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Torts - Liability of an Owner/Employer for Injuries to an Independent Contractor's Employee - Noonan v. Texaco, Inc.

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TORTS—Liability of an owner/employer for injuries to an independent contractor's employee. *Noonan v. Texaco, Inc.*, 713 P.2d 160 (Wyo. 1986).

Kevin Noonan was an employee of Brinkerhoff-Signal, Inc. (Brinkerhoff), working on Brinkerhoff Rig #6.¹ Rig #6 was operated by Brinkerhoff which Texaco, as operator of the well, had engaged under contract to drill.²

On December 6, 1979, Noonan was washing the drilling rig floor with a water hose. There were no witnesses to the subsequent events which ended Noonan's life.³ Apparently the hose wrapped around his leg and then around the kelly bushing. A kelly bushing connects the kelly or drill stem to the rotary table and turns at various speeds as the well is drilled.⁴ The hose traumatically amputated Noonan's leg, resulting in his death.⁵

The personal representative of Noonan's estate and various family members brought a wrongful death action in Sweetwater County District Court against several defendants.⁶ All defendants denied liability, and subsequently plaintiffs settled with all defendants except Texaco, Inc. (Texaco), Joy Manufacturing Company (Joy), and Dresser Industries, Inc. (Dresser).⁷ Texaco, Joy, and Dresser then moved for summary judgment, which the trial court granted.⁸

The allegations against Joy and Dresser were product liability claims for their failure to produce a guard for the kelly bushing. The Wyoming Supreme Court affirmed the summary judgment in favor of Joy and Dresser because the facts showed that they had no control over how the rig was assembled, Wyoming OSHA regulations exempted them, and even if Joy and Dresser had provided the guard, Brinkerhoff had consciously decided not to use kelly bushing guards on its rigs.⁹

In their action against Texaco, plaintiffs alleged that because Texaco had undertaken responsibility and control for rig safety and had not exercised that control with reasonable care, Texaco was liable in damages for Noonan's death.¹⁰ The Wyoming Supreme Court held that the relationship between Texaco and Brinkerhoff was clearly an independent con-

1. Brief of Appellee Texaco, Inc. at 2, *Noonan v. Texaco, Inc.*, 713 P.2d 160 (Wyo. 1986) (No. 84-300) [hereinafter Brief of Texaco].

2. *Noonan v. Texaco, Inc.*, 713 P.2d 160, 164 (Wyo. 1986).

3. Brief of Texaco at 2.

4. Brief of Appellants at Appendix A, *Noonan v. Texaco, Inc.*, 713 P.2d 160 (Wyo. 1986) (No. 84-300).

5. Kevin's employer submitted a worker's compensation report which stated: "Employee must have slipped, tripped or stepped on rotary table, hose wound up and lashed employee's foot to kelly. Rotation of kelly caused body to strike joint of pipe in mousehole with such force as to tear left leg off at hip joint." *Id.* at 5.

6. *Noonan*, 713 P.2d at 161. The initial action was against Texaco, Inc., Joy Manufacturing Co., Dresser Industries, Inc., Leonard Charles Cruth, Max Atwell, Hercules Drilling, Brinkerhoff Drilling Company, Inc., Brinkerhoff-Signal, Inc., Petrolane Co., Petrolane Drilling Co., Signal Drilling Co., Inc., and Signal Drilling, Inc.

7. *Id.*

8. *Id.*

9. *Id.* at 164.

10. Brief of Texaco at 2-3.

tractor relationship and that plaintiffs had failed to support their allegations of Texaco's control and subsequent negligence. The court affirmed summary judgment for Texaco.¹¹

The supreme court relied heavily on the contract between Brinkerhoff and Texaco as establishing an owner and independent contractor relationship.¹² After considering plaintiffs' contention that, despite the owner/independent contractor relationship, Texaco had retained control over rig safety, the court held that Texaco retained minimal control.¹³ The court held that the minimum control was only that necessary to protect Texaco's interest.¹⁴ Retention of such minimal control did not destroy the independent contractor relationship or create liability in Texaco.¹⁵

This casenote analyzes the general non-liability rule applied to owners or employers in independent contractor relationships.¹⁶ This casenote also analyzes the circumstances which may create an exception to the general rule, and result in liability of the owner for injuries to an employee of its independent contractor.

