**No.: S204543**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| TAYLOR PATTERSON., | ) | Court of Appeal |
| | ) | No. B235099 |
| Plaintiff and Appellant, | ) | |
| | ) | Ventura County |
| *vs.* | ) | Superior Court |
| | ) | No.: 56-2009-00347668- |
| DOMINO'S PIZZA LLC, et al,, | ) | CU-OE-SIM |
| | ) | |
| Defendants and Respondents. | ) | |
| | ) | |

Appeal from a Judgment of Dismissal
Honorable Barbara Lane, Judge

## ANSWER BRIEF ON THE MERITS

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# ANSWER BRIEF ON THE MERITS

"The manual which Domino's provides to its franchisees is a veritable bible for overseeing a Domino's operation."[1] According to the Court of Appeal, Domino's application of its bible as its franchisee attested, "supports reasonable inferences that there was lack of local franchise management independence."[2] A jury could reasonably find that the franchisee was Domino's agent and responsible for the severe, physical sexual harassment its supervisor visited upon sixteen-year-old appellant Taylor Patterson. Thus, the trial court erred in granting Domino's summary judgment motion.[3]

Domino's does not challenge this unremarkable application of California's agency law to it. Rather, Domino's calls for a new test of franchisor liability for franchisee torts and statutory misconduct. Pointing to what it claims is the "modern rule", it urges the Court to adopt "a bright line 'instrumentality of harm' standard for vicarious liability in the franchise area." (OBM[4] 2.) Under this rule, it says, Patterson would be required to show

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[1] *Parker v. Domino's Pizza, Inc.* (Fla. App. 1993) 626 So.2d 1026, 1029 cited by the Court of Appeal below, Opinion [Opn.] 6.

[2] Opn. 8.

[3] Opn. 9.

[4] OBM = Opening brief on the merits.

Domino's had the right to "control the day-to-day training, hiring and firing of franchise employees . . . .the 'instrumentality of harm' in this case–sexual harassment by a franchisee's employee." (OBM 32.)

Other than to advance its own interests in avoiding liability, Domino's presents no sound reason for the Court to adopt its test. Insofar as a tension exists between what Domino's describes as business-format franchising and common-law principles of vicarious liability, that tension is resolved by the settled California rule that requires a plaintiff to show that the franchisor reserved control over its franchisee beyond that necessary "to control its trademarks, products and the quality of its services."[5] The sister states that have considered the question apply the same standard.[6]

Domino's' call for a new rule fails to address the public policy underpinnings of enterprise liability. "Respondeat superior is based on " 'a deeply rooted sentiment' " that it would be unjust for an enterprise to disclaim responsibility for injuries occurring

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[5] Opn. 4, citing *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1296.

[6] See, e.g., *Rainey v. Langen* (Me. 2010) 998 A.2d 342, 347-348; *Miller v. McDonald's Corp.* (1997) 150 Or. App. 274, 280; *Billops v. Magness Const. Co.* (Del. 1978) 391 A.2d 196, 197-198.

in the course of its characteristic activities."[7] Its call fails to consider the implications of the codification of these vicarious-liability principles in the Civil Code provisions regarding agency.[8] And its call fails to consider the deleterious effect of its new rule on the public policy against sexual harassment underlying the Fair Employment and Housing Act[9] upon which Patterson's claims are based.

Moreover, Domino's overstates the geographic sweep of the "modern trend" it touts. The "instrumentality test" has not been accepted in other than a handful of states whose principles of agency differ from those of California.

In short, Domino's fails to offer any sound reason why the Court should adopt the new rule it urges. But even if the Court were to do so, the result in this case would not change. The control vested in Domino's by its "bible," as expressed and as practiced, extends to personnel management justifiably exposing it to liability for the misconduct of its franchisee-supervisors. Whether the Court adopts Domino's' new test or not, the judgment of the Court of Appeal must be affirmed.

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[7] *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.

[8] Civ. Code, §§ 2295, 2300, 2338.

[9] Govt. Code, § 12920 [hereafter FEHA]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.

## STATEMENT OF THE FACTS[10]

### I. The standard of review requires the Court to view the evidence most favorably to Patterson.

The Court's review is de novo. While the Court takes the "facts from the record that was before the trial court when it ruled on that motion, . . . we liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [citations omitted].) Domino's fails to acknowledge this latter principle and its corollary–"that any doubts as to the propriety of granting a summary judgment motion should be resolved in favor of the party opposing the motion." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; see OBM 8 fn. 1.)

Consequently, Domino's factual recitals are decidedly pro-Domino's and tiptoe around the indicia of day-to-day control found in the record by the Court of Appeal and on which this Court must conduct its review. As the Court of Appeal noted,

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[10] Patterson agrees with the procedural history described by Domino's but only insofar as it describes what pleadings were filed and what court proceedings occurred. Domino's does note correctly that certain of its objections to Patterson's evidence were sustained but mis-cites the ruling. It is at 4 JA 861 not at 4 JA 830 as Domino's says at page 19 fn. 3. The excluded evidence is not material to the dispute.

"Domino's points to contrary evidence. But in reviewing a summary judgment we do not resolve factual disputes." (Opn. 8.) Patterson recites the facts as does the Court of Appeal.

