

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Bamberg County
Court of Common Pleas
The Honorable Doyet A. Early, III
Circuit Court Judge

Civil Action No. 2005-CP-05-00078

LOUIS M. JAMISON AND EVELYN JAMISON,
Respondents,

v.

JOHN M. MORRIS AND KEVIN MORRIS D/B/A MORRIS MINI-MART, ANDERSON OIL
COMPANY, INC., TEXACO INC., AND SHELL OIL COMPANY,
Defendants,

of whom

TEXACO INC., is the
Appellant.

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE AND STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT & AUTHORITIES 3

I. This Court should not overlook the fact that there is no evidence of a legal relationship between Texaco and Morris Mini-Mart. 3

II. There is no evidence of consent between Texaco and Morris Mini-Mart 5

A. Consent is a crucial element of actual agency because actual agency has serious implications for both parties 6

B. Courts in various jurisdictions have consistently required evidence demonstrating both consent by the principal and consent by the agent 7

C. In this case, the judgment is unsupported by any evidence of consent by the purported principal or by the purported agent 8

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE 13

INDEX OF AUTHORITIES

Cases

<i>Archbold v. Reifenrath</i> , 744 N.W.2d 701 (Neb. 2008)	4
<i>Asbell v. BP Exp. & Oil Co., Inc.</i> , 497 S.E.2d 260 (Ga. App. 1998)	10
<i>Bach v. Winfield-Foley Fire Protection Dist.</i> , 257 S.W.3d 605 (Mo. 2008)	4
<i>Barker v. Skagit Speedway, Inc.</i> , 82 P.3d 244 (Wash. App. 2003)	7
<i>BP Exp. & Oil Co., Inc. v. Jones</i> , 558 S.E.2d 398 (Ga. App. 2001)	10
<i>Courtney v. Remler</i> , 566 F.Supp. 1225 (D.S.C. 1983)	6
<i>Fleming v. Asbill</i> , 326 S.C. 49, 483 S.E.2d 751 (S.C. 1997)	3
<i>Fred Striffler, Inc. v. General Motors Corp.</i> , 73 N.W.3d 526 (Mich. 1955)	8
<i>Garrett v. Wallace Oil Co.</i> , 608 S.E.2d 693 (Ga. App. 2004)	10
<i>Giordano v. Atria Assisted Living, Virginia Beach, L.L.C.</i> , 429 F.Supp.2d 732 (E.D. Va. 2006)	7, 8
<i>Hendricks v. Clemson Univ.</i> , 353 S.C. 449, 578 S.E.2d 711 (S.C. 2003)	7
<i>Hydro Resources Corp. v. Gray</i> , 173 P.3d 749 (N.M. 2007)	4
<i>Kelley v. Schnebelen</i> , 545 S.W.2d 332 (Mo. App. 1976)	7

<i>Nat'l Westminster Bank, U.S.A. v. Ross,</i> 130 B.R. 656 (S.D.N.Y. 1991), <i>aff'd</i> , 962 F.2d 1 (2d Cir. 1992)	7
<i>Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club,</i> 310 S.C. 132, 425 S.E.2d 764 (S.C. App. 1992)	3, 6
<i>Schlumberger Technology Corp. v. Swanson,</i> 959 S.W.2d 171 (Tex. 1997)	7
<i>State ex rel. Ford Motor Co., v. Bacon,</i> 63 S.W.3d 641 (Mo. 2002)	6, 8
<i>State ex rel. McLeod v. C & L Corp.,</i> 280 S.C. 519, 313 S.E.2d 334 (S.C. App. 1984)	4
<i>Teegarden Co-Operative Cheese Co. v. Heckman,</i> 72 N.W.2d 920 (Wis. 1956)	8
<i>United States v. Bestfoods,</i> 524 U.S. 51 (1998)	9
<i>Ware v. Timmons,</i> 954 So.2d 545 (Ala. 2006)	4
<i>Watkins v. Mobil Oil Corp.,</i> 291 S.C. 62, 352 S.E.2d 284 (S.C. App. 1986)	3
Statutes and Rules	
Rule 211, SCACR	12
Other Authorities	
2A C.J.S. <i>Agency</i> § 34 (2008)	6
RESTATEMENT (THIRD) OF AGENCY § 1.01	4, 6
RESTATEMENT (THIRD) OF AGENCY § 2.01	6
RESTATEMENT (THIRD) OF AGENCY § 3.15	5
RESTATEMENT (THIRD) OF AGENCY § 8.01	7