BACKGROUND

Generally, the owner is not liable for injuries to employees of an independent contractor resulting from the work which the contractor was hired to perform.¹⁷ An exception to the general rule may be established if the owner retains control over the work being performed by the contractor.¹⁸ To hold the owner liable, the control retained by him must be more than a mere right to inspect and ability to insure that the work he has contracted for is being performed properly at a reasonable cost, or he cannot be liable.¹⁹ Control is the factor that determines the type of relationship between the owner and the contractor as well as the potential liability of the owner to the independent contractor's employees.²⁰

Federal Law

In *Hurst v. Gulf Oil Corporation*,²¹ a decision relied on by the court in the principal case, the owner of an oil and gas lease hired an independent contractor for the drilling and completion of a well on its lease. An employee of the contractor who was injured on the site sued the owner for damages. The employee claimed that the owner inadequately super-

11. *Noonan*, 713 P.2d at 168.

12. *Id.* at 164.

13. *Id.* at 167.

14. *Id.*

15. *Id.* at 166-167.

16. As used in this casenote the term "owner" is used to denote any party who employs an independent contractor whether as an owner of property, an employer of a contractor, or a general contractor.

17. RESTATEMENT (SECOND) OF TORTS § 409 (1965); 57 C.J.S. *Master and Servant* § 600 (1948).

18. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

19. *McDonald v. Shell Oil Co.*, 44 Cal.2d 785, 285 P.2d 902, 904-905 (1955).

20. *Combined Ins. Co. of America v. Sinclair*, 584 P.2d 1034, 1042-43 (Wyo. 1978).

21. 251 F.2d 836 (5th Cir. 1958).

vised the work and permitted the independent contractor to use defective equipment.²² A Gulf representative was present at the accident site but there was no evidence that he had supervised or directed the independent contractor's employees. The district court denied Gulf's motion for a directed verdict. The issue of negligence went to the jury, which returned a verdict for Gulf.²³ The Fifth Circuit affirmed the verdict and held that the evidence was insufficient to hold the owner liable for injury to the independent contractor's employee. The court referred to its concurrent ruling in *Sword v. Gulf Oil Corp.*²⁴ stating:

In the absence of any actual control of the operation, or of any reserved right of control more than that deemed necessary to secure the satisfactory completion of the work, an employer of an independent contractor owes no duty to the contractor's employees to inspect or to supervise the installation or operation of the machinery furnished by the contractor.²⁵

Similar facts and evidence were present in both *Sword* and *Hurst*.²⁶ In *Sword* no Gulf supervisor was present at the scene when the accident occurred. As in *Hurst*, however, the defective equipment had been provided and, presumably, inspected by the contractor and not by the owner. The question in *Sword*, as in *Hurst*, was whether the jury could properly hold an owner liable for injury to the independent contractor's employee.²⁷ In *Sword* the plaintiff did not allege that Gulf's control was sufficient to establish an employer/employee relationship with the contractor's employee but instead relied on section 414 of the Second Restatement of Torts, which provides:

[O]ne who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.²⁸

The court held that the owner did not owe a duty to the independent contractor's employee to inspect or supervise the operation of machinery furnished by the independent contractor.²⁹

In *Holdaway v. Amoco Production Co.*³⁰ the court considered a case factually similar to the principal case.³¹ An employee of an independent contractor operating a drilling rig for the owner was injured while working on the rig. Though there was no question that the owner's agent par-

22. *Id.* at 838.

23. *Id.*

24. 251 F.2d 829 (5th Cir. 1958).

25. *Hurst*, 251 F.2d at 838.

26. *Sword v. Gulf Oil Corp.*, 251 F.2d 829 (5th Cir. 1958); *Hurst*, 251 F.2d at 828.

27. *Sword*, 251 F.2d at 830.

28. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

29. *Sword*, 251 F.2d 836.

30. *Holdaway v. Amoco Prod. Co.*, 751 F.2d 1129 (10th Cir. 1984).

