D.A. 5-5-93 027

SUPREME COURT OF FLORIDA

NO. 80,310

MOBIL OIL CORPORATION,

Petitioner,

vs.

JEREMY BRANSFORD,

Respondent.

ON DISCRETIONARY CONFLICT REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE POSITION OF PETITIONER, MOBIL OIL CORPORATION

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INTRODUCTION

The American Petroleum Institute is a trade association representing approximately 300 member companies, many of which are engaged in the refining, distribution, and sale of gasoline in the United States, including the State of Florida. The American Petroleum Institute submits this brief in support of the position of the Petitioner, Mobil Oil Corporation.

As of July, 1990, there were 10,136 retail gasoline outlets in Florida. Of those over 90 percent were operated directly by independent operators. This case, accordingly, if decided incorrectly, would drastically and unreasonably expand the potential tort liability exposure of refiners who, through franchise, distribution, and lease agreements, market their products to independent service station owner/operators who in turn sell these products to the consuming public in Florida.

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STATEMENT OF THE CASE AND FACTS

The American Petroleum Institute ("API") adopts the statement of the case and facts set forth in the initial brief filed by Petitioner, Mobil Oil Corporation ("Mobil"), as well as the facts set forth in Mobil's reply brief. API would add the following observations.

Respondent Bransford filed a six-count second amended complaint against Mobil, Alan M. Berman d/b/a Berman's Service Station ("Berman"), and Hyman Stethem. Berman was the independent operator of the service station wherein Bransford was allegedly assaulted and battered by Stethem, Berman's employee.

In Count I of his amended complaint, Bransford sought recovery from Mobil under an apparent agency theory. The only allegations in support of this vicarious liability theory are as follows:

> This agency relationship existed by virtue of the following:
>
> a) There was a representation made by MOBIL that the station in question was owned and/or controlled by MOBIL and/or that the station was the agent of MOBIL. This was further supported by the fact that there was a MOBIL sign on the building and other parts of the property and that the property comported to the color schemes of the MOBIL OIL CORPORATION;
>
> b) That there were MOBIL products sold on the property.

(R. 303-304, 334; ¶ 8 of the Second Amended Complaint). None of the other counts of the amended complaint reallege these apparent agency allegations nor do the other counts seek to hold Mobil liable on an apparent agency theory.

The trial court entered summary judgment against Bransford and in favor of Mobil and Berman on all counts. (R. 921-922). Bransford thereafter appealed to the Fourth District. As to Berman, Bransford sought reversal of the summary judgment on his claims that Berman was

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liable for negligent retention, negligent hiring, negligent training, and negligent security. As to Mobil, Bransford challenged only the trial court's ruling that Mobil was not liable as a matter of law under an apparent agency theory.

In a split decision, the Fourth District affirmed in part and reversed in part. *Bransford v. Berman*, 601 So. 2d 1306 (Fla. 4th DCA 1992). The panel unanimously agreed with Bransford that summary judgment was improperly entered on his negligent retention claim against Berman. The summary judgment on the other claims Bransford asserted against Berman, however, were not disturbed by the appellate court.[1]

The panel's majority furthermore ruled that Mobil "might be liable under the theory of apparent agency for failing to provide adequate security and/or failing to remedy a foreseeable danger. *See Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA), *dismissed*, 589 So. 2d 291 (Fla. 1991)." *Bransford*, 601 So. 2d at 1307. However, the Fourth District did not hold that the summary judgment in favor of Berman on these same claims was improper, and Berman was Mobil's supposed apparent agent. As noted above, the only claim against Berman which survived the Fourth District's review was the claim for negligent retention.

Although Bransford did not seek recovery from Mobil based on its ownership of the property on which the service station was located, and Bransford did not assert that Mobil had control of the station, the Fourth District distinguished its previous decision in *Sydenham v.*

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[1]Respondent does not dispute the representations found in footnote 1 of Mobil's initial brief that the Fourth District affirmed the summary judgment in favor of Berman in all respects save the negligent retention claim. Nor has Respondent filed a cross-petition seeking review of the Fourth District's decision. Consequently, it is conceded and clear that the summary judgment on Respondent's claims against Berman for negligent security and for failing to remedy a foreseeable danger stands affirmed.

