SUPREME COURT COPY

No. S182508

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

SUPREME COURT
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San Francisco Superior Court Case No. 458707

APPELLANTS' JOINT ANSWER BRIEF ON THE MERITS

HODSON & MULLIN
Samuel C. Mullin, SBN 139193
601 Buck Avenue
Vacaville, CA 95688
(707) 452-9606 (telephone)
(707) 452-9607 (facsimile)

O'MARA & PADILLA
Michael Padilla, SBN 067060
12770 High Bluff Drive, Suite 200
San Diego, CA 92130
(858) 481-5454 (telephone)
(858) 720-9797 (facsimile)

Attorneys for Plaintiff/Appellant Anthony Verdon Lujan

ENGLAND PONTICELLO & ST.CLAIR
Barry W. Ponticello, SBN 159339
Nadine D.Y. Adrian, SBN 190973
701 B Street, Suite 1790
San Diego, CA 92101-8104
(619) 255-6450 (telephone)
(619) 255-8981 (facsimile)

Attorneys for Plaintiff/Appellant Seabright Insurance Company

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I. ISSUE PRESENTED

U.S. Airways, Inc. (hereinafter referred to as "Respondent"), had both contractual and regulatory nondelegable duties to cover and guard the moving parts of a conveyor at the San Francisco Airport. Respondent failed to cover and guard the moving parts of the conveyor. As a result of the lack of covering and guarding of the conveyor, an employee of one of Respondent's contractors was injured. Based on its breach of both contractual and regulatory nondelegable duties, is Respondent liable under an exception to *Privette v. Superior* Court (1993) 5 Cal. 4th 618, 21 Cal. Rptr. 72, 854 P.2d 721 *(Privette)* and its progeny, such that the Court of Appeal's decision should be upheld?

II. STATEMENT OF THE CASE

A. Procedural History

This matter involves a subrogation action brought by Seabright Insurance Company (hereinafter referred to as "Seabright") based on California Labor Code sections 3850, *et seq.*, as the workers' compensation carrier for employer Lloyd W. Aubrey Company (hereinafter referred to as "LWA"), whose employee, Anthony Verdon Lujan (hereinafter referred to as "Verdon") was injured in the scope and course of his employment. Verdon later intervened.

Respondent U.S. Airways filed Motions for Summary Judgment against Seabright and Verdon (hereinafter referred to jointly as "Appellants"). Respondent asserted it could not be liable as a matter of law based on the *Privette/Toland* line of cases, which provide that a non-negligent hirer is not liable for damages sustained as the result of an injury to the employee of a contractor. *Privette, supra; Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 74 Cal. Rptr.2d 878, 955 P.2d

504 (*Toland*). Following the submission of Oppositions and oral argument, Respondent's Motions were granted by Orders dated November 6, 2008 (as to Seabright) and November 7, 2008 (as to Verdon). (See *Clerk's Transcript*, Vol. IV, pp.1053-1060.) Pursuant to section 437c(m)(1) of Code of Civil Procedure, Appellants filed a Notice of Appeal on December 11, 2008.

The Court of Appeal, First District, Fourth Division, issued its Opinion on March 29, 2010, *Seabright Insurance Co. v. U.S. Airways, Inc.* (2010) 183 Cal.App.4th 219 and reversed the trial court's grant of summary judgment.

B. Factual Background

On November 3, 2005, Verdon, a union Millwright, severely injured his arm, elbow, wrist, hand and upper extremity while performing maintenance work on luggage conveyor #10 (hereinafter referred to as "conveyor"), which was leased by Respondent from the City and County of San Francisco and located at the lower levels of San Francisco International Airport ("SFO"). (*Id.*, Vol. I, p. 23, 287.) The November 3, 2005 injury ended Verdon's career as a union millwright. (*Id.*, Vol. II, p. 324.) Respondent operated its portion of the SFO conveyors, as do the other airlines, under a Space and Use Permit from the owner, City and County of San Francisco. (*Id.* Vol. I, pp. 48-86.)

LWA's agreement with Respondent to perform maintenance on its luggage conveyor is memorialized in a two-page document dated February 12, 1996, entitled "SERVICES AGREEMENT" (hereinafter referred to as "Agreement"). (*Id.*, pp. 93-94.) The Agreement provides for a basic preventative maintenance program for the subject conveyor at a cost of $120/month. (*Id.*) LWA was not retained by Respondent to analyze, assess or make recommendations regarding the safety of the conveyor; rather,

LWA simply inspected the conveyor periodically for the sole purpose of performing necessary maintenance to keep the conveyor in working order, i.e., "to keep the conveyors running". (*Id.*, pp. 42-43, 93-94, Vol. III, pp.668-674, 677-679.)

