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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

EQUILON ENTERPRISES, LLC, Plaintiff and Respondent, v. BRINDERSON, L.P. et al., Defendants and Appellants.	B232090 (Los Angeles County Super. Ct. No. TC022201)

APPEAL from a judgment of the Superior Court of Los Angeles County. William P. Barry, Judge. Affirmed in part, reversed in part, and remanded.

Acker & Whipple, Stephen Acker, Leslie Anne Burnet; Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller and Matthew B. Stucky for Defendants and Appellants.

Caldwell Leslie & Proctor, Caldwell Leslie Newcombe & Pettit, Michael R. Leslie, David Zaft and Alison Mackenzie for Plaintiff and Respondent.

Brinderson, L.P. appeals from the trial court's judgment notwithstanding the verdict (JNOV) and alternative order granting a new trial after a jury found for Brinderson in this action by Equilon Enterprises, LLC, seeking contractual indemnification for costs incurred in settling a third party action for personal injuries. The third party was injured when diesel fuel escaped from an oil pipeline built by Brinderson. Because there was substantial evidence to support the jury's verdict, we reverse the JNOV. However, we affirm the new trial order and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In 1998, Shell Pipe Line Corp. and Texaco Refining and Marketing, Inc., formed a joint venture called Equilon Enterprises, LLC, that called for the construction of a pipeline to transfer refined petroleum products from Texaco's Los Angeles refinery to Shell's tank storage farm in Carson (the Jumpover Line Project). Appellant Brinderson, L.P. is the successor in interest to Hilbert & Associates, Inc., and Brinderson Constructors, Inc., which were the contractors that constructed the Jumpover Line Project.[1] The main part of the Jumpover Line Project was the jumpover line, a 20-inch diameter pipe intended to deliver petroleum products from one location to another. Another part of Brinderson's work on the Jumpover Line Project included a pressure relief system to handle expansion of fluid in the jumpover line caused by hot weather: two pressure relief valves which, when activated, discharged fluid into a 1.5-inch pressure relief line that ran about 100 feet until it connected to a much larger 10-inch diameter slops line.[2]

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[1] As a result, and for ease of reference, when we refer to Brinderson, we mean Brinderson, L.P., and, by incorporation, both Brinderson Constructors, Inc., and Hilbert & Associates, Inc.

[2] A slops line diverts petroleum products to a holding facility. Because pipelines are measured by their diameter, when we refer to a pipeline's size, we refer to its diameter. For clarity's sake, when we refer to the Jumpover Line Project, we include the

In 2004, Equilon hired another company to build the Commingle Line Project. The Commingle Line Project modified the Jumpover Line Project by detaching the 1.5-inch pressure relief line from the 10-inch slops line and connecting it instead to a 6-inch line that would thereafter function as the slops line at the end of the pressure relief line. The existing larger 10-inch slops line then became part of the Commingle Line Project and was no longer part of the pressure relief system. Brinderson did not work on the Commingle Line Project.

The pressure relief system that Brinderson built for the Jumpover Line Project worked without significant incident until after the Commingle Line Project was completed. Six months after completion, a small amount of diesel fuel was released from a pressure relief test valve when an operator failed to close a valve and tighten the valve cap. Vibrations along the pressure relief line were thought to have played some small role in causing the cap to come loose. During that same period, a small amount of fuel leaked from the pressure relief line about 100 feet from the pressure valves, and Equilon believed that vibrations in that line played a part in that leak as well.

In February 2005, a weld failed on one of the pressure relief valves, causing the release of a large amount of diesel fuel. The leaking fuel sprayed into a nearby railroad facility, and railroad worker Seth Vigil suffered serious injuries from breathing in the diesel fumes. Vigil sued Equilon, which tendered the defense of that action to Brinderson pursuant to certain contractual indemnity provisions. Brinderson refused to defend or indemnify Equilon, which incurred more than $463,000 in legal fees and ultimately settled with Vigil for $450,000.

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entire project constructed by Brinderson, including its constituent parts: the jumpover line and the pressure relief system. When we refer to the jumpover line, we mean the 20-inch main line designed to carry out the main purpose of the Jumpover Line Project: conveying petroleum products from the Los Angeles refinery to the Carson tank farm. When we refer to the pressure relief system, we include the pressure relief valves, the 1.5-inch pressure relief line, and the slops line that Brinderson constructed as part of the Jumpover Line Project. When we refer to the pressure relief line, we mean the 1.5-inch line that Brinderson built as part of the Jumpover Line Project.

