

NO. A04-1409

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, and
The American Legion, Department of Minnesota,
Respondents,

American Legion Post 184, Charles Cowden Post, a/k/a Charles
Cowden Post 184; The American Legion, Department of Minnesota;
City of Pine Island, Minnesota d/b/a Pine Island Liquor Store and
Pine Island Municipal Liquor Store,
Defendants.

**BRIEF OF RESPONDENT
THE AMERICAN LEGION, DEPARTMENT OF MINNESOTA**

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STATEMENT OF LEGAL ISSUES

- I. Appeals are moot when the appellate court cannot award effective relief. Appellant failed to obtain review of one of the district court's alternative bases for dismissing Appellant's claims, namely that Appellant failed to give notice of his claim. Appellant also failed to argue the notice issue in his brief, so that review of it is now waived. The district court's holding will therefore be law of the case on remand. Is Appellant's appeal now moot?

Yes, this court should dismiss Appellant's appeal as moot because Appellant failed to obtain or preserve review of the district court's alternative basis for its ruling.

Apposite authority:

In re: Application of Olson, 648 N.W.2d 226 (Minn. 2002).

Mattson v. Underwriters at Lloyds, 414 N.W.2d 717 (Minn. 1987).

Balder v. Balder, 399 N.W.2d 77 (Minn. 1987).

In re Inspection of Minn. Auto Specialties, Inc., 346 N.W.2d 657 (Minn. 1984).

- II. The Minnesota Legislature created a statutory cause of action against a "person who caused the [drunk driver's] intoxication by illegally selling alcoholic beverages." The legislature further specified that only "licensees" are vicariously liable for an employee's illegal sales. The statute preempts common law claims except for certain ones involving minors. Should — indeed may — this court extend vicarious liability through the common law of respondeat superior to a party other than the "licensee" for a claim that does not involve a minor?

No, this court should not employ common-law principles to disrupt the legislature's public policy decisions with respect to civil responsibility for illegal alcohol sales.

Apposite authority:

Minn. Stat. § 340A.801 (2005).

Minn. Stat. § 340A.501 (2005).

Minn. Stat. § 340A.802 (2005).

Koehnen v. Dufuor, 590 N.W.2d 107 (Minn. 1999).

Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982).

III. As justification for extending liability beyond the liquor licensee, Appellant analogizes the Department to a for-profit corporate franchisor. But in doing so Appellant urges this court to apply a lower threshold for vicarious liability to the Department than that to which a franchisor would be subject:

A. If liability is extended beyond licensees, should this court give the Department, a non-profit organization that benefits veterans, their families and communities, less protection from vicarious liability for its posts' conduct than a majority of courts give to for-profit corporate franchisors?

B. Did the evidence that Appellant submitted in response to the Department's summary-judgment motion raise a genuine issue of material fact regarding whether the Department had "control or a right of control" over Post 184's bar's "daily operation?"

As to subpart A, if this court holds that the Department may be held vicariously liable under the Civil Damages Act, then it should provide at least the same amount of protection to the Department as a majority of courts apply to corporate franchisors. As to subpart "B," the district court and the court of appeals each correctly concluded that — despite Appellant's voluminous submissions — there is no genuine issue of material fact regarding whether the Department had the right to control Post 184's bar's daily operation.

Apposite authority:

Frankle v. Twedt, 234 Minn. 42, 47 N.W.2d 482 (1951).

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State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

Minn. R. Civ. P. 56

STATEMENT OF THE CASE

This is a dram shop case. The automobile accident that gave rise to this claim occurred in August 2000. (R.A. 176).¹ In the 240 days after Appellant entered into an attorney-client relationship, counsel never gave notice of a claim under the Civil Damages Act to Respondent, the American Legion, Department of Minnesota (“Department”). (A. 77).²

Appellant commenced suit against the American Legion Post 184 (“Post 184”) and the Pine Island Municipal Liquor Store in June 2002. (R.A. 154-68). Two months later he commenced a second suit against Respondents the American Legion (“Legion”) and the Department. (A. 17-31). The two cases were consolidated. (R.A. 169-73).

Appellant based his claims against the Legion and the Department on three legal theories: (1) joint venture; (2) joint enterprise; and (3) agency. (*Id.*) In January 2004, the Department moved the Goodhue County District Court for summary judgment. (A. 43-44). The Department advanced several bases for its motion: 1) that Appellant had failed to give the notice required by Minn. Stat. § 340A.802; 2) that the Department was not a licensed retailer and therefore not subject to liability under the Civil Damages Act; 3) that the Appellant had failed to present evidence to support its claim that the Department and Post 184 were somehow engaged in a joint venture; 4) that the Appellant had failed to present evidence to support its claim that the Department and Post 184 were

¹ “R.A.” refers to the Department’s appendix.

² “A.” refers to Appellant’s appendix.

somehow engaged in a joint enterprise; and 5) that the Appellant had failed to present evidence to support its claim that Post 184 was the Department's agent.

The Department's motion was not heard until more than four months later. (A. 1 (showing hearing date of May 7, 2004)). Nevertheless, after the summary-judgment hearing, Appellant attempted to supplement the record with depositions of Department representatives and other material. (See A. 13-14). The district court rejected Appellant's attempts and issued a protective order staying further discovery "pending the outcome of the Department's motion for summary judgment." (A. 14).

On June 1, 2004, the Honorable Thomas W. Bibus granted the Department's motion for summary judgment in its entirety and entered judgment under Minn. R. Civ. P. 54.02. (A. 1-12). The district court concluded that the Civil Damages Act could not be extended to reach an entity that had not "caused intoxication by illegally selling alcohol." (A. 3). The court also concluded that Appellant had failed to raise a genuine issue of material fact regarding whether Post 184 and the Department were engaged in a joint enterprise, a joint venture, or had a master-servant relationship. (A. 8-10). The district court also granted summary judgment on the alternative basis that, even *if* Appellant could articulate some sort of claim under the Civil Damages Act against the Department (and had presented evidence in support of such a claim), Appellant's counsel had failed to give the notice required by Minn. Stat. § 340A.802, subd. 2. (A. 5-6 ("Given the lack of required notice, a condition precedent to suit under the Civil Damages Act, the Court lacks jurisdiction to hear this matter."))).

Appellant appealed. On appeal, Appellant abandoned his joint-venture and joint-enterprise theories. (*See* A. 528 (describing issues raised on appeal to the court of appeals)). Appellant's sole arguments on the merits were that the district court erred "because (1) the Civil Damages Act applies to entities that are vicariously liable, (2) genuine issues of material fact exist[ed] regarding vicarious liability, [and] (3) appellants complied with Civil Damages Act's notice requirements." (*See id.*) Appellant also argued that the district court had abused its discretion by rejecting his efforts to supplement the record after the summary-judgment hearing. (*See* A. 528-29).

The court of appeals affirmed, concluding that the Civil Damages Act could not be extended to provide a cause of action against anyone other than "persons who are in the business of providing liquor." (A. 531). The court further agreed with the district court that Appellant had failed to raise a genuine issue of material fact regarding whether Post 184 was the Department's agent, or whether the Department was merely an alter ego of Post 184. (A. 532-37). The court also affirmed the district court's order staying further discovery. (A. 537-38). Finally, because the court of appeals had concluded that the district court had not erred by granting summary judgment, it declined to reach the notice issue. (A. 537).

Appellant then petitioned this court for review. (Petition for Review dated May 25, 2005). In the text of its petition, Appellant asserted three issues for review: 1) whether "[c]ommon law principles of respondeat superior" applied to claims under the Civil Damages Act; 2) whether the evidence raised a genuine issue of material fact regarding whether the Department and Post 184 were in a "master-servant" relationship;

and finally, (3) whether the evidence raised a genuine issue of material fact regarding whether the Department was Post 184's "alter ego." (*Id.* at 1). Appellant included facts relevant to these three issues and argued their merits in the argument section of its petition. (*See id.* at 1-5).

