

No. 04-1409

**State of Minnesota
In Supreme Court**

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

Appellants,

v.

The American Legion, and its Subdivisions, and
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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STATEMENT OF THE ISSUE

SHOULD THE REACH OF THE CIVIL DAMAGES ACT (“CDA”) BE EXTENDED BEYOND A LICENSED, COMMERCIAL VENDOR TO AN ENTITY WHICH HAS NO CONTROL OR RIGHT TO CONTROL THE SALE OF INTOXICATING BEVERAGES?

The trial court held that The American Legion was not a proper party under the CDA because it was neither a licensee nor a commercial vendor of intoxicating beverages.¹ The trial court also held that Appellants failed to create a genuine issue of material fact regarding whether The American Legion had a legal right to control Charles Cowden Post 184's (“Post 184”) day-to-day operations or revenue-producing activities.

The Minnesota Court of Appeals affirmed the trial court and held that the CDA provides for a cause of action only against persons who are in the business of providing intoxicating beverages and concluded that The American Legion was a separately incorporated business which was neither a licensee nor a bar owner. The appellate court also held that Appellants did not raise a genuine issue of material fact on whether The American Legion had the right to control the physical undertakings of Post 184's daily activities. Finally, the appellate court held that it was not for the courts to extend the application of the CDA and that any extension should be left to the legislature.

The most apposite authority on this issue includes Minn. Stat. § 340A.801, Minn. Stat. § 340A.501 and *Koehnen v. Dufuor*, 590 N.W.2d 107 (Minn. 1999).

STATEMENT OF THE CASE

Appellants commenced an action under the CDA against Post 184 and the Pine Island Municipal Liquor Store for the death of Barbara Urban and injuries to Todd, Brett

¹The terms “intoxicating beverages,” “alcoholic beverages,” “alcohol” and “liquor” are synonymous and are used interchangeably herein.

and Michael Urban, resulting from a motor vehicle accident on August 10, 2000 with Orvin Rolland (“Rolland”). Appellants alleged Rolland was illegally served alcoholic beverages by employees of Post 184 and Pine Island Municipal Liquor Store. Prior to commencing suit against Post 184, Appellants served it with a timely written notice of claim as required by the CDA.

Appellants commenced a second action under the CDA against The American Legion and the American Legion Department of Minnesota (“the Department”). The second action was commenced by personal service of the Summons and Complaint upon The American Legion in Indiana. Appellants admit they never served The American Legion with a timely, written notice of claim. The first and second actions were subsequently consolidated for trial.

Respondents brought motions for summary judgment. On June 1, 2004, the Honorable Thomas W. Bibus granted the motions for summary judgment in favor of Respondents. Judge Bibus held that Respondents were not liable under the CDA because: Respondents were neither licensees nor commercial vendors; Appellants failed to serve Respondents with a timely written notice of suit; and Appellants failed to demonstrate that Respondents had the right to control the day-to-day operations or revenue-producing activities of Post 184 under any common law theories. Appellants appealed.

The Minnesota Court of Appeals affirmed the summary judgment of the trial court and held that since neither The American Legion nor the Department were in the business of providing liquor, the CDA did not provide a cause of action against either entity. It also held that since the record did not establish that The American Legion and the

Department had the right to control the physical undertakings of Post 184's daily activities, they could not be vicariously liable for the acts of Post 184. The court of appeals also rejected Appellants' contention Post 184 was the *alter ego* of The American Legion and the Department. The court of appeals did not reach the issue of whether Appellants were required to give timely, written notice under the CDA to either The American Legion or the Department.

Appellants petitioned this Court for review on May 25, 2005 on multiple issues, including: 1) Whether the legislature intended to prevent the future application of *respondeat superior* to the CDA; 2) whether there was a genuine issue of material fact about the existence of a master-servant relationship between Post 184 and The American Legion and the Department; 3) whether or not Post 184 was the *alter ego* of The American Legion and the Department; 4) whether the CDA required Appellants to give written notice to The American Legion and the Department; and 5) whether the trial court abused its discretion on several procedural and discovery matters. On July 19, 2005, the Minnesota Supreme Court rejected review on all issues except the narrow issue of "whether respondents are subject to vicarious liability based on *respondeat superior* for an illegal sale of alcohol by defendant American Legion Post 184."

STATEMENT OF FACTS

I. THE PURPOSE, STRUCTURE AND POWERS OF THE AMERICAN LEGION, DEPARTMENTS AND POSTS

A. THE AMERICAN LEGION

The American Legion is a federally chartered, non-profit corporation that was created by an act of Congress in 1919. *See* 36 U.S.C. § 21701, *et seq.* It was chartered as

a patriotic, mutual-help, war-time veterans organization. R. 23. The purpose of The American Legion is:

[t]o uphold and defend the Constitution of the United States of America; to promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the two World Wars and the other great hostilities fought to uphold democracy; to cement the ties and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country.

36 U.S.C. § 21702. The American Legion has powers enumerated in 36 U.S.C. §21704, which include the power to (1) adopt a constitution, bylaws and regulations to carry out the purposes of the corporation seal; (2) adopt and alter a corporate seal; (3) establish and maintain offices to conduct its activities; (4) establish State and territorial organizations and local chapter or post organizations; (5) acquire, own, lease, encumber and transfer property as necessary to carry out the purposes of the corporation; (6) publish a magazine and other publications; (7) sue and be sued; and (8) do any other act necessary and proper to carry out the purposes of the corporation. 36 U.S.C. § 21704.

The American Legion is the largest veterans' organization in the United States and has approximately 2.7 million members in nearly 15,000 posts worldwide. R.23. Membership in The American Legion is restricted to those who were members of the United States Armed Forces assigned to active duty during a time of war or hostilities between the United States and other nations. *See* Constitution of The American Legion, art. IV, § 1. Criteria for membership was established by Congress in 36 U.S.C. § 21703.

B. DEPARTMENTS

The American Legion is authorized by congress to establish State and Territorial organizations and local chapter or post organizations. R.23. Pursuant to that

congressional authority, The American Legion has chartered 50 Departments in the United States and eight foreign Departments. A.185. Each domestic Department's territorial limits correspond to the State in which it is located. *Id.* Each of these Departments of The American Legion are separate legal entities from the National Organization of The American Legion. R.23. The National Executive Committee of The American Legion, after notice and hearing before a subcommittee may cancel, suspend or revoke the charter of a Department for good cause. A.188.

The Department of Minnesota was chartered in 1920 and was incorporated as a Minnesota corporation in 1937. A.340, 342. The Department has its own management organization, board of directors and officers. R.27-8.

C. POSTS

Those desiring to form a post must first obtain approval from the Department in which they reside. A.187. Approval is conditioned upon the applicant's pledge that the post shall uphold the declared principles of The American Legion and shall conform to and abide by the regulations and decisions of the Department and the National Executive Committee, or other duly constituted national governing body of The American Legion. *Id.* Each Department may prescribe the Constitution of its posts. A.188. The American Legion provides suggested forms for Constitutions and By-Laws. A.197-203. The American Legion has no oversight of the posts. A.276, 281, 293. Although a post's permanent charter may be suspended, cancelled or revoked by its Department, the Department has no day-to-day control over the post's affairs or operations. *Id.* A.191, 219-222, 281. The post is the judge of its own membership. A.192. Trials of members are held only by the post or the Department. *Id.* The American Legion does not mandate

procedures for members' discipline. A.223. In fact, The American Legion merely provides a guide for the suspension or expulsion of post members. *Id.*

Post 184 was issued a temporary charter by The American Legion on September 22, 1919, and a permanent charter on August 27, 1920. R.32-36. Pursuant to its charters, Post 184 has never been authorized to represent The American Legion or to do any act, or enter into any contract or agreement on behalf of The American Legion, in any capacity whatsoever, except that the post is directed to collect the annual national *per capita* assessment of membership dues ("national dues") from its members and transmit them through the Department, to the National Treasurer of The American Legion. A.188; R.24. The amount of national dues is fixed during The American Legion's annual convention. *Id.* The posts and Departments also set their own dues. R. 24. National dues are not based on the profits generated by local posts. R.25. Nor are national dues tied in any respect to the profits or losses of sale of intoxicating beverages, if the post has a bar. R.25.

