S204543

In the Supreme Court of the State of California

Taylor Patterson,

Plaintiff and Appellant,

v.

Domino's Pizza, LLC; Domino's Pizza Franchising, and Domino's Pizza, Inc.,

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Six, Case No. B235099
Ventura County Superior Court
Case No. 56-2009-00347668-CU-OE-SIM
Honorable Barbara Lane

Reply Brief to Answer to Petition for Review

KOLAR & ASSOCIATES
Elizabeth L. Kolar (#140073)
12241 Newport Avenue
Santa Ana, CA 92705
Tel: (714) 544-0041
Fax: (714) 544-0051
e-mail: kolarlaw@sbcglobal.net

SNELL & WILMER L.L.P.
Mary-Christine Sungaila (#156795)
600 Anton Blvd., Suite 1400
Costa Mesa, California 92626
Tel: (714) 427-7000
Fax: (714) 427-7799
e-mail: mcsungaila@swlaw.com

Attorneys for Petitioners Domino's Pizza, LLC;
Domino's Pizza Franchising, and Domino's Pizza, Inc.

S204543

In the Supreme Court of the State of California

Taylor Patterson,

Plaintiff and Appellant,

v.

Domino's Pizza, LLC; Domino's Pizza Franchising, and Domino's Pizza, Inc.,

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Six, Case No. B235099
Ventura County Superior Court
Case No. 56-2009-00347668-CU-OE-SIM
Honorable Barbara Lane

Reply Brief to Answer to Petition for Review

KOLAR & ASSOCIATES
Elizabeth L. Kolar (#140073)
12241 Newport Avenue
Santa Ana, CA 92705
Tel: (714) 544-0041
Fax: (714) 544-0051
e-mail: kolarlaw@sbcglobal.net

SNELL & WILMER L.L.P.
Mary-Christine Sungaila (#156795)
600 Anton Blvd., Suite 1400
Costa Mesa, California 92626
Tel: (714) 427-7000
Fax: (714) 427-7799
e-mail: mcsungaila@swlaw.com

Attorneys for Petitioners Domino's Pizza, LLC;
Domino's Pizza Franchising, and Domino's Pizza, Inc.

Table of Contents

Page

Reply to Answer to Petition for Review 1

Legal Discussion 4

I This Case Provides The Court With The Opportunity To Clarify That A Franchisor Is Not Vicariously Liable For The Acts Of A Franchisee Employee In An Area Over Which The Franchisor Does Not Maintain Day-To-Day Control 4

II This Court Should Grant Review Because The Court Of Appeal Had No Jurisdiction To Hear The Untimely Appeal In This Case 8

III The Court Of Appeal Retained The Power To Dismiss The Appeal And Vacate The Opinion After The Opinion Was Published, But Before The Remittitur Issued 10

Conclusion 12

Certification of Word Count 13

Table of Authorities

Page

Cases

Bellows v. Aliquot Assoc., Inc.
(1994) 25 Cal.App.4th 426 11

Cislaw v. Southland Corp.
(1992) 4 Cal.App.4th 1284 ..... 5, 6, 8

Dakota Payphone LLC v. Alcaraz
(2011) 192 Cal.App.4th 493 10

Daon Corp. v. Place Homeowners' Ass'n
(1989) 207 Cal.App.3d 1449 8

Estate of Hanley
(1943) 23 Cal.2d 120 3

Hollister Convalescent Hospital, Inc. v. Rico
(1975) 15 Cal.3d 660 ..... 8, 10, 11

In re Adoption of Myah M.
(2011) 201 Cal.App.4th 1518 9

In re Marriage of Eben-King & King
(2000) 80 Cal.App.4th 92 11

Johnson v. Threats
(1980) 140 Cal.App.3d 287 8

Juarez v. Jani-King, Inc.
(N.D. Cal. Jan. 23, 2012) No. 09-3495,
2012 U.S. Dist. LEXIS 7406 5

Justus v. Atchison
(1977) 19 Cal.3d 564 8

Kaplan v. Coldwell Banker Residential Affiliates, Inc.
(1997) 59 Cal.App.4th 741 5

