

**BLOGS**

Vicarious Liability

New Mexico District Court Finds Franchisor May Be Vicariously Liable for Death of Franchisee's Employee

A federal district court in New Mexico held that a franchisor may be liable for its franchisee's failure to provide a safe working environment after an armed robbery resulted in the death of the franchisee's employee. In *Estate of Anderson v. Barreras, Bus. Franchise Guide (CCH) ¶ 15,181* (D.N.M. Nov. 13, 2013), the plaintiff brought a wrongful death action against the franchisee and the franchisor, Denny's, Inc., alleging that they were liable for the employee's death by failing to properly train personnel on emergency procedures, failing to implement adequate security measures, failing to exercise due care, and willfully ignoring the foreseeability of the crime that occurred. Denny's moved for summary judgment alleging that it did not owe a duty to the franchisee or its employees to safeguard the work premises from the criminal acts of third parties. Denny's acknowledged that it imposes certain standards on franchisees to protect its trademarks and reputation, but argued that this amount of control was insufficient to make it vicariously liable for the negligent acts of its franchisee.

In denying the motion for summary judgment, the court held that the facts did not establish as a matter of law that Denny's was not involved in the day-to-day operation of the franchisee's restaurant. Denny's pointed out that recent cases have narrowed the circumstances in which courts find vicarious liability, as most look only to whether the franchisor controls the specific aspect of the franchisee's business alleged to have caused an injury or death. It was undisputed that Denny's did not have the right to control security at the restaurant. The court concluded that although modern cases have recognized a more narrow "instrumentality rule," it was obligated to follow the traditional right-to-control approach adopted by the Supreme Court of New Mexico because the dispute was governed by New Mexico law. Applying that test, the court found a number of facts potentially demonstrating Denny's control over the franchisee's activities beyond the extent necessary to protect its trademarks, including, among other things, its right to (1) inspect the restaurant regularly for quality control, hazards, and hospitality; (2) approve restaurant site development, construction, and remodeling; (3) impose standards for food quality, timing, and service; (4) impose training requirements; (5) terminate the franchise agreement if the franchisee failed to comply with its standards and requirements; and (6) dictate the franchisee's hours of operation.

The court also explained that the manner in which the parties designated their relationship in the franchise agreement was not controlling. Instead, the court had to consider the agreement as a whole, and in this instance, the plaintiff had

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identified a sufficient number of provisions that created a jury question on the issue of Denny's right of control over the franchisee's restaurant.