Post 184 consists of approximately 270 members. R.64. Each member pays approximately \$25.00 per year in dues. R.71. This amount is set by the post. R.72. Of that amount, \$18.75 is sent on to the Department. *Id.* Of that amount, \$9.00 is sent to The American Legion. A.273. Post 184 receives 95% of its revenue through its bar and gambling. R.73. The post keeps a separate bank account for bar revenue, apart from other money it collects. *Id.* It does not share accounts with The American Legion. *Id.* It also purchases its own liability insurance and maintains that insurance so it can hold its liquor license. R.74.

Post 184 is licensed to engage in the sale of intoxicating beverages. R.77. It has operated a bar for approximately 20 years. R.75. It owns the building in which it conducts meetings. The building also contains a bar, kitchen and dining area/dance hall. R.57. It hires necessary employees to operate the bar and sets its hours of operation. R.44, 74-76. It approves expenditures for the operation of the bar. R.44. Post 184 has established a "Bar Committee" which "shall assist the Bar Manager when necessary in any or all operational problems concerning the bar." R.44. In addition, the Bar Committee:

shall recommend to the Executive Committee [of Post 184] the hiring of the Bar Manager and his/her rate of pay. They will establish a contract to be signed by the Bar Manager and the Executive Committee annually. All decisions of the Bar Committee will be passed on a four-fifths vote of the Bar Committee. The Bar Committee will take a quarterly inventory of saleable bar stocks and shall provide the membership with a monthly profit and loss bar report.

R.44. Ed Berryman, the former Commander of Post 184, testified about the operation of Post 184's bar:

Q. ...the American Legion, Department of Minnesota does not share in those revenues that your post generates from its bar?

A. It does not.

R.83.

Q. And again [the American Legion, Department of Minnesota] wouldn't hire any of those employees or tell you how to run your bar, the Department of Minnesota?

A. No.

Q. And does the Department of Minnesota at all dictate what types of revenue-generating programs your post can do and not do?

A. No.

R.84. According to Berryman, the national organization (The American Legion) provides no oversight into the daily activities of Post 184. R.66.

Significantly, although Berryman estimated that 94% of the revenue to the post is from the operation of the bar at Post 184, that revenue is separate from the membership dues which the post raises from its members. A.425. Aside from an occasional member who cannot pay his dues, The American Legion receives membership dues from members, not Post 184. A.426.

The American Legion did not require Post 184, or any post for that matter, to maintain a bar or to sell intoxicating beverages at its privately owned and operated facility. R.25. The American Legion did not control, in any manner, who was admitted or served intoxicating beverages at the bar at Post 184. R.25. The American Legion did not determine the amount of intoxicating beverages to be served to Post 184's patrons. R.25. It did not have any way to control the service of intoxicating beverages to the patrons of Post 184. R.25. The American Legion had no involvement with any of the daily activities of Post 184, or any other post. R.25.

The American Legion has never held a liquor license in the State of Minnesota, or in any other state. R.26. The American Legion has never provided or sold intoxicating beverages for sale to the public. R.26.

II. THE AMERICAN LEGION DOES NOT HAVE THE RIGHT TO CONTROL THE SALE OR SERVICE OF LIQUOR AT POST BARS

There is no reference in any of the governing documents for The American Legion concerning the operation of any establishment which serves or sells alcoholic beverages. A.184-194. The American Legion does not mandate that a post have a bar and provides

no regulation for the posts that decide to operate bars. A.305-306. Operating a bar is one of many options which a post has to raise funds to maintain its solvency. A.305.

Approximately 60% of the posts own their own facilities or clubhouses (there are no similar statistics regarding the number of posts which operate their own bars). *Id.*² The American Legion provides suggestions for operating such bars if they choose to do so. *Id.* The American Legion Extension Institute (“ALEI”) provides educational materials which may assist posts. A.299-311. By way of specific example, the AMLI provides:

As far as National Headquarters is concerned, *it's up to the individual Post* to decide whether it is going to have a *home*, and if it does have one, whether there will be a *bar*. But if you have either or both, they ought to be good ones.

A.305 (emphasis added). The ALEI makes some suggestions to posts which are interested in evaluating the success of their club rooms or in determining whether to have one. A.306 (“Here are some standards by which you can measure your own club room (or decide whether or not your Post should have one)”). Further, The American Legion also issues a Post Operations Manual for the benefit of posts. A.427-441. This document reiterates the fact that it is up to the post to determine whether it wants to operate a building or bar. A.431. (“It's up to the individual post to decide whether it is going to have a building, and, if it does have one, whether there will be a bar.”). The Post Operations Manual provides some suggested standards for bar operation. A.432. (“Here are some standards by which a post can measure its own operations or determine if it should enter into a building program...” and “Valuable guidelines and suggestions will be found in the following for any post which is involved in any way with a Legion

²Appellants use the term “bar” and “clubhouse” interchangeably. These terms are not synonymous. Not all “clubhouses” have “bars.” A.92.

building or hopes to be in the future. The suggestions are adapted from an outline compiled by the Department of Kansas.”). The Post Operations Manual also provides “Suggested House Rules” for the benefit of the post which chooses to operate a bar. A.439. The autonomy of the post in the decision and operation of a clubroom or bar is also found in the American Legion Officer's Guide, which provides:

Post Clubroom – It's Your Decision

It's up to the individual post also to decide whether it is to have club room facilities. If your post decides it wants a clubroom and/or bar, then it calls for the best possible operation. To assist the post officers charged with the supervision of the post club room facilities, the *Post Operations Manual* has been prepared.

A.92 (emphasis in original). Accordingly, there are no mandates, rules or regulations regarding whether a post should have a clubroom or bar, or how such facilities should be operated.

STANDARD OF REVIEW

On appeal from summary judgment, it is the function of the appellate courts to determine only (1) whether there are any genuine issues of material fact, and (2) whether the trial court erred in its application of the law. *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn. 1979). When a question of statutory interpretation is raised on appeal, the standard of review is *de novo*. *Oslund v. Johnson*, 578 N.W.2d 353, 356 (Minn. 1998); *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). The primary objective of statutory interpretation is to ascertain and effectuate the legislature's intent. *See Boutin v. LaFleur*, 591 N.W.2d 711, 715 (Minn. 1999). An appellate court may affirm a lower court ruling on any ground appearing as a matter of law on the record,

even if the ground was not considered by the lower court. *Kafka v. O'Malley*, 221 Minn. 490, 499, 22 N.W.2d 845, 849 (1946).

ARGUMENT AND AUTHORITIES

In this appeal, Appellants are attempting to persuade this Court to ignore the explicit language of the CDA and decades of judicial interpretation of that legislation, and expand the scope of the act to apply to a non-licensed, non-vendor of alcoholic beverages. The courts below recognized the obvious – the CDA did not include an organization like The American Legion in its field of potential defendants. The courts below appropriately understood that Appellants were requesting a significant expansion of the CDA, which only the legislature has the power to amend. The courts below correctly determined that as a non-licensed, non-vendor of alcoholic beverages, The American Legion was not subject to liability under the CDA.

No matter what inventive arguments Appellants attempt to craft and no matter how loudly or artfully they make them, Appellants cannot change the undisputed fundamental facts of this case. The American Legion did not have a liquor license. The American Legion has never sold alcoholic beverages at any time. The American Legion has never profited from the sale of alcoholic beverages. The American Legion did not have any daily control over the operation of Post 184. The American Legion did not sell any alcoholic beverages to Rolland and did not have the right to control whether Post 184 sold him a drink or not. These undisputed material facts are dispositive of Appellants' claims against The American Legion under the CDA.

I. THE UNIQUE NATURE OF THE CDA GOVERNS ITS JUDICIAL INTERPRETATION

A. THE CDA IS A PENAL STATUTORY CREATION WITH NO COMMON LAW COUNTERPART THAT MUST BE STRICTLY CONSTRUED

Historically, common law “did not permit an action against a liquor vendor for injuries resulting from the vendor’s illegal sale of intoxicating liquor.” *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605, 610 (Minn. 1984). *See also Koehnen v. Dufuor*, 590 N.W.2d 107, 109 (Minn. 1999)(“liability for injuries caused by illegal sale of liquor was unknown to the common law and is a part of our jurisprudence solely as a creature of the legislature.”). “In 1911, [however,] the legislature enacted the Civil Damages Act, also known as the Dram Shop Act,” which created a cause of action against vendors of liquor. *McGuire*, 346 N.W.2d at 610.

