RENDERED: April 2, 1999; 2:00 p.m.

ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT: DECEMBER 9, 1999 (1999-SC-0399-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001591-MR

DEWANNA SMALLWOOD, ADMINISTRATRIX
OF THE ESTATE OF TAWNE MARIE
HYDEN, DECEASED — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE DAVID L. KNOX, JUDGE
ACTION NO. 95-CI-000287

SHELL OIL COMPANY AND
ROGERS OIL COMPANY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Dewanna Smallwood (Smallwood) has appealed from two orders of the Scott Circuit Court entered on April 15, 1997, and June 16, 1997, which summarily dismissed her complaint against the appellees, Shell Oil Company (Shell) and Rogers Oil Company (Rogers). We affirm.

Smallwood's decedent, Tawne Marie Hyden (Hyden), died as a result of a gunshot wound to her head shortly after 3:00 a.m. on September 19, 1994. This senseless death occurred during the course of a robbery committed by two young men, one a juvenile, at Hyden's place of employment, the Shell One Stop,

located on Delaplain Road in Georgetown, Kentucky. Hyden was twenty-two years old at the time of her death, and the mother of two children. She had worked as a cashier at the Shell One Stop for over a year and had been promoted to the position of assistant manager. She was working alone on the morning she was murdered.

The Shell One Stop is owned and operated by Hamilton Enterprises, Inc. (Hamilton Enterprises). It is undisputed that Smallwood, Hyden's mother and the administratrix of her daughter's estate, sought and obtained workers' compensation benefits from Hamilton Enterprises' insurer, including burial expenses and benefits for Hyden's dependent children. On September 18, 1995, Smallwood filed a complaint in the Scott Circuit Court seeking damages for Hyden's wrongful death. In her complaint, and in amended complaints, Smallwood claimed that Hamilton Enterprises was negligent in failing to provide Hyden with a safe place to work. She also alleged that Shell and Rogers, the entities from which Hamilton Enterprises obtains the petroleum products it sells, had an agency relationship with Hyden's employer and were vicariously liable for the damages resulting from Hamilton Enterprises' negligence. Further, Smallwood alleged that Shell and Rogers had an independent duty to require Hamilton enterprises to maintain a safe place of employment and were thus directly liable for the damages resulting from Hyden's death. Finally, Smallwood's complaint included a claim against James Brian Bennett (Bennett) and Joshua

Young Cheng (Cheng), Hyden's killers[1]. Shell and Rogers filed cross-claims against Bennett and Cheng.

Before addressing the issues upon which the trial court predicated the dismissal of the two oil companies from this lawsuit, it is necessary to discuss the relationship between Shell, Rogers and Hamilton Enterprises. Shell, a major producer of petroleum products, had a contract with Rogers, known in the industry as a Ajobber@ contract. Under the terms of this agreement, Rogers agreed to purchase certain amounts of gasoline and other oil products from Shell and Shell granted Rogers the right to use Shell's name and logo and to assign the use of Shell's identifications to other entities. Pursuant to the jobber contract, Rogers entered into a marketing agreement with Hamilton Enterprises in 1992, in which Rogers granted Hamilton Enterprises the right to appropriate Shell's name and identification at the Shell One Stop in exchange for the purchase

[1]The record reflects that Cheng pled guilty in the Scott Circuit Court to the charge of murder and, as a result of that plea, was sentenced to serve twenty-five (25) years in prison without the possibility of parole. In his answer, he stated he had no affirmative defenses to the allegations in the complaint. Bennett, whose criminal charges were pending at the time he was served in this case, denied the allegations in the complaint. The resolution of the criminal charges against Bennett is not contained in the record on appeal.

of gasoline and petroleum products from Rogers for resale[2]. The marketing agreement specifically provided as follows:

> MARKETER'S INDEPENDENCE. Marketer [Hamilton Enterprises] is an independent businessman, and nothing in this agreement shall be construed as reserving to Rogers any right to exercise any control over, or to direct in any respect the conduct or management of Marketer's business or operations conducted pursuant to this agreement; but the entire control and discretion of such business and operation shall be and remain in Marketer, subject only to Marketer's performance of the obligations of this agreement. Neither Marketer nor any person performing any duties or engaged in any work at Marketer's station for or on behalf of Marketer shall be deemed an employee or agent of Rogers or Shell, and none of them is authorized to impose on Rogers or Shell any obligations or liability whatsoever.