## II. The franchise agreement, while purporting to reserve operational control in the franchisee, actually does the opposite.

Sui Juris, LLC bought Domino's store number 8386 from the prior franchisee in 2008. (3 JA 605.) Domino's' approval of the transaction was required. (3 JA 605.) Dan Poff was the only member of Sui Juris, owning 100% of the membership interests in that entity. (2 JA 440-441.) Domino's entered into a Standard Franchise Agreement with Sui Juris. (2 JA 402-439[11].) No part of the agreement was negotiable by the franchisee. (3 JA 683.) The store was operating when Poff bought it and had about seventeen employees, including Renee Miranda, an assistant manager. (3 JA 609.)

Although the franchise agreement provides that the franchisee "shall be solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store and those persons shall be your employees, and not [Domino's] agents or employees"(2 JA 410) and that the

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[11] Domino's' opening brief cites to the excerpts it submitted with the motion. (2 JA 197-205.) The complete agreement appears as cited above.

franchisee is an "independent contractor" (2 JA 438), the agreement and the mandatory rules of the 120-page standard's section of Domino's Manager's Reference Guide [MRG] which are incorporated into the agreement render those provisions illusory. (2 JA 418, 2 JA 443 - 3 JA 563.) These other provisions of the agreement and the MRG vest comprehensive, day-to-day control in Domino's.

The agreement's operating procedures section provides that the franchisee must "fully comply with all specifications, standards and operating procedures" that include "the qualifications, dress, grooming, general appearance of you and your employees." (2 JA 417.) Franchisees "agree not to employ any person who is . . . unqualified to perform his or her duties in accordance with the requirements established [by Domino's] for the operation of a Domino's Pizza Store." (2 JA 410-411.) Franchisee employees may not operate a store without first disclosing their identities to Domino's. (2 JA 425.) A violation of this provision may result in the summary termination of the franchise. (2 JA 424.) The franchisee is required to install a "PULSE," or another computer system designated by Domino's. Violation of "any other provision of this agreement or any specification, standard or operating procedure" that is not corrected in 30 days may trigger termination. (2 JA 426.)

Domino's' Manager's Reference Guide (MRG) does not even purport to be the"complete and total official statement of the

policies, practices and standards of Domino's LLC,"[12] but still prescribes "minimum" standards with which "all stores must comply." (2 JA 443, 451.) They may not be changed without a Domino's-approved variance. (2 JA 451.) Even if local codes and ordinances are more lenient than the standards, the standards control. (*Id.*) These standards are incorporated into the franchise agreement. (2 JA 418.)

The Standards section describes the specific employment hiring requirements for all "personnel involved in product delivery," and it describes the documents that must be included in their personnel files. (2 JA 456.) Only employees whose driving records conform to Domino's' rules may deliver. (*Id.*) It requires all employees to submit "[t]ime cards and daily time reports." (2 JA 475.) Detailed employee appearance standards are specified including those for clothing, hair, facial hair, "[d]yed hair," jewelry, tattoos, fingernails, nail polish, shoes, socks, jackets, belts, gloves, watches, hats, skirts, visors, body piercings, earrings, necklaces, wedding rings, "[t]ongue rings," "clear tongue" retainers, and undershirts. (2 JA 520-523.) Although the agreement purports to permit the franchisee to implement its own training program, managers must be trained using Domino's training system, regular employees "must go through the [Domino's] required lessons" and drivers must complete the

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[12] Poff testified that he was required to follow guides he "didn't even know about." (3 JA 615.)

Domino's' "Safe Driving Lessons." (2 JA 477.) Moreover, if a franchisee wants to use "different training program(s) other than those provided by Domino's . . . the program must be approved in writing by [Domino's]." (*Id.*)

The provisions of the agreement substantially limit franchisee independence in areas that go beyond food preparation standards. The franchisee's computer system is not within its exclusive control. Domino's has "independent access" to its data. (2 JA 421-422.) Domino's has the right to audit the franchisee's tax returns and financial statements. (2 JA 416.) Domino's also determines the franchisee's store hours, its advertising, the handling of customer complaints, signage, the e-mail capabilities, the equipment, the furniture, the fixtures, the décor, and the "method and manner of payment" by customers. (2 JA 417-418.) Domino's regulates the pricing of items at the counter and home delivery, and it sets the standards for liability insurance. (2 JA 418, 419-420.) A franchisee's liability insurance policies must name Domino's as "additional insureds." (2 JA 420.)

Domino's also decides the franchisee's book and record keeping methods. (2 JA 414.) It may determine the franchisee's location and right to re-locate and may send inspectors to monitor its operations. The franchisee must provide "direct, on-premises" and "full time" supervision. (2 JA 419.) And it may not "engage, or own any interest, in any other business activity" or "be employed by any other business." (*Id.*) Domino's requires

franchisees to report "weekly" on sales, and to provide it with their state and local business tax returns "for any period" and "such other information as [Domino's] may reasonably require. . . ." (2 JA 415.)

The "minimum guidelines for the operation of all Domino's Pizza stores" specified in the MRG's Standard's section include detailed requirements in a variety of areas beyond food preparation and brand identity. (2 JA 445-451.) These include: bank deposits, safes, "front till" cash limits, type of credit cards that must be accepted, mobile phone use, store closing procedures, store records, refuse removal, radar detectors, phone caller identification requirements, security, delivery staffing, holiday closings, stereos, tape decks, wall displays, franchisee web sites, "in-store conversations," and literature that is "allowed in a store." (2 JA 454-455, 458-460, 467-476.)

Domino's' agreement and mandatory standards are a bible, indeed. And the penalty for sins against this bible is excommunication–loss of the franchise. (2 JA 424, 426.)

## II. In practice, Domino's exerts even more day-to-day control of its franchisees than its documents suggest.

Apart from the provisions of the franchise agreement Domino's in fact exercised extensive local management control over Sui Juris, including employee conduct and discipline. Poff

testified that when, "I signed with Domino's, . . . I was told, in no uncertain terms, that if I did not play ball the way they wanted me to play ball, that [his franchise] would be in jeopardy." (3 JA 607.) Poff said he had no control about the food supplies he could purchase for his store, because Domino's made those determinations, with an exception for Coca-Cola products. (3 JA 629.) He was forced to order food he didn't want or need. (3 JA 631.)

Poff said Domino's provided guidelines "in their mountain of literature" about the employees he could hire. (3 JA 613.) They had to "look and act a certain way," and he implemented those policies when he hired applicants. (3 JA 613-614.) Domino's guidelines also included policies on employee "attendance" and sexual harassment. (3 JA 614.) Poff himself received Domino's human resources training that included sexual harassment. (3 JA 653.) Domino's required Poff's employees to watch Domino's-created training material on the Domino's proprietary PULSE computer system. (3 JA 610, 633.) This PULSE system "tracked any and all activity that was done on a computer . . . . including hires, terminations, leaves of absences, changes in positions, changes in pay, et cetera." (3 JA 611.) "[Domino's] had full and complete access to the system at all times." (*Id.*)

Poff testified that Domino's oversight of his franchise was extensive. Domino's sent inspectors to verify compliance, "called the store on the sly," and used "mystery shoppers" to determine

whether Sui Juris was following its procedures. (3 JA 624.) Such calls might last twenty-five minutes. (*Id.*) Poff said, "I was getting ticky-tacked to death by inspectors. . . . (3 JA 626.) It might have been just a light bulb out or a driver with too much change. (3 JA 627.) "They were very particular about what they wanted." (*Id.*) "[T]he way they changed the operating agreement made it easier for them to put you out of business by how they could write you up and how they graded their inspections . . . . They made it a lot harder for the franchisees." (*Id.*) "As a franchisee, . . . you were supposed to follow every guide they had – and some that you didn't even know about – the entire operating agreement, every guide, every training." (3 JA 615.)

Poff said he was required to follow the directions of Domino's' area leader Claudia Lee. (3 JA 607.) He indicated that Lee told him which of his employees should be terminated, and he had no choice but to comply. "[Domino's] area leaders would pull you into your office ... and tell you what they wanted. If they did not get what they wanted, they would say you would be in trouble. (*Id.*) "I never said 'no' intentionally to an area leader."(3 JA 618.)

On her part, Lee conceded that she "recommended" on at least one occasion that a franchisee fire an employee. (4 JA 752.) She also "recommended" that a particular manager, Dave Knight, not be left charge of Poff's store. (4 JA 752.) She told Poff, "If you have anyone working for you that is damaging the brand or going

to cause you to lose your franchise, that person is not the person is not the person you want working for you. . . . Right now [that person] is hurting your franchise." (4 JA 752-753.) Poff fired that manager couple weeks later. (3 JA 607-608; 4 JA 753.) Poff said it was "strongly hinted that there would be problems if I did not do so." (2 JA 608.) Lee said Poff "would be in default"[13] if Poff continued to leave Knight, in charge of the store. (3 JA 791.) Lee created written, mandatory action plans with deadlines by which Poff was required to complete certain items including documenting the Knight's termination. (3 JA 783-787, 794-795.) Knight could have "nothing to do with Dan Poff's franchise organization" in that store or "any future stores that Dan may own." (4 JA 795.) "Any further violations . . . will result in a recommendation of termination." (*Id.*)

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[13] The agreement provided that Domino's could terminate the agreement "effectively upon delivery of notice of termination" if Poff left anyone in charge of the store "other than a qualified employee designated by you whose identity has been disclosed to us." (2 JA 424-425.)

### III. From the start of her employment, Patterson is harassed by her supervisor. So Domino's tells the franchisee to "get rid of him."

Sixteen-year-old Taylor Patterson went to work for Domino's in December 2008. (1 JA 5.[14]) Almost immediately, her supervisor, Renee Miranda, began harassing her physically (unwelcome touching) and verbally (suggesting sexual activity). (1 JA 5-6.) When his conduct escalated, she told her father who complained to police and Domino's corporate management. (1 JA 6.) Domino's management told Mr. Patterson that they would investigate. (1 JA 6-7.) But, ultimately, Patterson's hours were cut and she was forced to resign in February 2009. (I JA 7.)

When Lee learned that Patterson's father had contacted the corporate office, she told Poff get a lawyer. (4 JA 762.) Then she told Poff to terminate Miranda. She said, "You've got to get rid of this guy." (3 JA 622-623.) She instructed him to "re-train" his employees. (3 JA 623.) Training had to utilize Domino's-provided or Domino's-approved materials. (2 JA 477.) Poff said he had to follow directions of the Domino's area leaders. He said, "If you didn't, you were out of business very quickly."(*Id.*) "There were incidents when the area team leading gave instruction, in no

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[14] On its summary judgment motion, Domino's did not contest the allegations of harassment that Patterson made in her complaint, so she takes the facts surrounding it from her pleading.

uncertain terms, to do things or bad things would happen." (3 JA 635.)

Neither Domino's nor Poff resolved Patterson's complaints were not resolved and she initiated this action. (1 JA 1.)

## ARGUMENT

The rule that a principal is liable for the torts of its agent has been the law in California since statehood. The rule was codified in the 1872 Field Code where it remains, unchanged, today. (Civ.Code, § 2338.[15]) The Fair Employment and Housing Commission has adopted this same codified rule of vicarious liability for violations of the Fair Employment and Housing Act. (2 Admn. Code, § 7286.6, subd (b).[16]) This rule has served the state well and finds application not only in franchising but in other business enterprise contexts such as parent and subsidiary or sister corporations. (See, e.g. *F. Hoffman-LaRoche, Inc. v. Superior Court* (2005) 130 Cal.App.4th 782, 798 [subsidiary as agent of parent supports personal jurisdiction over parent].)

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[15] " Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

[16] "In view of the common law theory of respondeat superior and its codification in California Civil Code Section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity. . . ."

The Court of Appeal applied that rule as it has developed in the state's common law. (Opn. 3-4.) Domino's does not challenge the application of the rule to it on these facts. Rather, and without even acknowledging the rule's venerable place in California law, Domino's asks the Court to abandon it in favor a narrow rule that would allow Domino's to dominate its franchisees' day-to-day operations insulated from liability for the harm its nationwide enterprise causes unless it controls the specific instrumentality that causes the victim's harm.[17] (OBM 26.)

The Court should adhere to the agency test that has served well in this context. No franchisor has a legitimate interest in exerting control over its franchisees' operations beyond that

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[17] Patterson suggests that the Court dismiss the petition for review as improvidently granted. Domino's never raised the issue of a new test in the trial court or in the Court of Appeal. In fact, in the Court of Appeal, Domino's asserted that the court should not look outside California but if it did so, should follow *Rainey v. Langen* (Me. 2010) 998 A.2d 342. The Maine high court expressly declined to adopt the instrumentality test, a point Domino's here concedes. (Compare RB 32-33 with OBM 28-29 fn. 11.) Patterson acknowledges that the Court has discretion to consider issues first raised on review where pure questions of law that have statewide importance are involved. (See, e.g., *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 901 fn. 5.) But in this case, unlike *Ghilotti* and other cases where the Court exercised its discretion to review a new issue, Domino's' issue is the only issue. Domino's Petition for Review offers no reason for its failure to raise this issue in the trial court or the Court of Appeal.

necessary to control its trademarks, products and the quality of its services. Domino's does not point to any California cases where the court imposed vicarious liability on a franchisor whose franchisee control was so limited.

The rationale for vicarious liability of business principals for the torts of their business agents is that the losses that occur in the course of a principal's enterprise caused by its agents are properly borne by the enterprise. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959–960.) Each individual franchisee-agent is part of the Domino's enterprise. This same rationale applies with even greater force for losses occasioned by sexual harassment or discrimination by agents and supervisors, as the Court of Appeal noted below. (Opn. 8-9 citing *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [strict liability for harassment by agent or supervisor].) Domino's offers no reason based on the rationale and public policy behind vicarious liability for the Court to fashion a special rule benefitting franchisors that further insulates them from liability for their enterprise-generated harm.

## I. Vicarious liability of principals for the wrongs of their agents has been the law since statehood.

Over one hundred years ago, the Court said, "It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its

agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business." (*Otis Elevator Co. v. First Nat. Bank of San Francisco* (1912) 131 Cal. 31, 39 citing Civ. Code, § 2338.) Over the years, the rule has been applied in various contexts including franchising.

Domino's sees some developing "nuance" in the decisions but none exists. In *Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, a decision Domino's characterizes as an "early" one, the defendant franchisor made the same argument it makes here.

> In the case at bench defendant depreciates the importance of the element of control, contending in a franchise agreement conferring the right to use a trade name controls are essential to the protection of the trade name; the controls provided by the instant agreement were for this purpose; the franchise holder was given some freedom of action; and, for these reasons, the court should have concluded the controls in question did not establish an agency relationship.

(248 Cal.App.2d at p. 613.)

To this argument, the court gave the same answer as did the Court of Appeal below–"the controls and rights to control retained by Arthur Murray, Inc. extended beyond those necessary to protect and maintain its trade mark, trade name and good will,

and covered day to day details of the San Diego studio's operation." (248 Cal.App.2d at pp. 613-614.) The franchisee was Arthur Murray, Inc.'s agent because it had reserved the right of control over the entire franchise operation.