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Santiago, 392 So. 2d 357 (Fla. 4th DCA 1981) on the ground that "in *Sydenham*, the oil company did not own the station and had no control over it, aside from gasoline sales." *Id.* at 1307.

Judge Stone dissented from the reversal of the summary judgment for Mobil:

> I concur in reversing as to the defendant Berman. However, as to Mobil Oil, I would affirm on the authority of *Sydenham v. Santiago*, 392 So. 2d 357 (Fla. 4th DCA 1981). *See also Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983) and *Cardounel v. Shell Oil Co.*, 397 So. 2d 328 (Fla. 3d DCA), *dismissed by* 407 So. 2d 1102 (Fla. 1981).
>
> In my judgment *Holiday Inns, Inc. v. Shelburne* does not extend liability to the extent that it may be imposed, through an agency concept, simply because a well-known company contracts with a truly independent contractor for use of its signs, logo, uniforms, products, or method of operating.

Id. at 1307.

SUMMARY OF ARGUMENT

The American Petroleum Institute respectfully submits that the Fourth District's determination that Petitioner, Mobil Oil Corporation, might be liable to Respondent under an apparent agency theory for failing to provide adequate security and/or failure to remedy a foreseeable danger is fundamentally flawed and should be quashed for two reasons.

First, the Fourth District's decision conflicts with the cases from this Court and the other district courts of appeal which hold that a principal against whom a vicarious liability theory of recovery has been asserted is not liable as a matter of law where the agent whose conduct gave rise to the suit is exonerated. In the present case, the Fourth District affirmed the summary judgment for Berman, Mobil's alleged apparent agent, on all of Respondent's claims against him save the claim for negligently retaining the alleged tortfeasor, Hyman Stethem. Consequently,

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the Fourth District erred in holding that Mobil is potentially liable under an apparent agency theory on claims which were held invalid as to Berman.

Second, the Fourth District's decision simply cannot coexist with this Court's decision in *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983). The Court in that case sustained the apparent agency claim brought against the motel franchisor where the franchisor was directly and deeply involved in the integrated commercial enterprise which was jointly operated by the franchisor and franchisee. In reaching its decision in *Robbins*, however, the Court also confirmed the continued vitality of cases such as *Sydenham v. Santiago*, 392 So. 2d 357 (Fla. 4th DCA 1981), which stand for the proposition that an oil company may not be held liable under an apparent agency theory where the only basis for the claim is the plaintiff's asserted subjective reliance on the presence of the oil company's signs and logo at the service station and the fact that the company's products are sold there.

The Fourth District's attempt to distinguish the "oil company cases," which were approved on their facts in *Robbins*, on the grounds that Mobil owned the premises in question and controlled the service station is ineffective. The law in Florida has long been settled that a landlord is not liable for the torts committed by the lessee or the lessee's employee, and "ownership" of the property where a tort occurs has no place in an apparent agency analysis. The law is likewise clear that control or the right of control is irrelevant to the question of liability under an apparent agency theory. In any event, Respondent's second amended complaint seeks recovery against Mobil under an apparent agency theory solely because Mobil signs were displayed at the service station and its products were sold there. Respondent does not allege in his operative complaint that Mobil controlled or had the right to control the operation

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of the service station, nor would the record support any such allegations had they been made. Thus, Respondent's apparent agency theory of liability fails as a matter of law under *Robbins*.

In sum, the trial court's summary judgment in favor of Mobil on Respondent's apparent agency claim was totally consistent with established Florida law. The Fourth District's decision therefore should be quashed, and the trial court's ruling should be reinstated.

