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IN THE
SUPREME COURT OF CALIFORNIA

SUPREME COURT
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Deputy

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN
Plaintiffs and Appellants
v.
US AIRWAYS, INC.
(erroneously sued herein as America West Airlines)
Defendant and Respondent

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

Supreme Court Case No.: S182508
First Appellate District Case No.: A123726
San Francisco Superior Court, No.: 458707

OPENING BRIEF ON THE MERITS OF US AIRWAYS, INC.

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ISSUE PRESENTED

When an employee of an independent contractor sustains an on-the-job injury, can the hirer of the contractor be liable on the theory that the hirer's breach of a non-delegable duty contained in a statute or regulation constituted an "affirmative contribution" to the injury within the meaning of *Hooker v. Dept. of Transp.* (2002) 27 Cal.4th 198, 212, footnote 3?

INTRODUCTION

A. Nature of the Case

This appeal seeks to resolve the appellate courts' uncertainty over the meaning of footnote 3 in *Hooker v. Department of Transp.* (2002) 27 Cal.4th 198 (*Hooker*). In that note the Court acknowledged the possibility that, in certain cases, a hirer's "omission" to address a safety measure could abrogate the hirer's protection from liability that ordinarily is afforded through the workers' compensation statutes and the "*Privette/Toland* doctrine." Inextricably woven through the "omission" analysis is the related issue of whether compliance with certain safety regulations was "delegable" by US Airways, Inc. to its specialty contractor.

Workers' compensation carrier Seabright Insurance Company (Seabright) initiated this case in subrogation. The injured employee, Anthony Verdon Lujan (Verdon), intervened to assert negligence claims directly against passive hirer US Airways. US Airways had hired Verdon's employer, millwright Lloyd W. Aubry Co. (Aubry), to perform daily maintenance and repair of the airline's baggage conveyor belts at San Francisco International Airport (SFO). Verdon was injured in the course of that work. Both Seabright and Verdon seek recovery from US Airways based on the theory that the mere existence of certain alleged Cal-OSHA violations at the worksite, about which US Airways knew nothing, constitutes an "omission" sufficient to impose tort liability on the airline in derogation of the California workers' compensation scheme and this Court's decisions in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and, particularly, *Hooker*.

US Airways was granted summary judgment against both plaintiffs. The trial court held that the airline had no liability under *Privette* and *Hooker*, and that there was no evidence of causation regarding Verdon's injury. Plaintiffs appealed. Division Four of the

First Appellate District, Court of Appeal reversed. In a footnote of its own (No. 14), the Court of Appeal acknowledged that there are "two strands of judicial thought" on *Hooker*'s footnote 3 regarding when an "omission" would constitute an "affirmative act" creating liability in a passive hirer.

The Court of Appeal then chose to follow the wrong strand. Explicitly rejecting a prior ruling on the same issue from Division One of the same appellate district (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267 [*Madden*]) as well as the Fourth Appellate District's opinion in *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338 (*Millard*), Division Four held that the mere existence of an alleged safety violation, by itself and without any evidence of knowledge on the part of US Airways or a causal link with Verdon's accident, was sufficient to sweep away the passive hirer protections of *Privette*, *Hooker*, and similar opinions. The Court of Appeal also held that US Airways could not rely on Aubry to ensure the safety of its own worksite, even when the condition of that site itself was the subject of Aubry's contract.

B. Why The Court of Appeal's Opinion Should Be Reversed

When this Court observed in *Hooker*'s footnote 3 that an "omission" could be actionable, clearly it was referring to nonaction resulting from induced reliance or a promise broken. The Court of Appeal therefore critically erred in finding that the airline's "omission" – failing to remedy alleged safety violations that Aubry had never identified, and so US Airways knew nothing about them – by itself constituted conduct that "affirmatively contributed" to Verdon's injury.

The Court of Appeal also erred in ruling that US Airways could not "delegate" to Aubry responsibility for ensuring the safety of its own worksite. Finding and remedying unsafe conditions in and around the baggage conveyors was an inherent aspect of Aubry's contract with US Airways; these measures also were at the core of the contractor's own internal jobsite policies. US Airways therefore did not "retain control" of Aubry's worksite. Moreover, issues relating to a "non-delegable" duty were irrelevant to the court's analysis under *Hooker*, and should not have taken precedence over the court's examination of evidence relating to "retained control" and

"affirmative contribution." Had these issues been considered in the proper order, starting with *Hooker*'s two-part test, the Court of Appeal would not have had reason to (erroneously) consider plaintiff's non-delegable duty argument at all.

The Court of Appeal's decision should therefore be reversed, and the meaning of an actionable "omission" under Hooker's footnote 3 clarified to include only knowing acts of induced reliance, or a promise broken.

STATEMENT OF THE CASE

A. Aubry's Exclusive Control Of Its Worksites

In November of 2005, nobody knew more about Conveyor Belt No. 10 at San Francisco International Airport (SFO) than Aubry, which was Seabright's insured and Verdon's employer. Aubry is a licensed mechanical contractor and has maintained the baggage conveyors used by several airlines at SFO since at least 1991.[1] On November 3, 2005, Aubry's employees were performing preventive maintenance and repair pursuant to the most recent, 1996 version of

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[1] Vol. 1 CT, 93-94.

Aubry's contract with America West Airlines, Inc., predecessor entity to US Airways.[2]

Aubry's thorough knowledge of, and control over, the conveyor belts at SFO – and Conveyor Belt No. 10 in particular – is illustrated by Aubry's having been retained by the City and County of San Francisco (CCSF) in 2002 to inspect, report on and make repairs necessary to bring the baggage handling system to "minimum acceptable operations."[3] Aubry was chosen for the job because it was a licensed mechanical contractor "that came highly recommended by a number of the airlines operating at SFO."[4] Aubry's repairs to the conveyor system were not insignificant, and cost CCSF $138,000.[5]

Aubry used only its own employees for the conveyor belt work at the airport.[6] Aubry worked on the belts every day for five to eight

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[2] Vol. 1 CT, 93-94. The 1996 contract was signed by Curtis Verdon, a 20-year veteran Aubry millwright and plaintiff Anthony Verdon's father. Vol. 1, CT 165-166, 71:15-75:15.

[3] Vol. 1, CT, 39-46.

[4] "Memorandum" from Airport Director dated March 28, 2002 at Vol. 1, CT, 39-40, 44-45, and specifically, 45 at 3.

[5] *Id.*; Vol. 1, CT, 40, 8.

[6] *See* deposition testimony of Stephen Duxbury, Administrator of Occupational Safety and Health for US Airways (Vol. 1, CT, 88 and Vol. 1, CT, 195 (8:13-24); 197 (77:11-78:14, 79:14-21); 198 (91:2-

hours per day.[7] Its employees were free to come and go as they pleased without the knowledge or permission of US Airways.[8] If US Airways learned of a problem with the belts, it would call Aubry and the contractor, in turn, would diagnose and repair the system.[9] US Airways knew nothing of the belts and only occasionally entered the conveyor belt area when it needed to clear jammed baggage.[10] There is no evidence that Aubry ever reported to US Airways that Conveyor Belt No. 10 was unsafe and violated Cal-OSHA regulations. There is no evidence that US Airways instructed Aubry to not repair the conveyor or not correct any other hazard on the jobsite.

Verdon's father, Curtis Verdon – himself a 20-year-veteran Aubry employee and former Manager of Operations at SFO –

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9); 199 (102:3-103:3); 200-201 (116:8-117:1), and Kenneth Ackermann, the airline's Shift Manager/Supervisor (Vol. 1, CT 203, 205 (15:4-18) and Vol. 1, CT, 208 (41:10-42:11); 209 (60:6-25); 210 (61:1-64:4).

