IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DOMINO'S PIZZA, LLC,

Appellant,

v.

Case No. 5D19-2343

YVONNE WIEDERHOLD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD E. WIEDERHOLD, DECEASED,

Appellee.

_____/

Decision filed October 23, 2020

Appeal from the Circuit Court
for Orange County,
Renee A. Roche, Judge.

Dinah S. Stein and Mark Hicks, of Hicks, Porter, Ebenfeld & Stein, P.A., Miami, and Richard S. Womble and Christine V. Zharova, of Rissman, Barrett, Hurt, Donahue & McLain, P.A., Orlando, for Appellant.

John S. Mills, Courtney Brewer, and Jonathan Martin, of The Mills Firm, P.A., Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ORFINGER, J., concurs.
COHEN, J., concurs specially, with opinion.
EISNAUGLE, J., dissents, with opinion.

COHEN, J., concurring specially.

While there are aspects of Judge Eisnaugle's dissenting opinion with which I agree, I do not believe this is the appropriate case for either reversal or certification. I agree that there are legitimate concerns and reasons for distinguishing the franchise relationship with other agency relationships. Some degree of control is inherent and necessary to maintain standards and consistency within the brand, whether it is Domino's or any other franchise.[1]

However, trial courts are accorded broad discretion to formulate jury instructions. Most trial judges are cautious to supplement standard instructions, which "give peace of mind to the [trial] judge" and reduce the chance of reversal. R.J. Reynolds Tobacco Co. v. Jewett, 106 So. 3d 465, 468 (Fla. 1st DCA 2012) (alteration in original) (quoting Ralph Artigliere, How to Write and Use Jury Instructions 8 (2d ed. 2000)). It is axiomatic that trial courts must be cautious to avoid invading the jury's province when crafting jury instructions.

Our standard of review in this matter is whether, in this case, the trial judge abused its discretion in giving the jury the standard agency instruction. E.g., Araj v. Renfro ex. rel. Jones, 260 So. 3d 1121, 1122 (Fla. 5th DCA 2018). A trial court's decision not to give a requested instruction will not be reversed unless the error complained of resulted in a miscarriage of justice, or in other words, the instruction or failure to give the requested instruction was reasonably calculated to mislead or confuse the jury. See, e.g.,

[1] The facts of this case are set forth in our earlier opinion in Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212 (Fla. 5th DCA 2018).

Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990); Force v. Ford Motor Co., 879 So. 2d 103, 106 (Fla. 5th DCA 2004); Hart v. Stern, 824 So. 2d 927, 929 (Fla. 5th DCA 2002); Reyka v. Halifax Hosp. Dist., 657 So. 2d 967, 969 (Fla. 5th DCA 1995).

This case has been tried twice, and both juries reached similar results. As noted in our earlier opinion, Mrs. Wiederhold offered substantial evidence in support of her position that Domino's control went beyond brand maintenance or franchise support, and instead, controlled the day-to-day affairs of the Fischler franchise in the making and delivery of pizza. Mrs. Wiederhold presented documentary evidence, including the Franchise Agreement and Manager's Reference Guide, as well as witness testimony on the agency issue.

Although the Franchise Agreement referred to the parties as independent contractors and contained repeated exculpatory clauses to avoid Domino's legal liability for store operations, it also contained detailed requirements for store operations. For example, section 15.1, "Operating Procedures," stated:

> You agree to fully comply with all specifications, standards and operating-procedures and rules from time to time prescribed for the Store, including, but not limited to, specifications, standards and operating procedures and rules relating to:
>
> > (a) the safety, maintenance, cleanliness, sanitation, function and appearance of the Store premises and its equipment, image, fixtures, furniture, decor and signs;
> >
> > (b) qualifications, dress, grooming, general appearance and demeanor of you and your employees;
> >
> > (c) quality, taste, portion control and uniformity, and manner of preparation and sale, of all pizza and other authorized food and beverage products sold by the Store and of all ingredients, supplies and materials used in the preparation, packaging and sale of these items;

> (d) methods and procedures relating to receiving, preparing and delivering customer orders;
>
> (e) the hours during which the Store will be open for business;
>
> (f) use and illumination of exterior and interior signs, posters, displays, menu boards and similar items;
>
> (g) the handling of customer complaints;
>
> (h) advertising on the Internet or other electronic media, including websites, home pages and use of domain names;
>
> (i) e-mail capabilities of the Store and other electronic communication devices to facilitate communication with us or our offices; and
>
> (j) the method and manner of payment which will be accepted from customers.
>
> By entering into this Agreement, you agree to abide by these specifications, standards, operating procedures and rules and to fully adopt and implement them.

