other financial schemes);
- Ellison v. Burger King Corp., 294 Ga. App. 814, 821 670 S.E.2d 469 (2008) (no vicarious liability for assault on customer by franchisee's store manager);
- Pizza K, Inc. v. Santagata, 294 Ga. App. 36, 547 S.E.2d 405 (2001) (no vicarious liability for car accident involving pizza delivery driver);
- Schlotzsky's, Inc. v. Hyde, 245 Ga. App. 888, 538 S.E.2d 561 (2000) (no vicarious liability for food-borne illnesses to customers);
- Coldwell Banker v. DeGraft-Hanson, 266 Ga. App. 23, 596 S.E.2d 408 (2004) (no vicarious liability for alleged intentional infliction of emotional distress for negative, race-based statements by franchisee's sales agents);
- McGuire v. Radisson Hotels Int'l, 209 Ga. App. 740, 435 S.E.2d 51 (1993) (no vicarious liability for injuries sustained by lounge customer ejected by bouncers).

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IOWA

Franchisor liability in **Iowa** is based on premise liability and analogized to employer-independent contractor law. *Hoffnagle v. McDonald's Corporation,* 522 N.W.2d 808, 812-13 (Iowa 1994). "Only the employer-independent contractor area carries some sort of direct connection which could be analogized to the franchisor-injured franchisee employee relationship." *Id.* at 813. To establish franchisor liability, a plaintiff must show that the franchisor maintained a degree of control over the franchisee beyond ownership or "merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed or prescribed alterations and deviations." *Id*.

I. Direct Franchisor Liability
To establish that a franchisor is directly liable for the injury, the plaintiff must establish that the franchisor owed an independent duty to the franchisee employees or patrons. *Hoffnagle,* 522 N.W.2d at 814. Whether the franchisor has such a duty depends on "the degree of control or direction the franchisor retained." *Id.* (citing *Clem v. Steveco, Inc.,* 450 N.E.2d 550, 555 (Ind. Ct. App. 1983)). Whether a duty exists is a matter of law to be determined by the court. *Id.* at 810.

Hoffnagle set the standard for franchisor liability in Iowa. In *Hoffnagle,* a McDonald's employee was assaulted during her shift by third parties and brought suit against the franchisor to recover for her injuries. The Supreme Court of Iowa concluded that McDonald's authority "is no more than the authority to insure 'the uniformity and standardization of products and services offered by a [franchisor's] restaurant. [Such] obligations do not affect the control of daily operations.'" *Hoffnagle,* 522 N.W.2d at 814 (citing *Little v. Howard Johnson Col.,* 183 Mich.App. 675, 682 (1990). The day-to-day control of the employees was handled by the franchisee, not the franchisor, and therefore the franchisor did not retain sufficient control to give rise to a duty to protect the franchisee's employees. *Id.* at 815.

With respect to premise liability, Iowa courts recognize the duties specified in section 343 of Restatement (Second) of Torts (1965). The section provides: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees and (b)[condition is not reasonably apparent to invites] and (c) fails to exercise reasonable care to protect them against the danger." A "possessor of land" turns on occupation and control of the land, not ownership. *Wiedmeyer v. Equitable Life Assurance Society of the United States*, 644 N.W.2d 31, 33 (Iowa 2002). Again, the duty only arises if the franchisor exhibits significant control over the land. *Wiedmeyer* found an owner of a mall liable for the injuries of a patron because the owner hired a third party to clear ice, effectively recognizing a duty and taking control by directing the third party to clear the ice. *Id.* at 34. However, a similar accident occurred in *Miller v. Casey's General Stores* when a customer slipped on ice near a fuel island and sought recovery from the franchisor. The court ruled that the plaintiff failed to show as a matter of law that the franchisor was a possessor of the store for premises liability purposes. *Miller v. Casey's General Stores,* 711 N.W.2d 733 (Iowa App. 2006). As in *Hoffnagle,* the analysis focused primarily on the license agreement with the franchisee to determine which party was in control of the premises. *Id.* at *2. The court affirmed the order for summary judgment in favor of the franchisor because "As in *Hoffnagle,* the day to day operations of the store are in the hands of the franchisee or licensee." *Id.* at *3.

Although *Hoffnagle* involved an injured employee, *Miller* applied the same reasoning to patrons. Therefore, in Iowa, a franchisor does not have direct liability unless the franchisor has sufficient control over the daily operations of the franchisee or over the property on which the franchisee is located.

II. Vicarious Liability

There are no Iowa statutes on case law that holds a franchisor vicariously liable for the "wrongs" of franchisees.

Vicarious liability is a form of strict liability without fault. It is imputed liability. Under the theory of vicarious liability, the franchisor would only be responsible for the torts of another because of the nature of the relationship. In Iowa, vicarious liability is used in cases involving respondeat superior, principals and agents, employers and employees, and other similar relationships. *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.,* 762 N.W.2d 463, 470 (Iowa 2009). Generally an employer of an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence. *Lunde v. Winnebago Industries, Inc.,* 299 N.W.2d 473, 475 (Iowa 1980). "Although various reasons have been suggested as the basis for this rule, the commonly-accepted reasoning is the lack of control by the employer over the details of the contractor's work." *Id.* Because the standard for finding vicarious liability revolves around the issue of "control," it is from a practical standpoint, indistinguishable from the direct liability analysis.

IDAHO

Franchisor liability has largely not been litigated in Idaho. The one case that is instructive regarding franchisor liability only speaks to vicarious liability of the franchisor for the negligence of the franchisee. See Ketterling v. Burger King Corp., 152 Idaho 555, 272 P.3d 527 (March 2, 2012). In that case, the Court partially relied on secondary authority, American Jurisprudence, in its analysis. Without expressly stating so, this is indicative that the Court will consider American Jurisprudence as persuasive authority in future litigation involving franchisor liability.

I. Direct Franchisor liability

A Franchisor will be liable for its own negligent acts. See generally Sliman v. Aluminum Co of Am., 112 Idaho 277, 731 P.2d 1267 (1986).

II. Vicarious liability

"A franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm." Ketterling, 152 Idaho at ___, 272 P.3d at 533 (citing 62B Am.Jur. 2d Private Franchise Contracts § 298 (2011); Miller v. McDonald's Corp., 150 Or.App. 274, 945 P.2d 1107, 1110 (1997)). In Ketterling, the Court relied on the operations manual to determine that there was insufficient evidence to show that the franchisor had sufficient control over the franchisee's daily operation that caused the customer to slip on snow and ice outside of the restaurant. Ketterling, 152 Idaho at ___, 272 P.3d at 533. Although the operations manual directed the franchisee to "clear snow and ice from the premises as soon as possible[,]" it also stated that franchisee is "an independent owner and operator of the restaurant who is responsible for day-to-day operations of his/her business." Id. (internal quotations omitted). The Court affirmed the district court's grant of summary judgment in favor of franchisor.

ILLINOIS

Illinois courts have decided cases involving questions of franchisor liability based upon principles of agency theory and the terms of the contracts between the parties in their franchise agreements. Liability has been considered under both vicarious and direct theories.

Vicarious Liability: Apparent Authority of the Franchisee

A franchisor may be held liable under a theory of apparent authority of the franchisee in which there is a consistent appearance of the franchisee locations to that of locations run directly by the franchisor and there is not any notice to the public that the location is operated by anyone other than the company whose trademark and branding is prominently displayed there.

Courts have held that the apparent agency doctrine (also known in Illinois as apparent authority) can and should be applied in a franchisor-franchisee setting. For a franchisor to be vicariously liable for the acts of its franchisee under this doctrine, it must be shown that: (1) the franchisor has represented or permitted it to be represented that the party directly dealing with the plaintiff is its agent; and (2) the plaintiff, acting in justifiable reliance on such representations of the franchisor, has dealt with the agent to the detriment of the plaintiff. *O'Banner v. McDonald's Corp.*, 173 Ill.2d 208 (1996). The doctrine is based on principles of estoppel so that if a principal creates the appearance that someone is his agent, he should not be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511 (1993).

It has been held that before a third party may impose liability on a principal through the theory of apparent authority, there must have been some form of communication from the principal to the third party, which may merely be the principal carelessly allowing the apparent agent to have a display indicia of authority. However, it must be the third party who is on the receiving end of a communication that originated from the principal. *Hoyt v. Docktor Pet Center Inc.*, 1986 WL 11619 (N. Dist. 1986).

In *O'Banner*, the difficulty for the plaintiff was not in showing that McDonald's advertising and other factors could make one believe that they were dealing with an agent of the corporation itself but was in showing that he actually relied on the apparent agency in going to the McDonald's restaurant where he was injured. *O'Banner*, 173 Ill.2d 208 (1996). Similarly, the theory was rejected in other cases as the plaintiffs failed to show any evidence as to the reason why they were patronizing the gas stations where they were injured. See *Miller v. Sinclair Refining Co.*, 268 F.2d 114 (5th Cir. 1959), *Crittendon v. State Oil Co.*, 78 Ill.App.3d 112 (1966).

Vicarious Liability: Actual Authority of the Franchisee

A franchisor may be held liable under a theory of actual authority of the franchisee when the franchisor has imposed sufficient restrictions on or reserved sufficient controls over the operation of the franchisee's day-to-day operations. It is generally deemed to be a question of fact as to whether sufficient controls exist to be considered actual authority.

Where a sufficient degree of control is exercised by the franchisor, an agency relationship may be created notwithstanding a clear declaration to the contrary in the franchise agreement between the parties. *Slates v. International House of Pancakes, Inc.*, 90 Ill.App.3d 716 (4th Dist. 1980). It becomes a question of the type and amount of control as a certain amount of control by the franchisor is recognized as acceptable to exercise control over its franchisee to protect its name, goodwill, trademarks, and service marks. It must be determined whether the control over the franchisee's operations establish a principal/agent relationship under Illinois law. *Mann v. Prudential Real Estate Affiliates, Inc.*, 1990 WL 205286 (N. Dist. 1990).

While a franchise agreement may clearly show the intent of the parties to exclude an agency relationship and establish that the franchisee is an independent contractor, such a declaration in and of itself does not control a court's determination. Circumstances may negate the intent of the agreement. *Mann*, 1990 WL 205286 (N. Dist. 1990). In a real estate broker franchise relationship, the court found that requiring the franchisee to operate in accordance with the franchisor's confidential operations manual, maintaining its office with furnishing in accordance with standards set by the franchisor, and allowing the franchisee to send its employees to the franchisor's training classes did not establish a sufficient degree of control as a matter of law to negate the terms of the franchise agreement that the relationship was not one of a principal/agent. *Salisbury v. Chapman Realty*, 124 Ill.App.3d 1057 (3rd Dist. 1984).

In *Slates*, the Court again did not find that the degree of control was sufficient to negate the clear intention of the franchise agreement that no agency relationship was to be created. The International House of Pancakes franchisee had to use the franchisor name without any suffix or prefix attached, could only serve and sell products as expressly approved by the franchisor, could only use flour and mixes from the franchisor or approved vendors, and was subject to a standard operational procedures manual. The court found the amount of control exercised to be customary in a franchise agreement. *Slates*, 90 Ill.App.3d 716 (4th Dist. 1980).

Direct Liability: Negligence of the Franchisor

A franchisor may be held vicariously liable under a negligence theory when the injury is caused by an aspect of the franchisee's operation of which the franchisor had actual control or the right of control. In order to recover on a theory of negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached the duty, that the plaintiff suffered injury as a result of the breach, and that defendant's breach of duty or negligence was the proximate cause of plaintiff's injuries. *Martin v. McDonald's Corp.*, 213 Ill.App.3d 487 (1991). The existence of a duty is a question of law; not of fact, and must be determined on a motion under 735 ILCS 5/2-619 (a)(9). *Marshall v. Burger King Corp.*, 222 Ill.2d 422 (2006).

In a case often cited involving a 15-year old employee who was injured by a meat slicing machine at a fast food franchise restaurant, Yankee Doodle Dandy, the court found in favor of the franchisor and against plaintiff's theory of negligence that the franchisor was aware that minors operated the machine and had the power to prevent such dangerous operations from being performed by minors. The court found that the right to interdict unsafe practices must consist of something more than a general right to make suggestions or recommendations. *Coty v. U.S. Slicing Mach. Co., Inc.*, 58 Ill.App.3d 237 (1978).

Courts have considered in several cases whether franchisors may be held liable for negligence for failing to exercise due care to protect the employees of their franchisees from harm caused by the criminal acts of others. Whether a franchisor maintains mandatory security procedures is a significant factor in determining if a franchisor has voluntarily undertaken a duty of care. *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill.App.3d 127 (2010).

In a highly-publicized 1993 murder case at a Brown's Chicken franchise restaurant in Palatine, IL, suit was filed by the estate of a victim alleging that Brown's Chicken exercised control over the franchisee by virtue of the franchise agreement and by recommending safety rules for the employees and voluntarily undertook to provide safety. The court found that Brown's did not mandate any security measures be taken by its franchisees and that the franchisee was free to operate its restaurant with any security measures deemed necessary. Finally, the court considered the terms of the franchise agreement that stated the franchisee was an independent contractor. Therefore, the court found that Brown's Chicken did not meet the necessary elements for a negligence claim by voluntarily undertaking a duty to the plaintiff. *Castro v. Brown's Chicken and Pasta, Inc.*, 314 Ill.App.3d 542 (2000).

One case that did find a duty of a franchisor under a voluntary-undertaking theory involved a worker at a Domino's store owned by a franchisee who was injured during a robbery. The court found that a voluntary-undertaking theory of liability was present because the franchisor formed a committee to study security issues, adopted a cash management system involving the use of time-delay safes in franchisees' stores, produced literature regarding robbery prevention, employed a franchise consultant to ensure compliance with the franchisor's standards, and maintained a security hotline to make sure management trainees were properly trained in safety and security. *Decker v. Domino's Pizza, Inc.*, 268 Ill.App.3d 521 (1994).

Conclusion

The decisions regarding franchisor liability in Illinois have overall been favorable to the franchisor as the plaintiff has the burden of proving that one of the theories of liability applies. The courts have not made decisions lightly in finding that an agency relationship exists where the terms of a franchise agreement expressly state otherwise. The level of control of the franchisor in aspects of the franchisee's operation as well as the terms of the franchise agreement are greatly considered in making such liability determinations.

INDIANA

Indiana law provides that a franchisor may be liable for a franchisee's actions under a direct liability theory and perhaps under a vicarious liability theory. The law regarding both is summarized below.

I. Direct Franchisor Liability

Under Indiana law, there are two foundations upon which the direct liability of a franchisor may rest. The first is embodied in Restatement (Second) of Torts § 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." The trier of fact must determine to what extent a franchisor can control the operations of a franchisee in franchisor-franchisee cases. To impose liability on the franchisor, the amount of control "must consist of something more than a general right to make suggestions or recommendations or to order the work stopped or resumed." Whitten v. Ky. Fried Chicken Corp., 570 N.E.2d 1353, 1357 (Ind. Ct. App. 1991).

For example, in Whitten v. Ky. Fried Chicken Corp., 570 N.E.2d 1353, 1356 (Ind. Ct. App. 1991), a plaintiff suffered an injury after steam rushed out of a fryer as he cleaned it. He filed a lawsuit against KFC, the franchisor, arguing that KFC only approved certain fryers for use by the franchisees and also failed to warn of the fryer's defects. KFC then sought summary judgment. The Indiana Court of Appeals held that pursuant to Restatement (Second) of Torts § 414 there were material issues of fact precluding summary judgment because KFC instructed the franchisees on what fryers it approved for use. Therefore, a question of fact existed on the issue of whether KFC retained control and had a duty to exercise reasonable care.

The second basis of liability for a franchisor is Restatement (Second) of Torts § 324A, which reads: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

The Indiana Court of Appeals also analyzed Restatement (Second) of Torts § 324A(a) and (b) in Whitten. Based on the facts mentioned above, the Indiana Court of Appeals held that KFC undertook to recommend or select safe fryers for its franchisees; therefore, a question of material fact existed as to whether KFC increased the risk to the plaintiff by failing to exercise reasonable care. Additionally, pursuant to § 324A(b), the Indiana Court of Appeals held that KFC undertook to perform a duty (i.e. assumed a duty) owed by the franchisee to the plaintiff (recommendation and selection of safe equipment), creating a question of fact as to whether KFC increased the risk to the franchisee's employees by failing to exercise reasonable care.

II. Vicarious Liability

In addition to direct liability, the doctrine of vicarious liability provides that a principal may be held liable for wrongful acts of its agent. Vicarious liability is indirect legal responsibility and "a legal fiction by which a court can hold a party legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party's relationship to the wrongdoer." Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 147 (Ind. 1999).

a. Vicarious Liability: Actual Authority

   A franchisor may be held liable for the acts of a franchisee under the theory of actual authority. Actual authority "is created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." The focus of actual authority is on the belief of the agent and not the principal's belief. Drake v. Maid-Rite Co., 681 N.E.2d 734, 737 (Ind. Ct. App. 1997).

   Drake v. Maid-Rite Co. provides an illustrative example of an agent's authority in the context of a franchisee selling a franchise to a purchaser and not in a bodily injury context. However, the same analysis would likely apply in a franchisee-franchisor bodily injury case in Indiana. In Drake, the purchaser of a restaurant from a franchisee sued the franchisor for failure to comply with the Indiana's Franchise Disclosure Act by failing to provide her with the required disclosure so she could make an informed and intelligent decision regarding the purchase of the franchise. The purchaser argued that the franchisee acted with the actual authority of the franchisor, so the sale of the franchise was "effected by or through a franchisor" subjecting the sale to the Franchise Disclosure Act.

   The Indiana Court of Appeals disagreed and held that there was no genuine issue of fact that the franchisee possessed no actual authority of the franchisor. The Indiana Court of Appeals noted that the franchisee submitted an affidavit acknowledging that he sold the restaurant on his own behalf without any approval by the franchisor. Further, the purchaser made payments to the franchisee, and the Indiana Court of Appeals rejected the purchaser's argument that the franchisee acted in furtherance of the franchisor's interest by purchasing the franchise and reselling it because accepting that argument would make anyone that bought and then sold a franchise an agent of the franchisor.

b. Vicarious Liability: Apparent Authority

   In order to hold a franchisor liable under the theory of apparent authority, a third person must reasonably believe that an agent possesses authority to act on the principal's behalf based on some manifestation from the principal. Drake v. Maid-Rite Co., 681 N.E.2d 734, 738 (Ind. Ct. App. 1997). "The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal." Pepkowski v. Life of Ind. Ins. Co., 535 N.E.2d 1164, 1166-67 (Ind. 1989). "It is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party. Statements or manifestations made by the agent are not sufficient to create an apparent agency relationship." Id. at 1167.

Based off the facts mentioned above in Drake v. Maid-Rite Co., the Indiana Court of Appeals assessed whether the franchisee possessed the apparent authority to act on behalf of the franchisor. The purchaser argued that the franchisor placed the franchisee in a position to represent that she was buying a franchise through the franchisor. The purchaser argued that the franchisee possessed apparent authority to act on the franchisor's behalf because the sale was for one of the franchisor's franchises, the franchisee used the franchisor's stationery, and the franchisor knew and approved of the sale.

However, the Indiana Court of Appeals held there was no genuine issue of material fact as to whether the franchisee possessed the apparent authority to act on the franchisor's behalf because the purchaser could not show any communication, direct or indirect, between her and the franchisor. The purchaser's conversations with the franchisee were not enough. Further, use of the franchisor's trademarks and commercial symbols did not give the franchisee apparent authority because a franchisor routinely allows a franchisee to use trademarks and commercial symbols.

III. Other Issues of Franchisor and Franchisee Law in Indiana

In addition to the foregoing, Indiana law holds that exculpatory clauses in franchisor and franchisee contracts generally do not apply to third parties. For example, in Morris v. McDonald's Corp., 650 N.E.2d 1219, 1222-23 (Ind. Ct. App. 1995), the Indiana Court of Appeals held that "While a party can ordinarily contract out his duty to exercise reasonable care with respect to another contracting party via a simple exculpatory provision, a party cannot contract out his duty to exercise reasonable care with respect to third parties."

KENTUCKY

Kentucky has not specifically addressed direct liability of a franchisor, but there is no reason to doubt that a franchisor may be held liable for its own direct negligence or tortious activity like any other person or entity. In addition, the franchisor may be vicariously liable for the actions of a franchisee if it has control or the right of control over the daily operation of the specific aspect of the franchisee's business alleged to have caused the harm.

1. Direct liability under Kentucky law

No Kentucky decision addresses direct liability in the franchisor-franchisee context. A Kentucky court likely would treat a franchisor as it would any other individual or entity, *i.e.,* a plaintiff would have to establish: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury. See *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). Liability for intentional tortious activity would require proof that the franchisor's conduct met each element of the alleged tort.

2. Vicarious liability under Kentucky law

A franchisor is vicariously liable for the tortious conduct of the franchisee when controls or has the right of control over the daily operation of the specific aspect of the franchisee's business alleged to have caused the harm. *See Papa John's Int'l v. McCoy*, 244 S.W.3d 44, 56 (Ky. 2008). If a franchisor exercises or contracts for the right to exercise control over specific aspects of the franchisee's business, the franchisor may be found liable for torts committed by the employees of the franchisee. As explained in the *Papa John's* case, because a franchisor typically concentrates its control on the quality and operational requirements relating to its trade or service mark, as opposed to the day-to-day operations and management of the business, "[t]he perceived fairness of requiring a principal who closely controls the physical conduct of an agent to answer for the harm caused by the agent is diminished in this context." *Id*. at 54 (internal citations omitted). The court concluded that "the traditional rules pertaining to

scope of employment and ostensible agency are inapposite to the issue of a franchisor's vicarious liability." *Id*. at 55.
A general right to control some aspects of the franchisee's business operations is insufficient to establish liability under Kentucky law. Instead, the franchisor must control the specific course of conduct giving rise to the plaintiff's claim. *See United States v. Days Inns of Am.*, 22 F. Supp. 2d 612 (E.D. Ky. 1998).

Even when the franchise agreement does not explicitly create an agency relationship, a plaintiff may still assert a vicarious liability claim against a franchisor under agency and apparent authority theories if the agreement gives the franchisor "full operating control over the franchise." *See Sims v. Marriott Int'l, Inc.*, 184 F. Supp. 2d 616, 617 (W.D. Ky. 2001); *see also Hyland v. Homeservices of Am., Inc.*, 2007 U.S. Dist. LEXIS 47990 (W.D. Ky. June 28, 2007) (courts analyze vicarious liability claims between franchisors and franchisees under a theory of actual agency when franchisors had control over the actions of the franchisees.)

Finally, the Kentucky Supreme Court holds that a franchisor is not liable for an franchisee's employees' worker's compensation benefits for a work-related injury when the franchisee is uninsured. *Doctors' Assocs. v. Uninsured Employers' Fund*, 364 S.W.3d 88 (Ky. 2011) (franchisor was not an "up-the-ladder" employer under Kentucky law when the franchisor did not control the day-to-day activities of franchisee.)

LOUISIANA

Concerning a franchisor's liability for the acts of its franchisee, a franchisor can be liable: (1) when the franchisor maintains authority or control over the conduct that caused harm; (2) when a master-servant relationship exists; and (3) when the franchisee has actual or apparent authority to act as an agent on behalf of the franchisor. Louisiana does not recognize absolute (strict) liability of a franchisor based solely on the existence of a franchisor-franchisee relationship. See God's Glory & Grace, Inc. v. Quik International, Inc., et al., 2005-1414 (La. 1st Cir. 6/9/06), 938 So.2d 730.

I. Direct Liability
A franchisor can be liable for the acts of a franchisee when the franchisor maintains authority or control over the conduct that caused harm.

For a franchisor to be held liable for the tortious conduct of its franchisee, or employees of its franchisee, it must be found that the franchisor maintained control over the daily operations of the franchisee. See Chambers-Johnson v. Applebee's Restaurant, et al., 12-98 (La. 5th Cir. 9/11/12), 101 So.3d 473. The Franchise Agreement ordinarily outlines and limits the control, and thus liability, of the franchisor.

Provisions concerning uniformity in appearance and standardization of products and services among franchisees, or providing general suggestions on how to conduct operations, are not sufficient "control" over the franchisee to impose liability on the franchisor. See Chambers-Johnson v. Applebee's Restaurant, et al., 12-98 (La. 5th Cir. 9/11/12), 101 So.3d 473 and Henry v. Taco Tio, Inc., 606 So.2d 1376 (La. 2nd Cir. 1992).

Further, the existence of a franchisor-franchisee relationship does not, alone, create solidary liability between the franchisor and franchisee. See Clark, et al. v. McDonald's System, Inc., 383 So.2d 61 (La. 2nd Cir. 1980).

II. Vicarious Liability
A franchisor can be liable for the acts of a franchisee's employee when a master-servant relationship exists.

Tort liability cannot be imposed vicariously on a franchisor for the actions of a franchisee's employee absent a master-servant relationship. See Galjour, et al. v. General American Tank Car Corp., et al., 769 F. Supp. 953 (E.D. La. 1991) (citing La. Civ. Code Art. 2320). The existence of a franchisor-franchisee relationship does not, alone, create a master-servant relationship. See Henry, et al. v. Taco Tio, Inc., et al., 606 So.2d 1376 (La. 2nd Cir. 1992). Whether a master-servant relationship exists is determined by considering the following questions:

Does the franchisor control the daily operations of the franchisee?
Does the franchisor control the physical acts and time of the franchisee?
Does the franchisor have a close economic relationship to the franchisee?
Does the franchisor have the right to hire, fire, or discipline employees of the franchisee?
Does the franchisor pay or withhold taxes for or on behalf of the franchisee?

See Henry v. Taco Tio, Inc., 606 So.2d 1376 (La. 2nd Cir. 1992) and Galjour, et al. v. General American Tank Car Corp., et al., 769 F. Supp. 953 (E.D. La. 1991).

If the answer to a majority of these questions is “yes,” liability will likely be imposed on the franchisor.

