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Don Foster v. Elmo J. Steed, An Individual, Gordon G. Wheeler, An Individual Elmo J. Steed and Gordon G. Wheeler Dba S & W Texaco Service, A Partnership and Texaco, Inc., A Corporation and Texaco, Inc. A Corporation : Appellant's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DON FOSTER,
Plaintiff and Respondent

vs.

ELMO J. STEED, an individual,
GORDON G. WHEELER, an individual
ELMO J. STEED and GORDON G.
WHEELER dba S & W TEXACO SERVICE,
a partnership and TEXACO, INC.,
a corporation
Defendants

TEXACO, INC. a corporation
Defendant and Appellant

No. 10685

APPELLANT'S BRIEF

Appeal from the Order of the Third District Court
for Salt Lake County
Hon. Bryant H. Croft, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for personal injuries resulting from a fire at the S & W Texaco Service in Bountiful, Utah.

DISPOSITION IN LOWER COURT

Defendant Texaco filed a motion for summary judgment which was denied. Texaco's petition for intermediate appeal to this court was granted.

RELIEF SOUGHT ON APPEAL

Texaco seeks a reversal of the order denying its motion for summary judgment.

STATEMENT OF FACTS

The following facts are undisputed: At approximately 6:30 P.M. on May 21, 1964, the plaintiff, Don Foster, went to the S & W Texaco Service at 530 South 200 West, Bountiful, to buy gas for his truck. (Foster dep. page 6) While Foster was at the station he was asked by Gordon G. Wheeler, a partner in Texaco Service, and Bob Madall, an employee of the S & W Texaco Service, to help push a car into one of the bays of the service station. (Foster dep. page 7) Foster was then asked to help start the car by pouring gas in the carburetor. (Foster dep. page 8) Foster said "It will blow up." He was assured by Bob Madall that it wouldn't blow up. (Foster dep. page 9) Foster proceeded to pour gas into the carburetor while Gordon G. Wheeler was blowing air in the gas tank and Bob Madall was starting the car. (Foster dep. page 9) While Foster was pouring gas in the carburetor, the motor backfired setting the gas on fire. (Foster dep. page 11) Foster jerked back and threw burning gas all over the upper part of his body. (Foster dep. page 11) Foster stepped back on to the edge of a can of gas spilling it all over himself and all over the floor. This gas was also ignited and burned the plaintiff. (Foster dep. page 11) Foster filed suit against Elmo J. Steed, an individual, Gordon G. Wheeler, an individual, Elmo J. Steed and Gordon G. Wheeler dba S & W Texaco Service, a partnership and Texaco, Inc., a corporation. At the time of the acci-

dent Texaco, Inc. had leased the service station premises to Gordon G. Wheeler. (Simmons dep. page 5; copy of lease agreement is found at R 51-52) There was an Agreement Of Sale in existence between Texaco, Inc. and Gordon G. Wheeler at the time of the accident. (copy of Agreement Of Sale is found at R 53-54)

Mr. Simmons, Texaco Division Service Representative, testified at his deposition that Texaco does not have any right to hire or fire the employees that are employed by the dealer. (Simmons dep. page 18) Texaco does not have any control over the hours for operating or closing the station. (Simmons dep. page 18) The expenses of operating the station are paid by the dealer. (Simmons dep. page 18) Steed and Wheeler were on a cash basis with Texaco so they were required to pay for their gas and accessories on a cash basis. (Simmons dep. page 18) Steed and Wheeler were free to turn around and sell products that they purchased from Texaco at any price which they felt would be competitive with the other dealers in the area. (Simmons dep. page 18) Steed and Wheeler also bought automobile accessories from other sources than Texaco. (Simmons dep. page 18) Steed and Wheeler were also in a position to buy petroleum products from sources other than Texaco. (Simmons dep. page 18) These items could all be sold at a retail price of the dealer's choosing. (Simmons dep. page 19) There were no reports required to be submitted by Steed and Wheeler to Texaco. (Simmons dep. page 19) Simmons would make periodic visits to the station to see that it was "sparkling and clean." The purpose of these visits was to assist the dealer to be competitive and to furnish him marketing helps that he could

use to improve his business. (Simmons dep. page 19) However, Steed and Wheeler were free to do whatever they wished in operating the business. (Simmons dep. page 19) Steed and Wheeler could also sell their products on a credit basis if they desired. (Simmons dep. page 20)

POINT I

STEED AND WHEELER OPERATED THE S & W TEXACO SERVICE AS INDEPENDENT CONTRACTORS AND WERE NOT THE AGENTS OF TEXACO, INC.

