THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

RECEIVED
DEC 20 2007
SC Court of Appeals

Case No. 2005-CP-05-78

Louis M. Jamison and Evelyn Jamison,..Respondents,

v.

John M. Morris and Kevin Morris d/b/a Texaco Morris
Mini-Mart; Anderson Oil Co., Inc.; Texaco, Inc.;
and Shell Oil Company,..Defendants,

Of whom John M. Morris d/b/a Texaco Morris
Mini-Mart; Anderson Oil Co., Inc.; and Texaco, Inc.; are the......................Appellants.

MOTION FOR LEAVE TO FILE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANT TEXACO, INC.

The Chamber of Commerce of the United States of America ("the Chamber"), American Tort Reform Association ("ATRA"), and National Federation of Independent Business Legal Foundation ("NFIB") respectfully move, pursuant to Rule 213 of the South Carolina Rules of Appellate Procedure, for leave to file a brief as amici curiae in support of Appellant, Texaco, Inc., in the above-captioned case. The proposed amici curiae brief accompanies this motion.

The Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the nearly six thousand Chamber members that are located in South Carolina, countless others do business within the state and are directly affected by its litigation climate. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

ATRA, founded in 1986, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation. For over a decade, ATRA has filed amicus curiae briefs in cases before the Supreme Court of the United States and state courts of last resort that have addressed important civil justice issues, including the issues that are addressed in the accompanying brief.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with approximately 5,000 members in South Carolina and offices in Washington, D.C. and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice

for small business, the NFIB Legal Foundation frequently files amicus briefs in cases that will impact small businesses nationwide.

The Chamber, ATRA, and NFIB seek leave to file the accompanying amici curiae brief to address an issue before this Court: Was there any legal basis for the jury's finding that Morris Mini-Mart was Texaco's agent? In particular, was there any competent, probative evidence that Texaco, Inc. had the right to direct and control Morris Mini-Mart's employees in the day-to-day sale of alcohol at the Mini-Mart?[1] In this case, the trial court ruled that a franchisor, Texaco, could be held vicariously liable for the actions of the employees of an independently owned and operated service station in selling alcohol to minors, despite Texaco having no authority over such conduct.

As the proposed amicus brief will show, the trial court's ruling is in stark contrast to numerous court decisions from around the country, involving gasoline service stations, as well as franchised hotels, restaurants, real estate companies, and convenience stores, finding that unless a franchisor controls or has a right to control the day-to-day operations of a franchisee, or exerts control over the specific instrumentality that caused the harm, it is not vicariously liable for the conduct of a franchisee or its employees. These decisions recognize that "standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability for all purposes or as a general

[1] A second issue before this Court, namely, did the trial court err in allowing Texaco, Inc. to be held liable for actions taken by other corporate entities when no claim was pled or proven to piece the several layers of corporate veils between them and Texaco, Inc., is also of importance to the Chamber and ATRA. The proposed amicus brief, however, is limited to issues of agency, vicarious liability, and franchisor-franchisee liability raised by Appellant.

matter." 62B Am. Jur.2d, Private Franchise Contracts § 298. Use of a franchisor's products and system "does not, in and of itself, create an agency relationship, absent additional evidence of control." *Jones v. Filer, Inc.*, 43 F. Supp.2d 1052, 1057 (W.D. Ark. 1999). The Supreme Court of South Carolina recognized these principles in *Watkins v. Mobil Oil Corp.*, when it reversed a lower court and found that an oil company could not be held vicariously liable for an assault and battery at a service station where "the display of Mobil signs and its emblem merely represented to motorists and others that the station marketed Mobil's products." 352 S.E.2d 284, 286 (S.C. 1986).

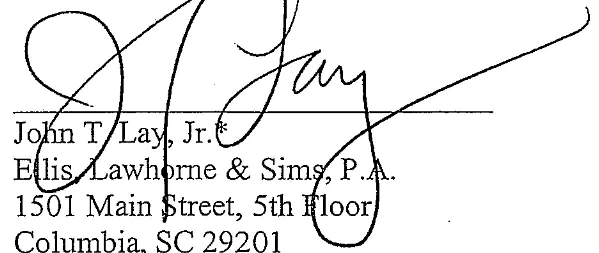
This issue is of great importance to members of the Chamber, ATRA, and NFIB because the fairness of requiring an innocent business to answer for the harm caused by another is vastly diminished where the innocent business is not involved in daily supervision of the party that committed the wrong, but only seeks to protect its trademark, as required by the Lanham Act, 15 U.S.C. §§ 1051 *et seq*. In such situations, imposing vicarious liability does not create an incentive for better management or increased safety measures because it is the independent business or entrepreneur, not a distant franchisor, that manages the operation. *See Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 338 (Wis. 2004). If this decision is allowed to stand, it will discourage franchising throughout South Carolina. Moreover, loosening the standard for vicarious liability will broadly effect all employers and adversely impact the state's economy.

The proposed amici curiae brief does not repeat Appellant Texaco's arguments. Rather, the brief examines the adverse impacts that loosening application of vicarious liability will have on franchising, businesses relationships, and the economy of South Carolina and analyses the principles and underlying public policy of vicarious liability.

The brief then surveys judicial decisions throughout the United States that have and have not found a level of control warranting imposition of vicarious liability.

Accordingly, Amici request that this Court grant their motion for leave to file the accompanying amici curiae brief.

