Yates' property that the defendants could have attached. The plaintiff's motion for summary judgment is granted.

ORDER OF COURT

September 16, 1992, plaintiffs' motion for summary judgment is granted.

SMITH V. EXXON, C.P. Franklin County Branch, No. A.D. 1991-356

Civil Procedure - Preliminary Objections - Demurrer - Admission of Facts and Inferences - Conclusions and Unjustified Inferences Not Admitted -Tests Sufficiency of Opponent's Pleading to State Cause of Action - Essentials of a Case in Negligence

1. Preliminary Objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments and all inferences deducible therefrom.

2. Conclusions of law and unjustified inferences are not admitted by a demurrer.

3. A demurrer tests whether the complaint sets forth a cause of action which, if proved, would entitle the party to the relief sought, and if such is the case, the demurrer may not sustained.

4. To establish a cause of action grounded in negligence, the plaintiff must establish (1) a duty by the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct; and (4) a subsequent injury to the plaintiff.

John A. Adamczyk, Esquire, Attorney for Plaintiff
John M. Phelan, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P.J., September 21, 1993:

FINDINGS OF FACT

On August 1, 1989, plaintiff Debbie Smith was assaulted and raped by Gerald Daniels while working the night shift at the Blue Chip Mini-Mart in Greencastle, Pennsylvania. The plaintiff filed two separate actions as a result of this incident. The plaintiff filed a complaint against Gerald Daniels, Richard Sterner, the owner/operator of the shopping center in which the mini-mart is located, Blue Chip Fuels, Blue Chip Mini-Mart and Oliver Oil Company, Inc. Blue Chip Mini-Mart, a twenty-four hour convenience store which also sells gasoline, is a subsidiary of Oliver Oil. In this separate action, the plaintiff filed a complaint against Exxon Corporation, wholesale supplier of gasoline to Oliver Oil.

In her complaint against defendant Exxon, plaintiff alleges that Exxon acted negligently in failing to develop, implement and maintain comprehensive security measures to deter criminal acts of third parties on the premises of Blue Chip Mini-Marts. In separate counts, the plaintiff also seeks damages for negligent infliction of emotional distress and loss of consortium (by plaintiff's husband). On July 9, 1993 Exxon filed preliminary objections to the complaint, averring that it owed no duty to the plaintiff since it was merely a wholesale supplier of gasoline to the Blue Chip stores through the parent company, Oliver Oil.

Exxon supplied gasoline to Oliver Oil and its mini-marts pursuant to a distributor agreement dated August 2, 1988, attached to the complaint as exhibit 1. In the agreement, Exxon agreed to supply motor fuels and diesel fuel to Oliver Oil (Paragraph 2); permitted Oliver Oil and its subsidiary stores to accept Exxon credit cards (Paragraph 5); permitted Oliver Oil to display Exxon trademarks (Paragraph 11); and reserved the right to sample the gasoline at Oliver Oil facilities to determine that they are Exxon products (Paragraph 11). Oliver Oil agreed to abide by Exxon guidelines for the proper use of Exxon trademarks (Paragraph 11) and to prepare a market development plan, subject to review by Exxon (Paragraph 12). The agreement also required that Oliver Oil meet certain minimum conditions at its facilities selling Exxon products, including clean stores with paved driveways, restrooms available to the general public,

buildings which comply with fire, building and zoning codes and ordinances (Paragraph 12(b)); and courteous, efficient and neatly dressed employees (Paragraph 14). Oliver Oil agreed to operate its stores during hours providing reasonable customer convenience (Paragraph 14); diligently promote the sale of gasoline and provide a representative offering of Exxon fuels (Paragraph 13).

DISCUSSION

In considering preliminary objections in the nature of a demurrer the court is bound by the following standards:

> [P]reliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments and all inferences fairly deducible therefrom. Conclusions of law and unjustified inferences are not admitted by the pleading. Starting from this point of reference the complaint must be examined to determine whether it sets forth a cause of action which, if proved, would entitle the party to the relief sought. If such is the case, the demurrer may not be sustained.

Abarbanel v. Weber, 340 Pa. Super. 473, 479, 490 A.2d 877, 880 (1985) (citations omitted).

Count I of plaintiff's complaint alleges negligence on the part of Exxon. To sustain a cause of action grounded in negligence the plaintiff must establish (1) a duty by the defendant to the plaintiff to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct; and (4) a subsequent injury to the plaintiff. *Casey v. Geiger*, 346 Pa. Super. 279, 289-290, 499 A.2d 606, 612 (1985).