Equilon then sued Brinderson for breach of the indemnification provision in three separate agreements that Equilon contended applied to Brinderson's work on the Jumpover Line Project: (1) the Hilbert agreement with Texaco to perform unspecified work on various projects at the refinery; (2) the Brinderson Constructors agreement with Texaco for something called the Pacific Pipeline project; and (3) a purchase order that was issued as part of the Brinderson Constructors agreement.[3] Although Brinderson acknowledged that it worked on the Jumpover Line Project, it disputed whether any of those three agreements governed that project, and therefore contended it was not subject to any of the alleged contractual indemnification provisions.

Even if one or all three of those agreements applied, Brinderson also disputed whether it was liable under the terms of their indemnification provisions. The Hilbert and Brinderson Constructors agreements contained identical provisions, which stated that Brinderson would defend and indemnify Equilon from claims or causes of action "which may be made or asserted by any third party . . . on account of personal injury or death . . . caused by, arising out of, or in any way incidental to, or in connection with, the performance of the work hereunder, including but not limited to, those situations where [the liability] was caused by the sole negligence [of Brinderson or its subcontractors or any third party], by the concurrent negligence of any combination of [Equilon, Brinderson, subcontractors, or third parties], or where liability for such personal injury . . . with or without fault is imposed on any theory of strict liability by operation of the law . . . ." The purchase order issued pursuant to Brinderson Constructors agreement contained a similar indemnification provision that was triggered by a variety of claims "resulting from or in connection with performance or nonperformance of work under this Order . . . even though caused by the concurrent and/or contributory negligence (whether active or passive or of any kind or description) or fault of a party indemnified" unless it was later determined that the claim arose from Equilon's sole negligence.

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[3] We have discussed the relationship between Hilbert & Associates, Inc., Brinderson Constructors, Inc., and Brinderson in footnote 1, *ante.*

Brinderson contended that these indemnification provisions were not triggered because the weld failure did not arise from and was not connected to its work on the Jumpover Line Project. Resolution of this issue turned mostly on competing expert testimony concerning the source of vibrations along the pressure relief line that eventually caused the pressure relief valve weld to fail. Both experts agreed that spikes in flow pressure could cause the pressure relief line to vibrate or move, and that the pressure relief line needed to be properly secured in order to prevent that from happening. Both also agreed that the weld failure on the pressure relief valve had been caused by vibrations that occurred because the pressure relief line was not properly secured. The parties' dispute centered on whether those vibrations were connected to Brinderson's work on the pressure relief system as part of the Jumpover Line Project, or whether they were caused solely by the modifications to the pressure relief system that took place as part of the separate Commingle Line Project.

An Equilon investigation concluded that the weld failure was caused by severe short term vibrations along the pressure relief line. Equilon's expert, Charles Freeny, believed the vibrations occurred in the segment of the pressure relief line nearest to the pressure relief valves because Brinderson did not follow the Jumpover Line Project's plans and specifications concerning the proper method of securing that line. Most notable was a stanchion – a concrete pillar with an upright bracket that was meant to provide support for the pressure relief line very near the pressure relief valves. According to Freeny, this stanchion suffered from two defects. First, it was placed over a pipe that ran just six inches below ground, when it should have been sunk deeper into the ground. As a result, the stanchion settled, and the vertical bracket that was meant to support the pressure relief line fell out of contact with that line. Second, the stanchion's bracket was not attached to the pressure relief line with a U-Bolt, which meant that even before the stanchion settled, it did nothing to stop the pressure relief line from vibrating. Freeny also believed that the pressure relief valves had been placed in an area subject to increased turbulence and that one valve, not two, should have been used.

Brinderson's expert, David Rondinone, testified that the Jumpover Line Project's pressure relief system had been properly built according to the plans and specifications. He did not believe the defects in the stanchion caused the vibrations that led to the weld failure because the pressure relief line was sufficiently supported in the same area by other means. Rondinone also concluded that Brinderson had not in fact built the stanchion because the plans did not call for it and because some witnesses were unsure when or by whom it had been built. According to Rondinone, the vibrations that caused the pressure relief valve weld failure emanated about 100 feet away from the valves at the 6-inch slops line that was part of the work on the Commingle Line Project and which replaced the original 10-inch slops line that Brinderson had installed during its work on the Jumpover Line Project. He based his opinion on two grounds: (1) the 6-inch slops line attached as part of the Commingle Line Project had less than half the capacity of the 10-inch slops line that Brinderson installed, thereby increasing back pressure on the pressure relief line; and (2) conflicting evidence that an Equilon inspection right after the February 2005 weld failure found markings on the pressure relief line that showed six inches of vertical pipeline movement had occurred, and which also found that some of the U-Bolt restraints on that line were missing or loose, leading Rondinone to conclude that U-Bolts on the pressure relief line had been loosened by workers on the Commingle Line Project.