Respectfully submitted,



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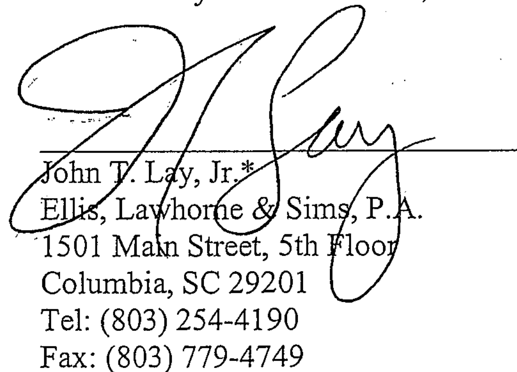

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This the 20th day of December, 2007.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. LOOSENING APPLICATION OF VICARIOUSLY LIABILITY WILL DISCOURAGE FRANCHISING IN SOUTH CAROLINA, BROADLY EFFECT ALL EMPLOYERS, AND ADVERSELY IMPACT THE STATE'S ECONOMY	4
II. GENERAL PRINCIPLES OF VICARIOUS LIABILITY	7
A. The Public Policy Reasons Underlying Vicarious Liability	7
B. Factors Considered in Determining Actual Agency	10
III. PLACING MORRIS MINI-MART IN CONTEXT: CONTROL OR NO CONTROL?	15
A. In Cases in Which Courts Have Found Potential Vicarious Liability, the Franchisor Exerted Day-to-Day Operational Control or Controlled the Precise Instrumentality Alleged to Have Caused the Harm	15
B. In Cases Finding No Vicarious Liability, Courts Have Ruled that Even Detailed Requirements to Protect the Franchisor's Trademark and Standardization of its Product Do Not Give Rise to Agency Unless the Franchisor Controls or Has a Right to Control the Specific Conduct at Issue	18
C. For Decades, Courts Have Overwhelmingly Rejected Vicarious Liability in the Gasoline Service Station Context	21
CONCLUSION	25
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page

Cases

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STATEMENT OF THE ISSUE ON APPEAL

Amici Curiae solely address the following issue on appeal, as stated by Appellant Texaco, Inc.:

A. Was there any legal basis for the jury's finding that Morris Mini-Mart was Texaco Inc.'s agent?

1. Is there any competent, probative evidence that Texaco, Inc. had the right to direct and control Morris Mini-Mart's employees in the day-to-day sale of alcohol at the Mini-Mart?[1]

STATEMENT OF THE CASE

Amici adopt Appellant's summary of the dispute in question.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber"), American Tort Reform Association ("ATRA"), and National Federation of Independent Business Legal Foundation ("NFIB") (collectively "Amici") respectfully submit this Amicus Brief.

The Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the nearly six thousand Chamber members that are located in South Carolina, countless others do business within the state and are directly affected by its litigation climate. The Chamber advocates the

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[1] Amici agree with Appellant Texaco's analysis of the second part of that question, namely, "Did the trial court err in allowing Texaco, Inc. to be held liable for actions taken by other corporate entities when no claim was pled or proven to piece the several layers of corporate veils between them and Texaco, Inc.?" Amici limit the scope of their brief, however, to issues of agency, vicarious liability, and franchisor-franchisee liability raised by Appellant. It does not address the highly questionable decision of the trial court to place liability on Texaco, Inc., despite the fact that Morris Mini-Mart purchased its gasoline through Anderson Oil, which, in turn, purchased the gasoline from Motiva Enterprises LLC, and Texaco had no relationship with Morris Mini-Mart.

interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

ATRA, founded in 1986, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation. For over a decade, ATRA has filed amicus curiae briefs in cases before the Supreme Court of the United States and state courts of last resort that have addressed important civil justice issues, including the issues that are addressed in the accompanying brief.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with approximately 5,000 members in South Carolina and offices in Washington, D.C. and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files amicus briefs in cases that will impact small businesses nationwide.

Together, Amici represent a significant voice in the American business community. Amici submit this brief as they are concerned that the imposition of overly broad and unwarranted vicarious liability on innocent parties, as occurred in this case,

will have adverse effects on franchising, on contractual relationships between businesses, and on the economy in South Carolina. Accordingly, Amici join with the Appellants in asking that the judgment of the trial court be reversed.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal involves important issues of agency liability and corporate separateness in South Carolina. At its core, this case centers on whether basic concepts of corporate separateness can be disregarded simply because a company complies with modest and conventional branding standards. In this case, the trial court permitted the jury to hold Texaco, Inc. ("Texaco") liable for the alleged negligent sale of alcohol by an employee of Morris Mini Mart — an independently owned and operated gas station and convenience store — because Morris Mini Mart utilized the "Texaco" brand name while complying with general branding standards. If allowed to stand, this decision will vitiate the basic rule in South Carolina that every company is liable only for its own actions. It will create vast liability for all franchisors who impose similar standards.

Should this Court fail to reverse the judgment of the trial court, this decision will have significant adverse implications for franchisor-franchisee relationships, employers, and the overall business climate in South Carolina. Franchisors will be reluctant to conduct business in the state knowing that they risk liability for injuries far beyond their realm of control. Businesses will have reason for concern that their independent contractors could be treated as employees, subjecting them to unwarranted vicarious liability. To avoid these adverse consequences, the well-settled laws of agency and corporate separateness should be reinforced, and the judgment of the trial court below should be reversed.

ARGUMENT

I. LOOSENING APPLICATION OF VICARIOUSLY LIABILITY WILL DISCOURAGE FRANCHISING IN SOUTH CAROLINA, BROADLY EFFECT ALL EMPLOYERS, AND ADVERSELY IMPACT THE STATE'S ECONOMY

The judgment below imposed actual agency liability on Texaco and Anderson Oil Company ("Anderson Oil") based merely on an ambiguous right of control. *See* Verdict Form, Questions #4, 5 & 6. This right of control was allegedly proven through common branding standards, none of which had any nexus to the injury causing behavior at issue — the purported illegal sale of alcohol. *See* Texaco's Initial Appellate Brief at 24-28. Imposing this type of broad vicarious liability will have adverse effects on franchising, on contractual relationships between businesses, and on the economy in South Carolina generally.

