Massage Envy

Massage Envy is a Corporation that was founded in 2002 as a massage and skin care franchisor. It began in Scottsdale, Arizona and has a membership-based business model. Since that time, Massage Envy has had several CEO’s who come from the field of business and venture capital.

# The Massage Envy concept was developed as a sales franchise business with profit in mind that happened to choose massage as its product as opposed to being a massage business developed into a massage franchise. (*See* Forbes, Tice, Carol - *Strip Mall Spa: How Massage Envy Created -- And Dominated -- A New Franchise Niche*  - “For years Rick Davis was a tech executive who helped raise millions of dollars in venture capital. Then he decided to try a different kind of investment. In 2004 he considered buying a fast-food franchise before choosing an alternative: the massage-and-facial franchise chain Massage Envy. In fast food, Davis reasoned, you never know how many customers will walk in the door, but Massage Envy sells one-year memberships for $59.99 to $79.99 a month, which means recurring revenue.”)

 In 2012, *Forbes* Magazine ranked Massage Envy number 20 on their list of "Top 20 Franchises for the Buck". In 2015, [*Adweek*](https://en.wikipedia.org/wiki/Adweek) reported that the company hired a new lead agency and spent approximately $15 million annually on advertising and marketing, with franchisees spending an additional $40 million annually in local markets.

In 2017, investigative reporters from Buzzfeed broke the news nationally that over 180 women nationwide had sued Massage Envy for sexual assault. (S*ee* <https://www.buzzfeednews.com/article/katiejmbaker/more-than-180-women-have-reported-sexual-assaults-at>) Franchise owners participated in the investigation and told reporters that they followed all of the Massage Envy policies but there was no guidance on what to do to prevent or respond to sexual assault. They alleged that they did not feel capable of handling the situation and that Massage Envy did not prepare them. The reporters found that the Corporate office of Massage Envy made a concerted effort to avoid police involvement following sexual assault reports and prevent public knowledge of sexual assaults at their spas. At the same time, they failed to train their personnel on assault prevention.

This Buzzfeed article broke the silence on the issue of sexual assault at Massage Envy. Even if Massage Envy could somehow have denied the foreseeability of sexual assault in its spas before 2017, it certainly could not after the barrage of media attention to the issue. See:

* <https://www.insider.com/sexual-assault-allegations-massage-envy-2018-8>;
* <https://www.usatoday.com/story/news/nation/2017/11/27/massage-envy-therapists-accused-180-sexual-assaults/896972001/>
* <https://www.foxnews.com/us/massage-envy-faces-new-lawsuit-alleging-it-enabled-employees-sexual-misconduct-report>
* <https://www.washingtonpost.com/news/business/wp/2017/11/27/one-incident-is-too-many-more-than-180-women-say-they-were-sexually-assaulted-at-massage-envy/>
* <https://www.cbsnews.com/news/massage-envy-sexual-assault-allegations/>

Following the bad publicity related to these issues, Massage Envy sought the advice of an anti- sexual violence organization called RAINN and made a public showing of the collaboration. However, there appears to be nothing different about their poor policies that fail to train, supervise, and prevent abusers and sexual assaults at Massage Envy locations continue at the same rate.

In fact, the AMTA (American Massage Therapy Association), and ABMP (Associated Bodywork and Massage Professionals) the leading massage therapy associations in the United States , offer resources and standards for best practices in Massage Spas that Massage Envy refuses to follow. For example:

* The placement of silent alarms on massage tables for customers to use in case of emergencies or threats of emergencies
* A short training session with first time customers to ensure they know what is and is not appropriate contact in a massage and that they know their safety options
* Training on a plan for handling sexual assault accusations when they occur
* Training for massage therapists on proper draping so as not to expose clients
* Sexual assault prevention training for employees
* Proper screening of potential employees
* Having “mystery shopper” massage clients report back to the business on employees
* Provide professional and well-trained supervision

Potential Lawsuit

This mediation is pre-litigation, however, if Plaintiff were to file a lawsuit in this matter the counts against Massage Envy would be as follows:

 I: Negligence per se based on Respondeat Superior

 II: Assault and Battery based on Respondeat Superior

 III: Negligent Supervision

 IV: Negligent Misrepresentation

 V: Premises Liability

**KEY LEGAL ISSUES**

There are several legal issues at play in this case. First, is the issue of the franchise company liability. In this case, the franchise company does business as Massage Envy Clayton. This is a fictitious business name owned by David J. Lovell Jr. and David J. Lovell III.

