

No. 04-1409

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**State of Minnesota  
In Supreme Court**

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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.*

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

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**Appellants' Reply Brief**

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## Reply Argument

### I. Introduction.

The Urbans maintain that the National Legion and Department are vicariously liable for Post 184's violation of the CDA because they have the ability to control Post 184. (The ability to control is one of the bases for holding a master liable for a servant's conduct). The Urbans are *not* arguing that the National Legion and Department directly violated the CDA – that the National Legion and Department, themselves, made an illegal sale of alcohol. Yet this fundamental distinction – between direct versus vicarious liability – seems to be lost on the National Legion and Department. Again and again, the National Legion and Department argue that they cannot be liable for an illegal sale of alcohol because they don't have a liquor license and don't sell alcohol. Common-law principles, including principles of master-servant, have been applied to claims under the CDA for many years (and they have apparently been applied by every state court that has considered the issue). The National Legion and Department do not cite a single case that holds that common-law principles of vicarious liability should not apply to claims under Minnesota's CDA.

The National Legion and Department repeatedly ignore the most salient facts in the record and they repeatedly offer their own gloss on the documents and other evidence that was presented below. Both of the respondents, for

example, fail to even mention that the Legion has a procedure and rule governing the admission of non-members to post bars, which is for the purpose of ensuring that the National Legion and its Department can remain tax-exempt. (Post 184's violated this procedure and rule when it admitted and served alcohol to the non-member who ruined the Urbans's lives.) This procedure and rule are evidence of *actual* control of the posts in the very area of the posts' business that caused harm to the Urbans. Also, to achieve group tax-free status, as the Urbans explained in their opening brief, the National Legion affirmatively represents to the Internal Revenue Service that it controls its subordinate posts. Many other facts are either ignored or distorted by the respondents.

This Court has to do more than pay lip service to the rule that on summary judgment the facts are viewed in a light most favorable to the non-moving party. The National Legion and Department must say, in effect, that they will accept all of the facts presented by the Urbans to be true, and that even based on those facts, the law still does not allow the claim they assert to proceed. That cannot be said on this record. The Urbans are entitled to a trial.

**II. This Appeal Is Not Moot, as the Department Contends; the Court Did Not Grant Review to Decide an Academic Issue.**

The Department argues that the Court should dismiss this appeal or "summarily" affirm the court of appeals because the Court did not grant review of the issue whether the National Legion and Department had to be served with

statutory notice under the CDA. The National Legion asks the Court to affirm the court of appeals on similar grounds. The Department and National Legion are both assuming, in effect, that this Court was not aware of the effect of its decision to grant review of fewer than all issues. The appeal is not moot and the notice issue does not provide any grounds for affirming the court of appeals.

**A. The Notice Issue Was Raised In the Petition for Review.**

In *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), this Court explained that “[w]hen submitting a petition for review, a party should bring issues ripe for review to the supreme court’s attention with specificity, or waive the opportunity to have them reviewed.” *Id.* at 67. Here, the issue of whether the National Legion and Department were entitled to receive notice under the CDA was decided by the district court and raised by the Urbans on appeal to the court of appeals. But the court of appeals did not reach the issue because the court’s decision on other issues rendered consideration of the notice issue unnecessary. In that context, the notice issue was not “ripe for review,” as the Court used that term in *Peterson* (more on this below).

Nonetheless, out of caution, the Urbans specifically sought review of the notice issue in their Petition, as well as issues relating to vicarious liability, alter ego, and the district court’s discovery rulings. *See* Urbans’s PFR at 1 (including n.1). While the notice issue and the discovery issue were included in a footnote,

they were specifically presented to the Court. No question exists that the respondent knew that the issue was presented to the Court; the Department does not deny it and the National Legion explicitly responded to the Petition on that issue. No question exists either that the Court knew that the issue had been presented. That fact is evidenced by the very words this Court used in its Order granting further review, when it denied review “as to the remaining issues.” The Court recognized that there were other *issues* (plural) raised in the petition, in addition to the vicarious-liability claims contained in numbered paragraphs 1 and 2. The Court declined to grant review on those other “issues” – including the notice issue.

**B. Issues Not Decided by the Court of Appeals Are Remanded If They Become Ripe As a Result of the Court’s Decision.**

When the court of appeals does not address an issue raised by the parties, this Court does not consider the issue to be moot, or waived. Instead, it considers the issue appropriate for remand to the court of appeals. Several recent cases decided by this court illustrate that very point.

