1966

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 : Respondent'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

RESPONDENT'S BRIEF

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

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

Page

TEXTS

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STATEMENT OF NATURE OF CASE

The appellant, Texaco, Inc., appeals from the denial of its motion for summary judgment by the Honorable Bryant H. Croft, District Judge. The

appeal is on interlocutory order granted by this Court on 28 July 1966.

DISPOSITION IN LOWER COURT

On September 3rd, 1965, the respondent Don Foster filed suit in the District Court of Salt Lake County against Elmo J. Steed and Gordon Wheeler as individuals and partners, and against their partnership S & W Texaco Service (R. 1). Suit was also brought against Texaco, Inc. The suit was for damages in compensation for burn injuries sustained by the respondent at th eS & W Texaco Service, Inc., in Bountiful, Utah on May 21, 1964 (R. 1-3). Answer was filed by the partnership and the individual defendants, however, the record does not reflect that Texaco, Inc., the appellant herein, ever filed an answer to respondent's complaint. Subsequently, interrogatories were served and depositions taken by all parties. On October 22, 1965, the appellant filed a Motion for Summary Judgment on behalf of Texaco, Inc. (R. 16). The matter was heard on the 29th day of March, 1966, and memorandums were submitted by the parties. On July 15, 1966, Judge Croft entered an order denying the appellant's motion for summary judgment on the grounds:

> " . . . it cannot be said that there is no genuine issue as to any material fact or facts concerning the relationship between Texaco, Inc. and the other defendants in the operation of the service station here involved, and in the opinion of the

court, additional factors helpful in determining the issue can be more fully dveloped by evidence and testimony upon trial."

On July 13, 1965, two days before entry of the trial court's order, the appellant filed a petition for interlocutory appeal. On July 28, 1965, this Court issued its order allowing the appeal.

RELIEF SOUGHT ON APPEAL

The respondent submits the interlocutory appeal should be dismissed as improvidently granted, or that the trial court's decision should be affirmed and the case remanded for trial with all parties being given an opportunity to be heard.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being more in keeping with the rule that the evidence under circumstances like those in the instant case will be viewed in a light most favorable to the trial court's judgment.(1)

The respondent, Don Foster, is a thirty-year-old father of three children, and a self-employed stone mason. (F 3, 4). On May 21, 1964, he entered the S & W Texaco Service Station in Bountiful, Utah at about

(1) The record will be cited as R., the deposition of respondent, Don Foster, as F, the deposition of Mr. Steed as S, the deposition of Mr. Wheeler as W, and the deposition of Mr. Simmons of Texaco as T.

6:30 P.M. (F 6, 7). He helped push a Plymouth automobile into the station garage. Mr. Wheeler, a partner in the service station operation, or one of his assistants asked the respondent to prime the carburetor of the car by pouring gas into it. They assured him it would not explode. (F 8, 9). Respondent complied with the request. The gasoline ignited, setting respondent on fire. He jumped back and tripped on a pan of gasoline on the floor of the service station, filled with gasoline and being used to clear parts. (F. 11). As a result, the respondent sustained serious burns for which the instant action was commenced.

Mr. Foster, in his deposition, testified that there was a large Texaco sign at the station, and that a sign over the station read "S & W Texaco Service". (F. 19).

The depositions of Gordon G. Wheeler and Elmo J. Steed were taken by the plaintiff. Mr. Steed indicated that he had been with Texaco stations for about twenty years, and in addition to the station involved in the instant litigation, he was operating another Texaco station under his own name. (S. 6). He stated that as between he and Mr. Wheeler there were no articles of partnership, nor had a notice of doing business under an assumed name been filed with the Secretary of State. (S. 5). He stated that Mr. Wheeler had gone to a school conducted by Texaco for about 30 days shortly after they started to operate the station. (S. 7). At the school, training hints and safety instructions were given. (S. 7), and Texaco was always

"giving you instructions on safety. . . . " (S. 7). He stated that using gasoline to clean parts would be contrary to Texaco instructions. (S. 10). He indicated that Texaco personnel came around regularly at the station, and that after the fire they painted the station (S. 11).[1]

Mr. Wheeler testified that he was one of the persons running the S & W Texaco station. A lease with Texaco had been executed on May 28, 1962 (W. 4, 5, Exhibit A, R. 51).