31. *Id.* at 1130.

tially supervised the drilling operation, the agent exercised insufficient control to destroy the independent contractor relationship. The trial court granted summary judgment to the owner.³² The Tenth Circuit reversed and held that there was a genuine issue of fact concerning whether the owner had retained sufficient control to destroy the independent contractor relationship.³³

The Tenth Circuit appears reluctant to allow an owner to be held liable for injuries to independent contractor's employees so long as the contractor is in actual control of the instrumentality causing the injury.³⁴ This is so even if the employer retains some type of general control over the independent contractor.³⁵

Wyoming Law

Wyoming courts look to the contract between the parties first to determine whether the relationship is that of an employer/employee or owner/independent contractor.³⁶ In addition to the contract, or in the absence of one, Wyoming courts look to the conduct of the parties, particularly the owner's.³⁷ When the owner has only retained control sufficient to oversee the work being performed, and does not retain control over the details of the work, the relationship is that of an independent contractor.³⁸ An employer/employee relationship is created when the agreement between, or the action of, the parties is such that the owner makes specific daily decisions regarding the work being performed and retains control over daily operations and performance. The relationship may then be viewed as that of a employer/employee with resultant liability for an employee's injuries lying in the employer.³⁹

In *Fox Park Timber Co. v. Baker*⁴⁰ the Wyoming Supreme Court noted that while individual circumstances in each case are important in determining whether a person is a servant or an independent contractor, if the owner has retained the right of control over the person injured, he may be held liable.⁴¹ The question of control is the significant factor in determining whether the employer owes a duty to the injured party. If the duty is owed and breached, it must directly relate to the injury to result in liability. Determining the extent to which there is a right of control is primarily a jury question.⁴²

32. *Holdaway v. Gustanson*, 546 F. Supp. 231, 234 (D. Wyo. 1982).

33. *Amoco*, 751 F.2d at 1131.

34. *Eutsler v. United States*, 376 F.2d 634, 635 (10th Cir. 1967).

35. *Id.*

36. *Combined Ins. Co. of America v. Sinclair*, 584 P.2d 1034, 1044 (Wyo. 1978).

37. *Id.*

38. *Brubaker v. Glenrock Lodge Int'l Order of Odd Fellows*, 526 P.2d 52 (Wyo. 1974); *Stockwell v. Morris*, 46 Wyo. 1, 8, 22 P.2d 189, 190 (1933).

39. *Holdaway v. Amoco Prod. Co.*, 751 F.2d 1129, 1130 (10th Cir. 1984).

40. 84 P.2d 736 (Wyo. 1938).

41. *Id.*

42. *Combined Ins. Co. of America v. Sinclair*, 584 P.2d 1034, 1044 (Wyo. 1978); *Holly Sugar Corp. v. Perez*, 508 P.2d 595, 598 (Wyo. 1973).

THE PRINCIPAL CASE

In *Noonan* the court recognized that “[i]n Wyoming, the overriding consideration in determining whether one is an employee or an independent contractor is dependent upon whether or not the employer has the right to control the details of the work whereby liability is sought to be established.”⁴³ The issue is one for the trier of fact but becomes an issue of law when only one reasonable inference can be drawn.⁴⁴ The court looked to the contract between the parties, and held that the paragraph entitled *Independent Contractor* clearly established an independent contractor relationship.⁴⁵ In opposition to Texaco’s motion for summary judgment, plaintiffs produced evidence to establish a question of fact that the actual control retained by Texaco was sufficient to destroy the independent contractor relationship found in the Brinkerhoff-Texaco contract. Plaintiffs filed affidavits of an engineer and a Texaco employee both of which stated that the lack of a guard on the Kelly bushing was unsafe and a violation of industry standards.⁴⁶ Plaintiffs argued that in the contract, Texaco retained rights to inspect and require safe equipment, material and supplies.⁴⁷ The plaintiffs alleged Texaco’s retention of the right to control destroyed Brinkerhoff’s independent contractor status with regard to equipment safety.⁴⁸ Texaco relied on the language of the contract and an affidavit by a Brinkerhoff employee which stated that Brinkerhoff controlled the daily drilling operations and had the power to hire and fire employees on the rig.⁴⁹

The court rejected plaintiffs’ contention holding that “a simple reservation of a right to inspect and secure that benefit does not cause the contractor to become the owner’s employee, for the owner has not taken over the details of safety with respect to the contractor’s employees.”⁵⁰ The court affirmed summary judgment for Texaco because it found that there was no genuine issue of material fact concerning Texaco’s lack of control over the details of rig safety.⁵¹

Texaco’s contractual retention of control over rig safety was held not to destroy the independent contractor relationship. Texaco did not exer-

43. *Noonan*, 713 P.2d at 164.

