

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

UDC-UNIVERSAL  
DEVELOPMENT, L.P.,

Cross-Complainant and Respondent,

v.

CH2M HILL,

Cross-Defendant and Appellant.

H033610  
(Santa Clara County  
Super. Ct. No. 801617)

In this appeal CH2M Hill seeks review of a judgment on a cross-complaint brought by respondent UDC-Universal Development, L.P. (UDC), pursuant to an indemnity provision in the parties' contract. The judgment required CH2M Hill, which had denied UDC's tender of defense, to reimburse UDC for the costs of its defense in a third entity's lawsuit. CH2M Hill contends that (1) the parties' contract required no defense because CH2M Hill's negligence was not alleged in the third party's complaint or established in UDC's action; and (2) UDC's cross-complaint was barred because its contract with CH2M Hill was illegal. We find no error and affirm the judgment.

CH2M Hill also seeks review of a postjudgment order under Code of Civil Procedure section 411.35, in which the court granted its motion for verification but denied its request for costs and attorney fees in the cross-action. We find no abuse of discretion in the court's application of the statute and will therefore affirm this order as well.

## *Background*

Between July 1995 and February 1996 the parties entered into two contracts under which CH2M Hill would provide engineering and environmental planning services in connection with the development of a residential condominium complex called Village Hidalgo, later known as Valle Vista. UDC was the developer of the project. Among the provisions of the 1995 agreement was paragraph 20, which obligated CH2M Hill to indemnify UDC under certain conditions and to defend UDC against "any suit, action or demand" brought against UDC "on any claim or demand covered herein."

In October 2001 the homeowners association of Valle Vista (hereafter, "the HOA") filed a first amended complaint against UDC (which by then was called Shea Homes) for property damage resulting from "defective conditions" at the project, due in part to negligent planning and design of open space and common areas. During the ensuing litigation the HOA submitted consultant reports describing the adverse effects of drainage problems at the site, as well as soil instability, erosion, settling, and other geotechnical concerns.

In November 2006 UDC cross-complained for indemnity against numerous subcontractors, eventually substituting CH2M Hill for one of its Roe defendants. In the first, second, and sixth causes of action for equitable, comparative, and express contractual indemnity, UDC tendered its defense against HOA's action to all cross-defendants based on their contracts with UDC.

CH2M Hill answered the cross-complaint with a general denial and numerous affirmative defenses, thereby rejecting UDC's tender. UDC therefore paid for its own defense between January 3, 2007 (the date of tender by service of the amended cross-complaint) and January 23, 2008, when HOA's lawsuit was dismissed pursuant to a settlement with the defendants. The September 2007 settlement encompassed UDC's cross-claims against all of the cross-defendants except CH2M Hill.

On September 25, 2007, CH2M Hill moved for summary judgment, asserting that (1) the lawsuit was barred by the applicable statute of limitations and (2) UDC's failure to be properly licensed rendered its contracts with CH2M Hill illegal and barred its claims against CH2M Hill. The superior court denied CH2M Hill's motion, and on July 15, 2008, the cross-action proceeded to trial.

On July 28, 2008, before the matter was submitted to the jury, UDC moved for a directed verdict. UDC sought a ruling that CH2M Hill was liable for UDC's defense costs under its agreement to defend and indemnify UDC. One week earlier, the Supreme Court had issued its opinion in *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541 (*Crawford*), holding that a contractual indemnitor incurs a duty to defend the indemnitee as soon as the indemnitee tenders its defense to the indemnitor. The parties stipulated that the jury would determine the factual issues of negligence and breach of contract, followed by the trial court's application of the indemnity provisions in the parties' contract in light of *Crawford*.

The jury was given a special verdict form on which to record its findings as to whether any party had been negligent and whether CH2M Hill had breached its contract with UDC. On July 29, 2008, it unanimously found that CH2M Hill had not been negligent and had not breached the contract. The trial court then took up the issue of CH2M Hill's duty to defend UDC in light of the jury's finding that CH2M Hill had not been negligent. The court suggested that "it would be a meaningless duty to defend if it did not arise from an accusation or complaint of negligence arising from the work." CH2M Hill then raised the question of whether the duty exists if there has been no evidence of such a claim by the HOA. The trial court invited additional briefing on that issue, along with further written argument on the applicability or effect of *Crawford*.

