No.: S204543

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Appeal from a Judgment of Dismissal
Honorable Barbara Lane, Judge

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

Taylor Patterson was sixteen when she went to work for Domino's Pizza in Thousand Oaks. One week later she began experiencing serious, unwelcome sexual harassment from her supervisor.[1] Domino's employees told the franchisee to "get rid of" the supervisor.[2] When her and her father's other complaints to local management and Domino's corporate offices went unheeded, she quit[3] and later filed this action.

The trial court granted Domino's motion for summary judgment but the Court of Appeal reversed finding a triable issues of material fact on the question of whether Domino's franchisee was also its agent such that Domino's would have vicarious responsibility for the franchisee's misconduct.

Domino's seeks review asserting two issues, neither of which it raised properly below. First, it claims that California's well-established standards for vicarious liability of franchisors should be changed. Secondly, it claims Patterson's appeal was untimely so that the Court of Appeal was without jurisdiction.

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[1] 1 JA 5-6. (JA = Joint Appendix.)

[2] Opn. 2. Domino's did not file a petition for rehearing challenging the factual statements in the Court of Appeal's opinion. (Cal.Rules Court, rule 8.500, subd. (c)(2).)

[3] 1 JA 6-7.

Domino's did not raise the first claim at all below; it presented the second two days before the Court of Appeal's opinion became final, well after the deadline for a petition for rehearing. But both must be rejected in any event. The Court of Appeal's opinion does not create a conflict in the appellate decisions. Rather it follows them and concludes, on the evidence presented, that triable issues of material fact exist. Patterson took her appeal from the only ruling in the case the trial court and the parties intended would be final judgment. To the extent they were mistaken, the mistake did not affect the Court of Appeal's fundamental appellate jurisdiction and provides no cause to disturb the court's opinion.

I. A franchisor is vicariously liable for acts of its franchisee if their relationship amounts one of principal and agent. Whether agency exists is ordinarily a question of fact. The Court of Appeal's opinion is but a modern application of these two well-settled principles.

Although Domino's would have the Court believe otherwise, the Court of Appeal did nothing more than acknowledge and apply the well-settled principles for determining vicarious liability of a franchisor. The opinion provides no grounds for the Court's review. Domino's simply does not like the result.

> Whether a franchisor is vicariously liable for injuries to a franchisee's employee depends on the nature of the franchise relationship. "[A] franchisee may be deemed to be the agent of the franchisor." (*Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547,[].) "The general rule is where a franchise agreement gives the franchisor the right to complete or substantial control over the franchisee, an agency relationship exists." (*Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1288,[]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.' " (Ibid.) Consequently, a franchisee may be found to be an agent of the franchisor even where the franchise agreement states it is an independent contractor. (*Kuchta*, at p. 548,[].) If the franchisor has substantial control over the local operations of the franchisee, it may potentially face liability for the actions of the franchisee's employees. (*Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610,[])

(Opn. 3.)

The authorities cited by the court reflect a body of case law that has developed over the years into today's standards. The parties relied exclusively on that law in the Court of Appeal. A quick scan of Domino's Respondent's Brief reflects it relies on the very cases cited above in the opinion. "[A] principal-agency relationship exists only when the franchisor retains complete or

substantial control of the franchisee's business." (RB 11.) The Court of Appeal applied that principle in its opinion. "But the franchisor may be subject to vicarious liability where it assumes substantial control over the franchisee's local operation, its management-employee relations or employee discipline. (Citations.)" (Opn. 4.)

In applying that principle, the court exercised its independent judgment on whether the evidence presented by the parties was such that Domino's was entitled to judgment as a matter of law. It was not, said the court. Like most questions involving whether a principal-agent relationship exists, this one involved issues of fact. "Patterson met her burden to show triable issues of fact involving the extent of Domino's control over [the franchisee]." (Opn. 8.)

In other words, the opinion breaks no new ground or blurs lines previously drawn. Whether or not the franchisee was Domino's agent turns on whether it had "substantial control" of the franchisee's business and that is a question of fact on this record. It is nothing more than a modern application of settled law that needs no further refinement from this Court.

