

No. 04-1409

State of Minnesota
In Supreme Court

Marcus Robert Urban, a minor, Michael Thomas Urban,
a minor, and Brett Ryan Urban, a minor, by and
through their parent and natural guardian, Todd Michael
Urban; and Todd Michael Urban, individually,

Appellants,

v.

The American Legion, and its subdivisions;
The American Legion, Department of Minnesota,

Respondents,

American Legion Post 184, Charles Cowden Post a/k/a
Charles Cowden Post 184,

Defendant.

District Court File No. 25-C6-02-001121
Goodhue County District Court, Judge Thomas W. Bibus

Appellants' Brief

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Statement of the Issue

Respondent The American Legion has “always” had in effect a Legion rule that requires its local American Legion posts to “police the doors and check for [membership] cards” so that non-members will not be admitted to Legion bars. A-383. Post 184 violated this rule and the terms of its “club” liquor license issued under Minn. Stat. § 340A.404 by admitting and serving alcohol to Orvin Roland, a non-member of The American Legion. Roland then left Post 184 with a blood alcohol content of .19 and drove his car into a vehicle carrying the Urban family, killing the mother and catastrophically injuring two of the children. The Urbans sued Post 184 under Minnesota’s Civil Damages Act (CDA), and also sued The American Legion and the State Legion Department asserting that they were vicariously liable for the illegal sale made by their agent.

Where a principal has the right to control the conduct of an agent licensed to serve alcohol under the CDA, can the liability of the agent for a violation of the CDA be imputed to the principal when the agent acted within the scope of its authority?

The district court and the majority in the court of appeals held that The American Legion and State Department cannot be liable under the CDA through vicarious liability principles.

- Minn. Stat. § 340A.801; 340A.404
- *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953)
- *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. App. 1985)

Statement of the Case

This action under the Civil Damages Act (Minn. Stat. §§ 340A.801– .802) (“CDA”) arises from the admitted illegal sale of alcohol by American Legion Post 184, Charles Cowden Post (“Post 184”), in Pine Island, Minnesota, to a non-member of The American Legion who was obviously intoxicated.

The Urbans commenced suit against Post 184, the Legion’s liquor licensee,¹ on July 1, 2002. In August 2002, they sued the two organizations up the chain of command from the Legion licensee: the National component of The American Legion (“National Legion”); and The American Legion, Department of Minnesota (“Department”). The Urbans suit against the National Legion and Department alleges vicarious liability, among other grounds, against those organizations.

The district court (Judge Thomas W. Bibus, First Judicial District) granted the motion of the National Legion and Department for summary judgment, entering final partial summary judgment in favor of these defendants pursuant to Minn. R. Civ. P. 54.02. The court of appeals (Judges Halbrooks and Dietzen;

1. Minn. Stat. § 340A.404 authorizes municipalities to issue on-sale liquor licenses to “congressionally chartered veterans’ organizations, provided that liquor sales will only be to members and bona fide guests.”

Judge Schumacher dissenting) affirmed the district court's decision to grant summary judgment. This Court granted review.²

2. If the Court agrees that the National Legion and Department are vicariously liable, then it necessarily follows that the application of that principle reverses the decision of the trial court on the notice issue. *See also* Minn. Stat. § 340A.802, subd. 1 (only requiring notice to be served on the licensee, i.e., Post 184).

Statement of Facts

I. Overview.

Many of the facts that support the Urbans's position and that relate directly to the issue on appeal—whether common law principles of vicarious liability apply to a licensee's admitted violation of the CDA – are undisputed:

- *Membership solely in posts.* Membership in the American Legion organization is only through its posts. A-89. The primary source of revenue flowing to the National Legion and Department is from post membership dues. A-188. Each post is required to pay part of the dues it collects to the National Legion and Department. A-198. The National Legion dictates how much of the dues paid to a post are to be forwarded to the National Legion. A-274. Post dues must include a sufficient sum to cover Department dues, set by the Department, and the National Legion's dues. A-253. The National Legion has looked to the annual dues of the individual member as its principal and most reliable source of revenue. A-303. The National Legion explicitly states: "Without membership there are no monies. Without membership there is no organization." A-485..
- *Interdependence of all Legion components on the sale of alcohol.* The National Legion and its state Departments are dependent on the Legion's local posts for survival. A-329. The National Legion requires its posts to adopt a

financial policy that will keep the post solvent. Typically, the post will be unable to remain solvent if its principle source of income is limited to membership dues. A-305. Therefore, it is necessary to supplement dues income. *Id.* Most posts do supplement dues by operating bars. A-390, 464. A purpose of Post 184's bar is to keep the post solvent. Ninety-four percent of Post 184's revenue is from its bar. A-415-16; 425.

- *Tax-exempt status vital to the American Legion.* The American Legion and its "subordinate" non-profit posts, including Post 184, are exempt from taxation under Section 501(c)(19) of the Internal Revenue Code. A-469. To maintain its tax exempt status and the exempt status of its "subordinate" posts, the National Legion annually represents to the IRS that its posts are affiliated with it and under its general supervision and control. A-318, 319-23. Allowing non-members of the Legion into a post bar can result in the loss of a post's tax exempt status which could, in turn, threaten the tax exempt status of the National Legion and Department. A-390. To protect its tax exempt status, the National Legion has relied on a "Legion rule" for posts that forbids them from serving alcohol to non-members and has mandated procedures for applying the rule: the "Staff" of the posts must "police the doors" and they must "check the [membership] cards" to

ensure that non-members are not allowed to drink in the bar and they must “get rid of” any non-members who get in the bar. A-383.

- *Internal written rules.* The American Legion publishes and promulgates a *Post Operations Manual* that strictly defines who must be admitted to a Legion post. A-439. In addition, the same Legion document sets forth rules (alleged recommendations) for operations of clubroom and bar areas and the sale and service of alcohol. *Id.*; A-504, 515.
- *Internal Legion chain of command.* The American Legion has a Department Adjutant in every state. “This individual is responsible for the daily business operation of the elements of the organization in the state.” A-486.
- *Revocation and cancellation of post’s charter.* The American Legion’s Department has full power to suspend, cancel, or revoke the charters of posts. There is a right of appeal to the National Legion Executive Council – giving the National Legion the final say on cancellations, revocations, and suspensions. A-191.
- *Illegal sale not in dispute.* Post 184 made an admittedly illegal sale of alcohol to a non-member in violation of Minn. Stat. § 340A.404, and in violation of the Legion rule against serving non-members. A-417. That heavily intoxicated non-member crashed his vehicle into the Urban family

immediately after leaving Post 184. The National Legion was fully aware before this that its posts needed to “clean up their act” regarding the admission and serving of alcohol to non-members. A-383, 390.

II. August 10, 2000, and the Actions that Gave Rise to this Case.

On August 10, 2000, Todd and Barbara Ann Urban and their three young children were driving south on Highway 52 near Pine Island, Minnesota. As they approached a rise on this major highway, a drunk driver (Orvin Roland) driving north – in their lane – crashed head-on into the Urban family. Roland had just left Post 184’s bar where he had been served alcohol in violation of the Legion’s rule against serving non-members of the Legion and in violation of Minn. Stat. § 340A.404.

As a result of Post 184’s illegal sale of alcohol, Barbara Urban, a stay-at-home mom, was killed in the collision. Her son, Marcus, then five years old, was rendered a life-long wheel-chair-bound paraplegic; her son, Brett, then two years of age, was severely brain damaged to the extent he will likely never speak or function independently. Both boys require permanent 24-hour-a-day care. Brett’s twin, Michael, suffered the loss of his mother, in addition to the devastating crippling of his two brothers. Todd Urban, their father, also sustained severe injuries. Mr. Urban now spends all day, every day, caring for his young children and working full-time from his home.

Todd Urban and his three sons (“the Urbans”) commenced an action pursuant to the CDA against Post 184 and the local municipal bar (where Roland had been drinking before entering Post 184). The Urbans followed the initial suit with an action against the National Legion and Department alleging that these two defendants are legally responsible for the violation of the CDA by their agent—Post 184. The two lawsuits were consolidated in December 2002.