In *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680 (Minn. 2004), the plaintiff brought a pharmacy-malpractice claim. The district court granted the plaintiff’s motion for a new trial after a jury found no negligence on the part of the pharmacy. Following the new trial, the district court entered judgment against the pharmacy based on the second jury verdict. On appeal, the court of appeals

reversed, holding that the district court had improperly granted a new trial. Because of that decision, the court of appeals did not reach other issues raised by the defendant regarding its right to a new trial based on errors in the second trial. The plaintiff petitioned the Supreme Court for further review. The defendant did not file a cross-petition to preserve the new trial issues rejected by the district court but not addressed by the court of appeals. This Court reversed the court of appeals' decision on a new trial, and reinstated the judgment based on the verdict in the second trial. The Court stated:

Our holding that the district court properly granted [the plaintiff's] motion for a new trial reverses the court of appeals on the only issue that court addressed on appeal. The alternative issues raised by [the defendant] before the court of appeals and not addressed by that court remain unresolved. Therefore, we remand this case to the court of appeals for consideration of [the defendant's] remaining issues in a manner consistent with this opinion.

*Id.* at 689.

In *Motor Sports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320 (Minn. 2003), the plaintiff brought an antitrust action against the defendant and others. The district court denied the manufacturers' motion for summary judgment insofar as it challenged the organizer's standing to bring the action, but granted summary judgment for the manufacturers on the ground that the plaintiff failed to show that the defendant's conduct cause any injury. The court of appeals reversed the district court's decision on standing, but did not address

the merits issue (injury resulting in damage) raised by the defendant. On further review, this Court held that the plaintiff did have standing to bring the claims. The Court remanded the case to the court of appeals for consideration of the merits issue on damages. *Notably, the Court had previously denied the defendant's cross-petition for further review on the damages issue.* Nonetheless, this Court remanded the case to the court of appeals "with instructions to review the district court's grant of summary judgment based on causation." *Id.* at 327.

In the recent decision of *Isles Wellness, Inc. v. Progressive Northern Insur. Co.*, \_\_\_ N.W.2d \_\_\_, 2005 WL 2233474 (Minn., Sept. 15, 2005), several clinics that provide chiropractic, physical therapy, and massage services sued two insurance carriers for their failure to pay bills for the treatment of the clinics' patients who were insured by the carriers. The carriers counterclaimed, alleging that the clinics operated in violation of the corporate-practice-of-medicine doctrine. The district court granted the carriers' motion for summary judgment, holding that the clinics' operations violated the doctrine and that the outstanding bills of the carriers' were void on public-policy grounds. The clinics appealed. The court of appeals held that the clinics were not in violation of the corporate-practice-of-medicine doctrine. But the court of appeals did not address the issue involving the carriers' outstanding bills.

The carriers petitioned this Court for review. The clinics' cross petition for review of the issue involving the outstanding bills was denied. Ultimately, this Court held that the physical-therapy and massage clinics were, indeed, in violation of the corporate-practice-of-medicine doctrine and it remanded the issue of the outstanding bills to the court of appeals "because the court of appeals did not address the issue" and because this Court denied the clinics' petition for cross review. *Id.* at \*9. See also *Hyatt v. Anoka Police Department*, 691 N.W.2d 824, 831 (Minn. 2005) ("Because the court of appeals did not reach the city's alternative claims of immunity or address whether the police department is a legal entity subject to suit, we remand to the court of appeals with directions to consider those issues.").

Like the cases described above, here, the Court was presented with the notice issue by the petition for further review. This Court chose not to grant review of the notice issue, presumably because it was not ripe. That action was entirely consistent with the Court's treatment of similar issues in other cases. Assuming that the Court decides this case in a way that makes the notice issue ripe, then it will, consistent with its earlier decisions, remand the matter to the court of appeals for consideration of the notice issue in light of its opinion.

**C. The Notice Issue Was Not Waived by the Urbans When They Filed a Brief Addressing the Sole Issue Allowed On Review.**

Neither the law-of-the-case doctrine nor the briefing-waiver rule has any application here. The Department argues that if this Court reverses the court of appeals and remands this matter to the district court, the district court's earlier ruling on the notice issue would be law of the case and binding on the Urbans, requiring judgment for the National Legion and Department. *See* Department Brief at 16. The Department simply fails to consider that this Court's practice is to remand such issues to the court of appeals in these circumstances.

