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IN THE SUPREME COURT OF FLORIDA

MOBIL OIL CORPORATION,

Petitioner,

v.

JEREMY BRANSFORD,

Respondent.

_____/

CASE NO: 80,310

FILED
SID J. WHITE
AUG 24 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA
CASE NO: 91-2147

AMENDED JURISDICTIONAL BRIEF OF MOBIL OIL CORPORATION, PETITIONER

ROGER S. KOBERT, ESQ.
FLORIDA BAR NO: 765295
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August 21, 1992

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TABLE OF AUTHORITIES

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BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On March 21, 1990, Respondent, JEREMY BRANSFORD (hereinafter "BRANSFORD"), entered the convenience store of a MOBIL service station in Ft. Lauderdale, Florida. While on the premises, BRANSFORD encountered HYMAN DALE STETHEM (hereinafter "STETHEM"), a cashier employed by ALAN M. BERMAN (hereinafter "BERMAN"), the franchise operator of the service station. After an exchange of words, STETHEM exited the locked, glass-enclosed booth in which he performed his cashier's duties and engaged in a fistfight with BRANSFORD. As a result, BRANSFORD allegedly suffered physical injuries and subsequently brought suit in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, seeking monetary damages against STETHEM, BERMAN, and MOBIL.

MOBIL, the owner of the real property upon which the service station is located, leased the station premises to BERMAN under a three year lease, from September 1, 1987, to August 31, 1990. According to the lease, BERMAN was required to use the premises as a gasoline facility offering petroleum and related products and services to the motoring public. Among the numerous conditions of the lease agreement, BERMAN was responsible for operating all facets of the service station business, while MOBIL allowed BERMAN to use MOBIL's trade name and to sell MOBIL products at the station. By the terms of this franchise agreement, BERMAN was an independent contractor/operator.

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On May 7, 1991, the Circuit Court, without opinion, entered two Orders granting in full both BERMAN's and MOBIL's Motions for Summary Judgment, thereby effectively leaving STETHEM as the only Defendant against whom BRANSFORD had a cause of action. However, by opinion dated July 8, 1992, the Fourth District Court of Appeal reversed portions of the Circuit Court's summary judgment rulings and remanded the case in accordance thereof. Specifically, with regard to MOBIL, the Court of Appeal held that the only viable cause of action BRANSFORD could possibly have is under the theory of apparent agency. In consequence of the Fourth District's decision, MOBIL now petitions the Court to invoke its discretionary jurisdiction, to effect review of the Court of Appeal's reversal as it relates to MOBIL, pursuant to Florida Rules of Appellate Procedure 9.120 and 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

MOBIL asserts that the decision filed on July 8, 1992, in the District Court of Appeal of Florida, Fourth District, expressly and directly conflicts with the Supreme Court's decision in Orlando Executive Park v. Robbins, infra, as well as several other decisions of Florida's District Courts of Appeal. These cases have uniformly decided that an oil company, as a matter of law, may not be held liable under the doctrine of apparent agency, in a case such as the one at issue.

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Inasmuch as the Fourth District reversed the summary judgment granted in favor of MOBIL on the basis that MOBIL can be held liable under the theory of apparent agency, MOBIL respectfully requests the Court to exercise its jurisdiction and entertain the case on the merits.

THE COURT SHOULD EXERCISE ITS JURISDICTION AND ENTERTAIN THE CASE ON ITS MERITS

MOBIL respectfully submits that the Fourth District's decision clearly presents the type of conflict which begs the Court to exercise its jurisdiction and entertain the case on the merits. In the decision in question, the Fourth District held that "MOBIL might be liable under the theory of apparent agency ...". MOBIL submits that the Court's decision in Orlando Executive Park v. Robbins, 433 So.2d 491 (Fla. 1983), precludes the possibility that MOBIL could be liable in this case under the theory of apparent agency.

As in the case at bar, several published decisions by Florida courts [1/] involve an oil company which has been sued by the victim of an alleged tortious act committed by the operator of the service station or an employee of the

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1/ See, e.g., Sydenham v. Santiago, 392 So.2d 357 (Fla. 4th DCA 1981); Cawthon v. Phillips Petroleum Co., 124 So.2d 517 (Fla. 2d DCA 1960); Cardounel v. Shell Oil Co., 397 So.2d 328 (Fla. 3d DCA 1981); Nelson v. Shell Oil Co., 396 So.2d 752 (Fla. 3d DCA 1981); Drum v. Pure Oil Co., 184 So.2d 196 (Fla. 4th DCA 1966).