The incident occurred while Verdon was performing a routine inspection of the conveyor for Respondent. (*Id.* Vol. III, p. 657.) In order to accomplish the inspection of the equipment, LWA employees were required to work in a poorly lit, tight/cramped space in the area of the conveyor's moving parts. (*Id.* at 680-685.) To perform this inspection, the conveyor could not be shut down as it was necessary for Verdon to keep the conveyor running in order to observe/listen for certain problems, malfunctions, etc. (*Id.* at 657-658.) While performing his inspection of the conveyor, Verdon's arm became caught and entrapped in the moving conveyor parts, resulting in a career ending injury. (*Id.*)

III. SUMMARY OF ARGUMENT

This is a case of direct negligence of the Respondent, and not one of vicarious liability. This negligence results from Respondent's failure to comply with regulatory nondelegable duties, which failure caused the injury to Verdon.

The Court of Appeal, First District, Fourth Division, in its Opinion in our matter noted in footnote 14 that there may be "two strands of judicial thought on the interpretation of footnote 3 of *Hooker*. *Barclay* and *Evard* take the view that the breach of a nondelegable statutory or regulatory safety obligation, without more, can create a triable issue as to whether the hirer affirmatively contributed to the employee's injury, while *Millard* and *Madden* take the view that it cannot." While Appellants acknowledge the potential conflict that may exist, under any "strand" of *Hooker v. Department of Transportation (2002) 27 Cal.4th 198, 212, fn. 3, 115 Cal.*

Rptr.2d 853, 38 P.3d 1081 (Hooker) interpretation, this matter contains sufficient admissible evidence to submit the disputed issues to a finder of fact.

Additionally, Respondent erroneously combines the "retained control" exception established by *Hooker* and the "nondelegable duty" exception articulated in *Evard* and *Madden* to create its own new more restrictive three-pronged test when combined with "affirmative contribution". While Appellants contend this is an attempt to impermissibly create a new, more restrictive standard to suit its attempts to escape liability for its nondelegable duty breach, in light of U.S. Airways' employees' activities in and around the conveyor, which included "clearing baggage jams", there are disputed facts as to whether U.S. Airways retained control. As noted in footnote 4 of the appellate decision, "Appellants presented evidence, which U.S. Airways did not dispute, that at times U.S. Airways's own employees entered the work space where the conveyor was located to clear baggage jams." As such, undisputed evidence exists as to retained control, such that this case would meet even a newly created three-pronged expanded test. Further, by the very nature of not being able to delegate a duty, the party who possesses the nondelegable duty "retains control" over that obligation such that arguing for such an additional test appears moot.

The undisputed fact is that there was no compliance with sections 3999 and 4002 of Title 8 of the California Code of Regulations regarding covering and guarding. These duties existed for Respondent before LWA and Verdon ever entered the airport premises, and are nondelegable. These regulatory duties to guard did not arise as a consequence of or during LWA's work. The admissible evidence herein establishes sufficient issues of material fact that Respondent's breach of its nondelegable regulatory

duties affirmatively contributed to the cause of Verdon's injury. Finally, the Court of Appeal's Opinion is consistent with the well-established public policy of the State of California that a hirer be held accountable for its direct negligence.

IV. STANDARD OF REVIEW

As a motion for summary judgment raises only questions of law, this Court's review is *de novo*, "considering all of the evidence the parties offered in connection with the motion (except that which the trial court properly excluded) and the uncontradicted inferences the evidence reasonably supports." *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.

V. ARGUMENT

A. Respondent's Regulatory Duty to Cover and Guard the Moving Parts of its Conveyor was Nondelegable.

The regulations at issue are General Industry Safety Orders. *See* 8 CCR §§ 3999, 4002. As correctly noted by the appellate court in our case,

> The obligations imposed by the regulations at issue here are not connected to construction or to work that would naturally be done by independent contractors who would control conditions at a constructions site....The regulations impose a continuing obligation to provide guards for conveyors and their moving parts and to provide adequate lighting, an obligation that inured to the benefit both of Aubry's employees and of U.S. Airways's own employees when they entered the conveyor area to clear baggage jams. Appellants offered undisputed expert evidence that the conveyor was not properly guarded as required by the applicable regulations. Thus, the regulations impose a nondelegable duty to provide guarding, and this duty survives *Privette* and its progeny.

