ORAL ARGUMENT – 02-0401
3-5-03
SHELL OIL V. KHAN ET AL.

WILSON: I will address how the CA erred in reversing the TC's grant of summary judgment. And this is true for two reasons. First, the lease agreement and the dealer agreement which controlled the relationship between Shell Oil Company and the plaintiff's employer does not give Shell a retention of control over areas of safety and security, such as would have been required by this court in Exxon v. Tidwell. Secondly, applying the facts of this case to other cases, and in particular a case from a sister CA, the Ft. Worth court in Smith v. Foodmaker, the facts that the TC had before it justified summary judgment. In effect, the opinion of the Texarkana court below conflicts with the opinion of the Ft. Worth CA in Smith v. Foodmaker.

PHILLIPS: Do you think we can look at the testimony of Mr. Herring and understand what the full nature of the agreement between Shell and the franchisee was or do you say we're limited just to the words of the agreement?

WILSON: Certainly with respect to the rights of the parties, that is controlled by the agreement. What Mr. Herring testified to as the corporate representative of Shell was his understanding of the meaning of that agreement. We've not taken the position in our brief that the court is somehow precluded from looking at his testimony. His testimony in essence if one looks at it simply says the agreements and the relationship between the parties are controlled by the dealer agreement and the lease agreement.

PHILLIPS: And anything he says you believe can be used and considered whether or not a fact issue has been raised?

WILSON: Yes. In particular, one thing that Mr. Herring testified to that the Texarkana courts relied upon needs to be analyzed because the CA simply got it wrong. That is the issue of whether Shell had the right or the authority to require La Sani, the dealer in this case, to hire security guards. If one looks at Mr. Herring's deposition testimony contained in the record at pages 170 and 171 in his deposition, he denied that he would do that, or have the authority to do that. He did not have the knowledge that Shell had the ability to do that. So there is nothing added to this issue of security guards by Mr. Herring's testimony. He disclaimed the ability to do that if one looks at what he testified to.

Additionally, the two agreements are silent on the issue of hiring security guards. There is nothing in the dealer agreement or the lease agreement that makes Shell somehow an arbiter of whether security guards can be hired or not.

O'NEILL: What if the franchisor had said we want to install additional lighting. Do you approve of that? And Shell had said, no. We don't approve of that. Would that be an actual exercise

of control that could cause a liability hook here?

WILSON: No. That's what Smith v. Foodmaker addressed. That very same requirement in a franchise or franchisee agreement, and the lessor or lessee agreement. There, Jack in the Box had the requirement that before the franchisee could make improvements to the premises, any improvements physically at all, Foodmaker had to give written permission. And the CA in that case said that's not the kind of retention of control that would give rise to liability over safety and security issues.

O'NEILL: What if they had actually asked? What if they had said, we have this lighting system, we want to put in, we're worried about our safety. And they have to run it by you for approval. And let's say they have done that and Shell had rejected it and said no we don't approve it. That would be an exercise of control that would cause liability wouldn't it?

WILSON: That would be an exercise of actual control if that took place. And it's important to keep in mind that the agreement always says in every aspect of these provisions that the consent of Shell will not be unreasonably withheld. So that if a reasonable request is made, the agreement provides that Shell cannot refuse it, because the agreement provides that Shell cannot unreasonably withhold consent to make these kinds of improvements.

O'NEILL: If the agreement sets up the situation where there has to be approval and Shell doesn't approve it, there is the exercise of control. Then doesn't the contractual retention of that control get you to the same place?

WILSON: No it does not. And that's what Smith v. Foodmaker said, that when you have these franchisor or franchisee agreements giving the franchisee the day-to-day control over the operations, simply retaining control over giving permission for improvements is not the retention of that right of control. And we have our agreement, which we don't know if Smith v. Foodmaker agreement has it with this caveat that Shell, the franchisor, cannot unreasonably withhold its consent to make those improvements.

JEFFERSON: The CA said that Syed had a remodeling proposal that included proper lighting that was rejected by Shell. Is there a fact issue on whether the consent was unreasonably withheld or not that would preclude summary judgment? What are the facts on that?