“Since a civil damage law is one highly penal in its nature introducing a remedy unknown to the common law, it is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope but yet may be interpreted, where the language is clear and explicit, so that its true intent and purpose is given full meaning, having in view the evil to be remedied and the object to be attained.” *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 892 (1955). As a creature of statute which has no common law counterpart, the court has made clear that the CDA “must be strictly construed.” *Whitener v. Dahl*, 625 N.W.2d 827, 829, 833 (Minn. 2001); *Haugland v. Maplevue Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 693 (Minn. 2003) (recognizing that the CDA “is to be strictly construed.”).

B. THE CDA IS A STRICT LIABILITY STATUTE

The CDA is a strict liability statute. This concept has been recognized by this court for decades. In *Dahl v. Northwestern National Bank of Minneapolis*, 265 Minn. 212, 121 N.W.2d 321 (1963), this Court construed the predecessor statute to Minn. Stat. § 340A.801 and held that the legislature intended to create strict liability through its passage of Minn. Stat. § 340.95. The *Dahl* Court reasoned that:

Strict liability is justified on the theory that such business or activity can best bear the loss occasioned by a violation of law regulating the business or activity, even though the violation was unintentional or did not involve any deviation from the standard of due care.

Id. at 220-21, 121 N.W.2d at 324 (footnotes omitted). *See also Hannah v. Jensen*, 298 N.W.2d 52. (Minn. 1980)(the CDA “imposes strict liability on the part of a defendant bar owner”); *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983)(“Through strict liability sanctions and by placing the burden of economic loss on the vendors, the Act ‘provides an extremely effective incentive for liquor vendors to do everything in their power to avoid making illegal sales.’”).

C. THIS COURT HAS REPEATEDLY RECOGNIZED THAT THE EXPANSION AND REDUCTION OF THE CDA IS FOR THE LEGISLATURE

Since the creation of the CDA, this Court has “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.” *K.R. v. Sanford*, 605 N.W.2d 387, 391 (Minn. 2000)(citation omitted). This Court has also recognized that its “role is to give effect to the language of the CDA when its meaning is plain, and when the language of the statute requires [] interpretation, to ascertain and effectuate the intent

of the legislature.” *Sanford*, 605 N.W.2d at 391 (citing Minn. Stat. § 645.16). Fifty years ago, this Court discussed the deference to which the legislature was entitled by the courts when construing the predecessor to the CDA:

The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Courts cannot pass on the soundness or expediency of theories embodied in statutes enacted in the exercise of the police power for the social benefit of the citizen and the public welfare. The control, regulation, and restrictions to be imposed, to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The legislative determination of the control to be applied is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.

Beck, 245 Minn. at 40, 70 N.W. 2d at 895 (citation omitted). *See also Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 245, 201 N.W. 305, 307 (1924)(“It is for the Legislature to limit or extend the operation of its enactments, and even though there are no self-contained limitations, **it would be judicial legislation to extend a statute beyond its subject-matter.**”)(emphasis added).

In summary, since the CDA is a “highly penal” creation of the legislature, in derogation of judicially-created law, it is beyond “judicial cognizance” and its expansion or reduction is reserved exclusively to the legislature. To the extent that it must be construed by the courts, it must be construed strictly and no rights or remedies exist save those expressly provided by the CDA.

It is undisputed that Appellants are requesting that this Court expand the CDA to include persons not subject to liability under its plain language. The American Legion, by admission, is not a licensed commercial vendor of alcoholic beverages. It is not for the courts to extend the reach of the CDA beyond its very plain and explicit terms, which

only allow claims against licensed, commercial vendors or municipal liquor stores, which illegally sell intoxicating beverages. This Court's "precedent and respect for the separation of powers dictates no other result." *Koehnen*, 590 N.W.2d at 113.

II. THE LOWER COURTS CORRECTLY DETERMINED THAT THE CDA APPLIES EXCLUSIVELY TO COMMERCIAL LIQUOR VENDORS

A. MINN. STAT. § 340A.801 CREATES A RIGHT OF ACTION ONLY AGAINST A PERSON WHO CAUSED THE INTOXICATION BY ILLEGALLY SELLING ALCOHOLIC BEVERAGES

This Court does not need to engage in any construction or interpretation of the CDA, does not need to examine this Court's precedent in interpreting the CDA, and certainly does not need to go outside Minnesota to determine whether the CDA applies to The American Legion. The answer, very clearly, is found in the plain language of Minn. Stat. § 340A.801, subd. 1. This section creates a cause of action: "for all damages sustained *against a person who caused the intoxication of that person by illegally selling alcoholic beverages.*" Minn. Stat. §340A.801, subd. 1 (emphasis added). By Appellants' own admission, The American Legion is not a person who illegally sold alcoholic beverages to Rolland on the day of the Urban accident. An illegal sale contemplates a direct transaction between a purchaser and a seller. *See, e.g., Carrick v. Franchise Associates, Inc.*, 671 A.2d 1243, 1244. By the statute's very terms, there is only direct, not vicarious or remote liability. There is no language in the CDA which expands liability for violations of the CDA beyond commercial vendors of alcoholic beverages. This Court's inquiry could reasonably end here.

B. THIS COURT HAS CONSTRUED “PERSON” TO PERTAIN ONLY TO THOSE IN THE BUSINESS OF PROVIDING LIQUOR

The issue of who is subject to liability under the CDA “is not an area of the law which suffers from legislative neglect.” *Koehnen*, 590 N.W.2d at 112 (“The Act is no stranger to the legislature...”). Nor is it an area which has suffered from judicial neglect. This Court has previously determined that the legislature intended to restrict liability under the CDA “**only to commercial vendors.**” *Cady v. Coleman*, 315 N.W.2d 593, 595 (Minn. 1982)(emphasis added). “Cases decided by this court since the 1977 Amendment have uniformly held that the Civil Damages Act provides the exclusive remedy for sale of intoxicating liquor **by an in-state vendor.**” *Cole v. City of Spring Lake Park*, 314 N.W.2d 836, 839 (Minn. 1982)(citations omitted)(emphasis added). See *Meany v. Newell*, 367 N.W.2d 472, 474 (Minn. 1985). See also *Englund v. MN CA Partners/MN Joint Ventures*, 555 N.W.2d 328, 332 (Minn. Ct. App.), *aff’d*, 565 N.W.2d 433 (Minn. 1997)(“[t]he legislature chose to regulate the sale of alcohol and place on liquor vendors the responsibility of complying with the requirements of chapter 340A.”). One of the reasons commercial vendors are subject to liability under the CDA is that “they profit by their sales and therefore should bear some of the risks created by their business...” *Cady*, 315 N.W.2d at 595. See also *McGuire*, 346 N.W.2d at 613. (the intent of the legislature in enacting the CDA was that “the liquor industry should bear the cost of injuries caused by the consumption of intoxicating liquor when there have been illegal sales.”). Accordingly, this Court has defined a “person” as referenced in Minn.. Stat. § 340A.801, subd. 1, as “only persons in the business of providing liquor.” *Koehnen*, 590 N.W.2d at 111-12.

The record in this case establishes, unequivocally, that Post 184 was in the business of providing liquor to its members and at least in the case of Rolland, to non-members. Post 184 possessed the license which allowed it to legally sell liquor in this state. It possessed the requisite insurance mandated by the CDA. It profited from the sale of liquor. As an in-state liquor vendor, it was subject to all of the regulation, penalties and privileges provided by the CDA. Accordingly, Post 184 is a “person” under 340A.801, subd. 1. Appellants have asserted claims against the person which the legislature intended to hold responsible for illegal alcohol sales – Post 184.³

The record is equally clear that The American Legion was not in the business of providing liquor. It is not a commercial vendor of intoxicating beverages. As an out-of-state corporation, which is not licensed to sell alcoholic beverages in this state or any other, it is not subject to the regulation, penalties and privileges provided by the CDA. The American Legion is not a “person in the business of providing liquor” and not subject to liability under the CDA for “illegally selling alcoholic beverages.”

C. MINN. STAT. § 340A.801 CREATES A RIGHT OF ACTION ONLY AGAINST A PERSON WHO CAUSED THE INTOXICATION

By its explicit terms, the CDA imposes an obligation on claimants to prove causation between the illegal sale of liquor and the “intoxication of another person.” Minn. Stat. § 340A.801, subd. 1. This element of the claim is critical, not incidental. It reinforces the precedent this Court has established that only commercial vendors of liquor could be subject to liability under the CDA because those commercial vendors are the

³Appellants also brought suit against Pine Island Municipal Liquor Store under the initial DCA claims, alleging an illegal sale of liquor to Rolland caused the Appellants’ injuries, but recently settled with this defendant.

only entities which could have caused the intoxication of another person. *See Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992). Causation remains a fundamental component of a CDA claim. Nothing The American Legion did or did not do could have “caused” Rolland’s intoxication. Vicarious liability is not contemplated by the causation requirement of Minn. Stat. § 340A.801.