Nine causes of action went to the jury, three from each of the three agreements that Equilon contended applied to the Jumpover Line Project: breach of the agreement to defend, breach of the agreement to indemnify, and breach of the implied covenant of good faith and fair dealing. After three hours of deliberations, the jury rendered general verdicts for Brinderson on all nine.[4] Equilon brought a motion for JNOV as to four causes of action: for breach of the indemnity and defense provisions in two of the allegedly applicable agreements. It also brought a new trial motion as to those causes of

[4] The trial was bifurcated, leaving unresolved Equilon's cause of action for equitable indemnity. Equilon eventually dismissed that claim.

action and two others for breach of the indemnity and defense provisions in the third agreement with Brinderson.

The trial court granted both the JNOV and new trial motions. Based on the testimony of several Brinderson employees, the trial court found that the evidence was undisputed that all three agreements applied to Brinderson's work on the Jumpover Line Project. The trial court interpreted the indemnification provisions to mean that Brinderson was liable unless the weld failure had been caused by Equilon's sole negligence. Even assuming that Brinderson's expert Rondinone's testimony was correct, the trial court found that Equilon expert Freeny's testimony concerning Brinderson's failure to properly secure the pressure relief line when building the Jumpover Line Project was uncontradicted, and that the jury therefore could not disregard Freeny's opinions. According to the trial court, the undisputed evidence showed at most that any negligence by Equilon had been a concurrent cause of the weld failure, in combination with Brinderson's omissions.

In the event JNOV was eventually reversed, the trial court conditionally granted Equilon's new trial motion because it believed the jury erred in its implicit finding that Brinderson's expert was more credible than Equilon's. The trial court found that Freeny "was markedly more qualified by his background and experience to render his opinions than was [Brinderson's] expert, Rondinone, and testified in a more credible fashion; Rondinone's testimony seemed to have been crafted to fit [Brinderson's] claims and defenses, not the total picture." The trial court found that Freeny's opinions "were more consistent with the credible evidence, including the sole cause of the weld failure being the unrestricted whipping motion created by the orientation and placement of the pressure relief valves, the role played by [Brinderson] in the construction of the stanchion, and the stanchion's role in the 2005 incident, the reasons why the 2004 [Commingle Line Project] work was immaterial; and the reasons why the other pre-2005 incidents were not significant."

In regard to whether any or all of the three contracts produced by Equilon applied to Brinderson's work on the Jumpover Line, the trial court found Equilon's evidence

similarly persuasive. Brinderson's failure to produce other agreements that applied to the Jumpover Line Project that did not contain indemnification provisions was also significant, the court found. According to the trial court, "Simply put, this jury did not do its job." On appeal, Brinderson contends the trial court erred by granting both the JNOV and new trial motions.

STANDARDS OF REVIEW

A trial court may grant JNOV only if, when viewed in the light most favorable to the party in whose favor a verdict was rendered, there is no substantial evidence to support the verdict. The trial court cannot weigh the evidence or judge witness credibility. If the evidence is conflicting or if reasonable inferences to support the verdict may be drawn from the evidence, the motion should be denied. (*Linear Technology Corp. v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1532.) We exercise independent review of the trial court's order granting JNOV. This requires us to resolve all conflicts, draw all inferences, and otherwise view the evidence in favor of the party opposing JNOV. (*Ibid.*)

We review an order granting a new trial based on insufficiency of the evidence under the abuse of discretion standard. Because the trial court sits as a 13th juror and is in the best position to assess the reliability of a jury's verdict, the Legislature has granted trial courts broad discretion to order new trials. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 386.) So long as the trial court states its reasons for granting a new trial, and those reasons are supported by substantial evidence, we defer to the trial court's findings and will affirm its order. (*Ibid.*)

DISCUSSION

1. *The JNOV Was Not Warranted Because There Was Substantial Evidence That the Weld Failure Did Not Arise From Brinderson's Work*

The trial court focused on the indemnification clauses' exception for damage or injury caused solely by Equilon.[5] Because the trial court believed there was no evidence that Equilon was the only cause of the weld failure, it found that even if Brinderson's expert was correct that vibrations in the pressure relief line were caused by work done on the Commingle Line Project, the undisputed evidence showed that this was a concurrent cause of the failure along with Brinderson's improper construction of the pressure relief line's pipe restraints. Brinderson contends there was sufficient evidence that it correctly installed those restraints and that the weld failure was caused by only the Commingle Line Project's modifications to the pressure relief system.

