No. S182508

IN THE SUPREME COURT OF CALIFORNIA

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN,
Plaintiffs/Appellants,

v.

U.S.AIRWAYS, INC. (erroneously sued herein as AMERICA WEST AIRLINES),
Defendant/Respondent.

After Decision by the Court of Appeal, First Appellate District, Division Four

First Appellate District Court Case No. A123726
San Francisco Superior Court Case No. 458707

APPELLANTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In its Petition for Review U.S. Airways, Inc. ("Petitioner"), erroneously asserts that the March 29, 2010, opinion issued by the Court of Appeal, First Appellate District, Division Four, Case No. A123726, *Seabright Insurance Co. v. U.S. Airways, Inc.* (2010) 183Cal.App.4th 219 ("the Opinion"), creates a conflict of law and/or expands the existing body of law, illuminating Petitioner's ongoing misunderstanding of the prevailing legal doctrines of retained control, non-delegable duty and affirmative contribution established by the *Privette-Toland* line of cases. Petitioner's claim that the Opinion creates law tantamount to negligence *per se* in the face of the *Privette-Toland* Doctrine is equally flawed and without merit. Instead, the Court of Appeal properly performed the analysis required by the *Privette* line of cases as to the non delegable duty and affirmative contribution issues present, specifically in light of *Hooker*, *Madden*, *Padilla* and *Evard*, and correctly determined the material facts established by the evidence were legally sufficient to survive a request of summary judgment. Unable to challenge the factual rulings and the specific legal doctrines at issue in this case, Petitioner instead seeks an academic exercise on resolution of potential conflicts in appellate law, even those alleged conflicts are not ripe for adjudication in this case.

II. BASIS FOR SUPREME COURT REVIEW

Rule 8.500(b) of the California Rules of Court provides grounds for Supreme Court review. Though not expressly provided in the Petition, the only grounds that appear to be asserted by Petitioner are "(1). . . to secure uniformity of decision or to settle an important question of law and "(4) [f]or the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." Petitioner provides

insufficient rationale or legal authority to support any basis for review by this Court for either purpose, and thus the Petition should be denied.

III. ARGUMENT

A. The "Issue Presented" is Not Framed by the Court of Appeal Opinion and Alone is Grounds for Denial.

Consistent with the principles established by the *Privette-Toland* line of cases, the analysis of the Appellate Court was two-tiered: (1) whether the applicable safety regulations and undisputed facts charged Petitioner with a non-delegable duty and breach thereof and (2) whether the breach of the non-delegable duty was a cause of the injury. The foregoing is consistent with the non-delegable duty exception established and upheld in *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267 and *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661. Contrary to the Petition, the Opinion does not set forth anywhere in its text "that the mere existence of alleged violations of safety regulations was sufficient to constitute 'affirmative conduct'. . ." (Petition for Review, p. 3.)

Petitioner sets forth their above argument to conform to what they perceive to be a conflict of law needing to be resolved. Whether or not that issue is a conflict needing to be resolved is one question. Whether that issue even exists in our case is another. A review of the Opinion shows that no such ruling was made, and that the Court in fact thoroughly addressed the "affirmative contribution" needed in a non-delegable duty case. Therefore, our present matter contains no such issue as framed by Petitioner, and there is no ripe conflict to resolve. Thus, the Petition for Review should be denied.

B. *Evard, Madden* and *Padilla* Provide for a Non-Delegable Duty Exception to *Privette.*

Evard, *Madden* and *Padilla* co-exist and establish grounds for an exception to the *Privette-Toland* Doctrine: where a hirer is charged with a non-delegable duty and the breach thereof affirmatively contributes to the cause of injury, the hirer is not shielded from liability.[1] In each of those cases, the safety regulations differed. Accordingly, the courts discussed those regulations and whether they imposed a non-delegable duty on the hirer, or whether the duty could be delegated. See *Evard, supra*, at 146; *Madden, supra,* at 1275; *Padilla, supra,* at 673. In this case the Court below properly evaluated this issue and concluded that Petitioner was charged with a non-delegable duty pursuant to Title 8, sections 3999 and 4002 of the California Code of Regulations. The same was supported by the indisputable terms of the Space and Use Permit defining Petitioner's duties upon taking possession of the premises and the Services Agreement between Petitioner and Aubry, Verdon's employer. See *Seabright, supra*, at 223, 232.