Moreover, the briefing-waiver rule can hardly apply when this Court specifically directs the parties not to brief the notice issue, and limits the briefing to the question of vicarious liability. The suggestion that the Urbans should have questioned the Court's order granting review before filing their brief has no merit. Rule 140.1 of the Minnesota Rules of Civil Appellate Procedure specifically prohibits requests for reconsideration or rehearing of the denial of a petition for further review. Only on remand to the court of appeals would briefing of the notice issue be appropriate.

**D. The Notice Issue Was Properly Raised in the Petition and the Appeal Is Not Moot.**

The notice issue was raised in the Urbans's Petition for Review. This Court recognized that fact and specifically declined to take that issue along with

two others. The decision to deny review of the notice issue does not conclusively decide the question, as demonstrated by the recent decisions of this Court discussed above. Because the notice issue has not yet been decided on appeal, the appeal cannot be moot.

There are no specific requirements in Rule 117 of the Minnesota Rules of Civil Appellate Procedure regarding the formulation or articulation of issues. All that is required is that the issues be clearly stated so that they are called to the attention of the Court and parties. It would be a disservice to the practicing bar if this Court were to adopt an arbitrary and absolute rule concerning the specific manner in which issues must be stated in order to preserve those issues for further proceedings. But that is what the Department maintains is or should be the law. That suggestion is meritless, both as a general proposition, and in the specific context of this case.

Here, the notice issue was clearly raised in the Petition. The National Legion and Department certainly understood that the issue was raised. Even though it was not ripe, the Urbans presented the notice issue to the Court, which considered it, and decided not to include it in the matters it would review.

Under no circumstances does the procedural posture of this case render the issue of vicarious liability moot.<sup>1</sup>

### III. Other Provisions of Minnesota's Liquor Act (Chapter 340A) Do Not Support the National Legion and Department's Arguments.

Both the National Legion and Department argue that certain provisions of Minnesota's Liquor Act (i.e., Minnesota Statutes, Chapter 340A)—in particular, Sections 340A.501, 340A.402, 340A.409, and 340A.801, subd. 6—show that the Minnesota Legislature did not intend to have common-law principles of vicarious liability apply to claims under the CDA. The arguments of the National Legion and Department show a misunderstanding of these provisions and the principles of statutory interpretation; none of the statutes cited by the National Legion or Department contradict or supplant the application of vicarious-liability principles to a claim under Section 340A.801, subd. 1.

- *Section 340A.501.* This section, which was enacted in 1985, provides that licensees are responsible—for the purposes of *every* provision of Chapter 340A

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1. Both the National Legion and Department include arguments about the merits of the notice issue in their briefs. Because this Court did not grant review of that issue, the Urbans will not argue the merits of the issue here but, instead, refer the Court to the short comment on the subject by Judge Schumacher in dissent in the court of appeals. *See Urban v. American Legion*, 695 N.W.2d 153, 164 (Minn. App. 2005). The issue is more weighted in the Urbans's favor than the Respondents would have the Court believe. *See, e.g., Olson v. Blaeser*, 458 N.W.2d 113, 119 (Minn. App. 1990) ("By requiring notice to the entities most likely to be subject to liability [i.e., licensed retailers and municipal liquor stores], the purposes of the notice provision will be served in the vast majority of cases.").

(not just Section 340A.801, subd. 1) – for all “the conduct” in the establishment, including any sale of alcohol by an employee of the licensee who is authorized to sell alcoholic beverages. This section does *not* show, as the National Legion and Department contend, that the Legislature intended “limited vicarious liability” for licensees *only* under Section 340A.801, subd. 1, and that vicarious liability “is part of the *statutory* scheme and is not a common-law creation.” Department Brief at 24; *see also* National Brief at 18-21. In fact, in *Hahn v. City of Ortonville*, the Court cited a similar, predecessor statute (Minn. Stat. § 340.941) and, at the same time, noted that common-law principles of master-servant *also* apply to claims under the CDA. *See* 238 Minn. 428, 438, 57 N.W.2d 254, 262 (1953). *Hahn* shows, in other words, that this statute does not *limit* the application of common-law principles of vicarious liability; it is consistent with those principles.

- *Sections 340A.402 and 340A.409.* These sections establish the eligibility criteria for holding a retail liquor license and the minimum amount of insurance that a licensee must carry (\$100,000 for bodily injury of two or more persons or for loss of means of support for two or more persons). According to the Department, the latter minimum insurance requirements, in particular, show that it is “within the legislature’s sole province to provide greater financial responsibility for those whose liability is limited because they choose to operate in a corporate form.” Department Brief at 27. Anyone reading into this section a

tacit disapproval by the legislature of courts applying vicarious-liability principles to claims under the CDA would be engaging in a far-fetched act of statutory interpretation. Section 340A.409 helps guarantee a minimum amount that will be available to injured people; it doesn't provide any limits for claims under Section 340A.801, subd. 1, including any cap on the amount of damages, and it certainly doesn't relate to vicarious liability.