A. Interpretation of Indemnification Agreements, an Overview

We begin with the rules applicable to interpreting indemnification agreements. Contracting parties have great freedom to bargain for such provisions, including the right to indemnity even if the indemnitor was not negligent. (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551.) Indemnity provisions are construed under the general rules of contract interpretation. Unless the parties have indicated a special meaning, the terms are to be understood in their ordinary and popular sense. (*Id.* at p. 552.) However, if the indemnified party "seeks, in a noninsurance agreement, to be indemnified for his or her own active negligence, or regardless of the indemnitor's fault – protections beyond those afforded by the doctrines of implied or qualified indemnity – language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Ibid*.)

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[5] As set forth in footnote 9, *post*, we assume but do not decide that Brinderson is subject to the indemnification provisions contained in all three agreements.

The indemnification provision in the Hilbert and Brinderson Constructors agreements does not expressly state that it is inapplicable for loss caused by Equilon's sole negligence. Instead, it states that it applies in various circumstances: (1) the sole negligence of Brinderson, its subcontractors, or unidentified third parties; (2) the concurrent negligence of Brinderson and Equilon, subcontractors, or third parties; and (3) where strict liability is imposed by operation of law. This language suggests that Equilon's sole negligence will relieve Brinderson of its indemnification duties. Assuming for discussion's sake that this is so, the indemnification provision is still subject to another limitation: that the loss or injury was caused by, arose from, or was in any way incidental or connected to Brinderson's performance on the Jumpover Line Project.[6]

Both parties agree that a "but for" test requiring some minimal causal link applies to determining whether the failure of the pressure relief valve weld arose from or was incidental to Brinderson's performance of its work on the Jumpover Line Project. (*Vitton Construction Co. Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766; *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1049-1051.)

Both parties also rely heavily on *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500 (*Continental Heller*), a decision that concerned an indemnification provision similar, but not identical, to the ones at issue here. Continental Heller was the general contractor on a project to expand an Oscar Meyer meat packing plant, and Amtech was the subcontractor installing an ammonia refrigeration system. Eleven years after the project was finished, a valve installed by

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6 The indemnification provision in the Brinderson Constructors purchase order states that if, after fulfilling its indemnity obligations, it turns out that the loss was caused solely by the negligence of an indemnified party, then Brinderson is entitled to a refund of its costs incurred. Similar to the other agreements, however, the duty to indemnify is limited to losses resulting from or in connection with the performance or nonperformance of the work on the Jumpover Line Project. The parties make no meaningful distinctions between these competing provisions, and their arguments focus on the broader language of the provisions in the other agreements.

Amtech exploded, causing property damage and personal injuries. After being sued, Continental Heller tendered the defense to Amtech under the subcontract's indemnification provision, which was triggered by any loss "which arises out of or is in any way connected with the performance of work under" the subcontract, and which applied to "any acts or omissions, willful misconduct or negligent conduct, whether active or passive, on the part of [Amtech]." (*Id.* at p. 505, italics omitted.)

Amtech rejected the tender, and, after settling the damage claims, Continental Heller sued to enforce the indemnity provision. The trial court found for Continental Heller, and the Court of Appeal affirmed, rejecting Amtech's contention that the indemnification clause was not triggered unless Amtech's work was somehow faulty, and that such failure in the performance of its work was a substantial factor or predominating cause of the accident. Under the plain terms of the contract, Amtech's installation of the faulty valve was an act carried out in the performance of its work under the contract, and the loss was in some way connected with that act, the court held. (*Continental Heller, supra,* 53 Cal.App.4th at pp. 504-505.) By combining "any acts or omissions" with "willful misconduct or negligent conduct," the contract made clear that the parties intended Amtech's duty to indemnify would arise for any reason except for the sole negligence or willful misconduct of Continental Heller. (*Id.* at p. 505.)

The *Continental Heller* court rejected Amtech's contention that in order to conform the agreement to the parties' reasonable expectations, its duty to indemnify did not arise unless its act or omission was a substantial factor or predominating cause of the valve failure. The court held that the risk allocation was neither unreasonable nor unconscionable because, as between Amtech and Continental Heller, Amtech "was in the better position to protect against loss arising out of its performance of its contract. This is illustrated by the fact it was Amtech, not Continental, which selected and installed the particular valve which subsequently failed leading to the explosion." (*Continental Heller, supra,* 53 Cal.App.4th at p. 506.)