Shell and Rogers have consistently maintained that they owed no duty to Hyden to provide her with a safe place to work, and that they never voluntarily undertook a duty to provide her with a safe place to work. On January 31, 1997, they moved for summary judgment arguing that there was nothing in the contractual relationship with Hamilton Enterprises that placed a duty on them to protect Hamilton Enterprises' employees from the criminal attacks of third parties. The oil companies contended that any control they asserted over Hamilton Enterprises was designed to maintain minimum standards of operation and

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[2]Hamilton enterprises is known as a "jobber-dealer" or a "subjobber." Shell Oil utilizes other types of arrangements in marketing its products. For example, it has "dealer stores," also known as "franchise stores" where it contracts directly with an independent business to operate a Shell branded store. We discern little difference between the relationship of Shell to its jobber-dealers and franchisees. Shell also owns and operates Shell convenience stores which are known as "salary or corporate stores."

appearance to preserve the public's confidence in Shell's products and that they had neither the right, nor the duty, to control the security at the Shell One Stop. They also insisted that since Hamilton Enterprises was an independent contractor and not their agent, they could not be held vicariously liable for any negligence by Hamilton Enterprises in not providing a safe work place. In the alternative, they argued that even if a principal/agent relationship were established, they would not be liable to Smallwood as they were protected by the "up-the-ladder" defense under Kentucky Revised Statutes (KRS) 342.610(2).

In her response, Smallwood argued that the contractual arrangement between Shell, Rogers and Hamilton Enterprises was designed to "manipulate and directly or indirectly control these so-called 'independent' marketers, jobbers and dealers, and others involved in the chain of petroleum product distribution"[3]. To make her point, Smallwood outlined nearly fifty terms in the contracts giving Shell and/or Rogers control over the manner in which Hamilton Enterprises operated the Shell One Stop[4]. She

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[3]In his affidavit filed in response to the motion for summary judgment, Smallwood's expert witness, James M. Patterson, explained that until the 1940s and 1950s, most gasoline stations were company owned and operated. According to Patterson, the switch to independent jobbers was accomplished in part "to attempt to insulate the major oil companies as much as possible from the risks and liabilities associated with gasoline retail sales, including unionization, harm to life and limb and environmental liability".

[4]Examples recited by Smallwood included: "Hamilton had to comply with Shell's standards of operation and appearance"; "Hamilton was required to have hours of operation from 6:00 a.m. to 12:00 p.m." (Interestingly, Hamilton Enterprises was not required to have the store open 24 hours a day or at the time of day that Hyden was murdered.); "Hamilton was required to perform

(continued...)

maintained that it was necessary for Shell and other major oil companies to control their jobber stations "if they are to effectively implement their strategy of product differentiation". This control, she argued, was sufficient evidence for the trial court to determine that Hamilton Enterprises was the agent of Shell and Rogers and to hold the oil companies vicariously liable for Hamilton Enterprises' negligence in failing to provide Hyden with a safe place to work.

Smallwood also argued that there was evidence from which a jury could determine that Shell voluntarily assumed a duty to provide Hyden with a safe place to work. This evidence consisted of Shell having provided materials for Hamilton Enterprises to use in training store employees regarding safety concerns. The packet of materials supplied by Shell to jobbers, including Hamilton Enterprises, was accompanied by a letter which read in part as follows:

> In today's society, security is critical to the success and safe operation of a service station facility. Good security practices help reduce the threat of robbery and burglary, enhancing the safety of both employees and customers. As part of Shell's ongoing effort to provide more information on service station security, the enclosed information packet was created. The packet contains important suggestions for deterring robberies at your station, as well as providing valuable sources of security

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[4](...continued)
automotive repairs in a workmanlike manner"; "Hamilton's employees were required to wear clean uniforms of a type and style approved by Rogers and Shell"; "Hamilton had to obtain Rogers' prior written approval before installing or replacing any vending machines or display equipment for merchandising sundry convenience items"; and "Hamilton was required to keep the station free from loitering".