David Lovell III’s LinkedIn page shows him to be the franchise owner of several businesses including multi units of the European wax center (a personal waxing company), multi units of Celsius Cryotherapy (and infrared sauna company), multi units of Massage Envy, and One Good Idea Marketing (a marketing and sales company for small businesses). David Lovell Jr. appears to be elderly (approximately 80 years old), and a retired dentist.

The franchise, Massage Envy Clayton, is liable for the sexual assault in this case in five different ways – negligence per se based on respondeat superior, negligent supervision, negligent misrepresentation, assault, and battery through respondeat superior, and premises liability.

1. Negligence

To prove negligence in Missouri, a Plaintiff must plead and prove the following:

(1)legal duty on the part of the defendant to conform to a certain standard of  conduct to protect others against unreasonable risks; (2) a breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426, 431 (Mo.banc 1985).

1. Duty

Generally, businesses do not owe a duty to prevent harm due to the criminal acts of third parties on their property. Wieland v. Owner-Operator Servs., 540 S.W.3d 845, 848 (Mo.banc 2018). However, the Missouri Supreme Court has carved out two exceptions to the rule. The first is if that business knows or has reason to know that the third party has harmed or is about to harm. That exception does not apply in this case. “The second is when the nature of defendant's business or past experience provides a basis for the reasonable anticipation on defendant's part that the criminal activity of third persons might put entrants at risk.” Id.

Accordingly, in the first exception that does not apply here, the Defendant would have had to know that Collins-Terry himself was an abuser or was about to abuse. However, the second exception does not require such knowledge about the abuser:

The second exception "recognizes 'a duty [on the part of business owners] to protect their invitees from the criminal attacks of unknown third persons' under certain special circumstances." *L.A.C.*, 75 S.W.3d at 257 (emphasis added). Because the second exception concerns when a business knows or has reason to know of dangerous persons in general frequenting its premises, a duty of care arises without regard to any specific person entering the business's premises. *See id.* at 257-58; Restatement (Second) of Torts § 344 cmt. f and § 12 cmt. a; The Law of Premises Liability § 11.03[1], 11-6. In other words, with the second exception, the business is tasked with taking  "precautionary actions to protect its business invitees against the criminal activities of unknown third parties." *L.A.C.*, 75 S.W.3d at 258.

Id at 849.

In the present case, although Collins-Terry was not a known abuser prior to the incident at bar, it was well known in the massage therapy community that massage spas, especially the lower-level, lower-paying, franchise business model massage spas that criminal activity might put entrants at risk. Accordingly, Defendants had a duty to prevent harm due to these reasonably anticipated criminal acts.

Also, here even if Defendants did not owe a duty to the business invites through the exception explained above, Defendants assumed a duty by partnering with RAINN and promising on its website and in advertising materials to keep customers safe (<https://www.massageenvy.com/about-us/health--and-safety/commitment-to-safety> “We believe each member and guest deserves a consistent, safe, clean, professional, and comfortable service. Our commitment has never been stronger. You put your trust in this brand and we will never stop working to keep it.”) “Missouri case law supports the proposition that one who acts gratuitously or otherwise is responsible for the negligent performance of the act, even though there is no duty to act.” Wood v. Centermark Props., 984 S.W.2d 517, 525 (Mo.App.E.D.1998).

1. Breach

In addition, Defendants here breached that duty by failing to train its employees, failing to supervise its employees, and negligently misrepresenting the safety issues involved in patronizing its business.

Records reveal that training for Massage Envy is focused significantly on sales of memberships and products and not on proper massage techniques and client safety. There is no supervision whatsoever in massage rooms – no security cameras, no “mystery clients” to report back on massage therapist compliance with safety measures, no security alarms, etc. Websites and marketing materials promise customers safety and prevention while policies and supervision lack.

1. Proximate Cause

"The practical test of proximate cause is generally considered to be whether the negligence of the defendant is that cause or act of which the injury was the natural probable consequence.(citation omitted). Thus, from the essential meaning of proximate cause arises the principle that in order for an act to constitute the proximate cause of an injury, *some* injury, if not the precise one in question, must have been reasonably foreseeable." Adams v. Certain Underwriters at Lloyd's of London, 589 S.W.3d 15, 33 (Mo.App.E.D. 2019). “Foreseeability, as it relates to proximate cause, "refers to whether a defendant could have anticipated a particular chain of events that resulted in injury or the scope of the risk that the defendant should have foreseen." Blanks v. Fluor Corp., 450 S.W.3d 308, 373 (Mo.App.E.D.20140 (*citing* Richey v. Philipp, 259 S.W.3d 1, 8 (Mo. App. W.D. 2008), 259 S.W.3d at 9 (quoting Lopez v. Three Rivers Elec. Corp., Inc., 26 S.W.3d 151, 156 (Mo. banc 2000)).

Here, as explained above, it is reasonably foreseeable in running a massage Envy spa that a massage therapist, alone in a room with clients in vulnerable positions including being undressed and lying on a table to be touched that sexual contact will occur and that a client will suffer damages from that contact.

Although there is not a factually similar case in Missouri involving a massage spa, there are cases holding Missouri businesses liable on the legal theories above. (*See* Richardson v. Quik Trip Corporation, 81 S.W.3d 54 (Mo. App. W.D. 2002) holding Quick Trip liable for a sexual assault by a third party in the gas station restroom.)

1. Negligence Per Se

Negligence per se is the violation of a statute or an ordinance that has the public’s safety and well-being as an objective. Downing v. Dixon, 313 S.W.2d 644, 650 (Mo. 1958). “A set of conduct may at once constitute a criminal offense and a civil wrong subject to private redress.” Imperial Premium Fin. v. Northland Ins. Co., 861 S.W.2d 596, 599 (Mo.App.W.D. 1993). “The rationale is one of *duty*: that is, a criminal statute imposes a duty to the public protection which, when breached and proximately causes specific private injury, does not preclude a civil action for damages even though violation imposes a public penalty.” Id.

A claimant may proceed on a negligence per se claim "if the following four elements are met: (1) There was, in fact, a violation of the statute; (2) The injured plaintiff was a member of the class of persons intended to be protected by the statute; (3) The injury complained of was of the kind the statute was designed to prevent; and (4) The violation of the statute was the proximate cause of the injury.” [King v. Morgan, 873 S.W.2d 272, 275 (Mo.App. W.D. 1994)](https://advance.lexis.com/document/?pdmfid=1000516&crid=6565820a-6974-4cc4-8e91-f9f56031b8d6&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A45SB-V9V0-0039-42W9-00000-00&pdcontentcomponentid=7857&pdshepid=urn%3AcontentItem%3A7XX3-8061-2NSD-M3HP-00000-00&pdteaserkey=sr0&pditab=allpods&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=ppnqk&earg=sr0&prid=f5bbbdad-a38b-4a67-ab83-1763bc7395da).

In this case, Defendant Collins-Terry committed negligence per se. He committed a violation of a statute – RSMO 566.061 Sodomy in the Second Degree. He confessed immediately to this offense and pled guilty to it, so this violation is not in dispute. Plaintiff is a member of the class of persons intended to be protected by the statute – a person vulnerable to sex abuse. The injury that Plaintiff suffered – emotional distress following sexual abuse is the type that the statute was designed to prevent. Lastly, as explained above, the violation of the sodomy statute was the proximate cause of the Plaintiff’s injuries. Accordingly, Plaintiff can prove all the elements of negligence per se in this case.

Plaintiff can further prove that Defendant franchise is liable for the negligence per se via the respondeat superior theory explained below.

1. Negligent Supervision

A claim of Negligent Supervision against the franchise does not require that the employee was working in the course and scope of his employment. Accordingly, as this claim goes directly to the actions of the supervisor, i.e. the employer, Plaintiff does not need to prove respondeat superior.

A cause of action for negligent supervision may be established when:

A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Reed v. Kelly, 37 S.W.3d 274, 278 (Mo.App.E.D.2000) (*citing* Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. banc 1997).

Here, Massage Envy Clayton had a duty to exercise reasonable care to control Collins-Terry even if he acted outside the scope of his employment in the massage room. This is because Collins-Terry was an employee, was on the Massage Envy premises, was using all tools provided by Massage Envy, and the employer knew or had reason to know he had the ability to control Collins-Terry and knew or should have known of the necessity and opportunity to do exercise that control in preventing sexual assaults.

This claim is perhaps the easiest for Plaintiff to prove in this case.

1. Negligent Misrepresentation

The elements of negligent misrepresentation are as follows:

1. The company supplied information in the course of his business;
2. Because of the business’s failure to exercise care, the information provided was false;
3. The information was intentionally provide for guidance in a busines transaction;
4. The customer justifiable relied on the information;
5. Due to reliance on the information, the customer suffered a pecuniary loss.

ABC Seamless Siding v. Ward, 398 S.W.3d 27 (Mo.App.W.D. 2013).

