B251933

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

JOEL HERNANDEZCUEVA, et al.,

Plaintiffs and Appellants,

vs.

E.F. BRADY COMPANY, INC.

Defendants and Respondent.

AMICUS CURIAE BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, THE ASSOCIATION OF THE WALL AND CEILING INDUSTRY, AND THE ROOFING CONTRACTORS ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT E.F. BRADY COMPANY, INC.

Appeal from the Superior Court of the State of California
Case No. BC475956, Honorable Joseph Di Loreto, Judge Presiding

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, Amicus Curiae provides the following information:

American Subcontractors Association, The Association of The Wall And Ceiling Industry, and The Roofing Contractors Association of California is the Amicus Curiae, and has made the primary monetary contribution for the preparation and filing of its brief.

Dated: September 23, 2015

CRAWFORD & BANGS, LLP

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CASE LAW

ISSUE TO BE BRIEFED

The issue to be decided in this case is whether a subcontractor, Respondent E.F. Brady, can be held strictly liable for installing material that complied with specifications which the subcontractor did not write, and installing material that was approved by the architect on the project.

The answer is no. A subcontractor cannot be strictly liable for installing material that complied with specifications. To impose a burden of strict liability on a subcontractor for installing material that complied with specifications because years later it is identified to have a dangerous component would impose liability on a party who did not specify or approve the material installed. Further, strict liability on subcontractors would place liability on a party who does not control the risk. It would also broaden liability in construction thereby raising insurance rates to contractors throughout California, which in turn would unnecessarily raise construction costs in a still struggling economic environment. This would place undue burden on the Construction Industry that is unnecessary to protect the public.

INTRODUCTION

Amicus Curiae, includes the American Subcontractors Association ("ASA"), The Association of the Wall and Ceiling Industry ("AWCI"), and The Roofing Contractors Association of California ("RCAC"). ASA is a national non-profit trade association supported by the membership dues paid by its approximately 2500 member businesses operating as construction subcontractors and suppliers throughout the country. More than 300 subcontractor firms in California are members of American Subcontractors Association of California (ASAC) having four chapters in the state. AWCI is a non-profit trade association with approximately 2,200 subcontractor, supplier and manufacturer members conducting business in the wall and ceiling trades, predominately in the United States. RCAC represents the interests of California's approximately 5,000 roofing contractors, as well as roofing material manufacturers and suppliers, in legislative, regulatory and business affairs. The *Amicus Curiae* application and brief have been filed because if the opinion of the trial court is reversed, such reversal would have significant adverse consequences for subcontractors who do business in California and on the California public at large.

Amicus Curiae supports Defendant-Respondent E.F. Brady in seeking affirmation of the trial court ruling holding that E.F. Brady could not be strictly liable for installing material approved by the Owner's architect and required by its Contract to comply with specifications that it did not write.

The decision of the trial court is in accord with established case law recognizing a clear distinction between a subcontractor, a manufacturer, and those who place a product into distribution. The equities courts have established through developing the doctrine of strict liability do **not** favor extending liability to one who installs material that is (a)required by specifications prepared by others, (b) purchased from others, and (c) merely installed as required by Contract.

On the other hand, if this Court rules as requested by Appellant and reverses the trial court, it will change long-standing California law and unfairly impose liability on California subcontractors for risks they do not control. This would be a severe inequity not only for E. F Brady but for other future similarly situated subcontractors who call California home and help build this state. Such a ruling

would also create uncertainty in the construction industry, and increase costs to subcontractors for insurance premiums, and increase the cost of construction in this state, to the detriment of the construction industry and the public at large.

As the primary basis for their appeal, Appellants seek to extend strict liability to subcontractors for merely installing materials in compliance with specifications they do not write. A thorough analysis of the relevant case law and public policy, as follows in this brief, will show that there is no support for Appellants' position, in either case law or public policy, for extending strict liability to subcontractors.

STATEMENT OF THE CASE

To conserve the Court's resources, the *Amicus Curiae* opts to omit this section and relies upon the statement of factual and procedural history set forth in the Opposition Brief of Respondent E.F. Brady.

ARGUMENT

I. STRICT LIABILITY DOES NOT APPLY TO SUBCONTRACTORS

A. The Holding of Monte Vista Development Corp. Applies to the Facts of this Case.

In *Monte Vista Development v. Superior Court* (1991) 277 Cal.App.3d 1681, 174, the court relied on the Restatement (Second) of Torts Section 402A (1)(a), which provides that one who sells a defective product is liable to the consumer for physical harm if the "(a) the seller is engaged in the business of selling such a product."