> related equipment and training aids. Also included is information on the enhanced Service Station Reward Program now offering up to $20,000 for the arrest and conviction of criminals committing violent crimes against Shell Dealers, Jobbers, Jobber Dealers or employees in Shell branded service stations.
>
> Using this material as part of your training program will help prepare your employees if they are faced with a life threatening situation. While this packet was originally distributed in 1990, the magnitude of service station security problems warrants its reissue. We urge you to use this material to make your business a safer place to work.

Smallwood also argued that a jury could conclude "that Shell and Rogers should have recognized the need for adequate training of marketers/buyer outlets so as to protect employees from criminal attack." Smallwood further argued that there were public policy considerations making summary judgment inappropriate. Specifically, she argued:

> To allow Shell to exert such control over Hamilton as will enable Shell to provide consumers nationwide with a uniform level of service, while at the same time allowing Shell to escape liability by claiming that it does not control Hamilton's operations, confers upon Shell the benefits of a franchise system or a jobber distributions system without requiring Shell to bear any of the burdens or risks.

Finally, Smallwood argued that Shell and Rogers were not entitled to assert the up-the-ladder defense as they were not "contractors" as contemplated by KRS 342.610(2).

In its order of April 15, 1997, the trial court analyzed the various cases cited by both Smallwood and the oil companies and held as follows:

> [T]here does not appear to be any evidence that Shell or Rogers sought to control the manner in which Hamilton was to operate its business. The Jobber Contract gave Shell the right to conduct inspections, and the Marketing Agreement gave Rogers the right to conduct inspections. However, there appears to be no evidence that Shell actually conducted inspections, and the evidence is disputed as to whether Rogers conducted inspections. Even if Rogers did conduct inspections, it does not appear that it ordered conditions corrected, issued threats to cancel the contract, or advised Hamilton how to conduct its business.
>
> Shell distributed a security packet to jobbers and dealers containing security suggestions which the packet stated that recipients should consider as part of their overall security program. The packet expressly disclaimed any claim that its suggestions would prevent crimes and injuries. Unlike J.M. v. Shell [922 S.W.2d 754 (Mo. 1996)], however, the security packet did not set forth details or the manner in which safety was to be achieved, and it does not appear that Shell required the recipients to implement those suggestions.
>
> In this Court's opinion, considering all of the foregoing, this Court does not believe that the evidence demonstrates that Shell and Rogers maintained sufficient control over Hamilton's operation of the station such as to create an actual agency relationship, and thus render them liable for Ms. Hyden's death.

The trial court also dismissed Smallwood's claim with respect to a breach of an independent duty to provide a safe work environment as follows:

> It does not appear to this Court that [Smallwood] articulates upon what basis she believes that that duty exists, nor does she appear to address the argument presented by Shell and Rogers. In any event, this Court does not believe that it has been shown law which would support a conclusion that Shell and Rogers owed Ms. Hyden an independent duty to provide her with a safe work environment.

As to the issue of Shell's and Rogers' voluntary undertaking to provide security to Hyden, the trial court held that there must be Agreater involvement for liability to attach than the degree undertaken by Shell and Rogers in this case@. It reasoned: AThe security packet expressly provides that it contains information which recipients should consider as part of the security program, and it disclaimed any representation that its implementation would prevent crimes or injuries@

The trial court's order did not address the effect, if any, of the Workers' Compensation Act. Smallwood asked the trial court to reconsider its order and address the issue of whether Shell and Rogers were entities protected by the workers' compensation scheme. The trial court granted Smallwood's request and in its order entered June 16, 1997, addressed the appellees' up-the-ladder defense as follows:

> This Court believes that, pursuant to KRS 342.610(2) and Firem[a]n's Fund [Insurance Co. v. Sherman and Fletcher, Ky., 705 S.W.2d 459 (1986)], in order for Shell and Rogers to be considered contractors, they must have been contracting with another to perform the kind of work which is a regular part of their business. There does not appear to be any requirement that they subcontract work because of a contractual obligation owed to a third party. It appears to this Court that marketing and selling oil products and operating convenient stores is a regular part of the business of Shell and Rogers. It seems to this Court that the business arrangement among Shell, Rogers, and Hamilton appears to place Shell and Rogers in the status of contractors, since they have contracted with each other and with Hamilton to sell oil products and to operate a convenient store. This Court believes that their status as contractors render them potentially liable for Workers[']
> Compensation coverage for Ms. Hyden, and

> pursuant to KRS 342.690(1), they are entitled to protection from liability for that reason.