If the trial court's judgment is upheld, all franchisors conducting business in South Carolina will be at risk of vast liability. Common franchising agreements will subject the franchisor to pervasive actual agency liability. This will discourage the licensing of franchises throughout the state. *See* Brief of *Amicus Curiae* Brief of *Amicus Curiae* The National Assoc. of Convenience Stores in Support of Appellants, *Jamison v. Morris*, No. 2005-CP-05-78, at 5 (filed June 29, 2007). For example, franchisors such as Lenny's Sub Shops, which recently expanded into South Carolina, might focus their investment in other states where they are not at risk of such broad liability. *See Lenny's Announces Deal to Open Restaurants in Georgia, South Carolina*, Memphis Bus. J., May 2, 2006, *available at* 2006 WLNR 7488155. Franchisors that remain in the state may ultimately cease to license their business model when confronted with the same level of liability regardless of their control over day-to-day operations. Instead, outright

ownership would become a more attractive option because the owner would have control over all aspects of the business and could take action to limit its liability exposure. A central purpose behind a franchise agreement, after all, is for the franchisor to relinquish control to an independent owner and reduce its potential business risk. If this distinction is cast aside, then there would be little incentive to franchise. The alternative, for the franchisor to pass on to the franchisee the substantial additional insurance costs needed to protect against vicarious liability, would making franchising unaffordable for many small independent businesses.

This deleterious effect will have a significant impact on South Carolina commerce. Franchised businesses play an essential role in the economy of South Carolina. According to the International Franchise Association ("IFA"), approximately 160,000 South Carolineans are directly employed by about 13,000 franchised businesses. *See* PriceWaterhouseCoopers, Economic Impact of Franchised Businesses at View S1, S44 (2004), *available at* http://www.franchise.org/impactstudy.aspx (examining 2001 data). Franchised businesses accounted for approximately 284,000 jobs (15.7 percent of all private-sector jobs) and $6.42 billion of payroll (12.9 percent of all private-sector payroll) in South Carolina in 2001. *See id.* at View S(44). As a report completed for IFA indicates, "franchised businesses employed about the same number of people in 2001 as did all manufacturers of durable goods, such as computers, cars, trucks, planes, communications equipment, primary metals, wood products, and instruments." *Id.* at 2. Should this Court adopt the Respondents' approach and create liability based upon generalized branding standards, these jobs will be at risk.

Unfortunately, franchised businesses are not the only companies who will be adversely affected by this decision. This expansion of liability will place all South Carolina businesses at risk of immense judgments as it indicates that courts will be more likely to disregard corporate separateness and view independent contractors as employees. Such a result will force all employers to redefine their liability exposure and reformulate projected costs for work-related injuries. Increased liability exposure will lead to insurance rate hikes and force businesses into increasingly complex litigation. Such consequences will increase overhead costs and harm South Carolina business interests.

South Carolina can ill afford the potential effect of discouraging business in the state or encouraging franchises to operate elsewhere. The state has among the highest unemployment rates in the country, significantly higher than the national average. *See* Ben Werner, *In S.C., Take-home Pay Not Growing as Fast as Expenses,* The State (Columbia, S.C.), July 8, 2007, at D9. In addition, the cost of food and fuel has gone up, *see id.*, and it could go up further if unwarranted vicarious liability is imposed against franchisors of gas service stations and restaurants. Such costs would be passed on by franchisors to their franchisees in the form of higher fees, and franchisees would, in turn, raise prices of their products for consumers. When the costs of food and fuel go up, "People's perception of the economy turns bad." *Id.* (quoting Mark Vitner, senior economist with Wachovia). At a time when South Carolina is continuing to lose manufacturing jobs, judicially-created vicarious liability should not place additional jobs in jeopardy. *See* Peter Hull, *SC Job Losses Drop in '06*, Charlotte Observer, Jan. 5, 2007, *available at* 2007 WLNR 220055 (reporting 11,300 manufacturing positions lost in 2005

and 8,500 positions lost in 2006). Creating an adverse legal climate would also run contrary to Governor Mark Sanford's strong efforts to promote economic development in South Carolina. *See, e.g.*, State of Carolina, Office of the Governor, *State Wraps Up Banner Week for Economic Development*, Oct. 13, 2006 (announcing nearly 900 new jobs and almost $750 million in capital investment), *at* http://www.scgovernor.com/Uploads/PressReleases/ NR-d101306-Economy.pdf.

This Court should instead follow existing, well-reasoned precedent, hold to the firmly rooted principles of agency law, and help facilitate the improving South Carolina economy by rejecting liability for a party that had no control in, or relevance to, the sale of alcohol by an independent business.

II. THE TRIAL COURT'S JUDGMENT DISREGARDS GENERAL PRINCIPLES OF VICARIOUS LIABILITY

To prevent these harmful effects, basic principles of vicarious liability should be upheld. Vicarious liability permits an innocent party to be liable for the tortious conduct of another. Actual agency — the only type of vicarious liability at issue here —is "an important exception to the usual rule that each person is accountable for his own legal fault but in the absence of such fault is not responsible for the actions of others." Dan B. Dobbs, The Law of Torts § 333, at 905 (2000). As such, this principle should be strictly construed to permit the passage of liability to a party that is *not* at fault only in situations that further its public policy basis: control. *See Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 331 (Wis. 2004).

A. <u>The Public Policy Reasons Underlying Vicarious Liability</u>

Vicarious liability developed based on the principle that one who controls the actions of another should be liable for the torts committed by that person under his or her

direction. It was first applied in cases involving slaves and servants, and then expanded to employees and other situations. *See* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 69, at 500 (5th ed. 1984).

