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IN THE SUPREME COURT OF FLORIDA

MOBIL OIL CORPORATION,

Petitioner,

vs. CASE NO. 80,310

JEREMY BRANSFORD,

Respondent.
_____/

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

AMICUS CURIAE BRIEF OF AMOCO CORPORATION SUPPORTING PETITIONER

FULLER, JOHNSON & FARRELL, P.A.

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STATEMENT OF THE CASE AND FACTS

Amoco adopts Petitioner's statement of the case and facts.

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Should oil companies be subject to vicarious liability through the doctrine of apparent agency on facts such as are presented by the Bransford v. Berman case?

III.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal ruling in Bransford ignores a well-founded line of precedent and appears to commingle the two distinct doctrines of actual agency and apparent agency.

Apparent agency is not objectively created by the mere appearance of corporate advertisements, signs, logos, or products. This is true of service stations as well as most other retail establishments. The cases involving hotel/motel chains do not apply because of the greater reliance on security which perhaps justifiably typifies the average hotel patron. The Fourth District's Bransford holding is thus overly expansive and unnecessarily creates liability potential where no valid policy concern compels creation of such potential.

IV.

ARGUMENT

In finding Mobil might be liable under a theory of apparent agency, the Fourth District Court of Appeal ruling in Bransford v. Berman, 601 So.2d 1306 (Fla. 4th DCA 1992) ignores a well-founded line of precedent and appears to commingle the two distinct doctrines of actual agency and apparent agency. This brief is devoted to clarifying the distinction between actual and apparent agency, and to presenting the reasons for why vicarious liability should not be imposed on oil companies under either doctrine in situations such as presented by the case at hand.

Actual Versus Apparent Agency

"The authority of an agent to bind a principal may be *real* or it may be apparent only, . . ." Stiles v. Gordon Land Co., 44 So.2d 417, 421 (Fla. 1950)(emphasis in original). Many appellate courts, when presented with issues involving both actual and apparent agency theories, have been careful to distinguish between the two theories. E.g., Deutsche Credit Corp. v. Gale Group, Inc., 18 FLW D476 (Fla. 5th DCA February 12, 1993); Ortega v. General Motors Corp., 392 So.2d 40 (Fla. 4th DCA 1980); Cawthon v. Phillips Petroleum Co., 124 So.2d 517 (Fla. 2d DCA 1960).

The Fourth District's Treatment of Agency Issues

In Bransford, the Fourth District wrote that Mobil might be liable under an apparent agency theory. The court distinguished its earlier Sydenham v. Santiago, 392 So.2d 357

(Fla. 4th DCA 1981) case but acknowledged that Sydenham appears to compel a contrary result, and it does. The court distinguished Sydenham writing that in Sydenham the oil company did not own the station involved and had essentially no control over it. However, the Sydenham references to ownership and control were mere dicta. And, as pointed out in the ensuing argument of this brief, ownership and degrees of control are not matters considered in determining whether apparent agency existed.

As in Bransford, the sole issue before the Sydenham court was the issue of apparent authority of an agent to act on behalf of a principal. Ownership and control of the service station were not matters that bore on the court's holding in Sydenham. This point is clear because the Sydenham court distinguished Fernandez v. Valle, 364 So.2d 835 (Fla. 3d DCA 1978) writing that in Fernandez the issue was *actual* agency and actual control and the issue "presented to us is simply one of *apparent* authority." Sydenham, 392 So.2d at 358 (emphasis in original). The Sydenham court's holding is that "[a]n 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." Sydenham, 392 So.2d at 357–58.

As a result, the Fourth District court in Bransford has distinguished its own precedent by referring to facts which do not bear on the determination of whether an apparent agency existed. Furthermore, it has departed from an established and reasoned rule of law.

Actual Agency

In determining the existence of an actual agency relationship, this Court has adopted the Restatement (Second) of Agency §1 (1957) on the essential indicia of an actual agency relationship: "Essential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) **control by the principal** over the actions of the agent." Goldschmidt v. Holman, 571 So.2d 422, 424 n.5 (Fla. 1990) (emphasis added). As to control, "[t]he existence of a true agency relationship depends on the degree of control exercised by the principal. Generally, a contractor is not a true agent where the principal controls only the outcome of the relationship, not the means used to achieve that outcome." Dorse v. Armstrong World Industries, Inc., 513 So.2d 1265, 1268 n.4 (Fla. 1987).

In Cawthon v. Phillips Petroleum, the Second District dealt with both the issue of actual agency and the issue of apparent agency. As to actual agency, the court focused on the degree of control exercised by the principal. In finding no actual agency relationship existed, the court noted the oil company did not control the operator's methods of operation, the hiring or firing of employees, the retail pricing, the hours the station was open, and it could not require operation reports or force the operator to comply with suggestions. Id. at 519. The Bransford case similarly lacks such key elements of control by Mobil and such degrees of control are commonly not a part of the relationship between oil companies and service station operators. Notice a number of oil company cases concerning the issue of actual agency, and the concomitant issue of control, have

uniformly found the degree of control insufficient to establish an actual agency relationship between the company and the operator. E.g., Nelson v. Shell Oil Co., 396 So.2d 752 (Fla. 3d DCA 1981); McMillion v. Sinclair Refining Co., 236 So.2d 151 (Fla. 1st DCA 1970); Drum v. Pure Oil Co., 184 So.2d 196 (Fla. 4th DCA 1966)(concerning both the issue of apparent agency and actual agency and finding on the issue of actual agency that the oil company lacked sufficient control over the station's methods of operation to establish an actual agency relationship).