In a footnote, Appellant purported to raise two more issues, namely "whether the CDA required the Urbans to give notice to the National Legion and Department" and "whether the district court abused its discretion" with respect to the May 28, 2004 discovery order. (*Id.* at 1, n. 1). Appellant included some of the facts relevant to the discovery "issue" in the body of his petition. (*See id.* at 2). But Appellant's petition included no facts or discussion regarding the notice "issue." (*See id.* at 1-5). The only sense in which its petition alerted this court to the notice issue was through this passing reference in a footnote:

A fourth issue raised below but not addressed by the majority opinion (but for which the Urbans also seek review) is whether the CDA required the Urbans to give notice to the National Legion and Department when the CDA only requires that notice be given to the 'licensed retailer of alcoholic beverages.'

(*See id.* at 1-5). This court granted Appellant's petition as to just one of the five purported issues, namely, whether the Department and the Legion are "subject to vicarious liability based on respondeat superior for an illegal sale of alcohol by defendant American Legion Post 184." (Order Granting Review dated July 19, 2005). The court denied review "as to the remaining issues," including, apparently, Appellant's footnoted notice "issue." (*Id.*).

STATEMENT OF FACTS

I. The undisputed facts regarding the Department and its relationship to individual posts, including Post 184.

A. The American Legion is a grass roots organization dedicated to serving veterans, their families, and their communities.

Congress chartered the American Legion in 1919 as a “patriotic, mutual-help, war-time veterans organization.” (R.A. 110). Since then, this community-service organization has grown to nearly three million members. (*Id.*). The Legion exists to provide services to veterans, their families, and their communities based on four basic programs: Veteran’s Affairs and Rehabilitation, Children and Youth, Americanism, and National Security. (A. 65, R.A. 20).

The American Legion consists of several layers of separately incorporated entities. The Legion’s national headquarters are in Indianapolis, Indiana. There are approximately 15,000 American Legion Posts worldwide, organized into 55 Departments, consisting of one for each of the 50 states, plus one each for the District of Columbia, Puerto Rico, France, Mexico, and the Philippines. (R.A. 110). The American Legion entities in Minnesota include the American Legion Department of Minnesota (Department), ten district organizations, and 584 local posts. (R.A. 74-75). Each Minnesota entity has a separate charter, a separate constitution, and separate by-laws. (R.A. 82, 88, 113, 118, 124). Not only is each Minnesota entity separately incorporated, but each has its own management organization, its own board of directors, and its own officers. (R.A. 82, 114). These separate non-profit entities have a cooperative relationship through which

the National Legion provides information about programs and about goals for membership. (R.A. 10, 74).

B. The Department administratively supports the posts in meeting their community-service goals.

The Department and the Districts communicate information from the National Legion to the local posts about American Legion programs and activities. (R.A. 8-9, 75). The posts, in turn, run these programs based on National Legion guidelines. (*Id.*). The Department elects new officers each year and then provides administrative support for the officers who oversee different programs. (R.A. 75). Although the Districts and the Department assist the posts with guidance and leadership, neither the Department nor the Districts exert direct control over the posts. (*Id.*).

The American Legion's revenue is derived from annual membership dues and from other sources that must be approved by the National Executive Committee. (R.A. 139). Membership dues are the only type of revenue that the Department collects from the posts. (R.A. 22). Each post collects annual dues from its members. (*Id.*). The Department then collects a portion of post membership dues and processes it through its office to the National Legion. (R.A. 21, 75). The Department uses its portion of the membership dues for administrative purposes. (R.A. 12, 21). This includes salaries for its Department Adjutant and his six-person administrative staff, as well as for office supplies and equipment. (*Id.*). The Department creates additional revenue for itself by appealing directly to American Legion members through sales of Christmas cards,

calendars, and address labels. (R.A. 75). None of these revenue-based activities are conducted through any particular post. (*Id.*).

The Department does not maintain insurance coverage for Post 184, or for any other local post. (R.A. 59, 76). In fact, after the plaintiffs commenced suit against the Department, the Department's insurer, West Bend Mutual Insurance Co., filed a declaratory-judgment action alleging that it had no duty to defend or indemnify the Department in this case. In early December 2003, the U.S. District Court for the District of Minnesota concluded that the Department's insurance policy does not cover the claims against it. (R.A. 148). The court concluded that the insurer had no duty to defend the Department because coverage was specifically excluded under the "ongoing operations" exclusion. (R.A. 152-53). It therefore concluded that it need not reach the other basis for which the insurer sought to be relieved of coverage, namely, that (as is true of virtually all general-liability policies) the Department's policy also had a liquor-liability exclusion. (*See* R.A. 151).

II. The Department's seven staff members cannot, and do not, police the daily operations of any of Minnesota's 584 posts.

The "post" is the general membership that runs the American Legion programs. (R.A. 29). Each local post is an independently incorporated entity. (R.A. 9, 114). The Department's sole "disciplinary" authority over the posts is limited to extending or revoking the local post's charter. (A. 188). The most common reason for termination of a post's charter is declining membership. (R.A. 19). The Department has not revoked a charter — for any reason — even once in the last 17 years. (*Id.*). Thus, while it is true

that the Legion's "Officer's Guide" states that departments "exercise[] a general supervision" over the posts within their boundaries, the seven Department of Minnesota staff members do not — and could not possibly — oversee the day-to-day activities of any of the 584 individual Minnesota posts. *Compare* (A. 76 ("Each department headquarters exercise a general supervision over the local posts within its jurisdiction."); *with* R.A. 51, 75). In fact, as Post 184's Commander, Ed Berryman, testified in the coverage dispute between the Department and its insurer,³ most of the individual post's officers have very little contact with the Department. (R.A. 46).

Posts typically make all of their decisions within the post organization, and Post 184 was no exception. (R.A. 49). The posts are "autonomous" and are governed only by "broad general guidelines carried in the National or Department Constitution or By-Laws." (A. 89). For example, the Post Adjutant's Manual — published by the Legion as a "blueprint" to assist the posts in "handl[ing] [their] business affairs" — contains such vaguely worded admonitions as:

Correspondence should be answered promptly. The primary contact with the Post is through the Commander and/or Adjutant. If a member makes an inquiry, don't sit on it ... the member deserves a timely reply. Also, when you receive information pertaining to an activity or program, see that it gets to the proper person as soon as possible. Delays can be embarrassing and/or cause deadlines to be missed.

(A. 268 (ellipses in original)). That same "blueprint" also simply referred the reader to

³ Appellant tends to dismiss this testimony as "self-serving," but, of course, it didn't benefit Post 184 when the Department lost coverage for claims "arising out of" the "ongoing operations" of the posts, "regardless of whether such operations are conducted by you or on your behalf." (*See* R.A. 151 (describing the exclusion in the Department's policy that defeated coverage)). So it is hard to see how Commander Berryman's testimony served the Department.

the "Post Operations Manual" for "detailed information on the management, planning, and record keeping involved in the club room." (*Id.*) And the so-called "detailed information" consists of "standards," and "administration suggestions" (many prefaced by "if the post has a bar") such as: "[i]f the post's activity center includes a bar, it should always be closed during post meetings;" "Club room rules must be established in accordance with those set forth by the state alcoholic beverage regulatory agency;" and "[i]f the post has a bar, remember that there are a lot of people who prefer coffee and soft drinks." (A. 432-34). The "Post Operations Manual" then goes on to explain why neither the Legion, nor the departments, help to finance individual post buildings — they would not be reasonably able to supervise such investments:

The question is often asked, 'Does department or National help finance posts?' The answer is 'no' for some very valid reasons — the primary one being that neither department nor National would have the necessary supervision to protect their investment.

(A. 434).

Each post is the judge of its own membership. (R.A. 50, 119-20). And each post has exclusive control over the programs that it decides to run. (R.A. 75). Even though a post can involve itself in a number of Legion programs, the post has the autonomy to decide if it will be involved in any given program. (R.A. 54-56, 75). If the post decides, for example, to run a baseball program, then the post baseball team must follow rules set forth by the National Executive Committee. (*Id.*). To this end, the Department's baseball committee provides administrative support and advises the post of baseball policy based on Legion guidelines. (R.A. 75).

The Department does not financially oversee Post 184. Rather, it collects membership dues only for administrative purposes. (R.A. 12, 21). Each member pays \$25 per year in dues. (R.A. 56). After Post 184 collects membership dues, it sends \$18.75 of the \$25 to the Department. (R.A. 56-57). The Department does not share any accounting system, financial records, or bank accounts with Post 184, or with any other local post. (R.A. 58, 76). Finally, the Department and each post file their own separate tax returns. (R.A. 146).

A post may own a restaurant or a clubroom to support its community-service programs. (R.A. 29). Post 184 has operated a bar for about 20 years and gets 95% of its revenues through its bar and from gambling. (R.A. 58, 59, 65). The Department does not provide the posts with any funds to purchase a liquor license. (R.A. 32). And a post is not required to get approval from any other entity regarding its decision to obtain a liquor license. (R.A. 31). Post 184 also owns the building within which it conducts meetings. (R.A. 42). The building contains the bar, a kitchen, and a dining area/dance hall. (*Id.*). The Department has never owned, maintained, or controlled Post 184's premises. (R.A. 76-77).

The Post Operations Manual — published by the National Legion — is meant to assist post operations. (A. 427). The manual includes “suggestions” for financing and administering business activities, including recommendations that posts “sit down with local financial experts and learn from them what will be required,” and that “[a]nyone handling post funds must be bonded.” (A. 434). Although the National Legion suggests ways for posts to keep their finances in order, there are no guidelines for actual bar

operations other than that “[c]lub room rules must be established in accordance with those set forth by the state alcoholic beverage regulatory agency.” (A. 434; R.A. 31).

The Department does not oversee Post 184’s bar. (R.A. 26). Nor does the Department receive any revenue based on the sale of alcoholic beverages from any post. (R.A. 76). The only time that Post 184 might transmit funds to the Department from its other revenue-producing activities is if a member fails to pay his membership dues and the post makes up the difference. (R.A. 70-71). But each post also keeps a bank account for bar revenue that is separate from other monies it collects. (R.A. 64).

The Department is not and will never be a liquor vendor and does not have a liquor license. (R.A. 76). Rather, the posts run their bars independently of the Department. A post bar committee oversees the bar. (R.A. 45). For example, a bar manager oversees the bar’s eight employees, hires them, trains them, and schedules their shifts. (R.A. 60-61). The Department has no voice in how the bar manager does his job. (R.A. 69). Bar proceeds are used in part to pay employee wages. (R.A. 68-69). And the Department does not instruct the bar manager regarding who is admitted to Post 184’s bar or regarding the amount of alcohol served to bar patrons. (R.A. 77).

ARGUMENT

I. Standard of review

On appeal from summary judgment, this court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine issue of material fact for trial if the Appellant presented only evidence that

created metaphysical doubt as to a factual issue, but not a fact sufficiently probative of an essential element of their case. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1997). Thus, this court will review de novo the issues involving the Civil Damages Act, as well as the legal standards applicable to Appellant's vicarious liability claim.

II. Appellant's appeal is moot and should be dismissed.

The issue presented in this case is purely academic, and Appellant's appeal should therefore be dismissed. *See* Dunnell's Minnesota Digest, Appeal and Error, § 10.06 (4th Ed. 2005) (proceedings generally dismissed where issue has become "academic," or where it is impossible for appellate court to award relief). Here's why: the district court dismissed Appellant's claim against the Department on several alternative bases, one of which was that Appellant was required to give notice to the Department per Minn. Stat. § 340A.802, subd. 2 and failed to do so. (A. 5-6 ("Given the lack of required notice, a condition precedent to suit under the Civil Damages Act, the Court lacks jurisdiction to hear this matter.")). So if this court were to reverse and remand without reversing the district court's "notice" holding, then that holding would still preclude effective relief on remand, rendering this appeal moot. *Mattson v. Underwriters at Lloyds*, 414 N.W.2d 717, 720 (Minn. 1987) (explaining policy considerations behind "law of the case" and other finality doctrines); *In the Matter of Inspection of Minnesota Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984) (appeal will be dismissed as moot when an award of "effective relief" is "impossible.")). For a number of reasons, reversal of the district court's notice ruling is not an available remedy on appeal. This appeal should therefore be dismissed and/or the court of appeals and district court should be affirmed.

Appellant is aware of this problem. Therefore, in a footnote on page 4 of his brief, Appellant attempts to piggy-back the notice “issue” onto the question for which the court granted review:

If the Court agrees that the National Legion and the 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.

(Appellant’s Brief, 4, n. 2 (citations omitted)). Apart from this passing reference, Appellant offers no other argument on the subject. The issue is therefore waived.

It is axiomatic that parties must actually argue issues in their briefs in order to preserve them for review. *In re: Application of Olson*, 648 N.W.2d 226, 228 (Minn. 2002). As a threshold matter, an issue is not argued in a party’s brief if it is not addressed in the argument portion of the brief. *Id.* (“It is axiomatic that issues not ‘argued’ in the briefs are deemed waived on appeal.”). If the text of the brief’s argument section does not discuss an issue, then it has not been adequately briefed, and it is waived. It is not enough for the party to identify an issue “tangentially” in, say, a heading, or a footnote. *Id.* (holding issue waived where argument section did not discuss issue and issue was “otherwise identified only tangentially in one argument heading and in one footnote.”). Appellant’s passing reference to the notice “issue” appears in a footnote in his statement of the case, not in his argument section. (*See* A. 4, n. 2). Moreover, he offers no authority supporting reversal. *See Schoepke v. Alexander Smith & Sons Carpet*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (assignments of error based on “mere assertion” and “not supported by any argument or authorities” is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection). Because he

failed to brief the issue and to support reversal with legal authority, Appellant has waived review of the notice “issue.” *Id.*

Nor may Appellant be excused on the ground that he was cowed by this court’s order granting review, because that order plainly denied review of every issue except “whether respondents are subject to vicarious liability based on respondeat superior for an illegal sale of alcohol by defendant American Legion Post 184.” (Order Granting Review dated July 19, 2005). This is so for two reasons: (1) Appellant’s petition for review failed to bring the notice “issue” to this court’s attention with specificity; and (2) Appellant had a duty to try to clarify this court’s order, in any event. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 66-67 (Minn. 2004).

Petitions for review must include a “statement of the legal issues sought to be reviewed.” Minn. R. Civ. App. P. 117, subd. 3(a); *see also Peterson*, 675 N.W.2d at 67. Petitioners have an obligation to bring issues that are ripe for review to the court’s attention “with specificity.” *Peterson*, 675 N.W.2d at 67. Passing references to issues not raised in the text of the petition do not preserve the right to obtain review of those issues. *Id.* at 68. If this court refuses review of an issue because the court was not adequately alerted to its importance, then the lower court’s ruling becomes law of the case on remand. *Sigurdson v. Isanti County*, 448 N.W.2d 62, 64 (Minn. 1989) (“We did not grant further review in that second appeal; consequently, *Sigurdson II*’s ruling finding discrimination in failure to promote plaintiff is the law of this case.”).

