**ORAL ARGUMENT — 10/20/99**
**98-1100**
**ELLIOTT-WILLIAMS V. DIAZ**

STEINBERGER: Petitioner is requesting this court to reverse the CA and affirm the TC's summary judgment.

The appeal to here is based on the fact that we believe that the CA misapplied the Restatement Second of Torts, §414 in holding that there was a fact question in this case.

The contract provisions that we have in this case are really unique but probably not so unique that when you deal with a US gov't contract, an entity such as Air Force Exchange, the contract was for the benefit of the Air Force Exchange. It was a strong contract. It has provisions which hold Elliott-Williams, which entered into the contract with Air Force Exchange, responsible. But the CA has equated responsibility with control. And I think that's their basic error, is the fact that those two, at least in my mind, are not the same.

The idea was to protect the Air Force Exchange under all circumstances. And the petitioner has taken the position that it was always and still responsible to the Air Force Exchange. If the refrigerators were not installed improperly, if something went wrong, the petitioner was responsible. But not to the third-parties but to the Air Force Exchange.

This contract was not made for the benefit nor does it really lend itself to a determination that there should be a responsibility on the part of Elliott-Williams as a contractor when they have an independent contractor. And for that reason, actually it should not be allowed to go forward.

There is no duty. And that's one of the things that the CA first said: Well it's our determination: Is there a duty? What is the duty of Elliott-Williams? All the duties that are spelled out in the contract are spelled out in favor of Air Force Exchange. It goes not only to the Air Force Exchange, it goes to its customers, it spells out to its representatives. Not one place in that contract does it say anything about third-parties. And in this particular instance, of course, we have an injury by an individual who was working for another subcontractor on the job. There is nothing said anywhere in the contract. But the CA has determined if Elliott-Williams is responsible for the actions of Lingle, then we must apply the Restatement of Torts and say, Were you responsible? If you're responsible that means that you have the control. And did you exercise reasonable control? That's not the test that this court has set forth as I determine. And the problem is is we have a determination that really opens up an independent contractor's status is going to be questioned in every case.

If parties entering into a contract, where they are not in let's say *Reddinger* and some of the other cases that we've looked at, they actually had provisions in there that we were going

to have OSHA - you need to protect against OSHA, we need to obey the various statutes. There is not anything like that in this contract. What this is is a contract between two parties and it is for the benefit of Air Force Exchange. And looking particularly at the provisions that talk about indemnity, assignment, and some of the things that the appellee is basing their defense on, it says, The contractor will indemnify, hold harmless and defend the Air Force Exchange and all other agencies and instrumentalities of the US, etc. from loss, damage alleged or established to arisen out of or in connection with items of service provided by the contractor unless that damage was caused by the Air Force Exchange. It goes on, That any loss, damage or injury alleged or established to have risen out of or in connection with any other acts _____ of the contract.

It talks about assignment. It says, The contractor may not assign his rights or delegate his obligations. Elliott-Williams did not assign his rights. It did not attempt to say, Lingle, you're going to be responsible to the Air Force Exchange. What it did is it contracted with Mr. Lingle. The affidavits show the method of the contract, the way the terms were, who was supposed to do what. There was not any operational control. And there was not anything called for. It also says that, The contractor is fully responsible for the actions of all employees and contracted representatives. If responsibility, and that is liability to the Air Force Exchange is going to be construed to be the same as to say, Well if you're responsible, therefore, it means you have control, and therefore, we have to make the second test to go down: Did you exercise that control reasonably? Did you look and was that control exercised over the given area that caused this accident? Which generally you're not responsible for an independent contractor?

The only place, and this goes onto a section 19 of the attached contract, talks about contractor liability, and this is something that the appellee has fastened on, but it talks about an injury to person or property proximately caused by action or inaction attributable to contractor. But that only comes into play if in fact Elliott-Williams was in default under the contract, and even then that's pretty broad language.

So really what this case comes down to is the fact that this contract has only one basis, it has a responsibility. As I say, if you're going to equate responsibility with control, then Elliott-Williams is going to be responsible to Mr. Diaz. That's not what this contract is about.

ENOCH: If I own some property and I'm fixing to have some work done on it, and I hire a contractor to come in and do the work, and I assign to the contractor the duty to maintain a safe workplace, and the contractor says, I undertake that obligation, unless the contractor actually complies with the contract and undertakes the activities of maintaining a safe place to work, you don't see under any circumstance that the contractor would be liable for injuries to a subcontractor's employee because of an unsafe place to work?