Here, Massage Envy Clayton promises in marketing materials, highly trained employees, extensive safety protocols, a commitment to safety, strict safety policies and procedures following a sexual assault report. This information was demonstrably false in this case. Massage Envy provides this information to entice customers into its business. Plaintiff justifiably relied on these promises of safety. Due to the reliance on this false information, Plaintiff suffered economic losses.

1. Respondeat Superior

“The doctrine of respondeat superior renders an employer liable for negligent acts committed by the employee within the course of his employment.” Wagstaff v. Maplewood, 615 S.W.2d 608, 610 (Mo.App.E.D.1981). “An employee's act is within the scope of his employment if the act is of the kind he is employed to perform, occurs within the authorized time and space limits and is performed, at least in part with, the intent of serving the employer.” Id.

In Wagstaff, the Missouri Court of Appeals analyzed a police officer’s excessive use of force and the damages that resulted and stated that because the Department authorizes the use of some force, it cannot escape liability when the officer’s act is the kind he was employed to perform but merely went too far.

Similarly, in the case at bar, the massage spa employer authorizes massage therapists to enter rooms with unclothed vulnerable patrons. The employer then authorizes those employees to touch and rub those customers for the purposes of the business. The employer cannot then escape liability for the massage therapist’s act in touching and/or rubbing the customer but merely went too far.

Again, there is no case in Missouri analyzing these legal issues in the context of massage spas and massage employees, but the situation is analogous to Wagstaff above.

In this case, Respondeat Superior applies in making the employer liable for negligence per se, and assault and battery.

1. The Parent Company – Massage Envy

Massage Envy, the parent company or franchisor in this case is directly liable in this case in many ways. First, Massage Envy voluntarily undertakes obligations regarding training, prevention policies and advertising on safety issues for all Massage Envy franchises.

According to the national Massage Envy website, Massage Envy requires, regarding safety and sex abuse prevention, that employees attend “Massage Envy University Required Training.” National Massage Envy further sets safety policies for the franchises. Lastly, National Massage Envy mandates the use of uniform advertising which provides information to potential customers about safety policies and procedures. This means that the national Massage Envy company is directly responsible for training, prevention, and advertising regarding sexual abuse at all franchises.

1. Voluntary Undertaking

Missouri recognizes that even if a company would not otherwise have a duty, that duty may be assumed or undertaken and once that happens, the company must exercise reasonable care in exercising that duty. Doe v. Ozark Christian Coll., 579 S.W.3d 220 (Mo.App.S.D. 2019).

Here, National Massage Envy has taken on the duty of training, preventing, and advertising regarding sexual abuse at its franchises. Accordingly, it has a duty to exercise reasonable care in performing that duty. As shown above, despite National Massage Envy’s attempts to train, set policies and then advertise to the world that its massage spas are safe, it has been negligent in that training, prevention in misrepresenting those claims. Accordingly, National Massage Envy is directly responsible for negligent supervision, negligence per se and negligent misrepresentation in this case.

1. Franchise Law

Franchisor liability can arise under several different theories, yet no special theory of franchisor liability exists in Missouri. J.M. v. Shell Oil Co*.,* 922 S.W.2d 759, 765 (Mo. banc 1996). "[T]he general rules of agency and tort provide adequate guidance for vicarious liability." Id*.*

Here, national Massage Envy is vicariously liable for its franchises “The supreme test in determining whether vicarious liability applies to a tort is whether the person [in this case, National Massage Envy] sought to be charged as master had the right or power to control and direct the physical conduct of the other [in this case, the franchise] in the performance of the act. Balderas v. Howe, 891 S.W.2d 871, 873-874 (Mo.App.W.D.1995).

Here, as explained above, National Massage Envy maintains complete control over training and policies regarding sexual assault prevention in the franchises. Franchise agreements between the national company and the franchise are over 200 pages long and reveal a significant level of control that the national company exerts of the franchise:

* National Massage Envy trains the franchise owner and managers on day-to-day operations of the massage spas. The training is mandatory, recurrent, and supervised by a regional manager who makes on-site regular visits.
* The national company controls what products and services can be sold in the spas and franchises must sell those products and services and only those products and services.
* The national company determines whether the franchise is in good standing and follows all the policies and rules of the national franchise.
* The national company dictates the computer software, computer systems and communications systems to be used in the spas.
* The national company dictates that the franchise must use its marketing materials
* The national company has the right to audit the franchise for compliance with policies
* The national company must approve the location of the spa
* The national company must review and accept the lease for the spa; in addition, the franchise agreement contains a “Rider” whereby the franchise owner assigns the spa lease to the national Massage Envy Corporation.
* The national company must review all construction documents and specs
* The national company provides an operations manual that provides all mandatory instructions for day-to-day operations

Accordingly, National Massage Envy has built into its franchise agreements the ability to maintain control over the franchise from the day to day operations to training to its lease and more. It can direct the physical conduct of the franchise in the performance of training and supervising employees when it comes to prevention of sexual assault. As the franchise, in turn has liability, as shown above for the acts of its employees, the National Massage Envy is liable in this case.