WILSON: I anticipate response of counsel is going to show you a copy of the letter in his exhibits. And if you look at that, the letter is dated in Dec 1996. It was a letter if you read it that was made as part of the application process to become a dealer or lessee. This request was made and the consideration of it was made before these parties entered into any kind of business relationship at all. There is no evidence in the summary judgment record that I recall to the effect that Mr. Syed renewed this request once he signed the agreements. If you look at the two agreements that govern the relationship of the parties they are dated June 1, 1997 subsequent to this request. So there's no evidence in the summary judgment record that once this relationship took place that Shell exercised

its control over renovations and alterations of the premises.

That letter predates the relationship of the parties and does not raise a fact issue over Shell's exercise of control.

ENOCH: I understand you say Herring said he could not. But under that agreement if Shell wanted to exercise the type of control that we're arguing about here, under that agreement they could have done so could they not?

WILSON: Not at all...

ENOCH: Couldn't Shell have said, Look, for all of our franchisors out here we just think that we want our customers to know if they go to a Shell station they are safe. We want customers to know if they go to a Shell station it's a friendly atmosphere. And so we think every Shell station ought to have an attendant on duty for safety purposes and if it's late a night they ought to have two. This isn't broad enough they could have done that?

WILSON: It is not. All the agreement provides is that the dealer will provide an adequate and competent staff. The dealer has the discretion and the requirement under the lease to provide that staff. It doesn't say that Shell has the ability to require some third party vender like a security guard to be retained by the independent dealer.

When we look at where the agreement addresses the specific issues of safety, the one area where keeping the premises safe is mentioned in both agreements, particular 6.1 of the lease agreement and paragraph 11.1(e) of the dealer agreement, both provide that it is the dealer who has the responsibility to keep the premises safe, orderly and maintained. Both agreements allocate contractually that authority to the dealer, not to Shell. And simply requiring the dealer as part of that to have an adequate and competent staff is not the kind of retention of control over specific issues of safety and security that this court talked about in Exxon v. Tidwell.

What the CA did was take any aspect that Shell retained control over and apply the standard of, well does it conceivably affect safety and security? In fact the CA used the language in a couple of places in its opinion: Did this conceivably contribute to plaintiff's injury? And that's not the standard that this court set forth in Exxon v. Tidwell. The standard is, does the duty agreements allocate responsibility for safety and security to the dealer or do they retain it to the franchisor or lessor the position that Shell was in the position of?

By creating this conceptual construct of does this retention of control conceivably impact the injury, in effect the CA's opinion below waters down or makes less useful the SC's opinion in Exxon v. Tidwell.

Exxon v. Tidwell was written by this court for the specific purpose of separating the analysis in oil and gas, wholesale/retail relationships from the old standard of general

rights of control. What the CA did in this case was analyzed general rights of control and extrapolate from that how they might hypothetically have affected security. The Smith v. Foodmaker court went more straight down the line in that they looked at what was retained and whether that specifically addresses the area of safety and security. That's what the CA below should have done, and that is look at whether safety and security were allocated to Shell or to the dealer. The agreements here if one looks at them in their entirety allocates the responsibility to the dealer.

Paragraph 5.2 of the lease agreement says that Mr. Syed has the sole responsibility for management. Paragraph 6.1 and 5.4 require Mr. Syed to maintain the premises including lighting. He's required to keep the premises in an orderly fashion. He's required to keep the premises safe. Section 5.2 of the lease agreement requires Mr. Syed to keep the premises illuminated. Lighting is his responsibility. That's one of the things that the respondent asserted in this case, that the lighting was deficient. Well the responsibility for lighting is allocated to Mr. Syed the dealer.

In the dealer agreement, 11.1(a) of that agreement also requires La Sani, Inc, owned by Mr. Syed to manage the premises.