There is no legitimate evidentiary or legal basis to disturb the appellate court's finding in this regard. Before Verdon set foot on Respondent's property to conduct his visual and audio inspection of the conveyor,

Respondent was under a long standing duty to provide specified safeguards or precautions for the safety of others, namely, to cover and guard the conveyor's moving parts.[1] This duty ensured that Respondent's premises would be maintained safely for anyone that entered, including its own employees and vendors. There was nothing that Verdon or his employer did to trigger the imposition of the duty, and neither Verdon's presence, nor the work he undertook on behalf of LWA, could eradicate Respondent's permanent obligation to comply with the statutes.

The foregoing indisputable facts clearly distinguish this matter from other cases where plaintiffs have failed to establish a nondelegable duty gives rise to a hirer's liability. For example, *Madden v. Summit View, Inc.* (2008) 165 Cal. App.4th 1267, 81 Cal. Rptr.3d 601 *(Madden)* involved a dynamic work of improvement, and the regulation at issue was Title 8, Code of Regulations section 1621, a Construction Safety Order. *See* 8 CCR §1621. At no point *prior* to the commencement of the contractor's work was the regulatory duty at issue (erection of a guardrail) imposed upon the hirer of the contractor. The duty only arose after construction commenced, and only if the work conditions fit within the regulatory criteria. Thereafter, as is common in the construction context, compliance with section 1621 was *delegable* as between the general contractor and the subcontractors working on the site.

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[1] Respondent's duties not only arose by statute, but also by contract, as set forth in the Space and Use Permit between Respondent and the City and County of San Francisco. (See *Clerk's Transcript,* 48-82.) That contract required Respondent to "[a]t all times . . . cause the Premises and its operations [there]under to comply with all present and future . . . state . . . laws, rules, regulations and ordinances . . ." and ". . . keep the Premises, including the baggage handling system, and every part thereof in good condition and repair, and in compliance with applicable Laws . . ." (See *Clerk's Transcript*, 60, 66.)

Similarly, in *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, the employee of a subcontractor hired by the general contractor to demolish water pipes during renovation of a dormitory at Pomona College, sustained serious injuries when he fell from a ladder. See *Padilla*, *supra*, at 664-665. He was standing on the ladder to demolish an unpressurized cast-iron metal pipe. *Id.* at 665. During the demolition, part of the pipe came loose and fell, striking a pressurized PVC pipe and breaking it. *Id.* The gush of water knocked Padilla off the ladder. *Id.* The PVC pipe was not to be demolished and remained pressurized to continue to provide water during the renovation. *Id.* Padilla and his employer knew of the PVC pipe and knew it was not to be demolished or damaged. However, they did not know it would remain pressurized. *Id.*

Relying on *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, Padilla argued that Code of Regulations section 1735(a) imposed a nondelegable duty on the hirer (the general contractor) and Pomona College to depressurize the PVC pipe prior to demolition. *Id.* at 671. The *Padilla* court recognized that "a nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety . . . ," but stated that it was the ". . . nature of the regulation itself that determines whether the duties it creates are nondelegable." *Id.* at 673.

In granting summary judgment, the *Padilla* court reasoned that section 1735(a) did not specify who must perform the acts described in the regulation and did not expressly place that obligation on the landowner. Thus, contrary to our case, there was no basis to conclude the duties in section 1735(a) could not be delegated, as the duty to depressurize the pipe did not arise until demolition was undertaken. See *Id.*

1. The Legislative History of Section 4002 Does not Establish It was Intended to be Delegable.

Respondent asserts that the legislative history of section 4002 is instructive to the Court as to whether the duty it imposes is delegable. In support of its position, Respondent provided the Court with one hundred forty (140) pages of legislative history[2] that it argues establishes section 4002 was never contemplated to be nondelegable. Respondent's position relies solely on the absence of any discussion documented in the legislative history that in revising section 4002, the legislature intended it to be nondelegable.

The documents presented relative to the proceedings which took place in 1974 and 1981-1982[3] inform this Court of the following: First, the Legislature undertook a comparison between the Federal OSHA standards and the California OSHA standards and determined that the California OSHA standards ought to be revised to be "at least as effective" as the Federal standards. *Petitioner's (sic) Request*, Exhibit 3-4. Second, the proposed changes to section 4002 represented only a "condensation of existing machine guarding requirements. . . contained in section 4002, 4003 and Article 55." *Id.* at Exhibit 3-44, 45. Therefore, the proposed revisions did not represent substantive changes. *Id.* Members of the affected

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[2] Appellants note that the voluminous documents concerning the legislative history of section 4002 are the subject of a pending Request for Judicial Notice by Petitioner (sic). The Court has yet to rule on that Request. Appellants note the Request was not in compliance with Rule 8.252(a)(2)(A)&(C) of the California Rules of Court.