III. The Structure and Seat of Power Within the Legion.

The American Legion is a federally chartered organization, created by an act of Congress in 1919. *See* 36 U.S.C. §§ 21701–21708. Today, the Legion boasts that its founders probably did not visualize that someday their organization would own over half a billion dollars in real estate and that the operation of clubrooms (bars) would be an activity of thousands of posts. A-305.

Congress gave the Legion the power to “adopt a constitution, bylaws, and regulations to carry out the purposes of the organization,” to “establish State and territorial organizations and local chapters or post organizations,” to “sue and be sued,” and to “do any other act necessary and proper to carry out the purposes of the corporation.” *Id.* § 21704.

The constitution adopted by the Legion requires it to “be organized in Departments and these in turn in posts.” A-185 The federal act authorizing the Departments and posts does not provide for separate autonomous entities and

has always categorized them as mere “subdivisions” of the Legion. 36 U.S.C. § 21705. A description of each of the three levels of the Legion shows both the unified nature of the Legion and the manner in which the National organization and the Departments have the ability to exercise and do exercise control over the operations of their posts.

A. The National Legion.

The Legion uses the label “National organization” to identify its elaborate “National framework” of commanders and officers, commissions, and committees, including an annual National Convention, which is attended by delegates from every Department. A-240–49. The Legion emphasizes its coordinated activities, stating, “the unity of the Legion is effectuated as a National force” through this National organization. A-93. The Legion identifies its headquarters in Indianapolis, Indiana as “the nerve center of the organization,” A-239—proclaiming, that is where “the policies of the Legion are clarified and its activities are centered and directed. Thus, the influence of nearly 15,000 posts is coordinated and directed along the lines of Legion policy.” A-93. The power structure of the National Legion and its ability to command its Departments and local posts is evident in the hierarchical nature of its operations. The annual National Convention, which consists of delegates from all Departments, is where the Legion as a whole prepares and debates legislation

that becomes “the law” for the entire organization. Between annual Conventions, the ultimate power of the Legion is vested in a National Executive Committee (“NEC”), which consists of various National and state-level officers, including the National Commander. A-244. Acting alone, the National Commander has the “full power” to enforce the provisions of the Legion’s Constitution and By-Laws and the resolutions of the annual convention. A-191.

The Legion proclaims that its Commanders at the district level “are the lynch pin of The American Legion’s chain of command, serving as the vital link between the National and Department organizations and all posts. . . . District Commanders are the people charged with insuring that all posts in their district maintain their vitality.” A-388. If a post begins to falter the District Commander can be expected to start giving directions and assuming control. A-75.

The Legion employs a National Judge Advocate whose duty is to advise “on all legal matters, including the construction and interpretation of the National Constitution and By-Laws. . . .” A-261. Each year, the National Judge Advocate issues a large number of written and verbal opinions to Departments and posts, prohibiting, directing, or otherwise approving or disapproving the activities of both Departments and the local posts, in accordance with his interpretations of the Legion’s Constitution and By-Laws. A-261, 289-96. The National Judge Advocate has the final word on who is eligible to join the Legion.

A-261; 290-91. Included among his duties is the responsibility to assure that local posts refrain from serving alcohol to non-members of the Legion, which he has affirmed as “always the Legion rule.” A-383.

B. The Departments.

The “Departments” represent each state – and territorial-levels of the Legion – the next step down in the hierarchy. The Departments are established by the National Constitution. A-185. According to the constitution, the Departments are “composed of the posts.” A-187. The Departments each have a commander, vice commanders, adjutants, committees, and officers – much like the National organization. *Id.*

In Minnesota, the Department’s constitution acknowledges its subordinate place in the Legion chain of command, clarifying that it “is a Department of and subject to the jurisdiction of The American Legion.” A-348. The Department’s charter likewise acknowledges that the Department is “in all things subject to the Constitution of The American Legion and the rules, regulations, orders and laws promulgated in pursuance thereof.” A-330. Each Department has supervision over Posts within its boundaries. A-76 . Departments also have the authority to create intermediate bodies between the post and Departments – “districts” – for the purpose of promoting the programs of The American Legion. Depending on

the powers delegated by the Department, the district does have some supervisory powers over the posts comprising its district. A-94.

C. The Legion Posts – Including Post 184.

The American Legion is organized into local posts. Membership in The American Legion is by posts only. These posts, for purposes of coordination and administration, are grouped into Departments. A-89. In its official *Officer's & District Commanders' Guide*, the Legion clearly states: "The post is The American Legion." *Id.*

Local posts are created by temporary charter from the National Commander and National Adjutant and, eventually, a permanent charter issues from the Department. A-187. Post 184's temporary charter was issued on September 22, 1919, six days after The American Legion was chartered by Congress. A-370, 258-59.

The Legion does not distinguish itself from its local posts. "The local post 'IS' The American Legion as a whole." A-264 (emphasis in original); *see also, e.g.*, A-60 ("In your community, The American Legion is your Post."); A-329 ("If there were no posts, there would be no Department, there would be no The American Legion."); Post 184's Commander, Ed Berryman, testified unequivocally, under oath, that Post 184 is *not* a separate organization from the Legion. A-423.

Post 184 must comply with the obligations imposed on it by rulings, regulations, and decisions of the National and Department. A-334, 412. All Legion “objectives and programs” are ultimately carried out through local posts and posts must “comply fully” with the obligations assumed under the various Legion constitutions. A-75. Post 184 admits that it coordinates its efforts with the National Legion and Department to carry out their shared programs, missions, functions, purposes and goals and that it provides building and facilities for Legion members to carry out the goals and programs of The American Legion and Department. A-413, 415. One of Post 184’s shared purposes and goals with the Legion and its Department is “to grow and expand the membership of The American Legion.” A-413-16. The Legion has often stated, “as we are all aware, the local Post is where the ‘rubber meets the road.’ If it doesn’t happen at the Post level – it doesn’t happen at all.” A-388. As will be seen in the following sections, The American Legion’s very existence is dependent on the availability of alcohol at its local posts to recruit Legion membership, assist in its retention and maintain posts’ solvency.

IV. The Legion’s Need for Alcohol Revenues.

The Legion requires that its posts adopt and carry out a policy that will keep its posts solvent. A-415. The Legion’s admitted experience is that, “[t]ypically, the Post will be unable to remain solvent if its principle source of

income is derived from membership dues. Therefore, it is necessary to supplement anticipated income from dues by other enterprises" A-305. The enterprise first described is the "operation of club rooms." *Id.* ("Club room" or "lounge" are synonymous in Legion parlance for "bar." A-101, 416-17 (Nos. 22, 24, 25, 27), 434 (No. 9), 436.

Minutes from a subcommittee hearing of the Legion's National Executive Committee (NEC) recording a dialogue between a NEC panel member and a representative of a Legion post confirms that: "You can't operate a post on membership dues alone." "[Y]ou're mostly dependent on raising money through the bar , is that correct? That's your main source of income?" Response: "That's our main source of income." A-464.

Post 184 admits that it operates a bar so that it can remain solvent. A-416. Post 184's Commander testified that the post's bar accounts for "probably 94 percent" of the post's revenue. A-425. Other posts have admitted in NEC proceedings pertaining to operation of a post bar: "Hell, yes. That's the only way we can survive." A-390. Also, in correspondence to the IRS a different post has declared "it would be impossible to remain solvent if it restricted access to the bar to members of the post." A-466.

A. The Legion Promotes “Club Rooms” or “Bars” For Membership Recruitment-Retention and “To Serve The Legion.”

The Legion explicitly states in the training manual it prepares for its posts: *“Membership is the life blood of The American Legion.”* “. . . our membership must continue to grow.” A-523. Without dues paying members there would be no money for the National and Department. A-485.

Legion literature states that the post clubroom (bar) is supposed to be an “asset” to the post. A specifically stated purpose for the club room (bar) is being of help “in getting and retaining the members it wants and needs.” A-305-06.

The Legion instructs its posts on the desirability and purpose for a post bar: “Many like a post with a good club room. They like the sociability that develops around a good bar. A club room can add to a post . . .” A-101. “A large post should consider two bars – one for stags and one for more formal use.” A-433. “However organized . . . a club room or Legion home has only one purpose – to serve The American Legion.” A-306.

