

5 Trials Digest 11th 7 (Cal.Superior), 2007 WL 4896701

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Superior Court, Sacramento County, California.

F&H Construction Inc. vs. Placer County Water Agency

TOPIC:

Synopsis: Vendor not required to indemnify for fire during installation of equipment

Case Type: Contracts; Breach; Contracts; Indemnity; Construction & Industrial Accidents; Fire/Burn/Explosion

DOCKET NUMBER: 04AS05135

STATE: California

COUNTY: Sacramento

Verdict/Judgment Date: December 13, 2007

JUDGE: [Lloyd G. Connelly](#)

ATTORNEYS:

Plaintiff: [Joseph D. Ryan](#), Ryan & Lifter, San Ramon.

Defendant: [Raymond Bangle III](#), Matheny, Sears, Linkert & Jaime, Sacramento; [Richard S. Linkert](#), Matheny, Sears, Linkert & Jaime, Sacramento.

SUMMARY:

Verdict/Judgment: Defendant

Verdict/Judgment Amount: Defense

Range: \$0

The jury found in favor of defendant Kruger. The claims against all other parties were resolved by way of settlement or summary judgment prior to trial.

Trial Type: Jury

Trial Length: 39 days.

Deliberations: 4.5 hours.

Jury Poll: 9-3.

EXPERTS:

Plaintiff: [Donald J. Perkins](#), fire investigator, Fire Cause Analysis, Berkeley, (510) 649-1300.; [Glen R. Stevick](#) Ph.D., P.E., mechanical engineer, Berkeley Engineering and Research Inc., Berkeley, (510) 549-3300.

Defendant: [Stephen P. Andrew](#), P.E., physical engineer, Exponents Failure Analysis Associates, Menlo Park, (650) 326-9400.; [Abid Kemal](#), Ph.D., physical engineer, Exponents Failure Analysis Associates, Menlo Park, (650) 326-9400.; Joshua Ritti, practice director/principal engineer, Exponent Failure Analysis Associates, Oakland, (510) 268-5000.

TEXT: CASE INFORMATION FACTS/CONTENTIONS

According to Plaintiff: A fire occurred during the course of constructing the "Foothill Water Treatment Plant, 28MGD Expansion," a facility owned by defendant Placer County Water Agency ("PCWA"). Plaintiff F&H Construction Inc. was the general contractor for the project. Defendant I. Kruger Inc. ("Kruger") was a vendor who supplied materials and equipment for installation of Kruger's proprietary "Actiflo" filtration system pursuant to written contract that was not signed by plaintiff. Prior to trial, a settlement was reached with defendants PCWA and Essex **Insurance** Company, the insurer for the project. In addition, defendant Nova Chemicals Inc. was dismissed following a successful motion for summary judgment. Plaintiff attempted to enter a default against defendant GT Plastics Inc. The trial proceeded solely against Kruger.

The subject fire occurred during the final phase of constructing the Actiflo Building, a structure made principally of concrete and steel that contained various tanks and other elements of the water filtration system. The final process in the Actiflo Building involved filtration of water that was circulated through plastic (polystyrene) honeycomb slanted hexagonal tubes called lamellas. The polystyrene filtration elements were manufactured in various dimensions, all of which were approximately four feet high. After installation of the lamella modules, located approximately at the 12-foot level of a 24-foot-deep concrete tank, it was discovered that some of the modules were sagging. Pursuant to the request of PCWA, plaintiff contacted defendant Kruger. Defendant Kruger developed a proposed fix that involved welding L-shaped stainless steel support beams to eliminate the sag issue.

The process employed by plaintiff's welders was to level a 10-foot A-frame step ladder on the floor of the sloping tank, place a 2-foot by 6-foot board on the top of the ladder, and then place a "bottle jack" on top. Another 2-foot by 6-foot

board approximately 2 feet long was placed underneath the lamella modules, and the hydraulic bottle jack was used to raise the lamella panels between 3 to 6 inches above the stainless steel beam onto which the L-brackets were welded. Two welders together with an assistant were used for this process; approximately 50 L-brackets had been welded prior to the subject fire. According to the plaintiff's welder, he observed a small flame in one of the lamella tubes directly above where he was making a tack weld. He attempted to snuff the flame out with his welder's glove but was unsuccessful. There were no fire extinguishers in the bottom of the 24-foot-deep concrete tank where they were working. A fellow welder climbed out of the tank via an extension ladder carrying with him an ice water bucket. He dumped the contents over the area that was smoking, without success. The fire continued to grow, and, eventually, the other two men climbed out of the tank. A "bucket brigade" was formed without success. No fire extinguishers were ever located.