And in any event, once this court granted only a limited right of review, Appellant certainly could have (and should have) sought to clarify this court’s order granting

review. *Cf. Mattson*, 414 N.W.2d at 721-22 (stating parties must take “some * * * precaution” to assure issues preserved for appeal). At the very least, Appellant should have “explained the situation of the undecided issues” in his opening brief to this court. *Id.* His failure to do any of these things is fatal to this appeal.

Moreover, the district court’s conclusion on the notice “issue” — that *if* the Department could be held vicariously liable for Post 184’s negligence, then it would also be entitled to notice under Minn. Stat. § 340A.802, subd. 2 — could not possibly be characterized as the type of “prejudicial error” that was so “obvious on mere inspection” that this court would be justified in reversing *sua sponte*. *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (observing that appellate courts have discretion to decide issues *sua sponte* where prejudicial error was “obvious on mere inspection.”). Rather, the district court’s very astute observations about the Civil Damages Act’s notice provision highlight the fundamental unfairness in Appellant’s summary and legally unsupported position:

Plaintiffs argue that statutory notice is not required on the Defendants American Legion National and the Department because the two provisions of the statute, sections 340A.801 and 340A.802, must be read separately to provide a cause of action against non-licensees but only require notice to licensees. * * * The Court will not follow Plaintiffs’ argument that the legislature would deprive some defendants of due process by intending a cause of action to be maintained under the statute without requiring statutory notice. On the contrary, Defendants are entitled to statutory notice if the claim can be maintained against them under the statute.

(A. 6). In short, Appellant’s result would be absurd and unfair. That is true because notice of a claim is critical to a defendant’s right to seek contribution from other tortfeasors under the Civil Damages Act. *See* Minn. Stat. § 340A.802, subd. 2 (2005)

(requiring notice to other tortfeasors governed by Act within 120 days after injury, or 60 days after receiving notice of claim for contribution or indemnity). Because the Department never had the required notice (and was not even aware of the accident until it received the complaint in this case),⁴ it was unable to preserve its rights against the other tortfeasors who were governed by the Act. If the Department had received timely notice, it might have had opportunity to give notice of its own contribution claims against, for example, the Pine Island Municipal Liquor Store. Appellant's failure to give notice to the Department thus deprived the Department of rights under the statute that other (actually culpable) defendants would enjoy. There can be no conceivable rational basis for such disparate treatment. Appellant's summary position is without merit.

Moreover, the district court's interpretation — that the statute's notice provision "informs the right of action"⁵ — is well-rooted in the canons of statutory construction. Even assuming that parties other than licensees could be vicariously liable under the Act, those parties would still be entitled to the notice required under Minn. Stat. § 340A.802, subd. 2. Any other interpretation would lead to absurd and unfair (and arguably unconstitutional) results. Minn. Stat. § 645.17 (2005) (legislature is presumed not to intend result that is absurd or unreasonable, or one that violates state or federal constitutions).

Finally, even if he had preserved the issue for review, even if this court had granted review, and even if he had briefed and legally supported the issue, Appellant's

⁴ (R.A. 77).

⁵ (A. 6).

summary contention that the notice requirement is “necessarily” satisfied upon a finding of potential vicarious liability is also without merit. This court has interpreted the Act’s notice requirement to require that plaintiffs serve the notice-of-injury letter on “a registered agent of [the corporation], or upon an officer of [the corporation], or upon the Secretary of State.” *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995) (emphasis added) (holding that plaintiff had not served proper notice under Act, and thus, case against defendant was dismissed); *see also* Minn. Stat. § 302A.901, subd. 1 (2004) (authorizing notice on corporation through service on registered agent or officer of corporation); Minn. R. Civ. P. 4.03 (defining personal service on corporation as service on agent authorized by statute). A registered agent is defined as the designee in the corporation’s articles of incorporation. Minn. Stat. § 302A.121, subd. 2 (2004). “The registered agent must maintain a business office that is identical with the registered office.” *Id.* The Department’s articles of incorporation designate Department Adjutant Lyle Foltz as the registered agent. (R.A. 74, 86). But Foltz did not receive notice of injury or of the plaintiffs’ potential claim before he received the summons and complaint. (R.A. 77). And the plaintiffs commenced this lawsuit against the Department long after the 240-day deadline. (A. 17-31). Therefore, Appellant failed to serve timely and appropriate notice to the Department.

“When a statute supplies a specific notice requirement, any claims under that statute are barred when notice has not been timely given.” *Oslund v. Johnson*, 578 N.W.2d 353, 357 (Minn. 1998). Appellant does not dispute that his counsel failed to deliver notice to the Department’s registered agent or officers within the 240-day

deadline. (R.A. 77). And the district court correctly concluded — based on actual legal authority and argument — that Appellant had to give such notice to the Department in order to preserve his claim. Therefore, if the court reaches the notice issue, it should affirm the district court’s summary judgment in favor of the Department.

In summary, affirmance and/or dismissal is required because: (1) Appellant failed to adequately present the notice issue for review; (2) in any event, this court denied review; (3) Appellant failed to bring the matter to the court’s attention, failed to brief the issue, and failed to provide any legal authority that would support reversal; (4) Appellant failed to request remand in his petition for review and in his supreme court brief. *See Hoyt Inv. Co. v. Bloomington Comm. & Trade Ctr. Assoc.* 418 N.W.2d 173, 175-76 (Minn. 1988) (counsel must state relief sought with specificity, and failure to alert supreme court to court of appeals’ failure to remand “extinguished [claim] by operation of the decision.”); and (5) Appellant’s position is without legal merit. The Department respectfully requests that this court dismiss Appellant’s appeal as moot because a reversal cannot result in effective relief on remand, or, alternatively, to affirm on the basis of Appellant’s failure to provide timely notice.

III. This court should not apply common law principles to extend liability under Minnesota’s Civil Damages Act beyond the commercial liquor vendor/licensee.

Minnesota’s Civil Damage Act (CDA) provides a statutory cause of action only against licensed commercial liquor vendors that have illegally sold alcoholic beverages:

A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a

right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parents, guardian, or next friend as the court directs.

Minn. Stat. § 340A.801, subd. 1 (2004). This court has defined a "person"⁶ who illegally sells alcoholic beverages as "only persons in the business of providing liquor." *Koehnen v. Dufuor*, 590 N.W.2d 107, 111-12 (Minn. 1999) (affirming dismissal because CDA only applies to commercial liquor vendors, not to social hosts); *Cady v. Coleman*, 315 N.W.2d 593, 595 (Minn. 1982) (defining legislature's intent to restrict CDA liability only to commercial liquor vendors). Despite this established precedent, the Appellant argues that the CDA applies to "others" through the common-law doctrine of respondeat superior. This proposed expansion of liquor liability contradicts the statute and established caselaw and should be rejected.

The legislature first enacted the CDA in 1911, thereby creating a statutory cause of action non-existent in the common law. Because the new cause of action could be maintained against any person "illegally selling, bartering or giving intoxicating liquors * * *," this court reasoned that the legislature intended "person" to include social hosts like an adult who provides alcohol to a minor. *Ross v. Ross*, 294 Minn. 115, 118, 200 N.W.2d 149, 151 (1972). In response to *Ross*, the legislature amended the CDA in 1977 by deleting the word "giving" and limiting liability to any person "illegally selling or bartering intoxicating liquors * * *." *Id.* In 1982, the court recognized that by this

⁶ The word "person" includes a corporation. Minn. Stat. § 340A.101, subd. 23 (2004); Minn. Stat. § 645.44, subd. 7 (2004).

amendment the legislature intended to hold only commercial liquor vendors liable for illegal sales, thus insulating social hosts from liability:

The Legislature's intent to restrict liability only to commercial vendors is sufficiently clear from its deletion from the Act of the word "giving." "Any person" who sells or barter liquor means a person *in the business of providing liquor*, and not a social host * * *.

Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982) (emphasis added). By restricting the CDA to commercial vendors, the legislature intended that such vendors "should be subject to liability because they profit by their sales and therefore should bear some of the risks created by their business * * *." *Id.* at 595. Thus, the legislature intended liability under CDA to extend only to commercial liquor vendors.

This court found further proof of that legislative intent in a 1985 legislative action repealing and replacing the CDA. In the 1985 version of the CDA, the legislature eliminated the term "bartered," thus limiting liability to the "sale" of alcoholic beverages. *Koehnen*, 590 N.W.2d at 111. Significantly, this court observed that the 1985 amendment left untouched the "sweeping holding of our 1982 decision in *Cady* that only persons in the business of providing liquor are covered by the Act * * *." *Id.* The *Koehnen* court then summed up the long history of legislative action and court interpretation: "Fundamental logic leads to the undeniable conclusion that *Cady* expresses the will of the legislature and legislative rules of construction so provide." *Id.* at 112. In short, the legislative and case history of the CDA restrict its application to commercial liquor vendors — vendors who are in the business of providing liquor.

Here, it is undisputed that the Department lacks what would be necessary to sell liquor in Minnesota — a liquor license. (R.A. 76); *see* Minn. Stat. § 340A.401 (requiring liquor license for person to sell liquor in Minnesota). In short, the Department is not in the business — or even authorized to be in the business — of selling liquor. And the Department did not make the sale at issue here. As a matter of law, therefore, the Department can have no liability under the CDA.

The Appellant contends that *Cady* and *Koehnen* do not apply because the Department is not analogous to a social host. But those cases control here because of the court's distinction between commercial liquor vendors and non-liquor vendors. It is immaterial what *kind* of non-liquor vendor is at issue, whether it be a social host or a state-level American Legion Department. This court made that clear when it recognized that, “* * * only persons in the business of providing liquor are covered by the [CDA].” *Koehnen*, 590 N.W.2d at 111. Social hosts cannot be liable because they are not in the business of selling liquor. The same holding that led to that conclusion must also lead to the conclusion that the Department cannot be liable because it is not in the business of selling liquor. *Cady* and *Koehnen* are directly controlling, and the Appellant's attempt to distinguish them based upon the *kind* of non-liquor vendor is without basis.

Appellant not only contends that *Cady* and *Koehnen* apply only to social hosts, but also that this court is unconstrained by statutory preemption or by separation of powers from expanding statutory liquor liability through the common law. There are several things wrong with Appellant's argument. First, it would be unfair. Businesses and patriotic organizations alike organize their affairs to meet defined liability. Here, liability

has been defined for at least two decades restricting liquor liability exposure to commercial liquor vendors. No wonder the six-person Department of Minnesota did not have liquor- liability insurance but instead purchased CGL coverage with a liquor-liability exclusion. Interpreting the unambiguous holdings in *Cady* and *Koehnen* as somehow limited to specific case facts — despite two decades of legislative acquiescence — not only would be unfair, it would be contrary to standards of statutory construction. *See* Minn. Stat. § 645.17, subd. 4 (2005) (“When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language”).

Second, vicarious liquor liability is part of the *statutory* scheme and is not a common-law creation. Moreover, the legislature has limited vicarious liability to *liquor licensees* for the acts of its employees:

Every licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverages by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee for the purposes of all provisions of this chapter except 340A.701, 340A.702, 340A.703 [, which provide for criminal penalties].

Minn. Stat. § 340A.501 (2005). The fact that the *statute* provides only for a *licensee's* vicarious liability does not provide a basis for court-made common-law vicarious liability of a non-licensee like the Department. Indeed, the opposite is true. The issue here, therefore, is not so much about the relationship between the Department and Post 184 as it is about separation of powers and the relationship between this court and the legislature. *See Koehnen*, 590 N.W.2d at 111-13 (describing history of “legislative action/court interpretation” as a “duet,” and declining to extend liability to social host

who was paid for beer, in part because of “respect for the separation of powers doctrine.”). It is the legislature’s function, not the courts’, to expand liquor liability beyond its statutorily defined boundaries.

Third, the history of the vicarious-liability provision reinforces the conclusion that the legislature chose to extend vicarious liability to “the licensee,” rather than to a broader class, as Appellants would now ask the courts to do. *See State v. Guminga*, 395 N.W.2d 344, 345-46 (Minn. 1986). In 1986, the statute more broadly extended vicarious liability to “every such employer” for an employee’s illegal sale; this included vicarious *criminal* liability:

Any sale of liquor in or from any public drinking place by any clerk, barkeep, or other employee authorized to sell liquor in such a place is the act of the employer as well as that of the person actually making the sale; and every such employer is liable to all the penalties provided by law for such sale, equally with the person actually making the same.

Id. This court struck the statute as unconstitutional insofar as it extended criminal liability without requiring proof of culpability. *See id.* at 347-48. The court declined, however, to “rewrite” the statute, because that was “more properly a legislative function.” But when the legislature performed that function, it delivered Minn. Stat. § 340A.501, which imposes vicarious liability even more narrowly than before, now restricting it to “the licensee.” Minn. Stat. § 340A.501 (2005). The legislature, not the courts, is charged with expanding (and narrowing) the reach of liquor liability. The legislature has done so for vicarious liability. The common-law expansion Appellant proposes is preempted.

Moreover, the legislature also specifically chose to preserve one potential species of common-law claim when it inserted subd. 6 into Minn. Stat. § 340A.801 in order to

make possible certain claims that this court held had been preempted by the Act. *See Holmquist v. Miller*, 367 N.W.2d 468, 471-72 (Minn. 1985). The legislature could have simply stated that the Civil Damages Act did not preclude any (or precluded all) common-law claims, but instead it chose to limit Subd. 6 to claims involving minors:

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.

Minn. Stat. § 340A.801, subd. 6 (2005). Again, it is a legislative function to define the reach of liability under the CDA.

Fourth, respondeat superior has never been used to extend the CDA's reach to non-liquor vendors under the common law. Yet the Appellants cite to *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953) as supporting such a result. But in *Hahn* the question concerned whether a municipal liquor store could defend itself under the CDA based on governmental immunity. *Id.* at 433, 57 N.W.2d at 259. This court held that a municipality is not immune because it engages, in part, in the proprietary function of profiting from alcohol sales. *Id.* at 435, 57 N.W.2d at 260. More importantly, the court determined that the legislature intended "the word 'person' to apply to and include municipal corporations engaged in selling liquor" because the legislature would not have established by statute the municipality's right to own and operate a municipal liquor store within the Liquor Control Act without intending that the CDA apply to it. *Id.* at 437, 57 N.W.2d at 261; *see also* Minn. Stat. § 340A.601 (2004) (establishing a municipality's right to own and operate municipal liquor store). The court

mentioned a master/servant relationship only respecting the municipal liquor vendor's employee. *Id.* at 438, 57 N.W.2d at 262.

Although a licensee's vicarious liability for its employees' illegal sales is statutorily recognized, neither *Hahn* nor any other case has used the common law of respondeat superior to extend the CDA to non-liquor vendors. Indeed, in the 93 years since the legislature enacted the CDA, not a single case has recognized liability against a non-liquor vendor based on vicarious liability. That is undoubtedly so because this court has recognized that the CDA preempts all common-law causes of action based on the illegal sale of alcohol, and that only commercial liquor vendors may be held liable. If the scope of liability is to be expanded, that change must come from the legislature.