The indemnity provision did not impose unlimited liability, however. After a footnote pointing out that the few decisions construing similar language imposed a "cause

in fact" or "but for" test, (*Continental Heller, supra*, 53 Cal.App.4th at p. 506, fn. 3), the court went on to state: "Amtech's liability must be connected to an 'act' or 'omission' in the performance of its subcontract, not merely to the performance itself. Therefore, the fact Amtech installed the refrigeration system in the plant would not make it liable for indemnity for the loss incurred in paying damages to someone who suffered food poisoning from eating an Oscar Meyer hot dog on the theory that but for the refrigeration system Oscar Meyer could not have made the hot dog. The indemnitee in this hypothetical case would have to establish the loss was in some way connected to a specific act or omission of Amtech. Amtech is not liable for *any* act or omission connected with the performance of work under the subcontract, but only acts or omissions 'on the part of [Amtech], its agents, subcontractor or employees.' As a further limitation on its liability, Amtech is expressly not required to indemnify Continental for losses arising from the sole negligence or the sole misconduct of Continental, its officers, agents, servants, or independent contractors." (*Ibid.*)[7]

B. Evidence that the Pressure Relief Line Was Properly Constructed

At bottom, Brinderson contends *Continental Heller* is distinguishable because in that case, the indemnitor selected and installed the valve that actually failed, while here there was sufficient evidence that no part of the pressure relief line it built as part of the Jumpover Line Project was defective, and the weld failure was solely caused by the modifications to that line that occurred during the Commingle Line Project. Equilon contends there is no substantial evidence to support that contention and, as the trial court found, the jury could not disregard the opinion of its expert that the weld failed from vibrations caused by Brinderson's failure to secure the pressure relief line as called for in

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[7] A more apt analogy to our case would be an explosion caused by a third party which damaged the pressure relief valve, as a result of which oil and vapors escaped, causing injury. Brinderson's installation of the valve would not have met the "but for" test of *Continental Heller*.

the plans, and that those vibrations were exacerbated by Brinderson's placement of the valves and its use of two valves instead of one. We disagree with Equilon.

William Hudak, a Texaco asset manager who had a consulting and oversight role on the Jumpover Line Project for Equilon, testified that he had a good recollection of how Brinderson's project manager performed, and could not recall any criticism of his performance or any problems or defects in that project. Hudak testified that he inspected the Jumpover Line Project from time to time during its construction and as far as he could tell, it was being installed according to the plans. Hudak testified that when the Jumpover Line Project became operational, it looked like it had been properly constructed according to the plans, and performed well.

Randall McFetridge was a project engineer for Brinderson on the Jumpover Line Project. He left that position shortly before that project was completed, but did recall that it was tested successfully and was completed according to the plans and specifications. Manuel Ramirez worked at the Texaco refinery for 38 years in the Operations Department. Part of his job duties was to look for leaks or unusual pipeline vibrations. Before 2005, his work would bring him within 100 feet of the point where the pressure relief line was connected to the jumpover line, in a spot where he would be able to notice any vibrations or leaks, and he could not recall observing any. Other witnesses confirmed that the pressure relief line worked without significant incident in the six years before the separate Commingle Line Project was constructed in 2004. This evidence suggests the pressure relief line was properly secured and did not contribute to the weld failure.

As for the stanchion, Equilon contends it was poorly moored to the ground and built without a required U-Bolt. Based on this, Equilon contends the uncontroverted evidence shows that Brinderson's work was at least a concurrent cause of the accident. However, the stanchion evidence was also in conflict. David Bieda, who led Equilon's investigation into the 2005 weld failure, acknowledged that the plans referred to a "pipe support" where the allegedly defective stanchion was located and did not use the term stanchion. According to Bieda, the term "pipe support" meant a stanchion was required.

However, these ambiguities in Bieda's testimony at least plant the seed of a conflict, which grew in response to other evidence.

For instance, Bieda could not recall when the stanchion was installed, and could not rule out that another contractor had built it. He said he believed the stanchion was put in place in 1998 – the year the Jumpover Line Project was completed – because he had no information to the contrary, and because it would have been a typical place to put one. Based on Bieda's uncertainty, the jury could have found his claim that Brinderson built the stanchion was speculative. Texaco's Ramirez gave differing accounts of when the stanchion was installed, at first stating it was built in 1998, while later admitting that it could have been there as much as three years *before* the Jumpover Line Project started. Texaco's Hudak also could not recall whether the stanchion was installed in 1998 as part of the Jumpover Line Project. Finally, Equilon's own postincident investigation report stated that the U-Bolt was missing from the stanchion either because of an "installation oversight" or because "*it was not a design requirement*." Based on this evidence, the jury could find that Brinderson had not built the stanchion and that no U-Bolt was called for at that location.

Even if Brinderson built the stanchion, and did so improperly, its expert witness testified that the pipeline was adequately supported in the same area because it was braced alongside another larger pipeline. Neither the trial court's statement of decision nor Equilon has explained why that expert opinion should, as a matter of law, be disregarded. The Brinderson expert also testified that the absence of any vibrational bracing at or near the stanchion's location played no part in the weld failure because that bracing had been absent all along and the vibrational problems with the pressure relief line did not begin until after that line was modified as part of the Commingle Line Project.