[3] The proceedings offered took place decades before the non-delegable duty basis for liability of a hirer could be addressed by the courts in the context of *Privette*.

industries participated in the proceedings, according to the documents provided, arguing, in part, that the potential cost of compliance with the revised version of section 4002 outweighed the utility of those changes. (See *Id.* at Exhibit 3-37, 3-126, 3-129, 3-133, 3-136.) These concerns were considered, and the Occupational Safety and Health Standards Board, in its Final Statement of Reasons, dated July 22, 1982, held that the purpose of the proposed revisions to section 4002 was to consolidate the guarding requirements in sections 4002 and 4003 and to include additional guarding requirements. *Id.* at Exhibit 3-137.)

Respondent argues that the documents presented provide an "analysis of the meaning and intent of the Legislature and the agency in drafting [section 4002]." *Petitioner's (sic) Request*, pp.10-11. Within the 140 pages of materials provided, there is no reference to any consideration of (1) whom, with respect to a particular work site, would be responsible for compliance with section 4002, or (2) whether at a multi-employer work site, compliance with section 4002 was delegable by the owner of the premises. The documents do show that Cal OSHA was not considering revisions to its regulations for the purpose of determining whether the duties the regulation created were delegable or not. The stated purpose was to make the Cal OSHA regulations at least as effective as the Federal equivalent and to condense the guarding requirements into section 4002. Since the issue of delegability was not part of Cal OSHA's agenda, the absence of any reference or discussion concerning the same does not tend to prove or disprove any legislative intent relative to delegability of the duties outlined in section 4002. Further, even if section 4002 applied equally to LWA, that argument goes to comparative fault, not delegability

of Respondent's permanent duty to guard whether it hired LWA or not.[4] Based on the foregoing, Respondent's argument in this regard fails.

B. Where There is a Breach of a Nondelegable Duty by a Hirer That Causes Injury to an Employee of the Hirer's Contractor, An Exception to *Privette* Exists.

Evard stands for the proposition that where the breach of a nondelegable duty causes the subject injury, an exception to *Privette* exists, and an employee of a contractor is allowed to proceed in a cause of action against the directly negligent hirer. The Court of Appeal correctly noted that *Evard's* holding continues to promote this Court's rationale that ". . .the liability of the hirer in such a case is *not* '"in essence 'vicarious" or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor."' *Seabright, supra*, at 232 (citing *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244 (quoting *Toland v. Sunland Housing Group, Inc.* (1993) 18 Cal.4th 253, 265)). *Evard* is consistent with the public policy of holding parties accountable for their direct negligence.

Of significance in our case is the fact that Respondent, at all times, was the entity legally responsible for compliance with Code of Regulations sections 3999 and 4002. Even if there was no such nondelegable duties placed upon Respondent, the Agreement between Respondent and LWA eliminates the possibility that those duties were delegated to LWA. (See *Clerk's Transcript*, Vol. 1, pp. 60, 66.) It cannot be disputed that Respondent remained obligated to ensure the equipment was in compliance with Code of Regulations sections 3999 (cover) and 4002 (guarding) irrespective of whether or not it hired LWA to perform preventative maintenance and repair of the conveyor. It is undisputed that the conveyor

[4] To the extent Respondent establishes comparative fault is at issue, it supports the parties' right to have a jury decide liability.

had open and unguarded moving parts in violation of these regulatory mandates.

The facts in our case are similar to those in *Evard, supra*. The issue in *Evard* was whether the owners of a billboard, who hired Evard's employer, A.M.P. Tree Service, negligently violated a regulation that required them to maintain the billboard in a safe condition and to provide precautions against injuries to workers performing work on the billboard. *Evard, supra*, at 142-143. Specifically, Title 8, California Code of Regulations section 3416(a), a General Industry Safety Order, mandated the use of a horizontal safety line in the absence guardrails for platforms of a certain height. *Id.* at 147.

The *Evard* court found that the owner of the billboard was responsible for complying with section 3416(a). The Court opined that the *Privette* line of cases did not abolish liability for breach of a non-delegable duty imposed by statute or regulation. As *Evard* instructs: "[a] non-delegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." *Id.* at 146, citing *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App. 4th 1032, 1036.

The *Evard* court further emphasized, that:

> A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. Restatement Second of Torts, section 424 states the nondelegable duty rule as follows: "One who by statute or administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

Id., citing *Felmlee*, supra, at pg. 1038.

