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BLOGS

Vicarious Liability

Kentucky Supreme Court Adopts Majority “Control Over Instrumentality” Rule

In a case of first impression in Kentucky, the state’s Supreme Court turned away from using a mixed bag of respondeat superior and ostensible agency principles and, taking a more precise approach given the ubiquity of the franchise method of doing business, adopted the emerging majority rule on the issue of franchisor vicarious liability. In *Papa John’s Int’l, Inc. v. McCoy*, 2008 WL 199716 (Ken. Jan. 24, 2008), the state supreme court reversed an earlier court of appeals decision and adopted what it considered the “emerging judicial consensus” by applying a franchisor vicarious liability test that considers the franchisor’s control or right of control over the instrumentality that is alleged to caused the harm.

In adopting the “majority rule” the court was persuaded by the Wisconsin Supreme Court’s decision in *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328 (Wis. 2004), a negligent supervision case against Arby’s involving an employee shooting, and the rule adopted by that court that whether a franchisor is vicariously liable depends on the extent of control exerted by the franchisor over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm. In the Kentucky case, the high court found that the franchisee’s employee was acting outside the scope of his employment and that Papa John’s “had no control over the employee’s intentional, tortious conduct.” Interestingly, the dissent of the court’s chief justice focused on the reliance of the party dealing with the ostensible agent of the franchisor, not the degree of actual control exercised by the franchisor.

This decision adds Kentucky to the growing majority of courts that require a franchisor to have control over the instrumentality that causes the harm in order to be held vicariously liable – a requirement that is both fundamentally fair and legally sound.