At a hearing on September 15, 2008, UDC urged the court to apply *Crawford* by ruling that CH2M Hill owed UDC a defense upon its tender; CH2M Hill, on the other hand, argued that *Crawford* was distinguishable. According to CH2M Hill, the

indemnity provision of the parties' contract was "exceptionally broad," the defense provision did not come into play absent a finding of negligence by CH2M Hill, and the negligence allegations in the underlying complaint did not target or implicate CH2M Hill.

The trial court adhered to its earlier view that the parties' contract called for a defense upon an allegation of "some negligence in the manner in which the work was conducted." It was only the duty to indemnify, the court explained, that depended on a finding of negligence. The court stated that a separate duty to defend must occur before the duty to indemnify arises. "[O]therwise, you wouldn't need the duty to defend. The duty to indemnify would include all costs associated with the defense of the lawsuit based upon the work of the subcontractor. So, you know, logically I don't understand how or why you would have a separate duty to defend unless it arose at the time that the litigation was occurring as opposed to the duty to [indemnify]." The court further rejected CH2M Hill's argument that *Crawford* should not be applied retroactively.

The parties then discussed apportionment of costs and attorney fees for the present action. CH2M Hill asserted the right to recover costs as the prevailing party on UDC's allegations of breach of contract and negligence; UDC maintained that CH2M Hill had not prevailed on breach of the contractual obligation to defend UDC. The court deferred that issue pending further briefing.<sup>1</sup> On October 2, 2008, it entered an order and a judgment requiring CH2M Hill to reimburse UDC for the defense costs it had incurred in defending the HOA claims related to CH2M Hill's work. On November 19, 2008, CH2M Hill filed a timely notice of appeal from the judgment.

Meanwhile, shortly after entry of judgment CH2M Hill moved for verification of UDC's compliance with Code of Civil Procedure section 411.35. According to CH2M Hill, UDC had not filed a certificate of merit as required by that statute and therefore

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<sup>1</sup> The issues concerning prevailing-party status and entitlement to fees and costs are addressed in the companion appeal, H033862.

should be ordered to pay CH2M Hill its costs and fees in the cross-action. In opposition, UDC asserted that CH2M Hill had waived this claim, having raised it for the first time in the history of the parties' dispute. UDC further asserted that CH2M Hill was not entitled to verification because it had not obtained a "favorable conclusion" to the litigation, within the meaning of Code of Civil Procedure section 411.35. In any event, UDC argued, it had satisfied the purpose of the statute because it brought its case against CH2M Hill with a good faith and reasonable belief that the action was meritorious, based on the expert opinion of a licensed engineer in the field.

On November 20, 2008, the superior court entered its order granting the verification motion but denying CH2M Hill's request for attorney fees and costs. The court rejected UDC's waiver argument, but it concluded that UDC had "fully complied" with the pre-filing requirements of Code of Civil Procedure section 411.35 and that good cause existed for filing the cross-complaint against CH2M Hill. Although UDC had not filed a certificate required by the statute, CH2M Hill had not shown additional fees or expenses resulting from that omission. CH2M Hill, having already filed its notice of appeal from the judgment, separately appealed from this postjudgment order.

### *Discussion*

#### *A. The Judgment on the Cross-Complaint*

##### *1. CH2M Hill's Duty to Defend*

CH2M Hill's primary assertion of error is directed at the court's finding that CH2M Hill had a duty to defend UDC against the HOA's lawsuit. In CH2M Hill's view, the parties' contract called for a defense only when the underlying claims arose out of CH2M Hill's negligence, whereas here there was no negligence finding by the jury or even allegation in the underlying HOA complaint. CH2M Hill also contends that the court's ruling was inconsistent with the jury's determination that CH2M Hill had no duty to defend UDC. As for the trial court's reliance on *Crawford*, CH2M Hill argues that the

case is distinguishable and in any event should not be applied retroactively. None of these contentions can succeed.

The argument that the court's ruling was inconsistent with the jury's verdict on the defense issue is based on a false premise, contrary to the procedural posture of the case. As noted earlier, the question of whether CH2M Hill had breached its duty to defend UDC was discussed before the matter was submitted to the jury, at the outset of a hearing on proposed jury instructions and other issues. The court set forth its understanding of the parties' agreement on these matters as follows: "First of all, we don't have a final form of the special verdict form at this point but the parties have agreed to submit a special verdict form based upon negligence and breach of contract and reserve to the court the application of the indemnity provisions to those findings by the jury. [¶] Is that a fair statement of what counsel have agreed to?" Counsel for both parties answered affirmatively. The court proposed to decide the indemnity issues after the jury returned its verdict, and neither party objected.