In addition to assisting the post in its recruiting and retention of Legion members, Post 184 has admitted that revenue from its beer and liquor sales may be transmitted or otherwise made available to The American Legion and Department to support shared programs, purposes and goals. A-415.

Post 184 also pays the dues of a post member who is not able to pay dues. The revenue used for payment of such dues can include revenue generated by the post's bar. A-426.

B. The Legion Control Over the Daily Bar Operation of Its Posts.

The National Legion has, in these proceedings, formally admitted: (1) that through its "*Posts Operations Manual*" it provides published materials to its American Legion posts pertaining to the "operations of club room and bar areas"; and (2) that it has prepared and published alleged "recommendations" for American Legion posts to adopt and follow regarding the sale and service of alcohol on post premises during post meetings. A-504 (No. 34), 515 (No. 33).

The true character of the alleged "recommendations" can be determined by the plain language employed by the Legion in the following rules promulgated to its posts:

- "Club room rules *must* be established in accordance with those set forth by the State Alcoholic Beverage Regulatory Agency." A-434 (emphasis added).
- "There is no exception to this flat rule. Keep the bar closed during meetings, and – do not permit beverages of any kind to be served or drunk during the meeting." A-432.

- “The following *shall be* admitted:” [Thereafter setting forth four identified categories consisting of] (a) American Legion members; (b) American Legion Auxiliary members; (c) Members of Sons of The American Legion; (d) Out of town guests accompanied by American Legion or Auxiliary members, all of whom must be admitted to the post. A-439 (emphasis added).
- “[C]redit or lending of lounge funds is strictly prohibited.” *Id.*
- “Legion meetings start promptly at 8:00 p.m. and the lounge should close and stay closed until meeting is adjourned.” *Id.*
- “There shall positively be no drinking of any kind during Legion meetings or drinks brought into the meeting room.” *Id.*
- The sale and service of alcohol at Legion baseball games is prohibited. A-463.

Post 184 has admitted that the Department (Minnesota) has created procedures to be followed by Post 184 pertaining to the sale and service of alcohol and admits that the Department has the authority to “inspect, review or examine the conduct of Minnesota American Legion posts pertaining to the operation of a post bar or club room.” A-416. It is also admitted that, “The American Legion requires regular and complete audits of . . . Post 184’s bar and clubroom operations.” A-416.

Posts that do not follow the Legion's rules risk revocation of their charters. *See, e.g.,* A-392-93 (Proceedings) (charges against post for temporarily using some dues money to pay state alcohol invoices); A-379 (Proceedings) (appeal from revocation of charter for violations of Alcohol Control Board, among other things).

C. The National Judge Advocate Controls Who Drinks at Legion Posts to Prevent the American Legion's Tax Exempt Status From Being Compromised.

The American Legion is a tax exempt organization under section 501(c)(19) of the Internal Revenue Code. A-469 Post 184 as a "subordinate organization" of The American Legion also is tax exempt as a result of a "group ruling" issued to American Legion National Headquarters. The IRS issues the "group ruling" in the form of a "group exemption letter" after a blanket application for tax exemption from Federal Income Tax is filed by the National organization with the IRS on its behalf and on behalf of its subordinate posts. A-441, 517-21. This letter is directed to a central organization, i.e., the National Legion, "recognizing as a group basis the exemption under section 501(c) of subordinate organizations on whose behalf the central organization has applied for recognition of exemption." A-469, 517-21.

Letting the public (i.e., non-members of the Legion) into the post jeopardizes the post's tax exempt status. Reporting to the National Commander

and members of the NEC and legionnaires, in October 1994, the National Judge Advocate warned of an IRS “assault” on “the tax exempt status of the National organization, the Departments and Posts.” Stating that the IRS is going to enforce the rule against serving non-members, the National Judge Advocate, opined: “And it isn’t going to take too many posts to cause a problem for the whole organization.” A-383. In October of 1996 the National Judge Advocate again warned of an IRS “plan” to go after the exempt status of the National and Department. A-383, 390.

To preserve the National Legion’s and Department’s tax exempt status the Judge Advocate declared to any post admitting non-members—“they must get rid of them—that has always been the Legion rule, but the IRS is going to enforce it now.” A-383.

The Judge Advocate is on record in the October 19, 1994 proceedings as stating that he had spoken to the “Commanders and the Adjutants” about his report (i.e., the IRS intentions) and “The[y] must ensure that post staff police the doors and check the cards.” A-383. This command by the National Judge Advocate was to be communicated to the posts “verbally” because what he had previously “put out in writing . . . has ended up in IRS files [W]e are trying to rely on passing the word verbally, basically, to the posts to clean up their act.”

Id.

In addition to being directed by the National Judge Advocate to keep non-members out of the posts, the posts are at the same time directed to admit “guests from other posts, members of the Auxiliary and Sons of The American Legion – that they can come to the Legion bar to have a drink and pay for it.” *Id.*

D. The National Legion Annually Represents to the IRS that Its Posts Are Under the National’s Control and Supervision.

The National Legion has long required every post to cooperate in obtaining a “group” tax exemption for Legion posts – also known as a “group exemption” letter from the IRS. *See* A-297-98; A-469-70. Under federal tax regulations, “[a] central organization applying for a group exemption letter” (here, the National Legion) must establish its own tax-exempt status and must establish that its “subordinates” (which includes any “chapter, local, post, or unit of a central organization”) are affiliated with it and “*under its general supervision or control.*” *See* 26 C.F.R. § 601.201(n)(8) (emphasis added). Each year, an officer of the National Legion submits an affidavit to the IRS in support of and to maintain the Legion’s tax-exempt status. A-318, 319-23.

V. The National Legion’s Right to Control Its Departments and Posts.

The National Legion’s ability to exercise and its actual exercise of powerful controls over the activities of its Departments and posts is illustrated in the governing documents of the Legion, its manuals and other literature, and the legal admissions of Post 184.

A. Obedience to the National Legion. The National Legion will only issue a temporary charter for formation of a post if the applicant receives approval from its jurisdictional Department and accepts certain conditions, including agreeing to “uphold the declared principles” of the Legion and “conform to and abide by the regulations and decisions” of the Department and the NEC. A-187. A temporary charter is “subject to revocation” by the NEC. *Id.*

Upon seeking a permanent charter, the new post must agree to establish and maintain the facility “in conformity with the policies” of its Department and the National Legion. A-368-69. Post 184 admits that it must comply with the obligations imposed upon it by the Constitutions, By-Laws, regulations, and rulings of the National Legion and Department. A-412.

B. Dictating Operating Conditions. The permanent charter of any post can be suspended, cancelled, or revoked by its Department. A-188. The NEC has the power to hear appeals from a Department’s decision, and the NEC uses this power to demand operating conditions from posts. A-192. For example, in 1997, the NEC stayed a decision of a Department to revoke the charter of a local post and, at the same time, required the post to have its books audited, its elections supervised, and imposed certain reporting requirements for the post. A-394-95. Similarly, the NEC overrode another Department’s decision to revoke the charter of a post but only allowed reinstatement on certain conditions,

including its election of new officers and the attendance of those officers at the Department's "indoctrination course for Post officers." A-379.

C. Controlling the Post Name, Post Advertising, and the use of Emblems and Uniforms. The National Legion forbids any post from naming itself after a living person and imposes restrictions of the use of the Legion's emblem and name. A-187, 309. As to the use of the name and emblem, the Legion promulgates an extensive *Manual* that imposes what the National Legion calls detailed "guidelines" but that also says posts and members must "follow [them] . . . strictly." A-447. The National Legion also keeps a tight rein on any advertising that posts might do, including halting advertising and requiring advertising to "conform to American Legion policies." A-294.

D. Mandating Procedures for Post Meetings and Ceremonies. The National Legion exercises considerable control over post meetings and ceremonies through a large *Manual of Ceremonies*. A-115-83. It covers admission to meetings and duties and installation of post officers — among other directives.