Taken together, this evidence supports an inference that the pressure relief system was properly built and according to plan, with the line properly secured, and worked without incident for six years. It therefore supports the testimony of Brinderson's expert witness to that effect. Because this shows that the facts underlying the opinion of

Equilon's expert witness were in conflict on these points, the jury was free to disregard his testimony and find that Brinderson's work played no part in the weld failure. (*Lauerdale Associates v. Dept. of Health Services* (1998) 67 Cal.App.4th 117, 126.)

C. Effect of the Commingle Line Modifications

As for whether the Commingle Line Project modification to the pressure relief system was the sole cause of the vibrations that led to the weld failure, evidence in the record would also support that implied finding by the jury.

We begin with evidence that the pressure relief system worked without incident until after the Commingle Line Project was built in 2004. Within six months of that point, however, two minor leaks occurred. Equilon's investigation report included a sequence of events table covering the life of the pressure relief system from its completion in 1998 as part of the Jumpover Line Project to the weld failure in February 2005. From August 1998, when the Jumpover Line Project began operation, the table reflects no problems with the operation of the pressure relief system. Most notably, inspections revealed leak rates of only 1 to 3 parts per million up to March 17, 2004, before the Commingle Line Project modified the pressure relief line. The next entry listed is the changeover from the 10-inch slops line to the 6-inch line as part of the Commingle Line Project on April 2, 2004. The very next inspection on June 10, 2004, showed a leak rate of 42 parts per million. A 6 parts per million leak rate was noted on September 2, 2004, followed by the minor October 2004 diesel spill. Leak rates of 42 parts per million were again noted from November 13, 2004, until December 1, 2004. The very next set of entries concern the major spill that occurred in February 2005 that led to the present lawsuit. This evidence supports a finding that the Commingle Line Project's modifications to the pressure relief line were adversely affecting the performance of that line.

We next consider the testimony of Brinderson expert witness Rondinone, who said that the Commingle Line Project's switch over to the 6-inch slops line increased back pressure on the pressure relief valves due to the smaller capacity of that line. Equilon

attacks the sufficiency of this testimony because Rondinone did not conduct any tests on the actual system and because he testified speculatively that the smaller outlet pipe "could" have caused back pressure problems. However, Rondinone's testimony was supported by Equilon expert Freeny in two regards. First, Freeny testified that smaller diameter pipe is more subject to flexing than is larger pipe, from which the jury could conclude that the smaller 6-inch slops line that modified the pressure relief system would flex more than did the original 10-inch slops line, and that it in fact did so in response to vibrational impulses. Second, Freeny acknowledged that back pressure generally could exist, but testified that the system was designed to handle that pressure. He did not testify that the system was modified in any way to handle increased back pressure from the new, smaller slops line, however. From that, the jury could reasonably find that the smaller line installed as part of the Commingle Line Project did increase the amount of back pressure in the pressure relief line, causing the more flexible 6-inch slops line to vibrate enough to cause the weld failures on the pressure relief valves.

Other evidence supports a finding that work on the Commingle Line Project affected the stability of the pressure relief line. Equilon's report on the 2005 weld failure noted marks on the pressure relief line about 100 feet away from the pressure relief valves that indicated the pressure relief line had moved vertically – vibrating – up to six inches at that point.[8] Brinderson's expert testified that such movement was possible only if some of the U-Bolts securing the pressure relief line had been loosened, which he believed occurred when the 10-inch slops line was removed and the smaller 6-inch slops line was attached as part of the Commingle Line Project. Without those bolts, Rondinone testified, the flexible pressure relief line would whip around, sending vibrations back up along the line that would cause the pressure relief valves to crack. Rondinone said it was reasonable to expect that workers from the Commingle Line Project loosened the existing U-Bolts on the pressure relief line in order to align and attach the new 6-inch slops line.

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8 The evidence about the existence of those marks was hotly disputed.

The Commingle Line project was built by a company called Worley Parsons. Ron Myles was Worley Parsons's project engineer on the Commingle Line, and he inspected the pipeline after the February 2005 weld failure. Myles testified at trial that the U-Bolts that had been put in place on the pressure relief line as part of the Jumpover Line Project were not touched during the Commingle Line construction. Equilon's Bieda testified that those bolts were tight and in their original condition when he inspected the pressure relief line after the incident. Equilon expert Freeny testified that he never saw the markings showing six inches of vertical movement that were noted in Equilon's inspection report. However, Myles testified at his deposition that during his inspection, he discovered that one bolt was missing and another was loose about 100 feet downstream of the pressure relief valves. From this, the jury could conclude that the report accurately noted the existence of the markings, confirming Rondinone's testimony that the bolts had been loosened during the construction of the Commingle Line Project.

