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Grocery Store Is Liable for False Imprisonment by Its Independent Contractor Providing Security Service.

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legislation on the federal level, the Texas Legislature should revise the Texas Open Records Act.

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INDEPENDENT CONTRACTORS—Liability of Employers—Grocery Store Is Liable for False Imprisonment by Its Independent Contractor Providing Security Service

Dupree v. Piggly Wiggly Shop Rite Foods, Inc.,
542 S.W.2d 882 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

While leaving a Piggly Wiggly grocery store, Margaret Dupree was stopped by two employees of Denco Security Systems and told that she was under arrest for shoplifting. Denco Security Systems worked exclusively for Piggly Wiggly and had a contract to provide security at its stores. The guards took her to a back room of the store and detained her for almost two hours, despite the fact that she had repeatedly denied taking any merchandise and gave them a sales receipt which showed the items she was accused of shoplifting had been paid for earlier in the day. Piggly Wiggly's store manager was present in the room approximately one-half the time that Mrs. Dupree was detained. One of the guards called the police and she was formally arrested. A criminal complaint filed against her was subsequently dismissed.

A jury determined that Mrs. Dupree was falsely imprisoned by Denco, that Denco was an independent contractor for Piggly Wiggly, and that Piggly Wiggly's store manager did not participate in either the false imprisonment or the filing of the complaint. As a result, Denco was held liable, but Piggly Wiggly was not. Mrs. Dupree appealed. Held—*Affirmed in part, reversed and rendered in part.* A store is liable for false imprisonment committed by its independent contractor providing security service as a result of its nondelegable duty to protect its customers.[1]

Formerly, the rule was that the employer of an independent contractor[2] was not liable for harm caused by the contractor or his employees.[3] Absent

1. Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 890 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

2. An independent contractor is defined as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control . . . ." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1957); *accord*, Keith v. Blanscett, 450 S.W.2d 124, 127 (Tex. Civ. App.—El Paso 1969, no writ).

3. *See generally* Note, *The Independent Contractor Rule and Its Exceptions in Iowa*, 24 DRAKE L. REV. 654, 659 (1975). This immunity originated when the employer of a driver was held not liable for his negligence. Laugher v. Pointer, 108 Eng. Rep. 204, 216 (K.B. 1826).

a finding of independent contractor status, however, the employer would normally be found vicariously liable under the doctrine of respondeat superior.[4] The distinguishing feature of an independent contractor is that his employer has no control or right of control over the details of his work.[5] This fact is generally cited in explaining why the employer is insulated from liability, most contending it would be unjust to hold one liable for the torts of a person not under his direction.[6] Beginning in the middle of the nineteenth century, however, courts began creating exceptions to the general rule of nonliability in order to compensate injured plaintiffs.[7] The traditional notion of immunity has been challenged so often that today the American Law Institute recognizes twenty-four deviations from that rule.[8] In fact, "the rule is now primarily important as a preamble to the catalog of its exceptions."[9]

The exceptions fall within three categories: (1) negligence of the employer in selecting or supervising the contractor; (2) work which is inherently dangerous; and (3) nondelegable duties of the employer.[10] As to this last exception, writers have expressed the opinion that under some circumstances "the law views a person's duty as so important and so peremptory that it will be treated as non-delegable."[11]

"Although their liability may once have been broader, employers have been generally immune from vicarious liability for the acts of their independent contractors since the early 19th century." 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.11, at 1395 (1956); *see* Bush v. Steinman, 126 Eng. Rep. 978, 979 (K.B. 1799) (employer of independent contractor held liable).

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 458 (4th ed. 1971); *see, e.g.*, Weeks v. United States, 245 U.S. 618, 622 (1918) (agent); Howard v. Zimmerman, 242 P. 131, 132 (Kan. 1926) (joint enterprise); Jones v. Hart, 90 Eng. Rep. 1255 (K.B. 1728) (servant).

5. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1957); *accord*, Pitchfork Land & Cattle Co. v. King, 162 Tex. 331, 338, 346 S.W.2d 598, 603 (1961).

6. Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 343 (1934). An alternative justification for the contractee's immunity is that an independent contractor is less likely to be judgment proof than a servant. *Id.* at 341; *see* Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929).

7. Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. CHI. L. REV. 661, 663-64 (1973). The first exception made the employer liable because the work delegated to the contractor was illegal. Ellis v. Sheffield Gas Consumers Co., 118 Eng. Rep. 955 (K.B. 1853) (done without permit); *accord*, Moore & Savage v. Kopplin, 135 S.W. 1033, 1035 (Tex. Civ. App. 1911, writ ref'd) (post placed unlawfully in road).

8. RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965); *e.g.*, Hamilton v. Fant, 422 S.W.2d 495, 501-02 (Tex. Civ. App.—Austin 1967, no writ) (control by employer); Leonard v. Abbott, 357 S.W.2d 778, 781 (Tex. Civ. App.—Texarkana 1962) (inherently dangerous activity), *rev'd on other grounds*, 366 S.W.2d 925 (Tex. 1963); Randle v. Naugle, 299 S.W. 297, 300 (Tex. Civ. App.—El Paso 1927, no writ) (nondelegable duty).

9. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937).

10. RESTATEMENT (SECOND) OF TORTS § 409, Comment a (1965).

11. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.11, at 1406 (1956); *accord*, Randle v. Naugle, 299 S.W. 297, 300 (Tex. Civ. App.—El Paso 1927, no writ). The first case to discuss

It is within the nondelegable duty exception that liability arises for the employer of an independent contractor providing security protection.[12] In the leading case of *Adams v. F.W. Woolworth Co.*,[13] it was held that the duty of protection owed to the public is personal to the contractee so as to prevent delegation of any resulting liability.[14] Most courts confronted by this specific problem agree.[15] Until *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*,[16] however, the question had not been resolved in Texas.

In *Piggly Wiggly* the plaintiff contended that the defendant was not necessarily relieved of liability upon a finding that its security service was an independent contractor since the store had a nondelegable duty to afford its customers a safe place in which to shop. As a result, liability should have attached as a matter of law when the duty was breached by the security guards acting for the store.[17] Before answering this contention the court noted the existence of two possibly applicable exceptions to the rule that an employer is not liable for the tortious acts committed by an independent contractor.[18] The first of these exceptions is the prohibition against the delegation of duties relating to inherently dangerous activities.[19] The court left undecided the question whether employing a security service to protect property is inherently dangerous. It stated merely that the appellant offered no evidence on the issue and thus could not prevail.[20]

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this nondelegable duty exception held an employer liable for the negligence of his independent contractor in leaving a coal chute open. Pickard v. Smith, [1861-73] All E.R. 204 (C.B. 1861).

12. *See generally* Annot., 38 A.L.R.3d 1332, 1339-40 (1971).

13. 257 N.Y.S. 776 (Sup. Ct. 1932).

14. *Id.* at 781-82.

15. *E.g.*, Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 584 n.13 (Alas. 1973); Nash v. Sears, Roebuck & Co., 163 N.W.2d 471, 475 (Mich. Ct. App. 1968), *rev'd on other grounds*, 174 N.W.2d 818 (1970); Zentko v. G.M. McKelvey Co., 88 N.E.2d 265, 268 (Ohio Ct. App. 1948). *But cf.* Williams v. Wometco Enterprises, Inc., 287 So. 2d 353, 354 (Fla. Dist. Ct. App. 1973) (employer absolved from liability without discussion of nondelegable duty).

16. 542 S.W.2d 882 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e).

17. *Id.* at 887.

18. *Id.* at 887.

19. *Id.* at 887. The exception to immunity for inherently dangerous activities originated in Bower v. Peate, 1 Q.B.D. 321, 322 (1876), and is recognized in Texas. *E.g.*, Galveston-Houston Elec. Ry. v. Reinle, 113 Tex. 456, 463-64, 258 S.W. 803, 805 (1924) (work done near electric wires); Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 159, 81 S.W. 282 (1904) (excavation in public street); Leonard v. Abbott, 357 S.W.2d 778, 781 (Tex. Civ. App.—Texarkana 1962) (crop dusting), *rev'd on other grounds*, 366 S.W.2d 925 (Tex. 1963). For a general discussion of the exception, see Fleming, *Vicarious Liability*, 28 TULANE L. REV. 161, 205-07 (1954); Note, *The Independent Contractor Rule and Its Exceptions in Iowa*, 24 DRAKE L. REV. 654, 664-65 (1975). One court has specifically held that use of armed guards to protect property is not inherently dangeous. Brien v. 18925 Collins Ave. Corp., 233 So. 2d 847, 849 (Fla. Dist. Ct. App. 1970).

20. 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.).

The court decided the case under the second exception. When a merchant undertakes to protect his property he has a duty so personal in character that it may not be delegated. In such cases, liability cannot be avoided, at least where the tort committed is intentional, by the simple expedient of securing special personnel through an independent contractor.[21] The court quoted from *Adams* and approved its rationale for denying the employer protection under the traditional rule.[22] Public policy requires that one expecting to benefit from an act done by another for him should answer for any intentional injury which a third party may sustain from it.[23] While both courts emphasized the advantage to the employer and that the plaintiff was "invited into the store to buy its merchandise,"[24] the holding in *Piggly Wiggly* contained somewhat broader language. Piggly Wiggly could not by utilizing security guards to protect its property obtain immunity from liability which would not be available if it had personally selected and paid the agents and expressly retained control over their actions.[25] A store owner's duties under such circumstances are "personal and non-assignable."[26]

While each of the cases relied upon in *Piggly Wiggly* contains some expression of the theory of nondelegable duties, most can be distinguished.[27] For example, in a frequently cited case, it was held that the detective service making the false arrest was in fact an agent.[28] In light of

21. *Id.* at 888.

22. *Id.* at 888-89, *quoting* Adams v. F.W. Woolworth Co., 257 N.Y.S. 776, 781-82 (Sup. Ct. 1932).

23. Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 889 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

24. Adams v. F.W. Woolworth Co., 257 N.Y.S. 776, 781-82 (Sup. Ct. 1932); Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 889 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

25. Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 890 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

26. *Id.* at 890.

27. *Id.* at 888; *see* Adams v. F.W. Woolworth Co., 257 N.Y.S. 776 (Sup. Ct. 1932) (agent status of security service); Hendricks v. Leslie Fay, Inc., 159 S.E.2d 362 (N.C. 1968) (participation of store employee in tort); Zentko v. G.M. McKelvey Co., 88 N.E.2d 265 (Ohio Ct. App. 1948) (participation of store employee in tort); Szymanski v. Great Atl. & Pac. Tea Co., 74 N.E.2d 205 (Ohio Ct. App. 1947) (participation of store employee in tort); Halliburton-Abbott Co. v. Hodge, 44 P.2d 122 (Okla. 1935) (participation of store employee in tort); Webbier v. Thoroughbred Racing Protective Bureau, Inc., 254 A.2d 285 (R.I. 1969) (duty imposed by ordinance). The most positive support for the rule that the duty owed to the public by a store owner seeking to protect his property is nondelegable may be found in Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 584 n.13 (Alas. 1973). It is the only case cited by *Piggly Wiggly* which discusses nondelegable duty other than as dictum.

28. Adams v. F.W. Woolworth Co., 257 N.Y.S. 776, 781 (Sup. Ct. 1932); Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 888-89 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). In *Adams* the court went further and stated that if additional grounds for liability were needed then participation by the store's manager in the arrest would suffice. 256 N.Y.S. at 781. Only after offering these reasons for liability did the opinion express the

this, it is significant that the jury in *Piggly Wiggly* found that Denco was acting as an independent contractor and that the manager of the grocery store did not participate in either the false imprisonment or the filing of the complaint.[29]

In *Szymanski v. Great Atlantic & Pacific Tea Co.*,[30] a case cited approvingly by the court in *Piggly Wiggly*, the Ohio Court of Appeals specifically found that the defendant's store manager participated in the false imprisonment along with an employee of the security service.[31] The court there distinguished the facts from those in a case where no agent of the store participated in the tort of the detective.[32] In another case, the emphasis was on the complicity of a store manager in a false arrest and the rule that a joint tort-feasor remains liable even though the other joint tort-feasor was an independent contractor.[33]

The court in *Piggly Wiggly* relied to some extent on participation by the grocery store manager, despite the jury finding of no participation. Immediately before stating its holding, the court emphasized Piggly Wiggly's role in the arrest of Mrs. Dupree, noting the fact that the manager remained in the back storeroom one-half the time Mrs. Dupree was detained there.[34] Moreover, the court chastised Piggly Wiggly for making no effort to investigate the propriety of the arrest and detention.[35]

The only other Texas decision to consider a situation involving false imprisonment by a detective agency held the employer of the agency liable.[36] In that case, however, the detective agency was an agent of the defendant and acting with defendant's employee.[37] Further, that court found that the defendant's employee was guilty under a penal statute because he knew the illegal intent of the detective agency and he encouraged the tort.[38] Still another case cited by the court in *Piggly Wiggly* provides questionable authority because liability was found under an en-

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view that Woolworth should be vicariously responsible for the acts of an independent contractor. *Id.* at 781.

29. Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 886 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

30. 74 N.E.2d 205 (Ohio Ct. App. 1947).

31. *Id.* at 207.

32. *Compare id.* at 206, *with* Niles v. Marshall Field & Co., 218 Ill. App. 142, 146 (1920).

33. Hailliburton-Abbott Co. v. Hodge, 44 P.2d 122, 126 (Okla. 1935).

34. Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 889-90 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

35. *Id.* at 890. The court's approach overlooks the point that the major reason for hiring a security service would be to keep the store management out of such investigations.

36. Kroger Co. v. Warren, 420 S.W.2d 218, 222 (Tex. Civ. App.—Houston [1st Dist.] 1967, no writ).

37. *Id.* at 220.

38. *Id.* at 221-22. A person is a principal offender when knowing the unlawful intent of another he aids by acts or encourages by words or gestures those actually engaged in the unlawful act. Tex. Penal Code art. 66 (1925) (repealed 1973).

tirely different exception to the general rule that there is no vicarious liability for acts of an independent contractor.[39]

In cases with facts similar to those in *Piggly Wiggly,* courts in Illinois have exempted the employer from liability,[40] and in a decision by a North Carolina court the employer of an independent contractor acting as a collector of accounts was held not liable for a wrongful arrest by the contractor.[41] Also, the Florida Court of Appeals has stated, without addressing the issue of a nondelegable duty, that absent a showing that the contractee knew or should have known of the dangerous propensities of a guard employed by an independent contractor or that the contractee exercised control, no liability could exist.[42]

The opinion has sometimes been expressed that the servant, for whose torts the master is liable, and the independent contractor, for whose torts the contractee is not liable, are very similar in an economic sense.[43] Furthermore, courts "have found it difficult to develop a convincing, manageable justification for the two different rules of liability."[44] This difficulty has often resulted in unclear decisions, and many of them have offered a mixture of reasons for finding liability.[45] Frequently courts attempt to find exceptions to the general rule of a contractee's immunity, and since the exceptions overlap, cases are comparatively rare in which at least several do not appear.[46]

At common law the employer was responsible for a contractor's negligence because of a duty to keep the premises reasonably safe for those

39. Webbier v. Thoroughbred Racing Protective Bureau, Inc., 254 A.2d 285, 289 (R.I. 1969) (statutory duty to protect race-going public). Where a duty to the public is imposed by ordinance, the contractee cannot escape liability by delegating it to his independent contractor. Comment, *Responsibility for the Torts of an Independent Contractor,* 39 YALE L.J. 861, 867 (1930); *accord,* Houston & Great N.R.R. v. Meador, 50 Tex. 77, 85-86 (1878) (railroad had duty to construct cattle-guards).

40. Komorowski v. Boston Store, 263 Ill. App. 88, 96 (1931) (false arrest by guard employed by detective service); Niles v. Marshall Field & Co., 218 Ill. App. 142, 146 (1920) (employee of detective service falsely arrested customer of defendant).

41. Inscoe v. Globe Jewelry Co., 157 S.E. 794, 795 (N.C. 1931). *But see* Hendricks v. Leslie Fay, Inc., 159 S.E.2d 362, 368 (N.C. 1968) (employer of security service held liable).

42. Williams v. Wometco Enterprises, Inc., 287 So. 2d 353, 354 (Fla. Dist. Ct. App. 1973).

43. Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule,* 40 U. CHI. L. REV. 661 (1973).

44. *Id.*; *see* Williams, *Liability for Independent Contractors,* 14 CAMBRIDGE L.J. 180 (1956).

45. *E.g.,* Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 584 n.13 (Alas. 1973) (nondelegable duty); Dillon v. Sears-Roebuck Co., 253 N.W. 331, 336 (Neb. 1934) (servant status of the security service); W.T. Grant Co. v. Owens, 141 S.E. 860, 866 (Va. Ct. App. 1928) (employer participation in the tort).

46. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 469 (4th ed. 1971). One writer has termed the rule "unduly difficult to apply, and divided against itself without any reason." Williams, *Liability for Independent Contractors,* 14 CAMBRIDGE L.J. 180, 192 (1956).