11.1(c) of the dealer agreement requires Mr. Syed, La Sani, Inc to train the employees. And that's another issue that the respondents below pointed to with the CA to try to establish control on the part of Shell. That is, the training of the employees. Training of the employees is the responsibility contractually allocated to La Sani, the dealer in this case. All Shell did was provide training materials and had the simple requirement that Mr. Syed use those training materials. That's exactly what the court had before it in Smith v. Foodmaker. And the Ft. Worth said that is not enough.

It's important to distinguish here between a concern for security, which Shell expressed by having security matters contained within its training materials, and control over security. This court said in Exxon v. Tidwell what there has to be in the agreements governing the parties is control over safety and security. And the agreements between the parties specifically allocate the responsibility for keeping the premises safe to the dealer, La Sani, Inc., Mr. Syed.

Standards and requirements that's put into the training manual and to the standards for operation exist to protect Shell's brand. And one of the reasons Exxon v. Tidwell exist in this oil and gas wholesale/retail context is the history of lawsuits against lessor pr like Shell is that plaintiffs have attempted to use the control retained to protect the brand as some evidence that control has been retained to make the oil company liable for injuries to the dealer's invitees. Exxon v. Tidwell was a time where this court said we're going to have a different standard. We're going to look at the specific right of control and whether it affected safety and security. And merely protecting one's brand is not a retention of control to...

SMITH: The Shell brand, to the extent the Shell brand is tarnished and you're not going to go to one of their stores because you know there's a high likelihood you may get shot by

somebody isn't that part of the brand and the reason that there's these provisions that Shell can go on and remodel the store and that they want it run in a clean and a safe manner? I don't know that you can separate the brand from at least one component being safety on the premises.

WILSON: That's a good point. And that's why the courts have consistently held that merely protecting the brand is not the retention of control over safety and security. There's a case that was cited by the respondent in their brief, ____ v. Chevron, in which Chevron had certain brand standards. They were not the owner of the premises. But the plaintiff in that case in New Mexico attempted to bring Chevron into the mix by saying that their exercise of control, protecting the brand and imposing their brand standards made them responsible for security on the premises. And the New Mexico SC said no. We have to focus as this court said on do they control the safety and security, or do they exercise an actual right of control or do they retain a contractual right of control.

JEFFERSON: Was there evidence that Shell was aware of a problem with the criminal element in the area in this case?

WILSON: Not with respect to this store. Shell does maintain statistics on crime at their brand of stores throughout the state. But there is no evidence that was adduced about crime at this specific area.

The point I think that's most important to answer your question J. Jefferson is, concern for security does not equal control.

* * * * * * * * * *

RESPONDENT

STARRY: Mohammed Khan came to this country in 1984, almost 20 years ago as part of a new wave of American immigrants that service a vital role in the American economy. Like in the 1800's and early 1900's his predecessors Irish/American, Italian/American, English/American and German/American immigrants came to this country to fill certain roles in the economy, that being in the industrial revolution and the labor. And now we have a service based economy. And again a new wave of immigrants has come into the service based economy to allow businesses to effectively compete with one another to keep the prices or a good and service low. These are the people that work in the convenience store. They work in the gas stations. They work in the pizza parlors. They work at jobs that might not be agreeable to someone with a higher education, someone who was born in the US and has higher expectations of their own employability sort of speak.

There people serve a vital role in our economy. This case is about protecting those people. The Exxon v. Tidwell case is a case that is designed to balance the ever present need for a company to be competitive and to allow it with the protections of those individuals.

Under the Exxon standard a company can make some choices with respect to how it manages a convenience store or a gas station in terms of what it decides to control and not

to control. And there's an old adage that kind of makes sense here when you think about it. Sometime ago I had an appellate brief to write and my boss came down and didn't like some of what I was doing and told me from now on this other attorney makes the final call on whatever goes in that brief Stewart. And I was frustrated by that but at the end the boss still wasn't satisfied with the brief and blamed me even though I didn't have control over the final product. That was a frustrating situation and everybody who has ever been in an employer/employee situation understands that without authority it's very difficult to be handed responsibility and be held accountable.