E. Insurance Requirements Imposed on Posts. The National Legion has the ability to require posts to carry any insurance that the National Legion deems necessary and to name the National Legion and their respective Department as insureds on the policy. In 1989, the NEC passed a resolution that requires that all Legion baseball teams be notified that before they can participate in the Legion's

baseball program, they have to “purchase insurance coverage offered by the Legion, or a policy equal to or greater than that offered by [the Legion].” A-375. In 1991, the NEC decided that the “potential for allegations of responsibility remain” and, thus, the NEC resolved that “[p]roper insurance coverage must be verified annually by National Headquarters before a team may hold try-outs or practice” and “[t]hat there shall be no activities, whatsoever, by a prospective Legion Baseball team without coverage under approved insurance.” *Id.*; *see also* A-296. The National Legion has to review and approve all insurance policies. *Id.* Policies are paid for by the posts but the policies must provide insurance for the post, the Department, and the National Legion. A-293.

F. Controlling Membership. The federal act that formed the Legion establishes broad criteria for membership, requiring that members be veterans who were members of the Armed Forces during certain periods of war or hostilities. *See* 36 U.S.C. § 21703. But beyond this, the National Legion has the ability to control who can be a member and the criteria or conditions for membership. The National Legion, for example, forbids any person from being “a member at any one time of more than one post,” A-185; it forbids posts from allowing any members who have been “expelled” by another post, *id.*; allows Departments to determine the minimum number of members that a post must have, A-187; and, retains the power to “rule” on who can and cannot be a

member of a post, *see, e.g.*, A-290-91, 451-52. It also promulgates the procedures controlling members transferring between posts. A-510 (No. 27).

G. Controlling Membership Dues. The National Legion requires its posts to collect the members' due and to transmit dues up the hierarchy of the Legion. A-188. The National Legion prohibits Departments from taking more than thirty days to transmit the dues to the National organization and its has even determined the date on which the dues are payable to the posts (October 20). *Id.* The National Legion requires individuals at the posts (and Departments) who handle the dues to be bonded "to cover double the average amount of money handled in a single year." A-192. Members who do not submit their dues forfeit membership and posts who fail to follow the National Legion's directives are subject to discipline. *See* A-191-92.

H. Controlling Other Financial Operations. The Legion requires posts to keep their books accurate and have them audited once a year. A-434. The National Legion expressly retains the power "to investigate the membership roll and financial statement of any Department" and, together with the Departments, of any post. A-193. The Legion requires that finance reports be made to the post membership on a regular basis and that "[a]ll tax returns must be filed promptly and accurately." A-434. The National Legion also requires "[e]ach post . . . to file an annual report" with its Department, providing information on programs and

activities of the post. A-113 (*Guide*).³ The National Legion also flatly prohibits posts from participating in any non-wholly owned subsidiary corporation and its requires posts to maintain tight control over subsidiary operations. See A-289.

VI. The Departments Also Have the Ability to Exercise and Do Exercise Control Over the Local Posts.

The Legion's Departments have "general supervision over the local posts within [their] jurisdiction" and other posts that might be assigned to them by the NEC. A-76. The American Legion has a Department Adjutant in every state.

"This individual is responsible for the daily business operation of the elements of the organization in the state. A-486. The National Legion has delegated many powers to its Departments, including the power to:

- approve the issuance of temporary and permanent post charters to new posts, A-188;
- set minimum membership requirements for new posts, *id.*;
- "prescribe [i.e., dictate] the constitution of its Posts," A-188;
- suspend, cancel or revoke the charters of posts (with an appeal to the NEC allowed from the Department's decision), A-191;
- "take possession, custody and control of all the records, property and assets" of any post whose charter is revoked, cancelled or

3. The Legion refers to some of these and other requirements in non-obligatory language (e.g., "Books should be kept accurately and audited at least once a year."). But this language can also be reasonably interpreted by a jury as mandating action by the posts. In fact, the Legion's literature acknowledges in some places, outright, that "should" means "must" – referring to "should" statements as "flat rules" that must be followed. See A-432 (*Manual*) ("If the post's activity center includes a bar, it should always be closed during post meetings. There is no exception to this flat rule.").

suspended to “provide for the transfer of the members [of a cancelled post] to other Posts of their choice,” *id.*

With the National Legion having the power to amend its Constitution or By-Laws for any reason, the powers delegated to the Departments can expand or contract as the National organization desires. *See* A-189, 193.

Argument

Both the district court and the court of appeals’ majority concluded that because the Civil Damages Act is penal in nature and is subject, in certain circumstances, to a rule of strict construction, the law will not recognize a claim for vicarious liability. The dissent recognized the flaws in this analysis, which confuses a direct claim under the CDA with a claim of vicarious liability. Simply put, even if a principal is itself free of fault, the principal is nonetheless liable for the harm caused by the principal’s agents to innocent third parties. In the context of this case, it is not necessary for either the National Legion or the Department to have directly violated the CDA; in the eyes of the law, if they are vicariously liable for the acts of the Post, then they are responsible for the harm caused by the Post’s wrongful conduct. The dissent also recognized that the CDA is a remedial statute, and that it should be given a liberal construction to achieve its purpose. As the dissent concluded, nothing in the CDA bars the application of vicarious liability in this case, and in fact, the application of that doctrine actually serves the overall purpose of the CDA – to suppress the social

ills that result from the illegal sale of intoxicating liquor and to provide compensation for those persons harmed by the conduct proscribed by the statute.

I. The Standard of Review Requires that the Facts be Viewed in a Light Most Favorable to the Urbans and the Legal Issues Reviewed *De Novo*.

This Court reviews a grant of summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law to the facts. *Westrom v. Minn. Dept. of Labor & Indus.*, 686 N.W.2d 27, 32 (Minn. 2004); *Christiansen v. Milbank Ins. Co.*, 658 N.W.2d 580, 584 (Minn. 2003). In the process, the Court must view the evidence in the light most favorable to the party against whom summary judgment was granted – here, in the light most favorable to the Urbans. *Westrom*, 686 N.W.2d at 32. The legal conclusions of the lower court, including determinations on questions of statutory construction, are reviewed *de novo*; no deference is given to the lower court’s legal conclusions. *Id.*; see also *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996) (describing how the court need not defer to the lower court’s decision on issues of law). Even where the court of appeals affirms a district court’s grant of summary judgment, this Court will reverse those decisions if the law and facts warrant. See *Xiong v. Voyagaire Houseboats, Inc.*, 2005 WL 1838964, ___ N.W.2d ___ (Minn., Aug. 4, 2005) (reversing district court and court of appeals in summary-judgment case).

II. Vicarious-Liability Principles Support the Legal Responsibility of the National Legion and the Department for the Action of Post 184.

Under the common-law doctrine of vicarious liability, a master is liable for a servant's wrongful acts committed within the scope of their relationship. That relationship is often referred to as "a species of agency." It is *not* limited to the typical employer-employee relationship, as the District Court suggested. A-10. The doctrine applies to business entities as well as individuals. See *Burman Co. v. Ed Zahler*, 286 Minn. 400, 405 178 N.W.2d 234, 238 (Minn. 1970); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1110 (Ore. App. 1997) (the relationship between business entities is "not precisely an employment relationship" but "most if not all . . . courts that have considered the issue [have] applied the right to control test for vicarious liability in that context as well").

This Court explained in *Burman* that a "master" is a principal who employs an agent to perform services and who has the right to control the conduct of the agent in the performance of the services. *Burman*, 286 Minn. 405, 178 N.W.2d at 238. A "servant," in turn, is an agent employed by a master to perform services in its affairs and whose conduct in the performance of the services is subject to the right of control by the master. *Id.* The scope of the master-servant relationship thus depends on two factors: (1) whether the master (i.e., the National Legion and Department) has the right to control the conduct of

the servant (i.e., Post 184); and (2) whether the servant's conduct was within the scope of services performed for the master. *See id.*

The label that parties give to their particular relationship – including any express denial of an agency or master-servant relationship or an intention not to create one – is not determinative. *See Jenson v. Dep't of Economic Security*, 617 N.W.2d 627, 630 (Minn. App. 2000); *In re Insur. Agents' Licenses of Kane*, 473 N.W.2d 869, 873 (Minn. App. 1991); *see also Restatement (Second) of Agency* § 1, comment b (same point). Cases involving the question of whether a relationship is one of master and servant are intensely factual and involve factors that “usually [vary] according to the circumstances of each case.” *See Frankle v. Twedt*, 234 Minn. 42, 48, 47 N.W.2d 482, 487 (1951). Many courts facing factual circumstances similar to those in this matter have denied motions for summary judgment; cases involving what is often a master-servant relationship between franchisors and franchisees are often analogous, as explained in Section III.B below.