The special verdict form asked whether CH2M Hill had been negligent (and corollary questions if the answer was yes), whether any other person or entity had been negligent, and whether CH2M Hill had failed "to do something that the Contract between it and [UDC] required it to do." This last question, in CH2M Hill's view, called for a determination of the defense issue, on which evidence had already been presented. But the only such evidence CH2M Hill points to is evidence regarding negligence by CH2M Hill. The jury was not given evidence on the request for a defense and its refusal, nor was it ever asked specifically to consider whether CH2M Hill's refusal to defend UDC constituted a breach of the consulting agreement.

The single query whether CH2M Hill failed to "do something" it was required to do under its contract was so broad as to be meaningless without further clarification for the jury. The jurors could not have been expected to examine all potential sources of breach without further guidance, nor would they have necessarily reasoned that no

negligence by CH2M Hill meant no breach of its duty to defend. The focus of UDC's argument on both the negligence *and* breach of contract claims was not CH2M Hill's defense obligation, but its obligation to perform its work in a competent and professional manner.<sup>2</sup> Conversely, CH2M Hill's argument was confined to defending CH2M Hill's performance and refuting criticism of its work on the project. Its counsel summarized by telling the jury, "At the end of the day, at the end of this trial it comes down to a single question for all of you: Has UDC convinced you that CH2M Hill and [its civil engineer] were negligent." The instructions likewise stated the contract issue as whether CH2M Hill had "breached its contract by failing to perform its work in a professional manner." Clearly the duty to defend was not an issue presented to the jury through evidence, in closing arguments, in the court's instructions, or on the verdict form. Consequently, the jury's findings can in no conceivable way be interpreted to encompass the duty to defend, an issue that was purposely withheld from its deliberations.

CH2M Hill's argument is not only contrary to the record of the trial, it is inconsistent with its own statements when the issue was before the lower court. In its written and oral arguments CH2M Hill insisted that the parties' contract required no defense of UDC unless CH2M Hill was negligent. At the hearing CH2M Hill's attorney pointed out that CH2M Hill had prevailed on breach of contract and negligence. The court then asked, "You prevailed upon the negligence. You didn't prevail upon the breach of contract if the duty to defend . . . was breached by you; correct? [¶] [UDC's attorney]: That's our interpretation, Your Honor. [¶] THE COURT: Correct? [¶] [CH2M Hill's attorney]: "Correct, Your Honor."

Thus, the record of all the superior court proceedings related to this issue convinces us that both the parties and the court understood that the duty to defend was a

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<sup>2</sup> In its opening argument UDC's counsel explained to the jurors that they would not be asked to decide the negligence issue as it related to indemnification.

matter for the court to decide. That the court did so independently of the jury's verdict did not constitute error in itself. Whether it correctly interpreted the parties' contract and correctly applied Supreme Court authority are questions to which we turn next.

CH2M Hill contends that the contracts between the parties created a defense obligation only if a claim against UDC arose out of CH2M Hill's negligence. The pertinent provision was paragraph 20 of the 1995 Consultant Agreement, which stated: "Consultant [CH2M Hill] shall indemnify and hold Owner, Developer, and their respective officers, directors, employees and agents free and harmless from and against any and all claims, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys, accountants, appraisers and expert witnesses, to the extent they arise out of or are in any way connected with any negligent act or omission by Consultant, its agents, employees or guests, whether such claims, liens, demands, damages, losses or expenses are based upon a contract, or for personal injury, death or property damage or upon any other legal or equitable theory whatsoever. *Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein.* Notwithstanding the above, Consultant shall not be required to indemnify Developer or Owner from loss or liability to the extent such loss or liability arises from the gross negligence or willful misconduct by Developer, Owner, or agents, servants or independent contractors who are directly responsible to Developer or Owner, or for defects in design furnished by such person." (Italics added.)

Focusing on the phrase "any claim or demand *covered herein*," CH2M Hill maintains that in order for a duty to defend to arise, there had to be at least an *allegation* by the HOA that its damages arose at least partially from negligence on the part of CH2M Hill. To determine the merit of this position requires an examination of *Crawford, supra*, 44 Cal.4th 541, on which the trial court based its ruling.