The determinative question of whether or not a service station operator is an independent contractor or an agent of the producing company is one of control. If the producing company has the control or the right to control the manner in which the operations are carried out, then the service station operator is generally held to be the agent of the producing company. Conversely, if the control extends only to the result to be achieved, then the station operator is regarded as an independent contractor and the producing company is not liable under the doctrine of respondeat superior. In determining whether or not the relationship between the oil producer and the station operator is that of an independent contractor or master-servant relationship, the formal contract between the parties is of substantial importance. In looking to the contract, the way in which the station operator was compensated, the manner in which title to the business property and the product to be sold was held, and the degree to which the oil company supervised the day to day

conduct of the business are important. See 83 ALR 2d 1282 *"Status of Gasoline and Oil Distributor or Dealer as Agent, Employee, Independent Contractor or Independent Dealer as Regards Responsibility for Injury to Person or Damage to Property"*.

In the following cases the courts determined that the defendant oil company had neither exercised nor retained control over the operation of the filling station and was not liable for the negligent acts of the filling station operator or the operator's employees.

In *Cawthon v. Phillips Petroleum Company*, 124 So. 2d 517, 83 ALR 2d 1276, (Florida 1960) an action was brought for bodily injuries and property damage resulting from the improper repair of brakes at a service station. The action was brought against Phillips Petroleum Co. and the operator of a Phillips 66 Service Station. Recovery against Phillips was sought on the theory that the station operator was its agent or on the theory of apparent agency. The lower court granted summary judgment in favor of Phillips. On appeal, the judgment was affirmed on the ground that the oil company did not have control or right of control over the operator's methods of conducting his business. The court pointed out that where the oil company did not control the filling station operator's method of operation, nor the hiring or firing of employees, did not set the retail price for gasoline sold at the station, nor hours of opening and closing, could not require reports on operations from the operator and could not force him to comply with suggestions except to the extent that it had power to cancel the franchise, then the

operator was an independent contractor and not an employee of the company.

In *Miller v. Sinclair Oil Refining Company,* 268 F. 2d 114 (5th Cir. 1959) an action was brought against Sinclair for injuries sustained when the plaintiff was severely burned in a fire. The plaintiff was standing beside his automobile while it was being filled with gasoline when another automobile collided with the gasoline pumps causing the fire. The lower court directed a verdict in favor of the defendant oil company and on appeal the decision was affirmed. With regard to the question of control or right of control over the service station operator, the court said:

> "The answer would appear to depend on the facts of each case, and the main fact to be considered would be the right of control as to the mode of doing the work contracted for. Gulf Refining Co. v. Wilkinson, supra. In this case it is clear that the oil company did not control the dealer's methods of operation. It did not control the hiring or firing of employees; did not set the retail prices for gas sold at the station; did not set the hours for opening and closing the station; required no reports on operations from Rogers; and could not force Rogers to comply with any of its suggestions except to the extent that it had the power to cancel the contract at the end of any year. Rogers' independent status is further emphasized by the fact that he purchased his gas from Sinclair for cash, handled automobile tires and other merchandise other than Sinclair's, was free to and did engage in other lines of business, supplied his own building and equipment except for the tanks and pumps, and stood to retain all

of the profits and suffer all of the losses from the operation of the station."

In *Green v. Independent Oil Company,* 201 A. 2d 207 (Penn. 1964) an action was brought for deaths resulting from an explosion at a service station. Here an employee of the service station was cleaning the station by spreading a mixture of kerosene, gasoline and soap on the floor. Shortly after he started to spread the mixture a sheet of flame swept through the service station injuring the plaintiff, a customer on the premises. The oil company was named as a defendant on the theory that it had the right to control the manner of performing the work at the service station. The employee attempted to establish a master-servant relationship between the service station operator and the oil company on the basis of the dealer's agreement, together with the fact that on frequent occasions representatives of the oil company visited the service station. The court pointed out that even though the oil company's representatives visited the service station there was no evidence that they gave any suggestions or instructions or exercised any control as to the manner of operating the gasoline service station. The court stated that such visits to the service station by the oil company's representatives in no manner indicated any right of control by the oil company and were not pertinent on the question of the nature of the relationship. The court concluded that the relationship between the oil company and the service station operator was that of an independent contractee-contractor not employer-employee so the oil company was not liable for the lessee's alleged negligence.