A. Vicarious Liability Describes a Legal Relationship, Not a Cause of Action.

There is no legal impediment to Urbans' assertion of a vicarious-liability claim against the National Legion and Department, based on the facts in this case. The National and Department are not licensees under the liquor statute,

but this fact is immaterial because vicarious liability is just that – vicarious and not direct.

In *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. App. 1985), the Michigan Court of Appeals considered a case remarkably similar to this one. There, a school district's athletic booster organization (the licensee) allegedly served alcoholic beverages to an obviously intoxicated person who later killed the plaintiffs' decedent. The plaintiffs asserted that the booster club was the agent of the school district, acting in that capacity at the time of the illegal sale.

Assuming that allegation to be true for purposes of its legal analysis (the trial court had dismissed the complaint on the pleadings for failure to state a claim), the appellate court in *Kerry* explained that a non-licensee can be vicariously liable for the illegal conduct of its agent when the agent holds the required license for liability under the dram-shop law. The appellate court explained this liability is based on the relationship between the parties:

Here, defendant school district similarly argues that because it was not a licensee prohibited from supplying liquor to intoxicated persons under [the statute], plaintiffs cannot maintain an action against it under the dramshop act. We disagree because . . . plaintiffs' theory is based on vicarious liability. *Vicarious liability describes the existence of a relationship, not a cause of action.* Because of this relationship, the principal is held responsible for the torts of its agent which are committed in the scope of the agency. . . . Nothing in the dramshop act appears to prevent the application of vicarious liability.

Id. at 280-81 (emphasis added; citations omitted).

In *Lange v. National Biscuit Company*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973) (a case not involving the CDA), this Court recognized the same principle: “Respondeat superior or vicarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault. Its derivation lies in the public policy to satisfy an instinctive sense of justice.” In *Lange*, a principal was held legally responsible for an assault committed by its agent. No one claimed that the principal was personally guilty of committing an assault, but the Court determined—just as the court had in *Kerry*—that a fault-free principal still bears legal responsibility for the actions of its agents. That same analysis should guide the Court here. No legal impediment exists to the Urbans’ assertion of vicarious liability, and it is immaterial that the National Legion and Department are not licensees. Vicarious liability is just that—vicarious and not direct.

B. Entities Like the National Legion and Department Are Vicariously Liable under the CDA.

Under the CDA (Minn. Stat. § 340A.801), anyone injured by an intoxicated person “has a right of action . . . against a person who caused the intoxication . . . by illegally selling alcoholic beverages.” In dismissing the Urbans’ action against the National Legion and Department, the District Court and the Court of Appeals interpreted this language to mean that someone injured by an intoxicated person can *only* bring an action against *the person* who illegally sold

the alcoholic beverages and not against others who might be vicariously liable under the common law.

The District Court gave essentially three reasons for this interpretation:

- (1) the District Court cited *Koehnen v. Dufuor*, 590 N.W.2d 107 (Minn. 1999), a case involving a claim under the CDA against a “social host,” and stated that “[c]ourts have been unwilling to expand the [CDA] beyond the legislative scope to non-commercial vendors,” A-4;
- (2) the District Court stated that “[t]he [CDA] was written in derogation of the common law, and must be strictly construed to effect its remedial and penal purpose,” A-4 (citing *Haugland v. Maplevue Lounge & Bottleshop, Inc.*, 666 N.W.2d 689 (Minn. 2003)); and
- (3) the District Court referred to the CDA as a “strict liability” statute and then cited *Gilbert v. Christiansen*, 259 N.W.2d 896 (Minn. 1977), which the District Court said “discuss[es] not imputing liability under a strict liability statute, [because] such expansion is a policy question for the legislature,” A-4.

The majority in the Court of Appeals essentially agreed with the District Court’s reasoning, relying by analogy on the social-host cases of this Court and also stating that allowing a cause of action against only the license holder (Post 184) would be consistent with the “plain language” of the CDA.⁴

The reasons that the District Court and the Court of Appeals gave for their interpretation of the CDA do not hold up under analysis. The principles of vicarious liability, which are as old as the common law itself, have long co-

4. Curiously, however, when the majority in the Court of Appeals discussed “vicarious liability” as an alternative argument, it limited its analysis to whether the district court should be affirmed on its conclusion that the Urbans had failed to raise fact issues on the essential elements of vicarious liability.

existed with Minnesota statutes, including, in particular, the CDA. And applying principles of vicarious liability to claims under the CDA is consistent— as the dissent in the Court of Appeals explained— with the remedial nature of the CDA and consistent with other state’s interpretation of their civil-damages statutes.⁵

1. Common-Law Principles – Including Master-Servant Principles – Have Long Applied to Claims Under the CDA.

More than fifty years ago, this Court decided that the very common-law principles of master-servant law that are at issue in this case apply to defendants under the CDA. In *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953), the Minnesota Supreme Court held that the CDA applies to a city operating a municipal liquor store (this was before the CDA included the notice section that mentions municipal liquor stores.) In *Hahn*, the municipality (the master) argued that it could not be liable for the act of the bartender in its liquor store (the servant) when the bartender served alcohol illegally to a minor. The Court rejected this argument, both by application of another statute and by reference to the common-law principles of a master-servant relationship: “[I]t is

5. See *Kerry*, 397 N.W.2d at 545; see also *Ripely v. Triplex Comm.*, 874 S.W.2d 333, 349 (Tex. App. 1994) (“[W]e do not believe that our Legislature through the enactment of [a civil damages act] intended the exoneration of non-providers and non-sellers of alcoholic beverages, who through possible joint enterprise or through possible civil conspiracy, became so interrelated with such providers or sellers, as to defy distinction of conduct and purpose.”), *reversed on other grounds*, 900 S.W.2d 716 (Tex. 1995).

the rule that a municipality is liable for the torts of its servants acting within the general scope of its corporate powers although their acts are unauthorized in the particular case.” 57 N.W.2d at 262 (citing *Welter v. City of St. Paul*, 40 Minn. 460, 42 N.W. 392 (1889) (involving same common-law principle).

As a matter of law, it is also well established in Minnesota – and probably in every other jurisdiction in the United States – that common-law doctrines of vicarious liability generally apply to lawsuits involving statutory claims, especially when the statute says nothing to the contrary and the common-law doctrine furthers the goals of the statute.⁶ Indeed, many common-law principles have long been commonplace in lawsuits under the CDA.⁷ Although the District Court and the majority in the Court of Appeals made no mention of the ordinary

6. See *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 570 (Minn. 1994) (explaining generally that “this court has long followed the presumption that statutory enactments are consistent with common law doctrines.”); see, e.g., *Church of the Nativity v. WatPro*, 491 N.W.2d 1, 5–8 (Minn. 1992) (principles of agency applied to claims under the UCC and the Consumer Fraud Act to hold the principal liable for acts of its agent); *Baker v. Ploetz*, 597 N.W.2d 347, 353–54 (Minn. App. 1999) (vicarious liability can be imposed on a principal for its agent’s violation of a penal statute involving both a civil penalty and punitive damages), *reversed on other grounds*, 616 N.W.2d 263 (Minn. 2000); *Opatz v. John G. Kinnard and Co.*, 454 N.W.2d 471, 473–76 (Minn. App. 1990) (imposing vicarious liability on principal for agent’s violation of state securities laws).

7. See, e.g., *Hannah v. Jensen*, 298 N.W.2d 52, 54 (Minn. 1980) (applying the common-law doctrine of assumption of risk to a claim under the CDA); *Farmers Insurance Exchange v. Village of Hewitt*, 274 Minn. 246, 250–53, 143 N.W.2d 230, 233–35 (1966) (recognizing a common-law right of contribution applied against someone liable under the CDA, before the CDA expressly mentioned contribution).

principle that statutory enactments are construed as consistent with common-law principles, the dissent in the Court of Appeals noted that “courts presume consistency with [the] common law” and should not construe a statute “in derogation of well-established principles of common-law.” A-539.