Kerl v. Dennis Rasmussen, Inc.
(Wis. 2004) 682 N.W.2d 328 ..... 5, 6, 7

Ketterling v. Burger King Corp.
(Idaho 2012) 272 P.3d 527 7

Kuchta v. Allied Builders Corp.
(1971) 21 Cal.App.3d 541 5

Nichols v. Arthur Murray, Inc.
(1967) 248 Cal.App.2d 610 5

Nu-Way Assoc. Inc. v. Keefe
(1971) 15 Cal.App.3d 926 10

People v. Mendez
(1999) 19 Cal.4th 1084 9

Petzel v. Valley Orthopedics Ltd.
(Wisc. App. 2009) 770 N.W. 2d 787 6

Rules

California Rules of Court, Rule 8.104(a)(2) 9

California Rules of Court, Rule 8.500(b) 1

Other Authorities

Joseph H. King, *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees,*
(2005) 62 Wash. & Lee L.Rev. 417 6

15753575

Reply to Answer to Petition for Review

Petitioners, Domino's Pizza, LLC, Domino's Pizza Franchising and Domino's Pizza, Inc. (collectively, "Domino's"), have petitioned for review of (1) a published decision by the Court of Appeal, Second Appellate District, Division Six reversing a summary judgment in Domino's' favor on vicarious liability grounds and (2) the Court of Appeal's subsequent refusal to dismiss the appeal and vacate the opinion for lack of jurisdiction.

In her answer to the petition, Plaintiff asserts that review is not warranted because the franchisor liability issue, as determined by the Court of Appeal, "does not create a conflict in the appellate decisions" in this state. (Answer, at 2.) Not so. The Court of Appeal's decision runs counter to the modern trend in California and sister states to employ a more focused analysis on the franchisor's control over the conduct at issue, rather than a more general determination of whether the franchisor had the right to control a variety of aspects of the franchisee's business.

Moreover, Plaintiff does not dispute that the issue of whether a franchisee's employee may be treated as an employee of the franchisor, for whom a franchisor may be held vicariously liable, is one of statewide importance. (See Cal. Rules of Court, rule 8.500(b).) Nor could she.

As noted in the petition, the appellate court's opinion has given rise to a variety of concerned commentary in the franchise and employment law communities. (Petition at 4, fn.1.) Multiple letters submitted in support of review by the International

Franchise Association, National Council of Chain Restaurants, and Jack in the Box underscore the liability issue's substantial impact. As the International Franchise Association notes: "The Court [of Appeal] held that the provisions of Domino's franchise agreement alone raised reasonable inferences supporting the plaintiff's claim that the Domino's franchisee in question was not an independent contractor. In doing so, the Court relied on operational controls and requirements in the Domino's franchise agreement that are found in virtually every franchise agreement of every franchise system that does business in California and throughout the U.S." (IFA Letter at 3.) Accordingly, "[i]f the Court of Appeal's decision is not reviewed, it is highly unlikely that any franchisor would be able to obtain summary judgment in a case where the franchisor was sought to be held vicariously liable for acts of one of its franchisee's employees. Such a result would impose unduly burdensome litigation expense and increased settlement and judgment exposure not only on franchisors but also on franchisees, who in most franchise systems are contractually obligated to indemnify their franchisors for third-party claims arising out of the franchisees' operation of their own businesses." (IFA Letter at 3.)

According to a PriceWaterhouseCoopers study, there are more than 82,000 franchised businesses in California and, in 2007, those businesses generated economic activity totaling almost $95 billion; as the IFA observes, "the risk of increased litigation expense and exposure would severely undermine the viability" of these franchise relationships, which form an

important part of the California economy. (IFA Letter at 1, 3.) This Court should grant review now to clarify the circumstances under which a franchisor can be held liable for conduct by a franchisee's employee, and provide guidance to both franchisors and franchisees about the potential scope of liability arising out of their relationship.

Plaintiff also urges that the second and third issues in the petition concerning the untimeliness of her appeal do not warrant review, even though they concern the Court of Appeal's lack of jurisdiction, because the trial court and the parties never "intended" the April 2011 judgment that disposed of all claims between plaintiff and these defendants to be final and appealable. (Answer at 2.) Plaintiff further argues that the timeliness issue was not "properly raised" in the Court of Appeal because Domino's first brought the finality issue to that court's attention two days before the opinion became final, and more than a month before any remittitur would issue. (Answer, at 1, 2, 15.)

An untimely notice of appeal, however, cannot be made timely by the parties' misunderstanding or mistake, and jurisdictional matters such as those stemming from an untimely appeal can never be waived. If an appeal is untimely, an appellate court has no jurisdiction to consider it, and "must dismiss [an] untimely appeal of its own motion even if no objection is made." (*Estate of Hanley* (1943) 23 Cal.2d 120, 123.) Accordingly, this Court should, at the very least, grant review

and retransfer to the Court of Appeal to determine the issue of the timeliness of this appeal.