After the trial court granted the motion of Shell and Rogers for summary judgment, it also granted a similar motion made by Hamilton Enterprises on September 2, 1997. The trial court held that Smallwood's claims against Hyden's employer were barred as a matter of law by the terms of KRS 342.690(1) and KRS 342.610(4). Smallwood has not appealed from the judgment dismissing Hamilton Enterprises. The claims against Bennett and Cheng are still pending in the trial court.

In this appeal, Smallwood continues to argue that Shell and Rogers are vicariously liable for the alleged negligence of Hamilton Enterprises in failing to provide Hyden with a safe place to work. She states that A[a] critical question before this Court is whether Shell and/or Rogers had the right to exercise control over the business operation of Hamilton [Enterprises] at the Delaplain Shell One Stop@. She argues in the alternative that summary judgment was inappropriate because there is a genuine issue of material fact regarding the control Shell and Rogers exerted over Hamilton Enterprises. Additionally, Smallwood argues that the trial court erred in summarily dismissing her claim that Shell and Rogers had an independent duty to require Hamilton Enterprises to maintain a safe place for Hyden to work. Shell and Rogers argue that Hamilton Enterprises was an independent contractor and that neither Acontrolled how Hamilton [Enterprises] operated its service station@ and Adid not participate in the decisions or details of the day-to-day operations@ to the degree necessary to

create an agency relationship and to be vulnerable to claims predicated on vicarious liability. In addressing Smallwood's theory of independent liability, the appellees contend that there is Ano general duty owed by a franchisor to provide a secure workplace to employees of its franchisee@ thereby justifying the summary judgment with respect to that portion of Smallwood's complaint.

As our recitation of the facts indicated, the trial court determined that Shell and Rogers did not maintain sufficient control over Hamilton Enterprises to create an agency relationship, or in the alternative, were protected by the up-the-ladder defense. It is our opinion that the trial court reached the right result on the issue of whether Shell and Rogers are vicariously liable for the negligence, if any, of Hamilton Enterprises, although our reasoning is different. Many of the cases Smallwood has cited convince us that there is a significant issue of fact concerning the existence of an agency relationship between Shell and Hamilton Enterprises. See note 6, infra. Also, we are not convinced that KRS 342.610(2)(b) is applicable in the context of a franchisor/franchisee relationship[5].

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[5]The purpose of KRS 342.610(2)(b) is to protect employees of subcontractors and Ato prevent subcontracting to irresponsible people.@ Fireman's Fund, 705 S.W.2d at 461. We question its applicability, however, where the relationship of the alleged contractor (Shell and/or Rogers) and the alleged subcontractor (Hamilton Enterprises) is that of franchisor/franchisee or parent/subsidiary. We have no doubt that if Hamilton Enterprises had not secured workers' compensation insurance coverage, the appellees would be quick to deny responsibility for those benefits, relying upon the explicit language in the marketing agreement providing that no employee of Hamilton Enterprises Ashall be deemed an employee or agent of Rogers or Shell@. The (continued...)

However, even if, as Smallwood urges, the control retained by Shell and Rogers over Hamilton Enterprises' operation of the Shell One Stop were sufficient to create a principal/agent relationship, and further assuming the appellees were not entitled to the up-the-ladder defense, Smallwood would not be entitled to recover damages from Shell or Rogers under a theory predicated on respondeat superior or imputed liability.

It is a settled principle in this jurisdiction that a release of the agent or servant acts as a release of the principal/master whose liability is Avicarious in nature and derived solely from its legal relation to the wrongdoer. . .@. Copeland v. Humana of Kentucky, Inc, Ky.App., 769 S.W.2d 67, 70 (1989). In Copeland, this Court held that a covenant not to sue the primary tortfeasors, two anesthesiologists, Aaffected a

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[5](...continued)
irony of the argument advanced by Shell and Rogers C i.e., that they were potentially liable for Hyden's workers' compensation benefits despite the clear terms of the marketing agreement C was not lost on Professor Larson who made the following observation:

> Ordinarily it is the corporation that is trying to insist on its separateness from its subsidiary, and it is the plaintiff that is trying to Apierce the corporate veil@. But here the positions are reversed. The parent strives to disavow its separateness so as to assume identity with its subsidiary and thus share its immunity as employer. But this makes it vulnerable to the argument that the parent, having deliberately set up the corporate separateness for its own purposes, should not be heard to disavow that separateness when it happens to be to its advantage to do so.