RESTATEMENT (THIRD) OF AGENCY § 8.02 7
RESTATEMENT (THIRD) OF AGENCY §§ 8.03–.12 7

INTEREST OF THE *AMICUS CURIAE*

The International Association of Defense Counsel (“IADC”) is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC is also dedicated to promoting the consistent and predictable administration of justice, which includes preserving existing precedent and current standards for imposing vicarious liability on corporate defendants.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The IADC adopts the Statement of the Case and Statement of Facts contained in appellant Texaco Inc.’s briefs. For the purpose of its argument supporting reversal of the trial court’s judgment, the IADC focuses on several key facts:

- The respondents conceded well before trial that this case involves only actual agency, not apparent agency.
- Texaco did not have a contract or agreement with any party to this case.
- Motiva, a corporate entity completely separate from Texaco, did contract with Anderson Oil under a Wholesale Marketer Agreement to sell Texaco-branded gasoline. The respondents never sued Motiva, however. Motiva thus is not a party to this case or to the trial court’s judgment.

SUMMARY OF THE ARGUMENT

Although the primary focus of this case is on the issue of control, this Court should resist the myopic view that this case is only about control. Control alone cannot determine whether a party is an actual agent because a similar degree of control exists in a variety of circumstances. A federal regulatory agency can direct how a company performs, and punish the company with fines if either the result or means of reaching the result is unacceptable. An insurance contract can direct how the insured performs, and punish the insured with denial of coverage for failure to provide notice or abide by the terms of the contract. For that matter, this Court can direct how attorneys perform, and punish attorneys with a variety of sanctions ranging from striking a pleading to disbarment. None of those circumstances, however, creates actual agency because key factors other than control are missing.

First, actual agency is a fiduciary relationship, which necessarily is more than an arm's length connection between the parties. A legal relationship between the parties must exist. The principal must be able to entrust the agent to act on the principal's behalf, which cannot occur if the connection between the principal and the agent is tenuous or non-existent. A holding that actual agency exists in the instant case would negate the legal relationship requirement because there is no evidence of a relationship between Texaco and the Morris Mini-Mart.

Second, actual agency requires mutual consent of the parties for the agent to act on the principal's behalf. The principal and agent must demonstrate through their own words or deeds that they agree to enter into an agency relationship. A holding that actual agency exists in the instant case would likewise negate the requirement of consent because there is

no evidence that Texaco consented to Morris Mini-Mart acting on its behalf, or that Morris Mini-Mart consented to act on behalf of Texaco. Instead, the evidence is that Morris Mini-Mart did not consent to be Texaco's agent.

Ignoring these two elements of actual agency beyond control, the trial court entered judgment on the jury's verdict that Texaco was vicariously liable to respondents for the actions of Morris Mini-Mart. The IADC urges this Court to consider the possible impact on South Carolina actual agency law of affirming the trial court's judgment – a holding that actual agency exists based on an analysis of control alone would substantially alter the jurisprudence and take South Carolina out of the jurisprudential mainstream.

ARGUMENT & AUTHORITIES

I. This Court should not overlook the fact that there is no evidence of a legal relationship between Texaco and Morris Mini-Mart.

The trial court's judgment conflicts with the legal relationship requirement of actual agency. It is well-settled that actual agency is a legal relationship between the agent and the principal. *See, e.g., Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 65, 352 S.E.2d 284, 286 (S.C. App. 1986). Not merely a normal arm's-length relationship, actual agency is a fiduciary relationship. *Fleming v. Asbill*, 326 S.C. 49, 53, 483 S.E.2d 751, 753 (S.C. 1997) ("Agency implies the existence of a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf."); *Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (S.C. App. 1992) ("Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his

behalf.”).¹ An affirmance would negate this nature of actual agency because there is no evidence of any relationship between Texaco and Morris Mini-Mart, much less a fiduciary relationship.

