CAUSE NO. 02-0401

IN THE
SUPREME COURT OF TEXAS

SHELL OIL COMPANY,

Petitioner

v.

MOHAMMED KHAN AND JAMILA WILLIAMS,

Respondent.

On Appeal from the 6th Court of Appeals
Texarkana, Texas

PETITIONER'S REPLY BRIEF

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Shell Oil Company, Petitioner, files the following Reply Brief.

STATEMENT OF THE CASE

This appeal arises from a suit to recover damages for personal injuries allegedly sustained by Respondent MOHAMMED KHAN ("Khan") on or about August 27, 1997, at a gas station located at 6451 North Freeway, Houston, Harris County, Texas. Respondent alleged below that at the time of his injury, he was employed by Defendants LA SANI, INC. ("La Sani") and SALEEM R. SYED ("Syed"). Respondent further alleged that the Defendants La Sani and Syed, as well as Appellees, Shell and Motiva, were in control of the premises on which Khan's injuries occurred because, upon information and belief, they were the owners of the premises and had the exclusive right to control the property. The Respondents allege that while Khan was working within the course and scope of his employment, he was shot by an unknown individual. Respondents brought claims under theories of negligence and gross negligence against all Defendants below. Specifically, Khan and Williams alleged that all of the Defendants below failed to maintain a secure work place, failed to adequately train Khan, required Khan to perform his duties in an unsafe manner, and failed to provide and/or implement policies and procedures regarding security and working early morning hours. They also alleged that the Defendants' conduct in requiring Khan to maintain and clean the parking lot and

bathrooms located outside the primary premises was grossly negligent, which proximately caused the injuries.

Petitioner, Shell moved for summary judgment. Shell's request for summary judgment was based upon its status as landlord of La Sani, Inc. and the general rule that a landlord is not liable for injuries to a tenant's employees in areas that are part of the tenant's leasehold.

The 157th District Court granted this Motion on November 14, 2000. (C.R.- 161-163). After the newly appointed Judge of the 157th District Court recused himself, the case was transferred to the 127th District Court. That Court granted Respondents' written motion for a new trial on February 12, 2001. (C.R.- 320). Upon resubmission of the Motion for Summary Judgment to the 127th District Court, summary judgment was granted again on March 15, 2001. (C.R.- 333-335). Respondents then filed notice of appeal on April 11, 2001.

On appeal the Sixth Court of Appeals reversed the trial court's judgment in all respects. The opinion is published at 71 S.W.2d 890.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 58.7(b) of the Texas Rules of Civil Procedure, Petitioner requests oral argument before this case is submitted.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction over this appeal under Sections 22.001(a)(1) and 22.001(a)(6) of the Texas Government Code.

ARGUMENT AND AUTHORITIES

I. The Respondent's Brief Misstates the Facts and Law

A. Hiring of Security Guards

The Respondent continues to maintain that there is evidence that Shell maintained the right to require the hiring of security guards. However, the controlling agreements in this case are silent on that issue, meaning that this is an area in which the dealer has complete and unfettered independence. This is because the independence of the dealer is "subject to" only those items enumerated in the lease and dealer agreement. Since they are silent on the issue of security guards, there is no ability on the part of Shell to require their hiring.

This is a significant defect in the "house of cards" that is the Respondent's argument. Indeed, the Court of Appeals suggested in its opinion below that Shell could have required the hiring of the security guard. However, nothing in the deposition excerpts contain in the record supports this. Indeed, Brooks Herring at page 171 thru 172 of his deposition testified on the behalf of Shell that he had **no** knowledge of an ability to require the franchisee to hire security guards (emphasis added). Thus, this important part of the Court of Appeals analysis finds its basis not in the record, but in the artful advocacy of the Respondent.

B. Requiring Permission Before Changes are Made

Respondents in their brief, and the Court of Appeals below, went to great lengths to discuss the myriad ways that Shell allegedly retained control of security by requiring the dealer to obtain permission. For example, at page 6 of its opinion, the Court of Appeals

wrote, "Yet, as stated in the contracts and understood by Herring, Syed could not remodel or alter the premises, even if it directly related to security, without Shell's permission." On the next page, the opinion states, "[S]hell had the right to install exterior lighting or security cameras, which Syed could not do without Shell's permission."

Of course, in *Smith v. Foodmaker, Inc.,* 928 S.W.2d 683 (Tex. App. - Fort Worth 1996), the Fort Worth Court of Appeals affirmed summary judgment for a lessor/franchisor that had the exact same requirement of permission before changes were made. In that case, the plaintiffs attempted to rely upon this similar language in the contract which stated that improvements to the premises had to be authorized in writing by the franchisor. This is no different than Shell's requirement in the instant case. Neither Respondent nor the Court of Appeals ever even attempted to distinguish the agreements in the two cases on that issue. Nevertheless, while the Fort Worth Court dismissed this as an insufficient element to establish control over security, the Court of Appeals below clearly made it a cornerstone of its analysis. This serves to highlight the need for this Court to reconcile the split in authority in this important area of the law.

Of course, the *Smith* franchisee was to follow the franchisor's training program for its employees, and the franchisor had control over the hours of operation of the restaurant. Respondent contends that Shell controlled training and hours of operation. These are additional factors rejected by the Fort Worth Court of Appeals, but were made foundations of the Sixth Court of Appeals' analysis. The two courts have applied *Exxon Corp. v. Tidwell,*

867 S.W.2d 19, 23 (Tex. 1993) inconsistently. The Fort Worth Court applied it consistently with other cases analyzing control, such as *Clayton* W. *Williams, Inc. v. Olivo,* 952 S.W.2d 523, 527 (Tex. 1997) or *Barnes v. Wendy's Intern., Inc.,* 857 S.W.2d 728 (Tex. App. - Houston [14 th Dist.] 1993, no writ). The Court of Appeals below simply extended the duties imposed by premises liability law further than *Exxon* intended. As such, this Court should reverse the opinion below.

PRAYER

For these reasons, Shell Oil Company, Petitioner, requests that this Court grant review in this case; that the Court of Appeals' judgment which reversed the trial court's judgment be reversed and rendered in favor of Petitioner; and that a final take nothing judgment be ordered to be entered by the trial court. Petitioner also requests any other relief to which it may be entitled.

Respectfully submitted,

HAYS, McCONN, RICE & PICKERING

By: _____

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ATTORNEYS FOR PETITIONER,
SHELL OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Review was sent to all counsel of record by messenger delivery, certified mail, return receipt requested, and/or facsimile this _____ day of November, 2002.

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_____
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