In our case, Respondent, just as the owners of the billboard in *Evard*, had a duty to comply with regulatory requirements (covering and guarding) to prevent injuries from those in and around the conveyor. Both Respondent herein and the billboard owner in *Evard* failed to comply with their nondelagable duties, leading to injury. These are both situations of direct, rather than vicarious liability.

Based on the same, the Court's reasoning in *Evard* is sound, and as the present case is analogous to the circumstances in *Evard*, the Court of Appeal's Opinion should be affirmed.

1. The Evidence Herein Establishes Issues of Material Fact Regarding Affirmative Contribution Consistent with *Hooker*.

If the Court finds that there is a second strand of footnote 3 of *Hooker* that requires affirmative contribution which must be followed, that may change the standard to be applied to nondelegable duty matters, but does not change the result in this case as there are material issues of disputed fact that should be allowed to be submitted to a jury. The First District in our matter correctly noted that regardless of the admissibility of Appellant's expert's testimony, "we conclude that even without this testimony there is sufficient evidence to raise a triable issue of fact as to whether the lack of guarding was a cause of Verdon's injury. (*Seabright* p.236)

In our case, the testimony by Verdon established that he was performing routine maintenance, which first required a visual inspection of the conveyor and its moving parts, which in turn requires the conveyor to be running in order to observe and listen to the conveyor for problems and/or malfunctions. (*Clerk's Transcript*, Vol. III, pp. 657:27-658:4.) He was working in a tight/cramped space, which limited his available range of

body movements and positions. (*Id.*, at 658:4-6.) He was accompanied by his co-workers, Marco Muniz and Noel Varela on the site, but they were inspecting other sections of the conveyor or undertaking other activities and did not witness the incident. (*Id.* at 658: 10-11.) "While performing [his] visual inspection of the conveyor, [his] arm got caught in the moving parts," causing his injuries. (*Id.* at 658:7-9.) He denied reaching into or knowingly placing any part of his body into or unreasonably close to the conveyor's exposed moving parts while it was running. (*Id.* at 658:15-18.)

Reasonable inferences drawn from the foregoing testimony[5] include that there was no other person present in the same "space" as Verdon when his arm became caught.[6] Respondent's agreement with the trial court that Appellants had "no evidence of any linkage" and "[did not] know how this accident happened" is simply not supported in the record and has no merit. (See *Reporter's Transcript*, 13:11-13.) The only conclusion that can be reached is that the uncovered, unguarded pinch point where the conveyor was exposed caused Verdon's arm to become inadvertently sucked into the moving parts while he performed his visual inspection.

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[5] In ruling on a Motion for Summary Judgment, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party." (*Clerk's Transcript*, Vol. 1, p. 289 (citing *Kids Universe v. IN2LABS* (2002) 95 Cal.App.4th 870, 878; quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843).)

[6] The trial court's concern that he could have been pushed, for example, lacks foundation and is inconsistent with that reasonable inference. Similarly, the trial court's concern that he may have tripped, in the absence of some supporting evidence, is inconsistent with the court's obligation to consider all of the evidence and all of the inferences reasonably drawn there from in the light most favorable to Appellants. Even assuming Verdon tripped or was pushed, this would still not be a bar to the action, but would go to the issue of comparative negligence.

The issue presented herein highlights the court's discussion in *Evard* that "the owners' mere omission to comply with the order was sufficient in itself to create a triable issue of material fact as to whether the owners 'breached their nondelegable duty in a manner that affirmatively contributed to Evard's injury.' " *Madden, supra*, 165 Cal.App.4th at p. 1280 (quoting *Evard, supra*, 153 Cal. App. 4th at pp. 147-149). In the present case, the Court of Appeal, while acknowledging this school of thought in footnote 14 of its Opinion, correctly concluded that Appellants presented sufficient evidence to create triable issues of material fact as to affirmative contribution as a separate causation prong based on the *Hooker* analysis.

Hooker established that the "affirmative conduct" can be in the form of an omission:

> Such affirmative contribution need not always be in the form of directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. 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, supra, at 212, fn. 3. The mechanism of Verdon's injuries is not in dispute- he was injured by the unguarded moving parts of the conveyor while working in a poorly lit, cramped space, with limited range of motion. (See *Clerk's Transcript*, Vol. III, pp. 657-659, 680-685.) It is further undeniable that the work conditions themselves posed a risk to Verdon's safety. (*Id.*, at pp. 680-685.) The work conditions were caused by Respondent's omission in complying with sections 3999 and 4002 of the Code of Regulations. (*Id.*) The fact that there is a causative link between the breach of a nondelegable duty and the injury is the determinative issue.