[7] *See* deposition testimony of Aubry employee Marco Moniz. (Vol. 1, CT, 142 (35:19-36:21); 147-148 (57:21-25; 58:12-59:16).

[8] *See* deposition testimony of Aubry millwright supervisor Noel Varela. (Vol. 1, CT, 178 (10:18-20); 184 (38:3-40:4).

[9] *See* Duxbury testimony at Vol. 1, CT, 194; 195-196 (8:13-19); and 199 (102:3-103:3), and Ackermann at Vol. 1, CT, 204; 205 (15:4-18); 207 (37:16-23); 208 (41:10-42:11); 209-210 (60:6- 61:2).

[10] Vol. 2, CT, 328, lines 6-25, 1-8.

acknowledged in deposition that Aubry was responsible for the safety of its employees, and that it used outside vendor Suzanne Smith to help devise Aubry's safety program.[11] Ms. Smith wrote Aubry's safety manual and handled Aubry's safety issues, including its involvement in the Verdon incident.[12] Aubry's safety manual explicitly acknowledged, "It is a *condition of employment* ... that all *employees* adhere faithfully to the requirements of this policy, as well as the safety rules, instructions, and procedures issued in conjunction with it."[13] Aubry's self-imposed contractual "conditions" included "conduct[ing] safety inspections of all the company's jobsites" and "be[ing] completely responsible for on the job safety and health and secur[ing] the correction of safety deficiencies."[14] Aubry's safety manual acknowledges its worksites will comply with the same kind of regulations it now claims are "non-delegable" by any hirer.[15] Verdon received all of his education, training and experience from Aubry or

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[11] Vol. 3, CT, 607-622.

[12] Vol. 2, CT, 596-605.

[13] Vol. 2, CT, 394; emphasis added.

[14] Vol. 2, CT, 395-396.

[15] Vol. 1, CT, 130-132, 230-236; 392-594.

from the school affiliated with his millwright's union, as did Aubry's other employees.[16]

B. Verdon's Injury

Verdon had been working as an apprentice millwright for eight months when he was injured on November 3, 2005.[17] That morning Aubry's daily safety briefing had emphasized to Verdon the importance of not putting his hand into or near a moving machine of any type.[18] Verdon then was assigned to work in tandem with Aubry millwright Marco Moniz, since it was Aubry's custom and practice to send out millwrights in pairs.[19] The two millwrights first were to visually inspect the conveyor belt system and make note of any deficiencies or conditions needing repairs.[20] Then Verdon and Moniz

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[16] *See* Verdon testimony at Vol. 1, CT, 248-250 (21:16-29:15); 251(31:2-10); 253-254 (51:7-57:10); 255-257 (69:13-76:1) and testimony of Aubry Supervisor Noel Varela. (Vol. 1, CT, 177-180 (1:1-20:16).

[17] Vol. 1, CT, 152 (75:18-76:6); 250 (27:13-15).

[18] *See* record of 11/3/05 routine Aubry safety training at Vol. 1, CT, 137-138, and description of training in Moniz testimony at Vol. 1, CT, 143 (40:3-41:1); 144-146 (43:22-53:1); 154 (87:1-89:14).

[19] *See* Verdon testimony, Vol. 1, CT, 259 (98:13-99:3).

[20] *See* Verdon testimony, Vol. 1, CT, 254 (55:5-57:10); 255-257 (69:13– 76:1) and Moniz testimony, at Vol. 1 CT, 182 (32:18-25).

were to turn off the conveyor belt, as required by Aubry's standard procedures and safety training, and make whatever repairs were needed.[21]

There were no witnesses to Verdon's injury because Moniz was looking at another section of the conveyor belt when the incident occurred.[22] When he heard Verdon yell, Moniz shut down the power to the equipment and found Verdon with his arm inserted into the conveyor belt.[23] Moniz then climbed out of the conveyor area and alerted another Aubry employee, Noel Varela, that there had been an accident.[24] US Airways was not alerted to the incident, nor was it aware that any injury involving its equipment had occurred until long after the fact.[25]

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[21] *Ibid.*

[22] Vol. 1, CT, 149-150 (65:9-68:11).

[23] *Ibid.*

[24] Vol. 1, CT, 150-151 (68:19-70:16).

[25] *See,* Testimony of US Airways Shift Manager Kenneth Ackermann, Vol. 1, CT, 205 (15:4-18); 207 (37:16-23); 210 (61:3-64:4).

C. There Is No Evidence Of A Causal Link Between Any Act/Omission Of US Airways And Verdon's Injury

Moniz and Varela each wrote contemporaneous incident reports stating that Verdon had inserted his hand into a moving conveyor belt to remove debris, in violation of his safety training just hours beforehand.[26] But in opposition to US Airways' motions for summary judgment, Moniz and Varela submitted declarations claiming that they had made up the cause of the accident in their incident reports and did not know what really had happened.[27]

Plaintiffs' expert Matthew Wilson inspected Conveyor Belt No. 10 on July 24, 2008, nearly three years after Verdon's injury.[28] His resulting declaration, submitted in opposition to the summary judgment motions, concluded that Verdon's injury was caused by worksite conditions which allegedly violated certain Cal-OSHA safety regulations.[29] Wilson also claimed to have relied on an unknown

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[26] Vol. 1, CT, 157, 188-189.

[27] Vol. 3, CT, 668-670 (Varela); 677-679 (Moniz).

[28] Vol. 3, CT, 680-685.

[29] 8 C.C.R. §§ 3999 ("Conveyors") and 4002 ("Moving Parts of Machinery or Equipment") are part of the Cal-OSHA regulations known as General Industry Safety Orders (GISOs) found at Subpart 7 of Title 8 of the California Code of Regulations.

portion of Verdon's deposition testimony.[30] No deposition excerpt was submitted for the record, and Wilson's declaration did not explicitly identify the testimony on which he relied.[31] Accordingly, the trial court struck that portion of Wilson's declaration which purportedly related to causation.[32]

PROCEDURAL HISTORY

The operative complaints are Seabright's form complaint filed on December 14, 2006, and Verdon's first amended complaint-in-intervention filed on May 19, 2008.[33]

US Airways filed identical motions for summary judgment against both plaintiffs on June 5, 2008.[34] The trial court granted both

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[30] Vol. 3, CT, 681, at 4, 5 and 12.

[31] *Ibid.*

[32] RT, 14:20-24.

[33] Vol. 1, CT, 115. Various procedural maneuverings pared down the party defendants on each pleading until only US Airways remained.

[34] Vol. 1, CT, 005.

motions for summary judgment on August 22, 2008.[35] The trial court entered its Orders on November 7, 2008.[36]

Plaintiffs timely appealed.[37] The Court of Appeal on March 29, 2010 reversed the trial court's judgment for US Airways, holding that the airline's alleged "omission" to bring its conveyor belt system into compliance with "non-delegable" safety regulations, by itself, constituted "affirmative conduct" under *Hooker* that raised a triable issue of fact as to whether US Airways had caused Verdon's injury. The Court of Appeal explicitly acknowledged that, in so holding, its decision directly conflicts with that of Division One of the same appellate district in *Madden* as well as *Millard*: "...[T]here appear now to be two strands of judicial thought on the interpretation of footnote 3 of *Hooker*."[38] The Court of Appeal also held that US Airways could not "delegate" to Aubry the responsibility for ensuring that Conveyor No. 10 was Cal-OSHA compliant, even though the condition of the baggage conveyors was the subject of Aubry's

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[35] Vol. 1, CT, 011.

