CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Seabright Insurance Company v US Airways, Inc. (08/22/11)

***Privette* case; Peculiar risk doctrine; Workplace Injury; Non-delegable Duties**

US Airways hired independent contractor, Aubry Company, to maintain and repair a luggage conveyor at San Francisco International Airport. The airline neither directed nor had its employees participate in Aubry's work. The conveyor lacked certain guards required by regulations and Verdon, inspecting the conveyor as an employee of Aubry, got his arm caught in the moving parts. Plaintiff Seabright, Aubry's workers' compensation insurer, paid benefits based on the injury and then sued US Airways. Verdon intervened, joining the action as a plaintiff.

US Airways brought summary judgment based on *Privette v Superior Court* (1993) 5 Cal.4th 689, and *Hooker v Department of Transportation* (2002) 27 Cal.4th198, arguing that it did not "affirmatively contribute" to the employee's workplace injury. Plaintiff Seabright, and intervenor Verdon countered with a declaration by an expert that the conveyor lacked guards in violation of Cal-OSHA regulations. The trial court granted summary judgment. The Court of Appeal held that US Airways had a non-delegable duty to ensure that the conveyor had safety guards, and questioned whether the airline's failure to perform this duty "affirmatively contributed" to plaintiff's injury, precluding summary judgment. The Court noted conflicting views among the Courts of Appeal. The California Supreme Court granted defendant's petition for review to resolve the conflict.

The plaintiffs contend that Cal-OSHA imposed a duty of care upon US Airways, that this duty extended to hired contractor Aubry's employees, and that defendant could not delegate the duty to Aubry. Defendant US Airways assumes that Cal-OSHA imposed on it a duty of care that extended to employees

of Aubry, arguing that even if it had such a duty, case law reflects a strong policy in favor of delegation of responsibility and assignment of liability to independent contractors. (*Kinsman v Unocal Corp.* (2005) 37 Cal.4th 659) Justice Kennard, authoring the majority opinion, noted that a 1971 amendment to section 6304 of the Labor Code, narrowed the definition of employer to a cross-reference to section 3300, which provides "every person… which has any natural person in service" is an employer. The Supreme Court has never held under the present law that a specific Cal-OSHA requirement creates a duty of care to a party that is not the defendant's own employee. Since defendant US Airways assumes it did have a duty and delegated it to Aubry, the issue here is whether it could delegate any duty it owed to Aubry's employees to its independent contractor Aubry to comply with Cal-OSHA safety requirements.

The Supreme Court reviewed the recent history of cases stemming from the **peculiar risk doctrine**. At first, the doctrine permitted only suits by injured neighbors or bystanders, not claims by injured employees of the independent contractors hired to do the work. The peculiar risk exception to the general rule of non-liability allowed a lawsuit against one who hired a contractor, if the work was, "likely to create … a peculiar risk of physical harm to others unless special precautions are taken…" (Rest.2d Torts, section 416) Eventually, the Supreme Court expanded the doctrine to include claims by injured employees of the independent contractor against the hirer or landowner. (*Woolen v Aerojet General Corp.* (1962) 57 Cal.2d 407) In *Privette*, the Court changed course, and overruled *Woolen* and its progeny.

Privette stated that work-related injuries are compensable under the state's Workers' Compensation Act, which affords the exclusive remedy for injury or death of an employee against an employer who obtains workers' compensation insurance coverage. *Privette* concluded that it would be unfair to permit the injured employee to obtain full tort damages from the hirer of the independent contractor because (1) the hirer likely paid indirectly for the workers' comp insurance as a component of the contract price, (2) the hirer has no right to reimbursement from the contractor even if the latter was primarily at fault, and (3) those workers who happen to work for an independent contractor should not enjoy a tort damages windfall that is unavailable to other workers. (*Privette*, at pp. 699-700)