III. Principal / Agent Relationship

A franchisor can be liable for the acts of a franchisee when the franchisee has actual or apparent authority to act as an agent on behalf of the franchisor.

Whether a franchisee may bind its franchisor is governed by Louisiana’s law of agency and mandate. See La. Civ. Code Art. 2989, et seq. A principal is bound by the authorized acts of his agent. See La. Civ. Code Art. 3020. A principal may also be bound by acts of a professed agent acting with apparent authority. See La. Civ. Code Art. 3021.

a. Actual Authority

   Consideration of the terms of the Franchise Agreement is necessary to determine a franchisee’s actual authority to bind its franchisor. See God’s Glory & Grace, Inc. v. Quik International, Inc., et al., 2005-1414 (La. 1st Cir. 6/9/06), 938 So.2d 730. The Franchise Agreement is determinative of an agency or fiduciary relationship between the franchisor and franchisee. Id.

b. Apparent Authority

   Apparent authority of a franchisee is evidenced by the extent of the franchisor’s manifestations to the plaintiff and the reasonableness of the plaintiff’s reliance on the apparent authority of the franchisee. See God’s Glory & Grace, Inc. v. Quik International, Inc., et al., 2005-1414 (La. 1st Cir. 6/9/06), 938 So.2d 730. Whether the franchisee had apparent authority to bind the franchisor is determined by the following questions:

   Is the franchisee is the alter ego of the franchisor?
   Do the two companies have separate and distinct directors, officers, employees, clients, and contracts?
   Does the franchisor participate in the day-to-day management and control the franchisee?
   Did the plaintiff know the business was a franchise before contracting with the franchisee?
   Did the franchisor make promises or representations to the plaintiff?
   Was the plaintiff’s reliance upon the authority of the franchisee reasonable?

   See God’s Glory & Grace, Inc. v. Quik International, Inc., et al., 2005-1414 (La. 1st Cir. 6/9/06), 938 So.2d 730.

The more connected the franchisor and franchisee and the more reasonable the plaintiff’s reliance, the more likely liability will be imposed on the franchisor.

MAINE

In Maine, a franchisor may be held liable for its own negligent actions or, through vicarious liability, for the actions of its franchisee in an agency relationship.

“A *prima facie* case of negligence requires a plaintiff to establish the following elements: a duty owed, a breach of that duty, and an injury to the plaintiff that is proximately caused by a breach of that duty.” *Stanton v. Univ. of Maine Sys.*, 2001 ME 96, ¶ 7, 773 A.2d 1045, 1049. “Whether a plaintiff is owed a duty of care is a matter of law.” *Id.* at ¶ 8.

“The general rule of substantive law is that corporations, like individuals, are liable for their torts.” *Isaacson v. Husson Coll.*, 297 A.2d 98, 102 (Me. 1972). A franchisor would, of course, be liable for its own actions and omissions to the extent it did so with a want of ordinary care. *Gravel v. Le Blanc*, 131 Me. 325, 162 A. 789, 790 (1932).

Generally, a franchisor would owe no special duty of care to the end customer of one of its franchisees. A franchisor may be vicariously liable however, for the actions of its franchisee and its employees under certain circumstances.

Maine first addressed the issue of franchisor vicarious liability in 2010. *Rainey v. Langen*, 2010 ME 56, ¶ 13 998 A.2d 342, 346. The Supreme Judicial Court of Maine expanded existing principles of vicarious liability to analyze liability in the context of the franchisor-franchisee relationship. *Id*. Maine courts use a right to control theory in establishing vicarious liability. *Id*. at ¶ 15 “The right to control ‘includes the rights both to employ and to discharge subordinates and the power to control and direct the details of the work.’” *Id.* (quoting *Legassie v. Bangor Publishing Co.*, 1999 ME 180, ¶ 6, 741 A.2d at 444). The *Rainey* Court contemplated the following two approaches taken by most states in dealing with vicarious liability in the franchisor-franchisee relationship:

- the traditional “right to control” test which would hold the franchisor vicariously liable for the actions of the franchisee where the franchisor exerts control over a franchisee’s day-to-day operations, beyond “controls designed primarily to insure uniformity and the standardization of products and services.” *Id.* at ¶ 16 (internal citations omitted); and
- the “instrumentality rule” which would hold a franchisor vicariously liable for “the tortuous conduct of its franchisee only if the franchisor had control or a right of control over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.” *Id.* at ¶ 20 (internal citations omitted).

The *Rainey* Court adopted the traditional approach, finding that the “right to control” test adequately protects the franchisor’s ability to maintain its intellectual property rights through control the franchisee’s end product by only assigning liability when the franchisor’s control extended to the franchisee’s performance of its day-to-day operations. *Id.* at ¶ 21.

In applying the “right to control” test, the *Rainey* Court considered a set of 8 factors developed to determine the existence of an independent contractor relationship for vicarious liability purposes as laid out in *Murray’s Case*, 130 ME. 181, 186, 154 A.352, 354 (1931). *Rainey*, 2010 ME 56 at ¶25. Those factors are as follows:

“ (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
(2) independent nature of the business or his distinct calling;
(3) his employment of assistants with the right to supervise their activities;
(4) his obligation to furnish necessary tools, supplies, and materials;
(5) his right to control the progress of the work except as to final results;
(6) the time for which the workman is employed;
(7) the method of payment, whether by time or by job;
(8) whether the work is part of the regular business of the employer.”

Id. at ¶ 15 n4 (internal citations omitted).

The *Rainey* Court found that no vicarious liability existed where the franchisor determined the wages of its employees, the scheduling of its employees, and made all day-to-day decisions regarding hiring, firing, training, supervising, and disciplining its employees. *Id.* at ¶ 26. The franchisor’s retention of the right to conduct inspections and terminate the franchise relationship were not held to constitute sufficient control to establish vicarious liability. *Id.* The Court also found that franchising, by its nature, involved licensing to independent businessmen for the purposes of the second factor of the 8 factor test. *Id.* at ¶ 27. The *Rainey* Court also found considered the franchisee's responsibility for purchasing or leasing its own equipment and supplies and the royalty fee payment structure under factors 4 and 7. *Id.* Finally, the Court acknowledged the parties' characterization of the relationship as that of an independent contractor in the franchise documents.

MARYLAND

Maryland courts determine franchisor liability by applying principles of agency. Specifically, courts look to the degree of control a franchisor has over a franchisee to determine liability under the theory of actual agency. Courts determining liability under a theory of apparent agency or agency by estoppels focus on the reliance of the injured party on the apparent authority of the franchisor over the operations of the franchisee. Injured parties must bring forth sufficient evidence to prove the existence of these agency relationships in order to implicate a franchisor in a suit alleging negligence against a franchisee.

Vicarious Liability: Actual Agency

The critical inquiry for Maryland courts determining whether an actual agency relationship exists between a franchisor and franchisee is the degree of control a franchisor has over the operations of the franchisee.

In Temple v. McDonald's Corp., the United States District Court for the Eastern District of Pennsylvania, interpreting Maryland law, held that the McDonalds Corporation did not exercise control over the specific cause of injury and did not owe a duty of care to the plaintiffs. See Temple v. McDonald's Corp., 2012 U.S. Dist. LEXIS 34105, at *11 (E.D. Pa. Mar. 13, 2012) In that case, the plaintiffs sued the franchisor, McDonalds Corporation, in connection with an injury sustained after slipping and falling on an icy walkway at a restaurant owned and operated by a franchisee in Maryland, McDonald's Restaurants of Maryland. McDonalds Corporation owned the real property on which the restaurant was located.

Addressing whether McDonalds Corporation owed a duty of care to the plaintiff, the court looked to the balancing test applied in Maryland to analyze the franchisor's duty as a landlord. Maryland courts "conside[r] the landlord's degree of control and ability to remedy the condition along with the foreseeability of the harm . . . [t]hus, whether a defendant as a franchisor and landlord owed a duty of care to plaintiffs turns on the extent of defendant's control over the property where the accident occurred." Temple, 2012 U.S. Dist. LEXIS 34105, at *6-*7. For the Temple court, "ownership of the premises . . . does not alone establish liability," rather, "whether the defendant had control over the specific condition which caused plaintiff's injury" is the critical situation in determining a franchisor's liability. Id. at *7 (emphasis added).

The Court of Appeals of Maryland addressed several theories of franchisor liability in Chevron, U.S.A., Inc. v. Lesch. Chevron, U.S.A., Inc. v. Lesch, 319 Md. 25 (1990). In Lesch, the Plaintiffs sued Bay Oil, Inc., Walker's Chevron, a Walker's Chevron employee, and Chevron U.S.A. alleging that the injuries and property loss suffered as a result of an explosion was caused by the negligence of a Walker's Chevron employee. Plaintiff's relied on theories of actual agency and apparent agency, specifically whether there existed a master-servant relationship to implicate the franchisor and franchisee in the suit. Bay Oil and Chevron U.S.A. filed motions for summary judgment, which were granted on the trial court level for the reason that neither entity exercised a degree of control and supervision to impose a duty of care to the plaintiff. The intermediate appellate court reversed a decision from which Bay Oil and Chevron U.S.A. appealed.

Walker's Chevron operated an automobile service station in Maryland. It leased the premises and purchased gasoline and products from Bay Oil. Walker's Chevron was branded as a Chevron U.S.A station, and Bay Oil sold only Chevron brand gas and oil. Bay Oil and Walker's Chevron operated under the terms of a Reseller's Contract and Lease agreement. Bay Oil also wrote a letter to Walker's Chevron advising it of certain issues at the station.

Turning to whether Bay Oil may be held vicariously liable for the torts of Walker's Chevron employees, the court analyzed whether a master-servant relationship existed between the two entities. The court characterized this relationship as "Actual Agency." In Maryland, a master-servant relationship "exists only when the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done." Lesch, 319 Md. at 32. The Court held that the agreements between Walker's Chevron and Bay Oil, and the letter sent from Bay Oil to Walker's Chevron were insufficient evidence that Bay Oil exercised a degree of control sufficient to hold it vicariously liable for the torts of Walker's Chevron employees.

In B.P. Oil Corp. v. Mabe, 279 Md. 632 (1977), the Court of Appeals of Maryland addressed the issue of whether a service station operator was an agent of B.P. Oil. Plaintiff suffered injuries when he pulled into the service station to have water put in his radiator, but the station operator put gas in the radiator instead, causing a fire when it spilled onto the motor. Plaintiff sued the service station operator and B.P., alleging that the station was "owned and under the direction" of B.P. Mabe, 279 Md. 634.

The service station was painted with BP colors, had a BP sign, BP insignia on the pumps, a BP sign on the tow truck, and the employees wore BP uniforms. The service station owner, however, was not paid any salary or commission from BP, and he controlled the hiring, firing, and day-to-day operations of the station.

The Court analyzed the facts under the principle of actual agency, noting that under Maryland law, the element of control is essential to determine if a master-servant relationship exists sufficient to establish actual agency. In Maryland, the decisive factor for finding a master servant relationship is "whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done." Id. at 638 (citing Keitz v. National Paving Co., 214 Md. 479 (1957).). To resolve the case at hand, the court turned to its "common knowledge" maxim, that it is common knowledge that national oil companies simply market their products at local service stations, and this arrangement does not demonstrate that the national oil company has the right to control the conduct of the local service station. The court held that actual agency was not established because the evidence was insufficient to show that BP exercised control over the service station's operations.

Apparent Agency/Agency by Estoppel

In Chevron, U.S.A., Inc. v. Lesch, the Court of Appeals also addressed whether the apparent agency theory renders Chevron U.S.A., the franchisor, liable for the negligence of Walker's Chevron, the franchisee. In order to implicate Chevron U.S.A. under the apparent agency theory under Maryland law, the plaintiffs would have to demonstrate that "1) they were misled by the appearances by Chevron U.S.A. into believing that [the employee of Walker's Chevron] was an employee of Chevron U.S.A.; 2) this belief was objectively reasonable under all the circumstances; and 3) they relied on the existence of that relationship in making their decision to entrust [the employee of Walker's Chevron] with the repairs." Lesch, 319 Md. at 34-35. Based on this test, the court held that summary judgment was properly entered in favor of Chevron U.S.A. because any belief held by the plaintiffs that the employee of Walker's Chevron was an employee of Chevron U.S.A. was not objectively reasonable. Turning to its "common knowledge" maxim, Maryland courts recognize the distinction between the products offered for sale at the station branded by a national oil company and the automotive services provided by the station. Just because a national oil company's oil is sold at a station does not "justify the inference that [the national oil company] is as well directly providing automotive services." Id. at 37 (citing Mehlmen v. Powell, 281 Md. 269, 274 (1977). This distinction, for the court, is a matter of "common knowledge."

The court in B.P. Oil Corp. v. Mabe also looked to the theories of apparent agency and agency by estoppel to determine whether BP may be held liable for the negligence of the service station owner operating under its brand. The court relied on the Restatement (Second) of Agency § 267, which states that "[o]ne who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such." Id. at 643 (citing Restatement (Second) of Agency § 267 (1958)). This test necessitates that there be actual reliance on the part of the injured party, which is the essence of proving agency by estoppel.

The plaintiff in this case testified that he chose the service station because it had a BP sign, and that he routinely buys BP gasoline. There is no evidence of any reliance on the part of the plaintiff on any advertising or representations of BP. Thus, BP cannot be held liable by the principles of apparent agency or agency by estoppel.

Liability by Agreement

In Temple v. McDonald's Corp., the court also looked at the Lease and License Agreement to determine whether the franchisor exercised control sufficient to be liable for plaintiff's injury. While the Agreement mandates that the premises be used only for a McDonald's restaurant, that all products and equipment must be approved by McDonald's Corporation, and that all managers at McDonald's of Maryland must enroll in "Hamburger University" run by McDonald's Corporation, the agreement states that McDonald's of Maryland is responsible for maintaining the building and parking area in good condition. See id. at *7-*8. The Agreement further states that McDonald's of Maryland shall "remain an independent contractor responsible for all obligations and liabilities . . . based on injury, illness or death of any person or persons." Id. at *9. Although McDonald's Corporation sought to conduct its business in Maryland consistent with all other McDonald's restaurants, that "does not mean that it undertakes to supervise such daily operations as removal of snow or ice from the premises and the salting or sanding of the areas surrounding the restaurant." Id. at *10. An agreement between the franchisor and franchisee may limit the scope of the franchisor's control over the operations of the franchisee. Though such an agreement is not the determinative factor for courts assessing whether or not an agency relationship exists sufficient to impose liability on the franchisor, it certainly indicates the intent of the franchisor to leave control of the daily operations to the franchisee, and may influence the actual behavior of the franchisee also leading to the same result.

Finally, in B.P. Oil Corp. v. Mabe, the service station owner and BP had a lease arrangement, under which BP mandated that the service station furnish a sign indicating that the station operated under a lease with BP and that the service station owner was the sole owner. See Mabe, 279 Md. At 634. This franchisor took steps to distinguish itself from the franchisee by way of the lease agreement, clarifying what the public would interpret as to the true owner of the shop. By way of agreement, the franchisor may be able to affect the perception of a third party as to the relationship between the franchisor and franchisee.

Conclusion

The decisions regarding franchisor liability in Maryland tend to be favorable to the franchisor because the plaintiff faces the obstacle of coming forward with sufficient evidence to prove an agency relationship between the franchisor and franchisee. Whether it is proving the level of control by the franchisor over the franchisee sufficient to find an actual agency relationship, or proof of actual reliance on apparent authority to find apparent agency or agency by estoppel, it seems that more often than not the franchisor is relieved of liability for the negligence of a franchisee. Although not determinative, agreements between the franchisor and franchisee also steer the relationship away from actual agency by limiting control and leaving the franchisee in charge of the daily operations of the entity.

Cases

Temple v. McDonald's Corp., 2012 U.S. Dist. LEXIS 34105 (E.D. Pa. Mar. 13, 2012)

B.P. Oil Corp. v. Mabe, 279 Md. 632 (1977)

Chevron, U.S.A., Inc. v. Lesch, 319 Md. 25 (1990)

MASSACHUSETTS

In Massachusetts, a franchisor may be held liable for its own negligent actions or, through vicarious liability, for the actions of its franchisee under the doctrine of respondeat superior.

In a Massachusetts negligence case, "the plaintiffs bear the burden of proving that the defendant committed a breach of the duty to use reasonable care, that the plaintiffs suffered actual loss, and that the defendant's negligence caused their loss." *Glidden v. Maglio*, 430 Mass. 694, 696, 722 N.E.2d 971, 973 (2000). "Whether a duty of care exists is a question of law." *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 40, 907 N.E.2d 213, 215 (2009).

"As a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others." *Remy v. MacDonald*, 440 Mass. 675, 677, 801 N.E.2d 260, 262-63 (2004). Such a basic standard of care would of course apply to a franchisor for its own actions.
Regarding actions of a franchisee however, "[a]bsent a special relationship with a person posing a risk, there is no duty to control another person's conduct to prevent that person from causing harm to a third party." *Leavitt*, 454 Mass. at 40-41. A franchisor would not generally be liable for the actions of a franchisee. Under certain circumstances however, a franchisor may be liable for the negligent actions of its franchisee based on the doctrine of respondeat superior in an agency relationship. *Vargas Mfg. Co. v. Friedman*, 661 A.2d 48, 53 (R.I. 1995)

I. Agency

The case law in Massachusetts on vicarious franchisor liability is very sparse. At the superior court level, *Miller v. McDonald's Corp.*, appears to be the only Massachusetts case directly addressing this issue. 93-3779, 1994 WL 878828 (Mass. Super. Dec. 27, 1994). The *Miller* court found that where a McDonald's franchisee was solely responsible for manager training and hiring, training and supervising other employees, there was no vicarious liability on the part of the franchisor for an assault by a franchisee employee. *Id.* The court also found that the plaintiff has presented no evidence that the franchisor had any duty to train franchisees or their employees. *Id.*

Another superior court case considered the franchise relationship in evaluating vicarious liability in the licensor-licensees context. *See Brun v. Caruso*, 030220J, 2004 WL 2915730 (Mass. Super. Nov. 5, 2004). The *Brun* court stated that, "[g]enerally, a licensor cannot be held liable for the wrongful acts of the licensee absent extraordinary circumstances which give rise to an agency relationship." *Id.* (citing *Sherman v. Texas Co.,* 340 Mass. 606, 607-08 (1960); *McLaughlin v. McDonald's Corp. et al.,* Civil Action No. 98-40240-NG (2001) (Swartwood, J.)). In determining the existence of an agency relationship, the court approvingly cited the following cases: "*McLaughlin v. McDonald's Corp. et al.,* Civil Action No. 98-40240-NG (2001) (Swartwood, J.) (interpreting Massachusetts law and finding that franchisor was not liable for franchisee's negligence because franchisor did not exercise sufficient control over franchisee as it did not participate in management of franchisee's business); *Wendy Hong Wu v. Dunkin Donuts, Inc.,* 105 F.Sup.2d 83, 87 (E.D.N.Y.2000) (whether franchisor should be held vicariously liable for negligent conduct of its franchisee depends on whether "the franchisor controls the day-to-day operations of the franchisee, and more specifically whether the franchisor exercises a considerable degree of control over the instrumentality at issue in a given case"); *Burgos-Oquendo v. Caribbean Gulf Refining Corp.,* 741 F.Sup. 330 (D.P.R.1990); *Pizza K, Inc. v. Santagata,* 547 S.E.2d 405 (Ga.App .2001); *Risner v. McDonald's Corp.,* 18 S.W.3d 903, 906 (Ct.App.Tex.2000); *Oberlin v. Marlin Am. Corp.,* 596 F.2d 1322 (7th Cir.1979); *Murphy v. Holiday Inns, Inc.,* 216 Va. 490 (Va.1975); *Arnson v. General Motors Corp.,* 377 F.Sup. 209 (N.D.Ohio 1974)." *Brun*, 030220J, 2004 WL 2915730. The *Brun* court looked for evidence of pervasive control over the day-to-day operations or employees of the franchisee by the franchisor to establish an agency relationship. *Id*.

The court found no agency relationship where the licensor exercised control over "matters such as building design and layout, menus, recipes, food preparation, and food and beverage specification." *Id.* The court also considered an indemnity clause in the license agreement to weigh against the existence of an agency relationship. *Id.* The *Brun* court indicated that control of the day-to-day activities, personnel decisions, and responsibility for the operational costs of the licensee could establish an agency relationship and, therefore, vicarious liability. *Id.*

II. Apparent Authority

"Apparent or ostensible authority results from conduct by the principal which causes a third person reasonably to believe that a particular person ... has authority to enter into negotiations or to make representations as his agent." *Hudson v. Massachusetts Prop. Ins. Underwriting Ass'n*, 386 Mass. 450, 457, 436 N.E.2d 155, 159 (1982) (internal citations omitted). Massachusetts courts have applied this theory of apparent authority to the physician/hospital relationship and in taxi leasing cases. *See Chase v. Indep. Practice Ass'n Inc.*, 31 Mass. App. Ct. 661, 666, 583 N.E.2d 251, 254 (1991); *Peters v. Haymarket Leasing, Inc.*, 64 Mass. App. Ct. 767, 773, 835 N.E.2d 628, 634 (2005); *Moussa v. Abdel-Kader*, 98-5084-F, 2000 WL 1736942 (Mass. Super. Nov. 20, 2000). It is unclear if Massachusetts courts would apply the apparent authority doctrine to franchisor-franchisee relationship but the *Moussa* case provides interesting insight into that process.

The *Moussa* court found that it was possible for a jury to find vicarious liability based on apparent authority where the taxi company required the driver to paint his taxi in the company colors and post company signage on the vehicle. *Id.* The court also noted that the taxi company's requirement that the driver keep his vehicle clean and in good mechanical order could be viewed by a jury as efforts by the taxi company to protect the reputation associated with its trademark which might also establish vicarious liability.

As the case law on this topic is lacking, the above is merely speculation on how a Massachusetts court might deal with this issue. The ability to protect intellectual property is a major consideration when courts deal with vicarious liability in the franchisor-franchisee relationship and it is unclear whether this consideration would lead to a different outcome in such a case.

MICHIGAN

Direct liability of franchisor
In one case, the Sixth Circuit, purporting to apply Michigan law, permitted a plaintiff to assert a direct claim against a franchisor as such. The plaintiff did not pursue a vicarious liability claim because he had already settled with the franchisee.

Kosters v The 7 Up Company, 595 F2d 347 (6th Cir. 1979) involved the design of packaging for soft drinks. The plaintiff was shopping at a Meijer's Thrifty Acres store when she picked up a six-pack of 7 Up, put it under her arm, and headed for the checkout counter. The carton secured the six bottles of soda at the top, but there was no barrier around the side of the carton. One of the bottles fell out as she was carrying it, fell to the floor, broke, and sent a piece of glass into her eye. She was blinded in that eye as a result of this injury.

The 7-Up Company owned the trademark and produced the syrup that goes into making the product. The bottling of the product, purchase and selection of the carton containing it, etc., was done by Brooks Bottling Company under a franchise agreement. The carton was designed and manufactured by Olinkraft, Inc.

Under the franchise agreement, Brooks was required to secure approval from 7-Up for all items used, including cartons. 7-Up was to approve the type and design of all containers and advertising materials. There was a question raised as to whether this allowed the franchisor to approve only the graphics and advertising materials, or if it also extended to the approval of the design of the carton itself.

The issue addressed by the court was whether the franchisor could be held to the implied warranty provided under Michigan law in the same manner as the manufacturer of a product. The court stated:

> "Michigan appellate courts have not had the occasion to consider these principles in the context of franchising. It appears to be a new question not generally considered in other jurisdictions."

In footnotes to the language quoted above, the court distinguished the issue that it was addressing from the related issues of whether the franchisor could be subject to vicarious liability in the personal injury context. It cited a couple of cases which will be discussed below. The plaintiff was not asserting a vicarious liability theory, apparently because the plaintiff had already settled with the bottler and this settlement and release would have also extinguished any vicarious liability claim it might have.

The court concluded that the franchisor could be held responsible, primarily because it "assumed and exercised a degree of control" over the design of the carton, and thereby materially assisted in introducing the defective beverage carton into the "stream of commerce." The court reasoned:

> "The franchisor's sponsorship, management and control of the system for distributing 7-Up, plus its specific consent to the use of the carton, in our view, places the franchisor in the position of a supplier of the product for purposes of tort liability."

There were four factors that, considered in combination, led the court to find in favor of liability of the franchisor:

1. The risk created by approving an unsafe product for distribution.
2. The ability of the franchisor to eliminate the unsafe character of the product.
3. The lack of knowledge on the part of the consumer.
4. The consumer's reliance on the trade name "which gives the intended impression that the franchisor is responsible for and stands behind the product."

A very important consideration for the court in *Kosters* was the specific reservation by the franchisor of the right to review and approve marketing and advertising materials, including the cartons used by its franchisee. Although it may not have elected to exercise its right of control and approval beyond the review of the graphics and other trademark information, it no doubt enjoyed the right to approve the engineering and design of the cartons if it chose to do so.

Application by Michigan court

When a state court considered the same issue, it significantly modified and limited the principle to a presumption of liability.

Kaminsky v The Hertz Corporation, 94 Mich App 356, 288 NW2d 426 (1979) was a case involving an interesting set of facts. The plaintiffs were injured when a large sheet of ice detached from a passing truck on the highway, hitting their windshield and shattering the glass, and causing serious personal injuries. The driver of the passing truck was never identified. The truck was solely identified by the fact that it was yellow and bore the Hertz logo.

The facts as stipulated between the parties included the fact that Hertz owned 90% of the vehicles bearing its logo. The other 10% were owned by licensees and franchisees.

The court's ruling on the franchisor issue was that the fact that the truck could be identified as one bearing the defendant's logo raised a *prima facie* showing, a presumption of ownership, subject to being rebutted by affirmative evidence brought on behalf of the defendant.

The court stated:

> "In the interest of justice, we feel that any business organization which permits a commercial conveyance to operate on the public highways prominently proclaiming its name owes a duty to the public to stand by that voluntary, self-advertising proclamation. That responsibility, of course, is not absolute. The named firm may introduce evidence indicating lack of control or ownership. But such explanations are for the jury to evaluate and appraise in light of all the surrounding circumstances."