But Domino's wants a new rule. Citing a "modern trend" supposedly supporting its view, Domino's would have the Court promulgate a new test that would "focus" on the "activities that relate to the conduct at issue." (Pet. 3.) Instead of a "simple

agency analysis," the franchisor must have control of the particular "instrumentality" that causes harm. (Pet. 12.) In other words, if Domino's dictates the brand of pepperoni and the victim is poisoned by it, Domino's might be liable but not if the victim slips on a greasy pizza carton left uncollected where Domino's has not promulgated rules for policing the public areas.[4]

But Domino's never raised this issue in the Court of Appeal in its Respondent's Brief or by way of Petition for Rehearing. Rather it stood by its position that, under the existing case law, the evidence established that its franchisee was an independent contractor because it lacked substantial control over the franchisee. (RB 42.) So the Court of Appeal was never called upon to address the issue in the first instance. Domino's advances no argument why the Court should consider the issue and depart from its policy not to do so.[5]

Moreover, the so-called "modern standard" or trend Domino's refers to is merely a product of its wishful thinking. The cases on which it relies either come from jurisdictions that have

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[4] The point is rhetorical. Domino's does, in fact, dictate to franchisees the procedures for "Refuse Collection and Removal." (2 JA 458-459.)

[5] Cal. Rules of Court, rule 8.500, subd. (c)(1). "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."

markedly different standards of respondeat superior than does California or do not actually employ the test it urges. Domino's relies heavily on Wisconsin law, for example. (Pet. 3, 11, 12.) But in Wisconsin, a principal is not necessarily vicariously responsible for the acts of its agents. "The master/servant relationship is a species of agency; all servants are agents but not every agent is a servant. (Citations.) Unless an agent is also a servant, his principal will not be vicariously liable for his tortious conduct except under certain limited circumstances." (*Kerl v. Dennis Rasmussen, Inc.* (2004) 273 Wis.2d 106, 116.) No such distinction exists in California. (*Slater v. Friedman* (1923) 62 Cal.App. 668, 672.) Wisconsin law cannot provide any guidance on this issue.

The other jurisdictions Domino's points to employ a "right-to-control" test that bears no difference from California's agency test. For example, Maine adopted such a test in *Rainey v Langen* (Maine 2010) 998 A.2d 342, 347. "In evaluating the requisite level of control, courts commonly distinguish between control over a franchisee's day-to-day operations and 'controls designed primarily to insure 'uniformity and the standardization of products and services.' (Citations.)"

Under established California law applied here by the Court of Appeal, this right of control is the salient feature in determining the existence of a principal-agent relationship. "[A franchisor] may control its trademarks, products and the quality of its services. But the franchisor may be subject to vicarious

liability where it assumes substantial control over the franchisee's local operation, its management-employee relations or employee discipline." (Opn. 4.) To the extent the sister-state cases utilize different phraseology in their formulations, the distinctions are without difference.

The Court of Appeal recited a litany of factors in the Domino's-franchisee relationship from which it concluded triable issues of material fact existed as to whether the franchisee was an agent. In the area of personnel management alone, it pointed to:

> Domino's Manager's Reference Guide (MRG)[6] 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. It requires all employees to submit "[t]ime cards and daily time reports." It specifies standards for employee 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

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[6] The Mater Reference Guide has 23 sections covering everything from "Product" to "Learning and Development" to "Human Resources" to "Sanitation." (2 JA 444.) The "Standards" section alone is over 100 pages, single-spaced with small type, and lists standards for every aspect of a franchisee's operation. (2 JA 445 - 3 JA 563.)

rings, "[t]ongue rings," "clear tongue" retainers, and undershirts.

(Opn. 5-6.)

In addition, the franchisee testified by deposition that "Domino's provided guidelines about the employees he could hire. They had to 'look and act a certain way,' and he implemented those policies when he hired applicants. Domino's guidelines also included policies on employee "attendance" and sexual harassment. Poff's [the franchisee] testimony suggests that Domino's oversight of his franchise was extensive." (Opn. 7.) Altogether, the Court of Appeal devoted over four pages of its nine-page typed opinion describing the overwhelming indicia of control that Domino's exercised over this particular franchisee. (Opn. 4-8.) And none of them could be justified as defense of the trademark or brand.

Domino's wants an outright departure from the settled California concepts of agency and respondeat superior. The doctrine of respondeat superior is "'a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960.) "[T]hree reasons exist for applying the doctrine: (1) to prevent recurrence of the tortious conduct, (2) to give greater assurance of compensation for the

victim, and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. (Citations.)" (3 Witkin, Summary of Calif. Law 10th (2005) Agency, § 166, p. 210.) Thus understood, the doctrine of respondeat superior applies with full force under the settled principles whenever franchisors exercise substantial control over franchisee operations so as to characterize their relationships as ones of agency.