Legal Discussion

I

This Case Provides The Court With The Opportunity To Clarify That A Franchisor Is Not Vicariously Liable For The Acts Of A Franchisee Employee In An Area Over Which The Franchisor Does Not Maintain Day-To-Day Control.

Plaintiff asserts that the Court of Appeal applied "well-settled principles" of agency law, under which a franchisor's vicarious liability for the acts of a franchisee's employee "turns on whether it had 'substantial control' of the franchisee's business." (Answer at 2, 4.) This broad recitation of the vicarious liability standard begs the question raised by the petition: should the standard be as broad as Plaintiff states; or should it be refined, in accordance with the modern trend in the law, to a narrower "instrumentality" standard that takes into account the special relationship between franchisors and franchisees?[1]

---

[1] Plaintiff contends that this issue was not properly raised in the Court of Appeal because Domino's did not urge the adoption of a more refined vicarious liability standard below, but rather relied on existing law to affirm the summary judgment. (Answer at 5.) There is no requirement that a party urge a statewide refinement or change in the law in the appellate court in order to do so in the Supreme Court. In fact, this Court has at least one case before it right now in which the petitioner, for the first time in the petition to this Court, urged the adoption of the Restatement and overturning of current precedent in the will context. (*Estate of Duke*, Case No. S199435.) After all, it is the role of this Court to secure

While early California case law determined that a franchisor may be held vicariously liable for the acts of its franchisees where the franchisor had a right of substantial control over the franchisee (see, e.g., *Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, 613; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547), subsequent decisions have focused on whether a franchisor exercised or had the right to exercise complete or substantial control over the day-to-day operations of the franchisee (see, e.g., *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1295; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746; *Juarez v. Jani-King, Inc.* (N.D. Cal. Jan. 23, 2012) No. 09-3495, 2012 U.S. Dist. LEXIS 7406, *12-13). Other states, too, have resolved the tension between franchisors' need to protect their trademark, trade name and good will and, at the same time, preserve the independent contractor relationship with their franchisees, by applying a more focused "instrumentality" test in the franchisor/franchisee context. (See *Kerl v. Dennis Rasmussen, Inc.* (Wis. 2004) 682 N.W.2d 328, 338 ["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 of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes."]; Petition for Review at 12 [collecting additional cases]; see

---

uniformity of the law and determine issues of statewide importance; the Court of Appeal's role, in contrast, is to

generally, Joseph H. King, *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees* (2005) 62 Wash. & Lee L.Rev. 417, 431-433 & 432, fn. 58 [collecting cases from "a number of courts [that] have required that the control by the franchisor not merely relate to the day-to-day operations, but extend 'over the specific aspects of the franchisee's business operations from which the injury arose'"].)

Plaintiff urges that the *Kerl* case is inapposite because Wisconsin applies a different respondeat superior standard than California. (Answer at 6.) While it is true that in Wisconsin an agent must be deemed a servant to impose vicarious liability on the principal/master, both California and Wisconsin focus on the degree of or right to control the principal/master has over the conduct of the agent/servant to determine vicarious liability. (Compare *Petzel v. Valley Orthopedics Ltd.* (Wisc. App. 2009) 770 N.W. 2d 787, 792 with *Cislaw v. Southland Corp.*, supra, 4 Cal.App.4th at p. 1288.) In the franchise context, the Wisconsin Supreme Court determined that the instrumentality test requiring "control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm" was an appropriate gloss on the right to control test; if the rule were otherwise, and "the operational standards included in the typical franchise agreement for the protection of the franchisor's trademark were broadly construed as capable of meeting the 'control or right to control' test that is generally used to

---

determine whether prejudicial error occurred.

determine respondeat superior liability, then franchisors would almost always be exposed to vicarious liability for the torts of their franchisees." (*Kerl, supra*, 682 N.W.2d at 112.)

Plaintiff implies that this case is not the right vehicle for deciding the proper franchisor liability standard, in any event, because the record shows that Domino's maintained extensive standards for franchisees. (Answer at 7-8.) To the extent these standards relate to things other than sexual harassment and day-to-day control of conduct in that area, they are irrelevant under an instrumentality test.[2] The record also shows that Daniel Poff, as the owner of Sui Juris, was ultimately responsible for hiring, firing, and training, and that the termination of the assistant manager at issue was ultimately Poff's decision. (See Petition at 7 & fn.3.) This should trump any language of control in the manual. (Cf. *Ketterling v. Burger King Corp.* (Idaho 2012) 272 P.3d 527, 533 [affirming summary judgment for franchisor where the manual "instructed franchisees to shovel snow from walks, apply ice melt, display caution signage, and replace ice melt when needed" but also provided that "the franchisee is 'an independent owner and operator of the restaurant' who [was] 'responsible for day-to-day operation of his/her business'"].)