In short, there was evidence that the pressure relief line was built according to specifications and worked properly until after the Commingle Line Project took away the 10-inch slops line and replaced it with a 6-inch line. This included evidence that Brinderson either did not build the stanchion because it was not called for in the plans, or, in the alternative, that even a defectively constructed stanchion had no role in the weld failures. There was also evidence that the pressure relief line experienced six inches of vertical movement, which formed the basis for the testimony by Brinderson's expert that the U-Bolts had been loosened. This was supported by the deposition testimony of Myles that some of the bolts were either loose or missing. According to Brinderson's expert, the unsecured pressure relief line, perhaps subjected to increased back pressure due to the smaller slops line, might have whipped back and forth, causing vibrations that were transmitted back up the pressure relief line, causing the valve welds to fail.

We see no reason why the jury could not believe the facts underlying Rondinone's opinion and therefore accept his expert testimony. Because we must presume that the jury made such findings, we must determine whether under those facts, the diesel fuel

discharge and concomitant injuries to Vigil arose from or were incidental to the performance of Brinderson's work on the Jumpover Line Project.

Because Equilon's appellate brief does not accept the possibility that the jury could have made the findings described above, it does not argue that even with such a finding, the weld failure nevertheless arose from or was incidental to Brinderson's work on the Jumpover Line Project. We therefore deem the issue waived. (*Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1239.)

We alternatively hold that when the evidence is viewed in the light most favorable to the judgment, the weld failure did not trigger Brinderson's contractual indemnity obligations. Although the causal link is broad, it is not unlimited. Given their commonsense meaning, the terms "arising out of" or "incidental to" mean originating from, having their origin in, growing out of, flowing from, or having connection with something. (*Vitton Construction Co. Inc. v. Pacific Ins. Co., supra,* 110 Cal.App.4th at pp. 766-767.)

Viewing the evidence and the inferences most favorably to Brinderson, the pressure relief line was properly built according to plans. The vibrations that caused the weld to fail were transmitted up that line, but were solely caused by loose restraints due to work by others on the Commingle Line Project, which attached a smaller slops line to the pressure relief line six years after the Jumpover Line Project had been built and had performed without improper vibrations. Brinderson had nothing to do with building the Commingle Line Project. Instead, its properly constructed pressure relief line merely served as the conduit by which vibrations were transmitted from alterations to that line that were constructed as part of the Commingle Line Project.

Applicable here is the analogy in *Continental Heller, supra,* 53 Cal.App.4th at page 507, where the refrigerator installer would not be obligated to indemnify for food poisoning caused by an Oscar Meyer hot dog on the theory that the hot dog could not have been made without the refrigerator. Although the Commingle Line Project "hot dog" could not have been made without attaching a modification to the already existing Jumpover Line Project's pressure relief line "refrigerator," the defects caused by the

Commingle Line Project did not have their origin in or grow out of Brinderson's work. We therefore hold that the trial court erred by granting JNOV.[9]

2. *The Trial Court's New Trial Order Was Proper*

Brinderson contends the trial court abused its discretion by granting Equilon's new trial motion. Brinderson does not challenge the trial court's evaluation of the evidence, however. Instead, relying on *Fountain Valley Chateau Blanc Homeowner's Assn. v. Dept. of Veterans Affairs* (1998) 67 Cal.App.4th 743 (*Fountain Valley*), Brinderson contends the trial court's new trial order did not provide a proper specification of facts and reasons, but was in effect a backdoor JNOV order based on the trial court's belief that Equilon should prevail as a matter of law.

The petitioner in *Fountain Valley* prevailed in a jury trial in an action against his homeowner's association for invasion of privacy and other claims. The trial court granted the association's new trial motion, stating that it believed the association had acted reasonably and that it would continue to grant new trial motions so long as juries continued to find for the petitioner. On appeal, the *Fountain Valley* court held that the trial court misused a new trial motion – which determines only that the party who lost at trial could win at a retrial – by effectively treating it as a dispositive JNOV motion based on its statements that it would continue to grant such motions should the association lose at a retrial. (*Fountain Valley, supra,* 67 Cal.App.4th at pp. 751-753.) Because the trial court pointed to no problems in the trial process that warranted a new trial, its order really found that the association acted reasonably as a matter of law and was entitled to judgment. (*Id.* at pp. 752-753.)