The dispositive issue in this case is whether, on the face of the complaint, Exxon had a legal duty to the plaintiff as an employee of the Blue Chip Mini-Mart to protect her from the criminal acts of third parties on those premises. Absent such a duty, the plaintiff fails to establish a cause of action in negligence and the demurrer will be sustained. Necessarily, such a duty is premised on the nature of the relationship existing between the parties at the relevant time, as evidenced by the distributor agreement. *Morena v. South Hills Health System*, 501 Pa. 634, 642, 462 A.2d

680, 684 (1983). This relationship defines the right of control Exxon had over Oliver Oil and the Blue Chip Mini-Marts. Absent such control over these parties as employers of the plaintiff, Exxon owed no duty to the plaintiff.

In *Green v. Independant Oil Company*, 414 Pa. 477, 201 A.2d 207 (1964), plaintiff's decedent was killed in an explosion at a gasoline service station. The oil company, lessor of the service station and supplier of gasoline, was named as defendant on the theory of respondeat superior. The undisputed terms of the dealer's station operator were the controlling factors in the court's determination whether, as a matter of law, the nature of the relationship between the parties presented a basis for liability.

> The sole evidence of the relationship between Independent and Graffius is the Dealers Agreement. Since the terms of such agreement are not in dispute and since the interpretation and construction of that agreement determines the relationship between the parties, it was the function of the court, not the jury, to determine the relationship between Independent and Graffius .... An examination of the instant agreement *in its entirety* indicates clearly and convincingly that the relationship between Independent and Graffius was that of independent contractee-contractor, not employer-employee.

Id. at 484-485, 201 A.2d at 210 (emphasis in original). The court went on to hold that the oil company was not liable for the lessee's alleged negligence on the theory of respondeat superior, despite the oil company's inspection visits to the service station. *Id.*

The court's analysis in *Green* is an appropriate basis for deciding the instant case. Plaintiff alleges that the provisions of the distributor agreement executed by Exxon and Oliver Oil demonstrate that Exxon had the right to control and the duty to implement security measures to protect the safety of the employees and customers of the Blue Chip Mini-Marts. Specifically, the complaint contains the following allegations:

> 12. The Defendant, Exxon, requires Oliver Oil to keep the Blue Chip Mini-Mart open 24 hours a day in order to meet contractually specified quotas.

14. That Defendant, Exxon, at all relevant times, had control over Oliver Oil and Blue Chip Mini-Marts and their employees and agents, as well as the premises in question, by virtue of the Distribution Agreement and plan of operation, which they required from Defendant, Oliver Oil.

17. That Defendant, Exxon's agreement with Defendant, Oliver Oil, necessarily involved and provided or should have involved or provided for implementing and maintaining plans to carry out the safeguarding of patrons, workers and employees of Defendants, including but not limited to , the Plaintiff, Debbie Smith.

18. That Exxon and Oliver Oil, pursuant to the Distribution Agreement and requirements therein, undertook a duty with Oliver Oil to patrons of Blue Chip Mini-Marts, as well as employees working within said mini-marts to provide for their safety and well-being while at said premises, including but not limited to, safety and protection from robbers, thieves, assailants, rapists and other undesirables.

49. Exxon, as the franchisor, had a non-delegable duty, which included but was not limited to, issuing guidance and setting requirements for the use or installation of security devices, measures and procedures to ensure that its franchise, Oliver Oil and Blue Chip Mini-Marts exercisd reasonable care to protect business invitees, attracted to trade under Exxon's name and logo, and employees of Oliver Oil, including Plaintiff, Debbie Smith, against an unreasonable risk of harm from reasonably anticipated criminal activities in and around the stores which it did business.

Exxon argues that the agrement does not vest such right of control as to form the basis of a legal duty to plaintiff.

As in *Green*, the nature of the relationship between the parties is embodied in the distributor agreement. Looking at this agreement in its entirety, it is clear to this court that Exxon's relationship to the plaintiff as the mere wholesale supplier of gasoline to plaintiff's employer is too attenuated to support a legal duty to plaintiff and ultimate liability to her for the criminal acts of Gerald Daniels. The agreement merely provides for the wholesale purchase of motor fuels.

As previously stated, a court need not accept as true averments which are essentially unjustified inferences or conclusions of law. *Abarbanel v. Weber,* 340 Pa.Super. 473, 479, 490 A.2d 877,

880 (1985). Moreover, a court need not accept as true averments which conflict or are inconsistent with exhibits attached to the complaint. *Philmar Mid-Atlantic v. York Street Association,* 389 Pa.Super. 297, 300, 566 A.2d 1253, 1254 (1989).

