IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

George Cumpston and Angel Cumpston, Individually and as Parent and Natural Guardian of Amber Kilkenny,	)	
Plaintiffs,	)	C.A. No. 06C-11-051-JRJ
v.	)	
Matthew McShane, Cluck-U Corp., and C.U.D., Inc.	)	
Defendants.	)	

Date Submitted: February 4, 2009
Date Decided: June 4, 2009
Date Amended: June 4, 2009

Upon Defendant Cluck-U Corp.'s Motion for Summary Judgment:
DENIED.

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Jurden, J.

I. INTRODUCTION

Before the Court is Defendant, Cluck-U Corp.'s ("Cluck-U") Motion for Summary Judgment. By its motion, Cluck-U argues that it cannot be held vicariously liable for the actions of co-defendant Matthew McShane ("McShane"). For the reasons discussed below, Cluck-U's Motion for Summary Judgment is **DENIED**.

II. BACKGROUND

From February to March 2006, McShane worked part-time for C.U.D., Inc. ("C.U.D."), which owned and operated a Cluck-U Chicken franchise in New Castle County, Delaware.[1] Cluck-U is the franchisor for the Cluck-U Chicken restaurant and C.U.D. is the franchisee.[2] Cluck-U and C.U.D. executed a written Franchise Agreement on July 26, 2002.[3] The Franchise Agreement is a 41 page document that explains in great detail the requirements and restrictions C.U.D. must follow to operate a Cluck-U Chicken franchise.[4] Should C.U.D. fail to operate its franchise within the limits of this Agreement, Cluck-U retains the "right to terminate" C.U.D.'s

[1] *See Cumpston v. McShane*, C.A. No. 06C-11-051 (Del. Super. May 15, 2009). The franchise is no longer in business in Delaware. From February to March 2006, while working for C.U.D., McShane was simultaneously enrolled as a full-time college student. Def. C.U.D.'s Requests for Admissions Directed to Def. McShane ("Interrogatories") at ¶14; Def. McShane's Answers to Request for Admissions ("Admissions") at ¶14.
[2] Cluck-U Mot. for Summ. J., Docket Item ("D.I.") 51.
[3] *Id.*; McShane's Opp. to Cluck-U Mot. for Summ. J., Ex. A (herein after the "Franchise Agreement"), Docket Item ("D.I"). 60.
[4] Franchise Agreement.

franchise rights.[5] Excerpts from the Franchise Agreement relevant to McShane's duties as delivery driver are as follows:

> Franchisor requires that Cluck-U Chicken restaurants under Franchisor's control maintain uniform products, operations and design and maintain a high standard of quality for food preparation *and service* to develop and maintain the good will of Franchisor and all its franchisees.[6]
>
> . . .
>
> Restrictions provided herein upon Franchisee's operations and acquisition of supplies are intended solely to protect the Franchisor's goodwill and its Marks, and to maintain a high level of quality in food preparation *and serving*.[7]
>
> . . .
>
> Franchisee shall *serve*, sell or offer for sale all food and beverage products and only such products . . . as have been prepared in accordance with recipes and *food handling* and preparation methods and procedures designated from time to time in the "Operating Manual".[8]
>
> . . .
>
> Franchisee agrees not to deviate from Franchisor's standards and specifications *for serving* or selling such products without franchisor's prior written consent.[9]
>
> . . .
>
> Franchisee may prepare food on the premises of the Franchise Restaurant and *deliver such food to locations off the premises of the Franchise Restaurant only: (1) in accordance with policies and procedures set forth in the Operating Manual; and (2) to*

[5] Franchise Agreement at 30.
[6] Franchise Agreement at 1, ¶4 (emphasis added).
[7] *Id.* at 1 ¶6 (emphasis added).
[8] *Id.* at 2 ¶2 (emphasis added).
[9] *Id.* at 3 ¶5 (emphasis added).

> *locations within the Territory. Franchisee may deliver food to locations off the premises only to locations within the exclusive delivery territory*.[10]
>
> . . .
>
> Franchisee agrees to follow the mandatory guidelines set forth in the Operating Manual supplied by Franchisor and as it may be modified from time to time. Franchisee acknowledges that the procedures contained in the Operating Manual are necessary and integral elements of the System developed by Franchisor and that the Franchisee must adhere to the procedures outlined therein with zero "0" tolerance. ("0" tolerance defined as no deviation at all from set routines for every facet of operations.)[11]

Cluck-U provided C.U.D. with an Operations Manual which is incorporated by reference into the Franchise Agreement.[12] The Operations Manual includes specific duties and responsibilities for delivery drivers.[13]

A manager of C.U.D. hired McShane to work as a food delivery driver. Cluck-U did not participate in any of the hiring or firing of any of C.U.D.'s employees or independent contractors, including McShane.[14] Cluck-U was not aware that McShane had been hired by C.U.D.[15] McShane did not fill out an application or sign an agreement/contract before he started working for C.U.D. C.U.D. compensated McShane for his work by paying