The court justified shifting the burden of proof to the defendant by noting that the defendant has the particular knowledge of the material evidence "essential to a determination of the facts." A motorist who is injured by the operation of the truck has no access to information about the operator of the truck, while the Hertz Corporation would presumably have access to business records or daily log sheets, either directly or through its licensees.

The plaintiffs had asserted not only the negligence of the driver of the truck but had also raised a product liability claim based on the position that the truck itself could be regarded as negligently designed if it allowed water to accumulate, freeze, and then be released from the top. At the summary disposition phase, of course, information regarding the specific design of the truck would not be available. The court cited the *Kosters* case as authority that permits a franchisor which consents to the distribution of a defective product bearing its name to be held liable for injuries occasioned by that product.

As to a claim for what is essentially vicarious liability on the part of the franchisor for the negligent actions of the driver of the truck (a person who may be an employee of a licensee or franchisee), the *Kaminsky* court did not announce a rule of automatic liability. Rather, without even citing *Kosters* at that point, the *Kaminsky* court held that the proof by the plaintiff that the vehicle had the defendant's name and logo would be regarded as establishing a presumption of ownership, but one which could be rebutted by evidence brought forward by the defendant to establish that it did not in fact own the vehicle in question.

Vicarious liability cases

The three cases that were cited in *Kosters* on the issue of whether a franchisor may be held vicariously liable for the actions of the franchisee are discussed below.

Clark v Texaco, Inc., 55 Mich App 100, 222 NW2d 52 (1974) involved a plaintiff who was bitten by a German Shepherd belonging to the operator of a local Texaco service station. The defendant moved for summary judgment, apparently before any significant depositions had been taken. The language of the Court of Appeals decision reversing the trial court order granting the motion makes it appear that the motion was based almost solely on the pleadings.

The court stated that the plaintiff had "stated a cognizable claim". It commented:

> "Plaintiff may be able to prove . . . that Texaco was more than merely passively involved with its dealer's business. Once at trial, plaintiff might be able to prove that the involvement 'of the man who wears the star' is so substantial as to justify the application of the agency by *estoppel* doctrine."

The court thus did not conclude that the facts as established did support vicarious liability. Its ruling was only that, at the early juncture that the case was presented, the plaintiff may be able to develop the facts that would support the imposition of liability.

Johnston v American Oil Company, 51 Mich App 646, 215 NW2d 719 (1974) was a claim brought by a man who was shot by the owner of a retail service station in the course of an argument. In that case, it appears that some depositions had been taken, and the court considered whether the pleadings and the facts established in the depositions taken so far would permit the claim to survive. The court noted:

> "Plaintiff alleged that since the gas station in question carried all the usual characteristics of a Standard station, the trademark name of the American Oil Company, and since the supplies and products sold were supplied to the station by Citron Oil which in turn obtained them from American, an agency relationship arose by virtue of apparent authority or by estoppel. American Oil's national advertising campaign promoting the Standard Oil name and products, including the slogans, 'As you travel, ask us' and 'You expect more from Standard and you get it,' would seem to raise a sufficient question of fact as to the existence of agency by *estoppel* or by apparent authority to defeat the granting of summary judgment."

The court noted that there was no Michigan authority directly on point, but it cited to the decision of the Third Circuit Court of Appeals in *Gizzi v Texaco, Inc.,* 437 F2d 308 (3d Cir. 1971). The court in *Gizzi* stated:

> "The concepts of apparent authority, and agency by *estoppel* are closely related. Both depend on manifestations by the alleged principal to a third person, and reasonable belief by the third person that the alleged agent is authorized to bind the principal. The manifestations of the principal may be made directly to the third person, or may be made to the community, by signs or advertising."

The court also noted, in reversing the grant of summary judgment by the district court, that "questions of apparent authority are questions of fact and therefore for the jury to determine."

Again, the Court of Appeals was not determining that apparent authority did exist under the facts of the case, but rather that enough of a showing had been made by the pleadings and by the depositions taken to date "to raise the question of agency" between the operator and the oil company. The court held that granting the motion was premature "until such time as plaintiff has been able to complete discovery."

The third case was cited in *Kosters* as a counter authority. *Sanders v Clark Oil Refining Corporation*, 57 Mich App 687, 226 NW2d 695 (1975) also involved a claim brought by a person who was shot by the owner of a retail service station. Again, it appears that the pleadings in the case were carefully crafted to include statements that Clark Oil, by representations and advertisements, had induced the plaintiff to visit the service station. It alleged that the defendant represented by the use of its name and by advertising programs that the station was:

> "under defendant's control, and that this was intended to induce the public and did in fact induce plaintiff to deal with defendant."

In his deposition, however, plaintiff admitted that he had simply accompanied his uncle to the service station to assist his uncle to deliver an automobile for service. He did not go there to obtain gasoline, and was not otherwise involved in the repair job. He testified that he purchased gasoline from a number of different suppliers, and could not recall any particular advertisement for Clark products that he had ever seen.

Under those facts, the court upheld the grant of summary judgment, finding that there was no genuine issue of material fact as to whether the plaintiff had relied upon the alleged advertising and representations made by Clark Oil. The court again cited the *Gizzi* case, and quoted it as stating that, in order for the plaintiff to recover against the franchisor, "he must have relied on the indicia of authority originated by the principal."

MINNESOTA

Minnesota does not have a special theory for determining franchisor liability, and the Minnesota courts have not directly addressed the issue. *See Urban v. Am. Legion Dept. of Minnesota*, 723 N.W.2d 1, 11–13 (Minn. 2006) (Hanson, J. dissenting). Minnesota has applied the general theory of agency in the franchise setting, and a franchisor may be held directly liable for its own negligence, or vicariously liable for the negligence of its franchisee. A franchisor may be found civilly or criminally liable for violations of the Minnesota Franchise Act.

I. Direct Franchisor Liability

There is no Minnesota caselaw directly addressing direct liability of a franchisor for acts of a franchisee. In order to find a franchisor directly liable, a plaintiff must show the franchisor's own negligence caused the injury. In Minnesota, the basic elements of a negligence claim are "(1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury." *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). Unless the franchisor exercises sufficient control over the daily operations of its franchises, a direct duty of care between the franchisor and injured party is unlikely to be established.

II. Vicarious Liability

Vicarious liability can be based on both actual and apparent authority. Minnesota follows general concepts of agency theory to determine vicarious liability.

a. Vicarious Liability: Actual Authority

Minnesota follows the Restatement of Agency to analyze questions of actual authority. *See, e.g.*, *Hockemeyer v. Pooler*, 130 N.W.2d 367, 377 (Minn. 1964). A principal provides

an agent actual authority by communicating to the agent, through written or spoken words, or conduct, that the principal expects the agent to act on its behalf subject to its direction. Restatement (3d) of Agency § 3.01 (2006). Actual authority can be shown by an express grant of authority by the principal to the agent. *Hockemeyer*, 130 N.W.2d at 377. It can also be shown by the principal's conduct and "inferred from course of dealing between the [principal and agent]." *Schlick v. Berg*, 286 N.W. 356, 358 (Minn. 1939).
Actual authority includes both express authority, which the principal directly grants to an agent, and implied authority. *Hockemeyer*, 130 N.W.2d at 377. Implied authority includes the powers that are essential for or directly connected to carrying out the agent's expressly delegated duties. *Hornblower & Weeks-Hemphill Noyes v. Lazere*, 222 N.W.2d 799, 805 (1974); *see also* Restatement (2d) of Agency § 50.

b. Vicarious Liability: Apparent Authority

Implied authority is distinct from apparent authority. *See Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 313 (Minn. 1997) (examining the difference between implied authority and apparent authority). "[I]mplied authority is actual authority circumstantially proved and is dependent upon the intention of the parties. . . . Apparent or ostensible authority, on the other hand, is not actual authority but is that which the principal holds the agent out as possessing or knowingly permits the agent to assume." *Derrick v. Drolson Co.,* 69 N.W.2d 124, 130 (Minn. 1955) (footnote omitted).

The Minnesota courts have relied on the Restatement of Agency to define apparently authority:

> "apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

Duluth Herald & News Tribune v. Plymouth Optical Co., 176 N.W.2d 552, 555 (Minn. 1970) (quoting Restatement, Agency (2d) § 27). In that case, the court also noted, "the general rule is that a principal is bound not only by the agent's actual authority but also by that which the principal has apparently delegated to him." *Id.* (citing 3 Am. Jur.(2d) Agency, s 73). The court looks to statements, conduct, lack of ordinary care, and "other manifestations of the principal's consent" to determine if a third person would be justified in believing the agent is acting within his authority. *Id.* (quotation omitted). "Whether an agent is clothed with apparent authority is a question of fact." *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App.2001).

In *Duluth Herald*, the court concluded the franchisor was liable as a principal for advertising services furnished by the franchisee based on apparent authority from "the conduct of defendant franchiser in authorizing and permitting the franchisee in this case to use the name 'Plymouth Optical Company' for 3 years." 176 N.W.2d at 557.
Apparent authority may also be found "when the agent has regularly exercised some power not expressly given to it and the principal, knowing of the practice, tacitly sanctions its continuance." *Vacura v. Haar's Equip., Inc.*, 364 N.W.2d 387, 391 (Minn. 1985).

III. Statutory Liability

The Minnesota Franchise Act applies to the offer, sale, and termination of franchises in Minnesota. *See* 20A1 Minn. Prac., Business Law Deskbook § 21:38 (2012 ed.). The Act mainly provides protections for a franchisee based on the perception of a lack of parity in bargaining power. *Id.* The Act requires a registration statement for the offer or sale of any franchise in the state (unless the transaction is otherwise exempt). Minn. Stat. § 80C.02; *see also Martin Investors, Inc. v. Vander Bie*, 269 N.W.2d 868 (Minn. 1978). Under the Act, a franchisor cannot terminate a franchise without good cause, written notice at least 90 days in advance stating the reasons for termination, and the opportunity for the franchisee to correct the stated reasons for termination. *Id.* § 80C.14, subd. 3. The Act also more broadly prohibits "unfair and inequitable" practice as defined by the commissioner of commerce. *Id.* § 80C.14, subd. 1; Minn. R. 2860.4400 (Unfair and Inequitable Practices).

A franchisor may be held civilly or criminally liable for violations of the Act. Minn. Stat. §§ 80C.16–17. The Act holds jointly and severally liable any partners, principal executive officers or directors, and every employee who materially aids a person in violating any provision of the chapter. *Id.* at subd. 2; *see also Martin Investors*, 269 N.W.2d at 876 (holding the chairman of the board and president liability along with the company for restitution under the Act). If the Act is violated, the franchisee may sue for damages, rescission, or other relief, and may recover actual damages together with costs and reasonable attorneys' fees. *Id.* at subds. 1, 3. The Act also authorizes criminal penalties for the willful violation of any provision in the chapter, including imprisonment for up to five years. Minn. Stat. § 80C.16, subd. 3.

<u>The Minnesota Franchise Act</u>

<u>The Minnesota Department of Commerce's Franchise Rules</u>

MISSISSIPPI

Under Mississippi law, franchisor liability is determined under the traditional agency theory of liability. *See e.g. Allen v. Choice Hotels Int'l*, 942 So.2d 817, 821-821 (Miss. Ct. App. 2006); *Parmenter v. J&B Enters.*, NO. 2010-CA-0125-COA, 2012 Miss. App. LEXIS 111 (February 21, 2012). More specifically, Mississippi courts consider whether an employer/employee or master/servant relationship existed between the franchisor and franchisee. *Id.* In regard to franchisor liability, the Mississippi Supreme Court has stated that "Our cases in the field revolve around the idea of control. The right to control is as important as de facto control at the tortuous moment, for the right to control the work of another 'carries with it the correlative obligation to see to it that no torts shall be committed' by the other in the course of the work." *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss. 1988) (quoting *White's Lumber & Supply Co. v. Collins*, 191 So. 105, 106 (Miss. 1939)).

Importantly, however, the mere possibility of control "does not create liability unless the alleged master had the right to control the means as well as the ends." *Allen v. Choice Hotels Int'l.*, 942 So.2d 817, 821 (Miss. Ct. App. 2006). Accordingly, in order to determine if a franchisor is indeed the master of the franchisee, Mississippi courts apply the non-exclusive list of factors set-forth by the Mississippi Supreme Court in *Kisner v. Jackson*, 132 So. 90, 91 (1931):

(1) Whether the principal master has the power to terminate the contract at will;
(2) Whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment;
(3) Whether he furnishes the means and appliances for the work;
(4) Whether he has control of the premises;
(5) Whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output;
(6) Whether he has the right to prescribe and furnish the details of the kind and character of work to be done;
(7) Whether he has the right to supervise and inspect the work during the course of the employment;
(8) Whether he has the right to direct the details of the manner in which the work is to be done;
(9) Whether he has the right to employ and discharge the subemployees and to fix their compensation; and
(10) Whether he is obliged to pay the wages of said employees.

The leading Mississippi case regarding franchisor liability is *Elder v. Sears Roebuck & Co.*, 516 So.2d 231 (Miss. 1987). The case was brought by the plaintiff as a premises liability slip and fall case. *Id.* On appeal, the Mississippi Supreme Court had to determine whether the defendant Sears could be held liable under a principal/agent relationship. *Id.* at 232. The court applied the factors which it had previously set-forth in *Kisner v. Jackson* and found that the jury did not err in finding that Sears acted as the principal of the franchise in question. *Id.* at 236. The liability was placed upon Sears because, even though the store was run by a third party, Sears had held itself out to the public as the entity, with whom the public conducted business.

Although Mississippi courts had on occasion addressed franchisor liability, it wasn't until recently that the courts began to characterize this type of liability in the context of franchisor/franchisee liability. In 2005 the Mississippi Court of Appeals noted that "other jurisdictions that have addressed the question of a franchisor's vicarious liability have noted that a franchise relationship is far different from a contract of employment where the rules of master/servant are typically applied." *Allen v. Choice Hotels, Int'l*, 942 So.2d 817, 821-22 (citing *Kerl v. Rasmussen*, 682 N.W.2d 328, 337 (Wis. 2004)). The court continued, "because of this difference, courts have held the franchisor vicariously liable only when it had the right to control the specific instrumentality or aspect of the business that was alleged to have caused the harm." *Id.* Therefore, the court found that the "application of the law [is] consistent with Mississippi law, which has consistently refused to hold the employer of an independent contractor liable unless the employer was maintaining a 'right of control over the performance of that aspect of work which gave rise to the injury.'" *Id.* (quoting *Cashwell v. Fincher*, 914 So.2d 1250 (Miss. 2005)).

In *Allen v. Choice Hotels, Int'l*, the court noted the law in Mississippi regarding when a third party can be liable for acting as the master of another party. *Id.* at 821. Quoting from *Fruchter v. Lynch Oil Co.*, the court commented that "there is another fact premise sometimes pointing to non-liability: If the party . . . is concerned only with ultimate results and not the details of the work," then he cannot be held liable as the master of another party. *Id.* The court once again applied the factors from *Kisner* and held that the franchisor could not be held liable for the acts of the franchisee because it did not have any control over the day-to-day activities of the franchisee.

The *Allen* court also took a unique approach regarding franchisor liability by examining the duty of the franchisor to protect its registered trademark or risk non-compliance with the federal Lanham Act. *Id.* at 826-27. The court noted that "a franchisor's principal asset is its trademark. As a result, a consideration in franchise cases that is not found in other vicarious liability cases is the control that a franchisor must exert over the franchised premises in order to protect its trade or service mark." *Id.* Under the Lanham Act an owner can lose its trademark if "the trademark ceases to represent in the public's mind the item or subject which the mark originally symbolized." *Id.* Mississippi law thus recognizes an inherent conflict that is unique to franchisor's which requires it to adamantly protect its trademark, while at the same time evade liability imposed as a master of a franchisee. Therefore, in determining liability, the amount of control exercised by a franchisor will not be given as much weight as when a traditional third party is involved.

Notably the *Allen* court distinguished this case from the supreme court's previous holding in *Elder v. Sears Roebuck & Co.* "because Sears held itself out to the public as the entity that the public was doing business with . . . [unlike Choice who] did not lead the public to believe that customers were doing business with Choice." *Id.* at 827. Accordingly, under Mississippi law, a franchisor could face liability under a theory of apparent authority if it acts in a manner which creates the impression that the customer is doing business with the franchisor and not simply the franchisee.

In *Parmenter v. J&B Enters.*, the Mississippi Court of Appeals determined that the trial court had properly granted the defendant McDonald's summary judgment because, as a franchisor, McDonald's had not exercise enough control over the day-to-day activities of the restaurant to be liable for acts of the employees. NO. 2010-CA-0125`-COA, 2012 Miss. App. LEXIS 111 *15-16 (February 21, 2012). The plaintiff had brought an action against McDonald's after she had been involved in an altercation with an employee, which caused her to allegedly suffer injuries. *Id.* *2.

In determining whether McDonald's could be held liable for the acts of an employee in one of their franchises, the court first noted that "an employer is responsible for the torts of its employee only when the torts are 'committed within the scope of employment.'" *Id.* at *11 (quoting *Favre v. Wal-Mart Stores,* *Inc.*, 820 So.2d 771, 773 (Miss. Ct. App. 2002)). The court then applied the factors established by the Mississippi Supreme Court in *Kisner v. Jackson*, and held that McDonald's did not act as the master or employer of the subject franchise. Furthermore, the court found that "McDonald's did not control the day-today operations of the franchise. McDonald's had no right to hire or fire employees, to direct the hours the employees worked, or to direct the details of the manner in which the day-to-day work of each employee was completed." *Id.* at *15-16.

Based on the cases in which franchisor liability was at issue, it is evident that in Mississippi the essential issue as to whether a franchisor can be held liable is to what extent the franchisor controlled or had the right to control "the 'specific instrumentality' that caused the plaintiff's harm." *Allen*, at 827. Moreover, the courts should not consider the rules and regulations that are part of the franchise agreement in determining a franchisor's amount of control. *Id.* It is only when a franchisor exhibits sufficient control over the day-to-day activities of the franchisee that a franchisor can be held liable.

MISSOURI

Franchisor liability can arise under several different theories yet no special theory of franchisor liability exists in Missouri. *J.M. v. Shell Oil Co.,* 922 S.W.2d 759, 764 (Mo. 1996). "[T]he general rules of agency and tort provide adequate guidance for franchisor liability." *Id.* To establish franchisor liability plaintiff must demonstrate that franchisor's direct negligence led to the injury or that franchisor is vicariously liable for the alleged negligence of the franchisee.

I. Direct Franchisor liability

To establish that franchisor is directly liable for the injury, plaintiff first must demonstrate that franchisor owed the injured party a duty of care. *See Hecker v. Property Ins. Placement Fac.,* 891 S.W.2d 813, 816 (Mo. 1995) (in any negligence action, a plaintiff must demonstrate that defendant owed a duty to plaintiff, defendant failed to perform that duty, and defendant's breach was the proximate cause of the plaintiff's injury; *see also Aaron v. Havens,* 758 S.W.2d 446, 447 (Mo. 1988) (whether a duty exists is a question of law for the court).

Generally, a franchisor does not have any duty to either its franchisee or the guests or customers of its franchisee. A duty could arise, however, if the franchisor has sufficient control over the daily operations of its franchises. Additionally, a duty can arise from the mere relationship between the claimant and the franchisor defendant, e.g., inn keeper-guest. *Brown v. Natl. Super Markets, Inc.,* 731 S.W.2d 291 (Mo. Ct. App. 1987).

II. Vicarious liability

The doctrine of vicarious liability imposes on a principal liability for the wrongful conduct of its agent. Decisions holding against franchisors have applied the vicarious liability doctrine under two different theories of agency law: actual authority and apparent authority.

A. Vicarious liability: actual authority

Under the theory of actual authority, to hold a franchisor responsible for the acts of a franchisee under vicarious liability, there must be a principal-agent relationship between franchisor and franchisee at the time of the injury. *Bost v. Clark,* 116 S.W. 3d 667, 675 (Mo. Ct. App. 2003). An agency relationship is defined by two elements: (1) the principal consents, expressly or impliedly, to the agent acting on its behalf; and (2) the agent is subject to the principal's control. *Bost,* 116 S.W. 3d at 676. "The touchstone is whether the party sought to be held liable has the control or right to control the conduct of another in the performance of an act." *J.M.* 922 S.W.2d at 764. The agency relationship only exists if the "person sought to be charged as the master had the right or power to control and direct the physical conduct of the other in the performance of the act." *Lee v. Pulitzer Publ'g Co.,* 81 S.W.3d 625, 631 (Mo. App. E.D. 2002). Currently, there is no clear demarcation of controls that may lead a court to find a franchisor vicariously liable.

In *Conrad v. Waffle House, Inc.*, 351 S.W.3d 813, 820 (Mo. Ct. App. 2011), the court applied the economic realities test to determine whether there was an employment relationship between the franchisor and one of the franchisee's employees. The court considered the following four factors: "(1) who has the power to hire and fire the worker; (2) who supervises and controls the worker's work schedule and conditions of work; (3) who determines the rate and method of payment of the worker; and (4) who maintains work records." *Id.*

The *Waffle House* court found a distinction between the authority to hire and fire employees and merely providing payroll and human resource services. *Id.* The court did not find sufficient control over the employee's work schedule where franchisor created the franchise manual but had the franchisee purchase it from a third-party vendor. *Id.* at 821-22. The court found that a franchisor does have a legitimate interest in retaining some degree of control in order to protect the integrity of its marks; however, the existence of those requirements does not necessarily mean a franchisor has a role in supervising and controlling an employee's work schedule or conditions of employment to qualify the franchisor as a statutory employer. *Id.* at 821.

The *Waffle House* court found that the franchisor's retention of certain rights, such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect the premises, the right to require that franchisees undergo certain training, or the mere making of suggestions and recommendations, along with actions taken to enforce those suggestions and recommendations, did not amount to sufficient control to subject the franchisor to liability for franchisee's actions. *Id.* at 822. Additionally, the court found that sufficient control over the employees is absent when the franchisor does not maintain personal documents, prior employment information, benefit information, personnel files, leave and attendance records, or performance reviews. *Id.* Furthermore, there is no basis of control over the franchisee and its employees where the franchisor acts solely as a payroll service provider and does not determine the franchisee's rate and method of pay. *Id.*

Other courts have determined franchisor liability by measuring the extent of the franchisor's control over the day-to-day operations of the franchised business. The ruling in *J.M,* holds that express language in the franchise contracts addressing an agency relationship is not enough to determine agency and that each individual franchise relationship must be looked at separately to determine whether the franchisor had sufficient control over the franchisee's day-to-day operation of the business and the particular instrumentality in question. *J.M.,* 922 S.W.2d at 764.

The court in *J.M.* determined the franchisor had extensive interaction with the franchisee's day-to-day operation of the gas station and was thus subjected to liability. *Id.* The franchisor leased the property, mandated extensive regulations in its operating agreement requiring Shell's approval on architectural design, uniforms, lighting, product display, vending machines, hours of operation, adequacy and training of staff, safety and orderliness guidelines, and route inspections. *Id.*. Moreover, the franchisor could unilaterally change the policies. *Id.* Most importantly, the franchisor prescribed the "manner in which safety of the premises was to be achieved." *Id.* at 763.

The court in *Bowman v. McDonalds*, determined that the franchisor did not retain sufficient control over the property and daily operation of the restaurant, and that even though a franchisor exercises control over its franchisees in the form of stringent requirements for operating the franchise with regard to standards of quality, cleanliness and service, and the monitoring of profitability, such requirements are distinguishable from having actual control over the subject premises. 916 S.W.2d 270 (Mo. Ct. App. 1995).

B. Vicarious Liability: Apparent Authority

In addition to an actual agency relationship, the theory of apparent authority bases vicarious liability on: (1) the representation to third parties that an agency relationship exists; and (2) the plaintiff's reasonable reliance on the representation to his or her detriment. *See Ritter v. BJC Barnes Jewish Christian Health Sys.,* 987 S.W.2d 377, 386 (Mo. Ct. App. 1999). The apparent authority of an agent must be based on some conduct by the alleged principal, and the injured party's reliance on that conduct must be reasonable and must be the cause of the injury. *Id.*

In *State ex rel. Domino's Pizza, Inc. v. Dowd,* 941 S.W. 2d 663, 666 n.2 (Mo. Ct. App. 1997), the court indicates apparent authority is created when the franchisor allows the franchisee to contract in the franchisor's name. *Id.* Thus, the franchisor is subject to vicarious liability under the theory of apparent authority when the franchisee fails to disclose in its advertisements that it is independent from the franchisor. *Id.*

In *Jordan v. Robert Half Personnel Agencies of Kansas City, Inc.,* 615 S.W.2d 574, 582 (Mo. Ct. App. 1981), the issue of agency relationship was submitted to the jury because the franchise agreement required the use of service marks and décor which conveyed to the public the impression that the franchisee was a part of the parent company. Also, the public viewed the particular employees as if they were working for the parent company because there was virtually no way a third party could know the independent nature of the franchisee's business entity. *Id.*

MONTANA

The Montana Supreme Court has had only one opportunity to consider franchisor liability, and currently does not recognize any special franchisor liability theories. Instead, Montana courts will apply general agency principles to determine whether liability exists. *See Burkland v. Electronic Realty Associates, Inc.*, 740 P.2d 1142 (Mont. 1987) (stating issue is whether a franchisee is the ostensible agent of the franchisor to determine franchisor's liability to injured third party in action for fraud, breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing, realtor malpractice and breach of implied warranty).

In *Burkland,* the district court found no evidence of actual or apparent agency, and granted summary judgment for the franchisor, a national real estate company. *Id*. at 1143. The Montana Supreme Court reversed, finding genuine issues of material fact sufficient to preclude summary judgment. *Id*. at 1145. The Court noted the franchisor's affidavit established without contradiction that 1) it was not a licensed real estate agent in Montana, 2) it had no involvement with the sale of the home to the plaintiff, and 3) the real estate listing in question contained an "independently owned and operated" disclaimer. *Id*. In contrast, the plaintiffs' affidavit stated that 1) they had not read any disclaimers, 2) they had relied on the franchisor's national television advertising and reputation, and 3) they believed they were dealing with the national company, not a franchisee, at the time they purchased the home. *Id*. The Court concluded the key issue of material fact was whether the "independently owned and operated" disclaimer was sufficient to make the plaintiffs' reliance on the franchisor unreasonable. *Id*.