- *340A.801, subd. 6. In Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985),* one of several decisions on social hosts, the Court held that no social-host liability can be imposed directly on an adult for serving alcohol to a minor. Section 340A.801, subd. 6, was enacted in 1990 in response to that holding: "Subd. 6. Common law claims. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years." This statute, which concerns *direct* liability, has nothing to do with whether common-law vicarious-liability principles apply to a claim under Section 340A.801, subd. 1.

In short, this Court should not read into any of the cited statutes a legislative intent to narrow the relief for people injured by the illegal sale of alcohol or, more specifically, an intention of the Legislature to reject this Court's application of common-law principles, including vicarious liability, to claims

under Section 340A.801, subd. 1. No such intent is expressed or implied in any of the statutes cited.

#### **IV. The Foreign Dram-Shop Cases Relied on by the National Legion and Department Do Not Involve Questions of Vicarious Liability.**

The National Legion and Department have very little to say about the decision in *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. App. 1985), in which the Michigan court applied vicarious-liability principles to a claim under Michigan's dramshop act, other than to speculate that Michigan might not have a statute like Minn. Stat. § 340A.501. The Department refers to *Kerry* as an "outlier decision," as if there were cases in other jurisdictions holding to the contrary (there are not). Department Brief at 30. The Department also says that "[i]t is noteworthy . . . that in the 20 years since [*Kerry*] was handed down, not *one* court outside of Michigan . . . has cited that case with approval," without mentioning that not one court has cited it with disapproval either. *Id.* Also, neither the Department nor the National Legion acknowledges that Texas, too, agrees that common-law principles of joint liability should apply under a dramshop claim. *See* Opening Brief at 34 n.5.

Instead of explaining why the Michigan and Texas courts are wrong, the Department cites a decision from the court of appeals in Oklahoma (*Pate v. Alian*, 49 P.3d 85 (Okl. App. 2002) and one from the supreme court in Vermont (*Carrick v. Franchise Assoc.*, 671 A.2d 1243 (Vt. 1995)). The Department maintains that both

of those cases “declined to extend” vicarious-liability principles to a claim under those states’ dramshop acts. *See* Department Brief at 30-31. This is not an accurate statement.

In *Pate*, a pizza-restaurant franchisee served liquor to a customer who then got in an automobile accident. The motorcyclist who collided with the customer sued the franchisee, the franchisee’s individual owner, and the franchisor under a relatively new common-law right recognized in Oklahoma that imposes a duty on “commercial vendors” of alcohol to exercise reasonable care in selling or furnishing alcohol. The plaintiff agreed that the franchisor was *not* a commercial vendor of alcohol so the intermediate appellate court, without even considering vicarious liability, concluded that the franchisor owed no duty to the plaintiff. *Id.* at 90 (“Nothing in this record indicates any duty of Pizza Inc. to Plaintiff in regard to the sale of alcoholic beverages, let alone any breach of duty.”). This decision has absolutely no bearing on this case.

Equally irrelevant is *Carrick*. In that case, the estate of a person killed by a drunk driver who had left a bar that leased its building from a Howard Johnson’s hotel sued the bar, the franchisee hotel, and the hotel franchisor under Vermont’s dramshop act. The plaintiff did *not* allege vicarious liability; instead, the plaintiff alleged that the defendants had illegally “furnished” alcohol to the drunk driver — a direct violation of Vermont’s dramshop act. *See* 671 A.2d at

1244 (“The sole issue on appeal is whether defendants, as franchisor of the Howard Johnson’s name and trademarks, can be held liable under the ‘furnishing’ provision of the Dram Shop Act . . .”). The case had nothing to do with whether common-law principles of vicarious liability could be applied to a claim under Vermont’s dramshop act.