But under the Exxon standard accountability is not based on some amorphous overall test. It is based on what the right to control specifically dealt with so that if an oil company decides to control something, they can be held accountable for that, for the negligent exercise of that control. That is the standard boilerplate law in the state of Texas going from the Reddinger case through the...

O'NEILL: You're not relying on actual exercise of control here. You're relying on retention of control in the contract.

STARRY: I'm relying on both. One of the issues in this case is that the presence of a security guard might have been requested or ordered by Mr. Herring. Mr. Herring in his testimony, ex. 7, it's the 7th page in your handout, testified that in certain instances he might add additional staff, and he might also hire a security guard with additional counsel. At least that's what he implied. He never said, I don't have authority; I don't have power to hire a security guard. There's nothing in the agreement itself that says you have the power to hire a security guard or not. But what Mr. Herring's testimony goes to is his actual control and his exercise of it. And what he stated in that particular section is that I would not, and he's the manager out there, without additional counsel require _____ to hire a security guard. Suggesting that he might hire a security guard. I might require _____ to provide additional staff at a site at any given time.

The agreement itself says, you must maintain an adequate staff given the nature of the business and the needs to satisfy the customers. And there's a plank in the dealer agreement that suggests that. And Mr. Herring and I were bickering over what the word adequate meant. If this court believes that the adequate in that particular provision and this is only one of the things the plaintiffs are relying on, but if the court believes that that language is not specific enough to, and it is toward and end rather than specifically controlling the means and the manner in which the gas station is supposed to behave, then certainly Mr. Herring's testimony that, hey, I may require additional staff. It's his actual control of the manner in which they may do that.

HECHT: If Shell called you to represent them and they said, here's our problem. We want to protect the people that are working out here, the customers, everybody that's on the premises as much as we can, but we want to leave all of that responsibility to the dealer who is there on the premises, but we don't want to just turn a blind eye to it. But if we see something bad we want to try to fix it but we want the primary responsibility to be the dealers and we don't want any liability to these people for control. What would you counsel them to - how would you counsel them to

structure the agreement differently than from the way this one is structured that would achieve those goals?

STARRY: I would counsel them to structure it like the agreement that was used by this court in the _____ v. Mendez case. In that case it was a little bit different and this court drew the line even though there was – what it was was a gentleman on a job site and he had one of these folding ladders and there was a regulation in the agreement that says if you're a subcontractor you can't use one of those folding ladders without unfolding it. You can't use it as a lean-to by.

A guy gets up there and he decides not to use it as lean-to ladder because he can't because they room cannot hold it, so he does something really stupid: he puts the toolbox up there, stands on the toolbox, slips on some tools and then sues. This court held there was no liability in that situation because the types of requirements that were in that case were so minimal that they didn't exercise control over exactly how things were doing, and there were basic reasonable security standards, such as, obey all the laws of the ____ in Texas regarding safety; obey the regulations, specific minimal regulations based on applying the local law, and not exercising actual control over. Because one you start exercising control over it you're going in and saying we really want to do something extraordinary. I would just tell them this is the price of doing business if you want your stations to be recognized for their safety. If you want your stations to be sought after by the public and think they are going to pull into your station instead of Joe's across the street that's darkly lit that doesn't have some of these other features you're going to have to exercise some control and you're going to have to exercise it in a reasonable manner and you're going to be held accountable.

They can do some minimal things without incurring liability. And those would be the things in _____ v. Mendez described.

HECHT: But petitioner says if they are just trying to protect the brand that should be enough and you disagree with that?

STARRY: I definitely disagree with that. The policy, and Judge Smith did mention to opposing counsel a question about that. He says does protecting the brand name include those kind of things and he mentioned safety may be one of the things you might use to protect your brand name. And I do believe that's the case. There's no doubt in my mind and I think this court could take recognition of the fact that safety does sell in some instances. It has sold in automobiles now. Originally people didn't think it would but it does, and it does sell in convenience stores. People definitely like to be able to go in to a well lit convenience store that is safe at night and has the security guard present and they would rather choose to do that. So it does impact the brand name. It does impact the quality of services. And it impacts their business in a positive way. They make more money and they get more customers and the price they pay for that under any policy we know that safety cost money. That's a standard basic presumption - safety cost money. And it also brings in customers.