The fire eventually spread to roofing insulation, and a major fire ensued.

Plaintiff alleged that defendant Kruger was legally responsible for all damages because the design of the lamella support system was defective, there was no warning that the polystyrene lamella modules were highly flammable, and Ken Hunt, director of operations, instructed plaintiff's Welding General Foreman Dana Leatherwood to raise the lamella 4 to 6 inches in order to avoid the costs associated with removing the lamella so that welding could take place. It was argued that Hunt was under an obligation to warn Leatherwood, who claimed he had no idea that the lamella modules were highly flammable. It was also claimed that defendant Kruger failed to provide a Material Safety Data Sheet ("MSDS") in response to a request made by plaintiff at the inception of the project. The MSDS sheet stated that, while not meeting the definition of "combustible," the lamella would burn upon prolonged exposure to flame or high temperatures. Plaintiff claimed that defendant Kruger breached a contractual indemnity obligation that required defendant Kruger to indemnify plaintiff for all damages save and except those damages caused by plaintiff's sole negligence or willful misconduct. Plaintiff also claimed that defendant Kruger was liable under a negligence theory.

Defendant Kruger contended that the lamella were described as being made of black polystyrene in the contract and that it was under no duty to warn professional welders regarding the flammability/combustibility of plastics. Defendant Kruger claimed that plaintiff breached all applicable welding standards set forth by the American Welding Society and embodied in ANSI Z49.1 and NFPA 58B in failing to either move known combustibles (plastics) away from the weld site or, in the alternative, protect the lamella with welding blankets or other appropriate screen devices. Defendant Kruger further contended that the cause of the extensive damage was the failure to have a fire extinguisher immediately available as required by all applicable standards and by plaintiff's Safety Manual developed for the subject project.

CLAIMED INJURIES NA

CLAIMED DAMAGES

According to Plaintiff: Prior to trial, plaintiff dropped a claim for consequential damages involving overhead expenses, lost profit, and liquidated damages amounting to approximately \$2.5 million. The Third Amended Complaint, which was filed during the pendency of trial pursuant to leave of court, claimed that plaintiff incurred fire rebuild expenses in the approximate amount of \$4,750,000. During the course of trial, these claims were reduced to approximately \$4,000,000.

SETTLEMENT DISCUSSIONS

According to Plaintiff: During the summer of 2006, a mediation was held, at which point plaintiff reached a settlement agreement with defendants PCWA and Essex **Insurance** Company. At the mediation, no offer was made on behalf of defendant Kruger. Prior to trial, a judicially supervised settlement conference was held. The lowest demand made by plaintiff was \$1,000,000. The highest offer made by defendant Kruger was \$200,000.

EXPERT TESTIMONY

According to Plaintiff: Plaintiff's expert, Glen Stevick, Ph.D., P.E., testified that he was retained to conduct a materials analysis shortly after the fire. He obtained an exemplar lamella and conducted combustibility/flammability tests with a portion of the black polystyrene used to manufacture the lamella as well as four other different types of plastics. All the plastics selected for testing burned with a butane lighter, with the exception of flame-retardant ABS. Three of the five samples burned with exposure to hot welding slag.

Plaintiff's expert, Donald J. Perkins, was called to testify as a fire cause and origin expert. He testified that the fire was caused by welding in close proximity to the plastic lamella. He testified that, given the kind of welding activity, the sparks were minimal. He did acknowledge, however, that one of the sparks or pieces of hot welding slag ignited the lamella and that the subject fire resulted from welding.

Defense expert, Stephen P. Andrew, was asked to evaluate the safety aspects of the welding operation. He testified that plaintiff failed to perform a hazard analysis, did not obtain a hot work permit, and did not take proper precautions to either protect the lamella for the welding process or remove it from the welding activity. Plaintiff also failed to supply a properly trained fire watch and did not have a fire extinguisher immediately available. All of these failures were in violation of ANSI/AWS Z49.1 and NFPA 51B.

Defense expert, Abid Kemal, Ph.D., was a fire/combustion/materials expert. Dr. Kemal testified that plastics are made

of hydrocarbons and, clearly, all plastics are flammable. He compared the physical properties of polystyrene with properties of other plastics that were the subject of Dr. Stevick's tests, resulting in testimony that polystyrene is more resistant to burning than other similar plastics. The high impact polystyrene ("HIPS") used to manufacture the lamella was desirable and appropriate. Other lamella manufacturers used HIPS. While certain additives can be used to render plastics more resistant to fire, the intended use of the lamella was submerged in water, and fire-retardant additives would not have been appropriate.

Dr. Kemal testified that use of standard CO2 fire extinguishers would not have compromised the oxygen levels in the tank, contrary to suggestions made by plaintiff's witnesses. He also testified that various other extinguishers specifically intended for confined space use were available. He testified that use of a welding blanket would have prevented the fire and that had a fire extinguisher been immediately available, the fire damage would have been limited to a portion of the lamella and not the destruction of the entire facility.

Defense expert, Joshua Ritti, was an expert in evaluating construction damages, including critical path issues. He testified that the presentation of damages made by plaintiff was outside his ordinary experience in terms of how the documents were presented and organized. As a result of his review of the thousands of pages of documents purporting to document the damages claim, he could only document a maximum fire loss claim of \$2,182,078. In reaching that opinion, he deducted \$314,000 for unsubstantiated general conditions cost beyond the estimated six months. Plaintiff contended that it took 34 months to complete the rebuild. Mr. Ritti stated that this delay could not be related to the fire because no critical path impact was documented. He also deducted \$1,011,799 based upon an analysis performed by defendant Kruger's Director of Operations, Ken Hunt. Mr. Hunt testified that defendant Kruger was not notified of plaintiff's damages claim until April of 2002. Accordingly, defendant Kruger did not have an opportunity to evaluate the equipment to see what equipment could have been salvaged. He completed an analysis based upon photographs taken by plaintiff's fire cause and origin expert and believed that \$1,011,799 worth of equipment may have been salvageable. Mr. Ritti also deducted \$19,422 that was improperly included as being related to other projects and further inappropriate costs of \$48,846.

COMMENTS

According to Plaintiff: The case had an exceedingly complex procedural history. The initial complaint related to the subject fire was filed by Essex **Insurance** Company on December 24, 2002. The complaint was dismissed on May 29, 2003 without prejudice, ostensibly because the subrogation claim did not include the uninsured damages plaintiff, its insured, had sustained. This initial complaint was filed in Placer County.

On December 31, 2003, plaintiff filed a complaint for damages against PCWA, Essex and Kruger in Contra Costa County. PCWA successfully moved to transfer venue to Placer County. On June 14, 2004, a dismissal with prejudice as to defendant PCWA was filed. This was followed by a request for dismissal, without prejudice, of the entire action. On June 24, 2004, a new complaint was filed by plaintiff in San Joaquin County against defendants Kruger, US Filter, GT Plastics, Nova Chemicals and PCWA. The case was subsequently transferred to Sacramento County where First and Second Amended Complaints were filed. A Third Amended Complaint was filed during the course of trial.

More than 20 Motions in Limine were filed by the parties, the vast majority of which were filed by defendant Kruger. A number of issues were litigated during the course of hearings on Motions in Limine prior to jury selection as well as during the course of trial. Among the issues presented were what documents comprised the contract between plaintiff and defendant Kruger, whether plaintiff would receive the benefit of the Collateral Source Doctrine for the \$4.1 million it collected from Essex **Insurance** Company and PCWA, whether or not the contract precluded the recovery of consequential damages, whether plaintiff sustained "property damages," whether plaintiff was properly pursuing an assignment of the Essex subrogation claim, and whether or not defendant Kruger was entitled to setoff for moneys already recovered by plaintiff.

Among the documents ultimately ruled to be part of the plaintiff/defendant Kruger contract was an indemnification clause that provided for the recovery of all attorney fees and costs. Defendant Kruger will contend that it is entitled to recover its attorney fees and costs, including expert witness fees, by virtue of [Civil Code § 1717](#). Entry of judgment was deferred pending resolution of several post-verdict issues.

The **insurance** carrier was American International Group.

Richard S. Linkert represented defendant Kruger and provided the information for this report.

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