44. *Id.*

45. *Id.* Paragraph 17.1 of the Texaco-Brinkerhoff contract specified, “In the performance of the work herein contemplated, Contractor is an independent Contractor. . . .” This paragraph also reserved a general right of inspection and supervision in Texaco. *Id.*

46. *Id.* at 166.

47. *Id.* at 166-67. Paragraph 3.21 of the contract stated:

Texaco shall have the right from time to time to inspect and examine the drilling equipment, material and supplies furnished by Contractor and if found inadequate or unsafe for the work required to be done, Contractor shall at once replace the article or articles with articles deemed by Texaco to be adequate and safe for such work.

Id.

48. *Id.* at 166.

49. *Id.*

50. *Id.* at 167.

51. *Id.*

cise actual control over the day-to-day details of rig safety.⁵² The court held that Brinkerhoff exercised actual control over the details of safety and Texaco's involvement in safety was minimal.⁵³ Because of Texaco's minimal involvement, Brinkerhoff did not become its employee. Texaco was therefore not liable to Brinkerhoff's employee, Kevin Noonan, under the doctrine of respondeat superior.⁵⁴

ANALYSIS

An independent contractor relationship is established when the owner has retained no more control than that necessary to oversee, in a broad and general manner, the independent contractor's performance. An owner is not liable for injuries to an independent contractor's employees which occur during performance of the contract. A question of the owner's liability becomes an issue of fact for the jury if the employer retains control over details of the work from which the liability arose.

The Wyoming Supreme Court has not yet articulated distinct guidelines concerning what constitutes sufficient control to subject an owner to liability for injuries to an independent contractor's employees. Although the *Noonan* court recognized the potential for liability in an owner, it did not define how much control will create a jury question of owner's liability. The court noted that Texaco had the power to shut down operations in the event of an uncorrected safety violation but did not find this sufficient control to create an employer/employee relationship.⁵⁵

Subsequent to *Noonan*, the Wyoming Supreme Court decided *Jones v. Chevron, U.S.A., Inc.*⁵⁶ In *Jones* the owner retained control over the de-energization of power lines being worked on by the independent contractor. There was also evidence that the owner had previously denied requests for de-energization. The court held that there was sufficient actual control exercised to create a jury question of the owner's negligence.⁵⁷ The only distinguishing feature between *Noonan* and *Jones* was that in *Jones* Chevron actually exercised the control it retained. In *Noonan* the court held as a matter of law that Texaco did not retain sufficient control over rig safety to subject it to liability.⁵⁸ In *Jones* the court allowed the owner liability question, where the owner retained and exercised control over the hazard that caused the harm, to go to the jury.⁵⁹ In both cases the owners contractually retained sufficient control to shut down operations of the contractor for specific reasons. Texaco had not exercised the control retained in the contract. There was no attempt by Texaco to take

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 166-67.

56. *Jones v. Chevron, U.S.A., Inc.*, 718 P.2d 890 (Wyo. 1986).

57. *Id.* at 895-96.

58. *Noonan*, 713 P.2d at 166-67, 171.

59. *Jones*, 718 P.2d at 896.

actual control over any of the rig safety. Because Texaco had retained control, however, the factual question should have been sufficient to go to the jury.

In *Noonan*, Texaco's supervisor was not present on the rig floor when the accident occurred, although he was on the site. In *Jones* there was some testimony, although conflicting, that Chevron's supervisor was present at the site when the accident occurred.⁶⁰ Because the supervisors were present as owners' agents, the owners were in a position to exercise actual control through those supervisors. In *Noonan* the Texaco supervisor had the authority to shut down the rig. In *Jones* the supervisor had the authority to order or deny de-energization of the power lines. Neither supervisor was exercising this authority when the accidents occurred. However, the Chevron supervisor had actually exercised his authority prior to the date of the accident by denying de-energization.⁶¹ Texaco's supervisor had not previously shut down the drilling rig because of a safety problem.⁶² The lack of actual previous control by the Texaco supervisor led to the assumption that Brinkerhoff, not Texaco, was in actual control of rig safety.