In *Coe v. Esau and Continental Co.*, 377 P. 2d 815 (Oklahoma 1963) an action was brought against a service station operator and his lessor to recover for damage to plaintiff's automobile for lack of adequate lubrication occasioned by an escape of oil through a faulty oil filter gasket installed by the operator. In support of the argument that the service station operator was the agent of Continental, the plaintiff called the court's attention to the following facts:

a. Continental owned the premises on which the service station was located;

b. Continental's name was prominently displayed upon the station premises;

c. The station was listed under the heading Conoco Service Station in the telephone directory;

d. The operator received advice and suggestions from Conoco concerning the standard of cleanliness at the station but he did not have to abide by them;

e. The operator paid 1¼¢ on each gallon of gas sold;

f. Although the operator controlled his business hours, he was required to occupy the premises and operate the station or he would lose such right.

The court held that the operator of the service station was an independent contractor. The court stated:

> "The facts and circumstances adduced by plaintiff's evidence are insufficient to raise the necessary

> inference that Continental either had the right to control or exercised the right to control the conduct of Esau in the operation of his station. Esau was free to, and did handle, tires and automotive accessories of other suppliers; he procured his own personnel, determined the daily business hours and the methods of doing business. The petroleum products supplied by Continental were sold to Esau on a cash basis. So far as the record discloses, Esau was not in any way restricted in adopting his own merchandising policies."

Plaintiff contends that even if Steed and Wheeler were independent contractors, Texaco is still liable, citing the case of *Boronskis v. The Texas Company,* 183 N.E. 2d 127 (Mass. 1962). In that case the plaintiff was injured as a result of gasoline leaking from a defective gasoline tank. *The injury was caused by a defect in the premises.* The Boronskis case has no application to the case at bar. In the instant case the alleged hazardous condition was a movable item of personalty. The can of gas was placed in the bay area by one of the lessees or their employees. Although a landlord may have a duty to make repairs to defects in the premises that might have been disclosed by ordinary care in making an inspection, this duty does not extend to a movable item of personalty that may be changed at will by the tenant.

The duty of a landlord regarding defects in the premises as distinguished from movable items of personalty was discussed in *Sinclair Refining Company v. Redding,* 133 N.E. 2d 421 (Georgia 1963) where the court held that Sinclair was not liable for injuries sustained by the plaintiff

in tripping over an advertising sign placed on the sidewalk by the service station operators.

The court stated:

> "But the placement of items of personalty, such as a sign of the type here involved, is something that may change frequently and at any time. It may be in a perfectly safe position at one time of the day and at another, even a few minutes later, in an unsafe position. It is something that can and may be moved at will by the tenant, his employees or by some third party. Defects in the premises may result from faulty construction or they may come on gradually, perhaps getting a bit worse from day to day as time goes on, until a dangerous or unsafe condition obtains. The only change calculated to come about unless repairs are made is a further deterioration. If the sign had been permanently affixed in an unsafe position or if it had been in a defective condition the rule of Anderson might have been applicable. But neither appears from the evidence here."

Plaintiff has previously argued that Texaco's repainting of the charred areas shows it had control over the lessees of the service station. Gordon Wheeler testified in his deposition that the inside of the station was due to be painted anyway, so Texaco went ahead with the painting after the fire.

> Q. (By Mr. Wright) Well, was it reported unofficially?
>
> A. (By Mr. Wheeler) Well, the salesman came. I told him what had happened and he says, "Well,

> the station is due to be painted." This is the outside of the station is cleaned one year, the inside one year on an alternating basis, and it was time for the station to be painted inside.

Texaco's commitment to paint the station every year does not show that it exercised or retained control over the operation of the filling station.

CONCLUSION

The facts conclusively show that Texaco neither exercised nor retained control over the operation of the station. The hazard of which the plaintiff complains, was a movable item of personalty, not a defect in the premises. Texaco respectfully contends that it is entitled to a summary judgment.

Respectfully submitted,

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