The Honorable Catherine Shaffer
Hearing Date: May 15, 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY and JANYCE L. MACKENZIE,

Plaintiffs,

vs.

COOPER TIRE & RUBBER COMPANY, a Delaware Corporation; TBC CORPORATION, a Delaware Corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina Corporation; MCCC 4333, INC. d/b/a/ MEINEKE CAR CARE CENTER #4333, a Washington Corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS® AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049, a New York corporation

Defendants.

ANGELA KELLY,

Cross-Claimant,

vs.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

Cause No. 18-2-17249-7 SEA

PLAINTIFF'S RESPONSE TO DEFENDANT MEINEKE CAR CARE CENTERS, LLC'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Janyce MacKenzie, or "Fi" as her family and friends know her, grimaced and furrowed her brow when she learned of Meineke's Summary Judgment motion. She said, "It makes me sick after what Meineke and their (local) shop did in its "Tire Inspection" not once but twice, failing to save me from all this" motioning to her brow, her body, her legs and to her refuge, mostly spent day-to-day in her bed. After hearing about its terminating motion and the complicated if not convoluted nature of the arguments made by Meineke, Fi's head shook slightly. "It seems pretty simple," she said. Her hands came together as if in prayer and she whispered, "The world should know what Meineke did, so it never, ever happens again to anyone else."

Meineke Car Care Centers, LLC ("Meineke") is directly and derivatively liable for catastrophic injuries suffered by Mrs. MacKenzie. Her vehicle's rear wheel lost its tread causing a high-speed rollover. Meineke breached all duty of care by failing to implement actual and effective tire inspections at franchisee shops: specifically, it implemented and enforced the use of its defective inspection worksheets that fail to determine the age of tires during inspection and to assure that their advertised tire inspection was in each case actually performed for consumers relying on the Meineke brand, like Fi MacKenzie.

Meineke knew or should have known this design flaw allowed its franchisees to perform tire inspections - or not - with no accountability. Meineke knew that its advertised tire inspections were not actually and always performed by all franchisees, including Meineke #4333 ("Franchisee") herein. This systemic safety design failure creates a genuine issue of fact

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for the jury. Meineke is also subject to derivative liability based upon actual control over its Franchisee, and separately based upon apparent or ostensible agency.

These material issues of fact should be given to a jury. The Motion should be denied.

II. STATEMENT OF FACT

A. The Catastrophic Event

On August 4, 2016, Plaintiff was driving on Interstate 90 with Angela Kelly as her passenger, outside the city limits of Missoula, Montana.[1] At 70 miles an hour, with no warning the tire tread suddenly separated from Mrs. Mackenzie's left-rear tire. She lost control of the 1998 Ford Explorer which at speed rolled over numerous times.[2] Both women suffered catastrophic injuries. Fi MacKenzie was thrown from the vehicle through the sunroof. Her life in an instant was changed forever. She is happy to be alive but it's a daily struggle. She suffered a traumatic brain injury, a deep laceration on her face and scalp, a degloved calf muscle of her right leg, double left eye stigmatism so she cannot drive, a broken left arm, a micro-fractured left wrist, permanent arthritis in her left arm, a broken right tibia, her right femur and fibula were cracked, all of her ribs were broken, as were several vertebrae, and her two front teeth. She suffered tremendous bruising, abrasions, and lacerations to her upper extremities, and she has permanent drop foot resulting in her inability to walk.[3]

[1] Lawrence M. Kahn Declaration ("Kahn Decl."), Ex. 5 (Janyce MacKenzie's Deposition) at 161:14-22.
[2] *Id.* at 162: 8-13; Kahn Decl., Ex. 25 (Trooper Nicholas Navarro Deposition) at 47:18-48:5.
[3] Kahn Decl., Ex. 1 (Plaintiff Janyce L. MacKenzie's First Supplemental Answers to Defendant Cooper Tire & Rubber Company's First Interrogatories) at p. 16-17.

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B. Inspection at Meineke 4333

Mrs. MacKenzie and her husband, Dennis, knew Meineke as an automotive services chain having often seen their national advertisements.[4] They saw the large yellow "MEINEKE" sign at the Everett location.[5] Dennis suggested that Fi get her vehicle serviced there because it was a national company, he trusted the national reputation of the Meineke brand, and he was familiar with the location near their home.[6] She took her SUV for service first in April 2016, and then again in August 2016, two days before her road trip.[7]

On the April 22, 2016 visit to Meineke, the mileage of the Ford Explorer was 190,903. She was to receive a free tire rotation.[8] She was told by Meineke's technicians that her tires would be checked as part of the service.[9], She understood "checking the tires" meant she would be informed if the tires needed replacement.[10] The Vehicle Inspection Report showed the tire tread depth was written as between 8-9.[11] Based on his alleged measurements, the technician determined that the tires were in good condition, marking the green boxes on the form.[12] Merely 4 months later, following the catastrophic wreck, plaintiff's Engineer and Tire Expert, Tom Vadnais, measured the tire reporting, "[T]read depths…ranged from 1/32 to 4.5/32

[4] Declaration of Janyce L. MacKenzie ("MacKenzie, J. Decl.") at ¶2; Declaration of Dennis MacKenzie (MacKenzie, D., Decl.") at ¶2.
[5] MacKenzie, J. Decl.at ¶3; MacKenzie, D., Decl. at ¶3.
[6] MacKenzie, D., Decl. at ¶5-8.
[7] Kahn Decl., Ex. 2 (April 2016 Vehicle Inspection Report); Ex. 3 (MCCC #4333 Invoice, August 2, 2016).
[8] *Id.*, Ex. 4 (April 2016 Invoice).
[9] *Id.*, Ex. 5 (Janyce MacKenzie's Deposition) at 54.
[10] *Id.* at 55.
[11] Kahn Decl., Ex. 2.
[12] *Id.*

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inch…indicat[ing] remarkably rapid treadwear."[13] More than likely, the 8-9 measurement was inaccurate.[14] A plain inference arises from this evidence that the measurement was falsified.

On August 2, 2016, the day before her move to Iowa began, Mrs. MacKenzie returned to Meineke for a complete vehicle inspection to "make sure it was safe."[15] The vehicle was to receive and Plaintiff was billed for both a 39-Point Inspection and a 23-Point Inspection.[16] The odometer reading at the time was 191,905, merely 1000 miles more than Meineke's April's inspection.[17] No Vehicle Inspection Report for this visit could be produced by Meineke.[18] Yet, Plaintiff was told that her tires would be checked as part of the service.[19] Afterwards, Plaintiff was not told about her tires' tread depth, age, if her tires had uneven wear, or if her tires showed signs of accelerated wear.[20]

C. Operations at Meineke 4333

Kyle Johnson was the manager of the Everett Meineke both times Plaintiff brought her car there. Mr. Johnson has no Automotive Service Excellence (ASE) certifications.[21] He testified that none of the technicians in his store were ASE certified. There were no requirements or qualifications by Meineke for hiring technicians.[22] Mr. Johnson worked for the Franchisee since 2009 and was not given any formal training to perform a 23-point

[13] Declaration of Tom Vadnais ("Vadnais Decl.") at ¶14.
[14] *Id.*
[15] Kahn Decl., Ex. 5 (Janyce MacKenzie Deposition) at 62.
[16] *Id.*, Ex. 3 (MCCC #4333 Invoice, August 2, 2016); *see* Ex. 5 at 64.
[17] *Id.*, Ex. 3.
[18] Meineke 4333 was allegedly unable to locate or produce the crucial Vehicle Inspection Report for this date of service, *see* Kahn Decl., Ex. 6 (Brett Harrison Deposition) at 167:23-168:5.
[19] *Id*., Ex. 5 (Janyce MacKenzie Deposition) at 35:20-36:9.
[20] *Id*. at 73:2-18.
[21] Kahn Decl., Ex. 7 (Kyle Johnson Deposition) 16.
[22] *Id.* at 20.