**V. The *Kerl* Decision In Wisconsin, Involving a Franchise Relationship, Does Not Support the Respondents and Is Distinguishable.**

The National Legion and Department argue that even if common-law principles of vicarious liability apply to claims under the CDA, the Urbans have not shown that there is enough evidence for the jury to conclude that the National Legion and Department should be vicariously liable for the actions of Post 184. Both the National Legion and Department rely heavily on the decision of the Wisconsin Supreme Court in *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328 (Wis. 2004), a franchise case that explains that vicarious liability is a form of strict liability without fault through which a master may be liable for a servant’s torts regardless of whether the master’s own conduct is tortious. *Id.* at 334. They urge this Court to apply the holding of *Kerl* to this case and they say that *Kerl* establishes a standard for vicarious liability that the Urbans cannot meet. *See* National Brief at 40-45; Department Brief at 33-36. In the end, the Wisconsin court’s decision in *Kerl* is distinguishable in many material respects from this

case. But, in its salient points, *Kerl* is actually entirely consistent with the arguments that the Urbans advance.

In *Kerl*, an employee of an Arby's franchised restaurant (owned by Dennis Rasmussen, Inc. or "DRI") left work without permission and shot his former girlfriend and her fiancé in a Wal-Mart parking lot, killing the fiancé and seriously injuring the former girlfriend. 682 N.W.2d at 332. The former girlfriend and the estate of her fiancé sued DRI for negligent supervision of its employee (the assailant) and they also sued DRI's franchisor, Arby's, Inc., seeking to hold the franchisor vicariously liable for the restaurant's conduct. *Id.* The vicarious-liability claim was based on a license agreement between DRI and Arby's, Inc., that authorized DRI to use Arby's trade name in the operation of its restaurant. *Id.* That agreement contained several quality and operational requirements that were "necessary," as the Wisconsin court described them, to maintain "the integrity of [Arby's] trade or service mark." *Id.* at 338. But, at the same time, nothing in the agreement "established that Arby's controlled or had the right to control DRI's hiring and supervision of employees, which [was] the aspect of DRI's business that [was] alleged to have caused the plaintiff's harm." *Id.* at 342. In these circumstances, the Wisconsin Supreme Court affirmed the summary-judgment dismissal of the complaint. The Wisconsin court also explained that the policy reasons for vicarious liability — spreading the risk and

encouraging safety and the exercise of due care by servants in a master-servant relationship – were “diminished” when the only purpose for the franchise agreement was to preserve the integrity and value of the franchisor’s trademark. *Id.* at 338.

Both the National Legion and Department argue that this Court should follow the reasoning and holding of *Kerl*. In fact, the National Legion criticizes the Urbans for failing to cite this “most recent and comprehensive decision,” National Brief at 40, but fails to mention that neither the National Legion nor Department apparently felt *Kerl* was persuasive enough to cite in the district court or the court of appeals. In any event, without so much as a nod to the relevant facts in the record of this case or the many distinguishing features between *Kerl* and this case – to say nothing of Minnesota’s own case law – the National Legion and Department both contend that this Court should follow the “clear trend of cases” like *Kerl*. The fact that the National Legion and Department embrace *Kerl* so determinedly is ironic because, in the end, the legal principles applied in *Kerl* support the Urbans’s position.

**A. *Kerl* Articulates Many Fundamental Points About Vicarious Liability that the Respondents Have Tried to Disavow.**

*Kerl* articulates many of the general common-law principles and policies behind vicarious liability that the National Legion and Department have otherwise tried to disavow or been loath to acknowledge. For example, *Kerl*

describes in some detail the difference between directly liability and vicarious liability, explaining that vicarious liability does not give any consideration to the conduct of the master: “Vicarious liability is imputed liability. It 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.” 682 N.W.2d at 334. This fundamental distinction between direct and vicarious liability is one that is apparently lost on the National Legion and Department, as they insist in their briefs that they cannot be (directly) liable under Minnesota Statutes § 340A.801, subd. 1, because they do not have liquor licenses and do not “sell” alcohol like the local posts. *See, e.g.*, National Legion Brief at 25; Department Brief at 23. The Urbans are not arguing, of course, that the National Legion and Department are directly liable for violating Section 340A.801 but rather that they should be vicariously liable for Post 184’s illegal sale of alcohol to a non-member of the Legion.

It is also ironic that the National Legion, before discussing *Kerl*, argues in its brief that this Court should not allow one corporation to be vicariously liable for the conduct of another corporation because this would, in effect, “pierce the corporate veil of The American Legion.” National Brief at 34. *Kerl* contemplates, without question, vicarious liability between two business entities when the requisite right to control can be found. *See Kerl*, 682 N.W.2d at 341; *see also*

Urbans's Opening Brief at 29 (noting that "'most if not all . . . courts" apply vicarious liability between business entities) (quoting *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1110 (Ore. App. 1997)). And it is ironic that both the National Legion and Department suggest in their briefs that they should, for some reason, be treated differently for vicarious-liability purposes because they operate as non-profit corporations. See, e.g., Department Brief at 31 n.9. *Kerl* makes clear that "'the [master's] business need not be an undertaking for profit.'" 682 N.W.2d at 335.