---

[2] In any event, any "standards" in the Manager's Reference Guide represented only "minimum guidelines" for store operation and not "requirements" (JA 451); moreover, information contained in other sections of the Manager's Reference Guide were "for informational purposes only" and were "not required to [be] adhere[d] to" (JA 444).

In California, "there are relatively few decisions on the nature of the relationship between the franchisor and franchisee as it affects third persons." (*Cislaw v. Southland, supra,* 4 Cal.App.4th at p. 1288.) This Court should take the opportunity to address the vicarious liability standard in the franchise context – something it has never done – and adopt the instrumentality approach as the standard for franchisor/franchisee liability in California.

II

This Court Should Grant Review Because The Court Of Appeal Had No Jurisdiction To Hear The Untimely Appeal In This Case.

Plaintiff urges that, in "doubtful" cases, an appeal should be deemed timely. (Answer at 10.) This is not a doubtful case. (See *Hollister Convalescent Hospital, Inc. v. Rico* (1975) 13 Cal.3d 660, 673-674 [rejecting, inter alia, the proposition that "doubtful" cases could include those in which estoppel was asserted due to delay in filing a motion to dismiss an appeal].)

Here, the order granting summary judgment in favor of the Domino's defendants and against plaintiff Taylor Patterson resolved all claims between those parties. The resulting judgment was therefore immediately appealable. (See, e.g., *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 [demurrers sustained on all causes of action of certain plaintiffs]; *Johnson v. Threats* (1980) 140 Cal.App.3d 287, 289 [demurrers sustained on all counts against one defendant]; *Daon Corp. v. Place Homeowners' Ass'n* (1989) 207 Cal.App.3d 1449, 1456 [judgment dismissing cross-

complaint is appealable if it finally adjudicates all pending claims as to a particular party].) Domino's counsel served notice of entry of judgment on May 4. A notice of appeal was due 60 days thereafter, on July 5. (Cal. Rules of Court, rule 8.104(a)(2).) Plaintiff filed her notice of appeal on August 10 – more than 90 days after notice of entry of judgment was served.[3] The notice of appeal is therefore untimely.

A "timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' [Citation.] It largely divests the superior court of jurisdiction and vests it in the Court of Appeal. [Citation.] An untimely notice of appeal is 'wholly ineffectual: The delay cannot be waived, it cannot be cured by nunc pro tunc order, and the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion.' [Citation.]" (*In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1530-1531, citing *People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) When a notice of appeal "has not been filed within the relevant jurisdictional time period – and when applicable rules of construction and interpretation fail to require that it be deemed in law to have been so filed – the appellate court, absent statutory authorization to extend the jurisdictional period, lacks all power to consider the appeal on its merits and must dismiss, on its own

---

[3] Plaintiff purported to appeal from a second, June 2011 judgment. (JA 890.) The appealability of the first judgment would only transfer to this later judgment and restart the 60-day period to appeal if the later judgment (1) substantially modified the first judgment or (2) materially changed the rights of the parties. (See, Petition at 15 [collecting cases].) It did neither.

motion if necessary, without regard to considerations of estoppel or excuse." (*Hollister Convalescent Hospital, Inc. v. Rico, supra* 15 Cal.3d at p. 674.)

As a result, the Court of Appeal never obtained jurisdiction to decide this appeal.

III

The Court Of Appeal Retained The Power To Dismiss The Appeal And Vacate The Opinion After The Opinion Was Published, But Before The Remittitur Issued.

Plaintiff urges that the timeliness of the appeal in this case was not brought to the Court of Appeal's attention until after the time for a petition for rehearing had passed, and therefore neither the Court of Appeal nor this Court may consider it. (Answer at 15.) The law is clear that a timely notice of appeal is a jurisdictional prerequisite, such that if the appeal is untimely, the "court has no jurisdiction to consider it, and it must be dismissed." (*Dakota Payphone LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 443.) Even if the jurisdictional argument is not raised by the parties, the court, on its own motion, must dismiss if the notice is untimely. (*Nu-Way Assoc. Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 928-29.) Thus, the timing of Domino's motion to dismiss did not preclude the Court of Appeal from dismissing the appeal. Moreover, the issue is properly presented for review to this Court, because the petition was not only filed from the opinion, but from the subsequent denial "by operation of law" of the dismissal motion itself.