ARGUMENT

A. THE FOURTH DISTRICT ERRONEOUSLY HELD MOBIL POTENTIALLY LIABLE FOR FAILING TO PROVIDE ADEQUATE SECURITY AND/OR FAILING TO REMEDY A FORESEEABLE DANGER WHERE THE SUMMARY JUDGMENT IN FAVOR OF BERMAN ON THESE CLAIMS WAS AFFIRMED.

This Court held long ago that where a party seeks recovery from a principal under a vicarious liability theory, and the agent whose conduct gives rise to the claim is exonerated, then the principal also is exonerated as a matter of law. *Williams v. Hines*, 86 So. 695 (Fla. 1920); *see also Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985) ("It is generally recognized that, when a principal's liability rests solely on the doctrine of respondeat superior, a principal cannot be held liable if the agent is exonerated."); *Jones v. Gulf Coast Newspapers, Inc.*, 595 So. 2d 90, 91 (Fla. 2d DCA), *rev. denied*, 602 So. 2d 942 (Fla. 1992) (negative adjudication on the merits of plaintiffs' claim against employee/active tortfeasor "barred [plaintiffs] from establishing liability" on the part of the employer); *Walsingham v. Browning*, 525 So. 2d 996, 997 (Fla. 1st DCA 1988) ("In an action against an employer for the actions of the employee based upon the theory of vicarious liability or respondeat superior, the plaintiff must show liability on the part of the employee: '[I]f the employee is not liable the employer is not liable.' *Mallory v. O'Neil*, 69 So. 2d 313 (Fla. 1954)").

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Here, the Fourth District clearly transgressed this well-settled rule by reversing the summary judgment in favor of Mobil and holding that Mobil "might be liable under the theory of apparent agency for failing to provide adequate security and/or failing to remedy a foreseeable danger." Mobil's alleged liability under an apparent agency theory necessarily must be based on the antecedent liability of the supposed apparent agent, in this case Berman. However, the trial court's summary judgment for Berman on these same claims was affirmed by the Fourth District. Since Berman was exonerated from liability on these claims, it follows that the Fourth District erred in holding Mobil potentially liable for them under an apparent agency theory. The Fourth District's decision therefore should be quashed.

B. THE FOURTH DISTRICT'S DECISION COLLIDES WITH THIS COURT'S DECISION IN *ORLANDO EXECUTIVE PARK, INC. V. ROBBINS.*

The Fourth District, relying on *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA), *dismissed*, 589 So. 2d 291 (Fla. 1991), concluded that Mobil might be liable under an apparent agency theory. The Court noted that Mobil owned the station and displayed its logo there, and distinguished its previous decision in *Sydenham v. Santiago*, 392 So. 2d 357 (Fla. 4th DCA 1981), on the grounds that "in *Sydenham*, the oil company did not own the station and had no control over it, aside from gasoline sales." *Bransford*, 601 So. 2d at 1307. In so ruling, the court created conflict with this Court's decision in *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983), and a long line of cases holding, under similar circumstances, that the oil company/franchisor/licensor was not liable as a matter of law for the torts committed by the independent operator of the service station or the operator's employees.

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1. The oil company cases

In *Sydenham v. Santiago*, 392 So. 2d 357 (Fla. 4th DCA 1981), the Fourth District squarely rejected the plaintiff's attempt to saddle an oil company with liability for the negligence of the independent service station operator's employee under an apparent agency theory. The plaintiff in *Sydenham* based his apparent agency claim on his reliance upon Gulf Oil's national advertising campaign and the presence of Gulf Oil's corporate logo on the premises. In affirming the summary judgment for the oil company, the court reasoned:

> The final summary judgment is affirmed on the authority of *Cawthon v. Phillips Petroleum Company*, 124 So. 2d 517 (Fla. 2d DCA 1960).
>
> An oil company does not confer apparent authority subjecting itself to vicarious liability for negligence, upon a retail service station by allowing the use of its trade name and selling its products to the station. This holding is consistent with our recent decision in *Ortega v. General Motors Corporation*, 392 So. 2d 40 (Fla. 4th DCA 1980) in which we declined to hold General Motors Corporation liable because a truck retailer displayed GMC signs and trademarks at its place of business.