And so the Exxon standard allows an oil company to make choices to protect

its brand name but have a _____ responsibility of exercising its control.

ENOCH: You're really saying that if you do consider safety to be part of your brand name, then you're going to be responsible for an event that happens at a franchised operation that involves safety?

STARRY: Not necessarily.

ENOCH: If you consider it part of your brand, you're going to put it in your agreement that you want the franchisor to do things that protects the brand.

STARRY: That is correct. But it's slightly more _____ to that, because the Exxon test still requires that the exercise of control be causally related to the incident. For example, if Shell only chose to exercise control over lighting, but this case involved training only and lighting wasn't - if this station in this particular case had been so well lit that it looked like a Super Bowl at night and that lighting wasn't an issue but the issues still was Mr. Khan's reaction to the robbery, which is an issue in this case as well, and Shell chose only to deal with lighting but said to the station owner training of safety is all yours. We're not going to get involved in that. Instead of what they did here, use our materials, train them this way, train them to do this, and if you don't do that we can take this lease out from under you. That was an exercise of detail control. So even within the realm of general safety the Exxon test requires a fact specific causation that the alleged defect pled by the plaintiff must be something that they exercise control over. And I believe that's what's been satisfied in this case with the laundry list of defects that we have and Mr. _____ affidavit saying these things may have contributed to this incident.

WAINWRIGHT: Can you give us a list of every provision in the lease agreement and in the dealer agreement that mentions the word "safety?"

STARRY: I don't have that off the top of my head. But I can tell you that there are some. It would be in the briefing if we had it. But §5.2 does say that they are responsible for a safe environment. But that again is kind of a result oriented. I don't think that language in itself under Exxon would mean that everything that they do they control. Because that goes to the end. And you've got to be safe. That's they type of thing you can put in an agreement that would allow them to exercise some sort of impetus or push in that direction but doesn't control the details.

WAINWRIGHT: Can you points us to the provisions in the lease and or the dealer agreement that say Shell is responsible for safety? The petitioner has already pointed to the lease agreement, provision 6.1 where it says lessee is responsible for the safe and orderly operation of the business. Is there something that says Shell is responsible for that?

STARRY: I don't think so. But Shell does say you must do this. And it is a safety oriented matter. And if you don't do it we can exercise control over you and take this lease away from you. And that's what the exercise of control is.

If you will go to exhibit 1, the dealer agreement itself does have specific _____. Most specific is in 11.1(c), and it's the one that's relied on heavily here. It says that the dealer shall have the responsibility. Now that's an interesting word. Dealer shall have the responsibility. That language has been used by my opposing counsel in this case to suggest that the Smith v. Foodmaker case and the Barnes v. Wendy case have some sort of strict application here and that that language is some sort of magic language. It all depends on the context of the agreement. Just because you say this will be your responsibility doesn't mean it's your sole responsibility and we're not touching it. They say you shall be responsible for maintaining a safe work environment. That's doesn't mean that Shell hasn't assumed some responsibility for how they are going to train their employees. In fact, Shell has assumed responsibility for how they are going to train their employee in 11.1(c) when Shell says dealer shall utilize training materials made available by Shell. Shell writes the training materials. That's an exercise of control. Mr. Herring interpreting the lease in Ex. 3, said that the green book wasn't an option. This is something that they have to do. It's required by Shell. So Shell is exercising control saying you've got to use the green book to train.

O'NEILL: So if the city of Houston gave a manual to convenience store owners that told them safety tips on robberies would that be control? Those just struck me as very generic.

STARRY: Well they may be generic, but they're not so generic. Do exactly as the robber tells you and says keep your contact with the robber brief, don't ask him if can move your hands. Those are very detailed things.

O'NEILL: What if this came from the local police association to all of the neighborhood?