D. THE LEGISLATURE HAS ALREADY LIMITED VICARIOUS LIABILITY UNDER THE CDA TO LICENSEES

Appellants attempt to promote the idea that vicarious liability is well-settled under the CDA and provides for liability “up the line” from a Post 184 bartender to The American Legion. In support of their argument in this regard, Appellants cite *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953). Appellants did not, however, cite the most apposite authority on the application of vicarious liability under the CDA – Minn. Stat. § 340A.501. The legislative enactment of Minn. Stat. § 340A.501, as well as the holding in *Hahn* establish exactly the opposite proposition that Appellants want this Court to adopt. Under the explicit terms of the CDA, vicarious liability only applies to the licensee and goes no further, for conduct of the licensee’s employees in the licensed establishment.

Minn. Stat. § 340A.501 is the only provision in the CDA which addresses the concept of vicarious liability. That section provides:

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

This provision is critical for the purpose of assessing Appellants' vicarious liability arguments because it demonstrates conclusively that the legislature gave careful consideration to the field of persons which it wanted to subject to the reach of the CDA and imposed a clear and defined limit on vicarious liability. There is no ambiguity in the CDA on this vicarious liability issue and, therefore, it should not be subject to judicial interpretation.

This statutory provision includes not only a geographic limitation on the scope of vicarious liability (responsibility to the licensee for all conduct which occurs in the licensed establishment), but also an action-based limitation on the scope of vicarious liability (responsibility to the licensee for the sale of liquor). Neither of these limitations applies to The American Legion. Post 184 holds the license, so there is no question that it alone is the licensee. As the licensee, Post 184 alone is responsible for conduct which occurs in its bar. As the licensee, Post 184 alone is responsible for the sale of alcoholic beverages in the bar. Vicarious liability runs "up the line" from the employee bartender to the license holder. If the legislature wanted to impose vicarious liability to others farther "up the line" it would have done so.

This limitation only makes sense. First, it captures the very *respondeat superior* arguments made by Appellants here. It avoids having to fight a battle over the responsibility of a licensee for the acts of the employees which it hires, fires, pays, trains, disciplines and controls. Second, it is consistent with the policy goal of holding the licensee responsible for liquor sales from which it profits. Third, it provides a logical endpoint to the extension of liability under the CDA, since the CDA only applies to licensed, in-state, commercial vendors of alcoholic beverages – in other words, only

those entities which seek the benefits of the right to sell alcoholic beverages within the state.

Furthermore, at least with respect to the imposition of vicarious liability, *Hahn* is not the landmark decision which Appellants suggest. In rejecting the City of Ortonville's contention that it should not be responsible for the acts of its bartender who made an illegal sale, this Court interpreted Minn. Stat. § 340.941, which was the predecessor to Minn. Stat. § 340A.501 and which had been part of the CDA since its inception. *Hahn*, 238 Minn. at 438, 57 N.W.2d at 262. According to the *Hahn* Court:

Section 340.941 expressly provides that any sale of liquor in a public drinking place by any clerk, barkeep, or other **employee authorized to sell liquor** in such place is the act of the employer as well as of the person actually making the sale and both the employer and employe are liable to all the penalties imposed by law.

*Id.*⁴ (emphasis added). The essential concept in Minn. Stat. § 340.941 as interpreted in *Hahn* is no different than that of Minn. Stat. § 340A.501 – vicarious liability ends with the person or entity in the best position to control the premises and the sale of alcoholic beverages on the premises.

If the legislature wanted to expand the scope of vicarious liability under Minn. Stat. § 340A.501 to include entities “up the line” past the employer or licensee, it has had nearly 90 years to do so. *See, e.g.*, Minn. Stat. § 340A.308 (prohibited transactions of brewers and malt liquor wholesalers encompass not only direct actions, but also those done “through an affiliate or subsidiary company, or through an officer, director,

⁴The most recent version of section 340.941 provided: “Any sale of liquor in or from any public drinking place by any clerk, barkeep, or other employee authorized to sell liquor in such 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.” Minn. Stat. § 340.941 (1984).

stockholder or partner...”). The legislature has chosen to limit liability only to licensees. The plain language of this section creates the endpoint for vicarious liability under the CDA. Liability for the violation of the CDA for any illegal sale to Rolland stops at Post 184. No judicial interpretation is necessary; nor is any allowed.

It is not for this Court to second-guess the wisdom of the legislature’s policy choice of limiting liability to the licensee. *Beck*, 245 Minn. at 40, 70 N.W. 2d at 895. *See also Donnelly*, 161 Minn. at 245, 201 N.W. at 307 (“It is for the Legislature to limit or extend the operation of its enactments, and even though there are no self-contained limitations, it would be judicial legislation to extend a statute beyond its subject-matter.”). The plain language of the CDA limits liability to licensees, and this Court need go no further in its inquiry.

E. OTHER SECTIONS WITHIN THE CDA AND LIQUOR CONTROL ACT SUPPORT THE CONCLUSION THAT THE LEGISLATURE HAS SOUGHT TO REGULATE ONLY THE CONDUCT OF LICENSED, COMMERCIAL VENDORS OF LIQUOR

There are numerous other provisions within the CDA and Liquor Control Act which support the conclusion that liability is limited only to licensed, commercial vendors of alcoholic beverages.

1. Liability For Serving Non-Members Lies Exclusively With The “Club”

Appellants contend that The American Legion is subject to liability for Post 184’s sale to Rolland under Minn. Stat. § 340A.404, subd. 1(a)(4), because he was not a member or *bona fide* guest of Post 184. This section, however, addresses the issuance of on-sale licenses to establishments which are located within its jurisdiction, including “congressionally chartered veterans organizations with the approval of the

commissioner...” Minn. Stat. § 340A.404, subd. 1(a)(4). A violation of this provision results in a misdemeanor. *See* Minn. Stat. § 340A.703. The violation of this provision can also result in a CDA claim against a club. *See Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989).

Here, The American Legion could not be subject to liability under Minn. Stat. § 340A.404, subd. 1(a)(4), because it never held an on-sale license. Accordingly, there was no *quid pro quo* between the licensee for the privilege of selling alcohol and the penalty for a violation of the law. Violations of this provision emanate from the fact that only licensees could ever be responsible for a violation of the licensing mandates. As this Court indicated in *Rambaum*, “[i]n view of the legislature’s strict regulation of **vendors** and its deep concern over alcohol abuse, we conclude that **the relationship between the restrictive club license and the purposes of the Civil Damages Act** is sufficiently substantial to make a club sale to a nonmember or nonguest an “illegal sale” for dramshop purposes.” *Id.* at 21 (emphasis added).

Further, the Liquor Control Act’s definition of “club” does not include The American Legion. Pursuant to Minn. Stat. § 340A.101, subd. 7, a “club” is an incorporated organization organized under the laws of the state. Post 184 is organized under the laws of Minnesota, The American Legion is not. The definition of “club” also includes “congressionally chartered veterans’ organizations” but the scope of the definition is clearly oriented to a local club, not a national entity. If a “club” is a “congressionally chartered veterans’ organization” it must have more than 30 members, it must have owned or rented space or a building for more than a year, and it must be

directed by a board of directors and not share the profits from the distribution or sale of beverages, beyond fixed wages or salaries. Minn. Stat. § 340A.101, subd. 7 (1)-(3).

Post 184 owns or leases the building where its bar is located. Post 184 is run by its board, and its bar is run by its Bar Committee. Its profits are used to pay its employees. The American Legion does not direct the operations of Post 184, it does not own or lease Post 184's building and does not make any determination of who profits from the sale of beverages.

2. The Retail Licensing And Financial Responsibility Statutes Limit Their Reach To The Licensee

The retail licensing statute also has specific application to the license holder, not to any parent company, holding company, or franchisor. The retail licensing statute charges a licensing fee which is "intended to cover the costs of issuing and inspecting and other directly related costs of enforcement." Minn. Stat. § 340A.408, subd. 2. Licenses can't be issued, maintained or reviewed "unless the applicant demonstrates proof of financial responsibility with regard to liability imposed by section 340A.801." Minn. Stat. § 340A.409, subd. 1. The legislature has created various methods of demonstrating a licensee's proof of financial responsibility. *See* Minn. Stat. § 340A.409, subd. 1(1)(*e.g.* \$100,000 in cash or securities or \$300,000 aggregate policy limit for dram shop insurance). There is no requirement that any person or entity beyond the applicant prove financial responsibility. Investigations are done on the background and finances of the applicant only. Minn. Stat. § 340A.412, subd. 2. Only licensees are subject to inspections of their books, papers and records for the purpose of determining compliance with the provisions of chapter 340A. Minn. Stat. § 340A.907. Violation of the licensing

statute can result in the revocation or suspension of the license or the imposition of a civil penalty on the license holder only. Minn. Stat. § 340A.415.