[36] Vol. 1, CT, 012-013, Vol. 4, 1053-1060.

[37] Vol. 1, CT, 013; Vol. 4, CT, 1087-1088.

[38] *Seabright Insurance Company, et al. v. US Airways, Inc., et al.* (2010) 183 Cal.App.4th 219, 371, fn. 14.

maintenance contract, and the contractor had exclusively maintained that equipment for decades.[39]

STATEMENT OF APPEALABILITY

US Airways appeals from the decision of the Court of Appeal, *Seabright Insurance Company, et al. v. US Airways, Inc., et al.* (2010) 183 Cal.App.4th 219 (*review granted*), which ordered a complete reversal of the trial court's order granting summary judgment to US Airways. This Court granted review on June 9, 2010, and stayed its consideration of *Lewis v. Pepper Construction* 2010 WL682286, *pet. for review granted*, 6/9/2010, pending a decision on this case.

STANDARD OF REVIEW

On an appeal from a summary judgment, appellate courts review the record *de novo* for the existence of triable issues, and consider the evidence submitted in connection with the motion (with the exception of evidence to which objections were made and sustained.) (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The reviewing court applies the same three-step process required of the trial court: first, the court identifies the issues raised by the

[39] *Id.* at p. 367.

pleadings, since it is these allegations to which the motion must respond; second, the court determines whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in the movant's favor; and when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. (*McAlexander v. Siskiyou Joint Community College* (1990) 222 Cal.App.3d 768, 773.)

Appellate courts apply the abuse of discretion standard to any trial court ruling on the admissibility of evidence, but where the appeal also turns on the trial court's determination of a disputed fact issue, the court will apply the substantial evidence standard. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) In appropriate cases, appellate courts may properly reject expert testimony when it is based on conclusions or assumptions not supported by evidence in the record. (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.) An expert's opinion testimony "cannot rise to the dignity of substantial evidence" where the expert bases his or her conclusion

on speculative, remote or conjectural factors. (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 487.)

Appellate courts independently determine the proper interpretation of a statute or regulation. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

ARGUMENT

A. *Hooker's* Requirements Of "Retained Control" And "Affirmative Conduct" Are Unrelated To Whether A Regulatory Obligation Is "Non-Delegable"

In *Hooker* the Court noted, "There will be times when a hirer will be liable for an *omission*. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker*, 27 Cal.4th at p. 212, fn. 3, emphasis added.)

The conflicting rulings on the meaning of this footnote suggest that lower courts have lost sight of the legal and policy reasons for the two-part *Hooker* test, particularly where the defendant allegedly breached a "non-delegable" duty. Plaintiffs argue, and the Court of Appeal seems to have held, that the alleged existence of a non-

delegable duty essentially eliminates any reason for a court to consider whether there is evidence of retained control or affirmative contribution. Not so.

This Court did not invent the requirements of "retained control" and "affirmative contribution" when it considered the further permutations on *Privette* presented by *Hooker*. Rather, these concepts have been constant themes in California jurisprudence for over 100 years. At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 668-670 [*Padilla*]; *see also,* Restatement (Second) of Torts [Restatement], §409.)

Accordingly, the common law "peculiar risk" doctrine developed in the latter half of the nineteenth century out of recognition that "a landowner who chose to undertake inherently dangerous activity on his land should not escape liability for injuries to others simply by hiring an independent contractor to do the work." (*Privette,* 5 Cal.4th at p. 695, fn. 2.) "Central to this rule of nonliability was the recognition that a person who hired an

independent contractor 'had no right of control as to the mode of doing the work contracted for.' ... On the other hand, if a hirer does retain control over safety conditions at a work-site and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (*Hooker*, 27 Cal.4th at p. 213, citing *Green v. Soule* (1904) 134 Cal. 96 [*Green*] and *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785 [*McDonald*].)

Hooker's reliance on *Green*[40] illustrates how early in the law California courts recognized that, before the alleged breach of a "non-delegable duty" even becomes relevant, the court first must examine whether the defendant had control over the conditions that allegedly caused the incident. This priority of analysis is critical. The "non-delegable duty" concept is inextricably related to the "peculiar risk" doctrine's focus on affording a remedy to an innocent bystander

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[40] Plaintiff Green claimed liability pursuant to a *city ordinance* requiring that the general contractor light both ends of a street where the construction activity obstructed the roadway. The court found no retained control in the first place that would necessitate an analysis of liability based on the ordinance. (*Green v. Soule* (1904) 145 Cal. at p. 100.)

harmed by work over which the bystander had no control.[41] But the "innocent bystander" situation is completely different from that of an employee injured while doing the work through which s/he has recourse to workers' compensation insurance. In short, the existence of a relevant statutory duty, whether delegable or not, is no substitute for evidence regarding the defendant's ability to alter the plaintiff's worksite safety conditions.

Hooker also relied on *Shell v. McDonald Oil* (1955) 44 Cal.2d 785, as the foundation for the second, "affirmative conduct" step in its two-part test for whether passive hirers have liability notwithstanding *Privette*. In *Shell* an oil company hired an independent contractor to remove an oil rig. In the course of that work, an employee of the contractor was injured while using a procedure not common to the industry but ordered by the employee's crew chief in part because there was no safety latch on a portion of rigging used during the procedure. The employee claimed that the oil company should have

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[41] The same "innocent bystander" principle has been used to justify imposing "non-delegable" duties in situations outside the construction context. *See, e.g., Maloney v. Rath* (1968) 69 Cal.2d 442, 446 (Vehicle Code imposed non-delegable duties to protect innocent bystanders against peculiar risks in the context of injuries caused by a vehicle driven with defective brakes.)

known the safety latch was missing, and that the company was liable because it had retained control over the jobsite. In rejecting the plaintiff's claims, this Court relied on *Green, supra,* and further cited to common law principles governing what constitutes the exercise of retained control so as to affirmatively contribute to an injury or loss. "An owner is not liable for injuries resulting from defective appliances unless he has **supplied them** or has the privilege of **selecting them** or the materials out of which they are made (*Hard v. Hollywood Turf Club*, 112 Cal.App.2d 263, 274-275) or unless he **exercises active control over the men employed or the operations of the equipment used** by the independent contractor. (*Willis v. San Bernardino Lbr. & Box Co*. [1927] 82 Cal.App. 751, 756.)." (*Shell*, 44 Cal.2d 785, 789, emphasis added.)

Thus *Hooker*'s conclusion, that a party seeking to avoid *Privette* must show that the defendant "retained control" so as to "affirmatively contribute" to the plaintiff's injuries, reflects a longstanding and well-founded distinction between on-the-job injuries versus those suffered by innocent bystanders who should be protected from dangers resulting from work to which they are not participants.

B. *Hooker* Likewise Required The Court Of Appeal To Reject Authorities Relying On Chapter 15, Restatement (Second) Of Torts

The Court of Appeal's decision primarily relied on *Evard v. Southern California Edison* (2007) 143 Cal.App.4th 137 (*Evard*), a decision applying the "non-delegable duty" rule found in Section 424 of Chapter 15, Restatement.[42] This Court, however, repeatedly has rejected attempts to impose liability on passive hirers under other Sections of Chapter 15. The Court of Appeal should have done the same.