In the employment context, an employer is presumed to control the actions of its employees because the employer hires, trains, and may discipline or fire employees. The employer also establishes policies governing day-to-day work and manages employees. Thus, an employer's exposure to vicarious liability for the conduct of employees when carrying out the company's business provides an incentive for an employer to carefully select, train, and supervise its employees. *Id.* at 336. Risk sharing is also a goal in applying vicarious liability in the employer-employee relationship. This is appropriate because an employer has general control or a right to control its employees and an employer is more likely to have the insurance and resources to compensate for an injury than an individual employee. *See Kerl*, 682 N.W.2d at 336 (noting that employees are usually less able to satisfy a judgment for damages and less responsive to a threat of tort liability than employers).

On the other hand, outside of the employment context, it is long recognized that when a party has no right to control over the manner in which the work is done, the actor is an independent contractor and the independent contractor is the proper party charged with the responsibility for preventing the risk. *See* Prosser & Keeton, *supra*, § 71, at 509. This distinction recognizes that an independent contractor "does the work on his own time, in his own way, and under no one's directions but his own" and therefore the enterprise, and the risk of liability, is properly allocated to that party. *See* Victor E. Schwartz, Prosser, Wade and Schwartz's Torts 669 (11th ed. 2005). It also reflects the

fact that independent contractors, such as businesses operating under a franchise agreement, are generally financially responsible parties, at least to a far greater extent than employees. *See id.*

A franchise agreement is a contractual, not employer-employee, relationship where the franchisor permits a franchisee to use its trademark and profit from its business model and goodwill, while the franchisee, in exchange, agrees to maintain certain standards of operation and appearance. A franchisor has the obligation to protect its trade or service mark, the reputation and uniformity of its entire marketing system, and its good will. *See* Lanham Act, 15 U.S.C. §§ 1051 et seq. Imposition of such standards, however, does not automatically convert a franchisor-franchisee relationship into that of a principal-agent, placing vicarious liability for each and every negligent act committed by an employee of any of numerous licensed franchisees upon the franchisor. *See Oberlin v. The Marlin Am. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979) ("The purpose of the Lanham Act, however, is to ensure the integrity of registered trademarks, not to create a federal law of agency . . . [or to] automatically saddle the licensor with the responsibilities under state law of a principal for his agent.").

Courts have resolved the tension by focusing on the element of control of the day-to-day operation of the business. *See, e.g., McGuire v. Radison Hotels Int'l, Inc.*, 435 S.E.2d 51, 53 (Ga. Ct. App. 1993) (distinguishing situations in which a contract gives, or a party assumes, the right to control the time and manner of executing the work from those in which it merely requires results in conformity with a contract) (citing *McMullan v. Ga. Girl Fashions*, 348 S.E.2d 748 (Ga. 1986)); *Kuchta v. Allied Builders Corp.*, 21 Cal.App.3d 541, 547 (1971) (requiring a franchisor to exercise "complete or substantial

control" over the franchisee for a finding of vicarious liability). Of particular importance is whether the party exerted control over the particular instrumentality alleged to have caused the harm in their analyses. *See, e.g., O'Bryant v. Century 21 South Central States, Inc.*, 899 S.W.2d 270, 271 (Tex. Ct. App. 1995) ("[T]he right of control must pertain to a task or matter material to the lawsuit.").

It is unjust to defendants and flawed public policy to apply vicarious liability when the requisite control is lacking. "If a principal does not control or have the right to control the day-to-day physical conduct of the agent, then the opportunity and incentive to promote safety and the exercise of due care are not present, and imposing liability without fault becomes difficult to justify on fairness grounds." *Kerl*, 682 N.W.2d at 336-37.

B. Factors Considered in Determining Actual Agency

The Restatement (Second) of Agency distinguishes between servants[2] and independent contractors on the basis of control. It provides that "[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." Restatement (Second) of Agency § 2(3) (1958). Section 220(2) provides a non-exclusive list that courts may consider in determining whether one is acting as a servant or as an independent contractor that is largely tailored to the employer-employee context.[3]

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[2] The term "servant," stemming from vicarious liability in the master-servant relationship, continues to be used in the law today, although "employee" has largely displaced "servant," and "employer" has replaced "master." *See* Restatement (Second) Agency §§ 2 cmt d., 220 cmt. g.

[3] The Restatement factors include (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed

The franchise relationship, however, is qualitatively different from the typical contract of employment where the rules of master and servant are typically applied. The question therefore becomes whether the franchisee, in the particular injury-producing conduct at issue, was acting as an agent of franchisor. To answer this question, courts have focused their inquiry on whether the franchisor had the right to control the specific instrumentality or aspect of the business that was alleged to cause the harm. *See Allen v. Choice Hotels Int'l*, 942 So. 2d 817 (Miss. Ct. App. 2006) (citing *Kerl*, 682 N.W.2d at 337). Some courts have honed in on whether the franchisor has the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. *See Schlotzsky's, Inc. v. Hyde*, 538 S.E.2d 561, 562 (Ga. Ct. App. 2000) (franchisor not vicariously liable for customer consumption of tainted food at deli). Thus, even if a franchise agreement and operations manual sets forth detailed standards for operation, the franchisor is not vicariously liable unless it reserves to itself a right to control the daily activities of the franchisee. *Id.*

A franchisor may impose standards to protect its trade name by requiring a general level of quality and uniformity within the system without taking on the liability of the franchisee. "A franchisor's reserving the right to inspect, monitor, or evaluate the franchisee's compliance with its standards and to terminate the franchise for noncompliance is not the equivalent of retaining day-to-day supervisory control of the

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is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.

franchisee's business operations as a matter of law." *Id.* at 563. Courts have found the right to hire and fire employees and language of the contract in which the parties agree that the franchisee in an independent contractor and not an agent significant, but not necessarily controlling, factors in this inquiry. *See, e.g., Miller v. Piedmont Steam Co.*, 528 S.E.2d 923, 927 (N.C. Ct. App. 2000) (finding that franchisor Stanley Steamer Company was not vicariously liable for injury to child caused by negligence of franchisee's van driver).