Id. at 358.[2] *Sydenham* is in complete accord with numerous other decisions from the district courts, *see, e.g., Cardounel v. Shell Oil. Co.*, 397 So. 2d 328 (Fla. 3d DCA), *dismissed*, 407 So. 2d 1102 (Fla. 1981) (summary judgment in favor oil company affirmed); *Nelson v. Shell Oil Co.*, 396 So. 2d 752 (Fla. 3d DCA), *rev. denied*, 407 So. 2d 1104 (Fla. 1981) (same), and well-reasoned and recent decisions from other jurisdictions. *E.g., Chevron, U.S.A., Inc. v. Lerch*, 319 Md. 251, 570 A.2d 840 (Md. 1990).

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[2]All emphasis has been supplied by counsel unless otherwise noted.

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2. *Orlando Executive Park, Inc. v. Robbins*

In *Robbins*, the plaintiff who was attacked by a stranger while she was a registered guest at a Howard Johnson's Motor Lodge sued Howard Johnson's on an apparent agency theory. On appeal from the judgment in favor of the plaintiff, the Fifth District affirmed. *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442 (Fla. 5th DCA 1981).

In reaching its conclusion, the court was careful to distinguish cases involving oil company franchisors, which held the defendants not liable as a matter of law on asserted apparent agency theories of liability:

> Appellant correctly points out that gas station signs alone do make a gas station operator a general agent of the oil company. *Cawthon v. Phillips Petroleum Co.*, 124 So. 2d 527 (Fla. 2d DCA 1960).
>
> The reason for this is that it is common knowledge that gas station operators are independent contractors, and "these signs and emblems represent no more than notice to a motorist that a given company's products are being marketed at the station." *Coe v. Esau*, 377 P.2d 815 (Okla. 1963); *id.* at 450, *accord*, *Cawthon v. Phillips Petroleum Co.*

On further review, this Court approved the Fifth District's ruling on the apparent agency issue. However, the Court recognized the rule set forth in *Sydenham* and *Cawthon*, discussed above, and held that those cases were limited to their facts. The Court said:

> On the facts of this case the district court has set out the proper standard, limiting *Sydenham* and other oil company cases to their facts . . . .

Robbins, 433 So. 2d at 494. The Court furthermore concluded that the plaintiff there had a valid apparent agency claim in light of the following evidence, over and above the evidence of the Howard Johnson signs at the hotel, the franchisor's national advertising campaign, and

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uniformity of building design and color schemes:

> We note that HJ, rather than OEP [the franchisee] operated the restaurant, lounge and adult theater at the motel. The complex was an integrated commercial enterprise, and HJ's direct participation was significant.

Id. at 494.

3. The Fourth District's error

From the foregoing, it should be clear that the "oil company cases" such as *Sydenham* were not overruled by this Court in *Robbins* and represent the law in Florida on similar facts. The Fourth District here appeared to recognize as much, but concluded that these cases were not controlling because Mobil owned the subject service station and supposedly exercised control over it. The Fourth District's attempt to distinguish *Sydenham* is flawed both legally and factually.

In the first place, the fact that Mobil owned the premises and leased them to Berman, an independent operator, is totally irrelevant to the apparent agency analysis. Bransford's injuries did not result from a defective condition on the premises for which Mobil might conceivably be held responsible. Rather, his injuries were allegedly caused by the employee of Berman, Mobil's lessee. Florida law is clear that a landlord is not liable for injuries to a third party caused by the wrongdoing of the tenant/lessee. *E.g.*, *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661, 664 (Fla. 5th DCA 1987) ("Of course, the lessor (owner) is not liable for injuries caused solely by the lessee's operations and activities on the leased premises"); *Vanner v. Goldshein*, 216 So. 2d 759 (Fla. 3d DCA 1968). The Third District so held in identical circumstances in *Cardounel v. Shell Oil Co.*, 397 So. 2d 328 (Fla. 3d DCA 1981), *dismissed*, 407 So. 2d 1102 (Fla. 1981), when it affirmed the summary judgment for Shell Oil Co., the owner of the service station, in

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an action brought by the plaintiff against Shell for injuries sustained in an altercation with the lessee who operated the station.