Finally, there is no reason to believe that the legislature simply overlooked an opportunity to impose liability beyond the licensee. After all, the legislature gave considerable thought to the owners of *corporate* licenses and the circumstances under which they may be barred from applying for other licenses because of their licensee's misconduct. *See* Minn. Stat. § 340A.402 (2005) (prohibiting holders of more than five percent of capital stock of corporate licensees that have violated their licenses from becoming '[p]ersons eligible' for retail licenses). Moreover, not only did the legislature not overlook corporate liquor licensees in its comprehensive liquor-liability scheme, 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. *See* Minn. Stat. § 340A.409 (2004) (defining minimum levels of financial responsibility for licensees). Thus, Appellant's contention that this court should provide a common-law

solution to corporate limited liability — by expanding liquor liability through one corporation’s vicarious liability for another’s illegal sales — not only violates the rule prohibiting common-law liquor liability, it does so on a subject on which the legislature has already deliberated and taken action. If the legislature deems it advisable for corporate license holders to be better capitalized, it will amend the statute. In short, the legislature did not overlook the potential for vicarious liability to apply beyond licensees. It has simply declined to adopt it.

Nor does Minnesota law somehow permit a common-law cause of action on the ground that doing so would be the result of “liberally construing” the CDA. Instead, because the Act is in derogation of common-law principles (and because civil damage awards are “highly penal in nature” and “introduc[e] a remedy unknown in the common law”), it is strictly construed “in the sense that it cannot be enlarged beyond its definite scope.” *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955). In *Lefto v. Hoggsbreath Ent., Inc.*, 581 N.W.2d 855, 857 (Minn. 1998), this court further explained that when the CDA’s provisions are clear as to intent and purpose, the courts have liberally construed it so as to suppress the mischief and advance the remedy. *Id.* But, “[a]t the same time, we noted that liberal construction is not without limitations and that the Act ‘is to be *strictly construed* in the sense that it cannot be enlarged beyond its definite scope.’” *Id.* (citing *Herrly v. Muzik*, 374 N.W.2d 275, 278 (Minn. 1985) (emphasis added)).⁷ Thus, liberal construction cannot include expanding statutory

⁷ This court’s 1955 statements in *Beck* — about when the statute is strictly construed versus liberally construed — are as true today as they were then. Contrary to

liability through common-law doctrines like respondeat superior. In fact, *strict* construction applies to such attempted expansions, as this court has expressly stated. Here, the Appellants' cause of action would enlarge the CDA's scope by redefining "person" to include non-liquor vendors. This would fundamentally alter the legislature's intent that "* * * only persons in the business of providing liquor are covered by the [CDA]." *Koehnen*, 590 N.W.2d at 111. The district court properly recognized that only the legislature can expand the CDA's scope, and that it would be improper to do so under the pretext of "liberal construction."

The supreme court's refusal to broaden the CDA is also consistent with its treatment of strict-liability statutes generally. To make this point, the district court cited to a case involving another strict-liability statute, *Gilbert v. Christiansen*, 259 N.W.2d 896 (Minn. 1977). The Appellants attempt to distinguish *Gilbert* — a case involving the dog-bite statute — on the ground that the CDA is not a strict-liability statute.⁸ But the supreme court has recognized that "[the CDA] might best be characterized as imposing strict liability essentially analogous to the liability imposed on a dog owner under [the

Appellant's claim, on page 39 of his brief, the proper canon applicable to this statute's construction is not "one of those muddled subjects in the law." (Appellant's Brief, 39). Appellant inexplicably cites a 40-year-old 8th Circuit decision as support for his claimed confusion, yet he overlooks three of this court's cases (issued within the last seven years), which specifically state the standard. *Haugland v. Maplevue Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 693 (Minn. 2003) ("The Act is to be strictly construed."); *K.R. v. Sanford, et al.*, 605 N.W.2d 387, 391 (Minn. 2000) ("[W]e have consistently recognized that, because the legislature created the cause of action authorized by the CDA, the legislature is free to expand or reduce the rights provided by the CDA."); *Lefto*, 581 N.W.2d at 857 (noting dual rule of construction stated in *Beck*).

⁸ The Appellants admitted during the summary-judgment hearing that the CDA is a strict-liability statute. (R.A. 192, 193).

dog bite statute].” See *Dahl v. Northwestern Nat’l Bank*, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963)). Thus, the district court properly cited to *Gilbert* because it is an example of this court’s refusal to skew legislative intent by broadening a statute. *Id.* at 898 (refusing to extend definition of “owner” of dog to include landlord). *Gilbert* supports the district court’s refusal to extend the CDA to non-liquor vendors.

Nor does Appellant find support in decisions from other jurisdictions. Appellant does cite an outlier decision from the Michigan Court of Appeals. (See Appellant’s Brief, 31 (citing *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. App. 1985)). It is noteworthy, however, that in the 20 years since it was handed down, not *one* court outside of Michigan — other than the dissent in the court of appeals below — has cited that case with approval. Moreover, the case itself makes clear that Michigan’s Civil Damages Act does not contain any provision similar to Minn. Stat. § 340A.501, which specifies that vicarious responsibility for illegal sales falls to “the licensee.” See *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. App. 1985) (stating that “[t]he class of persons who may be held liable under the dramshop act is to be determined by reference to those charged with the duty to refrain from supplying liquor to minors and visibly intoxicated persons.”).

In contrast to the Michigan Court of Appeals’ 20-year-old analysis, at least two courts in the last ten years have declined to extend their state’s Civil Damages Acts to parties claimed to be vicariously liable for a licensee. In *Pate v. Alian*, 49 P.3d 85, 90 (Okl. App. 2002), for example, the court held that franchisor Pizza Inn, Inc. was not liable under Oklahoma’s Civil Damages Act because it was not a commercial vendor and did not maintain any control over the actual service of intoxicating beverages at

franchisee Pizza Inn. And in *Carrick v. Franchise Assoc., Inc.*, 671 A.2d 1243, 1245 (Vt. 1995), the court held that a franchisor was not liable under Vermont's Civil Damages Act for alleged torts of the franchisee because the franchisor did not prescribe standards that included a bartender's proper exercise of discretion in serving alcoholic beverages.

In short, nothing supports the Appellant's argument that non-licensee vicarious liability is "well-accepted and commonplace under the CDA." (Appellant Br. at 36). In the 93 years since the legislature enacted the Act, this court has *never* applied the common-law doctrine of respondeat superior to impose liability on a non-licensee. There is no basis for this court to disrupt the legislature's carefully structured statutory scheme. As this court has observed, the Civil Damages Act is not an area of the law that "suffers from legislative neglect." *Koehnen*, 590 N.W.2d at 112.⁹ In Minnesota, the legislature has provided for the vicarious liability of licensees. Expanding vicarious liability to non-licensees not only is unsupported in the law, it would directly impinge on the legislative function. The court of appeals should be affirmed.

⁹ And there are obvious public policy advantages to letting the legislature make the decision that Appellant urges on this court. First, the legislature could then decide whether it will treat non-profit, community-service organizations such as the Department differently from parent companies of for-profit commercial licensees. Second, the legislature could determine what level of insurance is necessary (if any) to cover a parent corporation's or franchisor's potential liability. And third, the legislature could decide whether to impose liability retroactively or prospectively, thereby affording potentially vicariously liable parties an opportunity to obtain insurance to cover their new statutory obligations.

IV. Regardless of the legal standard that this court applies to determine whether Post 184 was the Department's agent or servant, the district court and court of appeals correctly concluded that Appellant did not raise a genuine issue of material fact regarding this allegation.

This court need not even reach this final issue unless it has concluded that it may extend the Civil Damages Act's statutory liability to parties other than the commercial liquor vendor/licensee. If it has decided to extend liability to parties who are "vicariously liable" for licensees, then it must decide whether Appellant's evidence raised a genuine issue of material fact with respect to this issue.

Regardless of the standard that this court applies, it should be no less protective of the Department's interests than the standard that a majority of courts apply to for-profit corporate franchisors. And when this court applies such a standard to the evidence that Appellant submitted to the district court, it is clear that Appellant did not raise a genuine issue of material fact regarding whether the Department should be vicariously liable for Post 184's alleged illegal liquor sales.