The only evidence conclusively demonstrates that there was no direct relationship between Texaco and Morris Mini-Mart:

Q. You don't have a contract with Texaco, do you?

A. No, sir.

...

Q. And I believe in your deposition you testified you have never met anyone from Texaco; is that correct?

A. No to my knowledge, no.

...

Q. So, I that it by that nobody from Texaco has ever come and told you how to operate Morris Mini-Mart,, have they?

A. No, sir.

R. 1091 (John K. Morris testimony).

In order to establish a relationship between Morris Mini-Mart and other defendants, Jamison advances the idea of sub-agency. Sub-agency has been acknowledged by at least one South Carolina court. *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 528, 313 S.E.2d 334, 340 (S.C. App. 1984). Although that court did not discuss subagency in any

¹ South Carolina law is in the mainstream in this view. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01; *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. 2008); *Archbold v. Reifenrath*, 744 N.W.2d 701, 707 (Neb. 2008); *Hydro Resources Corp. v. Gray*, 173 P.3d 749, 760 (N.M. 2007); *Ware v. Timmons*, 954 So.2d 545, 552–53 & n. 9 (Ala. 2006).

detail, the RESTATEMENT explains the mainstream view of subagency: “A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal.” RESTATEMENT (THIRD) OF AGENCY § 3.15(1). Even if it was theoretically possible that Morris Mini-Mart could have been a subagent of Anderson Oil, which was in turn a subagent of Motiva, which was in turn somehow an agent of Texaco, that theory was never developed at trial. Indeed, Texaco was merely a corporate affiliate of the entity that was a partial shareholder in Motiva. And Motiva, one necessary link of the chain between Texaco and Morris Mini-Mart, was not even included as a party. The only evidence conclusively breaks another link in the chain, between Motiva and Anderson oil, by expressly disclaiming an agency relationship. R 1632 (Wholesaler Marketing Agreement) (“Neither Purchaser nor the operators of Retail Facilities nor its or their employees or agents shall be considered joint venturers, partners, agents or employees of Seller for any reason or for any purpose whatsoever.”). In any event, the jury was not instructed or authorized to render its verdict on a subagency theory.

Accordingly, the IADC urges this Court to reverse the judgment because the evidence does not show that the legal relationship requirement of actual agency was satisfied.

II. There is no evidence of consent between Texaco and Morris Mini-Mart.

Additionally, the trial court's judgment conflicts with the consent element of actual agency. It is well-settled that actual agency required consent on the part of both parties.

Peoples Federal, 425 at 773.² The principal must consent to the agent acting on its behalf, and the agent must consent to being subject to the principal’s control. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1958)). Normally, this mutual consent is manifested in a contract. *See* 2A C.J.S. *Agency* § 34 (2008) (“Mutual consent of the parties is essential to the relation of agency, and ordinarily there must be a contract, express or implied, between the parties.”).

A. Consent is a crucial element of actual agency because actual agency has serious implications for both parties.

Consent is crucial to principal-agent jurisprudence because a principal-agent relationship has implications beyond merely determining liability for negligence damages. The principal-agent relationship is a *fiduciary* relationship, which has serious implications for both parties. *Peoples Federal*, 425 S.E.2d at 773; RESTATEMENT (THIRD) OF AGENCY § 1.01. Although this Court has not addressed the extent of those implications, the American Law Institute has painstakingly surveyed the laws of various jurisdictions in order to reflect the mainstream view as now reflected in the Restatement.

In particular, the principal faces legal consequences for actions taken on its behalf by the agent. RESTATEMENT (THIRD) OF AGENCY § 2.01. In turn, the agent owes numerous duties to the principal, such as “a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship” and “a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken

² South Carolina law is again in the mainstream in this view. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01; *State ex rel. Ford Motor Co., v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002); *see Courtney v. Remler*, 566 F. Supp. 1225, 1230 (D.S.C. 1983).

on behalf of the principal or otherwise through the agent's use of the agent's position." RESTATEMENT (THIRD) OF AGENCY § 8.01, 8.02; *see also* RESTATEMENT (THIRD) OF AGENCY §§ 8.03–.12.

Such a fiduciary relationship is not imposed lightly; it should certainly not be imposed without evidence that both parties want to enter a fiduciary relationship. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (S.C. 2003) (“Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.”).³

B. Courts in various jurisdictions have consistently required evidence demonstrating both consent by the principal and consent by the agent.

When the issue of consent is properly considered, and evidence of consent by either party is lacking, courts have consistently held that actual agency cannot exist:

- When there is no evidence of an agreement to consent, there can be no agency relationship as a matter of law. *Barker v. Skagit Speedway, Inc.*, 82 P.3d 244, 247–48 (Wash. Ct. App. 2003). In *Barker*, a race car driver and crew were held not to be agents of the race track because the plaintiff did not “set forth any evidence of an agreement or consent between the speedway and [the driver] or his crew as to the creation of an agency.” *Id.* at 248. Therefore, no agency relationship existed as a matter of law and summary judgment in the track’s favor was proper. *Id.*; *see also Kelley v. Schnebelen*, 545 S.W.2d 332, 336 (Mo. Ct. App. 1976).
- There must be evidence of consent by the principal. *Giordano v. Atria Assisted Living, Virginia Beach, L.L.C.*, 429 F.Supp.2d 732, 736–37 (E.D. Va. 2006). In *Giordano*, a daughter’s signature was

³ *See also, e.g., Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997); *Nat’l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 678–79 (S.D.N.Y. 1991), *aff’d*, 962 F.2d 1 (2d Cir. 1992).

held not to bind her mother under a theory of actual agency because there was no evidence the mother was aware of the agreement. *Id.* at 736. The only evidence of actual agency was the solitary fact that the daughter had signed her mother's name to the agreement. *Id.* at 737. Because the daughter testified she did not discuss with her mother whether she had consent to sign the agreement or whether the agreement was in the mother's best interest, the consent and control necessary to form a legal agency were not present. *Id.*; *see also Teegarden Co-Operative Cheese Co. v. Heckman*, 72 N.W.2d 920, 922 (Wis. 1956).

- There must also be evidence of consent by the agent. *Fred Striffler, Inc. v. General Motors Corp.*, 73 N.W.2d 526, 532 (Mich. 1955). In *Striffler*, an automobile dealer's widow sought to obtain the dealership after her husband died. *Id.* at 528. She asked a former employee to help her, and sued when he ultimately obtained the dealership for himself. *Id.* The court held that the employee was not the plaintiff's agent, and focused on the fact that, while he said he would talk the matter over with the distributor, he never agreed to accept an agency. *Id.* at 532.

C. In this case, the judgment is unsupported by any evidence of consent by the purported principal or by the purported agent.

In this case, there is simply no evidence at trial of an agreement to consent between Texaco and Morris. There is no evidence to show that Texaco consented to allow Morris Mini-Mart to act on its behalf, and the only evidence conclusively demonstrated that Morris Mini-Mart did not consent to act on Texaco's behalf.

The best respondents can do to show consent of any form to any legal relationship by Texaco is to note that Texaco was at one time a corporate affiliate of the entity which was a partial shareholder of Motiva. But it is well established that shareholder status, which did not even exist in this case, is wholly insufficient to create an agency relationship. *See, e.g., Bacon*, 63 S.W.3d at 642 ("A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other. Therefore, an agency

relationship between a parent and its subsidiary may only be established if the elements of an agency relationship exist.” (internal quotation marks and citations omitted)); *see also United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (“It is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.”). Because there was no evidence at trial that Texaco consented to have any party in this case act on its behalf, it could not be a principal as a matter of law.