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inspection.[23] Mr. Johnson doesn't actually know what a 23-point or 35-point inspection entails.[24] Instead, he "just learned on the job."[25] Mr. Johnson knew and had seen advertising stating that Meineke would perform 23-point inspections on all vehicles.[26] No advertisements note that the inspections were optional.[27] However, he admitted that if the shop was too busy, a vehicle inspection might not be performed.[28]

Meineke knew this was occurring. Brett Harrison, the Franchise Business Consultant ("FBC") employed by Meineke, conducted an invoice audit of the Franchisee. He found many invoices lacked Vehicle Inspection Reports and no additional notes written relating to the service.[29] Because there was no Vehicle Inspection Report attached to these invoices, Corporate FBC Harrison assumed that a mandatory inspection was not done.[30]

Technicians at the Franchisee are expected to perform 23-point and 35-point vehicle inspections using the Vehicle Inspection Report provided by Meineke.[31] If asked what a 23-point or 35-point inspection was, Mr. Johnson testified that the technicians would point to the inspection form furnished by Meineke.[32]

Jeremy Crick, the technician who inspected Fi's SUV, confirmed he reviewed "[t]he sheet that tells you what you have to look at in the car," referring to the Vehicle Inspection

[23] Kahn Decl., Ex. 7 (Kyle Johnson Deposition) at 40-41.
[24] *Id.* at 134-135.
[25] *Id.* at 11.
[26] *Id.* at 135.
[27] *Id.* at 69-79.
[28] *Id.* at 69-70.
[29] Kahn Decl., Ex. 6 at 69:19-22.
[30] *Id.* at 70:7-20.
[31] Kahn Decl., Ex. 8 (Cruz Deposition) at 72.
[32] *Id.*, Ex. 7 (Johnson Deposition) at 134.

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Report.[33] The Report contained a section for the tire inspection, but was missing critical information such as the age of the tire. The age of the tire is simple to determine with training. Every tire has a serial number that reveals it to the properly trained eye as will be seen.[34]

D. Tire Safety Facts

According to the National Highway Traffic Safety Administration, "Some vehicle and tire manufacturers recommend replacing tires that are six to ten years old, regardless of treadwear."[35] Cooper Tire, the manufacturer of Plaintiff's tire, recommended a similar standard.

> [C]ooper recommends that all tires, including full-size spares, that are 10 or more years from their date of manufacture, be replaced with new tires. Tires 10 or more years old should be replaced even if the tires appear to be undamaged and have not reached their tread wear limits. Most tires will need replacement before 10 years due to service conditions. This may be necessary even if the tire has not yet reached its tread wear limits.[36]

The tire on Plaintiff's car was nearly 9 years old at the time of the crash.[37]

In its advertising, Meineke promoted similar tire safety practices on its website:

> If you don't regularly inspect and service your tires, you may experience a blowout, a flat or worse. Meineke has the right tires for your vehicle and offers services. You need to keep your tires in good working order. Our certified technicians will inspect your tires, perform a tire repair or replace them entirely.[38]

Meineke designed the inspection for tires: 1) Define the size and brand; 2) Inflate to proper pressure; 3) Mark with tire chalk; 4) Measure tread depth; 5) Present Findings: "Chalk

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[33] Kahn Decl., Ex. 9 (Crick Deposition) at 10.
[34] Vadnais Decl. at ¶5.
[35] Kahn Decl., Ex. 10 (NHTSA "Tires").
[36] *Id.*, Ex. 11 ("Tire Service Life | Cooper Tire").
[37] Vadnais Decl. at ¶7 (The tire was eight years and 9.5 months old when it failed.)
[38] Kahn Decl., Ex. 12 (Meineke Advertisement); Meineke had the Franchisee display an advertisement that noted that a tire must be replaced when the tread depth is below 2/32nds. *Id.*, Ex.13 (Cooper Tires Advertisement), Ex. 8 (Brandon Cruz Deposition) at 229.

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Talk."[39] These requirements were integrated into all Meineke shop training. It provided a mandatory Meineke Vehicle Inspection Report, which included a box to input the size of the tire, the PSI, the tread depth, and also boxes for the "Chalk Areas" where the technician could indicate any visible damage to the tire.[40] Both the Meineke Inspection Procedure and the Meineke Vehicle Inspection Report lack any requirement for noting the actual serial number of the tire on the form which would have, by design, mandated that each tire *actually* be inspected to obtain the serial number. Both are devoid, too, of any language requiring notation of a tire's age. Failing to do so is a material issue to be determined by the jury.

E. Meineke's Control over the Franchisee

1. The Franchisee failed to represent itself as an independently owned shop to the public. Nothing was required to inform customers it was a Meineke franchisee, instead of a Meineke shop.[41] The Franchisee did not have to post any signs identifying the store as independently owned and operated.[42]

2. Meineke furnished its franchisees with the "required steps" to emblazon its store with "Marketing the Meineke Way.[43]

3. Although national marketing campaigns by Meineke might reference "participating Meinekes," there was no indication if "participating Meinekes" were independently owned.[44]

[39] Kahn Decl., Ex. 14 (Meineke Inspection Procedure).
[40] *Id.*, Ex. 2 (April 2016 Vehicle Inspection Report).
[41] *Id.*, Ex. 7 (Johnson Deposition) at 118.
[42] *Id.* at 119.
[43] Kahn Decl., Ex. 15 (Marketing the Meineke Way).
[44] *Id.*, Ex. 6 (Harrison Deposition) at 172.

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4. All Meineke shops, regardless of who owned and operated them, used the same 23-point inspection and the same Vehicle Inspection Report created by Meineke.[45]

5. Meineke instructs its franchisees to conduct business "The Meineke Way":

> At Meineke our business is based on total car care. That means we provide our customers with the one stop solution to all of their car care needs. Our customers should know to expect the same great service and support from every single Meineke. That means a clean, comfortable environment, a friendly, professional staff, ***a complete vehicle inspection with information to help them make smart decisions***, and a center fully equipped to provide all the products and services in the Meineke menu. All together we call that The Meineke Way…All Meineke team members should understand that we always give our customers a full report card every time they walk in.[46]

6. Mr. Johnson interpreted the phrase "all Meineke team members" to include all Meineke stores nationwide, including franchise stores.[47]

> Q. And have you been told that, that the Meineke stores all together are one team?
> A. I haven't been told that, but we should all know that.[48]

7. Meineke often referred to all Meineke stores collectively, without distinguishing between Meineke-owned shops and franchise shops. When Corporate FBC Harrison was made aware that MCCC Group stores, including the Franchisee, had employees doing side work during company time, FBC Harrison emailed reminding employees that:

> **We all work for Team Meineke, One Team, One Dream Meineke!** We work for Meineke – the name that is posted on over 900 stores across the country, A name that tens of thousands of customers know and trust. WE CANNOT BLEMISH THAT NAME.[49]

[45] Kahn Decl., Ex.7 (Johnson Deposition) at 120.
[46] *Id.*, Ex.16 (The Meineke Way) (emphasis added).
[47] *Id.*, Ex. 7 at 108.
[48] *Id.* at 118.
[49] Kahn Decl., Ex.17 (Harrison Email, 6/12/18) (emphasis in original in part; added in part).