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operator. In every single case involving an oil company, the court held, as a matter of law, that the oil company cannot be liable under the doctrine of apparent agency. Accordingly, summary judgment was granted in favor of the oil company in each instance.

The Court expressly recognized this uniform body of law in Robbins, where it quoted a passage from Sydenham v. Santiago, 392 So.2d 357 (Fla. 4th DCA 1981), a typical case on the issue of an oil company's apparent authority. In Sydenham, a tire repaired at Santiago's Gulf Station exploded and injured the plaintiff, who sued both Santiago, who owned the station, and Gulf Oil, whose products Santiago sold. As quoted in Robbins, the Sydenham court, which relied on another oil company case, Cawthon v. Phillips Petroleum Co., 124 So.2d 517 (Fla. 2d DCA 1960), found Gulf not liable under an apparent agency theory because:

> [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.

Robbins, 433 So.2d at 494 (quoting Sydenham, 392 So.2d at 357-58). Robbins held that the Howard Johnson Company created an apparent agency with the operator of a Howard Johnson motel. In so holding, however, the Court explicitly distinguished Sydenham and the other oil company cases:

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> 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, and we disapprove extending the language of Sydenham into cases such as the instant one to the extent of conflict with this opinion.

Robbins, 433 So.2d at 494. Thus, it is clear that the Court in Robbins approved of and let stand the oil company cases, which uniformly hold that an oil company cannot be held vicariously liable under the theory of apparent agency.

The Fourth District in the case sub judice held that "MOBIL might be liable under the theory of apparent agency ...", thus directly contravening Robbins and warranting the Court's exercise of jurisdiction in this case. MOBIL asserts that the Court's decision in Robbins directly conflicts with and expressly precludes the result reached in the Court of Appeal in its consideration of this case.

CONCLUSION

Inasmuch as the decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the Court's decision in Robbins on the question of apparent agency, MOBIL respectfully requests the Court to exercise its jurisdiction and entertain this case on the merits.

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By: _____
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Florida Bar No: 765295

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 21st day of August, 1992 to: MARK R. McCOLLEM, ESQ., Attorneys for Respondent/ Plaintiff, Chidnese & McCollem, 201 Southeast 12th Street, Ft. Lauderdale, Florida 33316 and to RICHARD B. ADAMS, ESQ., Attorneys for Defendant Hyman Dale Stethem, Adams & Adams, Suite 1000, Concord Building, 66 West Flagler Street, Miami, Florida 33130.

By: _____
ROGER S. KOBERT

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

JEREMY BRANSFORD,

Appellant,

v.

ALAN BERMAN and MOBIL OIL CORPORATION,

Appellees.

CASE NO. 91-2147.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed July 8, 1992

Appeal from the Circuit Court for Broward County; Robert Lance Andrews, Judge.

Mark R. McCollem of Chidnese & McCollem, Fort Lauderdale, for appellant.

Roger S. Kobert of Mark A. Cohen & Associates, P.A., Miami, for appellees.

LETTS, J.

An employee of a gas station emerged from his enclosed booth and started a fist fight with a customer. The gas station was owned by Mobil Oil Corporation and was leased to a franchisee who operated it. The operator, in turn, employed the attendant who started the fight. The customer filed suit against both the operator and Mobil Oil Corporation but the trial judge granted summary judgment in their favor. We reverse.

As to the station operator, the complaint alleged that the operator was negligent in failing, "to discharge [the] employee when [he] assaulted patrons." We find this, together

with other facts gleaned from the record, sufficient to allege a negligent retention claim. There is evidence in the record that the station operator had knowledge of prior violent behavior by the employee inflicted upon another customer of the station. This being so, there is a material issue of fact as to whether the operator "knew or should have known that the employee was a threat to others," Tallahassee Furniture, Inc. v. Harrison, 583 So.2d 744, 750 (Fla. 1st DCA 1991), rev. denied, 595 So.2d 558 (Fla. 1992), and therefore summary judgment on the negligent retention claim was improper.

As to Mobil Oil Corporation, we likewise believe the grant of the summary judgment was error. Under the facts in the record at the summary judgment hearing, it is clear 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). Mobil owned the station and prominently displayed its logo there in order to induce customers to patronize the premises. We are not unaware of an earlier case out of this court, Sydenham v. Santiago, 392 So.2d 357 (Fla. 4th DCA 1981), limited by Orlando Executive Park, Inc. v. Robbins, which might lead to a contrary result. However, in Sydenham, the oil company did not own the station and had no control over it, aside from gasoline sales.

REVERSED AND REMANDED.

WARNER, J., concurs.
STONE, J., concurs in part and dissents in part with opinion.

STONE, J., concurring in part and dissenting in part.

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.