I. Direct Franchisor Liability

Montana courts have not had occasion to address the question of direct franchisor liability. Because Montana has not established any independent or additional requirements for cases involving franchisor liability, an injured party bringing a direct liability claim would need to establish the generally applicable elements of that claim. For example, in a direct negligence claim against a franchisor, the injured party would have to show an existing duty, breach of duty, causation, and damages. *Richardson v. Corvallis Pub. School Dist. No. 1*, 950 P.2d 748, 751 (Mont. 1997). With respect to premises liability, an injured party would need to show the franchisor landowner breached its duty to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers. *Id*. at 755. The franchisor landowner would be absolved from liability for injury resulting from an open and obvious danger if it could not have anticipated such harm to occur. *Id*. at 756.

II. Vicarious Franchisor Liability

The Montana Supreme Court has recognized the possibility that a franchisor may be held vicariously liable for the acts or omissions of a franchisee through an agency relationship. *Burkland,* 740 P.2d at 1145. A principal is responsible to third parties for the negligence of its

> agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of business, and for the agent's willful omission to fulfill the obligations of the principal. Mont. Code Ann. § 28-10-602.

In Montana, an agency is either actual or ostensible. § 28-10-103. Actual agency occurs "when the agent is really employed by the principal." *Id*. Agency may be created and authority to act conferred by prior authorization or subsequent ratification, and consideration is not required to create an agent's authority. §§ 28-10-201 to 202.

Ostensible agency occurs "when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." § 28-10–103. When a party alleges there is an ostensible agency, the principal must have undertaken some act to lead the other party to believe that an agency existed, even if it did not exist in fact. *Dick Anderson Const., Inc. v. Monroe Property Co.*, 255 P.3d 1257, 1262 (Mont. 2011). A belief in ostensible agency must be reasonable. *Id*.

The existence of an ostensible agency can be implied from conduct and from all the facts and circumstances of the case. *Id*. at 1261. However, agency is not presumed but must be proven, and the burden of proof is borne by the party asserting the relationship. *Elkins v. Husky Oil Co.*, 455 P.2d 329, 332 (Mont. 1969). In determining whether to impose liability on the basis of an agency relationship in franchise cases, the facts relied on by the *Burkland* Court, as well as the holdings of non-franchise cases, indicate what factors the Montana courts would likely find determinative.

First, the Montana Supreme Court has previously considered the degree of control exercised by the alleged principal in determining whether to impose liability on the basis of an ostensible agency relationship. *See Farmers Elevator Co. of Reserve v. Pheister*, 455 P.2d 325, 328 (Mont. 1969) (upholding jury verdict finding no agency relationship in part because there was insufficient control by the alleged principal). As in *Burkland*, a Montana court would likely look at the scope of the franchise agreement to determine whether the franchisor has a requisite level of control over the franchisee.

Second, the Montana Supreme Court has cited with approval the Common Knowledge Doctrine as set forth by the Oklahoma case, *Coe v. Esau*, 377 P.2d 815 (Okla. 1963), noting "[i]t is indeed a matter of common knowledge and practice that distinctive colors and trade mark signs are displayed at gasoline stations by independent dealers of petroleum product suppliers. These signs and emblems represent no more than notice to the motorist that a given company's products are being marketed at the station." *Elkins*, 455 P.2d at 332. Franchisors could apply this doctrine by establishing that the public has common knowledge of the independent nature of the business.

Finally, the *Burkland* Court relied on the Alaska case of *City of Delta Junction v. Mack Trucks, Inc.*, 670 P.2d 1128 (Alaska 1983), for the proposition that reliance on a trademark or tradename is reasonable and may give rise to an agency relationship. *Burkland*, 740 P.2d at 1144. In *Burkland*, use of a small print "independently owned and operated" disclaimer was not sufficient to overcome the plaintiffs' ostensible reliance upon the national company name for the purposes of summary judgment. *Id*. at 1145. Franchisors may thus be considered principals if their franchisee's do not make disclaimers and notifications obvious to third parties.

NEBRASKA

Nebraska law currently does not recognize a special theory of franchisor liability. However, franchisors generally may be held liable for third party injuries caused by the acts of a franchisee or the franchisee's employees under a number of other generally accepted theories of liability. *See* 2 W. Michael Garner, <u>Franchise and Distribution Law and Practice</u> § 9:41 (West 2012) (stating that franchisors may be held vicariously liable under general agency principals or directly liable as owners or lessors of the real property on which the franchise is physically located).

I. Vicarious Liability

Under the doctrine of vicarious liability, "[t]he law imputes to the principal . . . responsibility for the negligent acts of his or her agent." *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 219, 475 N.W.2d 105, 112 (1991) *overruled on other grounds by*, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997). In such a case, "[t]he principal's liability is derived solely from that of its agent." *Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164, 169 (1996). In the franchise context, franchisors are typically found vicariously liable for the acts of their franchisees or the franchisee's employees under the agency principals of actual or apparent authority. Garner, *supra* § 9:41.

A. Actual Authority

"Under the well-established principals of agency law, a principal will be held liable for the injuries to third parties caused by its agents when they act within the scope of their authority." Garner, *supra* § 9:42. In order to find a franchisor liable under the agency theory of actual authority, there must be a principal-agent relationship between the franchisor and the franchisee. *See id.* § 9.41 (stating that a franchisor may be held liable under agency principals if the franchisee is the actual agent of the franchisor).

Under Nebraska law, an agency relationship "is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act." *Deutsche Bank Nat'l Trust Co. v. Siegel*, 279 Neb. 174, 179, 777 N.W.2d 259, 263 (2010). "For an agency relationship to arise, the principal 'manifests assent' to the agent that the agent will 'act on the principal's behalf and subject to the principal's control.' And the agent 'manifests assent or otherwise consents so to act.'" *Koricic v. Beverly Enterprises—Nebraska, Inc.*, 278 Neb. 713, 717, 773 N.W.2d 145, 150 (2009). In an agency relationship, "[a]ctual authority is authority that the principal expressly grants to the agent or authority to which the principal consents." *Id.*

In the franchise context, "[f]ranchisees are generally not formally designated as agents of franchisors." Garner, *supra* § 9:42. In fact, "franchise agreements usually provide that the franchisee is not an agent of the franchisor." *Id.* In such a case, it may appear that there is no grant of actual authority sufficient to establish an agency relationship between the franchisor and franchisee.

However, under Nebraska law, "[w]hether an agency relationship exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship." *State ex rel. Medlin v. Little*, 270 Neb. 414, 418-19, 703 N.W.2d 593, 596-97 (2005). Therefore, while a contract is evidence of the parties' relationship, and may be considered of prime importance, the contract may not be used to conceal the parties' true relationship. *Larson v. Hometown Commc'ns, Inc.*, 248 Neb. 942, 959, 540 N.W.2d 339, 351 (1995) (citations omitted); *accord* Garner, *supra* § 9:42 (recognizing that franchise agreements that disclaim an agency relationship may not be determinative).

Instead, under Nebraska law, when determining whether an agency relationship exists, the test is actual control or the right to control. *See Reeves v. Assocs. Fin. Servs. Co., Inc.*, 197 Neb. 107, 114, 247 N.W.2d 434, 438 (1976) ("Thus the distinguishing features of an agency relationship are consent and control."). In applying this to the franchise context, "when third parties seek to hold the franchisor liable for injuries caused by the franchisee or which occur on the franchisee's premises, a central issue is whether the franchisor controls the franchisee sufficiently to be an agent." Garner, *supra* § 9:42. In determining the level of control, courts typically "look to the franchise agreement for indicia of the franchisor's control over the franchisee." Garner, *supra* § 9:42.

There is currently no Nebraska case law outlining the types of control a franchisor must exercise over a franchisee in order to find the franchisor vicariously liable under the doctrine of actual authority. However,

> Some of the provisions in a franchise agreement that courts have found pertinent to the issue of control have included the franchisor's imposition of rules and controls for the conduct of the franchisee's business; the fact that only the franchisor's trade name was displayed on the store; the fact that the franchisor reserved the right to inspect the premises for quality control purposes

> and for purposes of the conditions of sale or manufacture; and detailed guidelines on operation of the business.

Garner, *supra* § 9:42. Thus, when the franchise agreement allows the franchisor to control the daily operations of the franchisee and provides standards that the franchisee must meet, an agency relationship may exist between the franchisor and franchisee. *Id.* Additionally, where the facts show that the franchisor is controlling the daily operations of the franchisee, regardless of what the franchise agreement says, an agency relationship may exist. *See id.* ("Apart from the agreement, courts look to the actual control exercised by the franchisor over the franchisee.").

B. Apparent Authority

In addition to actual authority, "where no actual agency relationship is found, a franchisor may still be vicariously liable for act of a franchisee under a theory of apparent authority." Garner, *supra* § 9:44. "Apparent authority gives an agent the power to affect the principal's legal relationships with third parties." *Koricic*, 278 Neb. at 719, 773 N.W.2d at 151.

Under Nebraska law, "[a]pparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority." *Id.* "For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her." *Id.* at 720, 773 N.W.2d at 152. In other words, "apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestations and cannot be established by the agent's acts, declarations, or conduct." *Id.* at 720, 773 N.W.2d at 151. The manifestations by principals that may create apparent authority include, "explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal." *Id.*

In the franchise context, apparent authority "may exist when the franchisor, through its acts or other manifestations of its presence, leads third parties to believe that an agency relationship exists between the franchisor and franchisee or that the franchisee is the same entity as the franchisor." Garner, *supra* § 9:44. In order for a franchisor to be found liable under a theory of apparent authority,

> the plaintiff must show that the franchisor acted in a manner that would lead a reasonable person to conclude that the operator of the restaurant or [its] employees . . . were agents of the franchisor and that the plaintiff relied to his detriment upon the care and skill of the negligent operator or employee.

Id. While there are no cases in Nebraska finding a franchisor liable under a theory of apparent authority, examples of behavior by a franchisor that could lead to apparent authority include "means and methods of maintaining an image of uniformity among all restaurants, using national advertising, common sides and uniforms, common menus, appearance, and standards." *Id.*

II. Direct Premises Liability

"Another basis of potential franchisor liability may be the franchisor's responsibility for the franchisee's business premises, if the franchisor owns or leases them." Garner, *supra* § 9:45. This is direct liability, not vicarious liability, because the franchisor is either the owner or the landlord of the real property on which the franchise is located. *Id.*

Under Nebraska's premises liability law, there are three categories of duties that a possessor of land owes to third parties that are lawfully on the premises. *Richards v. Meeske*, 268 Neb. 901, 906-07, 689 N.W.2d 337, 342-43 (2004).

> First, the possessor must take reasonable steps to protect the lawful entrant from conditions on the land. . . . Second, the possessor must take reasonable steps to protect the lawful entrant from the possessor's dangerous activities. . . . Finally, the possessor must take reasonable steps to protect the lawful entrant from accidental, negligent, and intentional harmful acts of third parties if those acts are foreseeable.

Id. at 907, 689 N.W.2d at 343 (citations omitted). It should be noted that the rules regarding premises liability apply to possessors of land and also to owners in control of the premises. *Haag v. Bongers*, 256 Neb. 170, 193, 589 N.W.2d 318, 334 (1999) (citing *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991) *disapproved on other grounds, Welsh v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998), *overruled on other grounds*, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997)).

In the franchise context, the issue of "whether a franchisor owes a duty of care to its franchisee's employees . . . turns on the extent of the franchisor's routine control over the property and daily operations of the business." Garner, *supra* § 9:45. Thus, in order for a franchisor to be found directly liable under a theory of premises liability, "the franchisor would have to exercise day-to-day control over the operations of the business." *Id.*

NEVADA

In Nevada, franchisor liability is found when a franchisor fails to distance itself from its franchisee. Franchisor liability is premised on an agency relationship between franchisor and franchisee. In the absence of an agency relationship, the franchisor cannot be liable for the acts or omissions of the franchisee in Nevada. Agency is typically based on a finding of actual or apparent authority. Furthermore, when a franchisor can show its franchisee acted as an independent contractor, and where the franchisor refrains from controlling the franchisee's day-to-day operations, a franchisor can avoid liability for the acts or omissions of the franchisee.

To find a franchisor liable for the acts of the franchisee in Nevada, one must establish the franchisee is an employee or agent of the franchisor, acting under the franchisor's control and within the course and scope of the employment or the agency. *See, e.g.,* NRS 41.130 ("... where the person causing the injury is employed by another person or corporation responsible for his conduct, that person or corporation so responsible is liable to the person injured for damages."); *see also Johnson v. Fong,* 147 P,2d 884, 886 (Nev. 1944) (a principal is liable for the torts of his agent committed in the course of his employment and within the scope of his real or apparent authority); *Busch v. Flangas,* 837 P.2d 438, 440 (Nev. 1992) ("Vicarious liability ... is based on conduct which is not the conduct of the employer but which extends to any and all tortious conduct which an agent performs within the 'scope of employment.'").

<u>ESTABLISHING THE PRINCIPLE AGENT RELATIONSHIP</u>

Nevada law provides that if a franchisee is neither an employee nor an agent of the franchisor, then liability cannot be imposed upon the franchisor. *See, e.g., Oehler v. Humana Inc.,* 775 P.2d 1271, 1273 (Nev. 1989) ("A hospital is not vicariously liable for acts of physicians who are neither employees nor agents of the hospital."). Generally, "[t]he existence of an agency relationship is generally a question of fact for the jury if the facts showing the existence of agency are disputed, or if conflicting inferences can be drawn from the facts." *Schlotfeldt v. Charter Hosp. of Las Vegas,* 112 Nev. 42, 47, 910 P.2d 271, 274 (Nev. 1996), *citing Latin American Shipping Co. Inc., v. Pan American Trading Corp.,* 363 So.2d 578, 579-80 (Fla. App. Ct. 1978). Nevertheless, the Nevada Supreme Court has stated "[a] question of law exists as to whether sufficient competent evidence is present to require that the agency question be forwarded to a jury." *Id., citing In re Cliquot's Champagne,* 70 U.S. 114, 140, 18 L.Ed. 116 (1865); 3 Am.Jur.2D Agency § 362 (1986).

The Nevada Supreme Court follows the Restatement (Second) of Agency for the elements of a principal-agent relationship. *See, e.g., Hunter Min. Laboratories, Inc. v. Management Assistance, Inc.,* 104 Nev. 568, 570, 763 P.2d 350, 352 (Nev.1988) ("In an agency relationship, the principal possesses the right to control the agent's conduct. Restatement (Second) of Agency § 14 (1958)).

<u>APPARENT AUTHORITY; THE ABSENCE OF FRANCHISOR CONTROL OVER THE FRANCHISEE'S DAY-TO-DAY OPERATIONS; AND LIABILITY OF INDEPENDENT CONTRACTORS</u>

Under well-settled Nevada law, absent control over the day-to-day operations of the franchisee, a franchisor is not liable for the acts and omissions of the franchisee merely because of things like the shared use of trademarks and logos. Nevada also recognizes the doctrine of apparent authority in a limited context of contracts and fraud-based torts and has not extended it to cases involving accidents resulting in personal injuries. Under Nevada law, one cannot be held liable under theories of vicarious liability and *respondeat superior* for torts committed by an independent contractor. *See, e.g., Hanneman v. Downer,* 110 Nev. 167, 174-5, 871 P.2d 279, 284 (Nev. 1994) (finding that owner of real property could not be held liable for survey negligently performed by surveyor, for relationship between surveyor and real property owner was one of independent contractors). This hornbook principle of law is axiomatic and universal in American jurisprudence. Restatement (Second) of Torts § 409 (1965) ("...the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."); *see also Patino v. Capital Bonding Corp.,* 465 F.Supp.2d 518, 522 (D.S.C. 2006) ("Generally speaking, a principal is subject to vicarious liability for the torts of a servant but not for the torts of an independent contractor.").

NEW HAMPSHIRE

Franchisor liability has largely not been litigated in New Hampshire. The leading case on franchisor liability is *Vandemark v. McDonald's Corp.*, 153 N.H. 753 (N.H. 2006). This case involved the criminal assault of an overnight custodian at a McDonald's franchise. The court affirmed a grant of summary judgment in favor of the defendant, McDonald's Corporation, on claims of both direct and vicarious liability.

I. Direct Franchisor liability
The court analogized a claim of franchisor negligence for failure to protect a franchisee employee from a criminal attack to a claim against a landlord by a tenant for failure to protect the tenant from a criminal attack. Landlords in New Hampshire have no duty to protect others from criminal attacks. However, if a landlord provides security, the landlord will be found to have assumed the duty to protect tenants from criminal attack. Similarly, if a franchisor assumes the duty to provide security to the employees of a franchisee then it can be held liable for failure to protect those employees from criminal attacks. The court held that the security procedures McDonald's provided to franchisees were recommendations, not mandates, and did not establish a duty to protect employees from criminal attacks. *Id.* at 757.

II. Vicarious liability
An agency relationship must exist for a franchisor to be held vicariously liable for the security breaches of its franchisee. The court examined both the franchise license agreement and the level of control McDonald's Corp. exercised over its franchisee. The license agreement explicitly stated no agency relationship existed between McDonald's Corp. and the franchisee.

The court next looked at the level of control McDonald's exerted over the franchisee's security procedures. The court held that the control McDonald's exercised over the "instrumentality" (security equipment) which caused the harm was not sufficient to find an agency relationship existed. Therefore, McDonald's was not held vicariously liable for its franchisee's security breach and the resulting harm caused to the plaintiff. *Id.* at 763.

NEW JERSEY

Under New Jersey law, a franchisor may be held directly liable for its own negligence, or vicariously liable for the negligent acts of its franchisee. General principles of agency law are used by New Jersey courts in determining whether to impose liability upon a franchisor for its alleged negligence and/or tortious conduct. Restatement (Second) of Agency Section 219; <u>see</u> <u>also</u> <u>Lehmann v. Toys 'R' Us, Inc</u>., 132 <u>N.J</u>. 587, 601, 626 A.2d 445 (1993). In order to establish the liability of a franchisor, a plaintiff must show that the franchisor's own negligence caused the injury, rendering the franchisor directly liable, or that the franchisor is vicariously liable for actions of the franchisee that caused the injury or damage sustained.

I. Direct Franchisor liability

The term "direct" liability of a franchisor may be a bit confusing since a franchisor-corporation generally only acts through its employees and/or agents, and therefore even its "direct" liability arising from its franchisee's operations is vicarious liability. Although direct liability is actually vicarious in the sense that it is based on the tortious conduct of the franchisor's own immediate employees and its own immediate operations, independent of the franchisee, it is referred to as "direct" because it does not depend on a vicarious connection to the franchisee or the franchisee's own employees. In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601, 626 A.2d 445 (1993), supra, the court noted that a franchisor's liability for its own negligence in failing to take effective remedial measures to prevent workplace harassment was a form of direct liability, which could be imposed against the franchisor in addition to vicarious liability. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 691 A.2d 321 (1997), aff'g 292 N.J.Super. 36, 678 A.2d 279 (App.Div.1996).

Typically, a franchisor does not owe any duty to its franchisee or business invitees. Simpkins v. 7-Eleven, Inc., 2008 WL 918482 (N.J.Super.A.D.). However, in Connolly v. Burger King, 306 N.J.Super. 344, (App.Div. 1997), the court found that a duty could arise where the franchisor was involved in the day to day operations of the franchisee's business since it enforced its own policies, implemented formal and informal complaint structures, along with training and/or other monitoring mechanisms upon the franchisee.

II. Vicarious liability

In addition to direct liability, under the doctrine of vicarious liability, a principal may be held liable for the wrongful acts of its agent. New Jersey courts have held that franchisors may be vicariously liable for the acts of the franchisee under agency law in instances where the franchisee has either actual, or apparent authority.

A. Vicarious liability: actual authority

In order to hold a franchisor liable under the theory of actual authority for the acts of a franchisee under vicarious liability, a principal agent relationship must first be established between the franchisor and franchisee. J.M.L. ex rel. T.G. v. A.M.P., 379 N.J. Super. 142, 877 A.2d 291 (App. Div. 2005). An agency relationship is created "when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Generally, an agent may only bind his principal for such acts that "are within his actual or apparent authority." Carlson v. Hannah, 6 N.J. 202, 212, 78 A.2d 83 (1951). Actual authority occurs "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency, supra, § 2.01.

The J.M.L. court addressed the liability of a karate chain franchisor for the tortiuous acts of its franchisee in connection with a sexual relationship between the owner of a karate studio franchise and a 14 year old employee. Specifically, the J.M.L Court considered the franchisor's direct conduct in assessing liability of the franchisor as an aider and abettor to determine whether the franchisor had sufficient control over the franchisee to warrant the imposition of vicarious liability. In determining whether the franchisee should be held liable, the J.M.L. Court considered the specific nature of the franchisor's role in the franchisee's business. In particular, the J.M.L. Court noted the following:

> [the franchisor], conducted monthly members meetings, but provided little or no guidance on the day-to-day operations of the franchises. [the franchisors] were members of the board that issued black belts to qualifying students from all franchises. [the franchisor] provided marketing and sales guidance to franchisees but franchisees were not required to use a pre-packaged marketing plan or contribute to a marketing plan devised by [the franchisor].

> Each franchise was required to carry franchise branded merchandise at each site.
>
> [The franchisor had no] role in hiring or terminating employees or any other personnel issues at any franchise. Each franchise was individually owned and operated as an individual business. J.M.L. ex rel. T.G. v. A.M.P., 379 N.J. Super. 142, 151, 877 A.2d 291, 297 (App. Div. 2005).

Thus, based upon review of these circumstances, the J.M.L. Court determined that "the relationship between [the franchisee], and [the franchisor], does not evince the degree of control that would warrant the imposition of vicarious liability under agency principles or liability as an aider or abettor." J.M.L. ex rel. T.G. v. A.M.P., 379 N.J. Super. 142, 152, 877 A.2d 291, 297 (App. Div. 2005).

Factually, in Simpkins v. 7-Eleven, Inc., 2008 WL 918482 (N.J. Super. Ct. App. Div. Apr. 7, 2008), the Appellate Court conducted a similar analysis of franchisor liability as the J.M.L. Court to determine whether a franchisor could be held vicarious liability under the theory of actual authority for the wrongful acts of its franchisee.

In Simpkins, the plaintiff was assaulted by another customer while shopping in a 7-Eleven franchise. An employee who was present during the assault had allegedly taken insufficient action to safeguard or aid the plaintiff. The plaintiff brought suit against the owner of the 7-Eleven franchise and the franchisor company. The Simpkins Court considered the vicarious liability of the franchisor under both the theory of actual authority authority.

Preliminarily, the Simpkins Court noted that the franchise agreement between 7-Eleven and the individual franchise contained language asserting that the franchise is an independent contractor, retains complete control over personnel matters, and that no employees of the franchise shall be held out as agents of the franchisor.

Specifically, the Simpkins Court again reviewed the specific degree of control that the franchisor exhibited over the franchisee, noting:

> Here, there is no evidence that 7-Eleven participated in the day-to-day affairs of the [franchised] store, other than in respect to certain financial activities. Defendant's loss expert … testified that franchisees were free to reject corporate 7-Eleven's supervision in security training for the franchisees' employees. This testimony is unchallenged. Further, the franchise agreement between Defendant 7-Eleven and [the franchise owner] expressly excluded 7-Eleven's participation in the franchisee's personnel matters. Simpkins v. 7-Eleven, Inc., A-3702-06T3, 2008 WL 918482 (N.J. Super. Ct. App. Div. Apr. 7, 2008).

After reviewing these facts, the Simpkins Court concluded that, "[i]n this light, there is no legal basis to impose upon 7-Eleven vicarious liability for the event that led to plaintiff's injuries. Simpkins v. 7-Eleven, Inc., A-3702-06T3, 2008 WL 918482 (N.J. Super. Ct. App. Div. Apr. 7, 2008).

B. Vicarious liability: apparent authority

Apparent authority arises "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency § 2.03 (2006). The doctrine of apparent authority "focuses on the reasonable expectations of third parties with whom an agent deals." *Id.* § 7.08 comment b. Therefore "a court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent." Sears Mortg. Corp. v. Rose, 134 N.J. 326 (1993).

The doctrine of apparent authority applies "where the actions of a principal have misled a third party into believing that a relationship of authority existed." Lobiondo v. O'Callaghan, 357 N.J.Super. 488, 497 (App.Div.), certif. denied, 177 N.J. 224 (2003) (quoting Rodriguez v. Hudson County Collision Co., 296 N.J.Super. 213, 221 (App.Div.1997)). The doctrine looks to the actions of the principal, and not of the alleged agent. Busciglio v. DellaFave, 366 N.J.Super. 135, 140 (App.Div.2004). The alleged agent cannot create apparent authority on his own accord, but must be held out as having such authority by the principal. Blaisdell Lumber Co. v. Horton, 242 N.J.Super. 98, 103 (App.Div.1990).

"In addition, the essential element of reliance must be present before apparent authority can be found." Wilzig v. Sisselman, 209 N.J.Super. 25, 36 (App.Div.), certif. denied, 104 N.J. 417 (1986). In Bahrle v. Exxon Corp. 279 N.J.Super. 5, 15 (App.Div.1995), aff'd, 145 N.J. 144 (1996), plaintiffs' wells were contaminated by seepage from one of Texaco's franchisee's gas stations. Plaintiffs sought to hold defendant Texaco Corporation liable on a theory of apparent authority because Texaco Corporation held out all gas stations bearing a "Texaco" sign as being under the control of the Texaco corporation and as being of a certain quality. Id. at 24-25.
The Bahrle Court held that in order for Texaco to be liable for its independent contractor's negligence under the theory of apparent authority, the following needed to be demonstrated: 1) the principal had to hold the independent contractor out as an agent; 2) the plaintiff had to rely on that relationship as an inducement. The Bahrle Court found that there was no evidence that the plaintiffs relied on this representation in moving into the neighborhood near the service station since there was no evidence showing that they moved into the contaminated area in reliance on the fact that the station displayed the Texaco insignia, or that plaintiffs remained residents in the neighborhood because they had relied on the fact that Texaco was in control of the station and would thus prevent it from becoming a source of contamination. Accordingly, the Bahrle court found that Texaco could not be held to be vicariously liable for the actions of its franchisee under the theory of apparent authority.

NEW MEXICO

New Mexico's Law is not well developed when it comes to a franchisor's liability to third persons, but relies on general theories of agency and the ability to control the operations of the franchise. The primary New Mexico case on franchisor liability is Ciup v. Chevron U.S.A., 1996-NMSC-062, 122 N.M. 537, 928 P.2d 263. Mihai Ciup was killed in the robbery of a Chevron gas station, and brought suit against the operator of the gas station, the owner of the gas station, and Chevron, who manufactured the gasoline sold at the station. Chevron moved for summary judgment, asserting that it did not exert sufficient control over the gas station's operation to support a claim against it based on vicarious liability, respondeat superior, agency, or premises liability theories. The court granted Chevron's motion, and plaintiff appealed. The New Mexico Supreme Court affirmed summary judgment. Id. at 539.

The supreme court found that a person does not have a duty to protect another from harm caused by the criminal acts of third persons unless the person has a special relationship with the other giving rise to a duty, citing Rummel v. Edgemont Realty Partners, Ltd., 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct. App. 1993). A duty flowing from actual or apparent agency arises with the existence of some degree of control by the principal over the conduct and activities of the agent. Ciup, 122 N.M. 539. The degree of control giving rise to liability depends on the particular facts of each case. Chevron Oil Co. v. Sutton, 85 N.M. 679, 681-82, 515 P.2d 1283, 1285-86 (1973). In the context of tort liability on gas station premises a court must closely examine the oil company's control or right to control the actual day-to-day operation of the services station, citing Shaver v. Bell, 74 N.M. 700, 705, 397 P.2d 723, 727 (1964).

Chevron submitted written contracts between the various parties involved in this case that demonstrated that it did not exert any control over the day-to-day operation of the gas station and that it was not subject to vicarious liability. The court also held that the plaintiffs had the burden to show that Chevron exercised control over the gas station's operation beyond that necessary to protect its trademark, because protecting a trademark does not constitute sufficient control over the gas station's operation under existed case law, citing Wood v. Shell Oil Co., 495 So. 2nd 1034 (Ala. 1986). Plaintiffs did not meet that burden.

In conclusion, the primary measure of a franchisor's liability under New Mexico law for injuries to third persons is the control the franchisor exerts over the day to day operations of the franchise, and the general law of agency.

NEW YORK

Direct Franchisor Liability

In certain limited circumstances, a franchisor may be held liable for its own negligence to the customers of its franchisee. However, as seen below, the cases frequently fail to find contractual liability.

In one such circumstance, the Second Department held that 7-Eleven, an out-of-possession tenant and franchisor, owed the customers of its franchisee a duty to "maintain the premises in a reasonably safe manner." Pipitone v. 7-Eleven, Inc., 67 A.D.3d 879 (2nd Dept., 2009). In Pipitone, the plaintiff allegedly sustained injuries when he fell over a concrete wheel in the 7-Eleven parking lot. The court held that although the franchisor, 7-Eleven, owed plaintiff a duty to maintain the premises in a reasonably safe manner, it was not duty bound to "protect or warn against an open and obvious condition which is not inherently dangerous." As such, plaintiff's claim against 7-Eleven was dismissed.

In Cullen v. BMW of North America, Inc., 691 F.2d 1097 (2nd Circuit, 1982), the court held that the franchisor owed its franchisee's customers a legal duty, but found that the franchisor could not be held liable, as plaintiff's injuries were not foreseeable. In Cullen, the plaintiff purchased a vehicle from BMW's franchisee, Barvarian. The president of Barvarian, Hans Eichler, stole and absconded with plaintiff's money, and plaintiff never received the purchased vehicle or a refund of the purchase price. Plaintiff commenced an action against BMW, as franchisor, alleging that BMW negligently permitted Barvarian to continue as a BMW dealer, even though BMW was aware of Barvarian's troubled financial condition. The district court held that the franchisor owed its franchisee's customers a legal duty to "reasonably police the authorized use of the BMW name and supervise the operation of its franchise." The court reasoned that where a franchisor had the opportunity to "reduce the risk of foreseeable injury," such a franchisor could be held liable for negligence when it failed to end the franchise or take other appropriate action. The Second Circuit reversed, holding that BMW could not have reasonably foreseen Eichler's criminal activity, and therefore could not be held liable for plaintiff's injury. However, in so holding, the Second Circuit did not dispute that the franchisor owed a legal duty to its franchisee's customers.

Vicarious Franchisor Liability

Under New York law, a franchisor will not be held vicariously liable for the acts of its franchisee based upon the existence of a franchise agreement alone. Martinez v. Higher Powered Pizza, Inc., 43 A.D.3d 670 (1st Dept., 2007). Rather, to determine whether the franchisor will be held liable for the acts of its franchisee, New York State courts examine the "degree of control" that the franchisor maintained over the daily operation of the franchisee, as well as the specific instrumentality which allegedly caused plaintiff's injury. Hart v. Marriott Int'l, Inc., 304 A.D.2d 1057 (3rd Dept., 2003).

In Repeti v. McDoland's Corp., 49 A.D.3d 1089 (3rd Dept., 2008), the decedent was allegedly injured when she was struck by an electronic door at the entrance of a rest area. An action was commenced against McDonald's Corp., as franchisor of the McDonald's food service restaurant located in the rest area. The McDonald's restaurant in issue was operated by franchisee, Magliocca Stores, Inc. McDonald's Corp. claimed it did not owe decedent a duty pursuant to its franchise agreement with Magliocca. However, the evidence showed that inspections regarding safety, maintenance and sanitation were completed by Magliocca pursuant to standards established by both Magliocca and McDonald's corp. The court therefore denied McDonald's Corp.'s motion for summary judgment, stating that McDonald's Corp. did not establish, as a matter of law, that it "lacked the requisite control over the facility to form the basis of a duty to the public users of the rest area."

In Hart v. Marriott Int'l, Inc., 304 A.D.2d 1057 (3rd Dept., 2003), plaintiff allegedly slipped and fell on water on the floor of a banquet room in the Albany Marriott Hotel. Defendant, Marriott International, Inc., was a Marriott franchisor that did not own or operate the Albany Marriott Hotel. The hotel was operated by defendant's franchisee, Interstate Hotels Corporation. Defendant claimed that it could not be held vicariously liable for plaintiff's injuries because the franchise agreement provided that Interstate Hotels Corporation was an independent contractor, and was "responsible for the daily maintenance, management, and operation" of the hotel. Further, Interstate Hotels Corporation maintained its own policy regarding slips and falls caused by wet floors. The court granted defendant's summary judgment motion, holding that plaintiff did not raise a triable issue of fact regarding the "day-to-day control over maintenance and management by Interstate."

The 'degree of control' standard has likewise been applied to determine a franchisor's vicarious liability in cases in which plaintiff is injured in a motor vehicle accident with an employee of the franchisee.

In Andreula v. Steinway Baraqafood Corp., 243 A.D.2d 596 (2nd Dept., 1997), an employee of a franchisee of Dunkin Donuts of New York, Inc. struck a pedestrian while operating his delivery vehicle. Dunkin Donuts of New York, Inc. was granted summary judgment as it did not "hire the driver, maintain control over its franchisee's hiring practices, or maintain the right to direct and control the manner of performing the very work in the course of which the accident occurred."

Similarly, in Martinez v. Higher Powered Pizza, Inc., 43 A.D.3d 670 (1st Dept., 2007), an employee of a franchisee of Papa John's struck plaintiff with his bicycle while making a delivery. The court granted Papa John's summary judgment as the franchise agreement gave Papa John's control over standards such as "food quality and preparation, hours of operation, menu items, employee uniform guidelines, and packaging requirements," but that there was "no reservation of control over the delivery process or delivery personnel."

Federal courts have also determined a franchisor's vicarious liability by examining the franchisor's degree of control, focusing particularly on the franchisor's control over the specific 'instrumentality' which caused plaintiff's injuries.

In Wu v. Dunkin' Donuts Inc., 105 F.Supp.2d 83 (E.D.N.Y. 2000), plaintiff, an employee of a Dunkin' Donuts franchisee, Turnway Donuts, Inc., was raped and beaten while working an overnight shift at a Dunkin' Donuts store. Plaintiff claimed that Dunkin' Donuts, as franchisor, was vicariously liable for Turnway's negligent failure to provide adequate security in the store. The district court found that although Dunkin' Donuts recommended certain safety measures and even made security equipment available for its franchisees to purchase, there was no evidence that Dunkin' Donuts "mandated specific security equipment or otherwise controlled the steps taken by its franchisee…to protect employees." Dunkin' Donuts therefore could not be held liable for Turnway's alleged negligent provision of security measures. In Wu v. Dunkin' Donuts Inc., 4 Fed. Appx. 82 (2nd Circuit, 2001), the Second Circuit affirmed the district court's finding that Dunkin' Donuts did not "exercise a level of control over the alleged instrumentality of the harm sufficient to support liability."

In Toppel v. Marriott Int'l Inc., 2008 U.S. Dist. Lexis 56226 (S.D.N.Y. 2008), the plaintiff allegedly sustained injuries at the Nassau Marriott Hotel and Crystal Palace Casino, when in attempting to read a menu located at the top of a flight of stairs, she slipped and fell down the staircase. Plaintiff claimed that the area was dimly lit, and that the carpeting did not distinguish between the floor and the staircase. Plaintiff commenced an action against Marriott International, the franchisor of the hotel in question. Marriott International claimed that they could not be held vicariously liable because they did not exercise the requisite degree of control over the hotel. Plaintiff pointed to specific "instrumentalities" which caused her injury, namely, the lighting and the carpeting in the area in which she was injured. In the agreement between Marriott International and its franchisee, Marriott International mandated that "light levels be increased and the carpet be replaced in and around" the area in which plaintiff fell. The court denied Marriott International's motion for summary judgment, finding that a triable issue of fact remained, as the agreement suggested that Marriott International had "at least some control over the particular instrumentalities" which allegedly caused plaintiff's injuries.

NORTH CAROLINA

In North Carolina, franchisor liability can arise as the result of the direct negligence of the franchisor or under an agency theory. In order for a franchisor to be liable to a plaintiff in tort, the franchisor must owe the plaintiff a duty of care. However, when an agency relationship exists between the franchisor and franchisee and the franchisee commits tortious acts within the scope of its agency authority, then a franchisor may be held vicariously liable for those tortious acts. *Vaughn v. N.C. Dept. of Human Resources*, 252 S.E.2d 792 (1979).

I. Direct Franchisor Liability

The first question to address in considering direct franchisor liability is whether the franchisor owed the plaintiff a duty of care. In North Carolina, whether a defendant owes a plaintiff a duty of care is a question of law. *Huntley v. Howard Lisk Co., Inc.*, 573 S.E.2d 233, 236 (2002). It is well settled in North Carolina that landowners owe a duty to exercise reasonable care in the maintenance of their premises to all lawful visitors.[2] *Keller v. Willow Springs Long Term Care Facility, Inc.*, 548 S.E.2d 761, 763 (2001). However, owners and occupiers of land are not insurers of their premises. *Nelson v. Freeland*, 507 S.E.2d 882, 892 (1998). The law only imposes upon landowners and occupiers the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. *Id*. at 892. "Reasonable care" requires that a landowner (1) not unnecessarily expose a lawful visitor to danger and (2) give warning of hidden hazards of which the landowner has express or implied knowledge. *Bolick v. Bon Worth, Inc.*, 562 S.E.2d 602, 604 (2002).

However, a landlord who had neither possession nor control of the leased premises is <u>*not liable*</u> for injuries to third persons that occur on the leased premises. *Vera v. Five Crow Promotions, Inc.*, 503 S.E.2d 692 (1998) (emphasis added). In fact, North Carolina courts have held that such a duty would be unreasonable. *Id*.; *see also Brady v. Carolina Coach Co.*, 162 S.E.2d 514, 517 (1968). Implied in North Carolina case law is the principle that a lessor may be liable if the premises were leased in an unsafe condition, but neither *Brady* nor *Vera* appear to expand the duties of a landlord/lessor to make certain that its lessees keep the property in a reasonably safe condition, provide adequate lighting, provide adequate security, etc. *Vera* at 697.

II. Vicarious Franchisor Liability

A franchisor may be vicariously liable for the tortious acts of its franchisee under a theory of actual or apparent agency. Actual agency arises when parties manifest consent that one shall act on behalf of the other and subject to his control. *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394 (1987). The principle of apparent agency, as recognized by courts applying North Carolina law, provides that "agency itself may be imposed by law on legal relations ... [t]hough no actual agency exists," when a party "has been held out by the other to be [the agent] in a way that reasonably induces reliance on the appearances." *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166 (1988) (*citing Fike v. Board of Trustees*, 279 S.E.2d 910 (1981)). The cases of *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394 (1987) and *Miller v. Piedmont Steam Co.*, 528 S.E.2d 923 (2000) are instructive on the issues of actual agency and apparent agency.

A. Actual Agency

Vicarious liability of a franchisor for the acts of its franchisee is contingent on the existence of an agency relationship. *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (1987). "A principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal <u>*over the details of the work as it is being performed*</u>. The controlling principle is that

[2] North Carolina has two classifications of plaintiffs in premises liability cases: lawful visitors and trespassers. *See Nelson v. Freeland*, 507 S.E. 2d 882 (1988).

vicarious liability arises from the right of supervision and control." *Vaughn v. N.C. Dept. of Human Resources*, 252 S.E.2d 792, 795 (1979) (emphasis added).

Determining whether the degree of control rises to the level of an agency relationship is a question of fact. *Miller v. Piedmont Steam Co.*, 528 S.E.2d 923, 926-27 (2000). In considering the nature and extent of control and supervision retained and exercised by the franchisor over the methods or details of the franchisees day-to-day operations, North Carolina courts have reviewed the terms of the franchise or license agreement between the parties. Terms to be considered could include whether the franchisor is allowed to interfere in the franchisee's day to day operations, whether the franchisor has any control over the hiring, firing, and supervision of franchisee employees and personnel, and what remedies are available to the franchisor for a breach of the agreement by the franchisee. *See Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (1987) (while a franchise or license agreement may require compliance with certain standards in construction, or requirements to maintain the premises in a "clean, attractive, safe and orderly manner", the general purpose of the agreement is the maintenance of uniform service within and public good will toward the Ramada Inn system); *Miller v. Piedmont Stream Co.*, 528 S.E.2d 923, 926-927 (2000) (periodic inspections of the business and its records and detailed standards prescribed in the franchise agreement, such as length and hair color of employees was not sufficient to establish a principal-agent relationship). An agency relationship is not created when one party requires another party to maintain liability insurance. *Id.* at 927.

Court have concluded that express language in the franchise or license agreement stating that the franchisee is an independent contractor and not an agent of the franchisor is an indicia of the parties' intent that no agency relationship exists. *Miller v. Piedmont Stream Co.*, 528 S.E.2d 923, 927 (2000). However, the denial of an agency relationship in a franchise agreement is only a factor to be considered; it is not determinative. *See Crinkley v. Holiday Inns., Inc.*, 844 F.2d 156, 167 (4th Cir. 1988) ("[T]he denial of an agency relationship in a franchise agreement is not alone determinative of liability."). Similarly, the power to hire and fire employees is only one factor in evaluating whether an agency relationship exists. *Miller*, 528 S.E.2d at 927 (examining the circumstances in their entirety for material facts which would support a finding of control and, therefore, agency); *c.f. Wood v. McDonald's Corp.*, 603 S.E.2d 539 (2004) (holding that the terms of the management services agreement between the franchisee's assignee and the management company raised an issue of fact as to the level of daily control of the management company over the franchise).

B. Apparent Agency

To establish liability based on apparent agency, sometimes referred to as agency by estoppel or equitable estoppel, a plaintiff must show that (1) the alleged principal has represented or permitted it to be represented that the party dealing directly with the plaintiff is its agent and (2) the plaintiff, in reliance on such representations, has dealt with the supposed agent. *Hayman v. Ramada Inns, Inc.*, 357 S.E.2d. at 398. In evaluating the first element, consider the following:

- Are there signs or other marks identifying the franchisee operating the establishment?
- How visible and conspicuous are any such signs?
- Where are they located on the property?
- Is there evidence of false representations or concealment of a material fact by the franchisor regarding its relationship to the franchised business?

See Hayman, 357 S.E.2d at 398 (finding plaintiff failed to forecast sufficient evidence of apparent agency as license agreement required licensee to identify itself as the owner and operator of the hotel, to expressly state its licensee relationship with licensor in all advertising, and to display a "clearly visible sign" "prominently at the front desk" indicating its licensee status); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166-67 (4th Cir. 1988) (sufficient evidence of first element necessary for apparent agency, in that only indication the hotel was not owned by franchisor was a sign in the restaurant that stated the motel was operated by another company pursuant to a franchise agreement).

As stated above, the plaintiff must also present evidence of reliance on the representations of the alleged principal that the franchisee is its agent. With respect to this second element, consider:

- Did plaintiff choose the hotel, restaurant or other place of business because of the brand?
- Would plaintiff have done anything differently had plaintiff known the facility was not owned and operated by the franchisor?
- Was plaintiff even involved in the decision to patronize the business?
-

See Hayman v. Ramada Inn, Inc., 357 S.E.2d 394 (1987) (holding that Ramada Inn, Inc. was not liable under a theory of apparent agency because plaintiff did not choose the hotel because of the "Ramada Inn" name); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156 (4th Cir. 1988) (holding that Holiday Inns, Inc. may be liable for franchisee's negligence because plaintiffs relied on the "Holiday Inn" name in deciding on where to stay); *Thomas v Freeway Foods*, 406 F. Supp. 2d 610, 619 (2005) (plaintiff purposefully went to restaurant because she could get food cooked the way she needed for certain health requirements and would not have eaten there if she had known the restaurant was owned and operated by another party).

NORTH DAKOTA

North Dakota does not have a special theory for determining franchisor liability, and North Dakota courts apply the general theory of agency in the franchise setting. A franchisor may be held directly liable for its own negligence, or vicariously liable for the negligence of its franchisee. A franchisor may also be found civilly or criminally liable for violations of the North Dakota Franchise Investment Law.

I. Direct Franchisor Liability

There is no North Dakota caselaw directly addressing direct liability of a franchisor for acts of a franchisee. In order to find a franchisor directly liable, a plaintiff must show the franchisor's own negligence caused the injury. In North Dakota, "[a]n actionable negligence consists of a duty on the part of an allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of the duty." *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, N.W.2d 748, 753 (N.D. 2012) (quotation omitted). "Generally, the existence of a duty is a preliminary question of law for the court to decide. When a duty does not exist, there is no negligence." *Saltsman v. Sharp*, 803 N.W.2d 553, 558 (N.D. 2011) (quotation omitted). Unless the franchisor exercises sufficient control over the daily operations of its franchises, a direct duty of care between the franchisor and injured party is unlikely to be established.

II. Vicarious Liability

There is no North Dakota caselaw directly addressing vicarious liability of a franchisor for a franchisee. General concepts of agency law would apply. **"**An agency relationship is created when one person, called the principal, authorizes another, called the agent, to act for the principal in dealing with third persons."*Lagerquist v. Stergo*, 752 N.W.2d 168, 172 (N.D. 2008). In North Dakota, creation and termination of agency is defined by statute. N.D.C.C. ch. 3-01. Agency can be either actual or ostensible (also called apparent). N.D.C.C. § 3-01-03.

a. Vicarious Liability: Actual Authority

"An agency is actual when the agent really is employed by the principal." *Lagerquist*, 752 N.W.2d at 172; *see also* N.D.C.C. § 3-01-03. In *Lagerquist*, the court concluded a scrap metal buyer was an actual agent of a company based on the evidence that the buyer was advanced money for the purchase by the company, purported to be affiliated with the company, and used the company's fax machine to send documents necessary to compete the scrap metal transaction. *Lagerquist*, 752 N.W.2d at 174.

b. Vicarious Liability: Apparent Authority

To establish apparent authority in North Dakota, a party must show "the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, who really is not employed by him." N.D.C.C. § 3-01-03. "An apparent or ostensible agency must rest upon conduct or communications of the principal which, reasonably interpreted, causes a third person to believe that the agent has authority to act for and on behalf of the principal." *Carpenter v. Rohrer*, 714 N.W.2d 804, 812 (N.D. 2006). If an agency relationship is denied, the burden is on the party alleging agency must establish it by clear and convincing evidence. *Id.*

"A principal is bound by acts of his agent under a merely ostensible authority to those persons only who in good faith and without ordinary negligence have incurred a liability or parted with value upon the faith thereof." *Farmer's Union Oil Co. of Dickinson v. Wood*, 301 N.W.2d 129, 133 (N.D. 1980) (citing N.D.C.C. § 3-03-03). "[A] third person acts in good faith and without ordinary negligence if the third person uses reasonable diligence and prudence in ascertaining whether the agent acts within the scope of his authority." *Farmer's Union Oil Co.*, 301 N.W.2d at 134. An apparent or ostensible agency relationship "must rest upon conduct or communications of the principal which reasonably interpreted causes a third person to believe that the agent has authority to act for and on behalf of the principal." *Id.* (quotation omitted).

III. Statutory Liability

The North Dakota Franchise Investment Law, N.D.C.C. chapter 51-19, "was enacted in 1975 to protect potential franchisees in North Dakota from unfair contracts and other prevalent and previously unregulated abuses in the growing national franchise industry." *Peck of Chehalis, Inc. v. C. K. of W. Am., Inc.*, 304 N.W.2d 91, 96 (N.D. 1981). The North Dakota Act is substantially the same as the Minnesota Franchise Act. *Id.* at n.3. Under the Act, it is unlawful to sell or offer a franchise for sale in North Dakota unless the offer has been registered with the Commissioner of Securities or exempt from registration. N.D.C.C. § 51-19-03. A violation of that section subjects the franchiser and those persons in control of the franchiser to liability for damages, rescission, or such other relief as the franchisee may seek. N.D.C.C. § 51-19-12.

A franchisor may be held civilly or criminally liable for violations of the Act. N.D.C.C. § 51-19-12. The Act holds jointly and severally liable every person who directly or indirectly controls a person liable under the statute, including every partner in a firm, every principal executive officer or director, every president or governor, and every employee who materially aids a person in violating any provision of the chapter. *Id.* The franchisee, if successful in a suit under the act, is also entitled to costs, disbursements, and reasonable attorneys fees. *Id.*

The North Dakota Franchise Investment Law (pdf)
The North Dakota Securities Department Registration Requirements and Rules

OHIO

Ohio law holds "a franchisor is not liable for the acts of its franchisee unless an agency relationship exists." Starks v. Choice Hotels Internatl., 2007-Ohio-1019, 175 Ohio App.3d 510, 513 (1st Dist.). The plaintiff has the burden of proof to establish whether the franchisee was the defendant's agent. Taylor v. Checkrite, Ltd., 627 F.Supp. 415, 416 (S.D. Ohio 1986).

I. Does agency relationship exist?

"Because a franchise is something of a hybrid business form, resembling both an association of independent businessmen and a company-owned chain, the primary problem in ascertaining franchisor liability for the acts of its franchisee has been [that of] fitting the franchisor-franchisee relationship into one of the two traditional categories of agency law, principal-independent contractor or master-servant." Broock v. Nutri/Sys., Inc., 654 F.Supp. 7 (S.D. Ohio 1986).

The existence of a franchisor-franchisee relationship between persons does not in itself preclude the existence of a principal agency relationship between them. Id. "The Court must scrutinize the relationship between persons who are franchisor-franchisee just as it would scrutinize any relationship in determining whether an agency relationship exists." Id.

The determinative factor in deciding whether an agency relationship exists between a franchisor and a franchisee is the degree of control the franchisor has over the operations of the franchisee's business. Coleman v. Chen, 712 F.Supp. 117, 124 (S.D. Ohio 1988). To determine this, a court often will look at the license agreement between the franchisor and franchisee, the franchisor's rules of operation, and how often the franchisor inspects and evaluates the franchisee. Id. Yet whether these factors show a degree of control sufficient to establish an agency relationship will be a question of fact for the jury. Id.

II. Apparent agency/Agency by estoppel

Even if a court finds no actual agency relationship exists, it may find liability exists under the theories of apparent agency or agency by estoppel. Broock, 654 F.Supp. at 10. Apparent agency of agency by estoppel imposes liability on the basis of a franchisor's representation of the franchisee as part of one overall operation and consumer reliance on that representation. Id. If the requisite showing is made, vicarious liability for the acts of the franchisee is imposed on the franchisor." Id.

Agency can be conferred if the principal, intentionally, or by the lack of ordinary care, causes or allows third persons to act upon the apparent agency relationship. Id. Apparent agency applies when the apparent agent has been permitted to use the principal's business or trade name. Id. And this principle especially applies when one licenses another to use his business or trade name. Id. This is because the public relies upon the business or trade name and that trade name's advertising promoting the product or service. Id. The public is entitled to assume that transaction undertaken with someone using that trade name, with authorization to do so, are transactions with the person whose business or trade name is used. Id. Thus, apparent agency can be used to hold a franchisor liable for the franchisee's tortuous acts. Id.

To establish such an agency, "it must be shown that the principal held the agent out in public as possessing sufficient authority to act on his behalf and the person dealing with the agent knew these facts and, acting in good faith, had reason to believe that the agent possessed the necessary authority." Id.

