STATE OF MICHIGAN

COURT OF APPEALS

DAWN N. ISON, as Personal Representative of the Estate of TENIKA HITER,

Plaintiff-Appellant,

v

WILLIAM PICKARD, BEARWOOD MANAGEMENT COMPANY, INC., and BRAILLE CORPORATION,

Defendants,

and

MCDONALD'S CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 24, 2000

No. 207199
Wayne Circuit Court
LC No. 95-535765 NO

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant McDonald's Corporation. We affirm.

This case arises out of a shooting at a McDonald's restaurant in Detroit on July 30, 1994. Tanika Hiter was working at the restaurant's drive-through window when an unknown assailant shot through the open window, killing Hiter. Plaintiff filed an action based on intentional tort against William Pickard, Braille Corporation, and Bearwood Management Company, Inc., which leased the restaurant and operated the franchise under a licensing agreement with McDonald's and employed Hiter. Plaintiff also sued McDonald's under a negligence theory. McDonald's filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), which the lower court granted on May 16, 1997. Plaintiff's claims against the remaining defendants were subsequently dismissed on summary disposition and are not at issue in this appeal.

This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *MacDonald v PKT, Inc*, 233 Mich App 395, 398; 593 NW2d 176 (1999). A motion pursuant to MCR 2.116(C)(8) is properly granted if the claim is so clearly unenforceable as a matter of law that no factual development could establish a claim of recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion is tested on the pleadings alone and all factual allegations contained in the complaint are accepted as true. *Id*. When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court considers the entire record to determine whether summary disposition was appropriate, drawing all reasonable inferences from the evidence in a light most favorable to the nonmoving party. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). A motion pursuant to this rule is properly granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *de Sanchez v Dep't of Mental Health*, 455 Mich 83, 89; 565 NW2d 358 (1997).

I

Plaintiff first contends that the trial court erred in granting summary disposition to McDonald's because McDonald's owed a duty to Hiter on the basis of its possession and control of the premises. We disagree.

In Michigan, there must be possession and control of the premises to impose liability for injuries sustained thereon. *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). The governing case regarding premises liability for invitee injuries in a franchisor-franchisee situation is *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990). In *Little*, a patron slipped and fell on an outside walkway at a franchise operating as a Howard Johnson restaurant. *Id.* at 677. The plaintiff sued the franchisor, Howard Johnson Company, as the owner and possessor of the land on which she was injured. *Id*. at 677-678. This Court held that, because Howard Johnson was not in possession and control of the premises, no direct liability could attach for the plaintiff's injuries. *Id.* at 679.

Plaintiff first argues that the trial court erroneously relied on *Little* because this case is factually distinguishable. Both *Little* and this case involve allegations of negligence by a franchisor for dangerous conditions on property. In *Little*, the plaintiff claimed Howard Johnson was liable because snow was not adequately cleared from the walkway on which she fell. Here, plaintiff claims the drive-through window was inadequate to prevent criminal assaults. As such, in both cases, the issue of liability rests upon whether the franchisor had sufficient possession and control of the property to be in the best position to correct the allegedly dangerous condition. *Merritt, supra* at 552, 554.

The Court in *Little* considered the control Howard Johnson retained in its franchise agreement and the actual control it exercised over the location in question. *Little, supra* at 679. The franchise agreement allowed Howard Johnson to inspect the premises and to monitor merchandise, equipment and operating methods. *Id*. However, even if the agreement gave Howard Johnson the *right* to control the land, i.e., the restaurant's maintenance, the Court found no evidence that Howard Johnson actually

exercised that control. *Id*. Consequently, Howard Johnson could not be held directly liable for the plaintiff's injuries. *Id*.

Similarly, in this case the license agreement between Pickard and McDonald's allowed for inspections by McDonald's to ensure Pickard adhered to McDonald's standards. These inspections included McDonald's right to check Pickard's accounts, books, tax returns, food products, preparation methods, food quality, and appearance. Pickard was required to use McDonald's layout designs, maintain the building in conformance with blueprints, and obtain written consent before altering, converting, or adding to the building. The license agreement also provided that McDonald's and Pickard would maintain a close working relationship and that McDonald's would consult with and advise Pickard regarding management, service, and food preparation.

Because retained authority to inspect and monitor the premises is not sufficient control to trigger liability, there must be an issue of material fact regarding the actual control exercised by McDonald's to survive summary disposition. See *id.* at 679. Pickard testified that a McDonald's field representative periodically inspected the premises to ensure the restaurant adhered to McDonald's basic standards of quality, service, cleanliness and value. Pickard further testified that McDonald's offered help and advice regarding food safety, equipment locations, operations, and management. However, Pickard also testified that his restaurant manager was in charge of the day-to-day operations for the restaurant. Even though McDonald's exercised some of the control retained under the license agreement with Pickard, the occasional inspections and advice to Pickard was insufficient to establish the degree of control necessary to impose direct liability on McDonald's for general injuries occurring on the premises.