Domino's refers to what it calls the "highly regulated" nature of the franchise industry and the need to protect its brand. But nothing in the Franchise Investment Law[7] speaks to relations between the franchised business and its employees or third parties. Nothing in the Lanham Act[8] directs the form of business entity a trademark holder must utilize.

Domino's wants to have all the benefits of its national "brand," controlling the minutia of its franchisees' operations, without any of the responsibilities, leaving victims such as Patterson to pursue financially-irresponsible franchisees.[9] Even if the Court were inclined to consider this belatedly-asserted issue, no reason exists to adopt a new rule that finds support only

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[7] Corp. Code, § 31000, et seq.

[8] 15 U.S.C., § 1125.

[9] The Court of Appeal observed that the franchisee here went bankrupt instead of defending the action. (Opn. 2.)

in jurisdictions that view agency and vicarious responsibility differently from California.

II. The Court of Appeal treated the judgment from which the appeal was taken as the one, final judgment just as the trial court and parties intended. Domino's motion to dismiss came far too late in any event.

In resolving issues that could limit a party's right to appeal, the Court has followed the well-established policy of "according [the] right [to appeal] in doubtful cases 'when such can be accomplished without doing violence to applicable rules.' (Citations.)" (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.) No violence occurs where, as here, the trial court, the plaintiff Patterson, the Court of Appeal and the Domino's defendants all intended and treated the June 20, 2011 judgment as the one, final judgment in the case. (4 JA 856-871.) Only Domino's new lawyer, apparently hired after the time to petition for rehearing had expired, sees the case differently. Just two days before the Court of Appeal's decision became final, Domino's filed a motion to dismiss, citing the principle that a void

judgment can be attacked at any time.[10] The decision became final without the Court of Appeal issuing a formal ruling.[11]

Although the April 11, 2011 "Judgment" seemingly resolved all the causes of action of Patterson against Domino's, the trial court's and parties' subsequent actions demonstrate that the no one intended it to be a judgment from which an appeal could be taken. (4 JA 859-871.) The June 21 judgment refers to the former as "an interlocutory judgment of dismissal" and describes itself as the "final judgment." (4 JA 885, 886.) The transcript of the June 7 hearing on plaintiff's motion to tax costs reflects the trial court's understanding of the effect of the prior ruling. (RT 9.) After counsel for Patterson expressed his view that the prior ruling might be appealable (and there was still time to do so), the court stated:

> I don't think you can appeal it. I think you need to – I think you need a final judgment. So let's get a final judgment prepared immediately as soon as the dismissals come in. (RT 9-10.)

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[10] Domino's does not address the Court's policy of not considering issues that were not timely raised below. (Cal.Rules of Court, rule 8.500, subd. (c)(1).)

[11] In this regard, Domino's mis-speaks when it refers to a "ruling" of July 30. (Pet. 1 and Exhibit B.) Exhibit B is nothing more that a printout from the Court of Appeal's online docket with the clerk's notation that the motion was denied by operation of law.

So Patterson waited for that final judgment and filed her notice of appeal some 45 days later. (4 JA 890.) In her opening brief she laid out the sequence of events and pleadings, describing the April 21 judgment as interlocutory and the June 21 judgment as the "final judgment." (AOB 3-4.) In its brief, Domino's did not even reference the April judgment but simply referred to the June 21 judgment as the operative one. "It is from that final judgment that Appellant has brought forth this appeal. (RB 3.)

As this Court has noted, there are many cases in which the policy of recognizing the right of appeal in doubtful cases, "implemented in accordance with 'applicable rules,' will lead to a determination, based on construction and interpretation, that timely and proper notice of appeal must be deemed in law to have been filed within the jurisdictional period." (*Hollister Convalescent Hospital, Inc. v. Rico* (1975) 13 Cal.3d 660, 674.) This is such a case. And the Court must presume that the Court of Appeal thought so, too. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [judgments are presumed correct].)

A further problem with Domino's eleventh-hour position is that it confuses void and voidable judgments. A judgment entered where the court lacks fundamental jurisdiction is said to be void while one where the court's jurisdiction can be exercised in only one way is said to be voidable. "'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over

the subject matter or the parties.' (Citations.)" (*People v. American Contractors' Indemnity Co.* (2004) 33 Cal.4th 653, 660.) The concept of lack of jurisdiction can also "'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' (Citation.) '[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction." (Citation.)(*Id.*, at p. 661.) "When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. (Citations.)" (*Ibid.*) Under this circumstance, "'its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by principles of estoppel, disfavor of collateral attack or res judicata.' (Citation.)" (*Ibid.*)

Here, the Court of Appeal had fundamental jurisdiction conferred by the California Constitution. The courts of appeal have "appellate jurisdiction when superior courts have original jurisdiction." (Cal. Const., Art. VI, § 11.) "'Appellate jurisdiction'" refers to the reviewing court's power to review for and correct error in trial court judgments and orders. That constitutionally-conferred power is distinct from civil litigants' right to obtain review, which is not of constitutional dimension." (J. Eisenberg, et al., Civil Appeals & Writs (Rutter Gp., 2011 rev.) ¶ 2:15, p. 2-13

citing *Leone v. Medical Board of Calif.* (2000) 22 Cal.4th 660, 666–668.)

All the cases dealing with the timeliness of a notice of appeal speak of jurisdiction in the sense that the appellate courts, once a matter is before them, may act in only one way. (See, e.g., *Hollister Convalescent Hospital, Inc. v. Rico, supra,*13 Cal.3d at p. 674 [court "lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary"].) This is the hallmark of a voidable, not void, judicial act.

The Court has indicated that exceptions may exist to the timeliness requirement. (*In re Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865.) Were the matter one of fundamental jurisdiction, no exceptions could be said to exist.

The Chief Justice, writing for the Court of Appeal in a case cited by Domino's, made the distinction. "'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction....' (Citation.) The distinction is critical, because '[a]ction "in excess of jurisdiction" by a court that has jurisdiction in the "fundamental sense" (i.e., jurisdiction over the subject matter and the parties) is not void, *but only voidable.*'

(Citations.)" (*Fireman's Fund Ins. Co. v. Worker's Compensation Appeals Bd.* (2010) 181 Cal.App.4th 752, 767 [emphasis original].)

In other words, presented with an untimely appeal, an appellate court may be statutorily constrained to exercise that jurisdiction only one way–to dismiss. But its failure to do, particularly in light of the absence of objection from the respondent before the time to file a petition for hearing has expired, does not render its judgment void. Domino's had a doubly-long period after the Court of Appeal rendered judgment in this case to call jurisdiction into question. The original judgment was filed on June 4, 2012 and ordered published on June 27. Domino's missed two rehearing deadlines before new counsel filed the motion to dismiss. (Cal. Rules of Court, rule 8.268.)

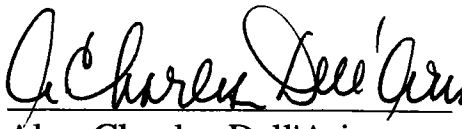
Nothing about this aspect of the case makes it a worthy candidate for review. Since Domino's never raised the issue in timely way, the opinion below is silent on it. Witkin describes the situation where the parties mistakenly treat a final judgment as interlocutory as "rare." (9 Witkin, Cal. Proc. 5th (2008) Appeal, § 137, p. 210.) Under the unique circumstances of this case, the Court of Appeal was well within its discretion to reject, by operation of law, the tardy motion to dismiss.

CONCLUSION

Nothing worthy of this Court's intervention attends this case. Neither issue presented was raised in a timely manner or at all. The merits turn on disputed issues of fact driven by the conflicting evidence. Did Domino's exercise substantial control over its franchisee? No need exists for a different test and policy considerations militate against one. Likewise, no basis exists to disturb the Court of Appeal's judgment as a matter of procedure. No "violence to applicable rules" will be worked. The petition should be denied.

Dated: August 23, 2011

ALAN CHARLES DELL'ARIO, P.C.
WINER & MCKENNA, LLP



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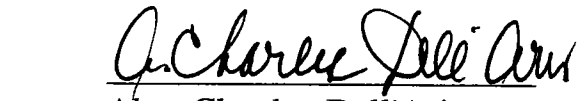
WORD COUNT CERTIFICATE

I certify that the foregoing Answer to Petition for Review contains 3,449 words as returned by Word Perfect X5.



Alan Charles Dell'Ario

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within cause; my business address is 1970 Broadway, Suite 1200, Oakland, California 94612. On August 23, 2012, I served the within Answer to Petition for Review 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 August 23, 2012 at Oakland, California.

Alan Charles Dell'Ario