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In his testimony, Harrison further clarified, stating, "we work under the name Meineke, so, yeah, I mean, we're all part of Meineke. We're Meineke.[50]

8. Meineke's FBCs like Mr. Harrison, worked directly with franchise stores to perform inspection training. Meineke retained the right to conduct periodic inspections of the Franchisee "to evaluate (their) Center's operations and compliance with the System when and as frequently as [Meineke] deem[s] appropriate. Franchisees are required to follow the Meineke system."[51] The FBC reports interactions with the individual stores back to Meineke.[52]

9. In 2016, Corporate FBC Brett Harrison visited the Franchisee two to three times to provide phone training skills to Franchisee employees.[53] FBC Harrison also audited the stores to make sure that inspections were being done.[54] This practice was confirmed by a Franchisee technician, who testified that someone from Meineke could step in to provide training and to ensure that the inspections were being performed consistently.[55]

10. On April 11, 2016, Meineke sent a "Weekly Operations Update" to the Franchisee explaining:

> I'll be working with everyone this quarter to get us used to providing customers with a Customer Packet, but also to ensure we are keeping a duplicate Customer Packet on hand as part of our paperwork procedures! The Customer Packet should include three things – Copy of the Invoice, Copy of the Meineke Inspection Sheet, and a Copy of a Factory Maintenance Schedule for the

[50] Kahn Decl., Ex. 6 (Harrison Deposition) at 170.
[51] Declaration of Noah Pollack in Support of Defendant Meineke Car Care Centers, LLC's Motion for Summary Judgment, para 2 (Kahn Decl., Ex. 26 for the court's convenience)
[52] *Id.*, Ex. 6 (Harrison Deposition) at 52:5-8.
[53] *Id.* at 65-66.
[54] *Id.* at 39-40.
[55] Kahn Decl., Ex.18 (Hallgren Deposition) at 104.

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> customer's vehicle and current mileage. Every customer should get a complete Customer Packet…when I come to your shop, I can review Customer Packets.[56]

This directly contradicts Meineke's moving papers stating it does not inspect how the Franchisee keeps and maintains its records and does not monitor or evaluate the performance of any of the Franchisee's employees. Meineke's Brief at p. 7.

11. Corporate FBCs also "help franchisees maintain brand standards" such as how the center looks, how the employees are dressed, how they represent the company when interacting with customers, that the signage is correct, and there are no customer complaints.[57] The Corporate FBC was tasked with upholding the Franchise Trade Agreement.[58]

12. Meineke has a warranty program set forth on the back of invoices printed out at franchise locations. This warranty program applies nationwide to all locations. If a customer came into the Franchisee but had service done at a different Meineke shop, the Franchisee would still honor that other shop's warranty.[59]

13. Mr. Johnson testified about his experience with Meineke customer service:

> Q. I'm wondering if you ever understood that Meineke (National) reserves the right to step in and resolve customer complaints if the individual store doesn't resolve them to the customer's satisfaction?
>
> A. Yes, they will try to contact them and - and solve the issue. They've called us before about issues.[60]

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[56] Kahn Decl., Ex. 19 (Harrison Email, 4/11/16) (emphasis in original).
[57] *Id.*, Ex. 20 (Price Deposition) at 13, 21.
[58] *Id.*, Ex. 6 (Harrison Deposition) at 33.
[59] *Id.*, Ex. 7 at 126.
[60] *Id.* at 72-73.

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14. Meineke represents it has certified technicians working on customers' vehicles, but they do not specify if these certified technicians work at franchise locations as well. On March 30, 2016, Meineke claimed on its website that "[o]ur certified technicians will inspect your tires, perform a tire repair or replace them entirely."[61] Meineke provided phone training to the Franchisee wherein service advisors were told to tell customers that certified technicians would inspect their vehicles.[62]

15. FBC Harrison would review the script with Franchisee employees, which stated "[w]e need to have my ASE certified technician look it over…"[63] If a particular franchisee, like the Everett franchisee here, had no ASE certified technicians working at their shop, FBC Harrison would instruct the employees to falsely say "certified technician."[64] He testified:

> Q. Well, that's what, I guess, I'm asking you is what certifications there were besides ASE certification for automobile service. So a phone service certification wouldn't apply to a technician who was actually -
>
> A. Right.
>
> Q. - - working on the car, right?
>
> A. A certification come from anywhere, and I guess I wouldn't - - many of these guys would have some sort of certification from somewhere that they've done something. Maybe, maybe not. You know, again, that was one of those things where I coached on the best discretion. If, you know, as - - as current, you know, the Washington state emissions certified, they're a certified technician to work on a car. So, they could - - they

[61] Kahn Decl., Ex. 20 (Price Deposition) at 81-84.
[62] *Id.*, Ex. 6 at 106.
[63] *Id.*, Ex. 21 (Meineke Telephone Procedures).
[64] *Id.*, Ex. 6 at 107.

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could use the name - - the word "certified technician.

> Q. So if they're emissions certified would you have them - - you would have the franchisee's employees on the phone say that a certified technician will inspect the entire vehicle?
> A. Right. Well, you could - - you could say that, or - - I guess let me, I guess, rephrase that. So certified means - - it's not saying that you're - - you're sanctioned by a facility or institution that you're certified. Someone could certify themselves. So you could say that as - - as for a marketing term that these - - that someone who's been working in the industry for so long that they could be self-certified.[65]

16. After the phone training, FBC Harrison reiterated to shop employees to represent to customers that its technicians were certified.[66]

17. Meineke furnishes a procedure to franchisees showing the required steps when hiring new employees.[67] Franchisees are directed to "use the 'Skills and Functions Tool' on dealer access to understand all of the skills that will be needed to run your center successfully."[68] However, Meineke's manager did not know what those 'Skills and Functions' were.[69] When franchisees needed assistance with hiring new employees, FBC Harrison would help them by posting ads on ZipRecruiter or Indeed to find employees for the Franchisee store and would forward any responses he received to the individual store manager.[70]

F. Meineke and the Franchisee Agreement

Meineke and the Franchisee signed a contractual agreement wherein the Franchisee

[65] Kahn Decl., Ex. 6 (Harrison Deposition) at 107-108.
[66] *Id.*, Ex. 22 (Harrison Email, 2/3/16).
[67] *Id.*, Ex. 23 (Hiring the Meineke Way).
[68] *Id*. at MEINEKE 000034.
[69] Kahn Decl., Ex. 7 (Johnson Deposition) at 22.
[70] *Id.*, Ex. 6 (Harrison Deposition) at 180.

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agreed to pay Meineke royalties and fees in exchange for the right to sell products and services using Meineke's name and branding. In return for substantial royalties and franchise fees, Meineke provides its franchisees with its trade secrets, know-how, branding, goodwill, processes, and forms. [71] The Franchisee is given an operations manual "containing our mandatory and suggested standards, specifications and operating procedures relating to the development and operation of Meineke Car Care Centers" which Meineke developed and mandated for all of its stores.[72] The franchise agreement also empowered Meineke to enforce and manage its "suggested" System standards.[73] The "System" is defined in the agreement as:

> The business methods, **systems, designs** and arrangements for developing and operating Meineke Car Care Centers that include the Marks; the Confidential Information; standards and specifications for equipment; **service standards;** training and assistance; advertising and promotional programs; and certain operations and business standards and policies.[74]

Additional requirements included attending a training program developed by Meineke before opening or operating a franchise, undertaking in "on-going guidance" and "periodic visits" by Meineke, and auditing of the Franchisee by Meineke.[75] Article 8 covers Marketing and Advertising and sets forth Meineke's "sole authority and discretion" to determine, conduct, and administer all national, regional, local, and other marketing, advertising, promotions, market research, and other related activities.[76]

[71] Kahn Decl., Ex. 24 (Meineke Franchise Agreement).
[72] *Id.* at §5.4.
[73] *Id.* at §1.2.
[74] *Id.* at §1.3 (29) (emphasis added).
[75] *Id.*, at §5.1, 5.2, 5.3, and 9.6. *See* Kahn Decl., Ex. 27 (Meineke University Training).
[76] *See Id.* at Art. VIII.