Moreover, the evidence indicates that McDonald's did not control security measures at the restaurant. The license agreement between McDonald's and Pickard contains no reference to security measures. Pickard testified that his companies promulgated security procedures and that he would pursue safety precautions that he believed were necessary. Even though McDonald's built the restaurant in 1982, Pickard/Braille was in possession and control. The evidence indicates no attempt by Pickard/Braille to change the drive-through window to a safety window or that permission for such change was or would have been denied by McDonald's. Pickard/Braille occupied the premises and controlled the restaurant's daily operations, and, as the possessor, was in the best position to provide a safe work environment.

Because Pickard/Braille was in physical possession of the restaurant and controlled operations and security, there was no genuine issue of material fact regarding possession and control. McDonald's owed no duty to Hiter, and the trial court properly granted summary disposition to McDonald's.

II

Plaintiff next contends that the trial court erred in granting summary disposition to McDonald's because McDonald's and Hiter had a special relationship, giving rise to a duty of reasonable care by McDonald's. The trial court did not discuss this theory in granting McDonald's motion and there is no indication that the trial court considered this issue. However, this Court "may properly review an issue if the question is one of law and the facts necessary for its resolution have been presented." *Adam v*

Sylvan Glenn Golf Course, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). Sufficient facts have been presented for the resolution of this issue. Because the parties relied on documentary evidence beyond the pleadings in support of their arguments, we review the issue pursuant to MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). Our review of the record does not show a genuine issue of material fact that would give rise to a special relationship between Hiter and McDonald's.

Generally, there is no duty that obligates one person to aid or protect another endangered by a third party's conduct. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). A duty may arise to protect another from foreseeable harm, however, if a special relationship exists between the parties. *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993); *Monusko v Postle*, 175 Mich App 269, 273-274; 437 NW2d 367 (1989). The kinds of special relationships generally recognized in Michigan include landlord-tenant, proprietor-patron, employer-employee, innkeeper-guest, doctor-patient and residential invitor-invitee. *Marcelletti, supra* at 664. Assuming, *arguendo*, that the harm at issue in this claim was foreseeable, no such special relationship arose between Hiter and McDonald's.

Plaintiff contends that, because Hiter was part of the "McDonald's system," that McDonald's and Hiter had a special relationship. To find a duty, the special relationship must be "sufficiently strong to require a defendant take action to benefit the injured party." *Murdock, supra* at 54. The key inquiry is whether a plaintiff entrusted himself to the protection and control of the defendant and lost the ability to protect himself in the process. *Williams v Cunningham Drugstores*, 429 Mich 495, 499; 418 NW2d 381 (1988); *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992). The court must consider the societal interests involved, the burden on the defendant, the likelihood of occurrence, and the relationship between the parties. *Id.*

The facts in this case do not indicate that McDonald's had any control over Hiter. Hiter was employed by Bearwood Management and supervised by Pickard/Braille Corporation. Pickard, and his companies Bearwood and Braille, were in charge of daily operations at the restaurant. Further, there is no evidence that any McDonald's employee ever had contact with Hiter. In short, McDonald's had no direct control over Hiter, and no evidence suggests that Hiter entrusted her care to McDonald's. Accordingly, the relationship between Hiter and McDonald's was tenuous, at best.

McDonald's, as a franchisor, did not control daily operations at the restaurant and was not in the best position to assess security risks, especially since McDonald's surrendered possession of the restaurant to Pickard in 1982. This situation involved a criminal act by an unknown third party. Because there was no direct relationship between Hiter and McDonald's, no evidence of control or entrustment as in an employment relationship, and McDonald's was not in a position to control the risk of harm to Hiter, there was no genuine issue of material fact regarding a special relationship between the parties and summary disposition was appropriate.

III

Even if a basis existed for imposing a duty on defendant under either premises liability or a special relationship, liability would not be established on the facts of this case. The duty of reasonable care generally does not extend to protection from criminal acts by unknown third parties; a possessor of land or business invitor is normally not the insurer of the safety of its invitees. *Williams, supra* at 500; *Perez v KFC Nat'l Management Co, Inc*, 183 Mich App 265, 268; 454 NW2d 145 (1990). Because a business invitor cannot control incidence of crime in the community, reasonable care does not extend to providing police protection on its premises. *Williams, supra* at 502, 504.

Plaintiff contends that in this case reasonable care required heightened protection through the installation of a safety drive-through window for workers because of previous incidents of crime. Generally, criminal acts of unknown third parties are not foreseeable, and no duty exists to protect against criminal activity, even in areas of higher crime. *Perez, supra* at 269. This Court has held that a merchant is not liable for attacks by irate customers where there is no notice of the danger. *Id.* at 270-271. Because crime is necessarily unpredictable, imposing a duty of care to protect workers from random criminal attacks would require a level of care specifically rejected in *Williams* and its progeny; this Court will not extend that duty under these facts.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad