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 BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Shell Oil Company, Petitioner, files the following Brief on the Merits.

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.

ISSUES PRESENTED

Issue No. 1

The trial court's summary judgment was proper because the summary judgment evidence established no legal duty on the part of Shell Oil Company to safeguard its tenant's employees from crime.

Issue No. 2

The Court of Appeals opinion below conflicts with *Smith v. Foodmaker,* 928 S.W.2d 683 (Tex.App. — Fort Worth 1996, no writ).

STATEMENT OF FACTS

Shell entered into a Motor Fuel Station Lease with La Sani effective on June 1, 1997. (C.R.- 34-47). The leased premises are described as 6451 North Freeway, Houston, Texas. The lease term expires on May 31, 2002 and, therefore, was in effect at the time of the occurrence giving rise to this law suit. The Lease states that the premises are to be used for the operation of an automobile service station at Part II, paragraph 5.1 of the Lease. The Lease requires La Sani, as lessee, to personally and actively manage the business conducted at the premises, according to Part II, paragraph 5.2 of the Lease. La Sani is also required to satisfy all regulatory requirements and is prohibited from maintaining any condition on the premises which might endanger the safety of persons on the premises, as set forth in Part II, paragraph 5.4 of the Lease. La Sani is required at all times to maintain the premises (including adjacent sidewalks and driveways, easements and all landscaped areas) in good condition and repair, and to keep them neat, clean, safe and orderly, which is set out in Part II, paragraph 6.1 of the Lease. The key management person designated for the lessee, La Sani, is Defendant below, Syed, which is recited in the Lease at Part I at 1. The Lease refers in Part II, paragraph 16.3 at 10-11 of the Lease to the key management person as the person who has or exercises primary management responsibility for the lessee's day-today operations.

Shell and La Sani entered into a Dealer Agreement effective June 1, 1997, which applies to dealer's station located at 6451 North Freeway, Houston, Texas. (C.R.- 48-63). Defendant Syed is also designated as the key management person for the Dealer Agreement at Part I at 1. This agreement terminates on May 31, 2002 and, therefore, was in effect at the time of the occurrence giving rise to this law suit. The purpose of the Dealer Agreement is stated as follows:

> "2. Shell's Identifications [trademarks, brand names, service marks or color scheme] have come to represent to the motoring public the manufacture and sale of quality petroleum and automotive products. The standards and requirements established for Dealer in this Agreement are for the purpose of preserving and continuing the consuming motoring public's confidence in and acceptance of Shell's products, to the benefit of such consumers, Shell, Dealer and all other authorized Shell dealers. Dealer, who desires to operate a Shell automobile service station or motor fuel dispensing station as an independent businessman, recognizes the need for Dealer's compliance with such standards and requirements to prevent detriment and injury to such consumers and Shell, as well as Dealer and such other dealers."

(C.R. 48-63 at Part II, paragraph 2 at 3). The Dealer Agreement in Part II, paragraph 6 at 4 forbids La Sani from maintaining or permitting any condition at the station which might endanger the safety of persons on the station premises. The Dealer Agreement in Part II, paragraph 11.1 (a) at 6 also requires La Sani to personally and

actively manage the business conducted at the station to assure good faith compliance with Shell's standards of operation and appearance and other provisions of the Agreement. The Dealer Agreement requires La Sani to maintain an adequate and competent staff of employees and to train its employees in order to fulfill its obligations under the Dealer Agreement. (C.R.- 48-63 at Part II, paragraph 11. 1 (c)) La Sani is also required to maintain the station (including adjacent sidewalks and driveways, easements and all landscaped areas) in good condition and repair, and to keep the same (including the restrooms) neat, clean, safe and orderly by Part II, paragraph 11.1 (e) of the Dealer Agreement. The Dealer Agreement further provides:

> "19. Dealer is an independent businessperson, and nothing in this Agreement shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, Dealer's business or operations conducted pursuant to this Agreement; but the entire control and direction of such business and operations shall be and remain in Dealer, subject only to Dealer's performance of the obligations of this Agreement. Neither Dealer nor any person performing any duties or engaged in any work at Dealer's Station for or on behalf of Dealer shall be deemed an employee or agent of Shell, and none of them are authorized to impose on Shell any obligations or liability whatsoever."

(C.R. 48-63 at Part II, paragraph 19 at 10)

There is nothing in either the Lease or the Dealer Agreement which grants Shell a

right of control over the safety and security of the service station.

On or about August 27, 1997, at La Sani's gas station located at 6451 North Freeway, Houston, Harris County, Texas, the Respondents allege that Khan was working within the course and scope of his employment, and was shot by an unknown individual. (C.R.- 198-199). Respondents alleged below that at the time of his injury, Khan was employed by Defendants **LA SANI, INC.** ("La Sani") and **SALEEM R. SYED** ("Syed"). Respondent further alleged that Petitioner, Shell, was in control of the premises on which Khan's injuries occurred because they were the owners of the premises and had the exclusive right to control the property. 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 Shell's conduct in purportedly requiring Khan to maintain and clean the parking lot and bathrooms located outside the primary premises was grossly negligent, which proximately caused the injuries.

SUMMARY OF THE ARGUMENT

Shell was entitled to a summary judgment dismissing it from the lawsuit below, because it neither possessed a right of control or exercised any actual control over the safety and security of the gas station in question which could give rise to a duty to protect employees of the station operator, including Khan, from the criminal acts of third parties. There is no genuine issue of material fact and Shell was and is entitled to judgment as a matter of law.

Shell had no supervisory control over the safety and security of the service station at issue. The Dealer Agreement and Lease between Shell and La Sani establish that Shell had no specific control over safety or security at the service station. The lengthy deposition of Brooks Herring, Shell's corporate representative on the issue of its relationship with independent dealers, established nothing other than the fact that the relationship between the landlord and tenant in this case was governed by the two exhibits attached to Shell's Motion for Summary Judgment.

This is a premises liability case against a landlord for an injury to the invitee of a tenant on property controlled by the tenant. Such cases frequently result in summary judgment because the law does not impose a duty upon a landlord to the guests of a tenant while the guest is on the property controlled by the tenant. The two trial judge's decisions were in accord with the usual resolution of such attempts to pierce the envelope of premises liability. The decision of the two trial judges was in accordance with Texas law as

announced in *Smith v. Foodmaker,* 928 S.W.2d 683 (Tex.App.-Fort Worth 1996, no writ). In that case, two very similar lease and dealer agreements were scrutinized against claims almost identical to those of the Respondents. The Fort Worth Court of Appeals opined that a franchisor/landlord requiring certain standards be met, requiring a certain level of training, and requiring permission before changes are made to the premises by the tenant do not give rise to a duty to provide a certain level of security to the tenant's invitees. Since these are the exact factors relied upon by the Sixth Court of Appeals in this case to find such a duty, the opinion below conflicts with Texas law and should be reversed.

ARGUMENT AND AUTHORITIES

I. The trial court's summary judgment was proper because the summary judgment evidence established no legal duty on the part of Shell Oil Company to safeguard its tenant's employees from crime.

There is nothing in either the Lease or the Dealer Agreement which grants Shell a right of control over the safety and security of the service station. Shell was entitled to a summary judgment dismissing it from this law suit because Shell had no supervisory control over the safety and security of the service station at issue. The Dealer Agreement and Lease between Shell and La Sani establish that Shell had no specific control over safety or security at the service station.

In *Exxon Corp. v. Tidwell,* 867 S.W.2d 19, 23 (Tex. 1993), this Court held that in order to determine whether an oil company was liable to an employee of a dealer, who was injured during an armed robbery at the dealer's service station, the inquiry must focus upon whether the oil company had the right to control the alleged security defects that led to the employee's injury. The Court stated that if the oil company did not have any right to control the security of the station, it did not have any duty to provide the same. *Id.* This Court noted that a hybrid body of law has developed governing oil companies and their service station lessees, involving principles of premises liability and agency law. *Id.* at 21. **Also see** *Clayton* W. *Williams, Inc. v. Olivo,* 952 S.W.2d 523, 527 (Tex. 1997), in which this Court held that the principles of *Exxon* applied in determining the duties owed by a general contractor, who occupied the premises as lessee, toward an employee of an independent

contractor who was injured on the premises. This Court stated that in order for the general contractor to be held liable for negligence, its supervisory control must relate to the condition or activity that caused the injury. 952 S.W.2d at 928. **Also see** *Hoescht-Celanese Corp. v. Mendez,* 967 S.W.2d 354, 357 (Tex. 1998).

In *Barnes v. Wendy's Intern., Inc.,* 857 S.W.2d 728 (Tex. App. Houston [14 th Dist.] 1993, no writ), the Court affirmed a summary judgment in favor of the franchisor of a restaurant in a suit brought by its franchisee's employee to recover damages for injuries she sustained in a fall at the restaurant. The plaintiff asserted that she slipped and fell due to an accumulation of water in the kitchen area of the restaurant, caused by leaking plumbing fixtures. The plaintiff argued that certain clauses in the lease between the franchisor and her employer created a duty to her because the franchisor maintained significant control of the premises. She noted language in the agreement pertaining to the franchisor's right to enter the premises in case of the franchisee's default of the lease, and the agreement of the franchisee/lessee to keep the premises in good condition. The Court disagreed, observing that in Texas a landlord is not liable for injuries sustained by a tenant's employees which occur in areas controlled by the tenant, or where the landlord has not otherwise agreed to make repairs. *Id.* at 730. The lease agreement between the franchisor and franchisee provided it was the obligation of the franchisee to maintain the entire premises, including the restaurant and any other improvements therein in good condition, and that the franchisee's obligation to maintain and repair included plumbing fixtures. The Court held that the trial

court did not err in granting the franchisor's motion for summary judgment based on the absence of a duty to the plaintiff, since that determination was a question of law. *Id.*

In general, a person has no legal duty to protect another from the criminal acts of a third person. *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex. 1995). As an exception to this general rule, a landlord who retains control over the security and safety of the premises owes a duty to a tenant's employee to use ordinary care to protect the employee against an unreasonable and unforeseeable risk of harm from the criminal acts of third parties. *Exxon Corp.,* 867 S.W.2d at 23; *Centeq Realty, Inc., supra.* Absent the essential element of control over safety and security, a lessor owes no duty to make the premises safe. *Lefmark Management Co. v. Old,* 946 S.W.2d at 54. Control is the dispositive factor in determining whether a legal duty should be imposed on the lessor. *Coleman v. Equitable Real Estate Investment Management, Inc.,* 971 S.W.2d 611, 615 (Tex. App. — Dallas 1998, no pet.). The tenant is responsible for providing security for so much of the property as he controls pursuant to his lease. *Id.*

Appellants' lengthy deposition of Brooks Herring, Shell's corporate representative on the issue of its relationship with independent dealers, established nothing other than the fact that the relationship between the landlord and tenant in this case was governed by the two exhibits attached to Shell's Motion for Summary Judgment. Just as in the case of the Wendy's patron above who argued the landlord had sufficient control to impose a duty to clean the premises, Appellants contend that Shell had some duty to control the lighting of the

premises, giving rise to a duty to, apparently, insure a crime-free environment. However, as section 11.1(h) of the Dealer Agreement and Section 5.2 of the Lease Agreement set forth, it is the Dealer/Lessee's obligation to keep the premises fully illuminated. Appellants' suggestion that the responsibility of illumination falls to Shell contradicts Herring's testimony and the uncontroverted language of the controlling agreements.

Even before *Exxon v. Tidwell*, a very similar agreement between Shell and a station owner was analyzed by the Supreme Court of Alabama in *Wood v. Shell Oil Co.*, 495 So.2d 1034 (Ala. 1986). There, an invitee to Parker Shell Station slipped on ice and other substances while he was there to purchase gasoline. *Id.* When he sued Shell Oil Company, alleging it was the owner of the premises with the right to control the operation of Parker Shell, Shell moved for summary judgment. Shell cited the provisions of the Lease Agreement and Dealer Agreement which stated that Parker Shell was an independent business. *Id.* The trial court agreed, and an appeal was taken. The Alabama Supreme Court affirmed the trial court, rejecting the argument that those portions of the Shell Lease Agreement and Dealer Agreement requiring certain operating standards to be maintained by the station operator amount to sufficient control of the operations to give rise to a duty to invitees. *Id.* at 1036-1039. Likewise, this Court should reject the argument that Shell had sufficient control of La Sani's operations in this case to give rise to a duty to Khan. To do otherwise, would put this Court at odds with the mainstream of the law in this area around the country and state, as reflected by the opinion in *Wood*.

The Dealer Agreement and Station Lease between Shell and La Sani establish that Shell had no right of control over the safety and security of the service station where Plaintiff Khan was injured. Therefore, as a matter of law, Shell owed no duty to Khan, the breach of which could serve as the basis for liability.

II. The Court of Appeals opinion below conflicts with *Smith v. Foodmaker,* 928 S.W.2d 683 (Tex.App.-Fort Worth 1996, no writ)

In *Smith v. Foodmaker, Inc.,* 928 S.W.2d 683 (Tex. App. - Fort Worth 1996, no writ), the Court affirmed a summary judgment granted in favor of the franchisor of a restaurant in a suit brought by the parents of a restaurant employee who was murdered during a robbery at the restaurant by his off-duty co-worker. The parents also sued the franchisee/lessee of the premises, alleging that all of the defendants had provided inadequate security at the restaurant despite previous criminal activity in the vicinity, and that the defendants had negligently hired the co-worker who killed their son. In its motion for summary judgment, the franchisor argued that the franchise agreement between it and the franchisee clearly stated that the latter was an independent contractor, rather than an agent, partner, joint venturer, or employee of the franchisor. The plaintiffs pointed out that under the "standards of operation" portion of the franchise agreement, the franchisor retained "sole and absolute discretion" to establish standards, specifications and procedures for the franchisee's equipment, restaurant facilities, and service format. The plaintiffs also relied

upon language in the contract which stated that improvements to the premises had to be authorized in writing by the franchisor, that the franchisee was to follow the franchisor's training program for its employees, that the franchisor had control over the hours of operation of the restaurant, and that the franchisor retained the right to inspect the restaurant's operations. The Court observed that although the franchise agreement required the franchisee to follow its standards of operation in a variety of areas, including employee training, the agreement did not give the franchisor any control over the safety and security of the premises. *Id.* at 687. Although the franchisee was required to follow certain corporate standards, the day-to-day operation of the restaurant was delegated fully to the franchisee. The Court concluded that, as a matter of law, the franchisor was not liable for the death of the franchisee's employee under the theories of negligent hiring, agency/joint enterprise liability, or lessor liability. *Id.* at 687-88.

Thus, the Fort Worth Court of Appeals opined that a franchisor/landlord requiring certain standards be met, requiring a certain level of training, and requiring permission before any alterations are made to the premises by the tenant do not give rise to a duty to provide a certain level of security to the tenant's invitees. Since these are the exact factors relied upon by the Sixth Court of Appeals in this case to find such a duty, the opinion below conflicts with Texas law and should be reversed.

Indeed, the Court of Appeals' attempts to distinguish *Smith vs. Foodmaker, Inc.* in its opinion below only serve to highlight the conflict between the view points of the two Courts

of Appeals. For example, the Court of Appeals below pointed out that "Shell had the right to install exterior lighting or security cameras, which Syed could not do without Shell's prior permission." However, as page 685 of the *Smith vs. Foodmaker, Inc.* opinion makes clear, the franchisee of Foodmaker also had to obtain written permission of Foodmaker before improvements were made to the restaurant premises. Additionally, the Court of Appeals below pointed to training of employees being mandated by Shell as a factor indicating a right of control. However, the same control over training was present in *Smith vs. Foodmaker, Inc.*, but the Court of Appeals there rejected this as a basis for establishing a right of control. *Id. 685*. Finally, the Court of Appeals suggests that Shell could have acquired 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, the Court of Appeals opinion cannot be distinguished from *Smith vs. Foodmaker* and is thus in direct conflict with that opinion. Since this area of premises liability law affects virtually every landlord, franchisor and gasoline wholesaler doing business in this State, this Court has a duty to reconcile the conflicting opinions of the two courts.

Furthermore, since the Dealer Agreement and Station Lease between Shell and La Sani establish that Shell had no right of control over the safety and security of the service station where Plaintiff Khan was injured, this Court should reconcile that conflict in favor

of Shell's position, which is that no duty to Respondents existed. As such, the trial court's decision should have been affirmed, and the Court of Appeals' opinion below should be reversed.

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

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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 October, 2002.

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