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FBC Harrison's primary role was to see that all franchise owners followed their agreement with Meineke.[77] This included ensuring that the Franchisee followed the "300 percent rule":

> So the role I was – I mean, what I – what I did was I go into these stores and I would make sure. . . whether they're doing everything for the customer using – we had an inspection form, whether they're using that inspection form and presenting all the findings. There was what's called 300 percent rule. 100 percent of the cars got 100 percent inspected and 100 percent of those inspections were presented to the customer. That was – that was a coined phrase that Meineke used called the 300 percent rule. So, I was – would help in – the franchisees in executing that program.[78]

If FBC Harrison found any drastic violation of Meineke's policies and procedures, he would inform the owner of the business and his superiors at Meineke.[79] Meineke could then take legal action against the franchisee in violation of the franchise agreement.[80]

III. ISSUES PRESENTED

1. Whether triable issues of fact exist for the jury to determine the designs of Meineke's tire inspection training program, procedures, and/or its Vehicle Inspection form were negligently defective?
2. Whether triable issues of fact exist for the jury to determine Meineke is responsible for the harm caused by the franchisee based on its control over the Franchisee's operations?
3. Whether triable issues of fact exist for the jury to determine Meineke is responsible for the harm caused by the franchisee based on apparent or ostensible agency?

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[77] Kahn Decl., Ex. 6 at 33:5-8.
[78] *Id.* at 36:7 – 38:1.
[79] *Id.*at 38:22-39:7, 40:8-14.
[80] *Id.*, at 40:21-23.

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IV. EVIDENCE RELIED UPON

The Declarations of Lawrence M. Kahn, Janyce L. MacKenzie, Dennis Mackenzie and Tom Vadnais, and attached exhibits, as well as the files and records in this matter.

V. LEGAL ANALYSIS AND ARGUMENT

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the court finds there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted and all reasonable inferences from the fact in the light most favorable to the non-moving party. *Wilson v. Steinbach, supra.* The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* The Washington Supreme Court is steadfast that "the summary judgment procedure should not be used to try an issue of fact." *Thoma v. C.J. Montag & Sons, Inc*., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); RCW 4.44.090. Article 1, § 21 of the Washington State Constitution provides that "[t]he right of trial by jury shall remain inviolate." *Sofie v. Fibreboard Corp*., 112 Wn.2d 636, 644, 771 P.2d 711 (1989).

The burden is on the moving party to demonstrate there is no genuine issue of material fact and that, as a matter of law, summary judgment is proper. *See Atherton Condo. Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving party is held to a strict standard. Any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id*. All facts submitted, and reasonable inferences

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therefrom, are considered in the light most favorable to the nonmoving party. *Id*. An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

B. MEINEKE IS LIABLE FOR DESIGN DEFECTS IN TRAINING, MATERIALS CRITICALLY OMITTING AN EVALUATION OF A TIRE'S AGE, AND IN MAKING CERTAIN A TIRE INSPECTION IS ACTUALLY PERFORMED.

Meineke is a franchisor. Part of what it must do is supervise franchisees, but that is not where it makes its money. It makes its money selling turn-key businesses (like Franchisee) to enterprising people in Everett, Washington and elsewhere. In return for royalties and franchise fees, Meineke provides its trade secrets, know-how, branding, goodwill, processes, and forms.

Under RCW 7.72.010(3), a "product" is "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts and produced for introduction into trade or commerce." The tire inspection process and form Meineke provides its franchisees is: (1) a trade secret, not subject to disclosure; (2) a matter of life or death, since a bad inspection or no inspection leads to serious injury as it did here; and, (3) was, at least in part, what the Franchisee bought with its royalty and franchise fee dollars.

The inspection process and forms have intrinsic value. The franchisor, providing both to all its franchisees in exchange for money are also, by definition, "trade" under the statute. Consequently, the inspection processes and forms are "products" – one of many such products sold by Meineke to the Franchisee.

It is true plaintiff was not buying these products specifically, but the service these products require. RCW 7.72.010(5) clarifies that this does not matter. A "claimant" is "any person or

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entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller." *Id*. The only issue is whether the franchisor's products - a deficient process and a deficient form for use in the franchisee's business - proximately caused harm. The evidence and inferences arising therefrom supports proximate cause as a triable issue of fact a jury should decide.

Technicians at the Franchisee are expected to perform 23-point and 35-point vehicle inspections using the Vehicle Inspection Report provided by Meineke.[81] If asked what a 23-point or 35-point inspection was, the technicians would point to the inspection form furnished by Meineke.[82] The Inspection Report contains a section for tires, but there is no entry space for each tire's serial number. It critically omits any determination of a tire's age. And the evidence supports this form is too easily falsified without even looking at a tire because it does not require the actual serial number of each tire be entered. The Vehicle Inspection Report's "Tires" section lacks any mention or designated space to input a tire's age.[83]

[81] Kahn Decl., Ex. 8 (Cruz Deposition) at 72.
[82] *Id.*, Ex. 7 (Johnson Deposition) at 134.
[83] *Id.*, Ex. 2 ("April 2016 Vehicle Inspection Report").

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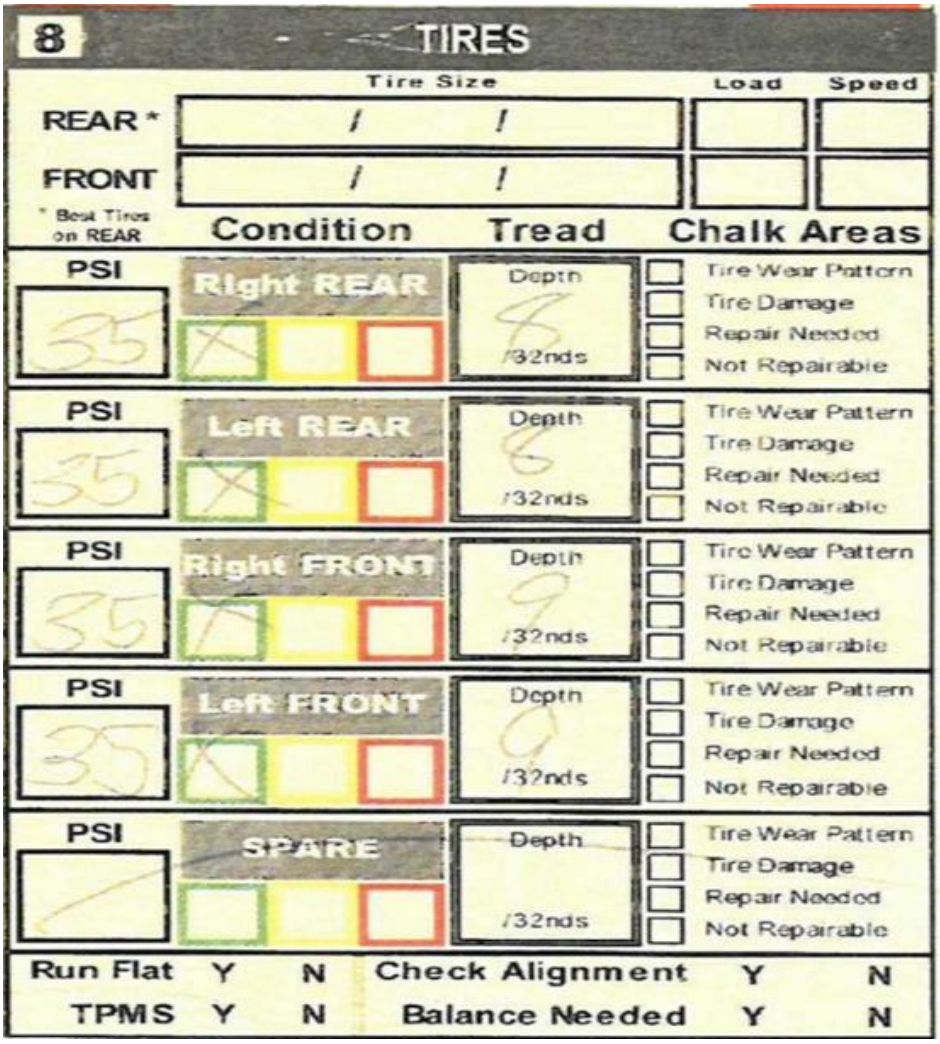