A. The standard for whether the Department may be held vicariously liable should be no more stringent than the standard for for-profit corporate franchisors.

In general, parties are not vicariously liable for the acts of another unless their relationship falls within a certain category of agency relationships. *See Frankle v. Twedt*, 234 Minn. 42, 45, 47 N.W.2d 482, 486 (1951). Under Minnesota law, agency is defined as a fiduciary relationship that results from one person's consent to another to act on the other's behalf and be under his or her control. *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). Not all agency relationships result in vicarious

liability. *Frankle*, 234 Minn. at 45, 47 N.W.2d at 486 (“The negligence of all agents indiscriminately is not to be imputed to the principal”). Thus, Appellant needed to show that the relationship between the Department and Post 184 was something more than just a garden-variety agency relationship.

And perhaps more importantly, Appellant had to show that the Department’s and Post 184’s relationship justified vicarious-liability *with respect to the latter’s illegal liquor sales*; this is because both of appellant’s vicarious liability theories — master/servant and franchisor/franchisee — each require that there be a nexus between the parties’ rights to control one another’s conduct and the specific activity that is alleged to have caused the harm. *E.g.*, *Frankle*, 234 Minn. at 47, 47 N.W.2d at 487; *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 113 (Wis. 2004) (holding franchisor may be vicariously liable for franchisee’s conduct but “only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.”). So regardless of which standard this court employs, Appellant has failed to meet his burden.

Appellant’s one surviving theory from the district court was that the Department and Post 184 were engaged in a master/servant relationship. Such a relationship arises when one person, the servant, is employed by the master to perform service in the master’s affairs, but only if the servant’s physical conduct in the performance of such service is controlled (or is subject to the right of control) by the master. *Frankle*, 234 Minn. at 47, 47 N.W.2d at 487. On appeal, Appellant has focused on a particular variety of potential master/servant relationships, namely franchisors/franchisees.

Appellant analogizes the Department and posts to a franchisor and its franchisees and suggests that this court should rely on several such cases from other jurisdictions. (See Appellant's Brief, 39, 51-52). The analogy is apt enough, but Appellant's cases are not helpful to this court. Minnesota courts have never had to articulate a standard for vicarious liability with respect to franchisors. And, not surprisingly, the cases on which Appellant urges this court to rely state an older, broader, *minority* rule, in which the franchise agreement is itself almost always enough to create vicarious liability. See, e.g., *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 788 (3d Cir. 1978) (cited on page 51 of Appellant's Brief); *Billops v. Magness Const. Co.*, 391 A.2d 196, 198 (Del. 1978) (cited on page 52). Appellant fails to mention that many courts have distinguished these decisions, most recently the Wisconsin Supreme Court. See *Kerl*, 682 N.W.2d at 339 n. 5.

The *Kerl* decision is especially worthy of study, for two reasons: 1) there are some similarities between the Department's relationship with Minnesota's 584 posts and a for-profit corporate franchisor's relationship with its franchisees; and 2) the majority standard that the Wisconsin court articulates requires a considerably stronger showing than Appellant has made here.

In *Kerl*, the plaintiff sought to hold Arby's, Inc. liable for its franchisee's failure to supervise its employees. See *id.* at 331-32. The court observed that the rationale for vicarious liability becomes "somewhat attenuated" when applied to the franchise relationship, because the franchisor necessarily retains an element of operational control in order to protect its trademark. *Id.* at 331. The court therefore concluded — as have a

majority of states nationwide — that a “more precisely focused test” is required. *Id.* at 331-32 (seeking “more precisely focused test”), 338-39 (noting “clear trend in the case law” is toward narrower test for franchisors). Ultimately, the court concluded — after reviewing cases from several jurisdictions — that quality or operational standards in franchise agreements are insufficient to establish vicarious liability:

[T]he franchisor must control or have the right to control *the daily conduct* or operation of the particular ‘instrumentality’ or aspect of the franchisee’s business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee’s tortious conduct. The quality and operational standards typically found in franchise agreements do not establish the sort of close supervisory control or right to control necessary to support imposing vicarious liability on a franchisor for the torts of the franchisee in all or general purposes.

Id. at 340 (emphasis added). The court went on to conclude that even provisions “specifying uniform quality, marketing, and operational requirements and a right of inspection” are insufficient. *Id.* at 341. And ultimately, the court concluded that even the power to terminate the license for failure to follow the operating manual was not enough, because it did not establish that the franchisor “controlled or had the right to control” the franchisee’s daily hiring and employee-supervision activities. *Id.* at 342. Finally, the court observed that the franchise’s license agreement contained only “broad and general” provisions, which were insufficient to establish vicarious liability. *Id.* The court’s reasoning is particularly descriptive of what the lower courts found with respect to Appellant’s evidence in this case:

The agreement’s provisions regarding the specific issue of personnel are broad and general. Section 6:1 of the agreement provides that DRI is required ‘to hire, train, maintain and properly supervise sufficient, qualified and courteous personnel for the efficient operation of the Licensed

Business.’ Section 6:2 states that someone in charge at the restaurant is required to complete a management training seminar conducted by Arby’s. The operating manual provides guidelines for hiring, training, and supervising employees in accordance with applicable labor laws and to achieve an efficient, courteous, and satisfied work force.

By the terms of this agreement, DRI [the franchisee] has sole control over the hiring and supervision of its employees. Arby’s could not step in and take over the management of DRI’s employees. Arby’s right to terminate the relationship because of an uncured violation of the agreement is not the equivalent of a right to control the daily operation of the restaurant or actively manage DRI’s work force. Accordingly, we agree with the court of appeals and the circuit court that there is no genuine issue of material fact as to whether DRI is Arby’s servant for purposes of the plaintiff’s respondeat superior claim against Arby’s: clearly it is not. Arby’s cannot be held vicariously liable for DRI’s alleged negligent supervision of [its employee].

Id. Nothing could be more descriptive of the almost 550 pages of documents contained in Appellant’s appendix; Appellant’s submissions are merely guidelines that, at best, suggest broad, general goals for posts.

This court should be loathe to hold the Department, a grass roots, non-profit, community-service organization, to a *higher* standard than the one to which it might hold, say, TGIFridays, or Applebees, or the Hard Rock Cafe. Indeed, this court should leave that problem to the legislature to resolve, at least insofar as it is being asked to impose vicarious liability under the Civil Damages Act.

B. At best, Appellant presented evidence that Post 184’s relationship with the Department was governed by general “marketing, quality, and operational standards;” such evidence is insufficient to justify vicarious liability, as a matter of law.

As a threshold matter, the Department urges the court to carefully scrutinize the Appellant’s “Statement of Facts” for actual record support. Many matters stated as facts

are excerpted and submitted without sufficient context to avoid misleading the reader. The facts span an almost 10-year period, both pre-and post-dating the August 10, 2000 accident. In fact, Appellant's 22-page statement of facts repeatedly refers to the same dozen or so statements, which are contained in just over half of 51 documents in Appellant's (almost 550 page) appendix.¹⁰ These statements and documents have little (if anything) to do with the Department, let alone Post 184. And they say literally nothing that suggests that the Department had control or the right to control the daily operations of Post 184's bar.

And what little they do say about the Department's relationship to the posts in general has been creatively edited to suit Appellant's theory of the case. For example, consider the support for this statement, which appears on page 16 of Appellant's Statement of Facts:

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.

While this statement appears to be taking a complete and unedited quotation from a document — "They like the sociability that develops around a good bar. A club room can add to a post" — it is actually edited to say something that the document does not. Here's the full quote, with the portions selectively omitted from Appellant's brief in italics and bolded:

¹⁰ To illustrate the extent to which Appellant has recycle the same evidence to create the appearance of a fact issue, Appellant's current fact section is less than half the length of its district court memorandum's "facts," but both fact sections were based on the same 50 documents.