Under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, a party must also prove that the breach of a non-delegable duty affirmatively contributed to the cause of an injury in order to trigger liability of a hirer. See *Seabright, supra*, at 229. Petitioner relies on the commentary in Footnote 14 of the Opinion to argue that it creates a conflict of law (*Madden/Millard* on the one hand and *Barclay/Evard* on the other) which must be reconciled. The Court of Appeal opinion in this case, however, does not provide that *Madden* and *Evard* create conflicting legal

[1] This exception to *Privette* is distinct from the exception created by *Hooker* which requires (1) retained control and (2) affirmative contribution.

standards from which it must choose.[2] In fact, the Court of Appeal specifically recognized that *Madden's* reference to *Millard* did not consider the effect of *Barclay* or *Park. Id.* at 234-235. Additionally, *Millard* did not consider the omission as affirmative contribution as allowed under *Hooker.* Thus, the Petitioner is seeking an academic evaluation of the body of jurisprudence related to the *Privette-Toland* Doctrine itself, rather than an actual reconciliation of any articulated conflict in the current case law related to the non-delegable duty exception based on the facts in this case.

The foregoing confirms Petitioner's fundamental misunderstanding of the *Privette-Toland* body of law. In its argument, Petitioner refers to "retained control" as it relates to the instant case and the analysis of "affirmative contribution" as it did in its brief submitted to the Court below. (See Petition, pp.5, 6.) The "retained control" and "non-delegable duty" exceptions to *Privette*, however are distinct and cannot be mixed and matched is achieve the desired result.

Finally, Petitioner wrongly asserts the Court of Appeal disregarded *Padilla* in its entirety, despite the fact the Opinion devotes over two of its fourteen pages of discussion of applicable case law to the analysis of the non-delegable duty exception, including *Padilla*. In doing so, the Court simply acknowledged that the nature of the safety regulations at issue in *Padilla* and *Evard* were distinguishable – one obligation arose in connection with a dynamic work environment of a construction site which would naturally be controlled by an independent contractor (*Padilla*), versus an obligation which was imposed on the hirer regardless of any work

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[2] Further, Petitioner detrimentally relies on *Millard* because it fails to recognize that *Millard* addressed affirmative contribution in the context of the "retained control" exception to *Privette*, which is not the subject of the present action. See Petition, p.9; *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348.

being done at the site and which inured to the benefit of all persons present at the site for any reason (*Evard*). See *Seabright, supra*, at 231. The Court recognized this distinction also existed as between the present case and the regulations at issue in *Madden* and *Millard*. *Id.* at 235. This is the very analysis upon which the *Padilla* decision is predicated, and thus Petitioner's argument in this regard lacks merit.

C. The Public Policy Underlying *Privette* is Not Frustrated by the Opinion.

The public policy underlying the *Privette* line of cases is meant to shield non-negligent parties from liability. *Id.* In this case, Petitioner alone created the risk by breaching its statutory and contractual duties, which arose irrespective of the work or activity of Verdon and employer Aubry. The liability of Petitioner is not premised upon the negligence of an independent contractor who caused its own employee's injury. The Agreement between Petitioner and Aubry disposes of any question that Aubry was retained to perform safety compliance analysis of the equipment as the scope of its work is described as only "preventative maintenance and repair of conveyor system." See *Id.* at 223. At best, Petitioner's argument amounts to nothing more than comparative negligence. Aubry and Verdon's disputed potential comparative negligence alone, however, does not support summary judgment in favor of Petitioner.