Even if Plaintiff could not prove vicarious liability in this case, Plaintiff can prove that National Massage Envy is liable via apparent authority. "When a principal cloaks his agent with apparent authority, the principal can be vicariously liable to wronged third parties even when the agent acts wholly out of personal motive or with the purpose of defrauding his principal and even when the principal is innocent and deprived of any benefit." Pitman Place Dev., LLC v. Howard Invs., LLC, 330 S.W.3d 519, 528 (Mo.App.E.D 2010).

Massage Envy forces every franchise to use its branding, logo, materials, advertising, training and more. Customers who have memberships to Massage Envy locations know that their membership is good at any location. Massage Envy goes to great lengths to make it look like every Massage Envy location is the same in furnishings, products, services, forms, and materials. When a customer patronizes a Massage Envy location, they have no idea that it may be owned by some other corporation. To them, it is Massage Envy and that is by design. Accordingly, Massage Envy has created an apparent authority situation for itself. Accordingly, it is liable for activities in the franchises.

1. Premises Liability

National Massage Envy includes provisions in the franchise agreements that the franchise must assign its lease to National Massage Envy. Accordingly, National Massage Envy is the leaseholder for the franchise location. As the leaseholder, National Massage Envy is responsible for the premises.

“As a general rule, a business is under no duty to protect an invitee from a deliberate criminal attack by a third person.” Keenan v. Miriam Foundation, 784 S.W.2d 298, 301 (Mo.App.E.D.1990). Despite this general principle, it has come to be recognized that there are some obligations imposed upon a party to protect others against a deliberate criminal attack by a third person. [*Meadows*, 655 S.W.2d at 721](https://advance.lexis.com/document/teaserdocument/?pdmfid=1000516&crid=3e75f7bc-9ec7-441e-a3f0-6387a26f9cbf&pdteaserkey=h1&pditab=allpods&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3RX4-91J0-003F-C2C1-00000-00&ecomp=txtrk&earg=sr1&prid=beca827b-1613-4087-8479-739a6ae3bafe); [*Madden*, 758 S.W.2d at 61](https://advance.lexis.com/document/teaserdocument/?pdmfid=1000516&crid=3e75f7bc-9ec7-441e-a3f0-6387a26f9cbf&pdteaserkey=h1&pditab=allpods&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3RX4-91J0-003F-C2C1-00000-00&ecomp=txtrk&earg=sr1&prid=beca827b-1613-4087-8479-739a6ae3bafe); [Restatement (Second) of Torts, § 344](https://advance.lexis.com/document/teaserdocument/?pdmfid=1000516&crid=3e75f7bc-9ec7-441e-a3f0-6387a26f9cbf&pdteaserkey=h1&pditab=allpods&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3RX4-91J0-003F-C2C1-00000-00&ecomp=txtrk&earg=sr1&prid=beca827b-1613-4087-8479-739a6ae3bafe). These exceptions to the general principle include obligations arising from (a) "special relationships" or (b) "special facts and circumstances," such that an act or omission exposes a person to an unreasonable risk of harm through the conduct of another. Id.

The violent crimes exception applies to this case. The elements of the "violent crimes" exception are: “(1) there must exist the necessary relationship between a plaintiff and a defendant, (2) there must be evidence of prior specific incidents of violent crimes on the premises that are sufficiently numerous and recent to put a defendant on notice, either actual or constructive, that there is a likelihood that third persons will endanger the safety of defendant's invitees, and (3) the incident causing the injury must be sufficiently similar in type to the prior specific incidents occurring on the premises that a reasonable person would take precautions against that type of activity.” Id at 303.

Here, Defendant Massage Envy has the business invitee relationship with Plaintiff. There is overwhelming evidence of prior incidents of violent crimes, namely sexual assaults, on Defendant’s premises merely because of the business that Defendant runs on those premises. Massage Envy is on notice of several specific and recent incidents of such prior incidents such that a reasonable person would take precautions against that type of activity.