017 D.A. 5-5-93

IN THE SUPREME COURT OF FLORIDA

MOBIL OIL CORPORATION,

Petitioner,

v. CASE NO: 80,310

JEREMY BRANSFORD,

Respondent.

_____/

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

REPLY BRIEF OF MOBIL OIL CORPORATION, PETITIONER

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March 9, 1993

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ARGUMENT

In its Initial Brief on the merits, MOBIL OIL CORPORATION (hereinafter "MOBIL") represented that Florida law precludes the imposition of vicarious liability upon an oil company franchisor for torts committed by its franchisee where no evidence is presented that the oil company franchisor exercised actual control at the franchised service station. *See Fernandez v. Valle*, 364 So.2d 835 (Fla. 3d DCA 1978). It has long been the rule in Florida that subjective reliance by the injured party upon manifestations of the franchisor's identity -- such as signs, logos and other trade marks -- is insufficient in and of itself to give rise to vicarious liability under the theory of apparent agency. *See, e.g., Sydenham v. Santiago*, 392 So.2d 357 (Fla. 4th DCA 1981); *Orlando Executive Park v. P.D.R.*, 402 So.2d 442 (Fla. 5th DCA 1981); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963).

In his Answer Brief, Respondent declares that MOBIL "routinely provided on site directions and support for the day to day operation of the business located on its property." Answer Brief at 6. However, Respondent does not -- indeed, cannot -- cite any record support whatsoever for this all-important but hypothetical claim. Because the degree of control by the franchisor is *the* determining factor on the issue of apparent authority, Respondent's insupportable statement underscores the fact that there exists nothing, at any level, to indicate that the general protections afforded by the franchise relationship should not be granted MOBIL in this case. Because Respondent presented nothing to the trial court to evidence an unusual degree of control by MOBIL at the

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subject station, the trial court was compelled to, and properly did, follow Florida precedent in granting MOBIL summary judgment on the claim of apparent agency. On the other hand, in reversing the trial court, the Fourth District Court of Appeal committed reversible error by deciding that MOBIL could be vicariously liable under the theory of apparent agency in the absence of evidence of actual control by MOBIL. That decision expressly and directly conflicts with the manifest rule of law, and should be reversed.

At no time has MOBIL urged that a new rule of law be created which would shield oil companies from tort.[1] This review is before the Court upon conflict jurisdiction grounds because an *established* rule of law is being examined, not because new law is being sought. By means of this review, MOBIL simply seeks to have the uniform law of Florida properly applied to MOBIL; conversely, a decision that MOBIL, an oil company franchisor, *can* be held vicariously liable for the alleged tort of its franchisee -- in the absence of evidence of actual control by MOBIL -- *would* create new law, by reversing the settled rule in Florida.

Respondent's argument that oil companies should not be entitled to "special ... exemptions" (Answer Brief at 4) because two hotel franchisors have been held vicariously liable under the doctrine of apparent agency is not well taken. The notion that some "new" exemption is being sought by MOBIL is fallacious. Although the decision of the Court in *Orlando Executive Park v. Robbins*, 433 So.2d 491 (Fla. 1983) does not specify whether the

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[1] Both Respondent, in his Answer Brief, and The Academy of Florida Trial Lawyers, in its *Amicus Curiae* Brief, have incorrectly construed MOBIL's position on review in this light.

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"hotel rule", if any, is an exception to the general prohibition on vicarious liability for franchisors, or whether it states the rule to which the "oil company rule" is an exception, MOBIL submits that the distinction is unimportant in the case *sub judice*.

In any event, the "oil company rule" is the rule applicable to MOBIL, but it was misinterpreted by the Fourth District. The "oil company rule" does not allow vicarious liability to attach to an oil company under the doctrine of apparent agency where the only basis for such liability, as in the case *sub judice*, lies in the injured party's subjective reliance upon the use of licensed oil company signs, logos and trademarks. The vitality of that doctrine, at least as to oil companies, was not diminished by *Robbins*; that opinion expressly states so. 433 So.2d at 494.

Because of the complete lack of evidence presented to the trial court in opposition to MOBIL's Motion for Summary Judgment, the "oil company rule"-- regardless of whether it is the general rule or the exception-- was properly applied by the trial court. No extension of the established rule or creation of a new rule need be made here; MOBIL simply seeks appropriate application of Florida law, which requires reversal of the Court of Appeals' decision in conflict with authority.

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CONCLUSION

Petitioner, MOBIL OIL CORPORATION, respectfully requests the Court to enter an Order reversing the decision of the Fourth District Court of Appeal as it pertains to MOBIL; to enter such further Orders as are consistent with reversal of the District Court's decision and reinstatement of the Circuit Court's decision; and to award Petitioner its costs of this review.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 9th day of March, 1993 to: MARK R. McCOLLEM, ESQ., Chidnese & McCollem, Attorneys for Respondent, 201 Southeast 12th Street, Ft. Lauderdale, Florida 33316; RICHARD B. ADAMS, ESQ., Adams & Adams, Attorneys for Defendant Stethem, Suite 1000, Concord Building, 66 West Flagler Street, Miami, Florida 33130; S. WILLIAM FULLER, JR., ESQ., Fuller, Johnson & Farrell, Attorneys for *Amicus Curiae* Amoco Oil Corporation, 111 North Calhoun Street, P.O. Box 1739, Tallahassee, Florida 32302-1739; and C. RUFUS PENNINGTON, III, ESQ., Margol & Pennington, Attorneys for *Amicus Curiae* The Academy of Florida Trial Lawyers, 76 South Laura Street, Suite 1702, Jacksonville, Florida 32202.

By: _____
ROGER S. KOBERT

REPLY.BRF

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