Moreover, a contractual relationship, such as a franchise agreement, can place obligations on a party without giving rise to a principal-agent relationship and pass-through vicarious liability. As Supreme Court of Nevada wisely recognized, "In an agency relationship, the principal possesses the right to control the agent's conduct. This principle of agency, however, does not mean that an agency relationship exists every time one party has a contractual right to control some aspect of another party's business." *Hunter Mining Labs., Inc. v. Management Assistance, Inc.*, 763 P.2d 350, 352 (Nev. 1988) (per curiam). For example, a contract can give a manufacturer some degree of control over the manner in which a distributor handles its products, such as requiring the distributor to maintain an appropriate premise, to inform the manufacturer of changes in management, and to submit monthly reports. *See id.* It can also provide the manufacturer with a right to monitor advertising of its products by the distributor and to rescind the contract under specified conditions. *See id.* "These types of controls, typical in manufacturer/distributor agreements, protect [the manufacturer's] goodwill and the integrity of [its product line]. They are not, however, the types of control that create a question of fact regarding agency." *Id.*

The Restatement similarly recognizes that "the fact that one of the parties has subsidiary duties to act for the interests of another, as where a purchaser of goods from a manufacturer agrees he will advance the interests of the manufacturer in certain respects, does not create an agency relation with respect to the sale." Restatement (Second) of Agency § 13 cmt. c. Rather, "[i]t is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." *Id.* § 1 cmt. b. In the franchise context, courts have found that

> the mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such a relationship. Whether the control retained by the franchisor is also sufficient to establish a master-servant relationship depends in each case upon the nature and extent of such control as defined in the franchise agreement or by the actual practice of the parties.

Jones v. Filer, Inc., 43 F. Supp.2d 1052, 1057 (W.D. Ark. 1999) (quoting *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978) (citing additional cases)).

As more fully discussed in the amicus brief of the National Association of Convenience Stores, retail companies take great pride in their independence and supplier companies are careful not to intrude on this autonomy. *See* Brief of *Amicus Curiae* The National Assoc. of Convenience Stores, *supra*, at 8. Franchisors and franchisees specifically design their agreements to address such issues of control. *See id.* at 5. The franchising model, by its very nature, represents a decision by the franchisor to give up a measure of control over the operation of a business. Subjecting that franchisor to vicarious liability when the two parties contract and both achieve their desired goals perverts the basic principles of contract law and risk allocation. *See id.*

The Wisconsin Supreme Court has recognized the challenge of applying principles of vicarious liability in the franchise context, and the adverse consequences that would result if courts paint the doctrine with too broad a brush:

> If the operational standards included in the typical franchise agreement for the protection of the franchisor's trademark were broadly construed as capable of meeting the "control or right to control" test that is generally used to determine respondeat superior liability, then franchisors would almost always be exposed to vicarious liability for the torts of their franchisees. We see no justification for such a broad rule of franchisor vicarious liability. If vicarious liability is to be imposed against franchisors, a more precisely focused test is required.
>
> We conclude that the marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter. We hold, therefore, that a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm.

Kerl, 682 N.W.2d at 331-32. The court concluded that the fairness of requiring a principal who closely controls the conduct of an agent to answer for the harm caused by the agent is diminished where the franchisor is not involved in daily supervision, but only provides contractual quality and operational requirements necessary to protect its trade or service mark. *See id.* at 338. In such situations, imposing vicarious liability does not create an incentive for better management or increased safety measures because it is the independent business or entrepreneur, not a distant franchisor, that manages the operation. *See id.*

III. PLACING MORRIS MINI-MART IN CONTEXT: CONTROL OR NO CONTROL?

As the cases in this section will illustrate, the common element that determines vicarious liability, in South Carolina and other states, is whether the franchisor has specific control over the particular conduct at issue.

A. In Cases in Which Courts Have Found Potential Vicarious Liability, the Franchisor Exerted Day-to-Day Operational Control or Controlled the Precise Instrumentality Alleged to Have Caused the Harm

In cases in which courts have found factual questions precluding summary judgment on vicarious liability, the franchisor either exerted control over the actual operation and day-to-day management of the franchise, or controlled or had a right to control the precise instrumentality alleged to have caused the harm.

For example, the Supreme Court of South Carolina considered the case of a fast food restaurant employee who was fatally injured in an automobile accident while riding with the assistant manager in *Fernander v. Thigpen*, 293 S.E.2d 424 (S.C. 1982). Although the Court considered apparent, not actual, agency in that case (i.e. the employee's belief that he worked for the franchisor, Burger Chef, not an independent franchisee, A & H Foods, Inc.), its decision that factual issues precluded summary judgment was rooted in the franchisor's "right to control" the conduct of the alleged agent. *Id.* at 426. In that instance, the franchisor controlled "the menu, the quality of food and service, the manner and equipment to be employed in the preparing of food and, most significantly, *the daily operating policies of the restaurant including management of the employees*." *Id.* at 426-27 (emphasis added).

The Domino's Pizza litigation of the 1990s stemming from the franchisor specifically requiring franchisees to deliver pizza within thirty minutes of receiving an order provides another salient example. The thirty-minutes-or-less policy led to a slew of lawsuits alleging that it motivated delivery drivers of franchisees to drive at excessive speeds leading to accidents. *See, e.g., Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026 (Fla. Ct. App. 1993) (recognizing the extensive control of Domino's over all aspects of franchisee operations, including the requirement that all pizza is delivered in thirty minutes after the order is taken). Ultimately, after a series of legal defeats, Domino's abandoned this practice. *See Huge Jury Award Stops 30 Minute Delivery*, N.Y. Times, Dec. 26, 1993, at E2 (reporting a $78 million judgment against Domino's after an accident by a local driver).[4]