*Nichols,* of course, found support for its holding in even earlier cases. For example, the court cited *Malloy v. Fong* (1951) 37 Cal.2d 356, where this Court applied the agency test to find that sufficient control existed as to establish an agency relationship between a supervising church body and a local church pastor, who in turn had appointed a tortfeasor sub-agent. The church body had vicarious liability. (248 Cal.App.2d at p. 614.) *Malloy* relied on cases earlier still. (*Id.*)

To similar effect is *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, another decision that Domino's characterizes as "early," and employing a "simple agency analysis." (OBM 22-23.) "In the field of franchise agreements, the question of whether the franchisee is an independent contractor or an agent is ordinarily one of fact, depending on whether the franchisor exercises complete or substantial control over the franchisee. (Citations.)" (21 Cal.App.3d at p. 547.)

Contrary to Domino's assertion, the more recent cases do not narrow the test. The test is still whether the franchisor retains complete or substantial control over the franchisee beyond that necessary to protect trade name, image and goodwill. In

*Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, one of Domino's' "nuance" cases, a teenager died after smoking clove cigarettes sold at the franchisee's 7-11 store. (4 Cal.App.4th at p. 1287.) The court reviewed all the prior decisions including *Nichols* and *Kutcha,* and concluded, "[t]he cases, taken as a whole, impliedly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent." (*Id.* at p. 1292.)

Domino's reference to "the means and manner" of control language appearing in *Cislaw* (4 Cal.App.4th at p. 1288) comes from *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 59. (OBM 23.) In *Wickham,* the court rejected plaintiffs' request for a jury instruction that would have made "right to control" the sole test of agency.

> The right to control the result is inherent in both independent contractor relationships and principal-agency relationships; it is the right to control the means and manner in which the result is achieved that is significant in determining whether a principal-agency relationship exists.

(168 Cal.App.3d at p. 59.)

The court found that the version of jury instruction–BAJI 13.20–then in effect which listed other factors to be considered in

determining the existence of an agency relationship was the correct statement of the law. (*Id.* at p. 58; see *Cislaw*, 4 Cal.App.4th at p. 1290-1291; see *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 [right of control alone is not dispositive].)

Whether one characterizes the test applied by the Court of Appeal below as simple or nuanced, it is a correct statement of the codified common law which has served well in California for over one hundred years in a variety of contexts. Domino's ultimately concedes this point. (OBM 26.) In general, as here, whether not a principal-agent relationship exists is a question of fact that cannot be resolved on summary judgment.

Vicarious liability in the agency context is based on public policy. (*Otis Elevator Co.*, 131 Cal. at p. 39.) This policy allocates the risk of harm from an agent's torts to the principal. "[It] rather than the innocent injured plaintiff, should bear them ; and because [it] is better able to absorb them, and to distribute them, through prices rates or liability insurance, to the public, and so to shift them to society, to the community at large." (*Hinman*, 2 Cal.3d at p. 960.) Domino's sets royalty rates, controls prices and imposes insurance requirements allowing it to distribute the cost of the harm its nationwide enterprise generates. (2 JA 405, 418, 419.) Its new rule runs directly counter to the policy underlying California vicarious liability principles.

## II. The vicarious liability rules in Civil Code section 2338 are consistent with the public policy behind the FEHA and apply in these cases.

Patterson alleges three FEHA-based claims. (1 JA 7 [sexual harassment],9 [failure to prevent], 11 [retaliation].) Missing from Domino's brief is any discussion of vicarious liability as it applies in FEHA cases. "Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor' ([Gov. Code],§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor [and by an agent]. (Citations.) (*State Dept. of Health Services,* 31 Cal.4th at p. 1041.) The administrative regulations adopt the "common law theory of respondeat superior and its codification in California Civil Code Section 2338. . . ." (2 Admin. Code, § 7286.6.) Domino's does not dispute that the Court of Appeal correctly applied this test to it.

The agency approach to vicarious liability of franchisors finds support in the federal cases under Title VII. ( 42 U.S.C. § 2000e.) "There is also the 'agency' theory for determining when two employers are jointly liable under Title VII, under which the determination of whether one entity is an agent for another is determined based upon traditional rules of agency. (*Miller v. D.F. Zee's, Inc.* (D. Ore. 1998) 31 F.Supp.2d 792, 806.) The court pointed out that the Ninth Circuit has applied the agency test where appropriate. (*Id.*; See *Yanowitz v. L'Oreal, Inc.*, 36 Cal.4th

at p. 1051 [although federal cases interpreting Title VII are not determinative as to FEHA, they are nonetheless persuasive when the two statutory schemes contain the same or similar language.].)

"[A]rticle I, section 8 [of the California Constitution] is declaratory of this state's fundamental public policy against sex discrimination, including sexual harassment, which, as noted, is merely one form of sex discrimination . . . . No extensive discussion is needed to establish the fundamental public interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are all demeaned." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.) One of FEHA's goals is "eliminating sexual harassment from the workplace." (*State Dept. of Health Services,* 31 Cal.4th at p. 1048.) Domino's' call for a more restrictive vicarious liability test than that of agency as applied in the franchise cases flies in the face of this fundamental pubic policy.