In all of these statutory provisions, the legislature limited the field of those entities which it sought to license, regulate, inspect or penalize. If its intention was to subject others who might be vicariously liable for the acts of the licensee, it certainly could have done so. If it thought that it could cure the “mischief” of illegal sales of liquor by holding shareholders, directors, subsidiaries, affiliates, parent corporations, holding companies, franchisors or others responsible for violating the terms of a liquor license, it could have done so. Which entities should be subject to licensing and the burdens attendant to it is entirely up to the legislature. If the legislature was concerned that a person injured by a driver who became intoxicated because of an illegal sale of liquor have unlimited assets from which to recover on a potential claim, it could have chosen to raise the level of financial responsibility now required by the statute, or require any entity which stood to benefit directly or remotely from the licensee’s liquor sales to prove financial responsibility. All of these provisions which regulate liquor vendors demonstrate that the legislature had no intention of imposing liability “up the line” to holding companies, franchisors, parent organizations and other entities who did not directly participate in the sale of liquor.

III. THE SOCIAL HOST CASES DEMONSTRATE THAT THE REACH OF THE CDA DOES NOT EXTEND BEYOND COMMERCIAL VENDORS OF LIQUOR

Appellants contend that the social host cases relied upon by The American Legion, the trial court and the court of appeals do not provide a meaningful analogy to address their contention that The American Legion should be vicariously liable for the conduct of

Post 184. The issue in this case is not whether The American Legion should be treated like a social host. The issue is whether the CDA applies to any person other than a commercial vendor. Appellants fail to appreciate that the social host cases provide direct support, not analogous support, for the conclusions drawn by the courts below.

The fundamental holdings made by this Court in *Cole*, *Cady*, *Meany*, and *Koehnen* all demonstrate conclusively that the CDA does not impose liability on persons not in the business of providing liquor. *See, e.g., Cole*, 314 N.W.2d at 839 (noting that courts in Minnesota “have uniformly held that the CDA provides the exclusive remedy for sale of intoxicating liquor by an **in-state vendor**” and that the act preempted other remedies for illegal sales)(emphasis added); *Cady*, 315 N.W.2d at 596 (liability applied only to a “person **in the business of providing liquor**, and not a social host who happens to receive some consideration from his guests in return for drinks he provides.”)(emphasis added); *Meany*, 367 N.W.2d at 474 (holding that an employer serving alcoholic beverages to employees at a Christmas party was not a commercial vendor and did not fall within the CDA); *Koehnen*, 590 N.W.2d at 111 (“Fundamental logic leads to the undeniable conclusion that *Cady* expresses the will of the legislature” and that the CDA is “clearly and unequivocally” limited to commercial vendors). As a matter of law, based upon the well-established and clear precedent of this Court, the CDA does not apply to The American Legion, because it was not in the business of providing liquor.

In addition, the social host cases are also significant because they demonstrate this Court’s appropriate deference to the legislative restrictions upon the scope of the CDA. In each of the social host cases, this Court rejected the policy arguments made by the appellants and refused to extend the reach of the CDA to entities who were not

commercial vendors. *See, e.g., Cole*, 314 N.W.2d at 840 (despite an expression of the validity of public policy arguments, the legislature intended to limit liability to commercial vendors); *Cady*, 315 N.W.2d at 596 (legislative intent to restrict liability only to commercial vendors is sufficiently clear); *Koehnen*, 590 N.W.2d at 111 (any expansion of the coverage of the CDA should be by legislative amendment). As it did in the social host cases, this Court should leave to the legislature any expansion of the coverage of the CDA beyond commercial vendors of liquor.

There can be no reasonable dispute that the CDA does not apply to any person, or entity, which is not a commercial vendor of alcoholic beverages. Because The American Legion is not in the business of providing liquor, and did not sell liquor to Rolland, or anyone else for that matter, it cannot be liable under the CDA.

IV. THE LEGISLATURE HAS PROVIDED A REMEDY FOR APPELLANTS WHICH WILL SUPPRESS THE MISCHIEF OF ILLEGAL ALCOHOL SALES

Appellants continually repeat the legislative purpose which this Court has ascribed to the CDA; namely, that the CDA should be “liberally construed so as to suppress the mischief and advance the remedy.” *Hahn v. City of Ortonville*, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953)(emphasis omitted). This construction, however, has its limits and this Court has also said that the CDA “is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope.” *Lefto v. Hoggsbreath Ent., Inc.*, 581 N.W.2d 855 (Minn. 1998)(quoting *Herrly v. Muzik*, 374 N.W.2d 275, 278 (Minn. 1985)). Appellants’ public policy arguments in this regard are rather hollow, simply because a remedy already exists for them under the CDA, and the mischief they seek to

suppress will be obtained by subjecting Post 184, or any other licensee, to liability for its illegal sale.

Appellants are not without a remedy in this case, because they have a cause of action against Post 184. Without expanding the scope of the CDA, Appellants already have a strict liability cause of action against Post 184, the liquor vendor which has profited from the sale of alcoholic beverages, which has subjected itself to the purview of the CDA by obtaining a liquor license and proving financial responsibility. More importantly, the subsection of Post 184 to strict liability in this case is the best way to “suppress the mischief” because Post 184 is undeniably in the best position to assess the level of intoxication of the persons it serves and make determinations of whether they are members or *bona fide* guests.

V. THIS COURT HAS REFUSED TO EXPAND THE REACH OF A SIMILAR STRICT LIABILITY STATUTE

Moreover, as the trial court noted in its decision granting summary judgment in favor of The American Legion, guidance on the expansion of a strict liability statute like the CDA can be found in this Court’s construction of another strict liability statute, Minn. Stat. § 347.22, commonly known as the “dog-bite statute.” In *Gilbert v. Christiansen*, 259 N.W.2d 896 (Minn. 1977), this Court refused to expand the meaning of the term “owner” to include a dog owner’s landlord. *Id.* at 898. In refusing to find Towns Edge an “owner,” as that term was defined by the strict liability dog-bite statute, the Court stated that “[a]t present, Minn. Stat. § 347.22 does not envision [the landlord’s] liability in these circumstances[.]” *Id.* Rather, it held that “[d]etermination of policy on this matter is a question for the legislature.” *Id.*

As in *Gilbert*, this Court should refuse to judicially expand the narrowly defined scope of the strict liability CDA by redefining the term “person who caused the intoxication by illegally selling alcoholic beverages” to include entities which are purportedly vicariously liable for the licensee.

In addition to contending that the CDA is not a strict liability statute, an argument which The American Legion has already addressed, Appellants also contend that comparison of the CDA to the dog-bite statute is inappropriate. This Court, however, previously endorsed such a comparison in *Dahl* when it considered whether a cause of action under the CDA survived the death of a dram shop operator. In *Dahl*, this Court explained:

The Section 340.95 [the predecessor to Minn. Stat. § 340A.801] might best be characterized as **imposing strict liability essentially analogous to the liability imposed on a dog owner under s 347.22**. Such statutes impose liability without regard to fault in the sense of any wrongful intent or negligent conduct. They represent an extension of liability for losses resulting from tortious conduct on the part of those engaged in businesses requiring strict regulation and control in order to insure the welfare and safety of the public.

Id. at 220, 121 N.W.2d at 324 (footnotes omitted)(emphasis added). The *Dahl* Court rejected the appellant’s argument, similar to the arguments made by Appellant in this case, that the liberal rules of construction should be applied to “suppress the mischief and advance the remedy” to hold that a CDA cause of action survived the death to the dram shop operator. *Id.* The “remedy” should not be judicially extended to a class of persons clearly not intended by the legislature.