A poorly trained technician would not be prompted by following this form to check the tires' age. A well-trained technician would not have a place to write down the serial number or age of the tires. Meineke does not require or expect its technicians to measure the age of tires, nor implicitly does it value the inherent danger of a customer driving away from one of its shops on old tires. This blatant disregard for customer safety breaches Meineke's duty to Plaintiff and to all customers obtaining tire inspections.

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The product liability statute contains the elements of a design defect claim, which requires proof of "(1) a manufacturer's product (2) not reasonably safe as designed (3) causing harm to the plaintiff." *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000) (citing RCW 7.72.030(1)). Proof that a product is not reasonably safe can be shown by a consumer expectation test. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326-27, 971 P.2d 500 (1999) (citing *Falk v. Keene Corp.*, 113 Wn.2d 645, 653-54, 782 P.2d 974 (1989)). That test requires evidence that "the product was 'unsafe to an extent beyond that which would be contemplated by the ordinary consumer.'" *Id.* at 327 (quoting *Falk*, 113 Wn.2d at 654; RCW 7.72.030(3)).

Jeremy Crick, who was Meineke's technician during the April 2016 visit, did not check the age of tires during the alleged tire inspections because he was told it was something he didn't have to worry about.[84] He understood that it was a requirement for every car to get a 23-point inspection, which included a tire inspection, but he did not check the age of tires as part of the alleged 23-point inspection.[85]

"Washington 'recognizes two elements to proximate cause: [c]ause in fact and legal causation.'" *Lowman*, 178 Wn.2d at 169 (quoting *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). "Cause in fact refers to the 'but for' consequences of an act – the physical connection between an act and an injury." *Hartley*, 103 Wn.2d at 778. Here, Plaintiff's delaminated tire had a four-digit age code of 4607, meaning it was manufactured during the 46th week of 2007, and was approximately nine years old at the time of the incident in 2016.[86]

[84] Kahn Decl., Ex. 9 (Crick Deposition) at 33:1-9.
[85] *Id.* at 40:18-41:16.
[86] Vadnais Decl. at ¶6.

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The cause in fact of Plaintiff's injuries was the physical act, or blatant omission, created by Meineke's failure to include this information in its training and forms designed to be used by Franchisee employees conducting the alleged tire inspection on Plaintiff's vehicle, *twice*, and *twice* failing to recognize that Plaintiff's tires were about nine years old. [87] On both occasions, they falsely told her the tires were fine.

An inference arises whether there was an inspection or whether the numbers were falsified by the Meineke technician. Merely 4 months after the April visit and following the catastrophic wreck, as measured by plaintiff's Tire Expert, Tom Vadnais, "Tread depths ranged from 1/32 to 4.5/32 inch…indicat[ing] remarkably rapid treadwear." [88] Had the tech been required to fill out the serial number of the tire indicating its age, the process would have assured that he at least looked at the tires which by all expert accounts, were actually worn well below the tire tread depth on the form.

Meineke knew or should have known that driving on nine-year-old tires is dangerous and there was no adequate accountability for these inspections. Its tire inspection system and forms fail to inspect and detect this hazardous condition. FBC Harrison conducted an invoice audit of the Franchisee before this wreck and found many invoices lacked Vehicle Inspection Reports attached and no additional notes written relating to the service.[89] Because there was no Vehicle Inspection Report attached to these invoices, Harrison assumed that a mandatory inspection was not done.[90] Where was the oversight? Where was the safety system that worked

[87] Vadnais Decl. at ¶7 (The tire was eight years and 9.5 months old when it failed.).
[88] *Id.* at ¶14.
[89] Kahn Decl.,Ex. 6 (Harrison Deposition) at 69:19-22.
[90] *Id.* at 70:7-20.

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despite Meineke's Corporate FBC oversight? All these material issues of fact should be decided by the jury.

C. MEINEKE CONTROLLED AND DIRECTED THE MANNER AND MEANS FOR THE FRANCHISEE'S BUSINESS

RCW § 4.22.070 (1) (a) states:

> "A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party."

Whether a principal-agent relationship exists is generally a question of fact. *O'brien v. Hafer,* 122 Wn. App. 279, 284, 93 P.3d 930 (2004). The determination of an agency relationship is not controlled by the manner in which the parties contractually describe their relationship. *See Matsumura v. Eilert,* 74 Wn.2d 362, 368, 444 P.2d 806 (1968); *Busk v. Hoard,* 65 Wn.2d 126, 134, 396 P.2d 171 (1964). An agency relationship may arise without an express understanding between the principal and agent that it be created. It does not depend upon an express undertaking between them that the relationship exists. *Petersen v. Turnbull,* 68 Wn.2d 231, 412 P.2d 349 (1966). If the parties by their conduct have created an agency in fact, then it exists in law. *Matsumura* at 368. Agency can be implied even if the parties execute contracts expressly disavowing the creation of an agency relationship. *See Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424 (1982). *Rho Co. v. Dep't of Revenue*, 113 Wash. 2d 561, 570-71, 782 P.2d 986, 991 (1989). An express disclaimer of an agency relationship is not determinative. Courts must look at the practices of the parties in determining operating control. "It is the facts and circumstances of the case, not just the words of the parties' agreement, that establishes an agency relationship" *Matter of Carolin Paxson Advertising, Inc.*, 938 F.2d 595, 598 (5th Cir.

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1991); *Matsumura* at 368. Even though the Franchisee was independently owned here, it is an issue of fact for the jury to determine whether it was independently controlled. The critical inquiry is the extent of control retained in the contract and that was exercised or could be exercised by the principal over the agent:

> When we distill the principles evident in our case law, ***the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed***, not simply whether there is an actual exercise of control over the manner in which the work is performed.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 121, 52 P.3d 472 (2002) (emphasis added).

Franchisor liability will arise where the franchisor retains sufficient control over the operation of the franchisee. *Folsom v. Burger King*, 135 Wn.2d 658 (1998). Here, franchisor liability rests on whether Meineke had sufficient control over the franchisee with respect to the part of the business that resulted in Plaintiff's injuries – i.e., the inspection procedure (or lack thereof), and notice to customers regarding the nature of the inspections. Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 432 (2005).

Meineke misstates its role by claiming that it does not control or place any requirements on the actual performance of the services that the franchisees offer.[91] The Franchisee was bound by its Franchise Agreement to adhere to "The Meineke Way," which specified a system, procedure, and manner of conducting business. It was expressly FBC Harrison's role to visit and audit franchises to make certain that they were fully complying with the franchise

[91] Kahn Decl., Ex. 20 (Price Deposition) at 63:17-64:3.