## III. Nothing in the Trademark Law or the Lanham Act warrants a relaxed standard of vicarious liability for franchisors.

Domino's points to California's Model State Trademark Law and the Lanham Act as justification for its retained control without liability. (Bus. & Prof. Code, §§ 14200 et seq.; 15 U.S.C., ch 22; OBM 5.) The state act was adopted in 2007. (Stats. 2007, ch. 711.) Nothing in the act carves out an exception for

trademark holders for vicarious liability of their agents' torts. Similarly. nothing in the Franchise Investment Law that regulates dealings between franchisors and franchisees limits liability. (Corp. Code, §§ 31000 et seq.) These provisions were adopted in 1970. (Stats. 1970, ch. 1400.)

The Legislature is presumed to know existing statutes and laws when it enacts new ones. (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) Had the Legislature intended to relax the principles of principal-agent vicarious liability codified in Civil Code section 2338 for franchisor-principals, it could have done so.

## IV. The handful of jurisdictions that have adopted Domino's new rule have different principles of vicarious responsibility from California's.

Domino's call for a new rule is based upon cases from other jurisdictions that is says "overwhelmingly recognize an 'instrumentality test.'" But the law it cites as well as that which it does not cite fails to support its grand claims. The handful of out-of-state court decisions that have actually adopted Domino's test can be distinguished by the variations of those states' agency and vicarious responsibility law from that of California.

The poster child for Domino's' new rule is the Wisconsin decision *Kerl v. Dennis Ramussen, Inc.* (2004) 273 Wisc.2d 106. After leaving work without permission, an employee of the

defendant Arby's restaurant franchise shot and killed two people in the parking lot of a nearby K-Mart and then turned the gun on himself. (*Id.* at p. 111.) The plaintiff heirs sought to hold Arby's vicariously liable. In Wisconsin, a master-servant relationship is required to impose vicarious liability. (*Id.* at p. 112.) The court noted that such a relationship cannot be found simply by looking at the "operational standards included in the typical franchise agreement for the protection of the franchisor's trademark," just as California law requires. (*Id.*) Rather, "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 p. 132.) The court determined that the "provisions in the license agreement are consistent with the quality and operational standards commonly contained in franchise agreements to achieve product and marketing uniformity and to protect the franchisor's trademark." (*Id.* at p. 133.) Such provisions as dealt with employees were "broad and general." (*Id.*) Thus the franchisee "clearly" was not Arby's servant. (*Id.* at p. 134.)

Wisconsin law varies in some significant respects from California. So far as *Kerl* reveals, its law of vicarious responsibility of a principal for the torts of its agents is not codified. Also Wisconsin only applies respondeat superior liability in master-servant relationships which the court points out are a subset of principal-agency relationships. (273 Wisc.2d at

p. 118.) California's Civil Code section 2338 is not so limited. Finally, nothing in the *Kerl* opinion suggests that the court looked beyond the four corners of the franchise agreement. In California, "the provisions of franchise agreements are not necessarily controlling." (*Wickham,* 168 Cal.App.3d at p. 59.) Rather, courts use a "totality of the circumstances" approach. (*Kutcha,* 21 Cal.App.3d at p 547.) California law does not "exalt form over substance." (See e.g., *Perry v. Brown* (2011) 54 Cal.4th 1116, 1126.)

*Kerl* has been cited only three times outside of Wisconsin. *Papa John's Intern., Inc. v. McCoy* (Ky. 2008) 244 S.W.3d 44, involved a pizza delivery driver who gave a false statement to police about certain customer conduct. The customer was arrested, then exonerated and brought a malicious prosecution claim against the franchisee and Papa John's. Although the court stated it was adopting the *Kerl* approach, the statement was dicta because court found the driver was not acting in the course and scope of employment. (244 S.W.3d at p. 56.) The opinion does not suggest the court looked beyond the franchise agreement.

In *Allen v. Choice Hotels Intern.* (Miss. App. 2006) 942 So.2d 817, a hotel guest was killed when robbers forced their way into his room. After finding that the franchisor-franchisee were not in a master-servant relationship from which vicarious liability would flow, the court found that the provisions in the franchise agreement that specified some minimum security

devices for the hotel did not "show enough control to shift responsibility for safety to [the franchisor]." (*Id.* at pp. 821, 822.) While the court looked to certain deposition testimony of the franchisor's representative, the plaintiffs failed to adduce any testimony from the franchisee that contradicted or supplemented the terms of the agreement as Poff does here. (*Id.* at p. 825.)

The only other case citing *Kerl* rejected the rule it proposes. In *Rainey v. Langen* (Me. 2010) 998 A.2d 342, the court surveyed the sister-state decisions. "With near uniformity, courts apply some version of the "right to control" test in determining whether the imposition of vicarious liability on a franchisor is appropriate. (Citations.)" (*Id.* at p. 347.) Citing *Kerl*, the court noted that the "instrumentality rule" "has been embraced in several other jurisdictions.(Citations.)" (*Id.* at p. 348.) "Other courts apply the traditional 'right to control' test. (Citations.)" (*Id.*) Rejecting Domino's' new rule,[18] the court stated:

> We conclude that the traditional approach strikes an appropriate balance and, for that reason, decline to adopt the instrumentality rule. The traditional test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability. (Citations.) If a

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[18] As noted earlier, Domino's told the Court of Appeal here that it should apply *Rainey* and not *Kerl*. (RB 32-33.)