III. Employment

Generally, a franchisor is not the employer of franchisee employees. Starks, 2007-Ohio-1019, 175 Ohio App.3d 510, 513. Yet the Starks court adopted the Sixth Circuit's four-part test to determine employer status relevant to whether a franchisor can be considered an employer of its franchisee's employees. Id. Under that test, courts will treat two entities as a single employer where the following circumstances are found to exist: (1) interrelation of operations, (2) common management, (3) centralized control over labor relations, and (4) common ownership or financial control. Id.

In Starks, the court stated the requisite relationship to establish an agency relationship could have been met if Choice Hotels had a vested right to control Econo Lodge's actions, but Choice Hotels had no such right to control in the franchise agreement. Id. at 513-14. Further, the facts did not support that Choice Hotels had ever attempted to control Econo Lodge. Id. at 514. Choice Hotels also averred in an affidavit that it did not own, operate, maintain, manage, possess, or control Econo Lodge, no agency relationship existed between choice and its franchisees, neither Choice nor its franchisees had authority to bind the other, and Choice did not direct the manner or methods of the franchisee's daily operations. Id. Therefore, the court found that Choice was not a proper party to the claim and could not be considered an employer of its franchisee's employees.

OKLAHOMA

In Oklahoma, statutory law defines a franchise relationship as follows: "'Franchise' means a contract or agreement between a seller and a purchaser, express or implied, orally or in writing, where it is agreed that: (a) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan prescribed in substantial part by a franchisor; and (b) The operation of the franchisee's business pursuant to such a plan is substantially associated with the franchisor's business and trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate." Okla. Stat. Ann. tit. 71, § 802 (West). However, despite the statutory definition, very little Oklahoma case law exists outlining the standards for franchisor liability. To the extent such case law exists, Oklahoma appears to follow general agency principles:

I. Direct Franchisor Liability

Case law in Oklahoma is not well developed on the issue of "direct" franchisor liability. However, in general, in the absence of control by the franchisor over the particular risk that caused the relevant injury, or other overriding circumstances, Oklahoma courts have held that a franchisor owes no general duty of care to third-persons. In *Pate v. Alian*, 2002 OK CIV APP 68, 49 P.3d 85, the plaintiff was injured in a motor vehicle accident by a patron of Pizza Inn, which was owned and operated by the defendant as a franchisee of Pizza Inn, Inc. The franchise agreement contained provisions requiring Alian to list Pizza Inn, Inc. as an additional insured on all insurance policies, and a provision requiring Alian to procure licenses and permits and otherwise comply with state alcoholic beverage and other laws. The court noted that such provisions, together with the other evidence in the case, did not demonstrate such control over the franchisee that Pizza Inn, Inc. should be subject to "dram shop" liability. The Court noted that "the decision to sell intoxicating beverages was that of the franchisee, and that the franchisee agreed to abide by all state alcoholic beverages laws . . . Nothing in this record indicates any duty of Pizza Inn, Inc., to Plaintiff in regard to the sale of alcoholic beverages, let alone any breach of that duty. . . [T]he decision to sell intoxicating beverages was that of the franchisee, as was the duty to abide by all state alcohol beverage laws. Under those admitted facts, the trial court correctly concluded that Pizza Inn, Inc., had no duty to Plaintiff." *Id.* at 89; *see also Rogers v. Anheuser-Busch, Inc.*, 491 F.3d 1165, 1170 (10th Cir. 2007) ("The wholesaler-retailer connection between Anheuser-Busch and Tumbleweed was not enough to impose common-law liability on Anheuser-Busch.").

Analogous case law in the Title VII context indicates that some Courts have reviewed the facts to determine whether the activities, operations, ownership, and management of the franchisee and franchisor are sufficiently interrelated to be perceived as a "single employer" for purposes of Title VII. *See Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir. 1991). While this theory of liability has shades of agency principles, the Courts have required proof of more than the mere existence of the franchise relationship. Rather, the Courts recognize that, in franchise situations, the franchisor exercises stringent controls over the franchisee's operations, conducts frequent inspections and provides training for employees. However, for purpose of Title VII-franchisor liability, the plaintiff must show that the franchisor exercised control over "labor relations with . . .franchise employees." *Id.* at 1090. For instance, the mere "power to terminate" the franchise did not mean that McDonald's was the plaintiff's direct employer for purposes of Title VII liability. *Id*; *see also Scales v. Sonic Indus., Inc*., 887 F. Supp. 1435, 1440 (E.D. Okla. 1995) (Sonic did not exercise control over franchisee's labor relations sufficient to impose Title VII franchisor liability); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (applying "integrated enterprise test" to determine whether parent corporation liable for acts of subsidiary, and considering (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control).

II. Vicarious Liability

A. Actual Agency

In Oklahoma, the law does not presume that an agency relationship is present; rather, the "burden of proving the existence, nature and extent of the agency relationship rests ordinarily upon the party who asserts it." *See Enterprise Management Consultants v. State*, 1988 OK 91, 768 P.2d 359, 362. A written contract between the parties which leaves the parties' true status in doubt may not be accepted as conclusive of agency status. *Id.* Rather, agency status is determined from the facts and "interaction of the parties – one vis-à-vis the other." *Id.* "If the facts show control by the principal, then agency can be established regardless of the labels attached by the contract." *Id.*

The *Enterprise Management* case involved a dispute concerning whether a particular corporation was an "agent" of an Indian tribe for purposes of taxation; in *dicta*, the Court noted that the determination of an "agency" relationship in the franchise context must be based on "detailed assertions of control." *Id.* at 362 n.15. The Court cited cases where the franchisor retained broad discretionary power to impose any regulation it desired on the franchisee, or where the franchisor controlled "virtually every aspect of its franchisee's business," and contrasted such holdings with cases where the franchisor's control was not constant or detailed but limited to a discrete area, or were the franchisor had only a one-time veto power over its franchisee. *Id.*; *see also Bayhylle v. Jiffy Lube Intern., Inc.*, 2006 OK CIV APP 130, 146 P.3d 856 (applying *Enterprise Management* in context of approval of class action settlement, and noting that liability of franchisor was not clear insofar as franchisor had no control over pricing for products and services).

In *Gable v. Holder and Smith, Inc*., 2000 OK CIV APP 107, 11 P.3d 1269, former employees brought an action against their employer, its officers and franchiser. The plaintiffs alleged in their petition that the franchiser was a controlling corporation of their employer. The trial court dismissed the case and the plaintiffs alleged (among other things) on appeal, that they had stated a claim against the franchisor. The appellate court rejected that argument, noting that the defendant exercised no day-to-day control over the co-defendant. The plaintiffs produced a copy of a website page for the franchisor, but the Court noted that this document established nothing more than the existence of a franchise relationship. While the plaintiffs were entitled to a favorable inference regarding the relationship – which included the fact that monetary consideration passed between the co-defendants and that the franchisor exercised some degree of control over how the local corporation conducted business – this was insufficient to establish the "detailed assertion of control which may make a franchise agreement the source of an agency relationship." *Id.* at 1274. Hence, the plaintiff's agency and *respondeat superior* claims failed. *Id.*

B. Apparent Authority

Oklahoma follows traditional agency principles when analyzing "apparent authority" in the franchise context. Accordingly, "[a]pparent authority' of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing." *Stephens v. Yamaha Motor Co., Ltd., Japan*, 1981 OK 42, 627 P.2d 439, 441. The elements that must be present before a third person can hold the principal liable for the acts of the agent on the theory of apparent authority are (a) conduct of the principal, (b) reliance thereon by the third person, and (c) change of position by the third person to his detriment." *Id.* The existence of actual authority between principal and agent is not a prerequisite to establishing apparent authority. *Id.* "Apparent authority results from a manifestation by the principal to a third person that another is his agent. The manifestation may be made directly to a third person or to the community by signs or by advertising." *Id.* (citing Restatement (Second) Agency, §§ 8, 27, 49. But, "apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." *Id.* (citing Restatement (Second) Agency, § 8, Comment c).

For instance, the Oklahoma Supreme Court has held that a motorcyclist's mere statement that he believed that tire repair services offered by service station were authorized by a petroleum company as part of its services was not sufficient to justify trial on the issue of the petroleum company's liability on theory of apparent authority. *Stephens v. Yamaha Motor Co., Ltd., Japan*, 1981 OK 42, 627 P.2d 439. The Court held that the plaintiff's argument "that he thought the tire service offered at the station was authorized by Conoco and part of the services offered by Conoco because of the two Conoco signs displayed on the station 'has no support in reason or authority.'"

In *Coe v. Esau*, 1963 OK 1, 377 P.2d 815, a car owner filed a lawsuit against a filling station operator and Continental Oil Company, owner of the station premises, to recover for damages to his car resulting from the lack of adequate lubrication occasioned by the escape of oil through a faulty oil filter gasket installed by the station operator. Although the court did not expressly raise the issue of apparent agency, it observed that "[i]t is indeed a matter of common knowledge and practice that distinctive colors and trademark signs are displayed at gasoline stations by independent dealers of petroleum product suppliers" *Id.* at 818. Ultimately, the court concluded that representations, without a showing of control or a right of control, were insufficient to meet the plaintiff's burden of proving the existence of a master/servant or agency relationship. *Id.* at 818-19.

In *Southwestern Bell Media, Inc., v. Arnold*, 1991 OK CIV APP 103, 819 P.2d 293, the plaintiff sought to collect on certain advertising promotions contained in its telephone listing. The defendant claimed that it had transferred the account to a subsequent purchaser, and that a marketing-type entity affiliated with the plaintiff bound the plaintiff to that transaction. The Court held that a fact question existed on whether the entity affiliated with the plaintiff was the apparent agent of the plaintiff for purposes of binding the subsequent purchaser (and therefore exonerating the defendant of liability on the advertising debt). Citing *Stephens, supra*, the Court noted that a jury might decide that "due to the identical logos and the similarities in names between SWB Media and SWB Telephone, and based on SWB Media's admission that as a regular part of its business procedures, SWB Media accept and enforces contractual assumptions of advertising expenses, that SWB acted as an apparent agent for SWB Media for the purposes of transferring telephone service . . ."

PENNSYLVANIA

I. Direct Franchisor Liability

To establish that a franchisor is directly liable for injuries sustained by a plaintiff, the plaintiff must demonstrated that the franchisor owed the plaintiff a duty of care. See Casselbury v. American Food Service, 2011 PA Super 217, 30 A.3d 510 (2011) (for a plaintiff to prevail in any negligence cause of action, plaintiff must establish that defendant owed him a duty, that defendant breached that duty, and that plaintiff suffered damage as a result of defendant's breach.)

See also, Myers v. Garfield & Johnson Enterprises, 679 F. Supp.2d 598(E.D. Pa 2010)(In a Title VII, 42 U.S.C.A. action for sexual harassment against franchisor in which the agreement specifically stated that franchisees were not agents of franchisor the court wrote, "the mere existence of a franchise relationship does not necessarily trigger the master-servant relationship, neither does it automatically insulate the parties from such a relationship...Whether the control retained by the franchisor is also sufficient to establish a master-servant relationship depends in each case upon the franchise agreement or by the actual practice of the parties," citing Drexel v. Union Prescription Ctrs., 582 F.@d 781, 786 (3rd Cir. 1978)).

II. Vicarious Liability

Generally, a franchisor does not have any duty either to its franchisee or the guests or customers of its franchisee. A duty could arise, however if the franchisor has sufficient control over the daily operations of the franchisee. Patterson v. Denny's Corporation, et.al. 2008 WL 250552 (W.D.Pa. 2008)(applying Pennsylvania law) citing Drexel v. Union Prescription Centers, Inc. , 582 F.2d 781, 785-786 (3d Cir. 1978).

Additionally, a duty may arise if the franchisor held itself out to a third party as the owner or controller of the franchise when the franchisor had no actual ownership interest or control of the franchise or over the franchisee. Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3d Cir.1978). The doctrine of vicarious liability imposes on a principal liability for the wrongful conduct of its agents. See Travelers Cas. & Sur. Co. v. Castegnaro, 565 Pa. 246, 252, 772 A.2d 456, 460 (2001) (concluding a principal is liable for the negligent acts and torts of its agents, as long as those acts occurred within the scope of the agency relationship). Decisions holding against franchisor have applied the vicarious liability doctrine under two (2) different theories of agency law: actual authority and apparent authority.

A. Vicarious Liability: Actual Authority

Before a franchisor can be held liable for the acts of its franchisee under the theory of actual authority, there must be a principal-agent relationship between the franchisor and franchisee at the time of the incident leading to injury. Myskowski v. Penn Stroud Hotel, Inc., 430 Pa. Super 315, 634 A.2d 822 (Pa. Super. 1993). However, not every relationship of a principal and agent creates vicarious responsibility in principal for the acts of the agent, Id. at 625. The basic inquiry is whether the franchisor has "day to day control over the manner" of the franchisee's performance." Id. at 625 citing Little v. Howard Johnson, Co., 183 Mich. App. 675, 679, 455 N.W. 2d. 390, 393 (1990)(franchisor must have the right to control day to day operations of a franchise in order to establish an agency relationship.)

In Myszkowski, supra, the Court held that no actual agency relationship existed between the franchisor, Best Western and franchisee, Penn Stroud because Penn Stroud managed the day to day operations of its business and made all decisions incidental to this operation. 634 A.2d 622 at 627. Factors considered where that the franchisee hired, fired, paid and supervised the hotel employees and set prices for various services and accommodations provided. Id, The franchisee pays the franchisor, Best Western, $23,500 per year. Moreover, the agreement between the parties specifically provides that the relationship is one of "independent contractor" and the franchisor, Best Western, has "no responsibility for the . . . safety of the premises." Id.

In Green v. Independent Oil Co., 414 Pa. 477 (1964), the Court held there was no agency relationship between Independent Oil and one its franchisees/dealers when (1) the agreement of the parties specifically disclaimed the existence of an agency relationship; (2) all profits went to the franchisee/dealer; (3) the taxes and the utility bills were in the franchisee/dealer's name, (4) the franchisee/dealer hired, fired and paid its own employees and (5) all monies were kept in the franchisee/dealer's bank account.

However, the Court in Drummond v. Hilton Hotel Corp., 501 F. Supp. 29 (E.D. Pa. 1980) denied the Motion for Summary Judgment of the franchisor find a genuine issue of material fact existed as to whether the franchisor exercised control over the franchisee's day to day operations despite the express denial of the agency relationship by the parties. The Court found that because (1) the franchisee was required to use the franchisor's name in advertising; (2) the franchisor could consult with the franchisee regarding hotel operating problems; and (3) the franchisor could inspect the franchisee hotel, a genuine issue of material fact existed as to which party had the right to exercise day to day control over operations. Drummond, supra at 31.

Likewise, in Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (Pa. 1978) the Court held that while there was no evidence presented that the franchisor exercised actual control over the manner in which the franchisee operated its store, the Court denied the motion for summary judgment that franchisor because the franchise agreement was so broadly drawn that it gave the franchisor such broad discretionary power as to be able to impose on the franchisee virtually any measure it deemed warranted. Id. at 789. It could not be determined as a matter of law on motion for summary judgment that franchisor did not have right to control the manner of franchisee's performance so as to be the "master" of the franchisee for purposes of imposition of vicarious liability on the franchisor for alleged negligence of the franchisee in filling prescription, Id.

B. Vicarious Liability: Apparent Authority

The Restatement (Second) of Agency § 267 outlines the rule for apparent agency and states, "one who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such." Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 790–91 (3d Cir.1978)(citing Restatement (Second) of Agency). While Pennsylvania has not formally adopted § 267, it has adopted the theories of apparent authority and agency by estoppel, which state that "a principal who clothes his agent with apparent authority is estopped to deny such authority." Myszkowski v. Penn Stroud Hotel, Inc., 634 A.2d 622, 629 (Pa.Super.Ct.1993). The doctrine of apparent authority or apparent agency is applicable to the franchisor-frachisee relationship if the franchisor held itself out as the owner of the franchise. Drexel, supra.

In Drexel, supra, an action drug store franchisor seeking to impose vicarious liability for alleged negligence of franchisee in filling prescription, the Court held that a franchisor may be held liable if evidence demonstrated that in fact customers of the franchisee were led to believe that they were dealing with the franchisor and the franchisor held out or represented franchisee to be a servant or employee even if franchise agreement provided that franchisee was to identify himself as owner of retail drug store under license on all signs and printed matter used.

However, in Myszkowski, supra, the Court found the doctrine of apparent authority was inapplicable. In Myszkowski, a claim was made by the plaintiff for negligence which resulted in plaintiff's sexual assault. The Court concluded that plaintiff could not have relied upon the apparent authority of the franchisee to avoid being the victim of this random act of violence and that plaintiff "presented no evidence which even remotely supports her allegation that she relied upon the fact that [the franchisee] represented [the franchisor], as its agent, on the night she was sexually assaulted." Id.

RHODE ISLAND

In Rhode Island, a franchisor may be held liable for its own negligent actions or, through vicarious liability, for the actions of its franchisee in an agency relationship.

"Under Rhode Island law, to establish a prima facie case of negligence, a plaintiff must show that: (1) the defendant owed a duty of due care to the plaintiff; (2) the defendant breached that duty; (3) the defendant's negligent acts constitute both the actual and proximate cause of the plaintiff's injuries; and (4) the plaintiff has suffered actual damages." *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 65 (D.R.I. 2000) (citing *Volpe v. Fleet Nat'l Bank,* 710 A.2d 661, 663 (R.I.1998); *Russian v. Life–Cap Tire Servs., Inc.,* 608 A.2d 1145, 1147 (R.I.1992); *Dunning v. Kerzner,* 910 F.2d 1009, 1013 (1st Cir.1990)). Whether a duty of care is owed is a legal issue for the court. *Hennessey v. Pyne*, 694 A.2d 691, 697 (R.I. 1997)

"A legal duty is an obligation imposed by the law upon a person. It requires that person to conform his or her actions to a particular standard." *Kuzniar v. Keach*, 709 A.2d 1050, 1055 (R.I. 1998). A franchisor is obligated to exercise "such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended." *Leonard v. Bartle*, 48 R.I. 101, 135 A. 853, 854 (1927).
Generally, a franchisor would owe no special duty of care to the end customer of one of its franchisees. Under certain circumstances however, a franchisor may be liable for the negligent actions of its franchisee based on the doctrine of respondeat superior. *Vargas Mfg. Co. v. Friedman*, 661 A.2d 48, 53 (R.I. 1995)

Rhode Island has not developed any specific evaluation for vicarious liability in the context of the franchisor-franchisee relationship. In considering this issue under Rhode Island law, the U.S. District Court for the District of Rhode Island laid out its analysis based on Rhode Island's agency and apparent agency doctrines. *Butler* 110 F. Supp. 2d at 66-70.

I. Agency

Under Rhode Island law, a principle is liable for the actions of its agent when those actions are within the scope of their authority. *Vargas* 661 A.2d at 53. In establishing whether an agency relationship exists, the "Rhode Island Supreme Court has outlined three elements that must be shown in order for an agency relationship to exist: (1) the principal must manifest that the agent will act for him, (2) the agent must accept the undertaking, and (3) the parties must agree that the principal will be in control of the undertaking." *Butler*, 110 F. Supp. 2d at 66 (citing *Rosati v. Kuzman,* 660 A.2d 263, 265 (R.I.1995); *Silvestri v. Pawtucket Mem'l Hosp.,* 1991 WL 789928 at *2 (R.I.Super.)). The key element of the agency relationship is the principle's right to control the work of the agent. *Lauro v. Knowles*, 739 A.2d 1183, 1185 (R.I. 1999).

The factors considered in determining the right to control include: "(1) a manifestation by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) an agreement by the parties that the principal will be in control of the undertaking." *Baker v. ICA Mortg. Corp.*, 588 A.2d 616, 617 (R.I. 1991). In the *Butler* case, where the franchisor owned the property and leased it to the franchisee, the court held that a jury could find that the franchisor in that case maintained a right to control based on the franchisor's operation and training manuals, a franchise lease agreement, and an operator's lease and license agreement. *Butler*, 110 F. Supp. 2d at 67. The *Butler* court also found that the franchisor's "frequent and detailed inspections of the premises and its operations, the taking of profits, and the right of the franchisor to terminate the agreement for material breach" could lead a jury to find that the franchisor maintained a right to control.

II. Apparent Agency

"In Rhode Island the doctrine of apparent agency, sometimes called agency by estoppel or ostensible agency, was intended to provide recourse to third parties who justifiably contract under the belief that another is an agent of a principal and detrimentally suffer as a result of that reliance." *Butler*, 110 F. Supp. at 68 (citing *Calenda v. Allstate Ins. Co.,* 518 A.2d 624, 628 (R.I.1986); *Petrone v. Davis,* 118 R.I. 261, 373 A.2d 485, 487 (1977)). Rhode Island extended this doctrine to tort actions in a 1993 medical negligence case. *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993).

The *Butler* court addressed apparent agency in the franchisor-franchisee relationship as follows:

> It is by no means clear that the Rhode Island Supreme Court will apply the doctrine of apparent agency to a franchisor/franchisee situation. But, if it did, clearly it would require the plaintiff to prove: (1) that the franchisor acted in a manner that would lead a reasonable person to conclude that the operator and/or employees of the franchise restaurant were employees or agents of the defendant; (2) that the plaintiff actually believed the operator and/or employees of the franchise restaurant were agents or servants of the franchisor; and (3) that the plaintiff thereby relied to his detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise restaurant.

Butler, 110 F. Supp. 2d at 69 (citing *Rodrigues,* 623 A.2d at 462 (citing *Soar v. Nat'l Football League Players Assoc.,* 438 F.Supp. 337, 342 (D.R.I.1975), *aff'd,* 550 F.2d 1287 (1st Cir.1977)); *Calenda,* 518 A.2d at 628; *Petrone,* 373 A.2d at 487–488.).

SOUTH CAROLINA

In South Carolina, franchisor liability can arise by either direct franchisor liability or by vicarious liability. Vicarious liability exists where the franchisee is acting as an agent of the franchisor either through an actual agency or apparent agency relationship.

I. Direct Franchisor Liability

"To assert direct liability based on a negligence claim in South Carolina, Plaintiffs must show that (1) Defendants owed them a duty of care; (2) Defendants breached this duty by a negligent act or omission; (3) Defendants' breach was the proximate cause of their injuries; and (4) they suffered injury or damages." Triplett v. Soleil Group, Inc., 664 F. Supp. 2d 645, 648 (D.S.C. 2009)(citing Dorrell v. S.C. DOT, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004)). In Triplett, the Plaintiff claimed that a hotel franchisor was liable to the Plaintiff when the Plaintiff contracted Legionnaires' disease when using the hotel's pools as a business invitee. Id. at 647. However, the court held that a generic request that a hotel have a properly lit and clean swimming pool "does not evidence sufficient control to find that Starwood and Sheraton directly owed Plaintiffs a duty of care." Id. at 650 (emphasis added).

A franchisor may be liable for the negligent actions of a franchisee if that franchisor had the direct duty to insure that the negligent action did not occur. In Allen v. Greenville Hotel Partners, Inc. six hotel guests were killed and twelve others were seriously injured when an arsonist set fire to the hotel. Allen v. Greenville Hotel Partners, Inc., 409 F. Supp. 2d 672, 674 (D.S.C. 2006) aff'd sub nom. Allen v. Choice Hotels Int'l, Inc., 276 F. App'x 339 (4th Cir. 2008). The personal representatives of the decedents' estates and other injured guests attempted to hold Choice Hotels International, Inc. liable for failure to require the franchisees "to retrofit the hotel facility with a sprinkler system before opening the facility as a Comfort Inn." Id. at 676. Furthermore the court stated, "neither the Plaintiffs nor the court has unearthed a single case, in any jurisdiction, holding that a hotel franchisor has a duty to require a hotel which complies with the relevant fire codes to retrofit the building with sprinklers." Id. The court examined the franchise agreement and stated "[u]nder the agreement, RGH and Gedda were listed as franchisees and independent contractors of Choice. The mere designation of RGH and Gedda as independent contractors of Choice is not conclusive as to the nature of their relationship." Id. at 676 (citing Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110, 111 n. 1 (2002)). Further, the franchise agreement called for the franchisees to have sufficient life safety systems, but Choice did not exercise control over these systems. Id. at 677. The franchisees operated the hotel under the franchise agreement established by Choice, and this did not amount to direct franchisor liability. Id.

II. Vicarious Franchisor Liability

Allen v. Greenville Hotel Partners, Inc. is one of the leading South Carolina cases discussing vicarious franchisor liability. Allen at 678. The South Carolina District Court, applying South Carolina law, discussed the different means of vicarious liability in which the personal representative of a decedent's estate may attempt to reach the deep pockets of the franchisor Choice Hotels International, Inc. The Plaintiff sought to reach Choice Hotels International, Inc. by proving that Comfort Inn was an agent of Choice. In South Carolina, a franchisor can be held vicariously liable for the negligence of a franchisee through actual agency or apparent agency. See Allen, 409 F.Supp.2d 672.

a. Actual Agency

"Under South Carolina law, '[t]he test to determine agency is whether or not the purported principal has the right to control the conduct of [its] alleged agent."' Allen at 678 (citing Fernander, 293 S.E.2d at 426) (emphasis in original). In Allen the court determined that "whether there was sufficient control for an actual agency relationship to result and the alleged principal to owe a duty to the Plaintiffs is a question of law for the court." Id. "Upon careful review of the evidence, the court finds that Choice did not control the hotel's daily operations or hotel security and life safety systems." Id. at 679. "Therefore, Choice is entitled to summary judgment on the Plaintiffs' claim that RGH and Gedda [franchisees] acted as Choice's actual-agents." Id. Allen was later affirmed by the Fourth Circuit, in an unpublished opinion applying South Carolina law, Allen v. Choice Hotels Int'l., Inc., 276 F. App'x. 339 (4th Cir. 2008). The Fourth Circuit examined the franchise agreement and reasoned, "[t]he mere terms of the Franchise Agreement do not establish that Choice exerted sufficient control over the operations of the hotel to create a duty." Id. at 343 (citing Kerl v. Dennis Rasmussen, Inc., 273 Wis.2d 106, 682 N.W.2d 328, 338 (2004)("[T]he clear trend in the case law in other jurisdictions is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability.")). "Therefore, Appellants have failed to establish that Choice owed a duty to Comfort Inn guests under this theory." Id.