1. Chapter 15's Legislative History Shows That It Was Not Intended To Apply To Passive Hirers of Independent Contractors

Chapter 15 generally addresses various exceptions to the common law rule under which passive hirers generally have no liability to injured employees of independent contractors. The Chapter divides the exceptions according to those based on a hirer's

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[42] "One who by statute or by 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 for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." (Unless otherwise noted, all Sections referred to are from Chapter 15, Restatement (Second) of Torts.) *Evard* is more fully discussed in Section E.1, *infra*.

direct negligence (Sections 410-415, which comprise "Topic 1"), versus vicarious liability imposed on the hirer by virtue of the independent contractor's negligence (Sections 416-429, which comprise "Topic 2"). (Chapter 15, Introductory Note, at p. 394.) Chapter 15 ambiguously refers to "third parties" or "others" when designating individuals to whom a landowner may be liable when injuries result from the negligence of a hired independent contractor, leaving open the possibility that "others" could include employees of independent contractors.

However, and as this Court noted in *Privette*, 5 Cal.4th at p. 699, Chapter 15's legislative history shows that it never was intended to allow employees of the independent contractor to file suit against a passive hirer such as, in this case, US Airways. An early draft of Chapter 15 included a Special Note which observed,

> Special Note. **The rules stated in this Chapter are, in general, not applicable to make the defendant who hires an independent contractor liable to two classes of persons.**
>
> One consists of the employees, or servants, of the defendant himself. ... **The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor.** ...

> **Again, when the Sections in this Chapter speak of liability to "another" or "others," or to "third persons," it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included.** (Restatement, Chapter 15, Special Note (unadopted), (Tentative Draft No. 7, 1962), emphasis added.)

The American Law Institute omitted this note at the recommendation of William L. Prosser, the reporter for the Second Restatement, due to his concern over its application to the disparate workers' compensation schemes found in various states. (39 A.L.I. Proc. 244-49 (1962).) Prosser added, however, that "certainly the prevailing point of view is that there is no liability on the part of the employer of the independent contractor." (*Id.* at p. 247.)

2. California Follows The "Majority" Interpretation That Section 15 Does Not Apply To Passive Hirers

The majority of state high courts have held that passive hirers are not liable to injured employees of an independent contractor, and some courts have even gone so far as to overrule prior interpretations of the Restatement.[43] But for a time California followed the minority

[43] *See, e.g., Dillard v. Strecker* (1994) 255 Kan. 704, 877 P.2d 371, 385; *Matteuzzi v. Columbus Partnership, L.P.* (Mo. 1993) 866 S.W.2d 128, 131-32; *Sierra Pac. Power Co. v. Rinehart* (1983) 99 Nev. 557, 665 P.2d 270, 273; *Valdez v. Cillessen & Son, Inc.* (1987)

position and permitted recovery from the non-negligent landowner or general contractor. (*Woolen v. Aerojet General Corp.* (1962) 57 Cal.2d 407, 410-417.)

California changed course and adopted the majority position when, in 1993, the California Supreme Court overturned *Woolen* in *Privette v. Superior Court* (1993) 5 Cal.4th 689. *Privette* explicitly acknowledged the Restatement's "Special Note" (*supra*) for its limitations on tort remedies available to injured employees of independent contractors who already were entitled to receive workers' compensation benefits. (*Privette,* 5 Cal.4th at pp. 699-700.) The Court gave three fundamental reasons for its decision. First, a "principal" who hires an independent contractor should be subject to

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105 N.M. 575, 580, 734 P.2d 1258, 1263 (1987); *Tauscher v. Puget Sound Power & Light Co.* (1981) 96 Wash.2d 274, 635 P.2d 426, 429-31; *Wagner v. Continental Casualty Co.* (1988) 143 Wis.2d 379, 421 N.W.2d 835, 841, 844; *Stockwell v. Parker Drilling Co.* (Wyo. 1987) 733 P.2d 1029, 1032; *cf. Rowley v. Mayor of Baltimore* (1986) 305 Md. 456, 505 A.2d 494, 503; *Vertentes v. Barletta Co.* (1984) 392 Mass. 165, 466 N.E.2d 500, 502-04; *Conover v. Northern States Power Co.* (Minn.1981) 313 N.W.2d 397, 404-07; *Whitaker v. Norman* (1989) 75 N.Y.2d 779, 552 N.Y.S.2d 86, 87, 551 N.E.2d 579, 580; *Fleck v. ANG Coal Gasification Co.* (N.D. 1994) 522 N.W.2d 445, 454. But see *Sievers v. McClure* (Alaska (1987) 746 P.2d 885, 887 n. 2; *Elliott v. Public Serv. Co.* (1986) 128 N.H. 676, 517 A.2d 1185, 1188.

no greater liability than an independent contractor agent, whose exposure for its employees is limited to workers' compensation insurance. Second, the rule of workers' compensation exclusivity, which shields an independent contractor from further liability to its employees for on-the-job injuries, should equally protect the property owner/hirer who indirectly pays for the cost of such coverage as a component of the contract price. Finally, the risks to a contractor's workers, as opposed to innocent bystanders, often are beyond an owner's (or hirer's) expertise or awareness. "...[T]o impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees." (*Privette*, 5 Cal.4th at pp. 699-700.)

Following *Privette,* the Supreme Court has with measured steps steadily trod through several of Chapter 15's "exceptions," each time finding the Section at issue inapplicable to passive hirers of contractors whose employees become injured while on the job. In *Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253, this Court

held that neither Section 413, "Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor" nor Section 416, "Harm Caused By Negligence Of A Carefully Selected Independent Contractor" [44] supplied grounds for liability as against a hirer "when the liability of the contractor, the one primarily responsible for the workers' on-the-job injuries, is limited to providing workers' compensation coverage…" (*Toland*, 18 Cal.4th at pp. 265-267.)[45]

Similarly, in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, this Court held that Section 411 (Topic 1, "Negligence In Selection Of Contractor") does not create liability to a passive hirer. (*Camargo,* 25 Cal.4th at p. 1244.) The Court again rejected Chapter 15's vicarious/direct distinction because, as in *Privette* and *Toland,* it would be unfair to impose liability on a passive hirer when the injured

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[44] Section 413 falls under the section of the Chapter 15 subdivided into "Topic 1" regarding duties giving rise to "direct liability." (*Toland*, 18 Cal.4th at p. 259.) Section 416 is part of Chapter 15's "Topic 2," which concerns conduct creating "vicarious liability." (*Id.* at p. 260.)

[45] The Court declined to comment on the general contractor's liability under Section 414. (*Toland*, 18 Cal.4th at p. 267, citing Restatement (Tent. Draft No. 7, Apr. 16, 1962) Ch. 15, special note, p. 18.)

employee's recovery against the independent contractor, "the one primarily responsible for the worker's on-the-job injuries," was limited to workers' compensation benefits. (*Camargo*, 24 Cal.4th at p. 1244.)

The Supreme Court extended *Privette* to claims brought under Section 414[46] when it decided *Hooker, supra.* In *Hooker*, the plaintiff claimed that the California Department of Transportation (Caltrans) had negligently retained control over safety conditions at a worksite where the plaintiff's husband was killed when improperly operating a crane. Justice Brown began the Supreme Court's decision with the observation, "This is the latest in a series of cases in which we have considered whether an employee of an independent contractor may sue the hirer of a contractor under tort theories covered in chapter 15 of the Restatement Second of Torts," referring back to *Privette, Toland* and *Camargo*. (*Hooker*, 27 Cal.4th at p. 201.) As was the case in each of those prior decisions, in *Hooker* the Supreme Court

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[46] "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Section 414 is a "Topic 1" exception under Chapter 15.

declined to find liability in the contractor's passive hirer under Section 414.