STEINBERGER: When we talk about an unsafe place to work, if you had - and that goes back to some of the Restatement of Torts and the commentaries, that if you have control over the area, if you have responsibility under the terms of the contract for safety, then you would have some

responsibility.

ENOCH: Your argument is just if you look at this contract it didn't assign to Elliott-Williams any particular duty that the subcontractor's employee is arguing was breached?

STEINBERGER: That's right. It just comes down to the fact that if this test here is allowed to stand, that okay if responsibility means that then you do have control and we need to check on down and see what kind of control you exerted, if that's going to be the test, then it seems to me that nearly every contract that you are going to have with an independent contractor status in it, is going to have to be tested, and it's going to have to be tested factually(?). What is comes down here is there is no dispute as to both the terms of the contract and to the manner of fulfilling the contract.

ENOCH: If this contract had explicitly required Elliott-Williams to be responsible for a safe workplace, there would arguably have been a duty established in this case, and then the only question is whether there was a breach of that duty?

STEINBERGER: Yes.

ENOCH: But because the contract doesn't explicitly do that, the general - just going to be responsible for the activities out there - doesn't create the duty?

STEINBERGER: I don't believe it does. I believe the responsibility that it's speaking to and perhaps I just don't see the problem, but to me it's speaking to a responsibility to the Air Force Exchange. It's a responsibility to indemnify the Air Force Exchange. If the Air Force Exchange were sued by Mr. Diaz, they would have had to have been indemnified. If they had been found in any responsibility Elliott-Williams would have had to indemnify them under the terms of the contract. Because they are responsible to the Air Force Exchange.

GONZALES: Let's suppose the contract was different and it said that Elliott-Williams shall supervise and control the activities of all of its representatives and independent contractors. And if they didn't do that, they would be in breach of their contract with the Air Force, but would they be responsible or liable to Mr. Diaz?

STEINBERGER: Under the cases as this court's been deciding, I think they could be. But that's not the case here. That's what we run into and that's what it appears to me this courts been delineating in the past years, is this status of an independent contractor, and required as a part of the commentary in that Restatement of Torts that there must be some type of provision in the contract and then that provision in supervising on that basis must be done in a reasonable manner.

GONZALES: But in the example I just gave you, if Elliott-Williams did not comport with the contract, if they did not indeed supervise and control the independent contractor, do you think that there would be liability perhaps to Diaz just because they have a contract with the Air Force to

do so?

STEINBERGER: Of course, we're talking about - it comes down of course we've got a tort basis in a contract basis for liability. And of course here we're looking at the tort basis and under the tort law the court has allowed to look to that contract. I guess I'm more of a strict interpreter of contracts and I have some doubts about how you look to a contract for the benefit of a individual who's not mentioned in it. But that's not really the point. The court has applied this restatement of torts and has then set forth the various limitations on it. And for that reason, under your circumstances, it seems to me, yes there could possibly be liability. But it's not there in this case. And I think in cases of this matter, and one of the problems is, is when you're contracting just as a practical matter, particularly with the government, you don't have any choice at all as to what's going to be done. Sure you go in with your eyes open but, nevertheless, you have no choice as to what the terms of that contract are going to be. But here the government protects itself, and if it's going to be particular about protecting everybody it could have spelled that out too, and it didn't.

* * * * * * * * * *

RESPONDENT

DUNBAR: This is a summary judgment case. I am mindful as are my clients that during recent years this court has decided a series of vicarious liability cases, which have turned on the degree of control retained by the principal, whether it's the occupier of the premises, the landlord, the owner, the general contractor in a variety of settings.

Recently, beginning with *Exxon v. Tidwell* and continuing in my reading at least through *Reed v. Scott Fetzer*, a number of theories have been applied, and counsel touched upon that briefly and to quote a previous justice on this court, that a hybrid of law has developed in this regard. And taking agency theories, taking landlord/tenant theories, premises defects, and really the general law of torts most notably §414 of the Restatement which was alluded to in the previous presentation.

There has been a bright line, I feel, that's been drawn in this. And were it not for this contract, I think my client would be outside of that line and would not be able to prevail against Elliott-Williams.

BAKER: When you say that, can we construe that as an agreement that this is a duty case, and the question is whether this particular contract furnishes the duty that gives rise to tort liability?

DUNBAR: I would agree with that.

BAKER: And we don't have a case of actual control here?

DUNBAR: I believe there was - there should have been actual control and it goes back to the contract.

BAKER: But I don't get from your briefs or what's in there on the facts that as between Elliott-Williams and Lingle or Elliott-Williams and James, who is also another contractor, that Elliott-Williams exercised actual control on the installation of the cooler freezers?

DUNBAR: As the Restatement teaches and the case law teaches, it's the right to exercise control...

BAKER: I understand and that's what I'm getting to. All that we're looking at here is the contract as the basis for furnishing the duty, and whether they did anything or not they've got a contractual control right in your view, which gives rise to tort liability?

DUNBAR: I agree with that assessment.

ENOCH: In that regard, in the cases that we've looked at it seems that the contract on control retention really is with respect to the contract _____ in the subcontractor or the actual control exercised between the contractor and subcontractor. Do you have any cases out there where the contract is between the contractor and the premises owner and not with the subcontractor who brings an employee on the grounds?

DUNBAR: I'm trying to remember some of the previous cases where there would have been the actual owner. I'm not sure if the *Clayton Williams* case had an ownership interest, but he certainly was the occupier of that company, had the whole oil rig, and it was there.

ENOCH: That was a question of control. In *Exxon v. Tidwell*, that was a question of contract and in *Reed Fetzer* it was really a control issue on who retained the right to control or who was dictating control. It seems to me your case is where you're saying, well Elliott-Williams had an agreement with someone upstream about what their responsibility would be but it had nothing to do with Lingle. This was not an agreement of Elliott-Williams to control what Lingle was _____?

DUNBAR: And that is why I view Lingle, while he may be called a subcontractor, Elliott-Williams was still responsible for his actions because of this. And if nothing else is remembered from my presentation, I would hope that this is. The article 8, dealing with assignment clearly states, that the contractor cannot assign its rights, or delegate its duties, its obligations under this contract. This was a contract where Elliott-Williams was to do the job. And it was not to be delegated. That's why the control is still there and that's why the control never left in our estimation.

HECHT: Why isn't that just to the owner's benefit?

DUNBAR: It was to the owner's benefit, but we're still talking about the right to control. And I don't think that wiped that out. Certainly if there was a breach of the contract in the performance if Lingle did something wrong, the owner could sue both of them. But by assignment and again it seems the Restatements are just woven through this, that to assign an obligation without getting permission or having a novation of some sort with the upstream owner, in this case the Exchange service, then the obligor is still obligated under the contract and that's our whole view of the control issue. And it turns primarily on the obligations that you were to perform and that you could not delegate. And in the discovery process, what little was done in this case, it was established that Elliott-Williams could have asked, did not ask, and so no provision was sought or ever received. They remained in control of the project.

HECHT: If the contract had not said, Fully responsible, if it had been an indemnification provision that Elliott-Williams indemnify AAFES for all actions that might occur on the project, would your position still be the same?

DUNBAR: No. The assignment clause, the representative clause, which is art. 9, that a contractor is fully responsible for the actions of all employees and contracted representatives, which I think the appellate court was correct in including Lingle within that phrase, it's these other provisions that are controlling. If it just was an indemnification agreement, I don't think we would have much. And certainly I don't think we would be here. But there's been an attempt throughout this to categorize these other requirements and obligations of Elliott-Williams as part of some sort of indemnity agreement or part of the indemnity. The indemnity is up in art. 7, and the assignment article, the representative's article, and then the one that was mentioned by counsel opposite, the contractor liability that states, In addition to everything else that Elliott-Williams will be responsible for consequential damages for the injury to person or property proximately caused by action or inaction attributable to the contractor. Taken as a whole, these provisions in the document tied Elliott-Williams to performing its obligations itself, which it could have easily had delegated had it only asked, but it did not. It remained in control.

PHILLIPS: Is there evidence in the record that this contract went to the subcontractor; and if so, then it also went to their employees?

DUNBAR: The evidence of how this went to Lingle is really within the affidavits only of the Elliott-Williams' representatives. There is a contract that was signed in 1986 that's one of the exhibits to the summary judgment proof. It's an independent representative agreement that's primarily directed to sales. And it then speaks to, If there is a separate installation, that will be handled differently. I'm not entirely sure, and I don't think the lower court was either that that agreement between Elliott-Williams and Lingle for sales really was the agreements whereby Lingle undertook to do - was employed - by Elliott-Williams. They could not rid themselves of the obligation they had undertaken. In the brief by Elliott-Williams there is an attempt to categorize this as well. It wasn't a non-delegable duty. And then they go into the common law of delegable duties which deal with non-delegable duties. If it's an artistic performance, or it's based on a personal

relationship or you hire the specific person to do a job for personal reason.

