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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent,
v.
GREAT AMERICAN INSURANCE COMPANY, et al.,
Defendants and Appellants.

After Decision by the Court of Appeal
Second Appellate District, Division Two
Case No. B189133

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

This case involves a substantial split among California Courts of Appeal concerning the appropriate standard for determining the scope of liability public entities face when entering into construction contracts for public works projects. The extent of that liability has widespread implications on the financing of such projects, the ability of public entities as well as courts to efficiently and effectively handle the increased litigation that will undoubtedly result from the appellate court's ruling, and, ultimately, on California taxpayers who must pay for it all. In this case, a contractor refused to pay for costs exceeding the contract price to complete construction of an elementary school. It is undisputed that the contractor sought millions of dollars above the already agreed-upon multi-million dollar contract price. It is also undisputed that the contractor admitted he neither possessed nor was aware of any evidence that the public entity affirmatively misrepresented or actively concealed any information about the project. The trial court, applying a well-established, long standing, and recently followed line of cases, ruled that the contractor's claim for breach of implied warranty based on nondisclosures in the plans and specifications could not be maintained because there was no affirmative misrepresentation or active concealment.

Reversing the trial court's ruling on this issue (and others), the Court of Appeal applied a completely different standard for recovery on a breach of implied warranty claim that is tantamount to strict liability for public entities, and is also inconsistent with other appellate authority of this State. Indeed, the Court of Appeal acknowledged that "[t]here is a conflict of authority as to whether a contractor must prove intentional concealment by the public agency in order to recover on a claim for nondisclosure of material facts." (*Los Angeles Unified School Dist. v. Great American Ins.*

Co. (2008) 163 Cal.App.4th 944, 964.)[1] The Second District Court of Appeal followed a watered-down standard recently rejected by the Sixth District Court of Appeal. (See *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551.) As this Court knows, public agencies are planning billions of dollars in public works projects crucial to the future of California. Thus, the time is *now* to resolve the conflict concerning the legal standards applicable to claims that invariably will be made by contractors as these projects move forward. Without clear guidance from this Court, and in light of the existing split of authority on this issue, public agencies will repeatedly find themselves embroiled in expensive and protracted litigation misdirecting scarce time and resources that are essential to ensuring the continued development of vital public works projects crucial to California's efforts to revitalize its infrastructure.

Thus, Petitioner asks this Court to determine conclusively whether California law should extend liability in contract to public agencies for breach of implied warranty, where the public entity neither fraudulently conceals nor affirmatively misrepresents any information in the plans or specifications for a public construction contract.

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[1] The Court of Appeal's decision became final and was published on June 5, 2008. A copy of the opinion is attached at Tab 1 to this Petition. (Cal. Rules of Court, rule 8.504, subd. (b)(4).)

WHY REVIEW SHOULD BE GRANTED

The Los Angeles Unified School District (the "District") respectfully submits that review is appropriate for two reasons.

First, there is a split of authority among California appellate courts as to whether a public works contractor, in a construction contract dispute with a public agency, may maintain a contract action for breach of the implied warranty of the correctness of plans and specifications based upon nondisclosure, absent any evidence that the public entity actively concealed or intentionally omitted the information. This is an issue of significant import that needs clarification now given the pervasiveness of public works contracts throughout the State. California voters approved over $40 billion in public funds in 2006 for State-wide public works, and there is a proposal to increase this amount by nearly $30 billion in the upcoming 2008 and 2010 general elections.[2] As they enter into or continue with public works projects, public entities throughout California need clarification of the significant issue raised, and new dilemmas created, by the Court of Appeal's decision.

Following this Court's precedent set down in *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, *Wunderlich v. State of California* (1967) 65 Cal.2d 777, and *Souza & McCue Construction Co. v. Superior Court* (1962) 57 Cal.2d 508, 510, the First and Sixth District Courts of Appeal have correctly held that proof of an affirmative misrepresentation or active concealment of material facts in the plans and specifications of a public agency is required for a contractor to recover in contract against a public entity on a breach of implied warranty claim. (See *Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara*

[2] These statistics are from the *2007 California's Five Year Infrastructure Plan*, as reflected on the California Department of Finance's Web site on July 7, 2008, at <http://www.dof.ca.gov/capital_outlay/reports/>, pp. i, 1.

County (1979) 91 Cal.App.3d 1, 10; *Thompson Pacific Construction, Inc., supra*, 155 Cal.App.4th at p. 551.) Contrary to existing precedent, the Third District came to the opposite conclusion, holding that a material omission is sufficient to saddle the public entity with contract liability, even when there is no evidence that the public entity affirmatively misrepresented or actively concealed any information in the plans or specifications. (See *Welch v. State of California* (1983) 139 Cal.App.3d 546, 556.)

In the instant case, the Second District Court of Appeal, in a published decision that reversed the trial court's rulings almost in full, agreed with *Welch* that in the context of public construction contracts where liability is based on breach of an implied warranty, "there is no requirement of proving an affirmative fraudulent intent to conceal." (*Ibid.*; see *Great American Ins. Co.*, *supra*, 163 Cal.App.4th at p. 965.) Insofar as it determined *Welch* to be more persuasive than the breadth of contrary precedent, the lower court's ruling deepens the split of authority among the appellate courts of this State. By likening the standard of proof in a breach of implied warranty claim based on nondisclosure to one that is tantamount to strict liability, and ignoring the body of California authority that requires some degree of fraudulent intent to subject public agencies to liability on such claims, the lower court's decision furthers an inconsistency in the law where before there existed merely an aberration in *Welch*. Review by this Court is thus necessary to secure uniformity of decision on this issue. (See Cal. Rules of Court, rule 8.500(b)(1); *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 407 ("We granted review to secure uniformity of decision.").)

Second, if not reversed (or at least decertified for publication),[3] the Court of Appeal's decision will have unintended, far reaching effects beyond this case and the parties before this Court. Given the incentive contractors have to bid as low as reasonably possible to win projects, it is not uncommon for contractors to claim losses or increased costs of performance and to seek recovery against public entities on any number of theories. If the Court of Appeal's decision is left untouched, these contractors, who have access to public planning records, will seek to have the State and other public entities act as "insurers" for asserted cost overruns, by claiming that some piece of information in the public records was not specifically disclosed. Such a result will give contractors added incentive not only to underbid projects, but also to conduct less due diligence. In framing legal standards for public works projects, this Court has been careful to avoid adopting legal arguments that encourage such conduct. (See, e.g., *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 240 ["allowing contractors to recover in quantum meruit for the actual as opposed to the bid cost of a project would encourage contractors to bid unrealistically low with the hope of prevailing on an abandonment claim based on the numerous changes inherent in any large public works project"].)

The Court of Appeal's decision essentially subjects public entities to strict liability whenever a contractor can point to some fact in the public agency's vast project file that the contractor can claim was not disclosed, which will cause an endless proliferation of litigation to which the agencies must re-direct their time and attention from other matters of pressing public concern. Worse still, these public entities will be forced to divert already

[3] The District is separately filing a letter requesting at the least that this Court order the entire Court of Appeal opinion decertified for publication. (Cal. Rules of Court, rule 8.1125.)

scarce financial resources away from much needed public works projects—such as the construction of schools, libraries, hospitals, roadways, and prisons—to cover the costs of litigating contract actions that, rather than being quickly resolved and disposed of by the trial court, will often result in lengthy and costly legal proceedings and subsequent appeals.

The California legislature has demonstrated its reluctance to impose liability on government entities given the implications on the effective operation of public works, and the attendant impact on the public interest. (See Gov. Code, § 818.8.)[4] Notwithstanding that a cause of action may lie in contract, as applied, the rule set down by the Second District Court of Appeal in this case would expose public agencies to the same type of liability the legislature sought to curb by precluding misrepresentation actions in tort. By negating a required showing of active concealment or material omission from a breach of implied warranty claim, public works contractors will be able to achieve the same end (i.e., imposing liability on public entities for misrepresentations, *whether negligent or intentional*) by different means.