In regard to affirmative contribution, our case is distinguishable from the facts in *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, and *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, wherein the courts agreed the *Hooker* analysis was required. In *Madden,* the court opined that the respondent's conduct was nothing more than a 'mere failure to exercise a power,' and therefore did not affirmatively contribute to Madden's injuries. (*Madden*, *supra*, at p. 1275.)

Unlike the hirer/general contractor in *Madden*, Respondent in this case did not merely fail to exercise a power, but instead, by its own admission, outright ignored *for a period of years* its statutory nondelegable duty and contractual obligations as outlined in the Space and Use Permit. (See *Clerk's Transcript*, Vol.1, pp. 25-27, 30-31.) Apparently, since December 5, 2001, it never undertook to secure an inspection of the conveyor to determine whether its condition was in compliance with California Code of Regulations sections 3999 and 4002, all General Industry Safety Orders. The Respondent's affirmative contribution is its omission to comply with its obligations to fulfill its nondelegable duties and contractual obligations, such omission in keeping with the *Hooker* affirmative contribution requirements.

Contrary to Respondent's representations, the Airport Commission Resolution merely shows that before December 5, 2001, the conveyors were not operating reliably and a resolution was passed to "bring the Equipment back to minimum operating condition." (See *Clerk's Transcript*, Vol. I, p. 42.) Moreover, though the scope of the Agreement between Respondent and LWA could not be more specific, Respondent has sought the Court's interpretation that the same relieved it of its nondelegable duty. (*Id.*, at pp. 93-94.)

Additionally, the *Madden* court concluded that the absence of the railing did not render the appellant's work especially dangerous, since the general contractor did not direct the ways and means of the electrican's work. Unlike the facts in *Madden*, Verdon's work was especially dangerous, due to the absence of a covered pinch point and insufficient illumination, and because the conveyor maintenance, by its very nature, required him to work in a cramped, dark space with limited range of motion, even if Respondent did not direct the ways and means by which Verdon performed the maintenance.

This case is also distinguishable from *Millard*. In *Millard*, the court defined affirmative contribution in the context of retained control. The *Millard* court concluded that affirmative contribution of a general contractor who contracted for work on a building remodel was defined as being "actively involved in or asserting control over the manner of performance of the contracted work." *Millard*, *supra*, 156 Cal.App.4th at p.1348 (quoting *Hooker*, *supra*, 27 Cal.4th at p. 215) (citations omitted). The *Millard* court did not consider the "omission" as affirmative contribution as allowed under *Hooker*. Moreover, plaintiff in *Millard* argued the defendant's duty arose from a generic duty of care pursuant to Labor Code section 6304.5, rather than the breach of specific General Industry Safety Orders. Like the facts in *Madden*, the facts in *Millard* involved a dynamic work environment where various duties arose as the work progressed.

2. Retained Control is Not Required To Prove a Nondelegable Duty Exception to *Privette*

The basis for Respondent's arguments lies in its misinterpretation of the body of law established by *Privette* and its progeny. *Privette* and the cases that followed established a general rule in California that a non-

negligent hirer could not held liable for an injury to the contractor's employee based on vicarious liability. In *Hooker,* this Court recognized an exception to the general rule where a hirer (1) retains control and (2) the negligent exercise of that retained control affirmatively contributes to the cause of the worker's injury. *Hooker*, *supra*, at 210. This Court further articulated that a hirer's omission, as well as affirmative conduct, could be used to establish liability. *Id.* at 212, fn.3.

Following *Hooker*, other exceptions to the *Privette* doctrine have been recognized, including where the hirer provides dangerous equipment that affirmatively contributes to the cause of the worker's injury, and the breach of a nondelegable duty that affirmatively contributes to the worker's injury. See *McKown v. Walmart* (2002) 27 Cal.4th 219; *Evard v. Southern California Edison* (2007) 153 Cal. App.4th 137; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661.

As articulated in *McKown*, this Court's creation of a second exception to *Privette* based on the provision of dangerous equipment was in keeping with its analysis in *Hooker*, which provided:

> The rule of workers' compensation exclusivity "does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury", and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer. *Hooker*, supra, 27 Cal.4th at p. 214 (citations omitted).