The *Noonan* decision does not specifically define the amount of control which must be retained by the owner to establish liability for injuries suffered by an independent contractor's employees. In *Jones* the court partially clarified the problem, stating that the rule that an owner is not liable for injuries to his independent contractor's employees is a narrow rule.⁶³ The rule "does not control when direct negligence of the owner, rather than respondeat superior is involved."⁶⁴ The *Jones* court partially answered the question posed in the *Noonan* case by holding:

[A]n owner of a worksite who retains the right to direct the manner of an independent contractor's performance or *assumes affirmative duties with respect to safety* owes a duty of reasonable care to an employee of the independent contractor even if the employee is injured doing the very work the contractor was hired to perform.⁶⁵

The *Jones* court specifically stated that if the owner had not *previously exercised his right to control*, there may not have been enough real control to raise a duty of reasonable care.⁶⁶ In *Noonan*, although Texaco retained control prior to the accident, it did not actually exercise that control.

The Wyoming Supreme Court refused to allow the question whether Texaco's right to control was sufficient to establish liability for a safety hazard to go to the jury. However, the court in *Jones* found that Chevron's

60. *Id.* at 892; Brief of Texaco at 4.

61. *Jones*, 718 P.2d at 896.

62. *Noonan*, 713 P.2d at 166.

63. *Jones*, 718 P.2d at 894 n.1.

64. *Id.*

65. *Id.* at 896 (emphasis added).

66. *Id.* at 897.

control was sufficient to raise a jury question. These two decisions suggest that the Wyoming Supreme Court is willing to submit to the jury the question of an owner's liability only when there is evidence that control has been retained *and* exercised; contractual retention alone is not enough.

The court failed to explain why it distinguishes between retained and exercised control. Control cannot be exercised without being first retained. Control retained can potentially be exercised. The failure to exercise retained control is as negligent as actual improper exercise of the control.⁶⁷ A fact question existed in *Noonan* concerning whether Noonan's death resulted from the absence of a kelly bushing guard.⁶⁸ Texaco did not exercise its retained control over rig safety and its negligence killed Kevin Noonan. Failure to act when there is a duty to do so is as negligent as improperly acting. The amount of control retained and the responsibility to exercise that control should determine the existence of a jury question. The Wyoming Supreme Court in *Noonan* refused to submit the control question to a jury because there was no evidence of actual, previously exercised control. In *Jones* the court held that "[t]he owner's hypothetical opportunity to retain control before he executes or performs the contract is irrelevant" and found a duty of care when the control was actually exercised.⁶⁹

CONCLUSION

The Wyoming Supreme Court decisions in *Noonan* and *Jones* indicate that the important factor in establishing a duty of reasonable care which may result in an owner's liability to an independent contractor's employee is not contractual retention of control over a certain portion of the work. Rather, it is a history of the actual exercise of the control retained which triggers a factual question of liability. Without actual previous exercise of the control retained, the Wyoming Supreme Court appears reluctant to allow an action for negligence against an owner for an independent contractor's employee's injuries.

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67. 74 AM. JUR. 2d *Torts* §§ 9, 11.

68. Six months after Noonan's death, Brinkerhoff was fined \$720 for drilling with an unguarded drilling rig rotary table and kelly bushing in violation of an OSHA standard found at 29 C.F.R. § 1910.212(a)(1) (1978). Brinkerhoff-Signal, Inc., 1980 O.S.H. Dec. (CCH) ¶ 24,591 (No. 79-2589) (Occupational Safety & Health Rev. Comm'n June 19, 1980) (Blythe, A.L.J.) (digest summary of judge's decision). Plaintiffs also introduced evidence that the rotary table and rotary drive bushing violated safety color-coding regulations at the time of the accident. Brief of Appellants at 29-30.

69. *Jones v. Chevron, U.S.A., Inc.*, 718 P.2d at 890, 900 (Wyo. 1986).