In short, holding a master (e.g., an employer) responsible for the actions of its servant (e.g., the employee-bartender) is well accepted and commonplace under the CDA. The Court of Appeals and the District Court offered no explanation for why vicariously liability principles should *not* apply “up the line,” so to speak, from Post 184 to the National Legion and Department, when those principles are so commonly applied “down the line.”

2. Vicarious Liability Is *Consistent* with the Remedial Nature of the CDA and the Legislature’s Policy Goals.

Both the District Court and the majority in the Court of Appeals concluded, as part of their reasons for dismissing the claims against the National Legion and Department, that the CDA “was written in derogation of the common law, and must be strictly construed to effect its remedial and penal purpose.” (A-4); *see also* A-530. To support this proposition, the District Court cited *Haugland v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689 (Minn. 2003) and the Court of Appeals cited *Whitener v. Dahl*, 625 N.W.2d 827 (Minn. 2001).

The Court of Appeals' reference to *Whitener* is odd because *Whitener* did not involve a question of whether a common-law principle should be applied to a claim under the CDA but rather whether the minority-tolling statute (Minn. Stat. § 541.15(a)) can toll the express two-year statute of limitations in the CDA. The Court concluded that "longstanding principles of statutory construction" and the "clear legislative intent" required holding that the minority-tolling statute does not modify the statutory two-year limitation period in the CDA. *Whitener*, 625 N.W.2d at 834.

The District Court's reference to *Haugland* is similarly odd because, although this Court in *Haugland* mentioned that the CDA should be "strictly construed," the Court intimated that this was due to the fact that a claim under the CDA was purely a creature of statute, with no common-law counterpart. See *Haugland*, 666 N.W.2d at 693. The Court in *Haugland* did *not* say that the Act should be "strictly construed to effect its remedial and penal purpose," as the District Court erroneously suggested. In fact, the District Court and Court of Appeals' view of the CDA does *not* give effect to the remedial and penal purposes of the Act – it frustrates those purposes.⁸

8. Indeed, this Court has considered it so important to give effect to the remedial and penal purposes of the CDA that it has actually declined to apply certain common-law principles if those principles would frustrate achievement of those purposes. See *Mayes v. Byers*, 214 Minn. 54, 60–62, 7 N.W.2d 403, 406–07 (1943) (declining to allow a defense of contributory negligence by the plaintiff

Applying the common-law doctrine of vicarious liability to claims under the CDA is consistent with the remedial nature of the CDA and the policy goals of the CDA. The mischief intended to be suppressed and remedied by the CDA consists of the social ills resulting from intoxication (e.g., deaths on the highway). *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983). The remedy advanced by the CDA is “to compensate members of the public who are injured as a result of illegal liquor sales.” *Id.* Here, applying the common-law doctrine of vicarious liability to a claim under the CDA helps suppress the mischief of intoxication by deterring liquor vendors from making illegal sales or sales to obviously intoxicated people and encouraging those who control the licensee to ensure that the vendors do not make illegal sales. Applying vicarious liability also advances the remedial goal of compensating injured parties. Thus, overall, applying vicarious-liability principles is consistent with the legislative intent behind the CDA.

The Urbans presented considerable evidence to prove that the National Legion and Department are in a master-servant relationship with the local posts. Assuming that the factfinder makes this finding at trial, the National Legion and Department—given their ability to control local posts—will be in the best position to help prevent more tragedies like the one that the Urbans have

because “the very object of this legislation would be substantially defeated”).

suffered. The National Legion and Department will also be in the best position to advance the remedial goal of the CDA: compensating injured parties. Post 184 has virtually no resources to compensate the Urbans.

If, on the other hand, the ruling of the lower court is allowed to stand, every franchisor – to take one example – who directly controls a franchisee with a license to serve alcohol will be absolutely immune from liability because an injured party will not be able to hold the party who has the ability to control the “licensee” liable. Under Minnesota law, franchisors will be insulated from the unlawful conduct of their franchisees, even when the franchisors have the right to control that conduct. And when a bar is owned by a separate company and that separate company is owned by, say, a holding company, the holding company will be untouchable by the injured parties.

Finally, the question of whether the CDA should be “strictly construed” or “liberally construed” is one of those muddled subjects in the law. See Mullins, “Coming to Terms with Strict and Liberal Construction,” 64 *Albany L. Rev.* 9, 10 (2000) (“Strict construction and liberal construction are among the most difficult, muddled, and commonly encountered terms in cases involving statutory construction.”). For every case like *Haugland* or *Whitener*, in which an appellate court has said that the CDA should be “strictly construed,” there is another case, like *Hahn* (which applied common-law master servant principles to a claim

under the CDA), that says the opposite – that is, it should be “liberally construed.” See *Hahn*, 57 N.W.2d at 261 (civil damages acts “although penal in nature, are also remedial in character and, according to the prevailing view, are to be liberally construed so as to suppress the mischief and advance the remedy”) (emphasis in original); see also, e.g., *Hannah v. Chmielewski, Inc.*, 323 N.W.2d 781, 784 (Minn. 1982) (holding that a policeman’s wife can make an independent claim for damages under the CDA and noting that the CDA should be “liberally construed”); *Hempstead v. Minneapolis Sheraton Corporation*, 283 Minn. 1, 166 N.W.2d 95, 97 (1969) (holding that passenger in car with intoxicated driver had a cause of action under the CDA and noting that a “liberal construction” of the Act was necessary to effectuate the purposes of the Act).

In *Village of Brooten v. Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961), then Judge Harry Blackmun recognized this confusing use of “strict” and “liberal” construction by Minnesota courts, which continues to this day, and conducted a thorough review of the *substance* of all the state-court decisions to determine the true nature of the state court’s approach to the CDA. He concluded “that the Minnesota Supreme Court has adopted a generally broad and liberal attitude toward the state’s [CDA].” *Id.* at 293.

Blackmun’s characterization of the court’s attitude is still true today. If any generalization can be made about the Court’s use of the terms “strict

construction” and “liberal construction” regarding the CDA, it is that whenever the primary actor-defendant is clearly within the scope of the CDA – as Post 184 is – then the Court will liberally construe the CDA to ensure that its penal and remedial purposes are given effect, which would include holding the master of the primary actor liable under the CDA. *See Lefto v. Hoggsbreath Enter.*, 581 N.W.2d 855, 857 (Minn. 1998) (allowing claim by an accident victim’s fiancée and her daughter as “other persons” under Section 340A.801, subd. 1, and explaining that if someone is within the “scope” of the CDA, which should be strictly construed, then the CDA should be interpreted liberally to suppress the mischief and advance the remedy).

3. No Analogy Can Be Made to Social-Host Cases.

Both the National Legion and Department argued in the District Court and the Court of Appeals that the Urbans’s claims should be dismissed by analogizing their case with a line of decisions under the CDA involving “social hosts.” They cited *Koehnen v. Dufuor*, 590 N.W.2d 107 (Minn. 1999), and *Cady v. Coleman*, 315 N.W.2d 593 (Minn. 1982), as examples. In *Koehnen* (which followed *Cady*), this Court held that “social hosts” – even those who receive some consideration from their guests in return for alcoholic drinks – cannot be sued under the CDA. The Court reached this conclusion by analyzing the long history of legislative amendments and interpretations of Section 340A.801. According to

the National Legion and Department, it should follow from these “social host” cases that someone who has the ability to control a licensee of alcohol should not be vicariously liable for the illegal sale of the alcohol. This is a poor analogy, but one that the District Court and the Court of Appeals accepted.