[10] *Id.* at 3 ¶7 (emphasis added).
[11] Franchise Agreement at 11 ¶5.
[12] Cluck-U Mot. for Summ. J., Ex. B.
[13] Pl.'s Reply Br., Ex. B at 6-8 (June 11, 2001 Ed.).
[14] Ilvento Dep. at 100-101, Sept. 29, 2008.
[15] Cluck-U Mot. for Summ. J.

him an hourly wage, plus tips.[16] All compensation was paid in cash. McShane did not complete any tax forms in conjunction with his work for C.U.D., nor did C.U.D. or Cluck-U withhold any taxes.[17]

McShane was not issued, nor was he required to wear, a uniform, insignia, logo, or sign that indicated that he represented Cluck-U Chicken, Cluck-U or C.U.D.[18] Neither C.U.D. nor Cluck-U provided McShane with an automobile or automobile insurance coverage in order to make food deliveries, nor did C.U.D. or Cluck-U compensate McShane for any of his automobile-related expenses.[19] Neither C.U.D. nor Cluck-U trained McShane in operating a motor vehicle, nor did they instruct McShane to take a specific driving route when making food deliveries.[20]

On March 11, 2006, at approximately 5:42 pm, George Cumpston ("Cumpston") was operating a motorcycle that allegedly collided with a vehicle driven by McShane ("the accident"). McShane's vehicle belonged to Timothy Stanton. McShane had borrowed the vehicle from Daniel Stanton, who was McShane's friend and the manager of C.U.D.[21] At the time of the accident, Amber Kilkenny ("Kilkenny") was a passenger on Cumpston's motorcycle (Cumpston and Kilkenny collectively referred to as

[16] Pl.'s Resp. to C.U.D.'s Mot. for Summ. J. ("Pl.'s Reply Br.") at ¶9, D.I. 61; McShane's Dep. at 48-49, May 2, 2008.
[17] *See* C.U.D.'s Mot. for Summ. J. at ¶7.
[18] *See Cumpston v. McShane*, C.A. No. 06C-11-051 (Del. Super. May 15, 2009); C.U.D.'s Mot. for Summ. J. at ¶6.
[19] C.U.D.'s Mot. for Summ. J. at ¶3-4.
[20] Interrogatories at ¶22; Admissions at ¶22.
[21] Pl.'s Reply Br. at ¶7; McShane's Dep. at 18:18-24.

"Plaintiffs"). Plaintiffs allege that McShane's negligence caused the collision and Plaintiffs' "significant physical injuries."[22] Plaintiffs claim that C.U.D. and Cluck-U are vicariously liable for McShane's alleged negligence under the doctrine of *respondeat superior*.[23]

III. STANDARD

On a motion for summary judgment, the Court examines "all facts in a light most favorable to the non-moving party, and determine[s] whether there is a genuine issue of material fact requiring a trial."[24] "When a motion for summary judgment is supported by evidence showing no material issues of fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact requiring trial."[25] "If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted."[26]

IV. DISCUSSION

Whether Cluck-U, the franchisor, may be vicariously liable for McShane, an agent hired by C.U.D., the franchisee, depends upon whether

[22] Pl.'s Reply Br. at ¶1; Compl. at ¶8, D.I. 1.
[23] Pl.'s Reply Br. at ¶2.
[24] *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. 2006), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
[25] *Id.; see also In re Asbestos Litig. ("Helm")*, 2007 WL 1651968, at *15 (Del. Super. June 25, 2007) (setting forth the standard of review on a motion for summary judgment).
[26] *In re Asbestos Litig. ("Hudson")*, 2007 WL 2410879 *2 (Del. Super. Aug. 27, 2007) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)); *Kulp v. Mann-Beebe*, 2008 WL 4120041, at *4 (Del. Super. July 10, 2008).

an agency relationship existed between Cluck-U and McShane.[27] An agency relationship existed if Cluck-U had actual or apparent authority over McShane, and McShane was acting within the scope of his duties as an agent of Cluck-U at the time of the accident.[28]

A. Actual Authority

Under Delaware law, a "franchisor may be held to have an actual agency relationship with its franchisee when the former controls, or has the right to control the latter's business."[29] Where a franchise agreement exists and it goes "beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists."[30] *Billops* and *International Dairy Queen, Inc.*,[31] involved franchisors who micro-managed their franchisees by requiring them to operate within the strict confines of their respective franchise agreements and operations manuals. The relevant franchise agreements and manuals in *Billops* and *International Dairy Queen, Inc.* are strikingly similar to the Cluck-U/C.U.D. Franchise Agreement. All three agreements include guidelines for each franchise's trade dress, trade marks, marketing, sanitation, inspections, record-keeping, food purchasing and preparation standards, among a host of other regulations concerning day-to-