VI. APPELLANTS' CDA CLAIM FAILS BECAUSE THEY FAILED TO SERVE THE AMERICAN LEGION WITH TIMELY WRITTEN NOTICE

Unlike common law causes of action, the Minnesota Legislature mandated that it was mandatory that a person claiming damages arising out of the violation of the CDA must provide notice of the claim to the "licensee" before commencing suit. Minn. Stat. §340A.802, subd. 1 (emphasis added). *See also* Minn. Stat. §340A.802, subd. 2. A CDA claimant, therefore, must give written notice of injury to each responsible liquor vendor within 240 days of the date of entering an attorney/client relationship. *See* Minn. Stat. §340A.802, subd. 2. The notice requirement is jurisdictional. *Id.* No action may be maintained unless notice is properly provided. *Id.*

In order to preserve claims for contribution or indemnity under the CDA, a municipality or licensee "must give a written notice to the other licensee or municipality in the form and manner" specified in Minn. Stat. § 340A.802, subd. 1. This notice must be served "within 120 days after the injury occurs or within 60 days after receiving written notice of a claim for contribution or indemnity, whichever is applicable." Minn. Stat. § 340A.802, subd. 2. "No action for damage or for contribution or indemnity may be maintained unless the notice has been given." *Id.*

In this case, there is no dispute that Post 184 was timely served with a written notice from Appellants. It is unknown whether Post 184 preserved any rights of contribution or indemnity against the Pine Island Municipal Liquor Store ("Pine Island"), which was an original party to this action and which Appellants alleged made an illegal sale to Rolland. There is also no dispute that The American Legion was never served with a written notice from Appellants and knew nothing about this accident or the alleged

illegal sale until it was served with the Summons and Complaint, well after its opportunity to serve a written notice compliant with Minn. Stat. § 340A.802, subd. 2, had passed.

The trial court determined that summary judgment was appropriate in favor of The American Legion because Appellants failed to timely serve The American Legion with a written notice. The court of appeals didn't reach the issue. This Court denied Appellant's petition for review on the inadequacy of written notice to The American Legion.

Appellants devote a single footnote to their failed argument that the door is still open on the issue of whether a timely notice under the CDA was necessary on The American Legion. As Appellants' argument apparently goes, if this Court finds that The American Legion was vicariously liable for the allegedly illegal sale of Post 184, there was no reason for Appellants' to have served The American Legion with a CDA notice. Whether this Court finds that a vicarious liability action can be maintained against The American Legion or not, Appellant's claims still fail because they failed to timely serve The American Legion with a CDA notice.

Compliance with Minn. Stat. § 340A.802 "is a condition precedent to a civil damage action." *Schulte v. Corner Club Bar*, 544 N.W.2d 486, 488 (Minn. 1996). The notice requirement demands strict compliance. *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995). Appellants completely failed to follow the mandates of Minn. Stat. § 340A.802 and failed to utilize any of the approved methods of corporate service in Minn. Stat. §302A.901 (service upon a "registered agent" or the corporation, upon one of the corporation's officers, or upon the Secretary of State). *See Wallin*, 534 N.W.2d at 715.

Without satisfying the condition precedent of adequate written notice on The American Legion, there can be no claim made against it, whether based upon direct or vicarious liability.

In response to this argument, Appellants will likely contend either: 1) that they did not need to serve The American Legion with written notice because it is not a “licensee” or 2) they did comply with Minn. Stat. § 340A.802 because they served Post 184. The first argument fails for a very simple and obvious reason: if The American Legion is not subject to service of a notice of claim under the CDA because it is not a licensee, it cannot be subject to liability under the CDA for that same reason. Appellants cannot argue that The American Legion is liable for an illegal sale of an alcoholic beverage under the CDA, yet claim that there is no requirement to provide it with notice under the statute because it is not a licensee or commercial vendor. Appellants cannot have it both ways.

Moreover, the legislature could never have intended to create a notice requirement for the entity directly liable for an illegal sale, yet waive that requirement for an entity which would be vicariously liable for the sale. If anything, notice would be far more important to a vicariously liable entity because it would never have actual notice that the illegal sale occurred. It would defy logic and fairness to require notice to the licensee, but not require it to a vicariously liable non-licensee. The legislature never intended such an absurd result.

Appellants’ likely alternative argument, that service to Post 184 was service to The American Legion, also fails because the record is clear that the service of written notice on Post 184 did not strictly or substantially comply with Minn. Stat. § 340A.802,

and The American Legion had no actual notice of Appellants' claim. It is undisputed that Post 184 is not The American Legion's "registered agent" for service of process. Appellants also failed to otherwise serve an officer of The American Legion or the Secretary of State. Appellants completely failed to comply with the service requirements of Minn. Stat. §302A.901.

Additionally, if this Court decided to override legislative prerogative and expand the scope of the CDA to include those vicariously liable parties who never received timely notice pursuant to Minn. Stat. § 340A.802, those vicariously liable parties would have no viable right of contribution or indemnity. Minn. Stat. § 340A.802, subd. 1, provides that: "A licensee or municipality who claims contribution or indemnification from another licensee or municipality must give a written notice to the other licensee or municipality in the form and manner specified in this section." The notice must be "served within 120 days after the injury occurs or within 60 days after receiving written notice of a claim for contribution or indemnity, whichever is applicable. No action for contribution or indemnity may be maintained unless the notice has been given." Minn. Stat. § 340A.802, subd. 2. Accordingly, despite the fact that Appellants contend that The American Legion should be completely responsible for the conduct of Post 184, Appellants' failure to serve The American Legion with a written notice, and Post 184's failure to do the same, effectively deprived The American Legion of any opportunity to make a contribution or indemnity claim against Pine Island, or any other potentially liable licensee or municipality. Due process and equal protection demand nothing less than the same ability to preserve rights of contribution and indemnity as a licensee or

municipality. The legislature could never have intended to deprive an entity subject to the CDA of its right to contribution or indemnity.

Appellants failed to persuade this Court to accept review of the inadequacy of their written notice to The American Legion under Minn. Stat. §340A.802. No matter how the issue of vicarious liability under the CDA is resolved, the fact remains that Appellants' failure to serve The American Legion with written notice is fatal to their CDA claim. The legislature never intended to allow a person to make a CDA claim without complying with the written notice requirements of Minn. Stat. § 340A.802.

VII. THERE IS NO MASTER-SERVANT RELATIONSHIP BETWEEN THE AMERICAN LEGION AND POST 184

A. NO LAW IN MINNESOTA SUPPORTS A MASTER-SERVANT RELATIONSHIP BETWEEN SEPARATELY OWNED ENTITIES

Although Appellants have selected the master-servant relationship as the primary conduit for their vicarious liability arguments, they fail to cite any Minnesota authority to support the proposition that one incorporated entity can be considered the master of another separately incorporated entity.⁵ Even assuming that the master-servant concept has any application in this case, Appellants fail to address all of the requisite factors which are used in testing the existence of a master-servant relationship. Finally, an examination of the master-servant factors reveals that no genuine issue of material fact exists to support the application of the master-servant doctrine to this case.

⁵Appellants cite *Burman v. Zahler*, 286 Minn. 400, 178 N.W.2d 234 (1970) for the self-evident proposition that the master-servant doctrine applies to business entities as well as individuals. *Burman* does not stand for the proposition that a master-servant relationship can exist between incorporated business entities.

Appellants' suggestion that The American Legion should be liable for the actions of Post 184 is part and parcel of an issue which this Court has chosen not to review, that is, whether the corporate veil of The American Legion should be pierced to hold it liable for the acts of Post 184. Appellants' arguments for holding The American Legion liable as "master" for the conduct of a separately incorporated entity "servant" would effectively pierce the corporate veil of The American Legion, without any showing of wrongdoing or the other factors enumerated in *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979). Entities which incorporate should be entitled to the fundamental protection from liability which was noted by the *Victoria Elevator* Court: "[d]oing business in a corporate form in order to limit individual liability is not wrong; it is, in fact, one purpose for incorporating." *Id.* at 512.

B. APPELLANTS CANNOT SATISFY THE FACTORS NECESSARY FOR A MASTER-SERVANT RELATIONSHIP

Appellants contend that the only factors which this Court should consider when determining whether a master-servant relationship exists between The American Legion are: 1) whether The American Legion has the right to control the conduct of Post 184; and 2) whether Post 184's conduct was within the scope of services performed for The American Legion. Even making the assumption that this limited analysis is sufficient to determine whether a master-servant relationship exists, Appellants' arguments in this regard fail as a matter of law because there is no evidence that Post 184's sale of liquor "was within the scope of services performed for The American Legion." Post 184 did not sell liquor for The American Legion, it sold liquor for its own profit. The American Legion did not authorize Post 184 to sell liquor for it and was never in the business of

selling liquor. Accordingly, there was no “scope of services” between The American Legion and Post 184.

