IN THE
SUPREME COURT OF CALIFORNIA

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN
Respondents and Appellants,

v.

U.S. AIRWAYS, INC.
(erroneously sued herein as America West Airlines)
Petitioner.

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

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

PETITIONER'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR REVIEW

KENNEY & MARKOWITZ L.L.P.
KYMBERLY E. SPEER (SBN 121703)
ELIZABETH D. RHODES (SBN 218480)
255 California Street, Suite 1300
San Francisco, CA 94111
Telephone: (415) 397-3100
Facsimile: (415) 397-3170

Attorneys for Defendant and Respondent
U.S. AIRWAYS, INC. (erroneously sued herein as America West Airlines)

IN THE
SUPREME COURT OF CALIFORNIA

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN
Respondents and Appellants,

v.

U.S. AIRWAYS, INC.
(erroneously sued herein as America West Airlines)
Petitioner.

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

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

PETITIONER'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR REVIEW

KENNEY & MARKOWITZ L.L.P.
KYMBERLY E. SPEER (SBN 121703)
ELIZABETH D. RHODES (SBN 218480)
255 California Street, Suite 1300
San Francisco, CA 94111
Telephone: (415) 397-3100
Facsimile: (415) 397-3170

Attorneys for Defendant and Respondent
U.S. AIRWAYS, INC. (erroneously sued herein as America West Airlines)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

IN THE
SUPREME COURT OF CALIFORNIA

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN
Respondents and Appellants.

v.

U.S. AIRWAYS, INC.
(erroneously sued herein as America West Airlines)
Petitioner.

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

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

PETITIONER'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR REVIEW

I.

INTRODUCTION

Respondents' unsolicited Answer to the Petition For Review ("Answer") responds to the Court of Appeal's clear signal for Supreme Court review simply by stating that no conflict in the law exists. Respondents' simplistic conclusion does not diminish the clear message of the appellate court's decision, nor does it refute the strong

arguments made in the Petition For Review ("Petition"). Without review, there will be no clarity of law. The fact that the Court of Appeal's decision regarding nondelegable duty and causation had no factual support in the record also is not addressed in the Answer. In that respect, the Answer actually supports Petitioner's alternative request for modification of the Court of Appeal's opinion. Respondents' other arguments are no more than recharacterizations of law and fact, without identifying additional issues for review. The Petition for Review therefore should be granted on the issues framed by U.S. Airways.

II.

REPLY

A. Respondents Disregard The Express Text Of The Underlying Appellate Decision

Respondents' first argument appears to be that there is no conflict of law addressed in the underlying appellate decision. Respondents particularly take issue with the phrasing of the Issue Presented as follows:

> 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." (Answer, at p. 2.)

Yet this is precisely what the Court said in Footnote 14 of the Opinion:

> *Barclay* and *Evard* take the view that the breach of a nondelegable statutory duty or regulatory safety obligation, without more, can create a triable issue of fact as to whether the hirer affirmatively contributed to the employee's injury, while *Millard* and *Madden* take the view that it cannot. [*Seabright Insurance Co. v. U.S. Airways, Inc.* ("*Seabright*") (2010) 183 Cal.App.4th 219, 235, fn 14.]

Respondents' corollary argument is to state that the conflict set forth in Footnote 14 is not ripe for resolution. It is hard to understand how this can be, when it is the precise issue on which the decision turned and the Court of Appeal explicitly noted that its decision required it to choose between "two strands of judicial thought on the interpretation of footnote 3 of *Hooker*." (*Id.*, citing *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 200-202.) Therefore, there is no merit to Respondents' contention that the "issue presented" was not framed by the Court of Appeal. In fact, it *was* framed, and stated in such a way as to signal the Supreme Court that its guidance was both needed and warranted.

B. Respondents Continue To Ignore The Split of Authority Recognized By The Court Of Appeal

As stated in the Petition For Review and restated *supra,* the First Appellate District accurately observed a clear split of authority on the application of the nondelegable duty doctrine in the context of the *Hooker* analysis. In contrast, Respondents contend that *Evard, Madden* and *Padilla* actually establish a new exception to *Privette/Toland* that is separate and distinct from the "exception"

created by the *Hooker* decision. (Answer, at Section B, pp. 3-4.) Respondents' theory requires the elimination of the *Hooker* analysis clearly enunciated and acknowledged in all three cited cases. *See*, *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 147 ("...[t]he liability of a hirer or owner for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation continues to be subject to the test in *Hooker*..."); *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1280 ("...safety regulations are only admissible in actions by employees of subcontractors brought against general contractors where other evidence establishes that the general contractor affirmatively contributed to the employee's injuries..."); *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673 ("...the liability of a hirer for injury to employees of independent contractors caused by a breach of a non-delegable duty remains subject to the *Hooker* test..."). Respondents are simply wrong when they characterize the application of the nondelegable duty doctrine as a separate "exception" to *Hooker*. *Hooker* requires a specific two-step analysis, from which an exception for liability may result. That analysis is required whether or not a duty is deemed to be delegable or nondelegable in character. The issue which is presented for review is what constitutes affirmative contribution under *Hooker* when an omission, in the form of an alleged breach of a nondelegable duty, is the sole evidence presented to the court or the trier of fact. Due to the split of authority on this very important legal issue, the Supreme Court's review is very much warranted.