[27] *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1978).
[28] *Id.*
[29] *Billops*, 391 A.2d at 197 (citing *Singleton v. Int'l Dairy Queen, Inc.*, 333 A.2d 160 (Del. Super. 1975)).
[30] *Id.* at 197-98; RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).
[31] *Billops*, 391 A.2d 196; *Int'l Dairy Queen, Inc.*, 333 A.2d 160.

day operations. In *Billops* and *International Dairy Queen, Inc.*, the courts denied summary judgment. The courts did so in order for the parties to further develop the record for the triers of fact to make an ultimate determination as to the amount of control and authority the franchisor maintained over the franchisees and their agents. Cluck-U's Motion must meet a similar fate.

This Court recently noted that there is a genuine issue of material fact as to whether McShane was a servant/employee or an independent contractor at the time of the accident.[32] At this juncture, it is unclear whether McShane was bound by the Operations Manual and C.U.D.'s *unsigned* "Employee/Driver Agreement[.]"[33] The parties dispute the extent of control C.U.D. maintained over McShane, McShane's work schedule, and the intentions of the parties as to McShane's employment status.[34] Assuming, *arguendo*, that McShane was a servant/employee of C.U.D., the relationship between C.U.D. and Cluck-U is insufficiently developed in the record for this Court to rule as a matter of law on actual authority. For example, Cluck-U did not monitor, inspect, or manage the activities of its C.U.D.'s delivery drivers. It is unclear whether Cluck-U *may have* exercised such control of the franchisee's delivery drivers should it have wished to do

[32] *Cumpston v. McShane*, C.A. No. 06C-11-051 (Del. Super. May 15, 2009).
[33] *Id.; see* Pl.'s Reply Br., Ex. B.
[34] *See* Pl.'s Reply Br. at ¶5, 9-10; McShane's Dep. at 12.

so. The record must be further developed to determine whether Cluck-U had actual authority over McShane. Consequently, Cluck-U's Motion for Summary Judgment on the issue of actual authority is **DENIED**.

B. Apparent Authority

The concept of apparent authority focuses not upon the actual relationship of a principal to the agent, but the reasonable perception of the relationship by a third party.[35] Where a principal represents through apparent authority that "another is his servant and causes a third person to justifiably and reasonably rely upon the care and skill of such apparent agent[,]" the principal will bear the same liability as if the agent had actual authority.[36] Liability may ensue from a principal's representation of apparent authority to a specific individual or the general public.[37]

Plaintiffs could not have reasonably believed that McShane was operating under the apparent authority of Cluck-U. McShane was not wearing a Cluck-U uniform or driving a vehicle bearing a Cluck-U sign at the time of the accident. Plaintiffs neither ordered nor were expecting to receive McShane's Cluck-U food delivery. The record does not support a

[35] *Billops*, 391 A.2d at 198.
[36] *Int'l Dairy Queen, Inc.*, 333 A.2d at 163 (citing RESTATEMENT (SECOND) OF AGENCY § 267); *Billops*, 391 A.2d at 198.
[37] *Billops*, 391 A.2d at 198.

basis for which Plaintiffs could have reasonably relied on McShane's care and skill as an apparent agent of Cluck-U.[38]

However, a genuine issue of material fact exists as to whether Cluck-U created an appearance of authority over its franchisees to the general public, by way of the Franchise Agreement. According to the Franchise Agreement, "Cluck-U Chicken restaurants under Franchisor's control [must] maintain uniform products, operations and design and maintain a high standard of quality for food preparation and service to develop and maintain the good will of Franchisor and all its franchisees."[39] With regard to local advertising, franchisees must "conform to Franchisor's standards and shall submit proposed advertising to Franchisor for approval. Franchisee must follow Cluck-U Corp.'s minimum marketing recommendations, but may exceed them."[40] Additionally, "Franchisor may issue gift certificates valid for use at any Cluck-U Corp. franchise, for promotional or other purposes."[41] Assuming C.U.D. complied with these aspects of the Agreement, it is possible members of the general public could have believed that Cluck-U exercised authority over C.U.D. McShane was delivering Cluck-U chicken at the time of the accident, which was within the scope of

[38] *See* Compl.
[39] Franchise Agreement at 1 ¶4.
[40] *Id.* at 23.
[41] *Id.* at 14.

his job responsibilities for C.U.D. Consequently, Cluck-U's Motion for Summary Judgment on the issue of apparent authority is **DENIED**.[42]

V. CONCLUSION

Viewing the facts in the light most favorable to the non-moving parties, the parties must further develop the record on the issues of Cluck-U's actual and apparent authority over McShane. It is therefore inappropriate for the Court to grant summary judgment on these issues, and Cluck-U's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary - Original

[42] *See Billops*, 391 A.2d at 199.