More importantly, *Hooker* established that the test for passive hirer liability is evidence of (1) retained control of the worksite which is (2) exercised so as to "affirmatively contribute" to the plaintiff's injury. The hirer's actionable conduct also must involve *"direction or induced reliance"* separate and apart from the event(s) which justified the plaintiff's recovery of workers' compensation benefits.[47] (*Hooker,* 27 Cal.4th at p. 201.)

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[47] In *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28 the Court of Appeal likewise concluded, "We are persuaded that the holdings of *Privette* and *Toland* should also apply to employees' claims under section 414 at least where, as here, (1) the sole factual basis for the claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor's own making, and (2) there is no evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, *e.g.*, ***inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise.*** [If not, the hirer's] liability would exceed that imposed on the injured plaintiff's immediate employer, who created the hazard." (*Kinney,* 87 Cal.App.4th at p. 39; emphasis added.)

C. The Court Of Appeal Erred In Deciding The "Non-Delegable Duty" Issue Before It Considered The Evidence Under *Hooker*

As discussed above, *Hooker*'s two-part test *must* be applied to the evidence in a case *before* issues of "delegable" or "non-delegable" duties are even considered. Here, the Court of Appeal analyzed these issues in reverse order. As a result, the appellate court's decision created the conflict with *Madden* and *Millard* that led to this Supreme Court review. The Court of Appeal erred.

In *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, Division One of the First Appellate District properly analyzed the question of whether the existence and alleged violation of Cal-OSHA safety regulations by a general contractor would give rise to a triable issue of fact under *Hooker*. Madden, a subcontractor's employee, was injured when he fell from a raised patio at a jobsite. He sued hiring general contractor Summit View, claiming that his injury was proximately caused by the absence of a guardrail along the open side of the patio as required by California Code of Regulations, Title 8, Section 1621.[48] (*Madden,* 165 Cal.App.4th at p. 1280, citing 8 C.C.R.

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[48] This regulation specified that railings "shall be provided along all unprotected and open sides, edges and ends of all . . . elevated

1621.) Summit View's summary judgment was affirmed by the Court of Appeal, First Appellate District, Division *One* (whereas the decision here issued from Division *Four.*)

The *Madden* court was skeptical of whether the evidence showed Summit View had "retained control" over the worksite in any meaningful sense at all. But even assuming a jury could find that Summit View *had* retained sufficient control over the site, the Court of Appeal found that there was no evidence whatever that Summit view had contributed to the absence of a guardrail by its affirmative conduct. Summit View had not directed that no guardrail be installed, nor had it acted in any way so as to prevent the installation of a guardrail.

Madden noted that in *Elsner* the Court had held that Cal-OSHA safety standards such as Section 1621 may be admitted to show a standard of care, but *not* to expand the defendant general contractor's duty of care toward a subcontractor's employee. Further, such regulations are relevant to liability as against general contractors only "where *other* evidence established that the general contractor

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platforms. . . . 7 ½ feet or more above the ground, floor, or level underneath."

affirmatively contributed to the employee's injuries." (*Madden*, 165 Cal.App.4th at p. 1280, citing *Elsner v. Uveges* (2004) 34 Cal.4th 915.) But *Madden* also recognized that *Privette* was not in issue in *Elsner* (*Madden*, 165 Cal.App.4th at p. 1279), and so looked to *Millard* for guidance.

In *Millard* the Court of Appeal, Fourth District concluded that "a claimed Labor Code safety violation was *insufficient* to create a triable issue of material fact where there was no evidence the general contractor affirmatively contributed to the plaintiff's injuries." (*Millard,* 156 Cal.App.4th at pp. 1352-1353; emphasis added.) In *Millard* the plaintiff was a subcontractor's employee who fell through a ceiling after the lights unexpectedly went out. The plaintiff claimed that there were violations of "applicable safety regulations" under Cal-OSHA at the worksite, and on appeal further claimed that the alleged regulatory violations constituted negligence *per se*. The Court of Appeal found there was no evidence showing that the general contractor controlled the means and methods of the subcontractor's work, and noted that none of the general contractor's employees were present when the fall occurred. (*Millard,* 156 Cal.App.4th at p. 1350.)

Millard also held that the alleged regulatory breach did not, by itself, create a triable issue of fact because there was no evidence that any action by the general contractor affirmatively contributed to the occurrence of the plaintiff's fall. Further, even had negligence *per se* been properly asserted (which it was not), "It is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages." (*Millard*, 156 Cal.App.4th at p. 1353, citing *California Service Station, etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166.) In short, since the evidence in *Millard* did not satisfy *Hooker*'s two-part test for "retained control" and "affirmative contribution," the *Millard* court had no reason to decide whether ensuring regulatory compliance was "delegable."

One month after *Madden* issued, the Court of Appeal in *Padilla* further examined whether an alleged violation of Cal-OSHA regulations could subject a passive hirer to liability for injuries to the employee of an independent contractor. *Padilla* held the answer was no.

In *Padilla,* a subcontractor's employee was injured when a pipe on the worksite broke, causing the employee to fall off a ladder set up

over the pipe. (*Padilla,* 166 Cal.App.4th at p. 665.) Padilla received workers' compensation benefits from his employer. (*Id.* at p. 666.) The pipe was allegedly controlled by the general contractor Gordon & Williams and owner Pomona College. (*Id.* at p. 667.) Padilla asserted that the general contractor had retained control of the jobsite and affirmatively contributed to his injuries when it failed to follow Cal-OSHA regulations "which required utilities to be shut off, capped, or otherwise controlled during demolition, or protected if use was necessary." (*Padilla*, 166 Cal.App.4th at p. 667, citing 8 C.C.R. 1735(a).)

The *Padilla* court first noted that Cal-OSHA regulations do not, *ipso facto*, give rise to a "non-delegable" duty. (*Id.* at p. 673.) The court then analyzed Section 1735(a) to see whether the regulation anywhere mandated that its compliance could *not* be delegated by a general contractor or a landowner such as Pomona College.[49] The

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[49] The "non-delegable duty" analyses in *Madden, Millard* and *Padilla* arguably were incomplete, although ultimately the courts reached the correct results. But all three courts should have made two findings to complete their scrutiny of the allegedly non-delegable statutory duties: (1) what does the plain language of the statute express; and (2) what was the intent of the statutory scheme under which the General Industry Safety Orders were created in the first place. US Airways respectfully submits that this appeal is the

court found that the language of Section 1735(a) did not expressly place the obligation with the landowner. (*Id.* at p. 673.) Because Padilla had not shown that (a) the duty imposed by Section 1735(a) was non-delegable and (b) the general contractor retained control so as to affirmatively contribute to Padilla's injuries, *Padilla* affirmed the lower court's judgment. The court concluded, "[T]he liability of a hirer for injury to employees of independent contractors caused by breach of a non-delegable duty imposed by statute or regulations remains subject to the *Hooker* test." (*Padilla,* 166 Cal.App.4th at p. 673.)

Here, under all of these authorities the Court of Appeal should have *first* examined whether (1) US Airways retained control over Aubry's worksite safety (which it did not), and (2) did the airline's exercise of that (nonexistent) control affirmatively contribute to the cause of Verdon's injury (again, no.) Had the Court of Appeal analyzed the correct factual elements and in the right order, it would

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proper vehicle for clarifying for lower courts the proper order in which the issues should be examined. This issue is further addressed at Section D, *infra.*

never have had cause to even consider the red herring presented by plaintiffs' non-delegable duty argument.