As this Court pointed out in *Robbins*, the essential elements to liability under the apparent agency doctrine is a "representation by the principal" clothing the apparent agent with authority to act on behalf of the principal, and the plaintiff's detrimental reliance on that representation. *Robbins*, 433 So. 2d at 494. That a party possesses legal title to premises on which a tort occurs, a fact which, in most cases, can be confirmed only by searching property records, certainly does not constitute a representation that another party occupying the premises is authorized to act on behalf of the owner. Consequently, Mobil's fee simple ownership of the service station property does absolutely nothing to further Bransford's apparent agency claim or the Fourth District's holding on this issue.

The Fourth District also mistakenly relied on Mobil's alleged "control" to distinguish *Sydenham*. The only theory of liability against Mobil which Bransford sought to have resurrected in the Fourth District, and which the Fourth District held was viable, was apparent agency. Consequently, control or the right to exercise control is of no moment whatsoever. As the Fifth District stated in the opinion which was approved by this Court in *Robbins*,

> Appellant argues strongly that the evidence fails to show any control or right of control by HJ over the operation of the motel, but while this argument may be relevant to a claim of actual agency, it has no relevance to the theory of apparent agency. Appellee sought damages against HJ solely on the apparent agency doctrine . . . .

Orlando Executive Park, Inc. v. P.D.R., 402 So. 2d 442, 449 (Fla. 5th DCA 1981) (emphasis in original); *see also Sydenham*, 392 So. 2d at 358 (observing that control is not a factor in apparent agency analysis).

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The Fourth District's reference to Mobil's supposed "control" is also inapt in light of Bransford's actual claim against Mobil and the record in this case. Bransford's second amended complaint does not allege that Mobil controlled or had the right to control Berman's operation of the service station. Bransford's apparent agency claim instead was grounded exclusively on Mobil's so-called representations as to Berman's "authority" arising from the Mobil signs displayed at the station and the fact that Mobil products were sold there. In any case, there is no evidence in this record to support the Fourth District's suggestion that Mobil exercised control over the service station sufficient to impose vicarious liability on Mobil for the alleged assault and battery committed by Berman's employee.

It follows from the foregoing that the Fourth District's holding as to Mobil is based on faulty legal and factual premises. When these faulty premises are cast aside, as they should be, the correctness of the summary judgment entered in favor of Mobil becomes manifest.

API submits that, in the words of this Court in *Robbins*, the present case fits neatly within the facts of "*Sydenham* and [the] other oil company cases" and that these decisions therefore are controlling. In stark contrast to *Robbins*, where the franchisor was directly and deeply involved on the site of the integrated commercial enterprise, Bransford's apparent agency theory is based solely on the allegations in the second amended complaint that Mobil signs were displayed at the service station operated by Berman and that Mobil products were sold at the station. Of course, this is precisely the indicia of apparent agency which *Sydenham* and the "other oil company cases," *Robbins*, 433 So. 2d at 493, held was insufficient as a matter of law to state a cause of action against the oil company/franchisor. In other words, the facts of this case are no different than the facts in these other cases and, as this Court plainly indicated in *Robbins*,

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the result also should be the same -- the summary judgment for Mobil should be affirmed.

CONCLUSION

Based on the facts and authorities set forth above and in the briefs submitted by Petitioner, Mobil Oil Corporation, the American Petroleum Institute respectfully requests that the Fourth District's determination that Mobil might be liable on an apparent agency theory be quashed with directions to order reinstatement of the summary judgment in favor of Mobil on all of Respondent's claims.

Respectfully submitted,

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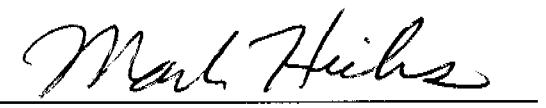
By 

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CERTIFICATE OF SERVICE

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