Larson, Workers' Compensation Law, § 72.40 (1998).

complete discharge of the hospital (the master/employer) who is only secondarily liable@ id. at 70, and reasoned as follows:

> Having agreed not to sue the servant/agent, and made recovery by settlement therefrom, the appellant may not now seek additional recovery from the master/principal based upon the same acts of alleged negligence, whether the document is called a "release" or "covenant not to sue."
>
> It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be blameless. Max v. Spaeth, 349 S.W.2d 1 (Mo.1961).
>
> This result is required for either or both of two reasons: "That such a result will avoid circuity of action or that since the liability of the master or principal is merely derivative and secondary, exoneration of the servant removes the foundation upon which to impute negligence to the master or principal." Holcomb v. Flavin, 34 Ill.2d 558, 216 N.E.2d 811, 814 (1966).

Id. at 69.

This principle is no less applicable where, as in the instant case, the agent/servant is released or immune from liability by virtue of a statute. A[A] statute that bars a claim against an agent equally protects those in whose behalf he acted as agent, where there are no circumstances of equity to prevent the operation of the statute in their favor[.@] 3 Am.Jur.2d Agency § 348 (1986). Clearly, our Kentucky Workers' Compensation Act grants immunity from tort liability to all employers covered by the act. KRS 342.690. In Boggs v. Blue Diamond Coal Company 590 F.2d 655 (6th Cir.1979), the Court, relying on the Restatement (Second) of Agency §§ 185 and 217, stated:

> The parent is not liable under the doctrine of respondeat superior for the negligence of

> the subsidiary. For purposes of the doctrine of respondeat superior, a subsidiary which provides workmen's compensation should be treated as having terminated the derivative liability of its parent or principal by satisfaction of the claim.

Id. at 663 (citations omitted). See also Clem v. Steveco, Inc., 450 N.E.2d 550, 554 (Ind.Ct.App. 1983) (satisfaction of claim against employer under workers' compensation act also satisfies the liability of all parties whose liability is predicated solely upon their relationship to the immediate employer).

We have reviewed the numerous cases cited by Smallwood for the proposition that a franchisor who retains control over its franchisee can be vicariously liable for the torts of the franchisee. However, these cases involve claims by patrons of the franchisee, not employees.[6] The importance of this

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[6]See Brenner v. Socony Vacuum Oil Co, 158 S.W.2d 171 (Mo.Ct.App.1942) (agency relationship found between oil company and lessee of service station so as to impute liability for injuries suffered by customer as a result of negligence of lessee's employee); Aweida v. Kientz, 536 P.2d 1138 (Co.Ct.App.1975) (summary judgment in favor of oil company in suit brought by customer injured by ruptured tire against service station operator and oil company determined to be inappropriate where evidence showed oil company had "the right to control all of the activities" of service station operator); Edwards v. Gulf Oil Corporation, 24 S.E.2d 843 (Ga.Ct.App.1943) (plaintiff, whose son died from burns sustained at service station where he was a patron, was allowed to recover against oil company under agency theory); Balderas v. Howe, 891 S.W.2d 871 (Mo.Ct.App.1995) (summary judgment in favor of franchisor reversed in suit by automobile accident victim whose injuries were allegedly caused by franchisee's employee where evidence indicated franchisor had right to control physical conduct of franchisee); J.M. v. Shell Oil Company, 922 S.W.2d 759, 764 (Mo.banc 1996) (customer, who was sexually assaulted and shot at Shell convenience store and gasoline station leased to franchisee, was entitled to proceed against oil company as the agreements between oil company and franchisee (similar to those in the instant case) "g[a]ve rise to a factual question as to whether Shell had a right of control over [franchisee] in providing security for customers of the

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distinction is obvious. There is no statutory or common law immunity implicated when the person injured is a customer of the franchisee. Smallwood has not cited a single case where an injured employee of a franchisee has recovered damages from the franchisor under the agency theory of respondeat superior and our research does not reveal any such cases. Rather, the only cases relied upon by Smallwood where employees prevailed against a franchisor involved allegations of independent negligence by the franchisor.