Other cases in which courts have found factual issues precluding summary judgment similarly involve scenarios where a franchisor controlled the particular decision, conduct, or policy alleged to have caused the harm. For instance, where a young girl was seriously injured entering a glass door at local Dairy Queen which shattered and cut her, and it was the franchisor that supplied the remodeling designs that included the door specifications, such a case was permitted to go to trial. *See Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160 (Del. Super. Ct. 1975); *cf. Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066-67 (5th Cir. 1995) (finding that while

[4] The Domino's cases can be compared to *Pizza K, Inc. v. Santagata*, 547 S.E.2d 405 (Ga. Ct. App. 2001), in which a court found no principal-agent relationship where a pizza delivery driver injured the plaintiff. In that case, the franchisor required employees to wear franchise uniforms, required franchisee use of certain bookkeeping forms and to purchase foodstuff from certain distributors, conducted inspections, and provided franchisee with initial training as a means of ensuring uniformity within the franchise system, but the franchisor did not have supervisory control over daily activities of franchisee employees.

franchisor maintained the limited right to "veto" modifications to store facilities, it did not specifically control modification of the store to improve accessibility to the disabled and therefore was not subject to liability under the Americans With Disabilities Act; other controls, such as accounting, uniforms, and use of trademarks, were irrelevant to determining liability because they did not relate to the harm at issue).

Likewise, where employees of Kentucky Fried Chicken (KFC) suffered severe burns while cleaning a fryer, and the KFC franchisor required franchisees to purchase the specific fryers, courts denied summary judgment. *See Whitten v. Kentucky Fried Chicken Corp.*, 570 N.E.2d 1353, 1356 (Ind. Ct. App. 1991); *see also Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991 (D. N.H. 1983) (duty exists where franchisor had control over equipment alleged to have caused injury to franchisee's employee). A final, rare, example is a case in which a McDonald's patron was injured when she bit into a sapphire stone while eating a Big Mac sandwich, and the franchise agreement and operations manual provided "precise methods" of food handling and preparation, which the court regarded as the specific aspect of the business alleged to cause the harm. *See Miller v. McDonald's Corp.,* 945 P.2d 1107, 1111 (Or. 1997).

As each of these cases show, where courts have found a duty, the duty has arisen because the franchisor had control over the specific policy or "instrumentality" that allegedly caused the harm or management of the franchisee's employees. In the case before this Court, Texaco clearly did not require Morris Mini-Mart to sell alcoholic beverages, did not control the franchisee's policies with respect to such sales, and had no control or right to control the management of the service station's employees.

B. In Cases Finding No Vicarious Liability, Courts Have Ruled that Even Detailed Requirements to Protect the Franchisor's Trademark and Standardization of its Product Do Not Give Rise to Agency Unless The Franchisor Controls or Has a Right to Control the Specific Conduct at Issue

Courts have adhered to the general principle that "standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability for all purposes or as a general matter." 62B Am. Jur.2d, Private Franchise Contracts § 298. Use of a franchisor's products and system "does not, in and of itself, create an agency relationship, absent additional evidence of control." *Jones v. Filer, Inc.*, 43 F. Supp.2d 1052, 1057 (W.D. Ark. 1999). Examples of courts precluding vicarious liability in the franchise context are widespread.

For example, a federal district court, applying South Carolina law, recently held that a hotel franchisor, Choice Hotels International, Inc., could not be held vicariously liable when a fire killed guests at a local Comfort Inn. *See Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 672 (D. S.C. 2006). The court found no agency relationship because the franchisee, R.G. Hospitality, LLC, "(1) owned the building; (2) held the operating licenses and permits; (3) hired, fired, supervised, and disciplined the franchisee's employees; (4) determined employee wages and room rates; (5) provided daily training for employees; and (6) provided insurance for the hotel." *Id.* at 677. While Choice required R.G. Hospitality to upgrade its facilities during renovation from a Days Inn to a Comfort Inn and provided rules and regulations to ensure a similar experience at all Comfort Inn locations, it did so to protect its trademark and goodwill, and not to

control day-to-day operations. *See id.* Thus, the court found that the franchisor did not operate the hotel, control its life safety systems, or undertake a duty to provide fire protection. *See id.* at 678-79. The court also noted that maintaining a "right to inspect" and to terminate the franchise agreement for noncompliance with its standards is not equivalent to a "right of control." *Id.* at 679-80 (citing *Schlotzsky's, Inc. v. Hyde*, 538 S.E.2d 561, 562 (Ga. 2000)).[5]

For similar reasons, courts have repeatedly rejected attempts to hold restaurant franchisor's vicariously liable for security breaches at a franchisee's premise absent a specific showing of control over the measures at issue or a specific requirement that the franchisee take such measures.[6] Likewise, it was Morris Mini-Mart, not Texaco, that

[5] Numerous other courts, in a variety of contexts, have similarly precluded the vicarious liability of hotel franchisors for alleged tortuous conduct of franchisees. *See, e.g., Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 821-26 (Miss. Ct. App. 2006) (finding that requirements of franchisor as to doors for guest rooms, and extensive rules in franchise agreement did not give rise to right to control both means and ends of safety of hotel guests); *Myszkowski v. Penn Stroud Hotel, Inc.*, 634 A.2d 622 (Pa. Super. 1993) (finding that Best Western's rules and regulations, workshops and programs, and ability to sanction for noncompliance with its quality standards was insufficient to show day-to-day control of hotel and therefore franchisor was not vicariously liable for attack in hotel restroom); *Schear v. Motel Management Corp. of America*, 487 A.2d 1240, 1249 (Md. Ct. App. 1985) (finding that "control element was totally lacking" and noting that a right to conduct periodic inspections as a means of insuring adherence to Holiday Inn standards did not amount to control over day-to-day operations); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. App. 1987) (finding no evidence of the kind of detailed control over the daily operation of the hotel to establish a principal-agent relationship and that imposition of requirement to maintain accommodations in a "clean, attractive, safe and orderly manner" did not establish otherwise).