D. The Court Of Appeal Erred In Its Analysis Of "Non-Delegable" Regulatory Obligations

The Court of Appeal held that compliance with Sections 3339 and 4002 of Title 8 of the Cal-OSHA regulations was "non-delegable" by US Airways to anyone, including Aubry. Therefore, the court reasoned, US Airways had "control" of Aubry's jobsite as a matter of law. The Court of Appeal was mistaken.

Courts faced with the interpretation of a statute or regulation must "seek to 'ascertain the Legislature's intent so as to effectuate the purpose of the law.'" (*Elsner*, 34 Cal.4th at p. 920.) Courts give the words of the regulation their "plain and ordinary meaning." (*Estate of Griswold* (2010) 25 Cal.4th 904, 910.) It is not the court's place to insert words into a statute. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 826.) However, courts may consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part. (*Phelps v Stostad* (1997) 16 Cal.4th 23, 32.)

Section 4002 ("Moving Parts of Machinery or Equipment")[50] states, in relevant part:

> (a) all machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.
>
> * * *
>
> Note: Authority cited: Section 142.3, Labor Code.
>
> HISTORY
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> 1. Repealer and new section filed 10-25-74; effective thirtieth day thereafter (Register 74, No. 43)
>
> 2. Amendment filed 11-17-82; effective thirtieth day thereafter (Register 82, No. 47).
>
> (8 C.C.R. 4002.)

Section 142.3 of the Labor Code is the legislative mandate which requires the State of California to adopt regulations that are at least as stringent as the federal standard under OSHA. Labor Code

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[50] Plaintiffs also allege the worksite violated Section 3999 ("Conveyors") of Title 8, which contains similar structure and language as Section 4002. It is not clear what part of Section 3999 is alleged to have been violated. However, because the duty under Section 3999 is delegable for the same reasons as Section 4002, for the sake of brevity US Airways confines its analysis to the latter regulation.

Section 142.3 contains no indication that the duties created by Section 4002 can only be fulfilled by one particular party. Likewise, the historical documents that are described in the "History" of Section 4002 do not expressly state that the statute is non-delegable or the responsibility of a single party.

For example, the Summary of the June 25, 1974 public hearing held by the Occupational Safety and Health Standards Board on the initial adoption of Section 4002 simply indicates that the section was up for discussion at the hearing, but no comments were made on its scope.[51] A review of a California Standards Comparison dated August 31, 1981, which compares the federal OSHA standard found at 29 C.F.R. 1910 to its California counterpart, Section 4002, provides the rationale for adoption of the current Section 4002 language as follows:[52]

> The State proposed to repeal existing Section 4002(a) & (b) as it does not adequately address the hazards of "danger zones" not associated with point(s) of operation(s).

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[51] *See*, Exhibit 3-4 through 3-36, Declaration of Elizabeth D. Rhodes (Rhodes Dec.) in support of Request for Judicial Notice.

[52] The Court may take judicial notice of legislative history. (*Elsner v. Uveges*, 34 Cal.4th at p. 929, fn. 10.)

> The State proposes to adopt new Section 4002(a) to address hazards of "danger zones" not specifically addressed in other sections of the General Industry Safety Orders. The Federal orders do not contain a like counterpart.
>
> The State proposes to maintain 4002(b) with minor editorial changes.
>
> The State proposed to repeal 4003 as the requirements are now contained within revised Section 4002(a). (*See,* Ex. 3-2, Rhodes Dec.)

There is no statement in the comparison indicating that compliance with either Sections 1910 or 4002 was non-delegable or otherwise attributable to only one particular category of "employer." Further, a subsequent March 15, 1982 California Standards Comparison performed by the Department of Industrial Relations, which compares Section 4002 and 4003 with 29 C.F.R. 1910.212(a)(1) and 1910.219(h), also provides only the following limited explanation for the language that currently is the text of Section 4002:

> The State here revises Section 4002(a) to address hazards of "danger zones" not specifically addressed in other sections of the General Industry Safety Orders. As amended, the State standard is comparable to, but more extensive than, the Federal standard.[53]

[53] *See* Ex. 3-3, Rhodes Dec.

Because the Department's rationale for enacting and amending Section 4002 contains no particular expression of purpose, the next step in the analysis is to look at Section 4002 in the context of Title 8's overall statutory scheme. The purpose of Section 4002 is set forth in Section 3202, the first section of Subpart 7 ("General Industry Safety Orders") of Title 8, which is entitled "Application." Section 3202 provides,

> (a) These orders establish minimum standards and apply to *all employments and places of employment in California as defined by Labor Code Section 6303.* [8 C.C.R. 3202, emphasis added.]

In turn, Labor Code Section 6303 defines "Employment" as "the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service." (Lab. Code § 6303.) "Place of employment" is defined as "any place, and the premises appurtenant thereto, where employment is carried on, except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division." (*Id.*)

Clearly, then, under Labor Code Section 6303 the Title 8 regulations apply to all worksites regardless how many employers are engaged there, and compliance with the regulations is required of *each* employer for the benefit of its employees.[54]

Further evidence that these regulations apply with equal force and effect to all employers at a worksite can be found in Section 336.10 of the California Code of Regulations. Section 336.10 provides that Cal-OSHA may issue administrative citations for violations of safety regulations to any employer on a multi-employer worksite who falls within the definitions found in the regulation. Here, Aubry would be such an employer.

In sum, the legislative history of Section 4002 and the statutory scheme of which it is a part show that this section, and others like it, were intended to apply with equal force and effect to *any* employer on

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[54] Labor Code based regulations have always been treated as delegable where tort remedies are sought by a party eligible for workers' compensation benefits. *See, e.g., Hard v. Hollywood Turf Club* (1952) 112 Cal.App.2d 263, re: Sections 6401, 7151 and 7152 of the Labor Code. Section 6401 requires all employees to maintain safe places of employment for their employees. Sections 7151 and 7152 require safety rails and lines to be established by an "employer" if scaffolding is being used.

a worksite.[55] The Court of Appeal here could not have found otherwise without essentially rewriting Sections 3999 and 4002 to insert language that simply does not exist.

E. The Authorities Relied On By The Court Of Appeal Are Distinguishable And/Or In Error

The Court of Appeal primarily relied on three cases as support for its "non-delegable duty" analysis: *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137 (*Evard*), *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281 (*Barclay*); and *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595 (*Park*). All of these cases are distinguishable and, in some respects, even may have been wrongly decided.[56]

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[55] As the Court of Appeal noted in analogous circumstances in *Padilla*, "Nothing in Regulation 1735(a) mandates that it imposes safety precautions that cannot be delegated from the landowner to the general contractor to subcontractors, as was done in this case." (*Padilla,* 166 Cal.App.4th at p. 673.)

[56] The Court of Appeal also made passing reference to *Felmlee v. Falcoln Cable TV* (1995) 36 Cal.App.4th 1032, a case in which the municipal ordinance at issue was found to *not* be "non-delegable."