C. Respondents Refer To "Facts" That Are Unsupported By The Record In Their Attempt To Defeat This Good Faith And Well Founded Petition For Review

Respondents argue that Anthony Verdon's employer Lloyd W. Aubry Company ("Aubry") was unable to analyze safety compliance on conveyor belts though its employees were union-trained millwrights. (Answer, p. 5.) Respondents fail to cite to the record for that statement for the simple reason that the record contradicts it. Aubry's Statement Of Policy, as set forth in its Safety Practice and Procedure Manual, expressly states that "All Of Its Employees" were to "[a]bide by all federal, state and local regulations that pertain to construction." (CT, 395, at Section 1 of paragraph entitled "Statement of Policy.") Aubrey's policy required that its Job Foremen "make sure work is performed in a safe manner and no unsafe conditions or equipment are present." (CT, 396, at section 8 of paragraph entitled "Job Foremen.") Workers, like Verdon, were to "correct unsafe acts or conditions within the scope of the immediate work." (CT, 396, at section 3 of paragraph entitled "Workers.") This policy governed all of Aubry's operations. (CT, 394.) Respondents' mistaken argument therefore goes to the crux of Petitioner's request that this decision be depublished and remanded to the Court of Appeal for modification.

As occurred in the *Evard* decision, here the Court of Appeal did not rely on the complete record to establish its findings with respect to the course and scope of work performed by Anthony Verdon as an employee of Aubry. The Court of Appeal found as a matter of law that U.S. Airways violated a nondelegable duty, and that the alleged violation, by itself and without a finding of causation, was sufficient

to warrant liability. But it is incontrovertible that no causation can be established, because the intervenor and his co-workers disavowed incident reports stating that the intervenor stuck his hand into the moving conveyor belt to remove debris, and replaced the reports with declarations stating they had no idea how the accident occurred. (*Seabright Insurance Co v. U.S. Airways, Inc.* (2010) 183 Cal.App.4th 219, 224, fn 5.) Thus, it is inherent in the Court of Appeal's decision that it found U.S. Airways negligent without the necessity of finding causation. In this way, the decision essentially creates strict liability for a simple negligence claim. No causation has been established, yet liability for negligence attaches. Moreover, the finding of a nondelegable duty in a regulation that expressly applies to all employers, coupled with facts demonstrating on their face that Aubry was the only party who could have identified a safety violation but failed to rectify it or notify the owner of its existence, is reason enough to consider review and depublication at the very least.

D. The Costly Effect Of The Underlying Decision On Industries That Rely On Specialty Contractors Should Not Be Glossed Over As Insignificant

As was stated in the Petition, the confusion over *Hooker's* application where an alleged nondelegable safety violation has occurred has significant and costly implications for the airline industry and other industrial entities which must rely upon specialty contractors to do work that the entity cannot perform due to lack of capacity and expertise in the contracted services. The price of doing business with any independent contractor will have to include additional sums to cover employee medical expenses which otherwise

would, and should, be covered solely by the workers compensation coverage already paid for through the contract price. Under current economic conditions which are unlikely to improve in the immediate future, industries such as the airlines will indeed suffer from the imposition of economic consequences from which the law is supposed to afford protection. For these reasons as well, review is sought in good faith and is warranted.

Respectfully submitted,

DATED: June 7, 2010

KENNEY & MARKOWITZ L.L.P

By: _____

KYMBERLY E. SPEER
ELIZABETH D. RHODES
Attorneys for Defendant
U.S. AIRWAYS, INC. (erroneously sued herein as AMERICA WEST AIRLINES)

CERTIFICATE OF WORD COUNT
First Appellate District Case No. A123726
(Cal. Rules of Court, rule 8.504(d)(1))

I, Elizabeth D. Rhodes, an associate with Kenney & Markowitz, counsel for Defendant and Respondent U.S. Airways, Inc., hereby certify on its behalf, that the length of this Reply to Appellants' Answer to Petition for Review is 2,309 words, relying on the word count of the computer program used to prepare the brief.

Dated: June 7, 2010

ELIZABETH D. RHODES
State Bar No. 218480

Case Title: *Seabright Insurance Company v. City and County of San Francisco, et al.*
Court: Supreme Court of California
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]

I, the undersigned, state:

I am a citizen of the United States. My business address is 255 California Street, Suite 1300, San Francisco, California 94111. I am employed in the City and County of San Francisco. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as follows:

PETITIONER'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR REVIEW

on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed and served as follows:

Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102 **(Original and 13 Copies - Via Messenger)**	**Case No. S182508**

Court of Appeal **First Appellate District** **Division Four** 350 McAllister Street San Francisco, CA 94102 **(1 copy– Via U.S. Mail)**	**Case No. A123726**
Peter J. Busch, Sup. Judge **Superior Court of California** County of San Francisco 400 McAllister Street San Francisco, CA 94102 **(1 Copy Via U.S. Mail)**	**Case No. CGC-06-458707**
Barry W. Ponticello, Esq. Nadine D.Y. Adrian, Esq. ENGLAND PONTICELLO & ST. CLAIR 701 B Street, Suite 1790 San Diego, CA 92101-8104 **(1 Copy -Via U.S. Mail)**	**Counsel for Seabright Insurance Co.**
Samuel Cloyd Mullin III HODSON & MULLIN 601 Buck Ave Vacaville, CA 95688 **(1 Copy -Via U.S. Mail)**	**Counsel for Anthony Verdon**
Michael Padilla, Esq. O'MARA & PADILLA 12770 High Bluff Drive, Ste. 200 San Diego, CA 92130 **(1 Copy -Via U.S. Mail)**	**Co-Counsel for Anthony Verdon**
Lisa A Lenoci, Esq. Dimalanta Clark, LLP 436 14th Street, Ste 1305 Oakland, CA 94612 **(1 Copy -Via U.S. Mail)**	**Associated Counsel for US Airways, Inc.**

[X] BY PERSONAL SERVICE – Following ordinary business practices, I caused to be served, by hand delivery, such envelope(s) by hand this date to the offices of the addressee(s).

[X] BY FIRST CLASS MAIL – I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.

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 this date in San Francisco, California.

Dated: June 8, 2010	
	JANIE CROWLEY