Logically, it does not follow that someone who is in an agency or master-servant relationship with someone who sells alcoholic beverages cannot be liable under the CDA simply because a *social host* is not liable under the CDA. In the social-host cases *no* defendant was a licensed, commercial seller of alcoholic beverages. Here, the National Legion and Department admit that Post 184 is a licensed, commercial seller of alcoholic beverages and, therefore, subject to the CDA. The question is whether the common law of vicarious liability should apply to claims under the CDA so as to make the controlling person in a master-servant relationship potentially liable under the CDA for the actions of the servant. A short history of social-host liability in Minnesota demonstrates that the social-host cases have absolutely nothing to do with the subject of vicarious liability under the CDA – a subject that never came up in those cases.

Before 1977 and from the time of its enactment in 1911, the CDA stated that liability would arise “against any person who, by illegally selling, *bartering or giving* intoxicating liquors, caused the intoxication of [a] person.” *See Ross v. Ross*, 294 Minn. 115, 123, 200 N.W.2d 149, 154 (1972) (quoting what was then

Minn. Stat. 340.95) (emphasis added). In *Ross* – a case of first impression – this Court concluded that by using this language, the Minnesota Legislature in 1911 had intended for social hosts (e.g., the host at a wedding reception; the employer at a company picnic) to be liable for its illegal acts under the CDA (e.g., furnishing liquor to a minor). *Id.* at 116–20, 200 N.W.2d at 150–52. In 1977 – in response to the *Ross* decision – the Minnesota Legislature amended the CDA to remove the words “or giving.” (Later, in 1985, the term “bartering” was also removed.) In *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982), this Court interpreted this amendment as an intent by the Legislature to eliminate claims against social hosts. This interpretation of the CDA has prevailed ever since. *Id.* at 840.

The social-host cases simply did not involve the same legal issue as this case and they do not provide an analogy to the facts of this case. The issue here is not whether the National Legion and Department are somehow analogous to a social host (they are not); the issue is whether the common-law doctrine of vicarious liability should apply to a claim under the CDA. Here, unlike the social-host cases, which did not involve any defendant with a license to sell alcohol, one of the defendants – Post 184 – holds a license to sell alcohol and the other defendants have the ability to control that licensee.

4. Any Reliance on the Dog-Bite Statute at Issue in *Gilbert* Is Misplaced.

The last explanation that the District Court offered for its decision to dismiss the claims against the National Legion and Department was a reference to the CDA as a “strict liability” statute, which the District Court suggested made the CDA analogous to the dog-bite statute at issue in *Gilbert v. Christiansen*, 259 N.W.2d 896 (Minn. 1977). According to the District Court, *Gilbert* “discuss[es] not imputing liability under a strict liability statute, [because] such expansion is a policy question for the legislature.” (A-4).

The CDA is *not* a strict liability statute, at least not in the classic sense that it imposes liability on someone without “fault.” The CDA requires a plaintiff to prove wrongdoing by the defendant— that is, some departure from a standard of care— by requiring proof that the defendant sold alcohol to an obviously intoxicated person or otherwise made an illegal sale of alcohol. *See, e.g.*, Minn. Stat. § 340A.502 (making sale to obviously intoxicated persons illegal).

In any event, the decision in *Gilbert* does not support the argument of the National Legion and Department. *Gilbert* did not involve the CDA; it involved a claim under Minnesota’s dog-bite statute (Minn. Stat. § 347.22), brought by someone who was bitten by a dog inside an apartment in an apartment complex. Section 347.22 holds the “owner” of a dog strictly liable in damages for anyone attacked or injured by the dog. The issue in *Gilbert* was whether the plaintiff

could sue not only the dog's owner, who was a tenant in the building, but also the apartment manager, on the theory that the manager, too, was an "owner" of the dog because the manager had promulgated rules and regulations relating to the care of pets in the building, which showed the manager could exercise some control over pets. *Gilbert*, 259 N.W.2d at 897. The Court rejected this interpretation of "owner" because, among other reasons, the rules and regulations were only applicable in common areas and not inside a tenant's apartment. *Id.* At the end of the opinion, the Court noted that if the apartment manager were to be deemed an "owner" of the dog, this could have an adverse affect on the availability of housing for people who own dogs, and that a determination of these policy effects was a "question for the legislature."

Gilbert did not involve any claim of vicarious liability or any question of whether a common-law doctrine should apply to the dog-bite statute. In *Gilbert*, the plaintiff was trying to make the apartment manager an "owner" of the dog—that is, directly liable under the dog-bite statute. Here, the Urbans are *not* alleging that the National Legion and Department are *directly* liable—that is, that they are the liquor licensee. They are alleging rather that the National Legion and Department are *vicariously* liable. The decision in *Gilbert* has no bearing on the Urbans's claim; it is inapposite to this case.

III. The Facts in the Record Establish a Master-Servant Relationship as a Matter of Law or at Least Create a Genuine Issue of Material Fact.

A. This Court Has Recognized the Existence of a Principal-Agent Relationship In Similar Circumstances.

Sixty years ago, this Court decided *Pierce v. Grand Army of The Republic*, 220 Minn. 552, 20 N.W.2d 489 (1945), a case that strongly supports the Urbans' allegation that an agency or master-servant relationship exists in the circumstances of this case. The Grand Army of The Republic – whose members were Union veterans of the Civil War – was organized like The American Legion, with a national organization, state departments, and local posts. In *Pierce*, the commander of a local post in Minnesota was terminated from his position by the national organization. He commenced a lawsuit against the national organization by serving an officer of the department. The national organization challenged the sufficiency of the service, arguing that it had insufficient presence in Minnesota and that the officer of the department was not its agent. This Court reversed the trial court and reinstated the lawsuit.

The Court noted that for many years, the national organization had been “acting through the Department of Minnesota and its commander, has collected and received, as part of its regular routine business, department reports and dues.” *Id.* at 556, 20 N.W.2d at 492. “Through the department commander, posts have been organized, charters issued, and orders have been made and submitted.” *Id.* The department and the local posts were “subject to the rules

and regulations (by-laws of the organization) then existing or to be adopted by the [national organization]." *Id.* The Court concluded that the national organization was subject to service of process in Minnesota and that the officer of the department who was served was likewise clearly an agent of the national organization because he was subject to discipline by the national organization. *Id.* at 558, 20 N.W.2d at 492-93.

Here, the evidence is likewise clear that Post 184 is subject to discipline by the National Legion and Department, including by cancellation or suspension of the Post's charter. These undisputed facts alone should compel the same conclusion as in *Pierce* – that Post 184 acts as an agent or servant of the National Legion and Department. At a minimum, the evidence in this case, when examined in the context of the *Pierce* decision, creates a question of fact for the jury to resolve.

B. The Record Establishes the Existence of a Master-Servant or Agency Relationship.

The Urbans are not required to show the existence of a master-servant or agency relationship as a matter of law. They need only present enough facts to create a genuine issue of material fact. The issue then becomes one for the jury to resolve. *See, e.g., Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992) ("Whether an agency relationship exists is a question of fact 'within the province of the jury.'"); *Vacura v. Haar's Equipment, Inc.*, 364 N.W.2d 387, 391

(Minn. 1985) (reversing summary judgment on agency: “We have frequently held that the existence of an agency relationship is a question of fact.”). When the evidence is viewed in a light most favorable to the Urban family, the record establishes the existence of a master-servant or agency relationship.

1. The Right of the National Legion and Department to Control Post 184 Is Easily Demonstrated.

Of course, “[t]he *right* of control, and not necessarily the exercise of that right, is the test of the relation of master and servant.” *Frankle*, 47 N.W.2d at 487. And here, the right of control (and control itself) is easily demonstrated, as shown in the Statement of Facts. The Court of Appeals’ concern that the right of control be not merely over *what* is to be done but over *how* it is to be done is also easily demonstrated – by undisputed facts that the lower courts overlooked or simply ignored.

Post 184, as explained above, holds a “club license” to sell liquor under Minn. Stat. 340A.404. This is undisputed. Section 340A.404 only allows Post 184 to sell alcohol to members of the Legion or bona-fide guests. The drunk driver who destroyed the lives of the Urbans was neither, and Post 184 admits this. A-417. Service of alcohol to non-member is a per-se violation of the CDA. *See Rambaum v. Swisher*, 435 N.W.2d 19, 21-22 (Minn. 1988).