1. *Evard* Disregarded *Hooker*'s Requirements In Favor Of Inappropriately Focusing On The "Non-Delegable Duty"

In *Evard* an independent contractor's employee was injured when he fell from a billboard because he was not wearing a safety harness, and there were no guardrails on the billboard. *Evard* did acknowledge that, regardless of "retained control" in the form of a duty to comply with safety regulations, there also must be "affirmative contribution" before liability will attach to a passive hirer even if the condition of the worksite violated a regulatory safety standard. (*Evard*, 153 Cal.App.4th at p. 485.) Yet, and as noted in *Madden* and *Padilla*, *Evard* then contradicted itself by holding that the Cal-OSHA regulation requiring the billboard owners to provide a guardrail was "non-delegable," and that the owner's failure to comply with the regulation created a triable issue of fact. As *Madden* commented, "[W]e find no indication . . . in the text of amended Labor Code Section 6304.5 that the Legislature intended to bring about a sweeping enlargement of the tort liability of those hiring independent contractors by making them civilly liable for Cal-OSHA or other safety violations resulting in injuries to the contractors' employees." (*Madden*, 165 Cal.App.4th at p. 1280.) *Evard* only

"purported to apply the affirmative contribution requirement set out in *Hooker*." (*Id.*)[57]

Evard also failed to properly analyze the nature of the regulation at issue, Section 3416(a), which also is from the GISO regulations at issue here. Section 3416 states:

> 3416. Fall Protection.
>
> (a) On all outdoor advertising structure platforms, over 7-1/2 feet above ground or other surface, which are not provided with standard guardrails, employees shall be provided with and required to use approved personal fall protection, and where employees' work requires horizontal movement at such heights, a horizontal safety line shall be provided. When the employee's harness lanyard is secured to the special purpose poster ladder, a horizontal safety line need not be provided.
>
> (8 C.C.R. 3416.)

Although the subject matter of Section 3416(a) differs from that of Section 4002, both regulations are governed by Section 6403 of the Labor Code and its definition of "employers" and "employment." Section 3416(a) is also governed, as is Section 4002, by Section 336.10 of the California Code of Regulations, so that any employer

[57] *See also Padilla*: "Notwithstanding *Evard's* conclusion that the regulation at issue imposed a non-delegable duty, we do not agree with plaintiff's inference from that case that in every instance Cal-OSHA regulations impose a non-delegable duty." (*Padilla,* 166 Cal.App.4th at p. 673.)

fulfilling one of the definitions of 336.10 could be held liable for an administrative citation if the regulations were deemed to have been violated by a Cal-OSHA inspector at the worksite. By its plain language, Section 3416(a) requires the "employer" to ensure that its "employee" (the *Evard* plaintiff) comply with Section 3416(a). This statutory analysis is no different from that followed above regarding Section 4002, and *Evard* plainly should have reached a different conclusion.

2. *Barclay* Is Distinguishable, Since There The "Non-Delegable" Regulation By Its Terms Applied To The Defendant

In *Barclay,* the plaintiff was injured by an explosion while working for his employer, an independent contractor that had been hired to clean and remove storage tanks from a gasoline bulk plant facility. The owner of the facility did not direct, control, supervise, or contribute any advice as to how the contractor should clean and remove the tanks. (*Barclay*, 129 Cal.App.4th at pp. 286-287.) The plaintiff asserted that the owner of the facility had affirmatively contributed to his injury by its direct negligence in breaching certain "non-delegable" duties, including a regulation (Section 7904.4.9.2 of the 1998 California Fire Code) that required portable fire

extinguishers to be located within 75 feet of the portion of the facility where fires were likely to occur. (*See,* Ex.2, Rhodes Dec.) The defendant owner was granted summary judgment under *Privette*, and the Court of Appeal reversed.

In the part of the decision most relevant here, the court held that Section 7904.4.9.2 imposed a non-delegable duty of the defendant to ensure that fire extinguishers were installed as required. Section 7904.4.9.2 of the 1998 Fire Code provides,

> 7904.4.9.2. Portable fire extinguishers. Suitable portable fire extinguishers with a rating of not less than 20-B shall be located within 75 feet (22 860 mm) of those portions of the facility where fires are likely to occur, such as hose connections, pumps and separator tanks. [24 C.C.R. 7904.4.9.2 (1998 vers.), Ex. 2, Rhodes Dec.]

The language of the regulation does not in and of itself provide an indication of whether the duty is delegable or non-delegable. Hence the court appropriately completed its analysis by reviewing the organizational context of the relevant Fire Code section to analyze how the fire extinguisher requirement fit into the overall statutory scheme.

The California Fire Code (now and in 1998) is codified at Part 9 of Title 24 of the California Code of Regulations, which is also

known as "The California Building Standards Code." Specifically, Section 7904.4.9.2 is located under the following set of subsections within in the Fire Code (Part 9 of Title 24): Part VII ("Special Subjects"), Article 79 ("Flammable and Combustible Liquids") and Section 7904 ("Special Operations.") (Rhodes Dec., Ex. 2.) Section 7904.4 is entitled "Bulk Plants or Terminals." The facility in *Barclay* fell under the definition of "bulk plant" found at Section 203-B of the Fire Code. (*Barclay,* 129 Cal.App.4th at p. 288, fn 5.) The *Barclay* court therefore found that subsection 7904.4.9.2 expressly applied to the defendant's "bulk plant" facility and compliance with this subsection was non-delegable. The court also relied on the plaintiff expert's opinion that the bulk facility had a duty under both the Fire Code and industry custom to provide such items.[58]

No such statutory framework exists with respect to Title 8 of the Cal-OSHA regulations. Pursuant to Labor Code Section 6303, the

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[58] *Barclay*, at least, analyzed the issues in the correct order: First it looked to evidence of retained control and then affirmative contribution, ultimately finding that the evidence raised a triable issue of fact regarding whether the lack of nearby fire extinguishers caused the plaintiff's injuries to be more severe than they would have been otherwise. Then, and only then, the court moved on to considering whether compliance with the Fire Code was non-delegable.

Title 8 regulations apply to *all* "employers" at a worksite. Here those "employers" included Aubry. Thus, *Barclay* is distinguishable from this case and does not support the Court of Appeal's decision.

3. In *Park* The Regulation Specified To Whom It Applied

In *Park* the plaintiff was a trucker simply employed to drive away hazardous waste (batteries) packaged by the owner/hirer. (*Park,* 108 CalApp.4th at p. 595.) The Court of Appeal held that compliance with regulations governing the manner in which the batteries were to be packaged was "non-delegable" and applied to the defendant. But in *Park* the regulation at issue specifically stated, "Before transporting hazardous waste or offering hazardous waste for transportation off-site, a *generator shall* package the waste in accordance with the applicable Department of Transportation regulations on packaging under Title 49 C.F.R. Parts 173, 178, and 179." (22 C.C.R. 66262.30, Packaging, emphasis added.)[59] Thus, the regulation expressly placed the duty of properly packaging the hazardous waste on the defendant "generator." That is not the case with Title 8 regulations. By their terms they apply to all "employers."

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[59] Ex. 2, Rhodes Dec.

F. The Evidence Establishes That US Airways Did Not "Retain Control" Over Verdon's Worksite Conditions

As discussed above, *Hooker* requires that a court first apply the two-step "retained control" and "affirmative conduct" test to the evidence before considering whether the defendant breached an allegedly "non-delegable" duty. Here, the Court of Appeal considered the issues in reverse order by addressing plaintiffs' "non-delegable duty" argument first. Had the court not put the cart before the horse, the trial court's summary judgments would have been affirmed.

The undisputed evidence shows that US Airways did not control the means or method of Verdon's work on the conveyor belts at SFO. Aubry employees worked on the conveyor belt eight hours per day, seven days per week. Aubry alone had the expertise to recognize and remedy any conditions that were hazardous or otherwise in violation of any applicable regulations. Aubry's Safety Practice and Procedure Manual, its website,[60] and the testimony of former Safety Manager (and father of the injured worker) Curtis Verdon unquestionably establish that Aubry was well aware of the

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[60] *See*, Ex. 4, Rhodes Dec. US Airways requests that the court take judicial notice of the safety pages of Aubry's website.

applicable safety regulations and recognized its own duty to comply with them. (8 C.C.R. 336.10, 3203, 3339, 4002.)[61] In contrast, US Airways knew nothing of the belts and only sporadically entered the conveyor belt area when it needed to clear a bag jam-up.[62] Neither plaintiffs nor the Court of Appeal cite to authority under which paying for repairs constitutes "control" of a worksite.