[6] *See, e.g., Wendy Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp.2d 83, 86-94 (E.D.N.Y. 2000) (holding that franchisor's requirement that franchisee operate 24-hours a day and its making security equipment available for purchase did not specifically control or limit security provided by franchisee to protect against risk of attack); *Vandemark v. McDonald's Corp.*, 904 A.2d 627, 634 (N.H. 2006) (holding that franchisor's recommended safety and security system was advisory only and franchisor did not exert sufficient control over security for vicarious liability for attack); *Folsom v. Burger King*, 958 P.2d 301, 309 (Wash. 1998) (en banc) (finding that Burger King's authority over franchise was limited to enforcing and maintaining uniformity of the Burger King system and did not extend to control over security of the restaurant); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 814-15 (Iowa 1994) (no vicarious liability where franchisee has power to control day-to-day operations, and where franchisee owned the business

held the alcoholic beverage license and managed and trained its employees with respect to proper procedures for alcoholic beverage sales and otherwise.

Two California cases took a similar view of vicarious liability in the convenience store context. *See Cislaw v. Southland Corp.*, 4 Cal. App.4th 1284 (1992); *Wickham v. Southland Corp.*, 168 Cal. App.3d 49 (1985). In the more recent of the two cases, the parents of 17-year-old Timothy Cislaw sued Southland Corporation, the owner of the 7-Eleven trademark and franchisor of California 7-Eleven stores, after he died of respiratory failure after smoking a package of clove cigarettes purchased at the store. *Cislaw*, 4 Cal. App.4th. at 1287. The court found no agency relationship because the owner of the franchisee had full and complete control over all employment, inventory, and marketing decisions, including the decision to sell clove cigarettes. *Id.* at 1295. In the earlier case, *Wickham*, the plaintiffs claimed that the franchisor was liable for their underage son's death in a car accident after a 7-Eleven store sold him alcohol when already intoxicated. 168 Cal. App.3d at 53. The court likewise found that Southland was not vicariously liable in that instance because only the owner of the franchisee and the employees hired by her sold beer and wine and the alcoholic beverage license was in the franchisee's name. *See id.* at 54, 57. As in those cases, Texaco did not have any control over the decision of the independent convenient store, Morris Mini-Mart, to sell the product at issue or Morris Mini-Mart employee's sale of the product to a minor.

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equipment, operated business, held operating licenses and permits, determined wages, provided basic training and insurance for employees, and hired, fired, supervised, and disciplined employees); *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683, 687 (Tex. Ct. App. 1986) (finding that Jack-in-the-Box franchisor was not vicariously liable for restaurant employee fatally shot during a robbery despite franchisor's extensive control over equipment used, operation procedures, training, and hours of operation, because franchisor did not have right to control day-to-day operations, hiring practices, or to require criminal background checks of employees).

Likewise, it is Morris Mini-Mart, not Texaco, that bears full responsibility for its sale of products to minors and the attendant results.

Courts have also found a lack of a principal-agent relationship in consideration of products sold outside the scope of a franchise agreement. For example, when an employee of a Dairy Queen franchisee spilled discarded cooking oil on a highway leading to an accident, an injured driver sought to hold the franchisor vicariously liable. *Carlton v. Alabama Dairy Queen, Inc.*, 529 So. 2d 921 (Ala. 1988). In addition to finding that the franchisee had sole authority to hire and fire employees and set their wages, the Supreme Court of Alabama also found it significant that the non-ice cream products from which the spilled cooking oil originated were not purchased from the franchisor, Alabama Dairy Queen, nor was any of the equipment used to cook fried food. *See id.* at 925. "Non-ice cream products, such as hamburgers, were purchased elsewhere and prepared as Lewis's store saw fit. Lewis d/b/a Dairy Queen clearly had sole control over all non-ice cream products. There is no evidence that Alabama Dairy Queen had any control over the operation of the kitchen or the disposal of the grease." *Id.* In the case before this Court, it is not Texaco-branded gasoline or any Texaco-branded product that is related to the harm. The product that lead to the alleged harm, beer, is completely outside the scope of the agreement and is one over which the Morris Defendants had complete control.

C. For Decades, Courts Have Overwhelmingly Rejected Vicarious Liability in the Gasoline Service Station Context

Over sixty years of case law support the principle that absent operational control, an oil and gas company is not vicariously liable for injuries occurring at licensed service stations or the actions of service station employees. *See, e.g., Arkansas Fuel Oil Co., v.*

Scaletta, 140 S.W.2d 684, 689 (Ark. 1940) (collision while station employee making gasoline delivery); *Horan v. Richfield Oil Corp.*, 105 P.2d 514, 516 (Ariz. 1940) (slip and fall injury); *Rothrock v. Roberson*, 197 S.E. 568, 569 (N.C. 1938) (automobile collision by service station employee).

In South Carolina, the requirement for control over a service station's operations is well-established. In *Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284 (S.C. 1986), the Supreme Court of South Carolina, examined whether an oil company could be held vicariously liable for an assault and battery at a service station where its products were marketed and sold. Like Texaco in the present case, the Mobil logo was atop the station, displayed on the pumps, and exhibited on the uniforms of the station employees. *See id.* at 286. The court nevertheless held that there was no evidence that the franchisor controlled any part of the service station's operations, reasoning that, "the display of Mobil signs and its emblem merely represented to motorists and others that the station marketed Mobil's products." *Id.* In finding no actual or apparent agency, the court reversed the lower court and held that the defendant's motions for directed verdict and judgment notwithstanding the verdict should have been granted. *See id.* at 288.