Mr. Wheeler indicated he attended a school for thirty days conducted by Texaco at Murray, Utah (W. 5, 24). At the school he was given safety instruction and thought there probably was instruction on the use of gasoline as a cleaning agent (R. 24). At the time of taking Mr. Wheeler's deposition, counsel for appellant and Wheeler refused to allow Wheeler to discuss whether Texaco had placed any restrictions on the length of time the station could be closed. Further, a copy of an agreement terminating the lease with Texaco was never produced at the time that Wheeler's deposition was taken (W. 29)[2] Mr. Wheeler indicated Texaco would send people around regularly and these

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(1) At this point counsel for appellant and Steed instructed him not to answer any further questions, taking the position that evidence of subsequent changes was not admissible. While this is true if the evidence is to show prior negligence, it is not so if it shows the extent of control by Texaco. McCormick Evidence P. 544 (1954); Dubenofski v. Howard Savings Inst., 124 NJL 368 12A2d 384 (1941).

(2) This agreement is also not a part of the record on appeal, although there is some evidence it was before the Court below. (R. 38).

people would observe the cleanliness and operation of the station (W. 34), and also Texaco provided marketing information (W. 34). The only gasoline pumps on the premises were those with a Texaco trademark (T. 22). Mr. Wheeler understood his lease could be broken at any itme by either party, or continue as long as the parties wanted (W. 5).

Mr. Worth W. Simmons, the Division Service Representative of Texaco, had established criteria for obtaining operators for their stations (T. 4). He also indicated each applicant must be analyzed by Texaco and that two men from Texaco had approved Wheeler (T. 4). He indicated that normally Texaco would supply all gasoline products for a station as well as provide tires and accessories (T. 6-8). Further, Texaco encourages the wearing of a Texaco uniform (T. 8). Wheeler wore such a uniform (T. 9). Mr. Simmons indicated that he had inspected the station to see if it was clean (T. 10), and further the premises would be inspected to see if they were safe because Texaco had an obligation to maintain the building (T. 10, 11). In addition to the lease, a products sales agreement was entered into (R. 53, Exhibit P-3). This agreement was not available to counsel at the time Mr. Simmons' deposition was taken (T. 7, 8).

Mr. Simmons indicated Texaco gave marketing help (T. 19), and encouraged the operator to buy from Texaco and that it was customary for an operator to obtain his needs from Texaco (T. 20). He indicated

Texaco would "try to sell" the operator on meeting Texaco standards, and a lease might be cancelled if they were not met (T. 21).

The lease between Texaco and Steed and Wheeler (Exhibit A, R. 51), provided it was cancellable at will, that lessee would not leave the station vacant for over 48 hours, lessee was to maintain the premises in good repair and in a "safe condition", and that assignment or sublease could not occur without the permission of Texaco. The sales agreement (R. 53, Exhibit P. 3), provided for a maximum delivery of gasoline, provided for 30 days notice of termination, but would terminate on cancellation of the lease. The purchaser, Wheeler and Steed, could not sell products purchased from others under Texaco's trademark, nor mix or co-mingle products. The only pumps and signs at the station were marked Texaco. The manner of delivery of the gasoline was specified, and the operators were required to comply with applicable federal rules of the Surgeon General on handling tetra ethyl lead gasoline, and instruct its employees.

All the appellant's witnesses testified Texaco did not set hours of operation, or control the hiring or firing of personnel, require reports or prevent purchasing products from other sources.