"In an actual agency case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so." Jamison v. Morris, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009). In Morris the passenger brought a personal injury action against a gas station and the franchisor Texaco, Inc. for injuries when an underage driver allegedly bought alcohol from the gas station and later was injured in a single car accident. Id. at 220, 684 S.E.2d at 168. The South Carolina Supreme Court found "no evidence to support a finding that either entity had the right or power to control Mini Mart in the performance of its retail alcoholic beverage sales or in the manner in which that work was done, and therefore reverse the verdicts against Texaco and Anderson, holding each was entitled to a directed verdict." Id. at 225, 684 S.E.2d at 173. "Moreover, a franchisor is not vicariously liable for a tort committed at an independent gas station unless the plaintiff can show that the franchisor exercised more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees." Id. at 222-23, 684 S.E.2d at 172. Therefore, to establish vicarious liability against a franchisor for the actions of a franchisee via actual agency in South Carolina, the plaintiff must look beyond the mere control regarding the appearance of the franchisee, and establish that the franchisor had control over other actions or business decisions.

In Triplett, discussed above, the South Carolina District Court reasoned that the license agreement entitled franchisor to inspect the hotel to preserve reputation of its trademarks, but the terms of agreement indicated that franchisee was not agent, franchisor never exerted "day-to-day maintenance and operation of the Hotel's swimming pool or whirlpool tub," and franchisee held record fee title to property. Triplett, 664 F. Supp. 2d 645, 652-53. Therefore, the franchisors were "entitled to summary judgment on Plaintiffs' claims that Main Street and Soleil Group acted as their actual agents." Id. at 653.

b. Apparent Agency

In Allen v. Greenville Hotel Partners, Inc., discussed above, the "[p]laintiffs have also alleged that Choice is liable for RGH and Gedda's negligent acts on the theory of apparent agency." Allen at 680. "Even if there is no actual agency, a party may be liable as the principal for another if that principal holds the other out in a way that reasonably induces reliance on the appearance of an agency relationship." Id. (citing R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113, 118 (2000)). In South

Carolina, the elements of apparent agency are: "(1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation." Id.

In Allen, the Plaintiffs attempt to prove that "the numerous Comfort Inn signs, the Comfort Inn name and mark on items in the hotel, advertisements, and other uses of the Comfort Inn mark and name constitute a 'representation' by Choice that RGH and Gedda are its apparent agents." Id. However, the court finds that signs in the hotel that state that Choice did not run or operate the hotel were sufficient to defeat the plaintiff claims that the franchisee's use of the Comfort Inn name was not a sufficient "representation" such that Choice would be liable for the franchisee's negligence. See also Jonathan E. Schulz, You Can't Have Your Cake and Eat it Too: The Standards for Establishing Apparent Agency, 60 S.C. L. REV. 999 (2009).

In a 1982 decision, South Carolina Supreme Court explained, "[g]enerally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) (citing Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958)). In Fernander, where an employee was fatally killed while riding home from work with an assistant manager from Burger Chef, the South Carolina Supreme Court found "sufficient evidence in the record to create a jury issue as to whether any agency relationship existed between Burger Chef and A & H Foods." Id. at 144, 293 S.E.2d at 427. The evidence consisted of the assistant manager believing that he worked for Burger Chef, another employee believing that he worked for Burger Chef, and the signage and uniforms of the employees. Id. at 143, 293 S.E.2d at 426. "Obviously, all of this evidence infers A & H Foods, Inc. was an agent of the Burger Chef Corporation despite the provision in the franchise agreement requiring A & H Foods to remain an independent contractor." Id.

In Triplett, the court held that the franchisee was not an apparent agent of Starwood and Sheraton (the franchisors) and refused to hold the franchisor liable for the negligence of the franchisee. Triplett at 657. "After carefully reviewing the record, the court does not find that Plaintiffs have submitted evidence sufficient enough to create a genuine issue of material fact as to whether or not Starwood and Sheraton represented to them that Main Street and Soleil Group had the apparent authority to act as their agents. South Carolina precedent has refused to find that national advertising and brand name usage constitute a representation of apparent authority, and Starwood and Sheraton have provided evidence that several placards were displayed throughout the Hotel that disclosed the Hotel's independent ownership. Moreover, the "Terms and Conditions" of Starwood's website and the business cards used by the Hotel's employees expressly represented to Plaintiffs, as well as other potential guests, that certain hotels operating under the Starwood and Sheraton brand names are independently owned and that the Hotel in question was one of them." Id.

SOUTH DAKOTA

South Dakota case law does not directly address franchisor liability. A franchisor, however, could be held directly for its own negligence or vicariously liable for its franchisee's negligence.

I. Direct Franchisor Liability

There is no South Dakota directly addressing direct liability of franchisor. In order to be liable for its own negligence, a franchisor would be subject to the familiar duty-breach framework. Whether a franchisor owes a third-party a duty hinges on whether "a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff." *First American Bank & Trust v. Farmers State Bank of Canton*, 756 N.W.2d 19, 26 (S.D. 2008).

A duty can also be imposed by common-law or statute. *Id*. But, there is no specific common-law or statute in South Dakota pertaining to franchisor liability. Finally, a duty can be based on foreseeability. *Id*. "In order to determine whether an actor's liability is shifted to a third person, one must look to see if the intervening cause was foreseeable. The risk created by the original actor may include the intervention of the foreseeable negligence of others. If such intervening negligence was foreseeable, the original actor remains liable because '[f]oreseeable intervening forces are within the scope of the original risk ....' *Braun v. New Hope Tp.*, 646 N.W.2d 737, 741 (S.D. 2002)(additional citations omitted).

Accordingly, for a franchisor to be directly liable, it would have to have a relationship with the plaintiff, presumably independent of the franchisee's, or the risk would have to have been foreseeable.

II. Vicarious Liability

There is no South Dakota case law addressing the vicarious liability of a franchisor for a franchisee. Agency law applies. In South Dakota, the creation of an agency relationship as well as the relationship with and duties to third-persons is governed by statute. *See* SDCL §§ 59-2 *et seq*., 52-5 *et seq*., *and* 52-6 *et seq*.

The South Dakota Supreme Court applies a "two-part test when analyzing vicarious liability claims. The fact finder must first determine whether the act was wholly motivated by the agent's personal interests or whether the act had a dual purpose, that is to serve the master and to further personal interest." *Hass v. Wentzlaff*, 816 N.W.2d 96, 103 (S.D. 2012) (internal citations omitted). "If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability exists." *Id*. (analyzing an employee-employer relationship). *See also Iverson v. NPC Intern, Inc.*, 801 N.W.2d 275 (S.D. 2011)(analyzing vicarious liability of Pizza Hut in an employment context, not in a franchisor-franchisee context).

Additionally, "An agent's authority, like the agency relationship itself, can be either actual or ostensible." *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988).

a. Actual Authority

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess." SDCL § 59-3-2. "Generally, a principal may be held liable for the fraud and deceit of his agent acting within the scope of his actual or apparent authority, even though the principal was unaware of or received no benefit from the agent's conduct." *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988)(*citing* SDCL § 59-6-1)(other citations omitted).

b. Ostensible Authority

Ostensible or apparent authority is "such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess." *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988)(internal citations omitted). "Whether or not an agent is acting within the scope of his apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the nature of the principal's business. If the apparent authority can only be established through the acts, declarations and conduct of the agent and is not in some way traceable to the principal, no liability will be imposed on him." *Id*.(citations omitted). "Once ostensible agency is determined, the principal is bound by the acts of his agent to only those persons who have 'in good faith, and without negligence, incurred a liability or parted with value upon the faith thereof.'" *Id*.(*citing* SDCL § 59-6-3). "The third person dealing with the agent, therefore, must show not only damages resulting from his reliance on the appearance of authority, but also reasonable diligence and prudence in ascertaining the fact of the agency and the nature and extent of the agent's authority." *Id*.(citing 3 Am.Jur.2d *Agency* §§ 80, 83 at 587,592-93 (1986)).

TEXAS

Texas law does not clearly distinguish between direct and vicarious liability of a franchisor. To the extent claims arise out of a franchisor's control over a franchisee, such liability is typically addressed as vicarious liability.

Direct Liability

Although Texas law does not expressly preclude direct liability of a franchisor, Texas courts appear unwilling to find liability absent some additional connection outside the franchise relationship. For example, courts have been unwilling to hold franchisors liable under the Americans with Disabilities Act, finding that franchisors do not own, lease or operate a place of public accommodation. *Neff v. American Dairy Queen Corp*., 58 F.3d 1063, 1064 (5th Cir. Tex. 1995); *Alonzo v. Mr. Gatti's Pizza*, 933 S.W.2d 294, 295 (Tex. App.—Corpus Christi 1996, no writ).

In addition, a Texas appeals court rejected an appellant's attempt to hold a franchisor directly, not vicariously, liable based on the idea that the franchisor *could* control the activity of the franchisee through the franchise agreement. *Jackson v. Coldspring Terrace Prop. Owners Ass'n*, 939 S.W.2d 762 (Tex. App.—Houston [14th Dist.] 1997, writ ref'd). In *Jackson*, the appellant was rendered a quadriplegic when he dove into a pool constructed by a "licensee/franchisee" of the appellee pool franchisor. *Id.* at 763. Under their agreement, the licensee/franchisee had the right to sell appellee's pools and equipment and to display the appellee's name and logo on its marketing materials. *Id.* In addition, the appellee provided the licensee/franchisee with equipment to build and maintain pools at a discounted rate, picture books, brochures, technical advice and advertisements in local newspapers with franchisor's name stating they'd been in business since 1954 and sold more pools than anyone. *Id.* All of the documentation seen by the customer would bear the appellee franchisor's name and logo and the constructed pool would also bear the appellee franchisor's logo. *Id.* at 763-64. Appellee franchisor did not participate in the actual construction of pools, and received a $100 royalty fee and $50 payment on a note for each pool constructed. *Id.* at 763.

The appeals court rejected direct liability and affirmed summary judgment for the appellee franchisor, finding that it presented sufficient summary judgment evidence that it did not participate in the design or construction of pools, but rather, only provided its name and marketing assistance. *Id.* 768. The court further found that liability could only result from the appellee franchisor holding itself out as the manufacturer, in which case the statute of repose would bar any potential claims. *Id.* at 768-69.

Vicarious Liability

Under Texas law, a franchisor's liability for the acts or omissions of a franchisee depends on whether the franchisor maintained control over the activity about which negligence is alleged. *Fitz v. Days Inns Worldwide, Inc*., 147 S.W.3d 467, 471 (Tex. App.—San Antonio 2004, pet denied); *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917, 920 (Tex. App.—Corpus Christi 2003, no pet.); *Risner v. McDonald's Corp*., 18 S.W.3d 903, 906 (Tex. App.—Beaumont 2000, pet. denied); *Smith v. Foodmaker, Inc*., 928 S.W.2d 683, 687 (Tex. App.—Fort Worth 1996, no writ). Control can be established by evidence of a contractual agreement that explicitly assigns a right to control or evidence that the franchisor actually exercised control over the activities at issue. *Fitz v. Days Inns*, 147 S.W.3d at 471; *see Doubletree Hotels Corp. v. Person*, 122 S.W.3d at 920-21 (reversing default judgment because, although the franchise agreement allowed the franchisor to inspect the hotel to ensure standards were met, it did not grant control over day-to-day operations, safety or security, and there was no evidence of such control).

At least one Texas appeals court has also examined franchisor liability for a franchisee's acts or omissions based on actual or apparent authority under a general agency theory. In *Nears v. Holiday Hospitality Franchising*, the appellant failed to preserve the issue of franchisor/franchisee liability for appeal, but did sufficiently present the general issue of actual or apparent authority of an agent. *Nears v. Holiday Hospitality Franchising, Inc.*, 295 S.W.3d 787, 792-793 (Tex. App.—Texarkana 2009, no pet.)

Actual authority arises when the principal intentionally confers authority to the agent, or intentionally or negligently allows the agent to believe he or she possesses the authority. *Reliant Energy Servs. v. Cotton Valley Compression, LLC*, 336 S.W.3d 764, 783 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Nears*, 295 S.W.3d at 795. Apparent authority arises when the principal knowingly permits an agent to hold himself out as having authority or when the principal's actions "lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority she purports to exercise." *Nears*, 295 S.W.3d at 793 (citing *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998)). In determining whether apparent authority exists, only the principal's conduct is relevant. *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007); *Nears*, 295 S.W.3d at 793.

In *Nears*, the appellant alleged that her former supervisor was an agent of the franchisor and that the franchisor was vicariously liable for the supervisor's intentional infliction of emotional distress and for breaching its alleged duty to supervise him. *Nears*, 295 S.W.3d at 790. The appeals court affirmed summary judgment for the franchisor. Actual and apparent authority under a general agency theory were the only issues preserved for appeal, and the court found there were no genuine issues of material fact with respect to thereto. *Id.* at 792-93.

The franchisor's hiring of a quality operations manager to evaluate the hotel and the franchisor's payment directly to appellant for participation in a marketing program were not sufficient to establish apparent authority. *Id.* at 794-95. Additionally, the court found that the franchisor's standards manual, required manager certification program, and quarterly property inspections, as well as the fact that guest comment cards were sent directly to the franchisor, were not geared toward the treatment of hotel employees and did not evidence actual authority. *Id.* at 795-96.

Finally, although *Nears* appears to be somewhat unique in its analysis of franchisor liability under a general agency theory of actual or apparent authority, it is strongly advised that franchisors make every effort to ensure customers and employees are aware the franchisee is in control of the premises and day-to-day operations of the franchise. Examples of such efforts may include requiring franchisees to prominently display a sign announcing the location is owned and operated by the franchisee, requiring that any written customer or employee agreements acknowledge the franchise and expressly state that such agreement is with the franchisee, and expressly stating in the franchise agreement and operations manual that the franchisee is responsible for day-to-day operations and individual transactions with the consumer.

Joint Enterprise

Texas courts have repeatedly expressed an unwillingness to apply liability to a franchisor based on a joint enterprise or joint venture theory. The essential elements of a joint enterprise include: (1) an express or implied agreement among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest in that purpose, and (4) an equal voice in the direction of the enterprise, which gives an equal right of control. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 526 (Tex. 2002); *Harris v. Houston Livestock Show & Rodeo, Inc.*, 365 S.W.3d 28, 34 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *KUV Partners, LLC v. Fares*, 2011 Tex. App. LEXIS 2005 at *36 (Tex. App.—Fort Worth Mar. 17, 2011, pet. denied).

As the Texas Supreme Court has observed, "[p]arties to an agreement may have a common business interest, a common pecuniary interest, or both, despite lacking a community of pecuniary interest in the purpose of their agreement." *St. Joseph Hosp.*, 94 S.W.3d at 527. In the context of franchises, a franchisor and franchisee share a common business and pecuniary interest in the marketing or sales of the franchised product or service. *Id.* However, the franchisee benefits from profits from retail sales and from the increased market value of his franchise resulting from its profitability, while the franchisor benefits by receiving royalty payments based on those sales and by the enhanced value of its franchise opportunities resulting from the success of existing franchises. *Id.* Because their interests are not shared without special or distinguishing characteristics, franchisors and franchisees usually do not have a "community of pecuniary interest." *Id.* at 528.

UTAH

The law of franchisor liability is not well-developed in Utah. However, the few cases that have discussed it indicate that the scope of franchisor liability will be determined through the principal-agent framework. *Glover By & Through Dyson v. Boy Scouts of Am.*, 923 P.2d 1383, 1386 (Utah 1996).

I. Direct Liability

Although Utah courts have not addressed direct franchisor liability, they have addressed when a principal can be directly liable for the acts of its agent. *Mallory v. Brigham Young University*, 2012 UT App 242, ¶ 29, 285 P.3d 1230 (citing Restatement (Third) of Agency § 7.03 (2006)). That authority suggests that a franchisor could incur direct liability (a) if it directs a franchisee to commit tortious conduct or if it ratifies the franchisee's tortious conduct, (b) negligently selects, supervises, or otherwise controls the franchisee, or (c) delegates performance of a duty to use care to protect others and the franchisee fails to perform that duty. *See id.*; Restatement (Third) of Agency § 7.03.

II. Vicarious Liability

Vicarious liability for a franchisor may accrue for actions within the franchisee's actual or apparent scope of authority. *Hale v. Big H Const., Inc.*, 2012 UT App 283, ¶ 57. To determine whether a franchisee has actual authority, courts determine whether the franchisor had a right to control the franchisee and whether the franchisee was acting within its scope of authority. *Boy Scouts of Am.*, 923 P.2d at 1386. Several general factors courts consider in determining whether control exists are (1) contracts or agreements evidencing a right to control; (2) the right to hire and fire; (3) the method of payment; and (4) the furnishing of equipment. *Id.* at 1385-86. Moreover, a franchisee's scope of authority may "refer[] to those acts which are so closely connected with what the [franchisee] is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of" the franchise agreement. *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 26, 61 P.3d 1009.

The Utah Supreme Court has applied the control analysis to determine franchisor liability. *Foster v. Steed*, 432 P.2d 60, 61 (Utah 1967). The court determined that the franchisor, Texaco, did not exert control over the franchisee service station because (1) the relationship was governed by a year-to-year lease agreement; (2) the franchisor was obligated to deliver products to the station; (3) the station paid its own operating expenses, paid cash for the franchisor's products, could buy from sources other than the franchisor, and could set its own price; (4) the station retained all profits and losses; and (v) the station could hire and fire its employees and set its own hours. *Id.* at 63; *Boy Scouts*, 923 P.2d at 1386. Additionally, Utah courts have also indicated that simply because the franchisor provides training to the franchisee or the franchisee uses the uniforms, logos, or signs of the franchisor that these factors are insufficient to establish control. *Boy Scouts*, 923 P.2d at 1388.

In contrast, to determine whether a franchisee had apparent authority, courts may determine whether the "conduct of the principal causes a third party to reasonably believe that someone has authority to act on the principal's behalf, and the third party relies on this appearance of authority and will suffer loss if an agency relationship is not found." *Hales*, 2012 UT App 283, ¶ 64. This analysis "focuses on the acts of the principal from a third party's perspective." *Id.*

VERMONT

Although Vermont generally recognizes the concept of vicarious liability, either under the doctrine of respondeat superior or agency theories of actual or apparent authority, there is no body of statutory or decisional law applying those theories to the franchisor/franchisee relationship and the franchisor's liability for injuries to third parties caused by the acts of the franchisee.

Only one case of record has addressed the issue, in the context of liability under Vermont's dram shop act. *Carrick v. Franchise Associates, Inc.*, 164 Vt. 418, 671 A.2d 1243 (1995). In *Carrick*, plaintiff's decedent was killed by a driver who had been served eight mixed drinks at the lounge in a Howard Johnson's hotel restaurant. The question for decision by the court was whether the franchisors had control over the service of alcoholic beverages at the lounge, the predicate for liability under the dram shop act.

Plaintiff relied on the terms of the franchise agreement, which gave the franchisors the power to "determine, prescribe and approve standards of restaurant services and of the quality for all…beverages…served or dispensed on or from the restaurant, and standards of service in connection with their sale." The franchisee was required to conform to those standards, including standards set forth in a manual. The manual was never presented to the court in the summary judgment papers, nor was any evidence offered that the franchisors actually prescribed any standards of service or, if they had, that those standards including the training of bartenders.

On that evidence, the Supreme Court concluded that the franchisors could not be held liable for furnishing alcohol under the dram shop act. One might infer from the decision that if sufficient evidence had been presented as to the imposition of standards and the training of bartenders, the outcome would have been different. However, the only certain lesson from this decision is that the mere existence in a franchise agreement of provisions giving the franchisor the power to control the conduct of its franchisee is not sufficient, in and of itself, to impose liability on the franchisor under the dram shop act.

VIRGINIA

Under Virginia law, franchisor liability is based on traditional notions of direct and vicarious liability. Although Virginia has enacted legislation directly related to disputes between franchisors and franchisees, *see* VA. CODE ANN. §§ 13.1-557 *et seq*., tort and agency law govern franchisor liability to third parties.

Direct Liability

A franchisor may be held directly liable for its own negligence if a plaintiff can prove the existence of a legal duty, a breach of that duty, and that such breach was the cause of the injury suffered. *See e.g., AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 620 n.3 (2012). Additionally, a franchisor may be held liable under an implied warranty theory where the franchisor distributes unreasonably dangerous products. *Harris v. Aluminum Co. of Am.*, 550 F. Supp. 1024, 1028 (W.D. Va. 1982).

Vicarious Liability

In Virginia, a franchisor generally will not be vicariously liable for the franchisee's torts. An agency relationship is a necessary predicate to impute liability to a franchisor. *See e.g., JHI Tax, Inc. v. H & R Block Eastern Tax Services, Inc.*, 128 F. Supp. 2d 926, 950 (E.D. Va. 2001); *United Bhd. of Carpenters and Joiners of Am., AFL-CIO v. Humphreys*, 203 Va. 781, 786-87 (1962) (citing *Wells v. Whitaker*, 207 Va. 616, 624 (1966) (quotations omitted)). Because a franchise agreement does not necessarily create such a relationship, franchisors are not, by virtue of being a franchisor alone, liable for the franchisee's torts. *See Murphy v. Holiday Inns, Inc.*, 216 Va. 490 (1975).

However, where a franchise agreement provides a franchisor with "control or [the] right to control the methods or details of [the franchisee's] work," the agreement may create an agency relationship sufficient to invoke vicarious liability. *Id.* at 494 ("If a franchise contract so regulates the activities of the franchisee as to vest the franchisor within the definition of agency, the agency relationship arises even though the parties expressly deny it." (quotations omitted)). It is irrelevant whether or not this right to control is actually exercised. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81 (1997) (citing *Smith v. Grenadier*, 203 Va. 740, 746 (1962)).

The extent of the franchisor's control over the franchisee's business depends on whether the franchisor may control business expenditures, fix customer rates, demand a share of the profits, hire and fire employees, determine employee wages, set employee standards, and supervise and discipline employees. *Murphy* at 878. Where a franchise agreement indicates no right to control any of these matters, the franchisor may prevail on summary judgment. *See id.* However, where a plaintiff introduces operating manuals and other materials evidencing a right to control the franchisee, summary judgment is not appropriate. *See Hayward v. Holiday Inns, Inc.*, 459 F. Supp. 634, 635-36 (E.D. Va. 1978). Furthermore, vicarious liability may arise from the agent's exercise of either his actual or apparent authority. *Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 834-35 (1943) (citing Story on Agency, § 452 (9th ed.) (explaining that a principal may be liable even for unauthorized acts because "the principal holds out his agent, as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.")

In addition to an agency relationship, the agent must have acted within the scope and course of his employment when the act or omission occurred for vicarious liability to apply. *Butterworth v. Integrated Res. Equity Corp.*, 680 F. Supp. 784, 789 (E.D. Va. 1988); *Humphreys* at 786. An act is within the scope of an agent's employment if:

> (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Humphreys at 787 (citing *Davis v. Merrill*, 133 Va. 69, 77 (1922) (emphasis omitted).

Once the agency relationship has been established, the principal bears the burden of proving that the agent acted outside the scope of his employment when he committed the offending act. *Id.* (citing *Alvey v. Butchkavitz*, 196 Va. 447, 453 (1954); *Slaughter v. Valleydale Packers*, 198 Va. 339, 343 (1956)).

WASHINGTON

Under Washington law, an agency relationship between the franchisor and franchisee may be established through actual or apparent agency.

Actual Agency

In *D.L.S. v. Maybin*, the Washington Court of Appeals found that no actual agency relationship between the franchisor and franchisee exists when the franchise agreement provides that the franchisee is not an agent of the corporation (McDonalds) and the corporation has no control over the franchisee's daily operations. 130 Wn. App. 94, 98 (2005); *see also, Folsom v. Burger King*, 135 Wn.2d 658, 673 (1998) (absent power to control day-to-day operations, franchisor is not liable to employee of franchisee).

Apparent Agency

The more likely scenario is whether the franchisee is the franchisor's ostensible agent. "Apparent agency occurs, and vicarious liability for the principal follows, where a principal makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal. *D.L.S.,* 130 Wn. App. at 98 (citing Restatement (Second) of Agency §267 (1957)). This doctrine is intended to protect third parties who justifiably believe that another is the agent of a principal. *Id*. Under this doctrine, three basic requirements must be met: (1) the actions of the putative principal must lead a reasonable person to conclude the actors are employees or agents; (2) the plaintiff must believe they are agents; and (3) the plaintiff must, as a result, rely upon their skill or care to their detriment. *Id*.; *see also King v. Riveland*, 125 Wn.2d 500 (1994).

Apparent authority can only be inferred from the acts of the principal, which causes the third person to actually or subjectively believe that the agent has authority to act for the principal. *Id*. at 101. In *D.L.S*., the plaintiff's father attempted to show that McDonalds Corporation was the principal by arguing that he only allowed his daughter to work at McDonald's because "a McDonald's is a McDonald's and would offer a safe, wholesome environment for teenage workers." *Id*. The parents in *D.L.S*. denied any knowledge that the McDonalds at issue was a franchise, or that most McDonald's are franchises. *Id*. at 102. They also argued that “no person in their right mind would believe that McDonald’s did not control what happened at the individual restaurants.” *Id*.

The *D.L.S.* Court was not persuaded, and stated that “using young people in advertisements, serving Happy Meals, sponsoring the Ronald McDonald house, and supporting Olympic athletes are not enough to create an apparent employment relationship between McDonald’s Corporation and its franchisee’ employees.” *Id*. at 103. More is required of the principal before its acts can create liability under the apparent authority doctrine. *Id*. Because the parents in *D.L.S.* could point to no representations or acts by McDonald’s upon which they relied in believing their daughter would be working for the Corporation, the Court found no agency relationship existed.

Conclusion
Although Washington case law discussing a franchisor’s liability in an agency relationship is sparse, it does make clear that the burden of proving the franchisor has *any* liability is an arduous task.