Further, the evidence demonstrates that Morris did not consent by words or actions to act on Texaco’s behalf. The evidence shows that Morris did not seek or receive input from Texaco on:

- Employee hiring and firing. R. 1099–1102.
- Food store policies or procedures, including procedures relating to alcohol sales. R. 1092.
- Employee appearance and duties policies. R. 1094, 1096–98.
- Store appearance and operation policies. R. 1095–96.
- Products to be offered, including alcohol. R. 1098–99, 1103–04.

Instead, Morris considered himself independent from Texaco’s influence with the exception of branding:

- Q. Isn’t it fair to say that you control the operation of your business?
- A. Basically, yes.
- Q. With the exception of the signage and other things associated with image, you control the operation of your business, don’t you?
- A. Yes, sir.

Q. And that's true for all of your stores, isn't it?

A. That's true.

R. 1107 (John K. Morris testimony).

Finally, any use of a mere branding agreement to demonstrate this consent would depart from the law of other jurisdictions. *See, e.g., Garrett v. Wallace Oil Co.*, 608 S.E.2d 693 (Ga. Ct. App. 2004). For example, in *Garrett*, Wallace Oil was a wholesaler of Texaco gasoline under a Wholesale marketer Agreement with Motiva. *Id.* at 694. Motiva supplied Texaco-branded fuel products to Wallace Oil, which, in turn, provided fuel to Baba Investments for a gas station located on Flat Shoals Road in Atlanta. *Id.* Wallace Oil was held not liable for the negligence of Baba Investments or its employees because the Wholesale Marketing Agreement between Motiva and Wallace Oil provided branding standards but did not provide for control over the station's day-to-day operations. *Id.* at 696.⁴ Additionally, summary judgment was proper because "even if the language of the agreement somehow could be construed as purporting to give Wallace Oil control of the [station], *in the absence of some other contractual agreement or evidence of consent*, the language would not be binding on Baba Investments, which owns the station. *Id.*

If this Court ignores the issue of consent, it risks taking South Carolina agency law out of the mainstream, and impairs the predictability on which corporations and businesses like Texaco rely in their daily operations. This Court should refuse the respondents' invitation to depart from traditional South Carolina law and instead require that plaintiffs

⁴ For other such cases, *see BP Exp. & Oil Co., Inc. v. Jones*, 558 S.E.2d 398, 401–03 (Ga. App. 2001); *Asbell v. BP Exp. & Oil Co., Inc.*, 497 S.E.2d 260, 261–63 (Ga. App. 1998) (construing similar marketing agreements).

prove all the elements of actual agency – including consent and a legal relationship — when they seek to impose vicarious liability under that theory.

CONCLUSION

For these reasons, Amicus Curiae IADC respectfully requests that this Court reject a relaxed standard for imposing actual agency absent evidence of a legal relationship or consent, and reverse and render the judgment in favor of appellant Texaco Inc.

Respectfully submitted,



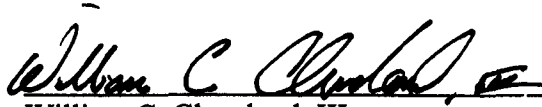
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I certify that this Brief complies with Rule 211(b), SCACR.



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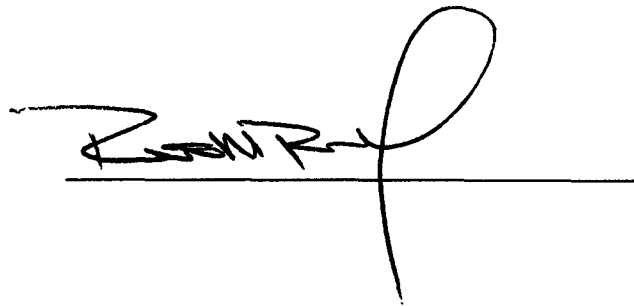
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A handwritten signature in black ink, appearing to read "Victor E. Schwartz", is written over a horizontal line. The signature is stylized and cursive.