The National Legion has known for a long time that its local posts serve alcohol to non-members and its knows that many posts do this to survive,

financially. (Post 184, as explained above, receives approximately 94% of its revenue from alcohol sales, including to non-members.) A-425. The National Legion has nonetheless expressed concern that the admittance of non-members could well result in losing the Legion's "group" tax exemption for its posts. A-383. In fact, the Legion's own national proceedings in 1994 verify that the National Judge Advocate has directed Legion posts to "ensure that Post [s]taff police the doors and check the [membership] cards. . . . So if any Post has any guest members, social or whatever, they must get rid of them. That has always been the Legion rule" *Id.* The District Court did not mention these undisputed facts and the majority in the Court of Appeals characterized these explicit procedures and rule as mere "advice." *See* A-527 ("National has also advised local posts for tax purposes to obtain club licenses and to serve alcohol only to members."). The majority did not explain how it could find that the National Legion has no right to control *how* posts operate their bars when the evidence shows that the National Legion issues rules and directives governing the very conduct that led to this tragedy.

The National Legion and Department's right to control their local posts is also shown in a myriad of other ways. For example, as explained above:

- *Each year* the National Legion submits an affidavit to the IRS, for the purpose of obtaining a "group" tax exemption, which exemption

requires that the “subordinates” of the National Legion (i.e., departments and posts) be *under its general supervision or control*. A-318; 319–23.

- Post 184 has *admitted* in its formal admission in this litigation that it is subject to control by the National Legion and Department. A-412.
- The National Legion has published a laundry list of “Suggested House Rules” for the operation of post clubhouses and bars. A-439.
- The National Legion dictates in detail to local posts the procedures that posts have to use for their meetings and ceremonies. A-115–83.
- The National Legion can and does require posts to carry insurance for certain activities, and requires that itself and the Department be included as insureds. A-293, 296, 375.
- The National Legion and Department can and do require that posts collect and transmit membership dues to them. A-188.
- The National Legion and Department can oversee the financial operations of posts, including by requiring an audit of a post’s financial records. A-193, 434.

The above points are essentially undisputed facts, and show that the National Legion and Department have an extraordinary right of control over local posts. Indeed, the evidence shows that the National Legion even exercises its power

over posts on the very subject that led to the tragic consequences for the Urbans— that is, service of alcohol to non-members of the Legion.

This evidence is sufficient to allow a jury to decide whether the National Legion and Department have the ability to control. Indeed, the lower courts' decision that a jury should not decide this issue is contrary to many, many decisions of other courts, which would hold to the contrary:

- *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 788 (3d Cir. 1978) (an agreement that required an entity to conduct its business in accordance with the parent company's policies and regulations as those policies might be promulgated from time to time "can hardly be considered anything but a means of dictating the most minute details of how the [servant entity] should be run");
- *Font v. Stanley Steamer Int'l*, 849 So.2d 1214, 1217-18 (Fla. App. 2003) (potential agency relationship existed because franchisor required franchisee to use certain equipment, submit advertising for approval, wear uniforms, and carry insurance, among other things);
- *Patterson v. Western Auto Supply Co.*, 991 F. Supp. 1319, 1324-25 (N.D. Ala. 1997) (franchisor required franchisee to make certain purchases, to spend certain amounts of money on advertising, to keep business records, to purchase insurance);

- *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1111-12 (Ore. App. 1997) (servant entity agreed to operate its business in a manner consistent with the master entity's system and the master entity issued detailed manuals for the operations);
- *Balderas v. Howe*, 891 S.W.2d 871, 873 (Mo. App. 1995) ("Even if [the franchisor] had no control of the [franchisee's] operations," it had the right to control);
- *Coleman v. Chen*, 712 F. Supp. 117, 124 (W.D. Ohio 1988) (the two entities had a license agreement, rules of operation, and the servant was subject to inspections and evaluations by the master);
- *Billops v. Magness Const. Co.*, 391 A.2d, 196 198 (Del. 1978) (master entity issued a detailed and, in part, mandatory operating manual and the servant entity was required to keep records and make itself available for inspections);
- *Kuchta v. Allied Builders Corp.*, 98 Cal. Rptr. 588, 591 (Cal. App. 1971) (agreement allowed master entity to control the servant's place of business, the quality of the goods sold, among other things, including a right to inspect and to audit books).

Indeed, the undisputed power of the National Legion and Department to suspend, cancel, or revoke the charter of a local post – a power that has been

exercised many times – is, alone, emblematic of a master-servant relationship. See, e.g., *Jenson v. Dep't Econ. Sec.*, 617 N.W.2d, 627 630 (Minn. App. 2000) (right to discharge a servant is a factor showing a master-servant relationship); *Toyota Motor Sales U.S.A. v. Superior Court*, 269 Cal. Rptr. 647, 653 (Cal. App. 2d Dist. 1990) (“[p]erhaps no single circumstance is more conclusive” to show the relationship of a master and servant than the master’s right to terminate the services of the servant when the master sees fit to do so); *Singleton v. Int’l Dairy Queen, Inc.*, 332 A.2d 160, 163 (Del. Sup. 1975) (“What greater control can there be than . . . the nebulously defined sanction of termination by the unilateral action of the franchisor.”); *Billops*, 391 A.2d at 198 (the strength of the control lies in the right of termination).

2. Post 184’s Operation of a Bar Is In the Service of the Legion.

Just as there can be no question that the National Legion and Department have the right to control Post 184, there can be no question but that a jury can reasonably conclude that Post 184’s operations, including its bar operations, are within the scope of services performed for the Legion. See *Edgewater Motels, Inc. v. A. J. Gatzke*, 277 N.W.2d 11, 16 (Minn. 1979) (reversing summary judgment because scope of service was a fact issue for the jury; smoking a cigarette while engaged in business of master is incidental to service for the master and can be

within the scope of service). The National Legion acknowledges that clubrooms have “only one purpose— to serve The American Legion.” A-306.

The Legion’s *Post Adjutant’s Manual*, as explained above, specifically encourages local posts to offer clubrooms or bars— and the Legion acknowledges that operating an alcohol business will help to draw in members. The Legion also knows that many local posts, including Post 184, could not survive, financially, without operating a bar. A-305; A-416; A-425. Thus, without a bar, the Legion would receive no membership dues from Post 184 because Post 184 would not be solvent. (Mindful of this reality, but in an attempt to avoid the reach of dram-shop laws, the National Legion provides its posts with many standards for bar operations, some of which are disguised as “guidelines” or “suggestions.”)

Operating a bar, in short, tends to accomplish the Legion’s goal of recruiting dues-paying members. Because the national organization issues rules governing the operations of bars, one can reasonably infer that the Legion has condoned, accepted, or authorized the operation of bars on the premises of local posts and, as shown above, explicitly encourages the creation and operation of bars. The fact that local posts will sell alcohol is thus entirely foreseeable. From these simple facts, the jury can reasonably infer that the operation of a bar was within the scope of Post 184’s service to the Legion. *See, e.g., Marcel v. Cudahy*

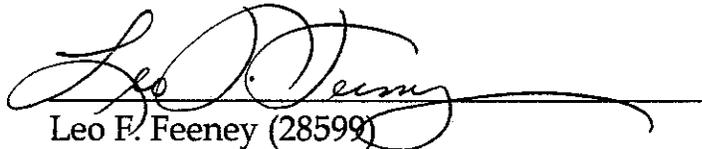
Packing Co., 186 Minn. 336, 341, 243 N.W. 265, 267 (1932) (the act that the servant was performing was “not wholly disconnected from the service” of the master and the jury might properly infer that “he was engaged in part in furtherance” of the master’s business); *see also Restatement (Second) of Agency* § 228, cmt. b (if it is “proved that the act tended to accomplish an authorized purpose and was done at an authorized place and time, there is an inference that it was within the scope of employment”).

Conclusion

The district court’s summary judgment should be reversed and this matter remanded for trial. Common-law principles of vicarious liability apply to the Urbans’s claim under the CDA against the National Legion and Department and that they are entitled to a jury trial to determine whether the National Legion and Department are liable to them.

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Certificate of Compliance

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 12,206 words. This brief was prepared using Microsoft Office Word 2003.



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