STARRY: The local police doesn't have the ability to kick me out of my house if I don't use them and don't train my children. In this case, Shell says to the station owner if you don't utilize these materials and you don't train your employees we can yank the lease out from under you. And that was the testimony of Mr. Herring in this case. That is control. And that is forcing those materials, not just to be set on a table, but to actually utilize in the training of the employees.

HECHT: But you don't say there is anything wrong the materials.

STARRY: Absolutely. And I think it's a responsible company that publishes those kind of materials. The problem in this case was and Mr. Herring admitted this, is the audit department at Shell knew, and this is in the briefing, that Mr. Syed was a startup operator, knew that he wasn't very competent, he had been tested and hadn't done that well in his training. There were memos going back and forth saying Mr. Syed is not - we've got to keep an eye on him. Had they kept an eye on him they would have known for example that he didn't have worker's compensation insurance.

HECHT: Doesn't it strike you as odd that if Shell were less responsible that they were more irresponsible and didn't provide these materials and didn't care a flip about safety, they wouldn't have any liability in this case.

STARRY: I don't think it's odd. It's the old adage that we learned in tort law that if there's a man overboard, you don't necessarily have to throw him a raft, thrown him a lifesaver, but if you do there ought to be a rope attached to it.

HECHT: So it would be better just to let him drown.

STARRY: That may not necessarily be the greatest policy, but the fact is is the law assumes that the persons acting and there's no affirmative duty to do those things. If you're going to maintain the corporate fiction, which is what Shell is doing here to avoid liability in cases, if you're going to maintain that corporate fiction well then the responsibility and the actions and the legal culpability ought to be on the person who's got that control really.

JEFFERSON: But don't you think there ought to be some kind of safe harbor for corporations to generally require as in Mendez that you follow routine safety requirements. Some of these examples here, there are things that it's just a routine factor that might save an employee's life, and yet, not subject the corporation of liability for doing that. And I'm just talking about general ones. They are not in the store everyday of them telling him exactly how to run the operation, when to lock the door, when to unlock it, what bulbs to use. It's not degree of control that we're looking at here. But just a general requirement that they conduct their operation safely. Shouldn't there be some kind of safe harbor there?

STARRY: I'm not so sure there should be a ____ safe harbor because it would turn tort law upside down and also reduce the effect _____ of reason for the corporate fiction. The reason for the corporate fiction is to hold those people who are acting accountable and to absolve those people who are merely shareholders, merely have some sort of economic stake other than control. Well once you start controlling and acting, and this is throughout all of jurisprudence, once you start controlling and acting you've got duties to act responsibly. That's in board of director cases. It's in alter ego cases. It's in every kind of case. So the safe harbor really isn't something of hey, you can go in and exercise this control and just throw it out there and not do anything to enforce it even though you have the ability to enforce it. If they wanted to say oh these are tips. You can use them if you like. That's one thing. But that's not what they did here. They said you must train employees with _____ and if you don't we'll take your lease away. That was an exercise of control. Very specific.

Mr. Khan was supposed to be under that lease told exactly as a robber tells you to, to take a test and answer questions saying that's what I'm going to do. If a robber comes up to me I'm going to do exactly as he says. He never got that test even though that's what the lease required him was to get that test. Because he didn't get that test he did just the exact opposite. He put his priorities and said, hey I'm going to protect Shell's money. I'm going to protect the station's money. I'm going to run to that door and lock it and do what I think is right for the company instead of me.

Now Shell to avoid these kind of accidents they stated _____ given in

training. He never got that training. They could have required that training. They weren't mere safety tips. They were specific requirements.

SMITH: The dealer sent this letter back when they were in negotiations that said he would like this to be what they call a sea store. And one of the points he made and why he wanted to do that was because generally it was going to bring in more money because more people are going to stop. But he also said women preferred well-lit stores. And as counsel brought up that was prior to the execution of these lease agreements. Can you give me your thoughts on what the relevance is that the letter occurred before they were signed verses during the actual term of these agreements?

STARRY: The timing isn't relevant because the fact is that there's no evidence that it didn't remain pending. In fact Syed never received a response.