POINT I

THE APPEAL SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Rule 72(b) U.R.C.P. provides for appeals from interlocutory orders. In this case appellant seeks review from the denial of its motion for summary judgment, although no answer was filed, at the time of taking the depositions important documents were not available to counsel, the depositions and other evidence does not reflect extensive treatment of the question of the relationship between Texaco and other defendants, and counsel, during the depositions, refused to allow inquiry into relevant matters. It is submitted that in this posture the record is not ripe for consideration of the issue of whether summary judgment should have been granted.

In *Dupler v. Yates*, 10 Utah 2d 251, 351 P2d 624 (1960), this Court handed down a landmark decision on summary judgment. However, the facts of that case seem to clearly show a full and thorough treatment of the issues. Several pages of the opinion demonstrate the exhaustive exploration of the issues and indicate the fact that if full consideration has been given to an issue in the discovery process, it may be ripe for determination if there is no genuine issue of fact. This Court observed:

> "Rule 56 U.R.C.P. is not intended to provide a substitute for the regular trial of cases in which there are disputed issues of fact upon which the outcome of the litigation depends. And it should

> be invoked with caution to the end that litigants may be afforded a trial where there exists between them a bona fide dispute of material fact. However, where the moving party's evidentiary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at the trial."

In this case a reading of the record and briefs of the parties discloses issues of fact, and that the depositions when taken were not complete treatments of the issue. No answer had been filed by the appellant. Appellant has only interrogated one witness of the respondent, and then with little view to the issue now before the court. Obviously, the record, which is possibly incomplete, does not provide a proper posture for review by this Court. See, Note on Dupler v. Yates, 7 *Utah L. Rev.* 251 (1961). In, *Leininger v. Stearns-Roger Manufacturing Co.,* 17 Utah 2d 37, 404 P2d 33 (1965), this Court, speaking through Judge Ruggeri, stated:

> "Summary judgment is not a substitute for trial, but is rather a judicial search for determining whether genuine issues exist as to material facts."

In *Controlled Receivables, Inc. v. Harman,* 17 Utah 2d 420, 413 P2d 807 (1966), this Court acknowledged that summary judgment was a harsh measure and should be sparingly used, also Justice Wade contended that since the Dupler decision the Court had

unwarrantedly expanded the effect of Rule 56, U.R.C.P. It is therefore submitted that this case should not be considered ripe for summary judgment because of the absence of such discovery as would allow a conclusion that the trial court should have ruled to the contrary.

In *Manwill v. Oyler,* 11 Utah 2d 433, 361 P2d 177 (1961), this ourt stated with reference to the purpose for interlocutory review:

> "The purpose to be served in granting an interlocutory appeal is to get directly at and dispose of the issues as quickly as possible consistent with thoroughness and efficiency in the administration of justice. But that objective is not always served by granting such an appeal. In some instances, the necessity of remanding for trial may result in protracting rather than shortening the litigation. For this reason, whenever it appears likely that the matters in dispute can be finally disposed of upon a trial; or where they may become moot; or where they can, without involving any serious difficulty, abide determination in the event of an appeal after the trial, the desired objective is best served by refusing to entertain an interlocutory appeal and letting the case proceed to trial. Then, if an appeal is necessary, there is this additional advantage: the issues of facts have been determined and the record is viewed in the light most favorable to the judgment, instead of the reverse."

It is submitted that the record in this case, when viewed in light of the objectives of interlocutory appeal, does not justify the Court in reviewing the issues raised. The respondent is not attempting to reargue the ques-

tion of whether interlocutory appeal should be granted, but rather is saying that now that the record is actually before the Court, instead of the statements of counsel, the case does not appear to be in a proper posture for review and the appeal should be dismissed as having been improperly granted.

The trial Court found conflict of fact, and was apparently also of the opinion that discovery had not developed the case sufficient to allow a summary judgment proceeding to determine the issues between the parties. In a similar instance the United States Supreme Court has felt the case was not ripe for interlocutory review. In *Switzerland Cheese Association v. E. Horne's Market, Inc.*, ... US ...., 87 S. Ct. 193 (Nov. 7, 1966), the Court ruled that an order denying summary judgment was not the type of interlocutory order allowing for intermediate review. It observed:

> "We take the other view not because "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but because the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of § 1292 (a) (1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals".