Here, Texaco's logo similarly markets its products to motorists and does not establish control over the service station's operations. Morris Mini-Mart independently handles all of the day-to-day operations, including the hiring, firing and payment of the station employees. Actions taken by a service station employee, whether it be a battery or the unlawful sale of alcohol, are therefore entirely unrelated to the service station's sale of Texaco's product and entirely outside the scope of any limited control reserved to Texaco under the relevant agreement. Texaco, in its business of selling petroleum

products, has no right to exercise control over the operation of service stations or their employees. Indeed, the agreement at issue here, which does not even involve Texaco, specifically provides that the service station has this exclusive authority.

Courts in other jurisdictions have repeatedly addressed a franchisor's lack of control over conduct at franchised service stations and reach the same conclusion in a variety of contexts. For example, state supreme courts have routinely recognized that an oil company is not vicariously liable for slip and fall injuries occurring at a service station bearing its name. *See Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1039 (Ala. 1986); *Hudson v. Gulf Oil Co.*, 2 S.E.2d 26, 29 (N.C. 1939); *Shaver v. Bell*, 397 P.2d 723, 727 (N.M. 1964); *Texas Co. v. Wheat*, 168 S.W.2d 632, 635 (Tex. 1943). Similarly, courts have not imputed liability against the franchisor where patrons are injured in automobile-related injuries occurring on the premises. *See Brown v. Standard Oil Co., Inc.*, 14 N.W.2d 797, 799 (Mich. 1944) (tire repair resulted in fatal injury); *Levine v. Standard Oil Co., Inc.*, 163 So. 2d 750, 751 (Miss. 1964) (customer injured by tire explosion); *Westre v. De Buhr*, 144 N.W.2d 734, 736 (S.D. 1966) (customer injured during tire change).

The operation of a separate business at a service station, such as Morris Mini-Mart's operation of a convenience store, has also been held not to impose liability on the station's franchisor. *See Cities Service Oil Co. v. Smith*, 346 F.2d 349, 352 (7th Cir. 1965) (injury resulting from vehicle repair company operating in connection with service station); *Cawthon v. Phillips Petroleum Co.*, 124 So. 2d 517, 519 (Fla. Dist. Ct. App. 1960) (defective break repair job); *Price v. Cities Service Oil Co.*, 418 N.Y.S.2d 488, 489-90 (N.Y. 1979) (faulty carburetor installation by accompanying repair service). Courts have further rejected attempts to impose vicarious liability on franchisors based on

the acts of service station employees, which a franchisor cannot control because it typically has no involvement in hiring, discipline, or termination decisions. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000) (racial discrimination against customers by service station employee); *Hoover v. Sun Oil Co.*, 212 A.2d 214, 216 (Del. 1965) (fire caused by negligence of service station employee); *Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 120 (Fla. 1995) (assault and battery of customer by service station employee).

Even in cases that involve injuries allegedly related to gasoline, state supreme courts have held that it is the service station that is liable, not a far-away franchisor. *See Parks Hiway Enter. v. Cem Leasing, Inc.*, 995 P.2d 657, 668 (Alaska 2000) (groundwater contamination from underground fuel storage tank); *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, 367 (Iowa 2000) (release of petroleum into the ground from underground storage tanks); *JBG/Twinbrook Metro Ltd. P'ship v. Wheeler*, 697 A.2d 898, 910-11 (Md. 1997) (subsurface percolation of gasoline from service station's leaking storage tanks); *Elkins v. Husky Oil Co.*, 455 P.2d 329, 332-33 (Mont. 1969) (overflow of gasoline storage tank causing explosion and death); *Bahrle v. Exxon Corp.*, 678 A.2d 225, 232 (N.J. 1996) (groundwater contamination); *Foster v. Steed*, 432 P.2d 60, 62 (Utah 1967) (customer injured while pouring gasoline to prime carburetor). These decisions are grounded in the lack of a franchisor's control over the day-to-day operation of a service station, including the storage and disposal of fuel.

As these decisions collectively recognize, franchisors are not vicariously liable for injuries occurring at independently-owned and franchised service stations where the

franchisor does not exhibit operational control. Operational control is also not dictated by the number of products or advertisements on display at a service station, or the existence of a franchise or lease agreement.

> In today's world, it is well understood that the mere use of franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or employment decisions. Nor does the provision of routine contractual support services refute this conclusion.

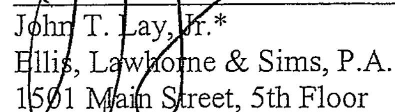
Bransford, 648 So. 2d at 120. Furthermore, an oil refiner "is not an operator of an independent station bearing its brand merely because the refiner's brand creates practical leverage over the station's owner or operator." *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 966 (Ind. 1999) (holding that contamination from an underground fuel tank did not create liability for an oil company that did not operate the service station).

This Court should continue to follow this well-reasoned precedent and hold that Texaco is not liable for the sale of alcohol to minors at a convenience store run as part of an independently operated service station.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America, American Tort Reform Association, and National Federation of Independent Business Legal Foundation respectfully request that this Court reverse the decision below and hold that Texaco cannot be held vicariously liable under the facts presented in this case.

Respectfully submitted,



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Dated: December 20, 2007

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2005-CP-05-78

Louis M. Jamison and Evelyn Jamison,..Respondents,

v.

John M. Morris and Kevin Morris d/b/a Texaco Morris
Mini-Mart; Anderson Oil Co., Inc.; Texaco, Inc.;
and Shell Oil Company,..Defendants,

Of whom John M. Morris d/b/a Texaco Morris
Mini-Mart; Anderson Oil Co., Inc.; and Texaco, Inc.; are the....................Appellants.

**PROOF OF SERVICE FOR
THE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS AMICI CURIAE
IN SUPPORT OF APPELLANT TEXACO, INC.**

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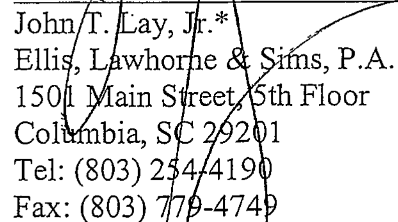

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