

MISSOURI LAWYERS WEEKLY

Kennett utility claims secured \$1.6 million settlement

Blood Loss Caused Brain Damage



Don Downing

\$1.6 million settlement

Information gathered from more than 50,000 pieces of e-mail proved to be the power behind a \$1.6 million breach of contract settlement involving two electricity-generating units built and installed by Wartsila North America, Inc., and operated by the city of Kennett, Mo.

The settlement itself was \$500,000 above a contractual damages cap, as professional engineering negligence along with construction design served to support this case in regards to an established economic loss doctrine.

On Oct. 18, 2000, city leaders entered into a contract with Wartsila to construct a 12,700 gross kilowatt natural gas fired power plant to support an existing and aging facility that supplies electric service to local customers. But a series of operational problems and delays caused officials to doubt what they were getting for their money.

"Kennett has had a power plant down there since the 1930s, and it is one of the reasons the city of Kennett has some of the lowest electric rates in the country," said plaintiff attorney Don Downing of St. Louis-based Gray, Ritter & Graham, who helped bring the lawsuit for residents of his boyhood hometown.

Downing explained that the new 3,500-square-foot facility and new units were intended to provide and house two backup engines that would meet usage needs during peak demand

times of the year and also serve as replacements when the existing units finally wore out and were no longer operational.

Wartsila originally faced a construction deadline of June 26, 2001, but when that date arrived, the municipality alleged that the facility was not commercially operational.

The city made their concerns involving construction delays and performance problems known, and Wartsila amended the original contract and agreed to remedy the problems by Aug. 31, 2003. In addition, the warranty was extended for an additional year to Aug. 31, 2004. Yet problems persisted.

Downing noted that in June 2005, the city filed suit against Wartsila to recover the original purchase price plus consequential damages caused by a four-year delay in meeting agreed specifications. As it turned out, that summer the plant performed well. Yet city leaders insisted they were still entitled to compensation.

Based on the contract with Wartsila, the company was limited to maximum aggregate damages of \$1.1 million. Downing argued that because of fraudulent and negligent misrepresentation and breach of fiduciary duty, Kennett was entitled to \$500,000 more than the designated contract limit allowed because economic loss damages reached beyond a simple breach of contract.

"We were going to argue that there was fraud in the inducement of the contract and therefore the contract was void and the \$1.1 million cap was unenforceable," Downing said.

Another factor that Downing



noted led to this settlement was internal evidence provided by Wartsila itself. "One of the things that would have been very helpful to us and harmful to Wartsila in a trial, and I guess this is a practice pointer for lawyers dealing with commercial cases, [is that] it was extremely important to us that Wartsila produced more than 50,000 internal e-mails. We had demanded that they produce all their internal e-mails back and forth. At one point or another, they had 10 to 12 different employees, some of whom were in Finland that were working on various aspects of the plant during the three- or four-year period when the plant wasn't working the way it should have.

"A lot of those e-mails were very telling in terms of severity of the problems. Their position was that the plant was fine. They just had a few hiccups that every plant of this size [has, and] you've got to iron out some wrinkles. Our position was that four years of ironing out wrinkles is way too long and furthermore the wrinkles that [they] were ironing out were not just wrinkles; they were major prob-

lems," Downing said.

Downing stressed that many of the e-mail entries among Wartsila employees pointed out design problems, which ran contrary to what company officials had stated in their own defense. Some problems related to basics in this project. "These engines were designed in Finland," Downing said. "Southeast Missouri in the summer is a far cry from Finland in terms of heat and humidity. So this is partly speculation, but there was some feeling that the engines had been designed for an environment that didn't exist in the city of Kennett," Downing said.

"The company had a number of operational issues that had to do primarily with reliability," said Larry Jones, superintendent of utilities for Kennett. "They made a lot of modifications to correct it, but it took a long time to get them worked out. Where we got into a problem was when the warranty was expiring. The warranty had been extended three times, and we were still not certain that the units were going to be reliable. That is why we got legal help, to look at our

Facts of The Case

Type of Action: Breach of contract, negligence, misrepresentation

Type of Injuries: Consequential losses

Court/Case Number/Date: U.S. District Court Eastern District of Missouri Southeastern Division/1:05CV114HEA/Feb. 21, 2006

Caption: City of Kennett, Mo. v. Wartsila North America, Inc., and National Union Fire Insurance Co.

Judge, Jury or ADR: Mediation

Name of Mediator: Bill Hartgering

Verdict or Settlement: \$1.6 million settlement

Special Damages: None

Allocation of Fault: N/A

Last Offer: N/A

Last Demand: N/A

Attorney for Plaintiff: Don M. Downing, Gray, Ritter & Graham, P.C., St. Louis

Insurance Carrier: N/A

Plaintiff's Experts: None

Defendants' Experts: None