Four additional cases followed, in which the Supreme Court further refined its new direction. In *Toland v Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253), it noted that the hirer, "has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees" and absent an obligation there can be no liability in tort. It said that subjecting those who hire contractors to peculiar risk liability in such circumstances would negate their "right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." In 2002, in *Hooker*, the Court held that an independent contractor's employee can sometimes recover in tort from the contractor's hirer if the hirer retained control of the contracted work and failed to exercise his control with reasonable care. Thus, the hirer cannot be liable merely because it retained the ability to exercise control over safety at the worksite, but the Court concluded it is fair to make the hirer liable if it exercised the control that was retained in a manner that affirmative contributed to the injury of the contractor's employee. (*Hooker*, at p. 210)

Next, the *Kinsman* case in 2005 said a hirer is presumed "to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." Noting that for policy reasons, courts have severely limited the hirer's ability to delegate responsibility to a contractor and escape liability to a bystander who is injured by the contractor's negligence, *Kinsman* pointed out if the injured party is the contractor's employee, and therefore entitled to workers' comp benefits, those policy concerns do not apply. (*Kinsman*, at p. 671) Finally, in *Tverberg v Filner Construction, Inc.* (2010) 49 Cal.4th 518, the Supreme Court held that an independent contractor's hirer is not liable in tort even if the contractor himself, rather than the contractor's employee, is the one that is injured in the workplace. Although the contractor was not entitled to workers' comp insurance benefits, his claim against the hirer nevertheless failed because of the hirer's presumed delegation to the contractor of responsibility for workplace safety.

Justice Kennard explained that the *Privette* line of cases establishes that **an independent contractor's hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.** At issue here is whether the hirer can be liable to the contractor's employees for workplace injures allegedly resulting from the hirer's failure to comply with

safety requirements of Cal-OSHA and its regulations. The question is whether the duty to comply with the regulations for the benefit of an independent contractor's employees is non-delegable.

The non-delegable duty doctrine prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work. The doctrine applies when the duty preexists and does not arise from the contract with the independent contractor. (See *Eli v Murphy* (1952) 39 Cal.2d 442) After *Hooker*, several Courts of Appeal have concluded that the hirer's statutory or regulatory duties constitute retained control if those duties are non-delegable. The courts disagree, however, about the effect of a breach. Some courts have held the breach of a non-delegable statutory or regulatory duty can, by itself, create a triable issue as to whether the hirer "affirmatively contributed" to the injury of the independent contractor's employee. (*Padilla v Pomona College* (2008) 166 Cal.App.4th 661) Others have held that if the breach is merely an omission, that breach alone cannot qualify as the affirmative contribution required for liability under *Hooker*. (*Millard v Biosources. Inc.*(2007) 156 Cal.App.4th 1338)

The Justices conclude these cases do not apply because the hirer's duties under Cal-OSHA and its regulations to the employees of its independent contractor are delegable. Here, when US Airways hired Aubry to maintain and repair the conveyor, it presumptively delegated to Aubry any tort law duty the defendant had under Cal-OSHA to ensure workplace safety for the benefit of Aubry's employees. **The delegation is implied as an incident of the independent contractor's hiring, including the duty to identify the absence of safety guards required by Cal-OSHA and address that hazard.**

Certainly US Airways owed its own employees a duty to provide a safe workplace. But under the definition of employer that applies to California's workplace safety laws, the employees of an independent contractor like Aubry are not considered to be the hirer's own employees. The issue here is whether defendant implicitly delegated to Aubry the tort law duty, if any, that it had to ensure workplace safety for Aubry's employees. The latter duty did not predate defendant's contract with Aubry; rather, it arose out of the contract. Any tort law duty US Airways owed to Aubry's employees only existed because of the work

that Aubry was performing for the airline, and therefore it did not fall within the non-delegable duties doctrine. The policy favoring delegation is bolstered by the same factors considered persuasive in *Privette*. In summary, the majority decided there is no reason to limit its holding in *Privette* simply because the tort law duty, if any, that the hirer owes happens to be one based on a statute or regulation.

Accordingly, plaintiffs here cannot recover in tort from defendant US Airways on a theory that employee Verdon's workplace injury resulted from defendant's breach of what plaintiffs describe as a non-delegable duty under Cal-OSHA regulations to provide safety guards on the conveyor. The Court of Appeal erred in reversing the trial court's grant of summary judgment for the defendant. The judgment of the Court of Appeal is reversed.