That is not what happened here. Instead, the trial court set forth clear reasons why it believed the jury reached the wrong verdict, listing what it saw as numerous

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9 Because we reverse on this basis, we need not reach Brinderson's alternative argument that there was sufficient evidence to support the jury's implied finding that none of the three agreements relied on by Equilon applied to Brinderson's work on the Jumpover Line Project. For purposes of our analysis, we have therefore assumed, but do not decide, that Brinderson was subject to the indemnification provisions.

evidentiary deficiencies in Brinderson's case. We therefore hold that the trial court's new trial order was proper.

3. *Mitigation of Damages Issue*

Brinderson contends the trial court erred by: (1) excluding evidence concerning Equilon's knowledge of defects in the pressure relief line that caused excessive vibrations; and (2) by refusing to instruct the jury that Equilon's failure to act in the face of this knowledge called into play the doctrine of mitigation of damages. The trial court rejected this theory because even if the jury found that Equilon knew of the defects and failed to act, it necessarily showed nothing more than Equilon's concurrent negligence, for which Brinderson was still liable under the indemnification provisions. We agree.

The parties frame the issue as whether the doctrine of mitigation of damages has any application to claims for breach of an indemnification agreement, contending that no reported California decisions have addressed the issue.[10] Statutory and case authority suggest the doctrine may apply, but not in a context applicable here.

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10 Both parties discuss *Thunderbird Electric & Plumbing Supply, Ltd. v. Allied Forest Products, Inc.* (Or.Ct.App. 1983) 672 P.2d 1217 (*Thunderbird*), and both have misconstrued its holding. The defendant in *Thunderbird* was an American company that provided consulting services to a Canadian company. Due to the possibility Canadian taxes might be levied on the defendant's services, the consulting agreement included a provision obligating the defendant to indemnify the plaintiff if it turned out the tax was levied. When that occurred, the plaintiff informed the defendant, which then advised the plaintiff it would protest the tax levy. Plaintiff wrote the Canadian tax authorities, asking them to ignore the defendant's protest, and they did so. The plaintiff then sued for breach of the indemnification agreement, and obtained summary judgment.

The Oregon appellate court reversed. Although the defendant raised numerous defenses, including mitigation of damages, the *Thunderbird* court considered only one – breach of the implied covenant of good faith and fair dealing. Because an inference could be drawn that the plaintiff's interference with defendant's ability to protest the tax assessment – in other words, to defend the plaintiff – showed a breach of the implied covenant, there were triable fact issues that called for reversal of the summary judgment. (*Thunderbird*, *supra*, 672 P.2d at pp. 1218-1219.)

Civil Code section 2778 sets forth the rules of interpretation applicable to indemnity contracts unless a contrary intention is expressed. Subdivision (3) of that section states that "[a]n indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability *incurred in good faith, and in the exercise of a reasonable discretion* . . . ." (Italics added.) We take this to mean that an indemnitee who acted unreasonably in defending itself cannot recover such costs from the indemnitor.

The court in *Massachusetts Bonding & Ins. Co. v. Osborne* (1965) 233 Cal.App.2d 648, held there was no evidence to support a trial court's finding that an indemnitee failed to mitigate his damages by allowing the foreclosure of real property, based at least in part on evidence that the indemnitee received an appraisal showing the property was worth less than the cost of redeeming the property from foreclosure. (*Id.* at pp. 658-659.) Although the court did not cite Civil Code section 2778, subdivision (3), its holding is in accord with that provision.

Brinderson does not claim that Equilon acted unreasonably in defending and settling Vigil's injury claim. Instead, it contends that Equilon was negligent for failing to discover the negligence of others in the construction and operation of the Jumpover Line Project, thus contributing to the weld failure that gave rise to the injuries upon which Equilon's indemnification claim was based. At bottom, we are guided by the terms of the parties' indemnity provisions, which expressly obligated Brinderson even if Equilon was concurrently negligent. Because that is the essence of Brinderson's mitigation of damages theory, we conclude the trial court did not err.[11]

Contrary to the parties' contentions, this decision neither supports nor forecloses use of the mitigation of damages doctrine in a breach of indemnity case. It is, however, consistent with our conclusion, which we discuss next, that mitigation of damages in this context extends to the reasonableness of an indemnitee's defense when the indemnitor declines to act on its behalf, and does not apply when the indemnification provision applies even when the indemnitee was negligent.

[11] This does not mean the evidence might not be relevant for some other purpose, such as showing that the weld failure resulted from Equilon's sole negligence.

DISPOSITION

The judgment notwithstanding the verdict in favor of Equilon is reversed. The order granting Equilon a new trial is affirmed, and the matter is remanded for further proceedings. Each side to bear its own costs.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.