G. There Is No Evidence Of Causation

It is undisputed that, in opposition to the motions for summary judgment, plaintiffs Seabright and Verdon were unable to submit evidence creating a triable issue of fact regarding causation.[63] *Madden* is instructive in this further respect. In *Madden,* as in this case, key evidence was missing regarding how the plaintiff came to fall off a patio he had worked around throughout the job. The court noted,

> Madden did not know how high he was off the ground when he fell and no one else witnessed the accident. Madden is therefore unable to establish that a safety railing would have been required by section 1621 at the location where he fell. Since he cannot prove a causal

[61] *See also*: Vol. 2, CT, 394-396.

[62] Vol. 2, CT, 328, lines 6-25, 1-8.

[63] RT, 13:6-15:6.

> relationship between his injuries and Summit View's asserted omission to perform a nondelegable duty, Madden cannot avoid summary judgment even under *Evard*. (*Madden,* 165 Cal.App.4th at pp. 1280-1281.)

Here, neither Verdon nor Seabright submitted any other evidence of causation, because Verdon and his fellow Aubry employees all submitted declarations disavowing their contemporaneous incident reports which had stated that Verdon inserted his hand into a moving conveyor belt to remove debris, in violation of his Aubry safety training given to him that very morning.[64]

Plaintiffs' retained expert Matthew Wilson likewise had no admissible evidence to offer on causation. He inspected Conveyor Belt No. 10 on July 24, 2008, two and one-half years after the incident. His declaration provided only cursory opinions regarding safety order violations and causation, which were based on conditions apparent to him two and one-half years after the incident of November 3, 2005 rather than contemporaneously with the subject event. Dr. Wilson also purported to have relied upon unspecified portions of

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[64] *Ibid.*

Verdon's deposition.[65] For all of these reasons, the trial court properly held that expert Wilson's declaration lacked sufficient foundation to be considered as admissible evidence of causation. In the trial court's words,

> He can testify that the conditions are unsafe, he can testify about that, but he cannot tell us how the accident happened. That [is] beyond anybody's ability without some information about what did happen, which – and to the extent there was information, it's been withdrawn.[66]

Under section 430 of the Restatement Second of Torts, "[i]n order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm." (Rest.2d Torts, § 430.) "Legal cause" exists if (a) the actor's conduct is a "substantial factor" in bringing about the harm and (b) there is no rule of law relieving the actor from liability. (Rest.2d Torts, § 431 (ALI 2009); *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052.) "Although proof of causation may be by direct or

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[65] Vol. 3, CT, 681, at 4, 5 and 12.

[66] RT, 14:20-24. The trial court was referring to the fact that the witnesses disavowed their incident reports and replaced them with affidavits stating no one knew how the incident occurred. (See, Vol. 3, CT, 668-670 (Varela), 677-679 (Moniz); see also, RT, 13:17-20.)

circumstantial evidence, it must be by 'substantial' evidence, and evidence 'which leaves the determination of these essential facts in the realm of speculation and conjecture is insufficient.'" (*Leslie G. v. Perry &* Associates (1996) 43 Cal.App.4th 472, 484, citing *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 471; Prosser & Keeton, Torts (5th ed. 1984) §41, p. 269 ("A mere possibility of causation is not enough, and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law").) Moreover, affidavits submitted in support of or in opposition to motions for summary judgment are required to set forth admissible evidence. (Code Civ. Proc. § 437c, subd. (d).)

Here, there was no evidence of causation. Therefore, regardless of plaintiffs' other arguments, both summary judgments should have been affirmed.

CONCLUSION

This Court in *Hooker* provided a very specific, two-part test which, when properly applied to the evidence in this or any other case,

should allow courts to properly analyze the issues and reach a result that comports with *Privette* and its underlying policies. This Court's comment in *Hooker* that certain kinds of "omissions" can be actionable doubtless was never intended to give plaintiffs and their workers compensation insurers a free pass to bring unmeritorious tort claims against passive hirers who otherwise would be protected under *Privette*.

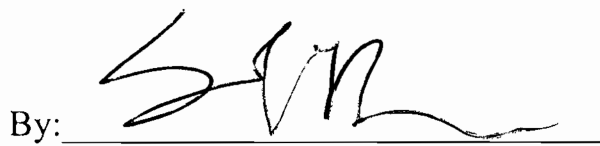
The Court of Appeal's ruling in this case furthers no salutary public policy. To the contrary, the underlying decision destroys the apportionment of risk established by the Legislature under the workers' compensation scheme, and causes an inequitable shift of liability to passive hirers like US Airways who depend on specialists to detect and correct unsafe conditions because they lack capacity and expertise in the contracted services.

It truly would be ironic if Verdon and Seabright were permitted to recover from US Airways for injuries arising from the very conditions Aubry was hired to remedy. For plaintiffs to seek such a windfall is deplorable. Clarification of the "omissions" referenced in

Hooker's footnote 3 is essential to bring certainty to this critical area of law.

Respectfully submitted,

KENNEY & MARKOWITZ L.L.P.

By: 

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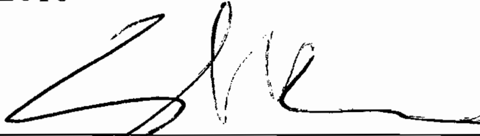
CERTIFICATE OF WORD COUNT

Case No. S182508

I, Elizabeth D. Rhodes, an attorney with Kenney & Markowitz, counsel herein for Defendant/Respondent US Airways, Inc. (Respondent), hereby certify on behalf of Respondent, that the length of its Opening Brief On The Merits is 10,199 words, relying on the word count of the computer program used to prepare the brief.

Dated: September 15, 2010



ELIZABETH D. RHODES
State Bar No. 218480

Case Title: *Seabright Insurance Company v. US Airways, et al.*
Court: California Supreme Court
Case No. S182508
Court: Court of Appeal of the State of California
First Appellate District
Case No. A123726
Court: San Francisco Superior Court
Case No. CGC-06-458707

PROOF OF SERVICE
[C.C.P.§2008, F.R.C.P. Rule 5]

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OPENING BRIEF ON THE MERITS OF US AIRWAYS, INC.

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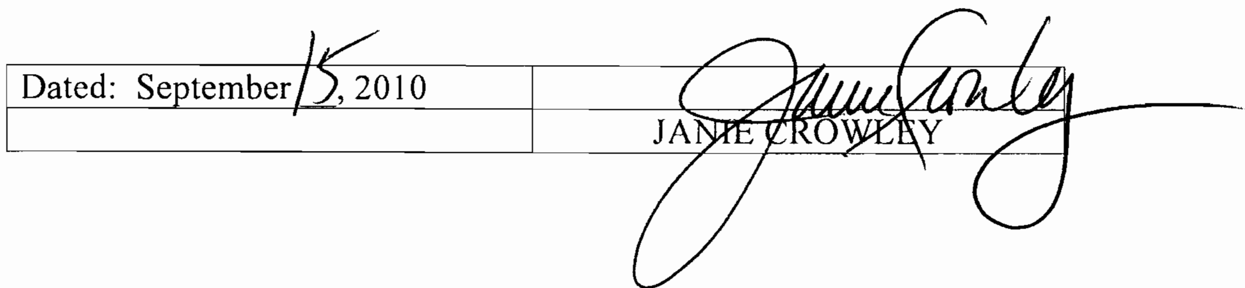

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