A determination of whether a master-servant relationship exists is actually more involved than Appellants suggest. In order to determine whether a master-servant relationship exists, a court examines: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge. *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (Minn. 1964).

Here, Appellants have focused almost entirely on the first *Guhlke* factor and have virtually ignored the rest. This is likely because Appellants could never establish factors 2 through 5 of the *Guhlke* test. Post 184’s bar employees were paid by Post 184, not The American Legion. The American Legion does not control the means and manner of the service of alcoholic beverages at Post 184. It did not mandate that Post 184 have a bar, when to stay open, what to serve or whom to serve. The American Legion did not pay Post 184 to serve alcoholic beverages, nor did it receive money which was dependent upon Post 184’s sales of alcoholic beverages. The amount of membership dues received by The American Legion was not dependent upon the sale of alcohol or any profit which Post 184 realized from such sales. The American Legion did not furnish any of the tools or materials which Post 184 used to dispense or sell alcoholic beverages in its bar. It did not own or control the premises of Post 184 where alcoholic beverages were served. The control of the Post 184 bar premises was by the owner, not The American Legion.

Finally, only Post 184 had the right to hire, fire, train and discipline its bar employees. *See Gohlke*, 268 Minn. at 143, 128 N.W.2d at 326.

Even in their attempts to focus on the first *Gohlke* factor, Appellants still miss the point. The issue is not whether The American Legion mandated some tangential aspect of Post 184's existence, which had nothing to do with mandating the sale of liquor. The only issue with regard to the application of master-servant principles is whether The American Legion had control, or the right to control, the "means and manner of performance" of the service of alcoholic beverages to anyone at Post 184. The American Legion does not mandate that its posts operate bars, let alone the bar owned by Post 184. The American Legion does not mandate that its posts sell liquor, let alone Post 184. The American Legion does not profit from the sale of liquor and in particular does not profit from the sale of liquor at Post 184. As much as Appellants attempt to make a tortured connection between the revenue Post 184 apparently generates from the sale of liquor and The American Legion, all such attempts are, at best immaterial and at worst, misleading. "Should" does not mean "shall" and a "suggestion" is not a "mandate" or a "requirement." A.305-305; 431-432; 439; 92. *See also* R. 89-95.

None of the other things Appellants reference support The American Legion's right to control Post 184. For example, requiring the purchase of insurance for a baseball team does not establish a right to control the service of alcoholic beverages. *Daniels v Reel*, 133 N.C.App. 1, 11, 515 S.E.2d 22, 28 (1999). The transmission of membership dues from members of the posts to The American Legion does not establish a right to control the service of alcoholic beverages. *See Stein v. Beta Rho Alumni Ass'n, Inc.*, 621 P.2d 632 (Ore. 1980)(mere forwarding of membership fees and rent does not create an

agency for tort liability). Issuing recommendations about the use or abuse of alcoholic beverages does not establish a right of control for the service of such beverages. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000)(adoption of institutional policies prohibiting underage drinking do not establish duty of protection on part of national fraternity of local chapter); *Foster v. Purdue University Chapter, The Beta Mu of Beta Theta Pi Fraternity*, 567 N.E.2d 865 (Ind. Ct. App. 1991)(same); *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 2005 WL 2043533 (Ky. 2005).

Having the ability to discipline a post by revoking its charter, which only the Department can do here, does not establish a right to control the service of alcoholic beverages. *Id.* at 872 (national fraternity's power to suspend or revoke charters does not create power to implement specific procedures in local chapter regarding use of alcoholic beverages). Whether The American Legion mandates ceremonies or the proper use of emblems or uniforms, has absolutely nothing to do with the service of alcoholic beverages. *See Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 824 (Iowa 1994)(“uniformity and standardization of products and services” not enough to subject franchisor to liability for acts of franchisee). Working toward a group tax exemption as a 501(c)(19) organization, does not have any bearing on The American Legion’s right to control Post 184’s liquor sales. In order to obtain the group exemption, The American Legion, among other things, must simply be an “organization that has one or more subordinates under its general supervision or control.” A.518. The bottom line is that Appellants have failed to create a genuine issue of fact regarding The American Legion’s right to control the day-to-day function and activities of the bar at Post 184.

VIII. THE *PIERCE* CASE DOES NOT PROVIDE ANY MEANINGFUL AUTHORITY FOR THE IMPOSITION OF VICARIOUS LIABILITY

Appellants' reliance on *Pierce v. Grand Army of the Republic*, 220 Minn. 552, 20 N.W.2d 489 (1945) is misplaced, since that case concerned only: 1) whether a national patriotic organization was doing business in Minnesota through its state and local posts so as to be amenable to personal jurisdiction in the state; and 2) whether a member of the national organization's "supreme controlling authority" was an agent for service of process. Further, unlike *Pierce*, Post 184 was not a member of the National Executive Committee, nor does the national organization have the power to suspend, cancel or revoke a local body's charter or discipline a member. *Pierce* has no bearing upon whether The American Legion and Post 184 are involved in a master-servant relationship for the sale of alcoholic beverages.

IX. THE *KERRY* CASE IS NEITHER PRECEDENTIAL NOR PERSUASIVE AUTHORITY FOR THE IMPOSITION OF VICARIOUS LIABILITY

Appellants rely heavily on *Kerry v. Turnage*, 397 N.W.2d 543 (Mich. Ct. App. 1987), a Michigan Court of Appeals case which was cited by the dissenting judge in the court of appeals below for the proposition that the scope of the CDA should be expanded to include vicariously liable parties. That case is plainly distinguishable and neither the holding nor rationale of *Kerry* is applicable to the present dispute.

In *Kerry*, the plaintiffs, conservators of a decedent's estate, brought a dram shop action against a school district. *Id.* at 544. The claim against the school district was based on vicarious liability since they contended that the school district's athletic booster organization provided alcohol to an obviously intoxicated person who later shot and killed the decedent. *Id.* The booster organization, "a group of parents and interested

persons,” had obtained a one-day liquor license to host a drinking and gambling event to raise money for and “promote” the school district’s athletic teams. *Id.* The school district itself, however, did not hold a liquor license. *Id.* at 545.

The school district moved for and was granted dismissal on the ground that a Michigan dram shop claim lies only against a liquor licensee. *Id.* at 544-45. The court of appeals remanded the case holding that “[n]othing in the [Michigan] dramshop act appears to prevent the application of vicarious liability.” *Id.* at 545.

The distinctions between *Kerry* and the present case are patently obvious. First, unlike Michigan, in Minnesota there is “something” in the dramshop act that prevents the application of vicarious liability further “up the line” from the licensee. As discussed *supra*, the Minnesota legislature determined that vicarious liability is appropriate from the licensee “down the line.” *See* Minn. Stat. § 340A.501. However, the legislature also determined that the scope of the application of vicarious liability stops there, at the licensee. *Id.*

Second, the *Kerry* Court never addressed the consequences of separate incorporation. Apparently, there was no corporate or other meaningful legal distinction between the school district and the “parents and interested persons” who acted on the school district’s behalf to “contribute money” to and “promote” the school district’s athletic teams. Here, of course, The American Legion and Post 184 are legally distinct, separately incorporated entities. The booster organization in *Kerry* really had no purpose at all, other than to raise money for the school district. In other words, the booster organization existed for the sole purpose of raising money and promoting the school district athletic teams. The money the booster organization received from the sale of

alcohol directly benefited the school district. In this case, Post 184's sale of alcohol benefited only itself, not The American Legion.

If the Minnesota legislature had wanted to subject school districts to CDA liability for affiliated booster clubs, it certainly would have said so explicitly. If it wanted to extend CDA liability to charities, franchises, holding companies, or others not in the business of providing and selling liquor, it would have done so. Based upon this Court's reasoning in the long line of social host cases referenced *supra*, the *Kerry* case would never have been decided the same way in Minnesota.

X. THERE IS NO VICARIOUS LIABILITY FOR THE AMERICAN LEGION WHERE IT DID NOT HAVE CONTROL OR THE RIGHT OF CONTROL OVER THE DAILY OPERATION OF THE SPECIFIC ASPECT OF POST 184'S BUSINESS ALLEGED TO HAVE CAUSED HARM

Appellants attempt to draw an analogy between extrajurisdictional cases where vicarious liability findings were made against franchisors for the tortious conduct of their franchisees. In making their arguments in this regard, Appellants have failed to cite to the most recent and comprehensive decision of the Wisconsin Supreme Court on this very issue. *Kerl v. Dennis Rasmussen, Inc.*, 273 Wis.2d 106, 682 N.W.2d 328 (2004) addresses the issue of restricting vicarious liability of franchisors for the tortious acts of franchisees.