HANKINSON: Do you agree that this contract is between AAFES and Elliott-Williams?

DUNBAR: Yes.

HANKINSON: And that the obligations and the responsibility clause that you're talking about flow from Elliott-Williams to AAFES?

DUNBAR: Yes.

HANKINSON: Then how do you make the next step that those obligations between two parties to a contract in fact endures to the benefit of the rest of the world?

DUNBAR: It endures to the benefit just the same way that other persons who were injured as a result of an upstream relationship, you always are going to have someone that is injured that is not party to the contract. I mean that happens in construction sites daily.

HANKINSON: But this assumes that these obligations are flowing the wrong direction for your client to be able to benefit from them?

DUNBAR: Not when viewed in the context of control that this left Elliott-Williams in control of the premises.

HANKINSON: It made him responsible for what happened, but did it actually give control over how work was to be performed at the job site?

DUNBAR: This is why I think the delegation and assignment clause is so important. Unless Elliott-Williams received permission to assign, then they remained in control.

HANKINSON: But you're talking about control. The clause is written in terms of responsibility. Aren't those two different words with two different meanings? I am responsible for what happens to AAFES, it doesn't matter whether I have control over anything or not, I'm going to be responsible as to AAFES. How does that language translate into a control obligation in the contract as to other people?

DUNBAR: I would argue that if one is obligated to perform a service that it cannot delegate, then it by definition it has to control the site to make sure the work is done. That it's responsible. It has a duty to provide a safe working environment for business invitees, such as Mr. Diaz.

OWEN: It seems like under your argument, you're saying that the general contractor

was supposed to do all the work and it really couldn't even hire subcontractors to do the work, because that would be a delegation under your reading...

DUNBAR: All Elliott-Williams had to do was to ask and receive permission to do this.

OWEN: No, my point is short of getting permission, it's your position that they were not permitted to subcontract out work under this agreement?

DUNBAR: They were obligated to do it themselves.

OWEN: At several junctures in the contract itself it explicitly contemplates and refers to subcontractors?

DUNBAR: I would state that the nondelegable clause would control. Again, this was not a general contractor who was going to erect a whole army Air Force Post Exchange unit. This was to place a rather large 34x13x8 feet walk-in freezer. Within a portion of it, that Elliott-Williams did have control over and could have exercised its control rights...

OWEN: But yet, you do concede that the contract specifically contemplates that Elliott-Williams will have subcontractors and tells it to do specific things with regard to those subcontractors?

DUNBAR: And to that extent, I would say that because they could have received permission to do it, I think then there's a reference to that, that that would not be a unusual thing for them to do.

HANKINSON: But again Mr. Dunbar even with the provision that if they got permission from AAFES to use someone else to install the refrigerator, why again does that contractual obligation inure to the benefit of your client?

DUNBAR: Because it required Elliott-Williams to perform the work and if they could not delegate they were to perform the work in a safe manner for business invitees. The duty responsibility - I mean they were supposed to do it and no one else was under the terms of the contract.

HANKINSON: As to their contract with AAFES?

DUNBAR: Yes. Just as in other upstream - when you have an agreement that flows upstream from a company or sales organization or what have you, the person that's usually hurt is not a part. That's what the whole body of law is about, that you're going to have an injured party that wasn't of course a party to the contract. And that's why in reviewing this case, the idea of third-party beneficiary is so inapplicable that it doesn't have anything to do with this. There's enough bodies

of law that are relevant to this area, such as agency and premises defects that that is one I don't believe has any place here. But that's the same idea. How can someone who is injured receive any protection under this? Well the answer is, because the contractor was obligated to provide a safe place for everyone.

ABBOTT: Even if the contract is assigned who do you think had the best ability to ensure safety in this particular situation?

DUNBAR: I would say Elliott-Williams had the best ability to do that. Elliott-Williams clearly was the one running the show here. They had the control over it. Now on the ground, on the day that happened, Lingle was there. And if your question is leading up into the specific circumstances of that day when the accident occurred, who was in the best position to _____? Clearly it would have been Lingle. But Elliott-Williams retained control throughout this whole process and could have and should have seen to it that you didn't stack unsupported freezer panels in a manner where they would domino and fall over.