In *Monte Vista Development v. Superior Court*, the issue was whether a subcontractor who installed a tile soap dish should be strictly liable for personal injuries suffered when the soap dish broke. The court after concluding that the subcontractor had merely installed material purchased from others, ruled a subcontractor was <u>not</u> a "seller" within the meaning of the Restatement.

Here, E.F. Brady was engaged to install drywall. Further, E.F. Brady simply installed material that it was required by its contract to install to comply with Project specifications written and approved by

others. Accordingly, under the reasoning in *Monte Vista Development v. Superior Court*, E.F. Brady is simply not a "seller" for purposes of being liable under the doctrine of strict liability. This reasoning is also supported by the Restatement (Second) of Torts Section 402A (1)(a) and the history of strict liability in construction in California as explained below.

B. California Case Law on Construction Does not Support Extension of Strict Liability to Subcontractors.

Strict Liability in the construction setting was first introduced in California in *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, when the court found a developer strictly liable for defects in mass-produced homes. In that case, the plaintiff (a homeowner) successfully sued a home developer in strict liability for damages caused by failure of the home's radiant heating system.

The Court in *Kriegler* pointed out that a developer of defective mass-produced homes, like a manufacturer, retailer, or supplier of another product, is responsible for dangerous conditions in its own products. Thus, such developers are in a better economic position to

bear the resulting loss than the consumer, who justifiably relied on the developer's expertise in constructing mass-produced homes. (*Id.* at p. 228.) The *Kriegler* court explained: "We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." (*Id*. at p. 227.)

Subsequently in *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131 the court held that a subcontractor hired by a developer cannot be strictly liable for defects in mass-produced homes. The cases prior to *La Jolla Village Homeowners' Assn*. had concluded that strict products liability did not apply to ordinary subcontractors because they provided services rather than products.

Later in *Jimenez v. Superior Court* (2002) the court extended the doctrine of strict liability to manufacturers of windows in mass produced homes. *Jimenez* did not specifically address subcontractors but addressed those providing services.

As the *Jimenez* court explained, under California law persons providing only services are not subject to strict products liability. (See *Murphy v. E.R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 677 [strict products liability law does not apply to services]; *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487 [those who sell services not liable in absence of negligence or intentional misconduct]; *Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 345 [law of negligence, not strict liability, governs services]; Rest.3d Torts, Products Liability, § 19, subd. (b) ["Services, even when provided commercially, are not products"]. *Jimenez, supra* at 479.

As explained above, in *Jimenez*, the court extended strict liability to the manufacturers of windows in mass-produced homes. But no California case has imposed strict liability in the standard construction case absent a "product", i.e., mass produced house. Here, there is no genuine dispute that the work performed by E.F. Brady did not produce a "product." Instead, E.F. Brady merely installed material that complied with the Contract specifications written by others and approved by the architect.

II. PUBLIC POLICY WOULD NOT FAVOR EXTENDING STRICT LIABILITY TO SUBCONTRACTORS.

A. Subcontractors Provide Services and Extending Strict Liability Would Extend Strict Liability to A Party Not Controlling the Risk

Jimenez, supra disapproved of *La Jolla Village Homeowners' Assn., supra* in the context of manufacturers but, as explained above, the decision makes clear that those providing services are not subject to strict liability. In *La Jolla Village Homeowners' Assn*. the court head on addressed why strict liability is not properly applied to subcontractors, explaining that "the realities of the real estate construction/development business weigh heavily in deciding **against** an extension of strict liability to subcontractors." (212 C.A.3d 1145, *emphasis added.*) The court added that "to extend the doctrine to … subcontractors would seriously impact that industry and the home buying public. The additional costs to the subcontractor for insurance premiums for the newly created exposure would be passed on to developers who in turn would pass the cost on to the consumer, resulting in higher housing costs." (212 C.A.3d 1145.)

The Court's analysis in *La Jolla Village Homeowners' Assn.* was spot on: Public policy would not be benefited by extending strict liability to subcontractors who do not create specifications.

B. Continuing to Follow *Monte Vista Development Corp.* is Equitable

At pages 39 through 43 of their Reply Brief, Appellants claim that E.F. Brady did not merely provide services and tries to distinguish the facts from *Monte Vista Development Corp.* or argue that *Monte Vista Development Corp.* got it wrong. These arguments are not supported by simple logic.