It is settled that summary judgment is inappropriate unless Ait appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . .@. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Regardless of the evidence Smallwood could produce on what she perceives to be theAcritical@ issue of control, it must be concluded as a matter of law that Smallwood's claim based on respondeat superior fails. Accordingly, the summary judgment for Shell and Rogers on this claim was appropriate.

We will now turn to Smallwood's claim that there is evidence precluding summary judgment dismissing her claim that Shell and Rogers are liable for their independent acts of

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[6](...continued)
station"); Chevron Oil Company v. Sutton, 515 P.2d 1283 (N.M.1973) (estate of woman who died from injuries sustained in an automobile accident attributable to repairs made by service station allowed to proceed against oil company under theory of imputed negligence); Juarbe v. City of Philadelphia, 431 A.2d 1073 (Pa.Super.Ct.1981) (plaintiff who slipped and fell on petroleum products on sidewalk next to service station allowed to proceed against oil company under theory of respondeat superior).

negligence resulting in Hyden's death. The gist of Smallwood's argument in this regard is that "Shell controls and directly influences nearly every aspect of an 'independent' dealer's operation, including security measures," and is "uniquely in a position to know about the risks and dangers associated with operation of service station/convenience stores and the ways in which the risks of crime and other hazards might be reduced". Further, she contends that because dealers, such as Hamilton Enterprises, "typically lack sophistication about technical and retail security and safety matters", Shell, at a minimum, should have insisted that Hamilton Enterprises demonstrate that it was "following accepted practice in the protection of [its] customers and employees from common health and safety hazards" before doing business with Hamilton Enterprises. Essentially, Smallwood would place a duty on Shell, because of its greater expertise and financial wherewithal, to voluntarily undertake to control the security for all their jobbers.

The cases relied upon by Smallwood fall into two basic categories: Either the franchisor required the franchisee to utilize the instrumentality that caused the employee's injury, or the franchisor voluntarily undertook to provide security for the franchisee. Wise v. Kentucky Fried Chicken Corp, 555 F.Supp. 991 (D.N.H.1983), involves the claim of an injured employee against a franchisor, Kentucky Fried Chicken (KFC). The plaintiff, injured by a defective pressure cooker, claimed that KFC was "primarily liable for its own negligent conduct". Id. at 994. Summary judgment in favor of KFC was reversed as the facts,

Aif proven, would support a finding that KFC, at a minimum, had a duty to warn.@ Id. at 996.[7] See also Whitten v. Kentucky Fried Chicken Corp., 570 N.E.2d 1353 (Ind.Ct.App.1991) (extent of franchisor's control over the injury-causing instrument, the chicken fryer, gave rise to a genuine issue of material fact as to whether it owed a duty to its franchisees' employees vis-a-vis the fryers).

In Martin v. McDonald's Corporation, 213 Ill.App.3d 487, 572 N.E.2d 1073 (1991), the verdict for the plaintiffs, whose daughter was killed while working at a McDonald's franchise, was affirmed based on a claim that the franchisor Avoluntarily assumed a duty to provide security@ at the franchisee's store. Id. at 492. The appellate court held that the evidence was sufficient to support the jury's finding that McDonald's breached that assumed duty and that the breach was the proximate cause of plaintiffs' injury. Id. at 493-494. In Clem v. Steveco, supra, an employee of a convenience store was murdered while working the late-night shift alone. As noted earlier herein, that Court rejected a claim of derivative liability against Southland, the franchisor. However, the Court reversed the dismissal for failure to state a claim with respect

[7]The facts at issue included that the agreement between KFC and its franchisee, plaintiff's employer, required the franchisee to purchase Aapproved equipment,@ that the pressure cooker which malfunctioned and caused plaintiff's injuries was purchased from Athe approved supplier list@ that KFC was aware of 40 accidents involving the specific pressure cooker in its various franchises and had been informed by the cooker's manufacturer of Acorrective measures which could be utilized to avoid such accidents@, and that, though knowing of the defect, KFC did not warn its franchisee of the Adangers associated with the use of the equipment.@ Id. at 993.

to that portion of the complaint which alleged an independent duty on the part of Southland to provide the deceased with a safe place to work, and reasoned as follows:

> We agree . . . that franchise agreements commonly involve questions of material fact which cannot be disposed of by summary judgment. Therefore, preliminary disposition of the question of the amount of control a franchisor retains is generally inappropriate on a motion to dismiss for failure to state a claim upon which relief could be granted because the question commonly presents a question which is not addressable by a T.R. 12(B)(6) motion.