> franchisor takes further measures to reserve control over a franchisee's performance of its day-to-day operations, however, the franchisor is no longer merely protecting its mark, and imposing vicarious liability may be appropriate. (Citation.) (*Id.* at p. 349.)

On the record, the Maine court held that the franchisor's–Domino's'–agreement and guide "do not establish the supervisory control or right of control necessary to impose vicarious liability." (*Id.* at p. 350.) Significantly, the Maine court limited its determination to the agreement and certain non-binding guides. It did not, apparently, consider Domino's' mandatory standards that the Court of Appeal here examined or any testimony by the franchisee attesting to how Domino's actually exercises its day-to-day control.

Domino's overstates its claim that a dozen states have adopted the instrumentality rule. (OBM 28 fn. 11.) *Helmchen v. White Hen Pantry, Inc.* (Ind.App. 1997) 685 N.E.2d 180 is a direct liability[19] case. (See *Kerl,* 273 Wisc.2d at p. 119 fn. 3 so noting). In *Kettering v. Burger King Corp.* (2012) 152 Id. 555, 561, the plaintiff did not make even make the franchise agreement part of the record so the court accepted the trial court's conclusion that

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[19] Direct liability in this context means that the court looks for some act or omission by the franchisor itself on which to predicate liability. It is akin to our "retained control" doctrine. (*SeaBright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590.)

no day-to-day control existed. The Massachusetts trial court that Domino's cites purported to apply the "right to control" test and noted that neither the Massachusetts Supreme Court nor its Court of Appeals had addressed the issue. (*Coworx Staffing Services LLC v. Coleman* (Mass. Super. 2007) 2207 WL 138913[20] at p. 5.) Its comments on public policy[21] and the rationale behind vicarious liability must be considered in that context. (OBM 31.)

No Arizona court has ever considered the issue. Domino's cites an unpublished federal district case from New York, *Karnuskas v. Columbia Sussex Corp.* (S.D.N.Y 2012) 2012 WL 234377 for its contrary claim. But the case the district judge cites, *Papasthatis v. Bell* (App. 1986) 150 Ariz. 279, 282, is a direct liability case.[22] The Kansas federal district judge Domino's

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[20] Patterson only cites to the unpublished cases cited by Domino's and attached to its brief. In consideration of the environment and to ease the paper burden of the Court she does not attach them to her brief.

[21] The court's comment culled from the *Kerl* opinion that franchisor liability might cause franchisees to "cut corners" has no application where, as does Domino's, the franchisor exercises nigh plenary control over the franchisee. (See, e.g. 4 JA 783-787, 794-794 [Domino's-mandated action plans for franchisee discipline].)

[22] The reasoning of unpublished federal district cases has been said to be "persuasive" but they cannot be considered any better authority on state law than the state cases they cite. (See *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8.)

cites does not point to any Kansas state appellate cases in her analysis. (*In re Motor Fuel Temperature Sales Practices Litigation* (D. Kan. 2012) 2012 WL 1536161 at p. 5.) Kansas seems to apply the same principal-agent vicarious liability principles as does California. (*St. Paul Fire & Marine Ins. Co. v. Tyler* (1999) 26 Kan.App.2d 9, 15.)

In the end, there is very little to distinguish the "instrumentality test" from the settled California agency test employed by the Court of Appeal.[23] Both require the franchisor's control to exceed that necessary to regulate the uniformity and standardization of products. (Compare *Kerl*, 273 Wisc.2d at p. 126 with *Rainey*, 998 A.2d at p. 348 and *Cislaw*, 4 Cal.App.4th at p. 1296.) Domino's does not point to any cases where there would have been a different result had its new test been applied.

None of Domino's cases involve sexual harassment or discrimination. It can have no answer to the public policy embodied in our constitution and the FEHA. It has not addressed the Legislature's determination that a principal/employer is

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[23] On the other hand, one commentator has argued that the instrumentality rule represents a merging of vicarious and direct liability because " '[c]ontrol of the instrumentality' becomes another way of saying that the franchisor assumed a duty."(William L. Killion, *Franchisor Vicarious Liability-The Proverbial Assault on the Citadel* (2005) 24 Franchise L.J. 162, 166-67.) California has never taken such a narrow view in this context.

strictly liable for harassment by its agents. But even if it had, its argument here, that a different result is required under its new test, fails, as Patterson demonstrates below.

## V. Even if the Court were to adopt Domino's' new test, it must affirm the Court of Appeal because Domino's controlled the instrumentality that caused Patterson harm.

With the bald statement that it is "undisputed" that Domino's had no day-to-day control of training, hiring and firing employees, Domino's claims that it prevails as a matter of law. (OBM 32.) The record belies Domino's claim. Domino's simply ignores the facts it does not like.

Miranda was a supervisor left in charge of the store. (3 JA 609.) He was one of several employees already working at the store when Poff bought it (3 JA 609), so Poff never really "hired" Miranda. The agreement allowed Domino's to terminate it, without prior notice, if Poff left anyone in charge of the store "other than a qualified employee designated by you whose identity has been disclosed to us." (2 JA 424-425.) As a manager, Miranda would have been required to have been trained on the Domino's-created "Master Servicer training system,"presumably prior to the time that Poff bought the franchise (2 JA 477.) Domino's either provided all training material or approved, in writing, any franchise-developed training. (2 JA 477.) The

training information was on the PULSE computer system that Domino's had unlimited access to. (2 JA 614.)

Within a day or so of learning about Patterson's complaint, Lee, the Domino's area manager, told Poff to terminate Miranda. (2 JA 618.) She said, " 'You've got to get rid of this guy.' " (3 JA 622-623.) Domino's also told Poff to terminate another supervisor, Dave Knight, or risk default. (2 JA 607-608, 616, 3 JA 795.) At that time, Lee required Poff to complete "action plans" which included documenting the termination. (3 JA 783-787, 794-795[24].)

After the incident, Lee instructed Poff to "re-train" his employees. (3 JA 623.) Poff said he had to follow directions of the Domino's area leaders. "If you didn't, you were out of business very quickly."(*Id.*) These incidents and Domino's' response belie its claims that it did not exercise day-to-day control in personnel management and training.

Domino's' analysis also fails to account for the vicarious liability standards incorporated into the FEHA. A covered party is strictly liable for acts of its supervisors and agents. (*State Dept. of Health Services,* 31 Cal.4th at p. 1041.) The instrumentality of

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[24] One action item required: "Dan [Poff] will fax Claudia [Lee] the written documentation . . . of his [Knight's] termination. Dave [Knight] is to have nothing to do with Dan Poff's franchise organization of the store in Thousand Oaks or any future store that Dan may own." (3 JA 795.)

harm in this case was not just any employee but a supervisor. None of the cases on which Domino's relies involved sexual harassment by a supervisor.

As the Court of Appeal noted, "Domino's points to contrary evidence. But in reviewing a summary judgment, we do not resolve factual disputes. We must " 'view the evidence in the light most favorable to the opposing party [i.e., the plaintiff] and accept all inferences reasonably drawn therefrom.' " (Citation.)" (Opn. 8.) Factual issues must be resolved before the issue of Domino's control of the instrumentality of harm can be decided.

## VI. The Court of Appeal decided all the issues in the case that the parties presented to it.

Domino's complains that the Court of Appeal did not decide all the issues it raised in support of the trial court's judgment. (OBM 33-34.) But in the section captioned "Other Issues," the opinion expressly addressed the incorrect standard the trial court applied on the FEHA claim. (Opn. 8.) "The trial court's finding that Domino's made a sufficient evidentiary showing is not supported by the record." (Opn. 9.) The court continued, " We have reviewed Domino's remaining contentions and conclude they will not change the result we have reached." (*Id.*) This was sufficient. This Court has sanctioned the practice of disposing of contentions without discussion when appropriate. (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 645 ["Having examined defendants'

other contentions, we find them of insufficient merit to warrant discussion."].)

Moreover, Domino's did not file any petition for rehearing calling the court's attention to any issue omitted from its opinion despite having two opportunities to do so. (Cal. Ct. Rules, rule 8.500, subd (c)(2).) The Court's order granting the petition for review limited review to the issue discussed in the opinion. Nothing remains undecided and no remand for this purpose is warranted.

## CONCLUSION

Domino's is a nationwide business enterprise that has its fingers on the pulse of every franchisee to a degree far beyond that necessary to protect its trademarks, products and quality of its services. Domino's does not contend otherwise. It does not dispute that the Court of Appeal correctly applied California's agency test to it. It wants a narrower test.

But beyond pointing to a handful of jurisdictions that seemingly have adopted a narrower test, Domino's offers no policy-based reason for doing so. Being better able to do so, the enterprise, not the victims, should bear the cost of the enterprise's torts. The policy justification for application of an agency test is heightened in the area of sexual discrimination and harassment for "[s]o long as it exists, we are all demeaned." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.)

Even if the Court were inclined to create a new, previously-unknown rule for California, triable issues of fact exist as to Domino's' control over the franchisee operations that caused Patterson's harm. The judgment of the Court of Appeal should be affirmed.

Dated: March 1, 2013

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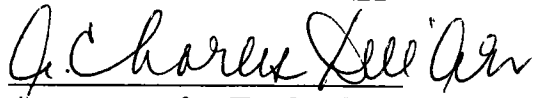

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WORD COUNT CERTIFICATE

I certify that the foregoing Answer Brief on the Merits contains 7,539 words as returned by Word Perfect X5.

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the County of Napa, California. I am over the age of eighteen years and not a party to the within cause; my business address is 5 Saint Francis Circle, Napa, California 94558. On, I served the within Answer Brief on the Merits on the below named parties in said cause, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 1, 2013 at Oakland, California.

Alan Charles Dell'Ario