E.F. Brady was retained to install drywall. Like virtually all subcontractors, it was required to follow specifications written by others and approved by the architect. E.F. Brady marketed no "product" and purchased materials from others to be installed in accordance with specifications it did not control. To hold as urged by the Appellant here, namely that E.F. Brady is the seller of a product ignores these facts.

Further, E.F. Brady, like all subcontractors, provides a service to install a component of a building that in and of itself is not a product. Under well-established California law, in construction cases

the only parties subject to strict liability are developers of mass-produced homes and manufacturers of windows that are a component part of such mass-produced homes. Here, E.F. Brady and other similarly situated subcontractors are not constructing a product, i.e., a mass produced home or a component of such, but instead are simply providing services to install materials as directed by and purchased from others.

If strict liability were extended to subcontractors this would extend strict liability beyond any identifiable "product." The building constructed with a portion of E.F. Brady's work is not a product under California Construction Law principals since it is not a "mass-produced" residential home but instead a commercial building. To extend liability to a subcontractor for following specifications others write and an architect approves for a building that is not a product unduly extends strict liability to one who does not control the risk and on one who does not make or market the product at issue.

III. IMPOSING STRICT LIABILITY ON SUBCONTRACTORS WOULD ADVERSLY IMPACT SUBCONTRACTORS AND IS UNNECESSARY FOR PROTECTION OF PUBLIC AT LARGE

Under California law it seems indisputable that a manufacturer of material, like the manufacturer of the material used by E.F. Brady as a bonding compound and drywall, is subject strict liability because they manufactured a "product." But here the end user of the "product" in question was E.F. Brady. Installing this material is not analogous to tires on a car as explained by *La Jolla Village Homeowners' Assn*. and there is simply no basis to push liability to E.F. Brady.

In a situation like the dispute here, subcontractors like E.F. Brady are doing nothing more than installing material; they are not distributing or marketing a product. As explained above, E. F. Brady and other similarly situated subcontractors are part of constructing a building that itself is not a product. To extend strict liability to Subcontractors, as explained in *La Jolla Village Homeowners' Assn* would increase costs of construction with the burden falling not only on subcontractors but the public at large, none of whom specified the

material to be used, manufactured the material, or put the material into commerce.

CONCLUSION

California Construction Law only applies strict liability in construction of mass-produced homes. The building in question does not fall into this category, and the Appellee was only a subcontractor, not a developer, and did not manufacture, market or distribute the product that allegedly harmed the Appellant. Instead, as the trial court correctly found, E. F. Brady simply purchased and installed material in compliance with specifications written by others and approved by an architect.

Extending strict liability to subcontractors such as E.F. Brady would unnecessarily change to existing law is simply not good public policy. If Appellant's request for reversal of the trial court is accepted, the resulting opinion would burden a party with no control over the specifications to be followed, and unduly increase the cost of

insurance against a party that does not control the risk in the first place. Therefore, the judgment of the trial court should be affirmed.

Dated: September 23, 2015

Respectfully submitted,
CRAWFORD & BANGS, LLP

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The Association of the Wall and
Ceiling Industry, and The Roofing
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

Pursuant to California Rules of Court, Rule 8.204(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Amicus Curiae Brief of American Contractors Association, The Association of the Wall and Ceiling Industry, and The Roofing Contractors Association of California in Support of Respondent E.F. Brady Company, Inc. contains 2,248.00 words, excluding those materials not required to be counted under Rule 8.204(c)(3).

Dated: September 23, 2015 CRAWFORD & BANGS, LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and the correspondence will be deposited with the United States Postal Service that same day in the ordinary course of business; my business address is 1290 E. Center Court Drive, Covina California 91724

On September 25, 2015, I served the following document described as:

AMICUS CURIAE BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, THE ASSOCIATION OF THE WALL AND CEILING INDUSTRY, AND THE ROOFING CONTRACTORS ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT E.F. BRADY COMPANY, INC.

on the interested parties in this action by placing copies thereof enclosed in sealed envelopes addressed as follows:

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_X_ **(BY FEDERAL EXPRESS)** By causing such envelope to be delivered via Federal Express, next day service, to the offices of the addressee. **EXECUTED ON** September 25, 2015, at Covina, California.

__X_ **FEDERAL** I declare that I am employed in the officer of a member of the bar of this court at whose direction the service was made.

MARIE MELENDEZ BY_____
SIGNATURE