Plaintiff further urges that the parties' – and the trial court's – apparently mistaken view that the April 2011 judgment was not appealable can be relied on to render the appeal timely. (Answer at 11.) Not so. "[T]he time for filing a notice of appeal is absolutely jurisdictional, and cannot be extended by a trial or appellate court without statutory authorization, even for reasons of mistake, estoppel, or other equitable considerations." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 116; see also *Hollister*, *supra*, 13 Cal.3d at p. 674 ["[t]he expiration of a jurisdictional period is not, and by its nature cannot, be affected by the actions of the parties"].)

Finally, Plaintiff urges that the late notice of appeal renders the Court of Appeal's opinion merely voidable, rather than void. (Answer at 12-14.) Plaintiff seizes on a discussion in the petition concerning an analogy between void judgments and the power of an appellate court to recall a remittitur. (See Petition at 18-19.) But here, the remittitur has not yet issued; there is no need to rely on these principles to find a dismissal was required. (See *Bellows v. Aliquot Assoc., Inc.* (1994) 25 Cal.App.4th 426, 433 [concluding that the jurisdiction of the appellate court terminates when the remittitur issues].) Thus, the void versus voidable distinction is one without a difference in this case. Finally, in any event, whether the opinion in this case is void or voidable, the appeal must be dismissed. (See generally, pages 8-9, ante.)

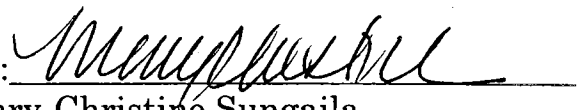
This Court should grant review to determine, or at least retransfer to the Court of Appeal to determine, the untimely filing of the notice of appeal in this case. The remittitur has not yet been issued and therefore the Court retains jurisdiction over this matter and should be required to fulfill its obligation to ensure it had the jurisdictional power to hear this appeal.

Conclusion

For the foregoing reasons, and the reasons set forth in the petition for review, this petition should be granted to answer important questions of law and to secure uniformity of decision.

Dated: September 4, 2012

SNELL & WILMER L.L.P.

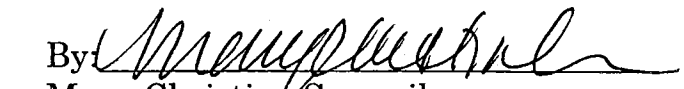
By: 
Mary-Christine Sungaila
Attorneys for Petitioners, Domino's Pizza, LLC, Domino's Pizza Franchising and Domino's Pizza, Inc.

Certification of Word Count

The undersigned certify that according to the word count feature of the word processing program used to prepare this petition for review, it consists of 2,763 words, exclusive of the matters that may be omitted under rule 8.504(d)(1).

Dated: September 4, 2012

SNELL & WILMER L.L.P.

By 
Mary-Christine Sungaila
Attorneys for Petitioners, Domino's Pizza, LLC, Domino's Pizza Franchising and Domino's Pizza, Inc.

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On September 4, 2012, I served, in the manner indicated below, the foregoing document described as **Reply to Answer to Petition for Review** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)), as indicated on the service list.

☐ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

☐ BY OVERNIGHT DELIVERY: I caused such envelopes to be delivered by courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 4, 2012, at Costa Mesa, California.

Rudi L. Wilson

Service List

Kent Frampton Lowry Winer & McKenna 21900 Burbank Blvd., 3rd Floor Woodland Hills, CA 91367	Attorneys for Plaintiff and Appellant, Taylor Patterson
Elizabeth L. Kolar Kolar & Asosciates 12241 Newport Avenue Santa Ana, CA 92705	Co-counsel for Respondents Domino's Pizza, LLC; Domino's Franchising, and Domino's Pizza, Inc.
Alan Charles Dell'Ario Alan Charles Dell'Ario, P.C. 1970 Broadway, Suite 1200 Oakland, CA 94612	Attorneys for Appellant Taylor Patterson
Clerk Superior Court of California County of Ventura 800 South Victoria Avenue Ventura, California 93009 For delivery to Hon. Barbara Lane	
Clerk Court of Appeal of the State of California Second Appellate District, Div. Six Court Place 200 East Santa Clara Street Ventura, CA 93001	
Clerk Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, California 94102-3600	**Via Federal Express**