In addition, the Franchise agreement also specified that Fischler was required to carry liability insurance listing Domino's as an additional insured; Fischler could only perform carry-out and delivery services authorized by Domino's; and Domino's would provide Fischler with specifications for "delivery and related motor vehicles." Specifically, regarding delivery drivers, Domino's provided training materials and required all drivers to be trained using those materials. Domino's controlled the driver's minimum age; required initial and periodic driving record checks; prohibited traffic violations; mandated vehicle inspections; prohibited smoking; prohibited cell phone use without a hands-free device; prohibited radar detectors; prohibited passengers; prohibited firearms or mace; specified vehicle appearance and signage requirements; regulated all aspects of drivers' clothing and uniforms, down to the type of socks worn; regulated all aspects of driver

appearance, including facial hair, jewelry, and tattoos; specified how drivers carried the pizza delivery bag; and prohibited carrying more than twenty dollars.

The franchise store manager testified that Domino's had rules for every aspect of day-to-day operations, including their drivers' appearance, uniforms, and vehicles. The franchise owner, Jared Fischler, also testified that Domino's controlled every aspect of day-to-day operations.[2]

I cannot conclude that the trial court abused its discretion in giving the standard jury instruction on agency. Domino's has not met its burden to establish that the failure to give the requested instructions resulted in a miscarriage of justice.

Still, like Judge Eisnaugle, I recognize that there are legitimate reasons to distinguish the franchise relationship from other agency relationships. This is an issue worthy of consideration by The Florida Bar's Standard Jury Instructions Committee—Civil Cases.

[2] Mr. Fischler attempted to walk back this earlier testimony, given at deposition, by explaining that he now, at the time of the second trial, had a better understanding of "control." On cross-examination, Mrs. Wiederhold established that after the first trial Domino's sued Mr. Fischler, personally, and his franchise, for indemnity.

Given Appellant's persuasive argument that Florida's standard jury instruction on agency does not adequately account for a franchise relationship, and based upon Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 120 (Fla. 1995) and our own holding in Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212, 221–22 (Fla. 5th DCA 2018), I would conclude that Appellant's requested instruction concerning day-to-day operations, contractual brand maintenance, and franchise support activities "contained an accurate statement of the law, the facts in the case supported a giving of the instruction, and the instruction was necessary for the jury to properly resolve the issues in the case."[1] Aubin v. Union Carbide Corp., 177 So. 3d 489, 517 (Fla. 2015) (citations omitted). I would therefore reverse the judgment for failure to give this instruction.

Appellant also argues that the instrumentality test should apply to determine vicarious liability in a franchise situation and asks that we certify this question. See, e.g., Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 340 (Wis. 2004) ("[C]ourts have adapted the traditional master/servant 'control or right to control' test to the franchise context by narrowing its focus: the franchisor must control or have the right to control the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct."); see also Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013) ("The 'instrumentality' test

[1] Importantly, the issue in this appeal is not whether there was competent, substantial evidence to support the jury's verdict, but rather whether the jury was given the proper measuring stick to evaluate the conflicting evidence.

adopted by the Kerl court accords with the approach of the majority of courts that have considered vicarious liability in the context of the franchise relationship.").

Unlike the narrowly tailored instrumentality test adopted in other jurisdictions, the inquiry into a franchisor's vicarious liability in Florida is expansive. As a result, the parties in this motor-vehicle accident case spent a considerable amount of effort on issues that were otherwise irrelevant to the actual accident—such as Appellant's level of control over accounting procedures. I would therefore grant Appellant's request that we certify this question to the Florida Supreme Court.