WEST VIRGINIA

In West Virginia, franchisors have been sued for damages allegedly caused by franchisees or their employees. *See, e.g., Bartles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996) (motorist injured in an automobile accident with a pizza delivery driver brought an action against the delivery driver, the pizza franchisee and the franchisor); *Stump v. Ashland, Inc.,* 201 W. Va. 541, 499 S.E.2d 41 (1997) (the family of people killed when a tanker truck collided with a home causing a fatal fire sued the owners of the tanker truck and the franchisor). However, in neither of those cases did the court discuss the circumstances that would support a determination that the franchisor may be liable for the actions of the franchisee or its employees.

Right to Control
Whether the franchisor will be found liable is largely dependent upon the franchisor’s right to control the operations of the franchisee business. *Sipple v. Starr,* 205 W.Va. 717, 520 S.E.2d 884 (1999). In *Sipple,* a customer was shot and killed at a gas station/convenience store. The decedent’s mother brought a wrongful death action against the store owner and the gasoline supplier. The West Virginia Supreme Court considered three separate theories of liability before finding that there was a question of fact regarding the degree of control the distributor had over the store owner.

Respondeat Superior
If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor is not the use of such right, but the existence thereof in the person for whom the work is being done. *Id.*, 205 W.Va. at 721, 520 S.E.2d at 888; Syl. pt. 2, *Spencer v. Travelers Insurance Company,* 148 W. Va. 111, 113 S.E.2d 735 (1963).

In *Sipple,* the relationship between the store owner and the gasoline distributor was governed by contract, pursuant to which the distributor asserted control over the hours of operation, the cleanliness of the bathrooms, the appearance of the store and the signs used to sell gasoline. The contract also provided that the distributor retained ownership of the gasoline until sold to customers, set the price of the gasoline, and required the store owner to pay workers’ compensation and unemployment insurance for his employees. The distributor also reserved a right of first refusal to purchase the store if the owner ever decided to sell it, and required the owner to purchase liability insurance, forbade illegal activities on the premises, demanded compliance with local laws, required courteous personnel and expeditious responses to customer complaints.

Beyond the express terms of the contract, there was evidence that the distributor retained significant control over the store’s daily operations. A representative of the distributor at various times ordered the store owner to clean the exterior of the store “right away,” to remove ceramic animals from the front of the store, to not argue with his girlfriend in the store, to obtain a liquor license to increase sales of gasoline, to ring up food items as gasoline on credit card purchases, and to fire an employee of the store because she had “bad teeth.” *Sipple*, 205 W.Va. at 723, 520 S.E.2d at 890.

Upon review of this evidence, the court held that the distributor had not met its burden of proving that the store owner was an independent contractor. “Where a question as to the existence of an independent contractor relationship exists and a party has presented substantial evidence indicating a principal’s control over the work performed, the determination of the existence of such a relationship is for the jury.” *Id.*

On the other hand, a franchisor can retain some degree of control without placing it in a position of being liable for the actions of the franchisee or its employees. The franchisor can retain broad general powers of supervision and control as to the result of the work so as to insure satisfactory performance of the contract – including the right to inspect, stop the work, make suggestions or recommendations as to the details of the work or prescribe alterations or deviations in the work – without changing the relationship from that of owner and independent contractor. Syl. pt. 4, *Shaffer v. Acme Limestone, Co.,* 206 W. Va. 333, 341, 524 S.E.2d 688, 696 (1999).

Negligent Hiring

Another theory of liability for the franchisor considered by the court in *Sipple* was whether the distributor was negligent in hiring the store owner to distribute its gasoline products. The West Virginia Supreme Court first recognized a cause of action for negligent hiring and retention in *Thomson v. McGinnis,* 195 W. Va. 465, 465 S.E.2d 922 (1995). In *Thomson,* the court found that the principal, a real estate broker who volunteered to find a contractor for a furnace inspection, could be found liable for her negligent hiring of a contractor who, as it turned out, was not qualified to inspect furnaces. The court held that a principal may be held liable to a third party for civil damages if the principal is negligent in the selection and retention of a contractor, and if such negligence proximately causes harm to the third party.

In *Sipple,* there was evidence that the distributor knew that the store owner kept a gun on the premises, that he had engaged in a fire fight outside the store, and had toyed with the gun in the presence of customers before. The court held that this evidence was sufficient to create a genuine issue of material fact as to whether the distributor was on notice of the deficient performance of the store owner, and yet failed to prevent the continuance of such negligence.

Joint Venture

The *Sipple* court also considered whether the distributor could be held liable as part of a joint venture with the store owner. The court noted that a joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge. A joint venture arises out of a contractual relationship between the parties, which may be oral or written, express or implied. *Sipple*, 205 W.Va. at 725, 520 S.E.2d at 892; Syl. pt. 2, *Price v. Halstead,* 177 W. Va. 592, 355 S.E.2d 380 (1987). In *Sipple,* there was evidence that the distributor provided property in the form of signs, gasoline pumps and associated equipment, as well as its skill and knowledge in the sale of gasoline. The store owner provided the location, the store and the personnel necessary to make gasoline sales to the public. The court held that there was sufficient evidence of a joint venture to defeat summary judgment and put the issue to the jury.

WISCONSIN

In Wisconsin, Ch. 553 of the Wisconsin statutes governs franchisor liability. Under the Wisconsin Franchise Investment Law (“WFIL"), a license, a dealership agreement, or any business contract can be deemed a franchise if: 1) the grantee is given the right to offer, sell, or distribute goods or services offered by the grantor; 2) the business is associated with a trademark, service mark, or advertising; and 3) the grantee is required to pay a fee. *See* Wis. Stat §553.01. Relevant statutes governing civil liability are Wis. Stat. §§ 553.27(4), 553.41, 553.51 and 553.76.

Wis. Stat. §553.51. Civil liability; sale in violation (1) Any person who sells a franchise in violation of s. 553.27(4), if the violation was material in the franchisee's or subfranchisor's decision to purchase the franchise, shall be liable to the franchisee or subfranchisor, who may bring an action for rescission.

(2) Any person who violates s. 553.41(3), (4) or (5) is liable for damages to any person who does not know or have cause to believe that the statement or representation was false or misleading and who, while relying upon the statement or representation, purchased a franchise, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, or if the defendant had exercised reasonable care would not have known, of the untruth or omission.

(3) Every person who directly or indirectly controls a person liable under sub. (1) or (2), every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as such person, unless the person who would otherwise be liable hereunder had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

(4) No action may be maintained against any person to enforce any liability under this section unless it is brought before the expiration of 3 years after the act or transaction constituting the violation upon which the liability is based or 90 days after delivery to the franchisee of a written notice from or on behalf of that person that discloses any violation of this chapter and that is filed with the division, whichever first expires.
(5) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity.

Even though “fraud” and “deceit” are not limited to common-law fraud and deceit under Wisconsin Franchise Investment Law (WFIL) and the element of detrimental reliance is not necessarily required, enforcement provisions of WFIL essentially write the element of detrimental reliance into statute by precluding liability if defendant proves that plaintiff knew the facts concerning the untruth or omission. *Simos v. Embassy Suites, Inc.*, 983 F.2d 1404, 61 USLW 2452 (7th Cir. 1993).

Direct Franchisor Liability
Direct liability cases look to the franchisor's own fault in bringing about plaintiff's harm. *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶21, 273 Wis. 2d 106, 119, 682 N.W.2d 328, 334 (citing *Chelkova v. Southland Corp.,* 331 Ill.App.3d 716, 265 Ill.Dec. 141, 771 N.E.2d 1100 (2002); *Helmchen v. White Hen Pantry, Inc.,* 685 N.E.2d 180 (Ind.Ct.App.1997); *Hoffnagle v. McDonald's Corp.,* 522 N.W.2d 808 (Iowa 1994); *Folsom v. Burger King,* 135 Wash.2d 658, 958 P.2d 301 (1998)).

Vicarious Liability
The Wisconsin Supreme Court has found that vicarious liability is a form of strict liability without fault. A franchisor may be held liable for a servant's torts regardless of whether the franchisor's own conduct is tortious. A plaintiff who suffers a single injury may plead both vicarious and direct liability claims against a party who is asserted to be a franchisor but vicarious liability is a separate and distinct theory of liability. Vicarious liability is imposed upon an innocent party for the torts of another because the nature of the agency relationship-specifically the element of control or right of control-justifies it. *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶21 273 Wis. 2d 106, 118-119, 682 N.W.2d 328, 334.

In order to impose vicarious liability on a franchisor, the principal must have control or the right to control the physical conduct of the agent such that a master/servant relationship can be said to exist. *Id*. ¶4. A servant is someone who is employed to do services for another in his affairs and who is subject to another's control or right to control his physical conduct in the performance of his services. *Id.* at ¶19; (citing *Heims v. Hanke*, 5 Wis.2d 465, 468, 93 N.W.2d 455 (1958). A servant does not need to be under formal contract or be paid to perform work for a master. *Id.* at ¶22; *See* Restatement (Second) Agency, § 225 (1958); Wis JI-Civil 4025. For example, a child operating a lawn mower at his father's express direction but out of his immediate physical presence would be considered a servant. *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 331 N.W.2d 585 (1983).

Although the courts have used the "control or right to control" test when determining franchisor liability, the test is not as easily transferrable because the control is exercised through contractual quality and operational requirements as opposed to daily supervision, routine and management. *Id.* at ¶32-35. The Wisconsin Supreme Court has determined that a franchisor is only liable for a franchisee's tort if the franchisor controls or has a right to control the daily operation of the specific aspect of the franchisee's business that is alleged to cause the harm. *Id.* at ¶43.

WYOMING

INTRODUCTION

In Wyoming, there is no special theory of franchisor liability. Additionally, the Wyoming Supreme Court has never addressed the issue of direct franchisor liability. The following, however, may provide guidance when broaching the issue.

I. DIRECT FRANCHISOR LIABILITY

To sustain a negligence action in Wyoming the plaintiff must prove: 1) the defendant owed a duty of care to protect the plaintiff from injury or loss; 2) the defendant breached this duty; 3) the plaintiff suffered actual injury or loss; and 4) the defendant's breach of duty proximately caused the plaintiff's injury or loss. Sorensen v. State Farm Auto. Ins. Co., 234 P.3d 1233, 1236 (Wyo. 2010). Absent a duty, there is no actionable negligence claim. Id. Whether this duty exists and the scope of this duty is a question of law for the court. Id.

To hold a franchisor liable for injuries, the franchisor must assume some independent legal duty by retaining or exercising control over some aspect of the franchise's operation that resulted in the plaintiff's injuries. Loredo v. Solvay Am. Inc., 212 P.3d 614, 619-20 (Wyo. 2009) (applying this test to determine a parent corporation's liability to employee of subsidiary corporation); see also Jones v. Chevron U.S.A., Inc., 718 P.2d 890, 895 (Wyo. 1986) (invoking this test when considering owner's liability to employee of a contractor). Although title ownership of the premises is indicative of the right to possession and control, it is not the determinative factor in ascertaining this right. Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 410 (Wyo. 1997). Rather, it is the actual exercise of such right that is relevant when determining whether the franchisor is liable for injury. Id.

A. PREMISES LIABILITY

In premises liability cases, the issue is whether the franchisor exercised control over the premises where the injury occurred. Id. In making this determination, the Court will look to a number of different factors. These factors may include whether the franchisor: paid bills such as rent, assumed responsibility for the property's condition, or managed personnel, policies, and security. Id.

II. AGENCY THEORY

Franchisor liability may also arise from the actions of the franchise or franchise employee under agency theory. In Wyoming, the test for establishing a principal/agent relationship is the principal's right to control the agent or employee. Krier, 943 P.2d at 411. The Court has stated:

Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent. There is no presumption that agency exists. In Wyoming, the overriding element in determining whether one is an employee of an independent contractor is dependent on whether the employer has a right to control the details of work whereby liability is sought to be established.

Id. (citations omitted). Whether a franchisor has control over the franchise or an employee will depend on a number of factors. Wyo. State Bd. of Examiners of Optometry v. Pearle Vision Ctr., 767 P.2d 969, 976-79 (Wyo. 1989). These factors include whether the franchisor: set fees, governed schedules, received payments for services rendered, required a certain type of clientele, or controlled the manner in which an employee performs his functions. Id. at 978. Although not determinative, the Court may also look to the franchisor's advertisements. Id. at 979.

A. IMPOSING LIABILITY ON THE PRINCIPAL

An agent may possess actual or apparent authority and either may serve to bind the principal. Cargill v. Mountain Cement Co., 891 P.2d 57, 62 (Wyo. 1995). Actual authority may be expressed or implied. An agent possesses actual authority when the principal, orally or in writing, specifically grants the agent the power to bind the principal. Id. Conversely, implied authority is established by the course of dealings between the parties and the circumstances surrounding the case. Id.

Apparent authority is established when a principal holds the agent out as possessing authority to bind the principal or when the principal allows the agent to claim such authority. Id. Under this theory, a third party must establish: personal knowledge of the apparent authority, reliance on the apparent authority, the principal "was responsible for the appearance of authority in the agent to conduct the transaction in question," and the third party reasonably relied on the representations of the agent. Id.

B. THE EFFECT OF FRANCHISE AGREEMENTS ON FRANCHISOR LIABILITY

Generally, a franchise agreement will be considered in addition to all other pertinent facts and circumstances. The existence of a franchise agreement alone is not enough to establish control. Wyo. State Bd. of Examiners of Optometry, 767 P.2d at 979. Similarly, a franchise agreement will not provide a franchisor unlimited protection from liability. Kure v. Chevrolet Motor Division, 581 P.2d 603, 609 (Wyo. 1978).

In Kure, plaintiff sued franchisor for breach of warranty as a result of franchise's warranty repairs. Id. A franchise agreement governed the relationship between Chevrolet Motor Division and its franchise dealers. Id. This agreement provided: "the dealer is not made the agent [or] legal representative of Chevrolet." Id. Chevrolet claimed this language protected it from liability for its dealers' actions. The Court rejected this argument, holding: "[the] agreement is between dealer and Chevrolet, not between Chevrolet and the buyer." Id. In this case, Chevrolet provided buyer with a warranty specifically instructing him to deliver his vehicle to any of Chevrolet's dealers for performance of warranty work. Id. As a result, Chevrolet is liable the actions of its dealers, despite the language of the franchise agreement. Id.

United States Virgin Islands

No U.S. Virgin Islands court has ruled on issues of franchisor liability and no Virgin Islands statute addresses the issue. Virgin Islands law provides, however, that in the absence of a statute addressing an issue, the courts should look to the Restatements of the Law of the American Law Institute and apply the rule set forth in the Restatements; or, if the Restatements do not provide an answer, courts are to apply the majority rule as applied across the United States.

We believe that when confronted with a question of franchisor liability, our courts will look to the Restatement of Agency to determine whether an agency relationship exists. If an agency relationship exists, then the franchisor would be liable for the negligence of the franchisee in the same manner, and under the same conditions, that any other principal could be liable for the acts of an agent. The same rule should apply with respect to vicarious liability – a franchisor should only be vicariously liable for the acts of the franchisee if an agency relationship exists and the conditions for imputing liability to the principal for the acts of the agent exist.

Canada

ALBERTA

Alberta does not have a robust line of case law regarding “franchisor liability”. In fact, the term “franchisor liability” has not appeared in a reported Alberta case to date.

Depending on the circumstances, it is not unthinkable that a plaintiff could establish that a franchisor’s negligence led to his or her losses, injuries or damages. If a franchisor owed a duty of care to the plaintiff, the defendant failed to perform that duty and the defendant’s breach was a proximate cause of the plaintiff’s injury, then the franchisor would be liable to the plaintiff in negligence.

Further, depending on the circumstances, a plaintiff may be able to establish the liability of a franchisor under the doctrine of vicarious liability – that is, the franchisor, as “principal”, is liable for the wrongful actions of the franchisee, its “agent”.

Alberta cases to date have generally only involved franchisors in contract disputes with franchisees. That said, there have been a few cases involving franchisors in other capacities.

Alberta courts have found franchisors liable for inducing breach of contract: Parks West Mall Ltd. v. Jennett (1995), 36 Alta. L.R. (3d) 44 (C.A.), leave to appeal ref’d, [1996] 193 A.R. 179 (note) (S.C.C.). This case involved a landlord mall that sued a tenant for breach of contract while also suing the tenant’s franchisor for inducing breach of contract. The trial judge found a breach of offer to lease by the tenants, for which they were liable to the landlord. The trial judge found the franchisor liable for inducing the tenant’s breach, with the requisite components of the tort of inducing breach of contract (1) an enforceable contract, (2) knowledge of the contract, (3) the defendant must act intentionally in inducing a breach, and (4) damage, all present. The trial judge also found the franchisor liable to the tenant franchisee in negligence for advising him on the actions to take in relation to the lease. The trial judge ordered the franchisor to pay damages to the landlord. The Court of Appeal upheld the trial judge’s findings, while varying the quantum of damages.

In only one reported Alberta case has a plaintiff attempted to name a franchisor in a personal injury action: Osepchuk v. Tim Hortons 1645, 2003 ABQB 364 (Q.B.). This case involved a trip and fall outside of a Tim Horton’s restaurant. The plaintiff named numerous defendants including the following:

- Wendy's Restaurant of Canada Inc. and Barhav Developments Limited – These were the legal owners of the lands and building in which the franchises of Wendy's and Tim Horton’s operated;
- Contiki Rose Inc. – This was the franchisee of the Tim Horton’s restaurant; and
- TDL Group Limited – This was the franchisor of the Tim Horton’s restaurant. In this situation the franchisor leased directly from Wendy's Restaurant of Canada Inc. and Barhav Developments Limited.

Unfortunately, the Court did not make any specific findings on the liability of the franchisor, as it found that the defendants as a group were not negligent. The Court noted that despite the plaintiff’s claim that a tripping hazard existed on the sidewalk outside of the restaurant, there was, in fact, no tripping hazard and no liability on the part of the defendants.

The concept of “franchisor liability” is undeveloped in Alberta law. We believe, however, that the creativity of the plaintiffs’ bar and the perceived deep pockets of franchisors certainly makes this an area of the law to be cognizant of in the future.

ONTARIO

As the largest provincial economy in the country, Ontario also experiences the highest rate of franchising among the provinces. Accordingly, it is no surprise that franchisor liability issues are becoming more prevalent and indeed, increasingly litigated.

The primary statute dealing with franchising in Ontario is the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, C. 3. Passed by the Ontario legislature on May 17, 2000, this Act contains provisions relating to pre-contractual disclosure, the duty of fair dealing, the right of franchisees to associate and the non-enforcement of waivers and releases under the Act. While this legislation is of minimal importance when discussing the issue of franchisor liability, it is important to note that it is the starting point of all contractual relationships between a franchisor and franchisee.

Franchisor-Franchisee Relationship

In almost all franchise cases, the court must engage in a determination of whether an individual is an employee, agent or independent contractor of the franchisor. The courts must first assess the terms of the contractual agreement between the parties and then consider the facts of each particular situation.

Early attempts to characterize the nature of the relationship between a franchisor and franchisee included discussions of fiduciary duty. In the seminal case of Jirna Ltd. v. Mister Donut of Canada Ltd.,[1975] 1 S.C.R. 2, the Supreme Court of Canada rejected the existence of a fiduciary relationship between a franchisor and franchisee and placed high importance on the terms of the agreement made between the parties. In Jirna, the court gave the independent contractor provision in the franchise agreement full effect and held that the parties' intentions when contracting were paramount.

Subsequent case law supports the notion that, in most cases, the franchisor-franchisee relationship is indeed one of independent contractors (even in cases where the franchise agreement is silent on the issue).

I. Direct Franchisor Liability

In general, a franchisor is not said to owe a duty to either its franchisee or customers of the franchisee. Accordingly, there are few instances where the courts will impose liability directly on a franchisor. This is, of course, notwithstanding the direct liability of a franchisor who fails to abide by the statutory obligations prescribed by the Arthur Wishart Act.

In all negligence actions, in order to impose liability directly on an individual, the plaintiff must demonstrate that the individual owed him or her, a duty of care. The following are a few situations where Canadian courts have held franchisors directly liable for a plaintiff's damages.

Liability for Misrepresentation

Liability for misrepresentation of a franchisor arises primarily with respect to the franchise agreement itself. Section 5 of the Arthur Wishart Act sets out an affirmative duty of disclosure for franchisors. Sections 6 and 7, deal with a franchisee's right of rescission where disclosure is not received as well as damages for failure to disclose and misrepresentation.

In general, a franchisee will be said to be liable to third parties who act in reliance on a misrepresentation made by the franchisee. However, in some cases, where the franchisor is aware of the misrepresentation and does not take steps to remedy it, the franchisor itself may be found to have participated in making the misrepresentations and incur its own direct liability as a result.

Liability Under Statute

Direct franchisor liability can also arise under various statutes. In some cases, direct liability arises a result of public policy issues. In other instances, joint liability will be imposed on franchisors and franchisees for the franchisees' statutory obligations to their employees. An example of such liability can be seen in the case of Youngblut v. Jim and Jaken Holdings Ltd., [2003] 3 W.W.R. 124 (Sask. Q.B.), in which a franchisor was held liable under employment standards legislation when it took over the business activities of its franchisee which had expressed a desire to shut down. Because of its assumption of day-to-day control over the operations and employees, the franchisor was deemed to be an employer under the Labour Standards Act (Saskatchewan) and therefore was liable for wages owing to the employees.

In Petro-Canada v. Workers Compensation Board of British Columbia, 2009 BCCA 396, the British Columbia Court of Appeal decided that a franchisor could be held responsible for ensuring the health and safety of employees of a franchisee under the Workers Compensation Act. After a number of hazardous incidents at various Petro-Canada service stations, the British Columbia Workers Compensation Board held that the franchisor was directly liable for failing to: (a) ensure the health and safety of all workers; (b) conduct a risk assessment of the workplace and eliminate any risk to the extent possible; and (c) report an unsafe condition, investigate it and ensure that the necessary correction action was taken without delay.

Franchisors and Franchisees as Partners

While there is no significant case law to support this proposition to date, there appears to be no reason why, in certain circumstances, a franchisor and franchisee could not be considered a partnership. By definition, a partnership consists of persons carrying on business with a common view to a profit. In the event that a franchisor and franchisee are found to be partners, liability will be apportioned jointly and severally. To avoid the liability implications of such a situation, most franchise agreements will affirmatively deny the existence of any partnership and will be careful when structuring fees.

II. Vicarious Liability

While in most cases franchisees are not held to be agents or employees of the franchisor, where a franchisee acts under the franchisor’s control and supervision, a relationship of agency can often be established. In these cases, a franchisor may be held vicariously liable for the negligent acts of the franchisee. Accordingly, Canadian case law dealing with this issue, stresses the importance of ensuring that each franchisee’s representations to the public clearly identify the franchisor and franchisee as independent business entities.

In the case of Fraser v. U-Need-A-Cab Ltd., (1983), 43 O.R. (2d) 389, aff’d 50 OR (2d) 281 (Ont. C.A.), the plaintiff was injured when exiting a taxicab that was dispatched by the defendant franchisor and bearing the defendant’s name, but was being operated by an independent franchisee owner. The court found in favour of the plaintiff and noted that the plaintiff could not have known that the taxicab was not owned by the franchisor. Accordingly, the court held that the defendant franchisor was liable for breach of an implied warranty that the taxicab was reasonably safe for use.

In the case of Percival v. Mayes, [1986] O.J. No. 137 (H.C.J), rev’d (1988), 9 A.C.W.S. (3d) 300 (Ont. C.A.), the franchisor Toronto Homeservice Maintenance Limited, would have been held liable for breach of contract in respect of poorly performed house renovations arranged through the franchisee. The court held that based on advertising, brochures and membership cards, the plaintiffs thought they were contracting with the franchisor who would have indeed been liable had the plaintiffs not lost the protection of the guarantee given by the franchisor by retaining their own contractor.

In Leahy v. McDonald’s Restaurants of Canada Ltd., [1993] O.J. No. 2226 (Gen. Div.), the court held that the franchisor was vicariously liable for the damages suffered by the plaintiff who slipped and fell on an icy walkway outside the restaurant. The premises had been leased to the franchisee by the franchisor. The court held that it was reasonable for the plaintiff to believe the restaurant was operated by the franchisor.

In the case of Toshi Enterprises Ltd. v. Coffee Time Donuts Inc., [2008] O.J. No. 5325, the appellate court reversed a Small Claims Court judgment which held a franchisor liable for smoke damage caused by a fire which emanated from a franchised store and caused damage to the neighbouring premises. The appeal court held that the franchise agreement was clear in this case and that no agency relationship could be established between the franchisor and the franchisee. There was no evidence that the franchisor exercised considerable control over the day-to-day operations of the franchisee, and at none of the relevant times was the franchisor in physical control of the premises.

In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] SCR 983, the court explained the rationale behind imposing vicarious liability in employer-employee, but not in circumstances where a person or business operates as an independent contractor.

In Sagaz the court held that there was no universal test to determine whether a person is an employee or an independent contractor. Instead, the central question in making such determination is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. Of course, the level of control the employer has over these business activities will always be a factor. The court went on to list other considerations relevant to such an analysis including: whether the worker provides his or her own equipment, whether the worker hires his or her own employees, the degree of financial risk and responsibility taken by the worker, and the workers ultimate opportunity for profit.

In Kent v. Stop N' Cash 100 Inc., [2006] O.J. No. 2699, the court held that since the franchisor and franchisee had both utilized the employment services of the plaintiff, then both were liable for damages arising from her wrongful dismissal. During the course of her employment, the plaintiff had managed the business for the franchisee but also performed several tasks for the sole benefit of the franchisor. Accordingly, both the franchisor and franchisee owed the plaintiff a duty. The plaintiff was at all material times under the supervision, control and direction of the corporate officers who, in this case, were also the franchisors.

Tim Violet, Esq.
Executive Director
THE HARMONIE GROUP
4248 Park Glen Road
Minneapolis, MN 55416
Cell: (612) 875-7744
tviolet@harmonie.org

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