The foregoing is the cornerstone of what is commonly referred to as the "*Hooker* analysis" in the context of *Privette*. Later, the *Madden* and *Padilla* decisions applied this Court's rationale in *Hooker* and *McKown* to the scenario where the hirer is charged with a nondelegable duty, creating a third exception to the *Privette* doctrine. In *Madden* and *Padilla*, the Courts

found that in addition to the breach of a nondelegable duty, the *Hooker* analysis must apply- that is the breach of the nondelegable duty must affirmatively contribute to the cause of the injury. Thus, in each of the three exceptions to the general rule of *Privette*, at the most a two prong test applies, the second prong consisting of the *Hooker* analysis.

It should be noted that while *Millard* dealt with the issue of regulatory duties, *Millard* did not consider the breach of a nondelegable duty and is thus distinguishable from the nondelegable duty standard. Thus, there is no legal authority supporting Respondent's new standard that under *Hooker*, the contractor must first prove the hirer retained control before the breach of a nondelegable duty is at issue. By contrast, relevant case law clearly establishes that the retained control and nondelegable duty exceptions to *Privette* are separate and distinct theories of liability. The *Hooker* analysis concerning affirmative contribution, including an omission as constituting affirmative contribution, considers the issue of direct negligence and causation-rather than the issue of retained control. Based on the foregoing alone, Respondent's arguments are fundamentally flawed and the Court of Appeal opinion should be affirmed. Again, this is a case of direct negligence not vicarious liability.

C. Affirming the Court of Appeal Opinion Will Not Expand Liability in California and is Consistent with the Public Policy to Hold Parties Accountable for Their Direct Negligence.

The fundamental public policy advanced by the *Privette-Toland* doctrine is that it is illogical and unfair to subject the hirer "who did nothing to create the risk . . . to greater liability than that faced by the independent contractor whose negligence caused the employee's injury." *Toland, supra* at 256. This Court will continue to advance such policy if it affirms the Court of Appeal Opinion. Here, Respondent alone created the

risk that others may sustain injuries, including its own employees, by breaching its statutory and contractual duties, which arose irrespective of the work or activity of Verdon and LWA. The liability of Respondent is not premised upon the negligence of an independent contractor who caused its own employee's injury, but on its own direct negligence. Any argument that LWA should have discovered and corrected the uncovered, unguarded moving parts in its efforts to fulfill its general duty to its own employees to provide a safe workplace only creates an issue of comparative fault, which should be decided by a jury.

Respondent argues that public policy is consistent with holding Respondent immune from liability based solely on its unsupported assertion that since it hired LWA to maintain the conveyors, it was LWA's duty alone to make the conveyor safe. The Agreement between Respondent and LWA, however, disposes of any question that LWA was retained to perform safety compliance analysis of the equipment as the scope of its work is described as only "[p]reventative [m]aintenance and repair of conveyor system." (*Clerk's Transcript*, Vol. 1, p. 93.) There is no evidence that LWA undertook anything more, or that it was contractually bound to do so. Respondent argues that the information contained on the LWA website regarding safety supports its position that LWA employees are trained to identify and correct safety hazards like its uncovered and unguarded conveyor, and therefore requests this Court assume Respondent hired LWA to do so.[7]

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[7] The website information is the subject of Respondent's pending Request for Judicial Notice. Appellants assert the website information does not satisfy section 452(h) of the Evidence Code as the purported facts and/or propositions contained therein (based solely on Respondent's interpretation) are vague and ambiguous and are reasonably subject to dispute by the evidence contained in the Record herein. Moreover, any

Respondent's logic is flawed. In this case, the website information is simply part of LWA's internet marketing and advertisement, describing a broad range of safety related matters not specific to any job, contract or project undertaken by LWA. The website does not state that every LWA employee has some specific training, knowledge or expertise in the field of Cal OSHA compliance. It also does not represent every project undertaken by LWA includes the evaluation of Cal OSHA compliance of a customer's premises. In that regard, this case is distinguishable from *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, upon which Respondent relies.

In *Gentry*, Defendant eBay was sued by online purchasers based on forged autographed sports items posted for sale on its website by a third party. The court in *Gentry* considered whether eBay was an interactive service provider (ISP), subject to specific regulations and protections pursuant to 47 U.S.C. Section 230, sufficient to sustain the granting of a demurrer. The very nature of eBay's business was online services, and whether it qualified for immunity set forth in section 230 as an ISP impacted whether the demurrer was sustainable. Thus, eBay's description on its website of the nature of services it provided was relevant to the issues before that court. Unlike eBay, LWA does not provide services online, and its website is not the forum within which it conducts its business. Thus, the website information does not tend to prove that the LWA employees at

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probative value of the website information is substantially outweighed by its prejudicial impact and potential to confuse the issues. Respondent presents the information as a substitute for direct evidence of any contractual obligation or agreement on the part of LWA to provide Respondent with services related to Cal OSHA compliance at Respondent's premises. The contract between the parties, which is in the Record, speaks for itself, and does not describe an agreement to provide services related to Cal OSHA compliance. This website information was available to Respondent at all times prior to this stage of the appeal. No effort was made to present the same at the trial court or Court of Appeal proceedings.