Plaintiff's averments as cited above do not fairly represent the provisions of the distributor's agreement. The agreement does not vest in Exxon the right of control over day-to-day management decisions at the mini-marts, which would encompass security measures. Indeed, security standards are not mentioned in the agreement. The contract merely allows Exxon a limited supervisory role over certain aspects of the sale of their gasoline at Oliver Oil facilities. The contract in its entirety appears to be centered on protection of the Exxon trademark through certain contractual standards, such as the sampling of gasoline to ensure that Oliver Oil is selling Exxon motor fuels as advertised through appropriate use of the Exxon trademark and association of the Exxon name with clean, afficient facilities. Moreover, because motor fuels are the only Exxon products sold at the mini-marts, as compared to the number of other products sold at such stores, the level of involvement in their operation must be minimal. If the court imposes a duty upon Exxon based on its role s wholesale supplier of products to the mini marts, then wholesale suppliers of the many other products sold at these stores would similarly owe a duty to the plaintiff. Such a scenario stretches the concept of duty too far.

Both parties have extensivley briefed the applicability of *Feld v. Merriam,* 506 Pa. 383, 485 A.2d 742 (1984), on the issue of liability of a party for criminal acts of third persons. In *Feld,* the plaintiff, a tenant in a large apartment complex, was assaulted and abducted from the apartment's parking garage and subsequently raped. The plaintiff sought to hold the landlord liable for his failure to anticipate and deter such criminal activity through an effective security program. The court held that the landlord had no general duty to protect tenants against such criminal acts and could only incur such a duty voluntarily or by specific agreement.

> [T]he risk of injury from the criminal acts of third persons arises not from the conduct of the landlord but from the conduct of an unpredictable independent agent. To impose a general duty in the latter case would effectively require landlords to be insurers

of their tenants safety: a burden which could never be completely met given the unfortunate realities of modern society.

Id. at 392-393, 485 A.2d at 746-747.

Although *Feld* concerns a relationship dissimilar to that presented in this case, the court's dictum that parties cannot be insurers against the criminal conduct of third parties is instructive. The mere happening of a criminal act indicates that security measures, however comprehensive, were ineffective. The *Feld* court stated:

> When a landlord by agreement or voluntarily offers a program to protect the premises, he must perform the task in a reasonable manner and where a harm follows a reasonable expectation of that harm, he is liable. *The duty is one of reasonable care under the circumstances. It is not the duty of an insurer* and a landlord is not liable unless his failure is the proximate cause of the harm.

Id. at 393, 485 A.2d at 747 (emphasis added).

Feld does not control the outcome of the instant case, however, because the crucial question here is not the extent of duty. As previously stated, the court will not impose a duty on Exxon or parties similarly situated.

Finally, plaintiff argues that it is not appropriate to dismiss Exxon on demurrer becuase she should be permitted to engage in extensive discovery to determine the intricate factual basis of the relationship between Exxon and the other parties to these actions. The court concludes, however, that even in light of the standards for sustaining a demurrer, the preliminary objections of Exxon must be sustained. The plaintiff has taken four years to get to this stage of the proceedings and it would be a waste of judicial resources, and time and expense to the clients, to allow such discovery only to dismiss Exxon on summary judgment, perhaps several more years down the road. It is clear to the court that the plaintiff does not state a case in negligence on the factual averments of her complaint because, as a matter of law, she cannot establish that Exxon owed a legal duty to her. Therefore, the court is sustaining Exxon's preliminary objections and as such need not discuss the issues raised in Counts II and III of plaintiff's complaint.

CONCLUSION

In accordance with *Green v. Independant Oil Company*, 414 Pa. 477, 201 A.2d 207 (1964) and *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), the preliminary objections of defendant Exxon Corporation are sustained and defendant is dismissed form this action.

ORDER OF COURT

September 21, 1993, the preliminary objections of defendant Exxon Corporation are sustained, and defendant is dismissed from this action.

BLACK AND WIFE V. SCOTTSDALE INSURANCE COMPANY, ET AL., C.P. Fulton County Branch, No. 1 of 1992-C

Declaratory Judgment Action - Interpretation of An Insurance Contract -Rules of Construction - Alleged Ambiguities in Language - recovery of costs and legal fees incurred in declaratory judgment action necessary to compel insured to defend its insured against a third party

1. The overriding goal when interpreting an insurance contract is to ascertain the parties' intent as manifested by the language of the policy.

2. Where the terms of an insurance contract are clear and unambiguous, the Court must read the policy in its entirety, giving the words contained therein their plain and proper meaning.

3. An insurance policy should be read to avoid ambiguities, where possible.

4. A provision is deemed ambiguous where reasonably intelligent persons would honestly differ as to its meaning when considered in the context of the whole policy.

5. When the language is ambiguous, the Court must resolve the ambiguity against the insurer, as drafter of the contract, and in favor of the insured, who typically lacks bargaining leverage regarding the terms of the coverage.