Id., 450 N.E.2d at 555-556.

In Helmchen v. White Hen Pantry, Inc, 685 N.E.2d 180 (Ind.Ct.App.1997), a recent case cited by both Smallwood and the appellees, the parents of an employee abducted and murdered while working at a convenience store early in the morning brought a suit against the franchisor, White Hen Pantry (WHP), for failing to provide adequate security at its franchisee's store. That case recognized, as the appellees argue, that "[t]here is no general direct duty to provide a secure workplace owed by a franchisor to employees of its franchisees". Id. at 181. Thus, Helmchen is contrary to Smallwood's argument that Shell's superior expertise and/or financial position created a legal duty to voluntarily provide security, or to insure that its franchisee provided adequate security, for the protection of the franchisee's employees.

Nevertheless, Smallwood finds support in Helmchen's holding that "a duty may arise depending on the extent of control a franchisor has over the operations of the franchisee". Id.

A[T]he relevant inquiry is whether there is a genuine issue of material fact as to the extent WHP controlled security measures at its convenience stores@ Id. at 182. Thus, Smallwood argues, A[a]t a minimum, the case should be remanded to allow for further factual development@ of the adequacy of the Asafety procedures in place which caused [Hyden] to be killed@.

Normally, the question of the existence of a duty is one of law. Mullins v. Commonwealth Life Insurance Company, Ky., 839 S.W.2d 245, 248 (1992). AThe statement of whether a duty exists is but a conclusion of whether a plaintiff's interests are entitled to legal protection against the defendant's conduct@. Alderman v. Bradley, Ky.App., 957 S.W.2d 264, 267 (1997). However, as the Helmchen, Clem, Wise, and Martin cases suggest, the issue may involve a mixed question of law and fact.

It is our opinion, however, that the trial court correctly determined that Shell and Rogers did not have a legal duty to provide Hyden with a safe work environment. The authorities upon which Smallwood relies, and others which we have found in our research, provide that in order for the franchisor to have a duty to the employees of its franchisee, it must be demonstrated that the franchisor retained the ability to make decisions concerning the daily operation of the franchisee and specifically retained the ability to control the security of the franchise. For example, in Clem, the Court, quoting from Coty v. U.S. Slicing Machine Company, 58 Ill.App.3d 237, 15 Ill.Dec. 687, 373 N.E.2d 1371 (1978), stated as follows:

> A[A] [franchisor] who possesses a right to supervise the internal operations of

> another's enterprise, which includes a right to veto an unsafe procedure, may be liable for the negligent failure to do so. . . . However, this right to interdict unsafe practices must consist of something more than a general right to make suggestions or recommendations or to order the work stopped or resumed.@

Id., 450 N.E.2d at 555. See also Folsom v. Burger King, 135 Wash.2d 658, 958 P.2d 301, 308-310 (1998). In the instant case, Smallwood has failed to present any evidence bearing on the issue of Shell's or Rogers' control of the security in place at the Shell One Stop. Thus, regardless of the adequacy of the safety procedures in place on the night Hyden was murdered, the record does not reveal, nor does Smallwood allege, that Shell or Rogers exerted any control over the security at the Shell One Stop. This lack of control was consistent with the contracts between the parties which did not provide the appellees with the right to control the security at the Shell One Stop.

The only evidence that Smallwood points to in this regard is the security packet provided by Shell to Hamilton Enterprises that contained information and suggestions for security at the Shell One Stop. As the appellees point out, Helmchen dispels the notion that giving adviceAcalculated to heighten awareness regarding security issues and to offer suggestions for addressing criminal activity@ is sufficient to create a legal duty on the part of a franchisor. Id. at 182-183. There being no duty owed to Hyden in the first instance by Shell or Rogers, summary judgment was appropriately granted. Sheehan v. United Services Automobile Association, Ky.App., 913 S.W.2d 4, 6 (1996).

Accordingly, the judgment of Scott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Shirley A. Cunningham, Jr.
Hon. Rosanna L. Peace
Lexington, KY

ORAL ARGUMENT FOR APPELLANT:

Hon. Shirley A. Cunningham, Jr.
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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Hon. Ashley W. Ward
Lexington, KY