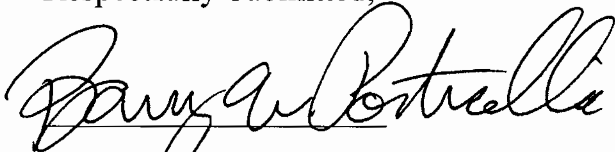
Respondent's premises had the requisite knowledge and expertise to evaluate Respondent's premises for compliance with section 4002[8], or that Respondent contracted with LWA to do so.

Appellants request that this Court only confirm what is the policy of the State of California: that one, who by statute or administrative regulation, is under a duty to provide specified safeguards or precautions for the safety of others, will be held accountable for all harm proximately caused by its failure to meet that duty. Accordingly, the Court of Appeal Opinion should be affirmed.

VI. CONCLUSION

The policy of the State of California is to hold those with direct liability accountable for the harm caused by their negligence, while absolving passive, non-negligent hirers from liability for damages caused by the negligent acts of others. Respondent herein is directly negligent and is not a passive, non negligent hirer who should be immunized.

Respectfully Submitted,



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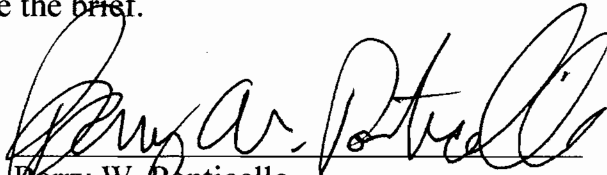
[8] This may assume section 4002 is delegable, which is at issue in this case, and disputed by Appellants.

CERTIFICATE OF BRIEF LENGTH

Case No. S182508

I, Barry W. Ponticello, an attorney with England Ponticello & St.Clair, counsel herein for Appellant Seabright Insurance Company, hereby certify on behalf of Appellant that the length of Appellant s' Joint Answer Brief on the Merits is 6202 words, relying on the word count of the computer program used to prepare the brief.

Dated: November 12, 2010



Barry W. Ponticello
State Bar No. 159339

PROOF OF SERVICE

CASE TITLE: *Seabright Insurance Company v. U.S. Airways, Inc.*
COURT: State Of California, Supreme Court
CASE NUMBER: S182508

I, the undersigned, an employee of ENGLAND PONTICELLO & ST.CLAIR, located at 701 B Street, Suite 1790, San Diego, CA 92101 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter, action or proceeding. On November 12, 2010, I served the foregoing document(s), described as

APPELLANTS' JOINT ANSWER BRIEF ON THE MERITS

in this action by placing ☐ the original of the document ☒ true copies of the document(s) addressed to the following party(ies) in this matter at the following address(es):

see attached Service List

☒ **BY U.S. MAIL (except as indicated).** I deposited such envelope in the mail at San Diego, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with ENGLAND PONTICELLO & ST.CLAIR's practice of collection and processing correspondence for mailing. Under that practice, documents are deposited with the U.S. Postal Service on the same day which is stated in the proof of service, with postage fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.

I declare under penalty of perjury under the laws of the state of California, that the above is true and correct.

Executed on November 12, 2010 in San Diego, CA

Angela Michaels

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CASE TITLE: *Seabright Insurance Company v. U.S. Airways, Inc.*
COURT: State Of California, Supreme Court
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SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO 400 MCALLISTER STREET SAN FRANCISCO, CA 94102-4514 *(San Francisco Superior Court Case No. CGC-06-458707)*	SAMUEL CLOYD MULLIN III, ESQ. HODSON & MULLIN 601 BUCK AVENUE VACAVILLE, CA 95688 *(Counsel for Respondent Anthony Verdon Lujan)*
MICHAEL PADILLA, ESQ. O'MARA & PADILLA 12770 HIGH BLUFF DRIVE, SUITE 200 SAN DIEGO, CA 92130 *(Co-Counsel for Respondent Anthony Verdon Lujan)*	ELIZABETH D. RHODES, ESQ. KYMBERLY E. SPEER, ESQ. KENNEY & MARKOWITZ L.L.P 255 CALIFORNIA STREET, SUITE 1300 SAN FRANCISCO, CA 94111 *(Counsel for Petitioner U.S. Airways, Inc.)*