The Fourth District has stated that

> the question of control for agency purposes must be determined by examining all of the rights and duties of the parties under the agreement. Of greatest importance are those rights and duties of the parties which bear most directly and significantly on the right to control the day-to-day operation of [the] business.

Ortega v. General Motors Corp., 392 So.2d 40, 42 (Fla. 4th DCA 1980). As a general rule, oil companies do not control or seek to control the day-to-day operations of service station franchises.

In Bransford, the Fourth District ruled Mobil might be liable under the theory of apparent agency. However not only did the court mention the issue of control, it also mentioned that Mobil **owned** the station involved. But as the Fourth District recognized in its Ortega decision, ownership is a factor to be considered on the issue of control. On the other hand, it cannot logically be considered in an apparent agency case because ownership is a function of legal title. In most all circumstances, legal title to a service station is not apparent to a patron from its premises. Therefore, since ownership is a factor in determining the degree of control a principal has, and since the degree of control

bears only on the question of whether an actual agency relationship exists, ownership is not a factor which is properly considered in an apparent agency case. Further, ownership is not dispositive of the issue of control. In Drum and Cardounel v. Shell Oil Co., 397 So.2d 328 (Fla. 3d DCA 1981), review dismissed 407 So.2d 1102 (Fla. 1981) ownership by the oil company or someone other than the operator did not establish sufficient control to impose actual agency liability on the oil companies in those cases.

As mentioned above, in Cawthon v. Phillips Petroleum the Second District separately addressed the issues of actual agency and apparent agency. In Cawthon, the court wrote that neither the general advertisement nor the signs involved in that case created an issue of control. The court recognized that advertisements, signage and logos have nothing to do with the issue of control or actual agency. The court did discuss oil company ads and signs, however, in the context of the claim of apparent agency involved in that case.

As Mobil made plain in their brief, the Bransford case involves only the issue of apparent agency—it was the only agency issue brought before the appellate court. It is thus important to maintain the distinction between actual agency and apparent agency. As the courts have recognized, facts concerning ownership and control do not enter into a determination of whether apparent agency can be properly asserted.

Apparent Agency

As the Fourth District wrote in Holiday Inns, Inc. v. Shellburne, 576 So.2d 322 (Fla. 4th DCA 1991), review dismissed, 589 So.2d 291 (Fla. 1991), the doctrine of

apparent agency or apparent authority is an estoppel doctrine requiring some representation by a principal and detrimental reliance on that representation by a third person. The court also noted in Shellburne that "the doctrine of apparent authority rests on appearances created by the principal, not the agent." Id. at 333. Moreover, "'[a]pparent authority' does not arise from the subjective understanding of the person dealing with the purported agent, . . ." Spence, Payne, Masington & Grossman, P.A. v. Gerson, 483 So.2d 775, 777 (Fla. 3d DCA 1986). Thus, whether someone is legally entitled to rely upon their assumption that a business is an agent of some larger company is not dependent upon a subjective belief they manifest upon seeing company advertisements, signage and logos.

On facts similar to those presented in Bransford, oil company cases concerning the issue of apparent agency have uniformly found that a party cannot conclude an agency relationship exists between an oil company and a service station simply because the oil company has communicated to patrons that they may find the company's products at the station. See e.g., Sydenham; Drum; Cawthon; Hudson v. Gulf Oil Co., 215 N.C. 422, 2 S.E.2d 26 (1939). Each of these cases involved either oil company advertisements, signs, or logos, or some combination or all of them. Even the Academy of Florida Trial Lawyers agrees in their amicus brief with the rule of law that "an oil company's petroleum products signs *alone* are insufficient to establish a franchisees' apparent agency." (AFTL brief p.2). The precedent these cases entail is well-grounded and there are no public policy concerns to be met by disturbing this precedent. Indeed, the stronger policy concerns dictate this precedent be upheld lest franchise agreements are to be emasculated.

Respondent and their amici encourage the Court to follow the "hotel cases" in

rendering its decision in this case. However, the distinction between hotel cases and oil company cases is already apparent in this Court's Orlando Executive Park v. Robbins, 433 So.2d 491 (Fla. 1983) opinion which discusses the Sydenham oil company case and declines to extend Sydenham to a hotel case. But the distinction observed in Robbins does not suggest that oil companies are afforded special consideration when an apparent agency theory is pressed against them. Ortega v. General Motors Corp., 392 So.2d 40 (Fla. 4th DCA 1980) is an example. Ortega involved a car dealership. There the court held the doctrine of apparent agency was not a basis for liability where the plaintiff asserted reliance upon signs, trademarks and other GMC appearances as a premise for an apparent agency theory. The Academy of Florida Trial Lawyers would have this Court believe that Mobil is attempting to carve out an exception in apparent agency jurisprudence for itself and other oil companies. To the contrary, Sydenham, Cawthon and other oil company cases long ago established the precedent for oil companies in this context, i.e., that an oil company does not confer apparent authority upon a retail service station by merely allowing the station to use company signs and advertisements and sell company products.

In conclusion, apparent agency is not created by the mere appearance of corporate advertisements, signs, logos, or products. This is true of service stations as well as most other retail establishments. The cases involving hotels do not disturb this precedent and there is no reason to disturb this precedent. The Fourth District's Bransford holding is thus overly expansive and unnecessarily creates liability potential where no valid policy concern compels creation of such potential.

CONCLUSION

Amicus Curiae Amoco respectfully requests this Court disapprove of the Fourth District Court of Appeal's Bransford opinion.

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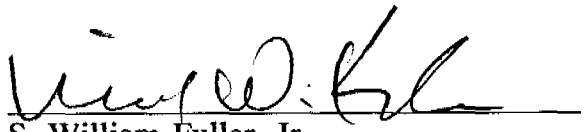

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