The National Legion also argues (before citing *Kerl*) that the Court has to examine a number of factors other than the ability to control and the scope of service before the Court can determine whether a master-servant relationship exists with Post 184. In particular, the National Legion argues that the Court has to examine the "mode of payment" between the alleged master and servant, whether the alleged master furnishes "material or tools," who controls the "premises where the work is done," etc. See National Brief at 35. The National Legion, in other words, would have this Court believe that a master-servant relationship can only exist between an employer and an employee. On this point, *Kerl* should have set the National Legion straight. In *Kerl*, the court explained that a person can be a servant without being paid, that a master does

not need to be in the presence of the servant, that the master's business does not need to be for a profit, etc. *See Kerl*, 682 N.W.2d at 335.

**B. The Record Supports a Ruling for the Urbans, Even Under the Holding In *Kerl*.**

The National Legion and Department both strongly embrace *Kerl*, while, at the same time rejecting, ironically, many of the fundamental precepts of vicarious liability that are outlined in *Kerl*. In the end, the holding of *Kerl* actually supports reversal of the court of appeals. In *Kerl*, the court concluded that the terms of the franchise agreement at issue were designed to protect the integrity of Arby's trade and service marks and did not "establish that Arby's controlled or had the right to control DRI's hiring and supervision of employees, which is the aspect of DRI's business that is alleged to have caused the plaintiff's harm." 682 N.W.2d at 342. Here, even *assuming* that the vicarious-liability standard for franchisors that was established in *Kerl* were to be adopted in Minnesota in this non-franchise case, the Urbans presented facts to the district court that show that the National Legion has the ability to control and does actually control the very aspect of Post 184's business that caused the tragedy for the Urbans.

As explained above, the National Legion's Judge Advocate has, himself, stated that the organization has "always" had a "rule" that requires local posts to "police the[ir] doors and check for [membership] cards" so that non-members

will not be admitted to the posts. A-383. The purpose for this “rule” is to help preserve the National Legion and Department’s tax-exempt status with the IRS.

*Id.* Post 184 violated this rule and its Minnesota club-liquor license when it admitted and served alcohol to the non-member who then ruined the Urbans’s lives. On the basis of this evidence, a jury could reasonably find that the National Legion and Department have the right to control who will be admitted to the posts they chartered and over whom they hold the right to discipline or terminate.

These facts are highlighted in the Urbans’s opening brief. The Legion’s rule about “policing” the doors, alone, undermines the National Legion and Department’s arguments that the Urbans cannot meet the test applied in *Kerl*. The Department refuses to even mention this “rule” in its brief and the National Legion makes only one vague allusion to the rule at the end of its brief. *See* National Brief at 44 (seeming to refer to these undisputed facts as mere “editorial and spontaneous comments by [the] leadership of The American Legion”). On a motion for summary judgment, the facts presented by the Urbans and all reasonable inferences arising from those facts must be accepted as true. The National Legion and Department’s insistence on arguing their version of the evidence belies their contention that the Urbans have failed to raise a fair question for the jury.

Also, the *Kerl* court decided that the policy reasons for imposing vicarious liability on a franchisor were not strong when the only interest that the Arby's franchisor sought to protect by its agreement with the franchisee was the protection of the franchisor's trade and service mark. 682 N.W.2d at 338. As the court explained, "while the rationale of encouraging safety and the exercise of due care is present in the domain of franchising," it has less strength in that context. *Id.* The same cannot be said about the context of this case. Here, the policy reasons for imposing vicarious liability on the National Legion and Department are compelling.

The local posts, including Post 184, serve alcohol – not roast-beef sandwiches – and the facts, viewed most favorably for the Urbans, show that the National Legion and Department *encourage* local posts to operate bars for the purpose of generating membership dues or revenue for the National Legion and Department. *See, e.g.,* A-51-52 (expert affidavit of a professor of finance who concludes, among other points, that the National Legion and Department benefit financially from the sale of alcohol by Post 184). The facts also show that there are myriad ways in which the National Legion and Department can or do exercise control over the local posts, including in their operation of bars, their purchase of insurance, etc. Indeed, the National Legion annually represents to the IRS that the local posts are within its control or supervision. *See* Opening

Brief at 21. With this power or ability to control, the National Legion and Department are in ideal positions to encourage safety and the exercise of due care by the local posts in the service of alcohol. When a master encourages a servant to engage in a potentially dangerous business (serving alcohol) for the purpose of enriching itself by that business and there is at least some evidence that the master has the ability to control the relevant aspects of that business, then it follows, as a matter of equity and sound policy, that the master should be liable along with the servant when the business does someone harm.