In *Kerl*, plaintiffs sued a local Arby's restaurant franchise ("DRI") and its franchisor ("Arby's, Inc.") for DRI's negligent supervision of an employee who left work without permission, shot and wounded his former girlfriend, shot and killed her boyfriend and then shot and killed himself. *Id.* at 111, 682 N.W.2d at 331. Plaintiffs contended that Arby's, Inc. was vicariously liable for the acts of DRI. *Id.*

The Wisconsin Supreme Court provided an overview of the principles of vicarious liability and discussed the typical characterization of a franchise, which “is ordinarily operated in accordance with a detailed franchise or license agreement designed to protect the integrity of the trademark by setting uniform quality, marketing, and operational standards applicable to the franchise.” *Id.* at 112, 682 N.W.2d at 331.

The *Kerl* Court analyzed the imposition of vicarious liability by looking to master-servant principles, but observed that “[t]he rationale for vicarious liability becomes somewhat attenuated when applied to the franchise relationship, and vicarious liability premised upon the existence of a master/servant relationship is conceptually difficult to adapt to the franchising context.” *Id.* at 112, 682 N.W.2d at 331. It considered the practical problems inherent in the creation of a broad rule of franchise liability, because if the operational standards contained in a typical franchise agreement were broadly construed to determine *respondeat superior* liability, then franchisors would almost always be exposed to liability for the torts of their franchisees. *Id.* at 112, 682 N.W.2d at 331. Similarly, the Wisconsin Supreme Court reasoned:

To impose vicarious liability where the requisite degree of control is lacking would not serve the original or more recent justifications for the rule. If a principal does not control or have the right to control the day-to-day physical conduct of the agent, then the opportunity and incentive to promote safety and the exercise of due care are not present, and imposing liability without fault becomes difficult to justify on fairness grounds.

Id. at 123, 682 N.W.2d 336-37. The *Kerl* Court noted that the premises for vicarious liability weaken when the control of the master or principal “does not consist of routine, daily supervision and management of the franchisee’s business...” *Id.* at 126, 682 N.W.2d at 338. It further noted that “[t]he imposition of vicarious liability has less

effectiveness as an incentive for enhancing safety and the exercise of care in the absence of the sort of daily managerial supervision and control of the franchise that could actually bring about improvements in safety and the exercise of care.” *Id.* at 126, 682 N.W.2d at 338. The *Kerl* Court conducted an exhaustive analysis of court decisions and commentary concerning the imposition of vicarious liability on franchises. It considered most of the cases cited by Appellants as support of their arguments for the imposition of vicarious liability and rejected their reasoning:

In light of these considerations, the clear trend in the case law in other jurisdictions is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor’s control or right to control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes.

Id. at 126-27, 682 N.W.2d at 338 (court rejected or distinguished *Drexel v. United Prescription Centers*, 582 F.2d 781 (3rd Cir. 1978), *Billops v. Magness Const. Co.*, 391 A.2d 196 (Del. Sup. Ct. 1978); *Singleton v. Int’l Dairy Queen, Inc.*, 332 A.2d 160 (Del. Sup. Ct. 1975); and *Miller v. McDonald’s Corp.*, 150 Or. App. 274, 945 P.2d 1107 (1997)).

The *Kerl* Court ultimately adopted a rule “that a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control **over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.**” *Id.* at 113, 682 N.W.2d at 332 (emphasis added). Applying its newly adopted rule to the facts of the case, the Wisconsin Supreme Court considered a license agreement between Arby’s and DRI which imposed many quality and operational standards on the franchise. The agreement also reserved Arby’s right to terminate the relationship because of an uncured violation of

the agreement. Despite these undisputed facts, the *Kerl* Court held that Arby's didn't have control or the right to control DRI's supervision of its employees and granted Arby's motion for summary judgment on the vicarious liability claims against it. *Id.*

The *Kerl* decision is significant for several reasons. First, it provides an exhaustive survey of the law on the extension or restriction of vicarious liability based upon franchise agreements. Second, it adopts the clear trend of cases which require physical control or a right of physical control over the specific aspect of a franchisee's business alleged to caused the harm. Third, it demonstrates that the existence of vicarious liability can be appropriately decided on summary judgment. Finally, the application of the *Kerl* test to the facts of this case disposes of Appellants' arguments for the extension of vicarious liability to The American Legion for the conduct of Post 184.

In order to establish vicarious liability under the *Kerl* test in this case, Appellants would have to create a genuine issue of material fact about whether or not The American Legion had control or a right of control over the daily operation of the service of liquor in Post 184's bar. It is undisputed that Post 184 controlled all aspects of the method and manner of alcohol service at its bar. Post 184 alone had the right to determine who it served and how it served them. Post 184 alone had the right to hire, train, discipline and fire its bar employees. Post 184 alone had the obligation to obtain a liquor license and liquor liability insurance. Post 184 alone had the ability to determine how its revenues would be raised and what was to be done with the money it made from liquor sales in its bar. Post 184 alone was required to abide by the terms of local and state law, or face the consequences. All of these facts demonstrate as a matter of law that The American

Legion had no right to control the daily operations of Post 184. *See also* R. 22-26. *See also Guhlke*, 268 Minn. at 143, 128 N.W.2d at 326.

The facts which Appellants contend “easily demonstrate” the right of The American Legion to control Post 184 do not have any bearing on the right to control Post 184’s bar operations. The proper use of American Legion emblems, the requirement for insurance to participate in American Legion baseball, or the “general supervision” necessary to obtain a group tax exemption do not create a genuine issue of material fact on specific control of Post 184’s bar operations. Advice on licensing or avoidance of legal liability issues, or the editorial and spontaneous comments by leadership of The American Legion concerning the preservation of tax-exempt status do not create a genuine issue of fact on specific control of Post 184’s bar operations. Leaving the creation of a bar up to the individual posts and providing helpful suggestions on its operation if it is created does not evidence a right to control the bar’s daily operations. The possibility of discipline by the Department (which merely exercises “general supervision over the local posts within [their] jurisdiction”), even resulting in revocation of a post charter, does not constitute the right to control the daily operations over Post 184’s bar. A.76. *See also Kerl*, 273 Wis.2d at 133, 682 N.W.2d at 342 (even franchisor’s unilateral right to terminate license if franchisee fails to comply with the agreement or fails to operate business in accordance with the then current operating manual insufficient to create right to daily control of restaurant operations).

When an entity like The American Legion did not have control or the right of control over the day-to-day physical conduct of Post 184’s bar operation, the opportunity and the incentive to promote compliance with the CDA and the exercise of due care are

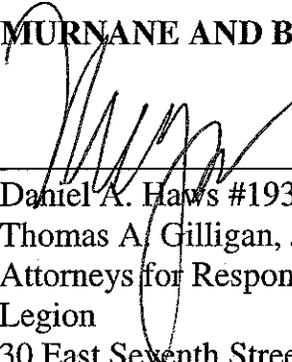
not present. *See Kerl*, 273 Wis.2d at 126, 682 N.W.2d at 338 (“The imposition of vicarious liability has less effectiveness as an incentive for enhancing safety and the exercise of care in the absence of the sort of daily managerial supervision and control of the franchise that could actually bring about improvements in safety and the exercise of care.”). The imposition of liability without fault, as advocated by Appellants here, is impossible to justify on fairness grounds. Based upon the holding in *Kerl*, public policy does not support the imposition of vicarious liability on a remote entity which has no daily, physical, right to control the activity which caused the harm. Liability should remain exactly where the legislature put it – with the licensee.

CONCLUSION

For the foregoing reasons, The American Legion respectfully requests that this Court affirm the court of appeals’ determination that it was not vicariously liable under the CDA for any conduct of Post 184 and affirm summary judgment in favor of The American Legion.

DATED: September 19, 2005

MURNANE AND BRANDT

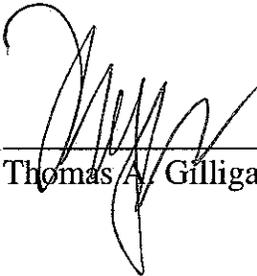


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CERTIFICATION

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 the brief is 13,093 words. The brief was prepared using Microsoft Word XP.

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