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agreement.[92] This included following their "300% rule", and thus, the Franchisee was required by Meineke to *actually perform inspection services* on 100% of vehicles.[93] If the Franchisee did not comply with this rule, FBC Harrison had a duty inform his Meineke superiors of the breach, who had the power to initiate action against the Franchisee.[94]

Authority in Washington State is sparse regarding franchisor liability for the negligence of a franchisee – with the moving party here only citing one readily distinguishable case. *Greil v. Travelodge Intern., Inc.* is a case directly on point. In *Greil*, the plaintiff was a guest at a franchisee hotel. When a robber entered his room, plaintiff jumped from a second story window to a sidewalk below to escape and suffered personal injuries. 186 Ill. App. 3d 1061, 1063 (1989). The Plaintiff brought suit against the franchisee hotel and the franchisor to recover for his injuries. The franchisor argued that it bore no fault for the negligence of the franchisee. The court noted that the franchisee paid a fee and agreed to operate the hotel in a "clean, *safe* and orderly manner." *Id*. at 1067 (emphasis in original). The franchisee further agreed to follow the standards and procedures set forth in the operations manual provided by the franchisor. This was all designed to "insure that [franchisee's] operations under the [franchisor's] mark would 'maintain the highest standards of hospitality.'" *Id.* The *Greil* court noted:

> In the franchise agreement, terms dictating that the facility be built and maintained according to specification sand requiring certain operational procedures are indicia of control as well as the requirement that the franchisee permit regular inspections by franchisor's inspectors to ensure compliance with procedures. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975). Also, terms providing that substantial violations of any of the covenants of the franchise agreement give the franchisor the right to cancel the license has been held to be

[92] Kahn Decl., Ex. 6 (Harrison Deposition) at 33:5-8.
[93] *Id.* at 36:7-38:1.
[94] *Id.*at 40:21-23.

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> indicative of control. *Id.* at 175. Other examples of control include minimum price fixing, approval by franchisor of all advertising, profit sharing and book auditing.

Id. at 1068 (internal citations omitted). With these factors in mind, the *Greil* court found genuine issues of material fact and reversed the trial court's award of summary judgment. *Id.* at 1069. Nearly every factor identified in *Greil* indicating control is present here: Meineke required certain operational procedures[95], required the Franchisee to permit regular inspections by it,[96] retained the authority to approve advertising,[97] called for royalty payments, provided for book auditing, mandated insurance, and provided for indemnification[98].

Folsom is far from the blanket prohibition against imposing liability on a franchisor for the acts and omissions of a franchisee as Meineke suggests. *Folsom* and the line of cases it relies upon markedly differ from the facts here. *Folsom* involved a franchisee's employees murdered at the franchise location because of inadequate security measures. Plaintiffs' theory of negligence was premised upon the franchisor's duty of care for the franchisee's employees regarding security. This is where the "extent of control was the critical inquiry" because the question of liability related to internal operations (i.e. security) at the franchise location. *Id.* at 671. It *did not* involve enforcing and maintaining the uniformity of the franchisor's system which caused the injury to customers.

Examining the daily operation of the franchised restaurant, the *Folsom* court specifically looked at the scope and extent of Burger King's retained control *regarding security*. Because

[95] Kahn Decl., Ex.16 (The Meineke Way).
[96] *Id.*, Ex. 26.
[97] *Id.*, Ex. 15 (Marketing the Meineke Way).
[98] *Id.*, Ex. 24 (Meineke Franchise Agreement).

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Burger King had not retained control over security on the premises or the property itself, it could not be held to a duty of care arising from the security in or around the franchise location. The court in Burger King specifically stated that "Burger King's authority over the franchise was limited to enforcing and maintaining the uniformity of the Burger King system." *Id.* at 673.

In another Burger King case, the court analyzed the same principles with different results. In *Bartholomew v. Burger King Corp.*, the plaintiff sustained injuries from eating a Triple Whopper sandwich imbedded with two needle-shaped metal objects at a Burger King franchise. 15 F. Supp. 3d 1043 (D. Haw. 2014). In contrast to *Folsom*, the court found that "There is clearly an issue of material fact as to whether Burger King retained the requisite control over the Triple Whopper consumed by Bartholomew." *Id.* at 1050. The *Bartholomew* court relied on *Miller v. McDonald's Corp*, yet another fast food case, where the plaintiff was injured when she bit into a sapphire imbedded in her Big Mac. *Miller* reversed summary judgment because there were sufficient facts for a jury to find that the franchisor had "the right to control the way in which [the franchisee] performed at least food handling and preparation." 945 P.2d 1107, 1108 (Or. Ct. App. 1997). The court held that when a franchisor details the specific procedures which employees must follow regarding "food handling and preparation," there may be sufficient control by the franchisor to establish respondeat superior liability for injuries resulting from that food. *Id.*

Here, Meineke directed the exact manner, nature, and extent of the inspections to be performed. The Franchisee had no choice but to use Meineke's processes and forms in every

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single vehicle and tire inspection.[99] Training was provided by Meineke and it explained each step a technician must follow to complete the tire inspection.[100] Moreover, if the Franchisee failed or refused to use the Meineke's Vehicle Inspection Report, it would be in direct breach of the Franchise Agreement.[101]

Plaintiff's injury occurred due to a product of the "Meineke System" that Meineke controlled raising a material issue of fact for a jury. Like in *Bartholomew* and *Miller*, Meineke not only controlled "all the products and services in the Meineke menu," they also controlled *the way* those products were served to clients via The Meineke Way.[102] Meineke controlled the instrumentalities of Plaintiff's injury. It failed by its design and execution to enforce the operations manual requiring tire inspections in every vehicle inspection at the Franchisee location.

There is an issue of material fact for the jury whether Meineke retained the requisite control over the tire inspection system and execution consumed by Mrs. MacKenzie. The injury occurred due to a product of the "Meineke System" that Meineke controlled and for which it should be accountable.

D. APPARENT OR OSTENSIBLE AGENCY

Plaintiff justifiably believed that the quality of the service paid for was backed by the national Meineke brand. Would any reasonable person see, among a sea of yellow posters,

[99] Kahn Decl., Ex. 6 (Harrison Deposition) at 36:7-38:1.
[100] *Id.*, Ex. 14 (Meineke Inspection Procedure).
[101] *Id.*, Ex. 6 at 40:21-23.
[102] *Id.*, Ex.16 (The Meineke Way).

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signs, forms, and advertisements, the fine print saying: "This Meineke is independently owned and operated"? If reasonable minds may differ, it is a jury question.

Under the principle of apparent authority, an agent binds a principal if objective manifestations of the principal "cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal" and such belief is objectively reasonable. *Mohr v. Grantham*, 172 Wn. 2d 944 (2011) (quoting *King v. Riveland*, 125 Wn. 2d 500, 507 (1994). Whether apparent authority exists is normally a question for the trier of fact. *D.L.S. v. Maybin*, 130 Wn. App. 94, 99 (2005); *Hansen v Horn Rapids O.R.V. Park*, 85 Wn. App. 424, 932 P.2d 724 (1997).

Apparent Agency has three basic requirements: the actions of the putative principal must lead a reasonable person to conclude the actors are employees or agents; the plaintiff must believe they are agents; and the plaintiff must rely upon their care or skill, to her detriment. *See King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994); *Greene v. Rothschild*, 60 Wn.2d 508, 513-14, 374 P.2d 566 (1962) (quoting RESTATEMENT, supra), overruled on other grounds by *Greene v. Rothschild*, 68 Wn.2d 1, 68 Wn.2d 5, 402 P.2d 356 (1965); *Hansen v Horn Rapids O.R.V. Park*, 85 Wn. App. 424, 932 P.2d 724 (1997).