ABBOTT: So you're saying that's the consequence regardless of the contract with Avis(?)?

DUNBAR: Without the contract, I think you would have just a regular independent general contractor, if you will, relationship and you would not have a _____.

BAKER: You said in answer to a question that Elliott-Williams had control of the area where this large 34X so forth, but that's different from what you said at the outs of your argument, that they had no actual control over the area where the...

DUNBAR: If I said they didn't have control, I don't recall that. I was wrong.

BAKER: But still what I'm trying to find out a statement that they had actual control of the area where this was installed is not the same as your argument that they had control because the contract required them to have control, which is what you said at the first, that the whole basis of why Elliott-Williams is liable in this case is the contract, and there's no liability based on regular premises liability on control?

DUNBAR: That one you would have a traditional case.

BAKER: And you also said that very clear in your mind that the third-party beneficiary theory does not apply in this case?

DUNBAR: I do not believe it does. If it were to be applied, I think would be an intent as the Restatement now calls it an intended beneficiary. You don't have to be called by name. I think an argument could be made - while the theory does not apply, if it were to be applied, I think we

would win.

HANKINSON: You mentioned in talking about the contract that Elliott-Williams had an obligation under the contract to maintain a safe workplace. What provision of the contract are you referring to?

DUNBAR: The contract does not speak to safety, but I think there is if you undertake to do a job, you must undertake. And if there are business invitees to be on the premises, you have a duty to make it safe.

HANKINSON: But this is a contract with a provision of merchandise, supplies and equipment, not a construction contract.

DUNBAR: Which were to be installed. The work order which is also part of the summary judgment proof speaks to delivery, storage, installation, and something else. So Elliott-Williams when they signed that, they did have to place it, put it together, assemble it and test it.

HANKINSON: But they were basically selling the equipment that they were going to install?

DUNBAR: Yes.

HANKINSON: And there is no provision in this contract, then given the kind of contract that it is, that they were to maintain a safe work environment for business invitees? No direct contract obligation?

DUNBAR: No, I think that is not implied. I think that is a duty that's enforced by the law, that if you undertake to do a job on a site, that you have control and you're just the same as a landlord or whatever, that you've got to do it is a safe manner. I think what you may be getting at is if this were a case with a more traditional setting if you didn't have - you would have to have that specific relation to safety and security such as you saw in *Tidwell* and some of the other cases.

HANKINSON: What I'm getting at is the fact that you said they had a nondelegable duty to maintain a safe work environment or a safe - that the location was safe for other business invitees that came in and they couldn't delegate that duty. And I'm just trying to figure out where that comes from and whether or not you were relying on a particular provision of the contract?

DUNBAR: No. Both the contracts are notable for their lack of mention of safety but that is a duty imposed by the law.

* * * * * * * * * *

REBUTTAL

STEINBERGER: The particular provision about the assignment, there is no attempt to assign any of the duties of Elliott-Williams to the Air Force Exchange by having Lingle make this installation. Elliott-Williams still remained responsible to the Air Force Exchange. And had there been any claim against the Air Force Exchange the indemnity provisions would have come in. If they wanted to make an assignment, the purpose of making an assignment would be then not to have that responsibility because Air Force Exchange then would be looking to the one that the assignment had been taken of. Elliott-Williams remained responsible, liable for the failure of Lingle. If installation was not made properly it remained that way. Had it made an assignment, then they might not have because then the one who the assignment was made to would take on that responsibility with the consent of the Air Force Exchange.

The Air Force Exchange was interested in having that refrigerator installed properly. And that's what Elliott-Williams' responsibility was. The suit was also brought against the general contractor in this case with the same allegations under *Reddinger* and the others that they had an on-site representative. But that case was dismissed.

BAKER: James was the general contractor?

STEINBERGER: Yes. And I admit by throwing in this third-party beneficiary, I suppose - I know we're dealing with tort law. But it seemed to me that there has to be some test here other than what the CA has done, because just to use the term "responsibility" and then as I say to me they've equated that with control, that just opens it up.

BAKER: I think Mr. Dunbar saved you that problem by saying the theory doesn't apply.

STEINBERGER: This is what it comes down to, there is just simply no duty in this case on the part of Elliott-Williams.