The decision in *Kerl* is also distinguishable on its facts from this case. The court in *Kerl* was faced with a franchise relationship in which the terms of the relationship between the alleged master and servant were fixed in a written franchise agreement. Thus, the court was able to point, for example, to Article 6 of the agreement and conclude, by quoting the agreement, that it was the responsibility of the licensee to supervise its employees, *see* 682 N.W.2d at 332; no provision of the agreement put this duty (the failure of which allegedly caused the plaintiff's harm) expressly on the franchisor. Here, on the other hand, the relationship between the National Legion and Department and their local posts is not a franchise relationship and the division of rights and allowance of powers is *not* fixed and established in a single written agreement. The relationship is much more fluid, and the history of that relationship shows that

the National Legion and Department have the ability to exercise considerable or increasing control whenever they deem that control is necessary. *See, e.g.*, Opening Brief at 23-24 (explaining how the National Legion decided one day that the local posts who participated in the Legion's baseball program had to purchase insurance for the National Legion's protection). Indeed, Post 184, as the Urbans explained, has formally *admitted* that it has to comply with all of the regulations and rulings that the National Legion chooses to impose on them. *See* A-412, 416 (No. 26).

**VI. Both the National Legion and Department Ignore the Most Salient Facts and the Proper Standard for Reviewing the Record.**

The Urbans have already discussed some of the many problems with the recitation of facts by the National Legion and Department. Their attempt to ignore the key undisputed fact that the Legion has a rule and procedures for local posts admitting non-members to their bars to preserve its tax-exempt status and that the National Legion represents under oath to Internal Revenue Service every year that the posts are under its control or supervision is glaringly obvious when reading their briefs.

In general, the National Legion and Department ignore the record presented by the Urbans and, instead, cite their own generalized and conclusory affidavits as "undisputed facts." The Department, for example, cites the affidavit of its Adjutant (Lyle Fotz) some 30 times and his self-serving testimony and the

testimony of Post 184's commander in the Department's collateral insurance dispute (in which the Urbans weren't even involved) some 56 times. The National Legion, likewise, cites its National Adjutant's affidavit some 17 times. Some of the Department's more blatant misuses of the record can be categorized as follows:

**The Department's Power Over Posts.** The Department contends that its "sole 'disciplinary' authority over the posts is limited to extending or revoking the local post's charter" and that the Department "has not revoked a charter – for any reason – even once in the last 17 years." Department Brief at 9 (citing A-188). There is *no* testimony or evidence to support these supposedly undisputed facts.

Although the Legion's "Officer's Guide" explicitly states that "[e]ach department headquarters exercise a general supervision over the local posts within its jurisdiction," A-76, *and* the Department's own documents state that the Department Adjutant "is responsible for the daily business operation of the elements of the organization in the state," A-653, the Department *argues* that its staff size limits its ability to carry out this function. Department Brief at 10.

The Department fails to disclose that the ten district bodies it has created exercise administrative power, direction, and control over its posts, including Post 184. *See* A-94 ("Officer's Guide" states that "[d]epartments have the authority to create intermediate [district] bodies"); Department Brief at 7

(admitting that the Department has created 10 district bodies in Minnesota); *see also, e.g.*, A-96 (district commanders must be prepared to “give direction and control” if a post “begins to falter or fail”); A-94 (“Depending upon the powers delegated, the district does have some supervisory powers over the posts comprising the district”). And although the Department argues that “most of the individual post’s officers have very little contact with the Department,” Department Brief at 10, the Legion’s “Officer’s Guide” says, in fact, that the Department’s district commander – who “is normally the elected representative of the posts in the district” – is to “keep[] a constant watch on district activities,” A-95, and has “an obligation to provide guidance and supervision” to the posts, A-96. *See also* A-101 (“As important as it is for the District Commander to know the internal operation of each post, it is equally important this information is put to proper use.”); A-96 (district commanders should assign to district officers “the important function of attending regular post meetings . . . within the district”). “District Commanders are the lynch pin of The American Legion’s Chain of Command . . . .” A-388.