SMITH: Did it merge into the documents, No we 're not going to build you a sea store. You're going to take this old Mobil base station?

STARRY: Don't know that. Even if it doesn't it's still an exercise of control. Because they said no.

SMITH: But it was before the relationship.

STARRY: I understand your point.

SMITH: Now afterwards if during the term he said, look, it's dark over there on that side. I want to put floodlights up and they said no, well of course that's something different.

STARRY: I agree with that. But even assuming that the request was made beforehand and the relationship merged it, it's not actual control. If you say no it's an exercise of actual control. That's what it was. It was an exercise of actual control under the lease agreement pursuant to whatever powers it had. That's not the test under Exxon. The test is the right of control, not the exercise. And even if you throw away that letter and that request and it didn't occur, they still had to get prior permission to make the change. And the prior permission was still an exercise of control.

Keep in mind also, we do know that it was darkly lit on the side. The _____ affidavit says that that may have been a causal relationship, the guy emerged from the side of the station in the darkness. If indeed it was dark and it was causal, Shell reserved the right under the agreement to go in and fix that at anytime.

* * * * * * * * * *

REBUTTAL

WILSON: The Smith v. Foodmaker court in 1996 got it right when it said that requiring written permission before improvements can be made is not the retention of control that's going to

give rise for liability when someone is killed in a criminal act or shot in a criminal act at a business. And that's because virtually every landlord/tenant relationship is going to have some level of control by the landlord over the ability of the tenants to make improvements.

In virtually no landlord/tenant situation are you going to have the situation where the tenant, such as La Sani Inc was in this case, is going to have the unfettered ability to make improvements on the premises. And having the reasonable requirement that you get written permission before those improvements are made is not a specific retention over safety and security.

With respect to the issue of the training manuals. I will point out that this court, not even before the _____ v. Mendez case and the CA's analyzing this court's jurisprudence in the matter have said that merely requiring a safety program by a general contractor for a subcontractor is not going to be a sufficient in and of itself exercise of control or right of control to give rise to liability. Shell's position is the same in this case. Requiring the training manual be incorporated into the dealer's training is no different than a general contractor having its particular safety program and requiring it be implemented. And there are no complaints about Shell's safety program.

It's important to recognize that this store opened sometime in June 1997. The lease agreement and the dealer agreement are dated Jun 1997. This accident happened August 27, 1997. Mr. Khan's summary judgment testimony is silent as to when he began working. But with respect to this theory that Shell somehow failed to discover there wasn't even training there's no evidence to support that because there's no evidence as to how long Mr. Khan had been working, how Mr. Syed trained his employees or anything like that. Those facts were not made part of the summary judgment response by the respondent in this case.

It's certainly reasonable to infer from the facts in this case that Mr. Khan may have been working there for an insufficient time for Mr. Syed to train him. Nevertheless, the agreement as shown to you by respondent's counsel makes clear Mr. Syed has the responsibility to train the employees. Mr. Syed can incorporate whatever materials he wants so long as the green book is included in that.

Comparing this case to the general contractor/subcontractor context and requiring a dealer like Shell to have such a hands off approach to its gas stations as general contractors have with their subcontractors as suggested by respondent's counsel in answer to J. Hecht's question ignores the fact that we have the issue of the dealer's interest in promoting its brand. An interest that Exxon v. Tidwell recognized and virtually court that has analyzed the wholesaler/dealer relationship has recognized. There is simply an additional interest that an oil company has that a general contractor doesn't have. And that's why this court in Exxon v. Tidwell made it clear that the retention of control has to be specific to safety and security. And with respect to J. Wainwright's observations, I've not seen any provision in the dealer or lease agreement that addresses the safety _____ that allocates it anywhere but the dealer.

I've looked at both agreements at length, and I can't find anywhere where the issue specifically of security is addressed at all. And to say that Shell is liable for the plaintiff's injury in the robbery when the agreement makes clear that safety and order on the premises is the responsibility of the dealer would have the effect of making Exxon v. Tidwell meaningless.