In light of the pressing legal and policy concerns implicated by the Court of Appeal's decision, the need for resolution by this Court is clear and immediate. Superior courts of this State are not bound by the precedent of any one appellate district. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) Consequently, trial courts will be left to choose which legal standard to apply in contract actions based on breach of implied warranty. Similarly, given the current split of authority among appellate courts, there will undoubtedly be continued dissension as future courts grapple with this issue. Rather than allow this important question of

[4] Section 818.8 states that "[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional."

law, which is likely to recur time and again, to fester among the courts of appeal and keep public entities and contractors guessing as to which rule of law a particular trial court will follow, this Court should grant review to resolve the issue with finality. (See Cal. Rules of Court, rule 8.500(b)(1); *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 337 ("We granted review to address an important question of law . . . .").)

FACTUAL AND PROCEDURAL BACKGROUND

I. The District Contracts to Erect an Elementary School

In March of 1996, following competitive bids required by statute, the District contracted with Lewis Jorge Construction Management, Inc. ("LJCM") to construct an elementary school, the Queen Anne Place School Project ("Project"), for approximately $10.1 million. (1 HA 0067.)[5] By late 1998, the District had become dissatisfied with LJCM's performance, and therefore declared LJCM to be in material breach and default. (1 HA 0060, 0067; 2 DA 0263-0264.)[6] The District determined at the time that approximately 93 percent of the contract work had been completed. (2 DA 0263; 1 HA 0204.)

II. The District Enters Into a Completion Contract

After calling upon LJCM's performance bond surety to perform, which it refused to do, the District sought out a contractor to complete the necessary construction, which would require the correction of LJCM's defective work, some of which was then known. (1 HA 0060, 0067.) This completion contract was an extension of the competitively bid contract the District executed with LJCM and, to the extent necessary, was authorized by an emergency declaration provision of the Public Contract Code. (2 DA 0267-0269.)

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[5] "HA" refers to Hayward's Appendix on appeal.

[6] "DA" refers to District's Appendix on appeal.

Following the submission of a few contractor bids, the District selected Hayward Construction Company Inc. ("Hayward") to complete the Project. In June 1999, Hayward and the District entered into a "Completion Contract for Queen Anne Place School" ("Completion Contract"). (1 HA 0067.) Attendant to the Completion Contract was a list of items that remained to be completed, referred to as a "pre-punch list." (1 HA 0229-0265.) The District explicitly described the "pre-punch list" to Hayward as a courtesy list only, and warned Hayward that it should not read the list as a final punch-list. (*Ibid.*) In light of the approximated percentage of completion, and absent precise knowledge of the remaining work to be done, the parties entered a "time and materials" contract—rather than a fixed-fee contract—that allocated payment based on time and material costs, plus a percentage profit. (1 HA 0069-0072.) The parties agreed to a guaranteed maximum cost of $4.5 million. (1 HA 0072.)

Although never before seeking change orders for such work, upon approaching the $4.5 million maximum, Hayward asserted that latent defects were outside the Completion Contract's scope and threatened not to complete the Project unless payments above $4.5 million were made. Under a reservation of rights, the District advanced additional funds to Hayward, and Hayward completed the Project. (1 GAA 0204-0205.)[7]

III. Litigation Ensues Between the District and Hayward/Great American for Breach of Contract and Performance Bond

The District filed its complaint against both Hayward and Great American Insurance Company ("Great American") in March 2001. (1 HA 0058.) Hayward cross-complained against the District in May of that same year. (1 HA 0106.) Among other allegations, both the District and Hayward claimed the other had breached the Completion Contract.

[7] "GAA" refers to Great American Ins. Co.'s Appendix on appeal.

There were then a number of motions and rulings by the trial court unrelated to the warranty issue here, which are detailed in the Court of Appeal's decision. As for the warranty issue, beginning in June 2004, the parties briefed Hayward's claim for breach of implied warranty regarding the District's plans and specifications for the Project. (5 HA 1123-1140.) On September 1, 2004, the trial court ruled in the District's favor, concluding that whether the District breached the implied warranty "requires an intentional non-disclosure or affirmative misrepresentation regarding the plans and hence is identical to the claim of breach of contract based upon affirmative misrepresentation and/or intentional non-disclosure . . . ." (5 HA 1141.) As noted in the Court of Appeal's decision, the trial court found that Hayward admitted that the District had neither affirmatively misrepresented nor actively concealed from Hayward any information about the project. (*Great American, supra*, 163 Cal.App.4th at 964.)