In *Greene*, the Yellow Cab taxi company made representations about its safety and service and allowed its colors, markings, and name to remain on cabs sold to and used by independent owners, without notice that it no longer owned the cabs. 60 Wn. 2d 508 (1966). Meineke cites *Greene* for argument that apparent authority can only be inferred by the acts of the principal: this is undisputed. Meineke required its franchisees to emblazon its stores with "Marketing the Meineke Way." Like in *Greene*, Meineke made representations about its

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complimentary services in its posters and advertisements, then not only allowed, but *required* that Meineke's branding yellow color and logo be used by independent franchisees.[103]

The principal's manifestations must have two effects: "First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable." *Hansen v. Horn Rapids O.R.V. Park*, 85 Wn. App. 424, 430, 932 P.2d 724, 727-28 (1997) citing *King*, 125 Wn.2d 500, 507 (1994). In *Hansen*, a Honda dealership advertised a motocross race using its name, telephone number, and logo, and answered calls from customers relating to the race; the court held that a question of fact existed as to whether the race promoter was its apparent agent. Here, the franchisees were not required to inform customers that they were independent.[104] In fact, the Franchisee here did not post any signs identifying the store as independently owned and operated.[105]

Here, all three elements of ostensible agency are satisfied. First, Meineke's actions had Plaintiff believe the Franchisee was Meineke or acting as an agent of Meineke. The Franchisee was required by Meineke to display the correct signage, maintain a clean appearance in their workspace, their technicians had to wear a particular uniform, and the employees had to answer the phone and interact with the customers in the proper "Meineke" way.[106] These policies were drafted with the intent to consistently maintain recognizable brand standards.[107] Reasonable

[103] Kahn Decl., Ex. 14 (Marketing the Meineke Way).
[104] *Id.*, Ex. 7 (Johnson Deposition) at 118.
[105] *Id*. at 119.
[106] Kahn Decl., Ex. 20 (Price Deposition) at 47:12-23.
[107] *See Id* at 13:3-7.

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customers like Plaintiff had no way of distinguishing between Meineke and the Franchisee with such uniform branding practices across the board.

Second, Plaintiff believed the Franchisee's employees were Meineke employees. Plaintiff knew of Meineke from seeing their advertisements on television, receiving flyers and mailings through the newspaper, and by seeing them online.[108] When she went inside the shop for service, there was no signage stating the Franchisee was independent of Meineke, nor was she told the same by any employee there.[109] With no indication to think otherwise, and when surrounded by advertisements, posters, and invoices emblazoned with the Meineke logo, it is reasonable for a person to think this shop was indeed a Meineke chain store and that Meineke would stand behind its work.

Finally, Plaintiff expressly relied upon the perceived quality of work through the Franchisee's use of the Meineke brand. Dennis wanted his wife to get her SUV serviced at the Meineke location because it was a national company and because he trusted the national reputation of the Meineke brand.[110] Plaintiff decided she trusted the Meineke brand and expected to receive the same high quality of work as she would receive at any other Meineke location.[111] Unfortunately, Plaintiff and her husband's trust was ultimately misplaced.[112] The question of apparent authority is a factual determination to be made by the trier of fact, unless there is no evidence presented to create that question of fact. *Barnes v. Treece*, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976). The evidence here is abundant.

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[108] MacKenzie, J., Decl. at ¶2.
[109] *Id.* at ¶4, 7.
[110] MacKenzie, D., Decl. at ¶8.
[111] MacKenzie, J., Decl. at ¶6,8.
[112] *Id.* at ¶8; MacKenzie, D. Decl. at ¶9.

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VI. CONCLUSION

For the foregoing reasons, Defendant Meineke Car Care Centers, LLC's Second Motion for Summary Judgment should be DENIED.

I certify that this brief contains less than 8400 words including headnotes and footnotes, except for the caption and the signature block, in accordance with King County Local Rule 56(c)(3).

RESPECTFULLY SUBMITTED this 4th day of May 2020.

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The Honorable Catherine Shaffer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

vs.

COOPER TIRE & RUBBER COMPANY, a Delaware Corporation; TBC CORPORATION, a Delaware Corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina Corporation; MCCC 4333, INC. d/b/a/ MEINEKE CAR CARE CENTER #4333, a Washington Corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS® AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049, a New York corporation

Defendants.

ANGELA KELLY,

Cross-Claimant,

vs.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

Cause No. 18-2-17249-7 SEA

DECLARATION OF THOMAS H. VADNAIS, P.E. IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT MEINEKE CAR CENTERS, LLC'S MOTION FOR SUMMARY JUDGMENT

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I, Thomas H. Vadnais, declare as follows:

1. I am over the age of eighteen years old. I make this statement upon my personal knowledge. I am a named expert witness for Mrs. MacKenzie in this matter. All of my opinions set forth herein are stated on a more likely than not reasonable probability.
2. Since 1981, I have been a Consulting engineer with Vadnais Engineering, Vadnais & Wood, and SEA Limited, on behalf of tire and vehicle dealers, tire service providers, truck lines, manufacturers, state and local municipalities, insurance companies, individuals, other experts, and law firms in the following areas: Tire failure analysis, maintenance, and applications including medium/heavy truck, light truck, and passenger tires; Professional photography including product and product liability; testing and test setup; ambient and detail night photography; macro and close-up; incident/accident area or facility; vehicle documentation; photo analysis; image processing; photographic exhibit preparation; and, photography and image processing instruction; Commercial vehicle and passenger car accident reconstruction, including human factors; Crash, skid, brake, and vehicle dynamics testing for cases or for research. I work as a consultant in the areas of tire applications and failures; photography, including nighttime, product liability, and other non-biological forensic photography; and commercial vehicle and passenger car collision reconstruction. (Attached hereto as Exhibit 1 is a true and correct copy of my Updated CV.)
3. I have on numerous occasions been qualified to testify in both state and federal courts across this nation.
4. The subject left rear tire was a 235/75R15 105S M+S Alpine Wild Country Radial XTX Sport. While the right rear tire also carried the M+S (all season) designation, the left rear

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tire had an additional Alpine (three-peak-mountain snowflake, or 3PMSF) symbol indicating it was a winter or snow tire, not just an all season tire.

5. Every tire has a Tire Identification Number (TIN) beginning with "DOT" branded on one sidewall.
6. The tire at issue's TIN was DOT 3D1TT5C4607 showing it was manufactured at the (now defunct) Cooper Tire & Rubber Company plant in Albany, GA, during the 46th week (November 12 through November 18) of 2007.
7. The tire was eight years and 9 ½ months old when it failed.
8. The Sears Auto Center inspection report from January 22, 2016 showed a line running down the red column for tread depth indicating all tires had 2/32 inch tread depth or less. Washington State Revised Code of Washington RCW 46.37.425 forbids use of unsafe tires including tires that have: "A tread depth of less than 2/32 of an inch measured in any two major tread grooves at three locations equally spaced around the circumference of the tire, or for those tires with tread wear indicators, a tire shall be considered unsafe if it is worn to the point that the tread wear indicators contact the road in any two major tread grooves at three locations equally spaced around the circumference of the tire". If the Sears Auto Center inspection report accurately reflected the conditions of the tires at that time, all four tires should have been removed and replaced right then.
9. Three months later on April 22, 2016, the MCCC #4333 inspection report showed both front tires had 8/32 inch while the rear tires had 9/32 inch remaining tread depths.
10. Obviously, the four tires did not add 6/32 or 7/32 inches of tread depth in three months and 715 miles between the Sears and first MCCC #4333 inspections. It is unknown if just one or if both sets of tread depth measurements were inaccurate.