Many like a post that has a good clubroom. They like the sociability that develops around a good bar, *but this doesn't appeal to a lot of veterans. Some of them are leaders in our communities, who are needed in the American Legion.* A clubroom can add to a post, *but think of the many posts where the meetings are held in the bar room or members must go through the bar to get to the meeting room. It doesn't matter how good a salesman you have on your membership team, the market is limited. Sure the first sale may be made, but you probably aren't gaining a continuing or active member.*

(A. 101). The unedited quote doesn't just fail to support Appellant's fundamental premise upon which he asks the court for reversal (that the Legion instructs posts that bars are desirable and serve a positive membership-development purpose), it actually supports the opposite conclusion. The cited document discourages posts from relying on bars as a way of building their membership because bars "do[n't] appeal to a lot of veterans," and may turn away "leaders in our communities, who are needed in the American Legion." (*See id.*) In short, the Department urges the court to examine Appellant's factual premises to determine whether they are credibly supported by the record.

Based upon the actual record, Appellant provided no evidence that the Department had ever "employed" Post 184 to perform work. Rather, Post 184 operated its bar for its own benefit — to support its chosen community-service programs. (R.A. 58, 65) The Department did not oversee the bar's operations or gain any monetary profit from them. (R.A. 76).

The Appellant submitted no evidence that suggested that the Department paid Post 184 any taxable wages to operate the bar. There was no evidence that the Department furnished any materials or tools, and Post 184 owned the building where the bar operates.

(R.A. 42). As such, the Department could not control Post 184's premises. (*Id.*). And finally, the plaintiffs provided no evidence (other than speculation) that the Department could have "discharged" Post 184 for alcohol violations. Although the Department had the power to form and to terminate posts' charters, it typically only terminated them because of declining membership. (A. 188, R.A. 19). In fact, the Department had not revoked a charter in 17 years. (R.A. 19). And even if it had, the power to revoke because of an "uncured violation" of the post's charter would not have been enough, standing alone, to justify imposing vicarious liability. *See Kerl*, 682 N.W.2d at 342.

Nor was it significant that the posts are required to carry insurance for their baseball programs. (A. 293). Such programs have nothing to do with the "specific aspect" of Post 184's "business" that caused the loss, i.e., its bar. *Kerl*, 682 N.W.2d at 332. The Appellant offered no evidence that either the Department or Post 184 carried insurance for the Department's potential liability arising out of the post's bar operations. The Department's insurance was independent of Post 184, and every other post. (R.A. 27, 59, 76, 79). Post 184 carried insurance for its own bar. (R.A. 59). And the Department did not provide liquor liability coverage for Post 184.

Nor is it significant that the Department obtained membership dues from the posts, including Post 184. Appellant presented no evidence that the Department's membership dues are somehow used to finance or control post programs. Membership dues allow the Department and the National Legion to administratively support the posts. (R.A. 134). But there is no evidence that the Department uses membership dues — collected by Post 184 and transmitted to the Department — to control Post 184's bar operations.

Moreover, the Department did not financially oversee Post 184, as the Appellant contends. The Department did not finance Post 184. (R.A. 58). And there are no facts to suggest that the Department had ever directed Post 184 concerning financial or any other aspect of its bar operations. Post 184's bar operated independently of the Department. (R.A. 76). Financial guidelines enacted by the National Legion and distributed by the Department were broad and general, and merely assisted the posts in finding revenue to finance their community-service programs.

The only written material that specifically mentions bar operations is The Post Operations Manual. That handbook explains general accounting principles to the posts, and suggests efficient procedures for operating a post as a business. (A. 429). For example, the handbook suggests that the posts should have adequate internal control over lounge operations in order to profit from bar operations. (A. 436). The handbook also suggests some methods — e.g., beverage and food-cost control, labor costs — to bolster profits. (A. 436-37). Although the handbook suggests “house rules” concerning post operations — e.g., when and where alcohol use is appropriate — it does not provide the sorts of detailed day-to-day control necessary to operate its bar. (A. 432, 439; R.A. 30-31). These suggestions regarding the efficient operation of a business certainly did not rise to the level of financial oversight necessary to imply a master/servant relationship.

The Department did not fund the Post's liquor license. (R.A. 32). And in fact the Department exerted no control over the day-to-day activities of Post 184 or its bar. (R.A. 75). A post bar committee oversaw the bar. (R.A. 45). A bar manager oversaw the bar's eight employees and hired them, trained them, and scheduled their shifts. (R.A. 60-61,

66). The Department had no voice in how the bar manager did his job. (R.A. 69). Bar proceeds were used to pay for the bar employee's wages. (*Id.*). And significantly, the Department did not instruct the bar manager regarding who could be admitted to Post 184's bar, nor did it instruct regarding the amount of alcohol to serve to bar patrons. (R.A. 77). The district court correctly concluded there is no evidence that the Department had the right to control Post 184's bar. (A. 10).

Further, the policy behind the CDA — holding a commercial liquor vendor liable based on profits from alcohol sales — does not apply here. Post 184's bar profits — 95% of its revenue along with gambling — are used to support the post and its community-service programs. (R.A. 57-58). The Department does not receive liquor-sale profits. (R.A. 76). Instead, the Department merely receives a portion of Post 184's membership dues, which it uses to support the administrative needs of the Department Adjutant and his six-person staff. (R.A. 12, 21). The plaintiffs try to claim that Post 184 admitted that bar revenues are distributed to the Department based on Post 184 commander Ed Berryman's testimony in the declaratory-judgment lawsuit. (R.A. 70-71). But in fact Berryman merely explained that if a member could not pay his dues, the Post would use money from its fundraising activities to make up the difference. (R.A. 71). This money would go to the Department as membership dues, not as bar profits. (*Id.*). Thus, the policy behind the CDA does not apply to the relationship between Post 184 and the Department because the Department does not share profits with Post 184.

The clubroom's “* * * one purpose — to serve the American Legion” did not mean that the bar operates to serve the Department. Rather, “[t]he post is The American

Legion.” (A. 89). The American Legion exists only through its membership, without which there would have been no reason for the National Legion or the Department to exist. (A. 89, R.A. 189-90). The Department provided the framework and supported the posts in their efforts to recruit members to achieve their common goal: supporting veterans, their families, the community, the state, and the nation. (*Id.*). The post does not provide a service to the Department; rather, the Department serves the posts, and consequently, the membership. Appellant has failed to produce any evidence that raises a genuine issue of material fact regarding vicarious liability under any reasonable standard.

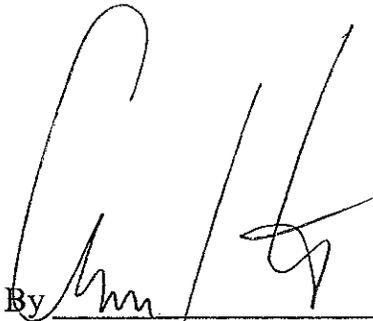
CONCLUSION

The district court properly dismissed Appellant’s claim against the Department, on multiple grounds. First, Appellant failed to give notice of his claim. Moreover, Appellant failed to preserve the notice issue for review — indeed the court denied review — failed to adequately brief or support the issue with legal authority, and failed to seek a remand in either the petition for review or in his opening brief. On these bases alone, the court should dismiss the appeal and/or summarily affirm. Second, the court rightfully refused to extend liability under the Civil Damages Act to parties other than the commercial liquor vendor/licensee. Third, Appellant’s evidence, though voluminous, did not raise a genuine issue of material fact regarding whether the Department could be held vicariously liable for Post 184’s bar’s illegal sale of alcohol. And thus, the court of appeals correctly affirmed the district court’s decision. The Department respectfully requests that this court affirm the court of appeals’ decision on the merits.

Respectfully submitted,

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