It is respectfully submitted that this appeal should be dismissed as improvidently granted.

POINT II

THE EVIDENCE DISCLOSES SUFFICIENT FACTUAL ISSUES AS WARRANT TRIAL AND THE RECORD DISCLOSES EVIDENCE SUFFICIENT TO RAISE A JURY QUESTION AS TO TEXACO'S LIABILITY.

It is well settled that summary judgment will not lie if there are conflicts in the facts of a case which would allow a jury to make a determination in favor of either party. Thus, in *Controlled Receivables, Inc. v. Harman, Supra,* this Court observed:

> "A motion for summary judgment is a harsh measure, and for this reason plaintiff's contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should the motion be granted."

Ct. *Bridge v. Backman,* 10 Utah 2d 366, 353 P2d 909 (1960).

It is of course well stablished that a person is not normally liable for the negligence of an independent contractor, Restatement, Torts 2nd § 409. Further it is equally well settled that determination of whether a person is an independent contractor or an employee

is to a great extent a matter of the control exercised or capable of exercise by the party sought to be held for the act of another. *Dowsett v. Dowsett,* 116 Utah 12, 207 P2d 809 (1949); *Oberhansly v. Travelers Ins. Co.,* 5 Utah 2d 15, 295 P2d 1093 (1956). Further, many courts have taken opposite positions on the issue of whether an oil company is liable for negligence of a service station operator acting under the trade name or sponsorship of the oil company. Anno. 83 ALR2d 1282.

The special marketing structure of the retail gasoline and oil business makes the traditional concepts of agency and independent contractor difficult of application. Often the marketing arrangement is based on anti-trust problems and avoiding unprofitable business arrangements rather than factors relevant to determining tort liability. See Anno. 83 ALR 1282, 1284. Further, it is submitted that the trend of cases is towards recognizing that the business relationship between an oil company and retail seller should not necessarily be the determinative factor in adjudicating tort liability, but the realities of the relationship should be appraised to see if the relationship is one where the oil company should be held responsible.

The facts of this case, when viewed most favorable to the plaintiff's case, quite clearly present a question for resolution at trial. The appellant had a responsibility for making certain the building was properly maintained (T. 10). Safety inspections of the premises

were made by representatives of Texaco (T. 10). After the fire, Texaco effected the needed repairs (to the extent the record allows in view of appellant's counsel's instruction not to answer such questions). Texaco encouraged Wheeler and others to wear the Texaco uniform, which Wheeler did. If the station were not properly maintained, the rights of Wheeler could be summarily terminated similar to an employee. Texaco encouraged the operator to identify with its product. The only pumps on the station premises bore the Texaco trademark, and sale of any other product under the Texaco trademark was forbidden. The manner and nature of delivery of products was under Texaco's control. It was customary for the operators to buy all items for sale from Texaco (T. 20). Texaco set up criteria for operators, and in effect hired them rather than negotiated with them. Operators went to a Texaco school where they received instruction on marketing, operations and safety instruction. Regular visits were made by Texaco personnel to inspect and service the needs of the station. There were no articles of partnership between Steed and Wheeler, nor had they ever bothered to file a statement of doing business under a fictitious name[1]. All documents evidencing the relationship of the parties were prepared by Texaco on standard forms. A large Texaco sign was the major evidence to the public of the company running the station. The only other sign on the premises—S & W

(1) This fact would preclude prosecution of a suit independently by Steed and Wheeler if they were in fact doing business independently, 42-2-10, Utah Code Anno., 1953.

Texaco Service—seemed to clearly show Texaco's involvement in the operation of the station. The format and design of the station were in accord with Texaco standards. Finally, the lease between Steed, Wheeler and Texaco required the former to keep the premises in a "clean, *safe*, and healthful condition". Taking all of these facts together, it is obvious that a jury question exists, and a jury would be acting reasonably in finding liability against Texaco based upon the full extent of the relationship and involvement of the appellant. *Restatement of Agency*, 2nd § 220 and Intro. note Ch. 7, Top. 2, Tit. B.

