IN THE SUPREME COURT OF TEXAS

NO. 04-0550

FIFTH CLUB, INC. AND DAVID A. WEST,
PETITIONERS,

v.

ROBERTO RAMIREZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued October 18, 2005

JUSTICE BRISTER, joined by CHIEF JUSTICE JEFFERSON, concurring.

I join fully in the Court's opinion, and write separately only to detail why we cannot adopt the blanket rule that first appeared in *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*, 542 S.W.2d 882, 888 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), and was adopted by the court of appeals here. *See* 144 S.W.3d 574, 588-89 (Tex. App.–Austin 2004).

The general rule in Texas and everywhere else has long been (in the words of the Restatement) that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." RESTATEMENT (SECOND) OF TORTS § 409. But both the Restatement and Texas courts recognize a number of exceptions to this general rule.

First, one who retains control over the manner in which an independent contractor performs its work is subject to liability for failing to exercise that control with reasonable care. *See Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); RESTATEMENT (SECOND) OF TORTS § 414. As the "supreme test" for vicarious liability, the presence or absence of control commonly sets the boundaries for such liability. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 542 (Tex. 2003). As the Court notes, there is no evidence that Fifth Club retained such control here.

Second, if a statute or administrative regulation imposes a duty to take specified safeguards or precautions, that duty (and any liability resulting from its breach) cannot be delegated to an independent contractor. RESTATEMENT (SECOND) OF TORTS at § 424, cmt. a. Thus, we held in *MBank El Paso, N.A. v. Sanchez*, that because the U.C.C. imposes on secured creditors a duty not to breach the peace while repossessing collateral, a secured party was vicariously liable for such a breach by the independent contractor hired for that purpose. 836 S.W.2d 151, 152 (Tex. 1992). Again, there is no evidence that any statute or regulation imposed a nondelegable duty here.

Third, Texas law and the Restatement recognize an exception for work that is inherently dangerous. *See Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 911 (Tex. 1981); *Loyd v. Herrington*, 182 S.W.2d 1003, 1004 (Tex. 1944); RESTATEMENT (SECOND) OF TORTS § 427A. Because the danger in such cases stems from the activity itself rather than the manner of performance, responsibility for creating the danger cannot be shifted completely to the contractor performing it. *See* RESTATEMENT (SECOND) OF TORTS § 427A, cmt. b. But this exception is a narrow one. *See MBank El Paso*, 836 S.W.2d at 159 (Hecht, J., dissenting) (noting Texas courts have refused to characterize as "inherently dangerous" activities involving heavy equipment, inflammable materials,

electrical work, blasting, and refinery operations). While we have reserved the question whether it includes security work, *see Ross v. Texas One P'ship*, 806 S.W.2d 222, 222 (Tex. 1991), the parties here do not argue that it does.

The question presented today is whether to adopt an additional exception for independent contractors hired to protect private property, based on the "personal character" of that activity. *See Dupree*, 542 S.W.2d at 888. The Restatement does not include such an exception, and for several reasons we should not create one.

First, we have refused to create new exceptions when the public safety is adequately protected by existing rules. For example, in *Baptist Memorial Hospital System v. Sampson*, we refused to impose vicarious liability on hospitals for malpractice by emergency room physicians, noting that patients could bring suit against the negligent physician or against the hospital for violating duties owed directly to patients. 969 S.W.2d 945, 949 (Tex. 1998). Here, existing law allows patrons to sue security contractors directly, as Ramirez did.[1]

Second, it is unclear what the boundaries of this "personal character" exception might be. The *Dupree* court stated that "[t]here are *certain duties* that an owner of a store cannot absolve itself from liability by delegating the performance thereof to an independent contractor," *see* 542 S.W.2d at 890 (emphasis added), but did not say which duties might or might not be included. Reviewing cases from other jurisdictions, the court discovered "the principle that he who expects to derive

[1] The *Dupree* court adopted its "personal character" exception so that a company could not "subject its patrons to the hazards of an irresponsible detective agency while escaping all danger of the legal ramifications adverse to itself." *Dupree*, 542 S.W.2d at 889. But owners cannot escape liability by hiring irresponsible contractors; to the contrary, both Texas law and the Restatement recognize explicit liability if they do. *See Salinas v. Fort Worth Cab & Baggage Co. Inc.*, 725 S.W.2d 701, 703 (Tex. 1987); RESTATEMENT (SECOND) OF TORTS § 411.

advantage from an act which is done by another for him, must answer for any intentional injury which a third party may sustain from it." *Id.* at 889. But presumably *everyone* who hires an independent contractor expects to derive advantage from doing so; if this is the only principle, then all of us are liable for the intentional torts of those we hire — even if we only wanted them to provide package delivery, babysitting, internet access, or lawn care.

Third, a blanket rule adopting vicarious liability for security services overlooks the many different circumstances in which such services are retained. The Restatement suggests that the same liability rule should not necessarily apply to widows and land developers:

> [A]n inexperienced widow employing a contractor to build a house is not to be expected to have the same information, or to make the same inquiries, as to whether the work to be done is likely to create a peculiar risk of physical harm to others, or to require special precautions, as is a real estate development company employing a contractor to build the same house.

RESTATEMENT (SECOND) OF TORTS § 413, cmt. f; *see also id.* § 411, cmt. c. The *Dupree* court saw the case before it as one in which a corporation hired a "detective firm to ferret out the irregularities of its customers . . . thereby intentionally exposing its customers to the possible tortious conduct of the guards." *Dupree*, 542 S.W.2d at 889. But the rule it declared would impose liability on all who hire security guards — widows, schools, churches, neighborhood associations, election officials, and many others — regardless of their motives or expertise. Because the individual circumstances of those who seek security may be important, liability should not be imposed in all cases as a matter of law.

Fourth, Texas law imposes certain duties on peace officers that no private employer can control. Peace officers have a duty to prevent crime and arrest offenders, off-duty or not. *See* TEX.

CODE CRIM. PROC. art. 2.13; *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 377 (Tex. App.–Dallas 1994, no writ) ("An off-duty police officer who observes a crime immediately becomes an on-duty police officer."). In doing so, peace officers exercise a nondelgable duty that is imposed by state law, not by a private employer.

Finally, hiring either an employee or an independent contractor includes many considerations beyond "escaping all danger" of vicarious liability, as the *Dupree* court assumed. *Dupree*, 542 S.W.2d at 889. Independent contractors are usually hired for their competence, not their incompetence. *See Anchor Cas. Co. v. Hartsfield*, 390 S.W.2d 469, 471 (Tex. 1965); *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 603 (Tex. 1961). But the decision to hire an employee or an independent contractor may turn on many other factors, including social security or income taxes, *see Hartsfield*, 390 S.W.2d at 471, worker's compensation coverage, *see Garza v. Exel Logistics, Inc*., 161 S.W.3d 473, 477 (Tex. 2005), product liability exposure, *see FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004), or professional independence, *see State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998). Moreover, workers themselves may prefer independent contractor status, as it allows them to control their hours, jobs, and location. *See, e.g., Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 614 (Tex. 2004); *Hartsfield*, 390 S.W.2d at 471. Courts cannot assume (as the *Dupree* court appeared to do) that just because vicarious liability is the most important aspect of independent-contractor status to us, it must have been the primary motivation for everyone else. By designating some activities as too "personal" to delegate to nonemployees, the judicial system would mandate a particular employment relationship that everyone else may find neither desirable nor appropriate.

We cannot adopt a rule that helps out a particularly sympathetic litigant but does not apply to other, similar cases. While the Legislature could make nightclubs or grocery stores strictly liable for the intentional torts of their security contractors, it has never done so, and it is difficult for this Court to adopt a common-law rule that applies only to them. Accordingly, I join in the Court's judgment and opinion.

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Scott Brister
Justice

OPINION DELIVERED**:** June 30, 2006