Verdon was injured in the course and scope of his employment with Aubry when his arm became caught in an unguarded conveyor in the possession of Petitioner as part of a Space and Use Permit between Petitioner and San Francisco International Airport ("the Airport"). Aubry was hired by Petitioner to perform preventative maintenance on the conveyor, and nothing more. As union trained millwrights, Aubry employees did not have any specialized training in the evaluation of

conveyors for compliance with applicable safety standards and regulations, as was established by the uncontroverted declarations of its employees submitted to the Court below. There is no evidence defining the scope of Aubry's work as anything other than keeping the conveyors functional so as to ensure timely delivery of luggage to Petitioner's passengers. See *Id.* at 223-224.

The Court of Appeal's ruling reversing the trial court's Order granting summary judgment and finding that the nondelegable duty exception to *Privette* is alive through *Evard* and *Madden,* is consistent with California's public policy: namely, one, who by statute or administrative regulation, is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed. The General Industry Safety Orders in this case were intended to safeguard those who were in or around the conveyor to ensure they were not injured by its moving parts. The fact that an employee of a subcontractor was hired to work on the conveyor does not excuse Petitioner from its statutory duties to guard the conveyor.

Petitioner's argument allows a hirer to escape liability- even when directly at fault. Petitioner's argument allowing for those with direct responsibility to comply with applicable safety standards and regulations to still escape liability is in direct contradiction with the *Privette-Toland* principles, including *Evard, Madden* and *Padilla.* Petitioner claims it should be immune from liability for violation of its non-delegable duty as long as it was not aware of the violation – in essence Petitioner seeks a ruling that a party who performs no inspections of its leased premises and claims ignorance of any applicable regulations to those premises should avoid all liability for harm caused by the violation of applicable regulations.

Petitioner espouses the very direct liability activities that public policy seeks to deter.

IV. CONCLUSION

The Opinion does not create a conflict in the existing law needing to be resolved. Additionally, Petitioner has set forth no good faith basis for this Court to grant review, and therefore the Petition should be denied.

CERTIFICATE OF BRIEF LENGTH

Supreme Court Case No. S182508

(CRC 8.520(c)(1))

I, Nadine D.Y. Adrian, an associate attorney with England Ponticello & St.Clair, counsel herein for Appellant Seabright Insurance Company, hereby certify on behalf of Appellants that the length of the Appellant's Answer to the Petition for Supreme Court Review is 1805 words, relying on the word count of the computer program used to prepare the Answer.

Dated: May 25, 2010

Nadine D.Y. Adrian
State Bar No. 190973

PROOF OF SERVICE

COURT: Supreme Court of California
CASE NUMBER: S182508
CASE TITLE: *SeaBright Insurance Company, et al. v. U.S. Airways, Inc..*

I, Caitlin Johnson, declare as follows:

I am a citizen of the United States, am over the age of eighteen and I am not a party to this action. I am employed in the County of San Diego with the law firm of England Ponticello & St. Clair, and my business address is 701 B Street, Suite 1790, San Diego, CA 92101-8104. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service.

On May 25, 2010, I served the attached document described as follows:

APPELLANTS' ANSWER TO PETITION FOR SUPREME COURT REVIEW

on the following persons to this action as indicated below and by placing a true copy (copies) thereof in a separate sealed envelope(s), addressed as shown, with postage fully prepaid thereon, for collection and mailing on the below indicated day pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the U.S. Postal Service on the same day in the ordinary course of business:

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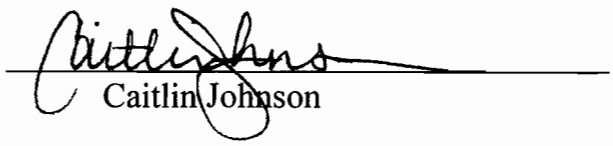
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 25, 2010, at San Diego, California.



Caitlin Johnson

COURT: Supreme Court of California
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CASE TITLE: *SeaBright Insurance Company, et al. v. U.S. Airways, Inc.*

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