

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JACQUELYN CIOFO, Next Friend of PHILLIP  
BOOKER,

Plaintiff-Appellant,

v

JOSEPH THOMAS SHOCK and THOMAS KEITH  
SHOCK,

Defendants,

and

HUNGRY HOWIE'S PIZZA & SUBS, INC.,

Defendant-Counterplaintiff-Appellee,

and

HUNGRY HOWIE'S STORE #10,

Defendant- Counterdefendant.

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RICHARD BERTRAND, Personal Representative of  
the Estate of RANDALL LYNN BERTRAND,

Plaintiff-Appellant,

v

JOSEPH THOMAS SHOCK and THOMAS KEITH  
SHOCK,

Defendants,

UNPUBLISHED

May 16, 1997

No. 193310

Washtenaw Circuit Court

LC No. 93-000486-NI

UNPUBLISHED

No. 194938

Washtenaw Circuit Court

LC No. 93-000485-NI

and

HUNGRY HOWIE'S PIZZA & SUBS, INC.,

Defendant-Cross-Plaintiff-Appellee,

and

HUNGRY HOWIE'S STORE #10,

Defendant-Cross-Defendant-Appellee.

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Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right an order granting summary disposition to defendant Hungry Howie's Pizza & Subs, Inc. (hereinafter defendant). We affirm.

Randall Bertrand and Philip Booker were walking northbound on Bagley Street in Ypsilanti on the west shoulder of the roadway when they were struck from behind by Joseph Shock, who was delivering pizzas for his employer, Gregory Moga, the franchise owner of Hungry Howies Store #10. Bertrand died as a result of the collision and Booker was severely injured.

Plaintiffs filed a negligence action against Shock, Shock's father, Moga, and Hungry Howie's Pizza and Subs, Inc., the franchisor of Moga's restaurant. Settlement agreements were reached with all defendants except for defendant Hungry Howie's Pizza and Subs, Inc. Plaintiffs alleged that defendant, as the franchisor, is both directly and vicariously liable for plaintiffs' injuries. Defendant filed motions for summary disposition against each of the plaintiffs pursuant to MCR 2.116(C)(8) and (10). Following a hearing, the trial court granted the motions, reasoning that because defendant neither exercised nor maintained the right to control the day-to-day operations of the franchisee, it could not be held vicariously or directly liable for plaintiffs' injuries.

The controlling case regarding the liability of a franchisor for the negligence of its franchisee is *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990). Generally, a principal is responsible for the negligence of its agent. *Id.* at 679-680. In Michigan, the test for a principal-agent relationship is whether the principal has the right to control the agent. *Id.* at 680. To determine whether a defendant franchisor and a franchisee had a principal-agent relationship sufficient to impose vicarious liability on the franchisor, we examine the defendant's control of the franchisee in terms of the defendant's right to take part in the day-to-day operation of the franchisee's business. *Id.* at 682. To

find a franchisor directly liable, it is not enough that a franchisor retained the right to control certain aspects of the franchisee's business. *Id.* at 679. The franchisor must actually exercise that right. *Id.*

In *Little*, the plaintiff sought to hold a franchisor liable for injuries she sustained when she fell on an icy sidewalk at a franchisee's restaurant. *Id.* at 678. This Court affirmed the trial court order granting the franchisor's motion for summary disposition, and provided the following reasoning:

The franchise agreement in this case primarily insured the uniformity and standardization of products and services offered by a Howard Johnson restaurant. These obligations do not affect the control of daily operations. Furthermore, while defendant retained the right to regulate such matters as building construction, furnishings and equipment, and advertising, it retained no power to control the details of the restaurant's day-to-day operations. Defendant had no control over hiring and firing or supervision of employees. Defendant retained no control over the daily maintenance of the premises other than to obligate the franchisee to maintain such in a "clean" and "orderly" condition. Again, the methods and details of maintenance were controlled by the franchisee. Although defendant had the right to conduct inspections, defendant's actual control was limited to the right to hold the franchisee in breach of the franchise agreement for any deviation. We conclude that plaintiff did not present a triable issue concerning defendant's right to control the day-to-day operations of the franchisee. [*Little, supra* at 682; citations omitted.]

Thus, a franchisor must have the right to control the day-to-day operations of a franchisee in order to establish an agency relationship, and such a relationship is not created where the franchisor merely retains the right to set standards regarding the products and services offered by the franchisee, the right to regulate such items as the furnishings and advertising used by the franchisees, and the right to inspect for conformance with the agreement. *Id.* at 680.

The franchise agreement between defendant and Moga primarily insures the uniformity and standardization of products and services offered by a Hungry Howie's franchise. Section ten of the agreement is entitled "Obligations of Franchise Owner" and requires "complete uniformity of operation, design and appearance among all Hungry Howie's franchisees." The agreement then establishes uniform requirements such as store hours, menu, food quality, employee uniforms, and insurance coverage. These obligations do not affect the control of daily operations of a franchise. *Little, supra* at 682. Further, Moga's deposition testimony indicates that although defendant's operations manual contained guidelines for hiring employees, the methods and details of hiring and supervising employees were controlled by Moga.

Like the franchisor in *Little*, defendant retained the right to conduct inspections of its franchisees to ensure compliance with the terms and conditions of the franchise agreement. However, also like the franchisor in *Little*, defendant's actual control was limited to the right to hold the franchisee in breach of the franchise agreement for any default. Because plaintiffs did not present a triable issue concerning

defendant's right to control the day-to-day operations of the franchisee, the trial court properly granted judgment for defendant as a matter of law.

Summary disposition was also properly granted regarding defendant's direct liability to plaintiffs. As stated above, to establish a franchisor's direct liability the franchisor must actually exercise control over the aspect of the franchisee's business at issue. *Little, supra* at 679. Direct liability will not be found where the franchisor merely retained the right to control an aspect of the franchisee's business but did not exercise that right. *Id.* Plaintiffs provided no evidence to show that defendant actually exercised control over Moga's hiring of employees. Further, even if defendant had retained the right to control the hiring procedures of its franchisees, no evidence was presented to show that defendant actually exercised such control. Moga's deposition testimony revealed that Moga was solely responsible for hiring and supervising his employees. Joseph Shock also testified that he had no contact with anyone other than Moga before he was hired. Because there is no factual support for plaintiffs' claims of direct liability against defendant, the trial court properly granted judgment for defendant as a matter of law.

Affirmed.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald