Subcontractors Legal Defense Fund
Subcontractors Legal Research Fund
2018-19

The courts are a key battleground in the fight for subcontractor rights. ASA's Subcontractors Legal Defense Fund (SLDF) and the Foundation of ASA's (FASA's) Subcontractors Legal Research Fund (SLRF) support ASA's critical legal activities to protect the interests of all construction subcontractors. Both funds invest in precedent-setting litigation to establish subcontractors' rights. This report summarizes ASA's recent legal advocacy activities. For more information, including copies of the supporting documents for these cases, visit www.SLDF.net.

Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America
On February 7, 2019, ASA produced a friend-of-the-court brief in California, affirming the Superior Court's judgment which voided a Surety's reliance on a "pay when paid" provision to withhold payment from a subcontractor. The case, *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America* is currently on appeal to the Fourth Appellate District in California.

At issue is a 2014 Public Works Project for construction of an arsenic water treatment plant in North Edwards, California. The North Edwards Water District entered into a contract with Clark Brothers as general contractor. Crosno Construction, Inc. was hired by Clark to fabricate, erect and coat two 250,000 gallon welded steel water reservoirs for the project, work that is was within one week of completing when a dispute arose between the Owner and Contractor and the Subcontractor was instructed to stop work. Subcontractor Crosno made a payment bond claim for its work, but because the contract stated that the Surety "shall have reasonable time to make payment to Subcontractor" and defining that time as not less than the time the required to pursue conclusion of legal remedies against the Owner, Travelers Casualty and Surety denied the claim.

In granting summary judgment on behalf of Crosno, the court voided as unenforceable the Surety's reliance on this "pay when paid" provision that defined "reasonable" time for payment as the period of time it took for legal disputes to be resolved. The trial court held that the obligation of the bond is enforceable without reference to any contract between the contractor and the materialman. As such, the contract's definition of "reasonable time" was unreasonable and unenforceable because it impairs the Subcontractor's right to timely payment under the bond. The court added that the primary focus of the Surety should have been on whether the Subcontractor furnished material and performed labor that was used in construction, not on the rights of the General Contractor or Owner. The Surety is appealing, arguing that almost four years after the Subcontractor stopped work on the project, there is still no money due them because of continuing litigation.

In its amicus brief, ASA encourages the Court of Appeal to affirm the Trial Court, citing the importance of maintaining current law on mechanics' liens, stop notices, and payment bonds in

the State of California. These laws provide meaningful security for payment for all interested parties involved in public and private construction. The brief states that arguments to the contrary conflict with the assurance of a bond as a primary obligation independent of the contract – “the very intention of payment protection.”

The brief addresses the contract language in question as an impermissible waiver of payment rights and affirms the bond claim as an independent obligation of the Surety. As such, it maintains, the language of the contract cannot be used to delay Crosno’s payment bond claim. The brief continues, “there is simply no legal or public policy basis to require subcontractors situated like Crosno to wait until after the conclusion of litigation…to be entitled to payment on a payment bond.”

Waverly City School District Board of Education v Triad, et al
ASA along with The Surety & Fidelity Association of America submitted a “friend of the court” brief on January 4th asking the Ohio Supreme Court to limit awards greatly in excess of legitimate claims in breach of contract cases involving multiple defendants. This case involves a lawsuit arising out of a $6 Million remediation to three Waverly City, Ohio schools built in the early 1990s. The Waverly City School District and Ohio Schools Facilities Commission had, on the eve of the running of the statute of limitations, sued all entities involved in any fashion in the underlying construction.

During discovery, the defendants found that rather than allocating damages with reasonable certainty as to each defendant, the Owner instead simply had its experts identify all parties involved in the construction of each item of work that ultimately was replaced in the remediation. By the eve of trial, the Owner had settled with the architect, the roofer’s surety, the roofer’s insurer, and the roofing materials supplier, and the construction manager. The total value of the settlement coming to the Owner for its $5.2 Million in recoverable remediation costs (plus $800,000 in agreed upon betterment) was in excess of $10.5 Million, yet the trial court was informed by the Owners that they still had $3.4 Million in claims left to litigate notwithstanding this excess recovery. The trial court granted summary judgment in favor of two remaining contractors, holding that the Owners had been made whole by previous settlements and failed to properly allocate damages among the defendants with reasonable certainty.

The appeals court reversed, claiming that the Owners can recover damages beyond the amount received in settlement from the settling co-defendants and that they are not required to allocate damages among co-defendants. The defendants have appealed the case to the Ohio Supreme Court and ASA has joined them in requesting intervention and a favorable ruling on their behalf.

In the amicus brief, ASA maintains that the appeals court decision conflicts with well-established law that a plaintiff is entitled to be made whole, but not recover a windfall. By opening the door for litigants to receive massive windfalls with no relation to actual damages, the decision would encourage and prolong costly litigation and impact construction contractors, subcontractors, and bonding companies with potentially devastating results.

The case involves matters of great public and general interest and profoundly affects ASA, its member companies, and the thousands of subcontractors and material suppliers working on construction projects of all sizes throughout Ohio. The American Subcontractors Association, encourages the Court to accept jurisdiction, reaffirm the well-established contract law principles that have been thrown into disarray by Waverly and reverse the Court of Appeals.

Steven Painter; Tonya Wright, Individually and as Representative of the Estate of Earl A. Wright, III, Deceased; Virginia Weaver, Individually and as Next Friend of A.A.C., a Minor; and Tabitha R. Rosello, Individually and as Representative of the Estate of Albert Carillo, Deceased v. Amerimex Drilling I, Ltd.

In a "friend-of-the-court" brief filed on July 31, 2018, the American Subcontractors Association asked the Supreme Court of Texas to reconsider its underlying decision in a case of importance for all employers who pay employees whose normal duties do not include transportation any amount to transport other employees to and from the workplace.

In the underlying case, Steven Painter, J.C. Burchett, Earl Wright and Albert Carillo were working the night shift for Amerimex Drilling, drilling a well for Sandridge Energy on an oil and gas drilling rig in Pecos County. The prime contract between Sandridge and Amerimex provided that Amerimex was to perform the drilling and provide the drilling crews. Due to some Sandridge restrictions, the bunkhouse for the Amerimex crew was not as close as they normally would have been, located about 30 miles from the remote drilling site. The prime contract provided that the driller for each crew would receive $50 per day for transporting the crew between the bunkhouse and the drilling site.

On July 28, 2007, after the Amerimex crew's shift ended, Burchett, the driller, was driving the crew back to the bunkhouse and on the trip, he fell asleep and the truck carrying the crew rolled over, ejecting all four members, injuring Painter and Burchett and killing Wright and Carillo.

Burchett received workers' compensation for his injuries after the Texas Department of Insurance determined that his injuries were covered because, the department concluded, Burchett "was paid to transport his crew to and from the worksite and the company bunkhouse." The trial court granted Amerimex's motion for summary judgment, dismissing the claims because Amerimex is not vicariously liable for the negligence of JC Burchett." The Eighth Court of Appeals, El Paso, Texas, denied the appeal. However, in an April 13, 2018, opinion, the Texas Supreme Court reversed and remanded the case to the trial court, relying on workers' compensation precedent holding that where an employee transports others to and from the place of employment as either part of the contract of employment or for payment by the employer, the work is within the scope of employment for purposes of the coverage and protections of the workers' compensation statute. Citing that case law, the Texas high court reversed and remanded the lower courts for a determination whether Burchett was acting in the course and scope of his employment at the time of the accident.

In the brief, ASA explains that Amerimex is not liable for the actions of Burchett because even if Burchett was considered to be an employee at the time of the accident, he was outside the course and scope of employment. "An employer will only be held vicariously liable for the actions of its worker if: (1) the worker was an employee; and (2) was acting in the course and scope of employment. Neither requirement is satisfied in this case. If a worker is determined to be an employee, the question is whether the employee was within the course and scope of his employment. Even if Burchett was an employee at the time of the accident, he was not within the course and scope of his employment when driving crew back to the bunkhouse. This Court has stated 'vicarious liability arises only if the tortious act falls 'within the scope of employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired.'' Traveling to and from work, even though arguably for the employer's benefit, has been consistently held to be outside the course and scope of employment."

ASA adds that travel reimbursement does not create an exception to the "coming and going" rule. "The contractual $50 per day Driver's Bonus paid to the driller of each crew was a travel reimbursement," ASA writes. "Travel reimbursements create no exception to the 'coming and going' rule, which states travel to and from a job location is not within the course and scope of employment. The Driver's Bonus was to reimburse workers for the costs associated with a remote drill site, similar to the $50 per day Subsistence Bonus that compensated crew for daily expenses and the $50 per day Bottom Hole Bonus available to crew who remained employed from the well's spud date through its completion."

"The lower courts," ASA continues, "correctly applied the principle…that an employer compensating travel does not create an exception to the coming and going rule." Amerimex exercised no control and had no right of control over Burchett once he completed his shift. The remote location of the drill site does not affect the coming and going rule, and in fact lends support to the argument that Amerimex is simply trying to reimburse crew members for their added personal costs due to the remote well location. The Court made an unnecessary and incorrect distinction between: (i) a contract requiring Amerimex to hire drivers to provide transportation, and Amerimex deciding to offer that extra work to Burchett; and (ii) the actual contract contemplating that Amerimex would assign the driving task to specific individuals, the drillers."

"While Amerimex had the right to control Burchett regarding his employment as a driller," ASA writes, "once Burchett's shift ended and Burchett left the well location, Amerimex no longer exercised control over him. The driving 'job' assigned to Burchett was wholly separate and unrelated to Burchett's employment as a driller. It, therefore, must be analyzed separately to determine whether Amerimex exercised sufficient control over Burchett's actions as a driver to impose vicarious liability on Amerimex. Even if Burchett was required to drive the crew back to the bunkhouse in the evenings, Amerimex exercised no control over Burchett completing this job. Amerimex had no right of control over the employees after their shift ended. They were not on the payroll and the company did not direct or instruct its employees in any regard as to how they commuted to and from work. Regardless of Plaintiff's contentions, a travel reimbursement is not being 'on the payroll'. At most, Burchett was an independent contractor, and an independent contractor's negligence does not impose liability on an employer for respondent superior purposes.

Ohio Northern University v. Charles Construction Services, Inc., and The Cincinnati Insurance Company (CGL insurance coverage)

On April 11, 2018, ASA, Associated General Contractors of Ohio, and Ohio Contractors Association asked the Supreme Court of Ohio to affirm an appeals court decision in a commercial general liability insurance case that otherwise could have tremendous negative ramifications for subcontractors in Ohio and beyond. In their brief, the *amici* emphasized that "their members have an interest in seeing that the language in commercial general liability policies be given its plain and ordinary meaning, without resorting to the use of judicial interpretation in attempts to alter that plain meaning." "It is the custom and practice in the construction industry to rely upon the coverage provided by the plain language of commercial general liability policies for defective workmanship by a subcontractor," the *amici curiae* said.

In the underlying case, Ohio Northern University contracted in 2008 with Charles Construction Services to build a new luxury hotel and conference center on the ONU campus, and most of the project construction work was performed by subcontractors to Charles Construction. In

2011, after construction was complete, ONU discovered evidence of water intrusion and moisture damage to numerous areas of the building. While remediating the problems, ONU discovered serious structural defects which greatly broadened the scope of the remedial work and required completely removing and replacing the brick and masonry façade. ONU sued Charles Construction, who brought in many of its subcontractors.

Charles Construction's CGL carrier, The Cincinnati Insurance Company, moved for Summary Judgment, citing an earlier case, *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, arguing that Charles Construction's CGL policy did not provide coverage with respect to any of the damages or claims, and therefore owed no duty to defend and indemnify Charles Construction against ONU's claims. Cincinnati Insurance grounded its arguments in the Supreme Court of Ohio's proclamation in *Custom Agri* that "claims of defective construction or workmanship brought by a property owner are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy."

ONU and Charles Construction countered that *Custom Agri* was not as broad as Cincinnati Insurance claimed and was distinguishable because the "products-completed operations hazard" portion of Charles Construction's CGL policy applied and that while the "your work" exclusion would exclude coverage for occurrence damages arising out of work performed by Charles Construction, the "subcontractor exception" to the "your work" exclusion would bring the damages in this case within the scope of coverage, as the damages were due to the allegedly defective work of subcontractors of the primary insured.

The trial court agreed with Cincinnati Insurance, finding that *Custom Agri* specifically applied and not only was there no coverage, the insurer did not even have a duty to defend the claim, because defective construction was not an occurrence under a CGL policy. ONU, claiming the benefits of coverage as an additional insured, and Charles Construction appealed, and the Hancock County Court of Appeals, Third Appellate District, reversed. The appeals court explicitly rejected Cincinnati Insurance's position that *Custom Agri* established that "all property damage" regardless of who performed it can as a matter of law never constitute an "occurrence." Further, the appeals court noted that its decision was consistent with the trend of many other jurisdictions—many of which involved cases in states where ASA has filed "friend-of-the-court" briefs—in addressing disputes with the same question.

In the brief, the *amici curiae*, arguing that *Custom Agri* should be overruled, told the Ohio high court, "The [*Custom Agri*] decision was wrongly decided, defies practical workability, and no undue hardship would occur from abandoning the precedent," adding, "Ultimately, the *Custom Agri* holding is inconsistent with the law of other states considering identical policies, and it is inconsistent with Ohio law, as the general holding renders superfluous existing coverage in the CGL policy."

The *amici curiae* concluded, "The primary argument relied upon by [Cincinnati Insurance] is the broad holding in *Custom Agri*. However … *Custom Agri* was not fully briefed by adverse parties. A full review of the law interpreting this universal CGL policy shows that *Custom Agri* was wrongly decided. It also defies practical workability because it is in opposition to the law of numerous other states, and ultimately, would not work a hardship if it were reversed. …The holding in *Custom Agri* should be completely reversed."