Under circumstances similar to those above, many courts have found the relationship between an oil company and a service station to be of such a nature that the oil company should be held liable for the torts of the service station personnel, Anno. 116 ALR 457; Anno. 83 ALR2d 1282.

In *Boronskis v. The Texas Company*, 183 NE2d 127 (Mass. 1962), an arrangement under a lease similar to that in the instant case was held to impose liability upon the Texas Company for damage sustained by plaintiff from leaking gasoline on the premises of the service station. A claim comparable to that now made by Texaco was rejected by the Massachusetts Court. The court found the evidence sufficient to submit to the jury.(1)

(1) The case also points up another error which occurred during the taking of the depositions when counsel for both defendant parties contended that the documents could not be varied by parol evidence. Of course, such a parol evidence rule is not applicable to third parties.

A recent California case, *Gonzales v. Derrington*, 10 Cal. Rptr. 700 (1961), the court discussed the cases in detail in which liability had been imposed against the station owner. The court held that since the company maintained reasonable control over the manner of delivery of the gasoline and the nature of the operations of its distributor, a factual question for the jury to resolve was presented and the jury's determination would not be upset on appeal.

In *Humble Oil and Refining Co. v. Martin*, 148 Tex. 175, 222 SW2d 995 (1949), the court ruled the oil company was liable when a filling station attendant negligently allowed a car to roll down an incline and strike the plaintiff. The filling station operator exercised control over the hiring and firing of personnel, but the relationship of the oil company was held to raise a sufficient issue of control as to warrant the matter being submitted to the jury. The court distinguished other Texas cases on their facts. In the instant case, safety inspection was made by Texaco. Texaco did set a requirement that the station could not be closed for a period in excess of 48 hours, and generally exercised some degree of control over the station so that it could have corrected unsafe practices.

A similar conclusion that the question was one for the jury was reached in *Standard Oil Co. v. Gentry*, 241 Ala. 62, 1 So 2d 29 (1941), where the court relied upon the fact that Standard Oil really advertised itself at the station. A similar conclusion can be drawn from the position of the *Restatement of Torts* 2nd § 429.

In *Edwards v. Gulf Oil Co.,* 69 Ga. App. 140, 24 SE2d 843 (1943), the court ruled that a prima facie case was made out against the oil company where the operator wore a uniform bearing Gulf's name and insignia, and had Gulf signs on the pumps and building, and passed out Gulf literature. The court ruled it error to non-suit plaintiff against Gulf. Similar results were reached by the Missouri Courts in ***Ryan v. Standard Oil Co.,*** 144 SW2d 170 (Mo. App. 1940); and *Brenner v. Socony Vacuum Oil Co.,* 236 Mo. App. 524, 158 SW2d 171 (1942).

In *Phillips Petroleum Co. v. Hooper,* 164 F2d 743 (5th Cir. 1947), the court applying Texas law said the question of the liability of the company and the issue of control was properly one for the jury to determine.

In the instant case when the full extent of Texaco's participation is viewed it is obvious the public would feel the station was under Texaco supervision, which it was, and that unsafe conditions on the premises would not be tolerated. Under facts comparable to this case, the only humane and proper result is to recognize that a company may not sell under its trademark, give classes of instruction on service station operation, make safety and other inspections, have right to terminate the lessee's relationship at will, require that safe premises be maintained, and then contend it owes no duty to the station patrons. The cases cited by appellant are in many instances distinguishable on their facts or otherwise doctrinally opposed to reality.

It is submitted the trial court's determination should be upheld.

CONCLUSION

The facts of this case and the posture of the record on appeal require either the affirmance of the trial court's ruling that the question of liability of appellant should await trial, or that the case should be dismissed on the grounds that the appeal was improvidently granted. There are no circumstances warranting the relief requested by appellant.

Respectfully submitted,

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