**The Posts’ Supposed Autonomy.** The Department argues that “[p]osts typically make all their decisions within the post organization” and, for example, that “[e]ach Post is the judge of its own membership.” Department Brief at 10, 11. The fact is that posts do *not* make all of their decisions. Both legal and

eligibility issues are decided by the Department's Judge Advocate and National Judge Advocate, respectively. *See* A-261. Posts also must "conform to and abide by the regulations and decisions of the Department and of the National Executive Committee or other duly constituted national governing body of The American Legion." A-187. Here, for example, Post 184 has formally admitted that the Department has, in fact, created procedures to be followed by the posts regarding the sale and service of alcohol on post premises. A-416 (No. 26). With respect to post membership, Post 184's own constitution provides that "[e]ligibility to membership in this post shall be as prescribed by the National Constitution of The American Legion," RA-119, and Post 184 has formally admitted that eligibility for membership is governed by the National constitution and by-laws of the Legion. A-414 (No. 16).

The Department argues that it "does not financially oversee Post 184." *See* Department Brief at 12 (citing RA-12, 21). This has no support on the appendix pages cited and it ignores the evidence to the contrary. Financial oversight must exist because the Department is obligated to revoke Post 184's charter if it fails to "pay the Department and National [Legion's] per capita dues." A-191; *see also* A-414 (No. 13). But more to the point, Post 184 admits that the Legion has the authority "to audit or investigate [its] membership rosters and financial statements . . . at any time." A-414 (No. 14). Also, the Legion requires Post 184 to

adopt and carry out a financial policy that will keep Post 184 solvent, A-415 (No. 21), and the Department has the authority to periodically inspect, review, or examine the conduct of Post 184 related to its bar and clubroom operations, which the Post requires in order to remain solvent. A-415-16.

**The Department and Bars.** The Department argues that it “does not oversee Post 184’s bar.” Department Brief at 13. But this is contradicted by facts in the record. Post 184 formally admitted that the Department “has the authority to periodically inspect, review or examine the conduct of [the posts] pertaining to the operation of a post bar or club room.” A-416 (No. 25). The Department also argues that it does not “receive any revenue based on the sale of alcoholic beverages from any post.” Department Brief at 13. But Post 184’s commander has admitted that revenue from bar proceeds may be used to pay dues for post members, RA-70, and Post 184 has also admitted that the National Legion and Department may receive or have available to them “revenue originating from beer and liquor sales” for their “shared programs, missions, functions, purposes and goals.” A-415 (No. 20); *see also* A-52 (expert affidavit of finance professor: “bar sales at Post 184 are an indirect source of revenue to [the National Legion and Department].”). The Department argues that “posts run their bars independently of the Department,” but ignores Post 184’s own formal admission

that the Department “has created procedures to be followed by [posts] regarding the sale and service of alcohol on . . . post premises.” A-416 (No. 26).

### **Conclusion**

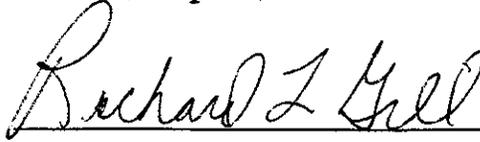
This appeal is not moot. At best the notice issue is not ripe, and will not become ripe until this Court decides to reverse the lower courts, and then the issue should be remanded to the court of appeals for consideration.

With respect to liability, vicarious liability is not direct liability. The elements of direct liability of the post or licensee are unrelated to the elements for vicarious liability of the superior organizations. Vicarious liability is a question of fact, and a question for the jury on the record here. The National Legion and Department need to control post conduct related to alcohol sales so that they can preserve the Legion’s tax-free status and protect the Legion’s alcohol-revenue stream, which is the lifeblood of the organization. To do both, the National Legion and Department, for their own benefit, must control the precise conduct that caused the Urbans’s harm – illegally admitting and serving non-members. If this conduct is not controlled, the Legion might lose its tax-free status.

The Urbans are not seeking an expansion of either the CDA or the law of vicarious liability. All they ask for is a chance to have a jury weigh the evidence and determine whether the superior Legion organizations should bear legal responsibility for the damages that they helped to cause.

Date: October 3, 2005

**Robins, Kaplan, Miller & Ciresi, L.L.P.**

A handwritten signature in cursive script that reads "Richard L. Gill". The signature is written in black ink and is positioned above a solid horizontal line.

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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 6,947 words. This brief was prepared using Microsoft Office Word 2003.

  
Richard L. Gill