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11. Although there was no record of the tread depths three and a half months later during the August 02, 2016, inspection at MCCC #4333, there was no indication on the invoice of any tire problem. As previously noted, Mrs. MacKenzie testified she was told there were no problems with the Explorer and it was good to go for her trip.

12. According to the MCCC #4333 invoices, the Explorer traveled 1,002 miles between the two inspections there or a total of 1,533 miles from their April inspection until the tire failure and wreck. The difference in tread depth measurements between MCCC #4333 in April and my measurements of the failed tire translated to a minimum average tread wear rate of 428 miles, which is an unrealistically fast wear rate.

13. The entire tread and top belt detached from the carcass and lower belt. Despite that detachment of the tread and top belt, the tire did not deflate. As the inflated tire continued traveling post-detachment, the exposed rubber belt coat stock abraded against the ground, leaving a black smear mark on the pavement. The tire was found partially unseated and completely deflated after the Explorer came to rest on its roof.

14. It is my opinion, based on my assessment of the tire at issue, on all of the materials I reviewed in connection with this matter, and with reasonable engineering probability, that the 8/32 and 9/32 inch measurements entered by Meineke #4333 showed that the inspection was either not done or the measurements were inaccurate. While the tread depths of the tires I measured after the rollover ranged from 1/32 to 4.5/32 inch, most tread grooves measured 3/32 to 4/32 inch remaining tread depths. This indicated remarkably rapid treadwear in only 1,533 miles if the 8/32 or 9/32 inch tread depth measurements made by MCCC #4333 during their April 22, 2016, inspection were accurate.

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15. Before undertaking a long trip, Mrs. Janyce MacKenzie did the reasonable thing and brought the Explorer into MCCC #4333 for an advertised safety inspection that included the tires. While there was no inspection report from the inspection by MCCC #4333 two days before the tire failure, there was no indication of a tire issue shown on the invoice from MCCC #4333 from that date.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of May 2020 in Atlanta, Georgia.

Thomas H. Vadnais

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Note to Court: Please be advised that this Declaration is to be considered for the Motion for Summary Judgment to be heard before Hon. Catherine Shaffer on May 15, 2020. Please disregard the caption stating otherwise.

The Honorable Patrick Oishi

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

vs.

COOPER TIRE & RUBBER COMPANY, a Delaware Corporation; TBC CORPORATION, a Delaware Corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina Corporation; MCCC 4333, INC. d/b/a/ MEINEKE CAR CARE CENTER #4333, a Washington Corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS® AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049, a New York corporation

Defendants.

ANGELA KELLY,

Cross-Claimant,

vs.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

Cause No. 18-2-17249-7 SEA

DECLARATION OF JANYCE L. MACKENZIE IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT MEINEKE CAR CENTERS, LLC'S MOTION FOR SUMMARY JUDGMENT

I, Janyce L. MacKenzie, declare as follows:

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1. I am over the age of eighteen years old. I make this statement upon my personal knowledge. I am one of the plaintiffs in this matter.
2. I have known of Meineke to be a national chain for automotive care services by seeing their advertisements on television, receiving flyers and mailings, through the newspaper, and by seeing advertisements online.
3. My husband and I located the Meineke shop located at 9424 Evergreen Way, Everett, WA 98104. I saw the large yellow sign used by all Meineke shops everywhere off Highway 99.
4. I reasonably believed the Meineke location at 9424 Evergreen Way, Everett, WA 98104 was actually part of the national chain of Meineke. I had no idea it was a franchise or independent of the Meineke corporation nor could I. There was no sign saying it was a franchise or independent that I saw on the separate occasions I was there.
5. I trusted that the employees at the 9424 Evergreen Way location would provide high quality automotive care services because I reasonably figured they were actually part of the Meineke chain, were properly trained by the Meineke national chain, and that Meineke naturally stood behind their work.
6. I particularly chose to get my car serviced at the 9424 Evergreen Way location because of the special deal that was advertised on their sandwich board, and because I reasonably trusted the national reputation of the Meineke brand.
7. Even all the paperwork I received said "Meineke." It didn't inform me at all that it was an independent shop and that the national Meineke corporation was not standing behind their work. No one at the shop told me that either.
8. I reasonably relied on the fact that I was going to receive the same high quality of

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services at the 9424 Evergreen Way location as I would at any other Meineke location nationwide. I was sadly wrong when I learned that the tires they represented had been checked were not checked or were checked so poorly, they sent me off on the road trip where my tire blew at the highway speed causing my vehicle to rollover numerous times and causing me serious injuries that will last for the rest of my life.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of October 2019 in Everett, Washington.

Janyce L. MacKenzie

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The Honorable Patrick Oishi

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

vs.

COOPER TIRE & RUBBER COMPANY, a Delaware Corporation; TBC CORPORATION, a Delaware Corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina Corporation; MCCC 4333, INC. d/b/a/ MEINEKE CAR CARE CENTER #4333, a Washington Corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS® AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049, a New York corporation

Defendants.

ANGELA KELLY,

Cross-Claimant,

vs.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

Cause No. 18-2-17249-7 SEA

DECLARATION OF DENNIS MACKENZIE IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT MEINEKE CAR CENTERS, LLC'S MOTION FOR SUMMARY JUDGMENT

I, Dennis.MacKenzie, declare as follows:

1. I am over the age of eighteen years old. I make this statement upon my personal

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knowledge. I am one of the plaintiffs in this matter.

2. My wife and I have known of Meineke to be a national chain for automotive care services by seeing their advertisements on television, receiving flyers and mailings, through the newspaper, and by seeing advertisements online.

3. My wife and I located the Meineke shop located at 9424 Evergreen Way, Everett, WA 98104. I saw the large yellow sign used by all Meineke shops everywhere off Highway 99.

4. I reasonably believed the Meineke location at 9424 Evergreen Way, Everett, WA 98104 was actually part of the national chain of Meineke. I had no idea it was a franchise or independent of the Meineke corporation nor could I. There was no sign saying it was a franchise or independent that I saw on the occasions I was there.

5. I had been familiar with the shop located at 9424 Evergreen Way, Everett, WA 98104. It used to be an Econo Lube & Tune before it became a Meineke store. I had gone to this location for several years to get my in-laws' vehicles oil changed.

6. When I saw the new large yellow Meineke sign at the 9424 Evergreen Way shop, I reasonably thought that Econo Lube & Tube had been bought or taken over by the national Meineke company.

7. My wife and I trusted that the employees at the 9424 Evergreen Way location would provide high quality automotive care services because we reasonably figured they were actually art of the Meineke chain, were properly trained by the Meineke national chain, and that Meineke naturally stood behind their work.

8. I particularly told my wife she should get her SUV serviced at Meineke's 9424 Evergreen Way location because it was a national company and because I reasonably

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trusted the national reputation of the Meineke brand.

9. I reasonably relied on the fact that my wife was going to receive the same high quality of services at the 9424 Evergreen Way location as we would at any other Meineke location nationwide. I was sadly wrong when I learned that the tires they represented had been checked were not checked or were checked so poorly, they sent my wife off on the road trip where her tire blew at a high speed on the highway causing her vehicle to rollover numerous times and causing her serious injuries and life threatening injuries that will last for the rest of her life.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of October 2019 in Everett, Washington.

Dennis MacKenzie

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