Outstanding issues pertaining to Hayward's and Great American's affirmative defenses were adjudicated in the District's favor in November 2004 and November 2005, respectively. Judgment was thereafter entered on December 19, 2005. (5 HA 1163, 1198.) Hayward and Great American appealed.

IV. The Court of Appeal Reversed, Specifically Holding that Neither Intentional Nondisclosure Nor Affirmative Misrepresentation is Required to Establish a Claim for Breach of the Implied Warranty of Correctness

On appeal, the court reversed almost entirely the trial court's judgment, affirming only the order determining that the Completion Contract was not illegal. (*Great American Ins. Co., supra*, 163 Cal.App.4th at pp. 967-969.) Importantly for purposes of this petition, the Court of Appeal expressly acknowledged that "[t]here is a conflict in authority as to

whether a contractor must prove intentional concealment by the public agency in order to recover on a claim for nondisclosure of material facts." (*Id.* at p. 964 [citing *Jasper, Thompson,* and *Welch*].)

Both *Jasper* and *Thompson* (a recently decided case in which this Court has previously denied a request for depublication) require proof of an affirmative misrepresentation or active concealment and justifiable reliance in order to recover on a contract action for breach of implied warranty. Nonetheless, the Court of Appeal in this case, relying on secondary source authority that concludes *Welch* to be the better decision, held that a contractor need not establish either intentional nondisclosure or affirmative misrepresentation in order to maintain a contract action against a public agency for breach of implied warranty based on nondisclosure. (163 Cal.App.4th at pp. 964-966.) Rather, a contractor need only establish that the public entity knew material facts concerning the project that would affect the contractor's bid or performance, and which the public agency failed to disclose. (*Ibid.*) Importantly, the Court of Appeal did not disagree with the trial court's determination that there was no affirmative misrepresentation or active concealment. Thus, this case involves a pure question of law for determination by this Court.

* * *

In light of the Court of Appeal's decision in this case, four Courts of Appeal, applying two different legal standards, have reached conflicting and irreconcilable conclusions when presented with the same legal question—a question, indeed, of significant public importance. The only court in a position to resolve that conflict is this Court.[8]

[8] Because this petition raises a purely legal question that may be definitively resolved by only this Court, the District did not petition for rehearing below. (Cal. Rules of Court, rule 8.504(b)(3).)

LEGAL DISCUSSION

I. This Court Should Grant Review Because There Is a Split of Authority Among the Courts of Appeal Concerning the Appropriate Standard for Determining the Scope of a Public Entity's Liability for Breach of Implied Warranty

In *Souza & McCue Construction Co.*, this Court first made clear that "a contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than represented." (57 Cal.2d at p. 510.) This Court thus held that the contractor stated a cause of action against the public entity "in contract on the basis of the alleged *fraudulent breach*" by the entity. (*Id.* at p. 511, emphasis added.)

Expanding on this principle, this Court later emphasized the importance of the requirement of justifiable reliance:

> If the agency makes a positive and material representation as to a condition presumably within the knowledge of the government, and upon which . . . the plaintiffs had a right to rely[,] the agency is deemed to have warranted such facts despite a general provision requiring an on site inspection by the contractor. *But if statements honestly made may be considered as suggestive only, expenses caused by unforeseen conditions will be placed on the contractor* . . . .

(*Wunderlich*, *supra*, 65 Cal.2d at p. 783, internal quotations and citations omitted, emphasis added.) With these legal principles firmly established, four courts of appeal, including the Court of Appeal in this case, have reached two inconsistent and irreconcilable outcomes concerning whether to recover on a breach of implied warranty claim based on the nondisclosure of allegedly material information, a contractor must prove

that the public entity actively concealed or affirmatively omitted the information.

The First and Sixth Districts have answered this question in the negative. In *Jasper*, the First District Court of Appeal considered the propriety of an implied warranty jury instruction that failed to include language concerning the absence of evidence of misrepresentation or intentional concealment. (*Jasper Construction, Inc., supra*, 91 Cal.App.3d at pp. 7-11.) Relying on *Souza*, the *Jasper* court determined that the instruction as given was erroneous because "[s]ubsequent cases make it clear that there must be an affirmative misrepresentation or concealment of material facts in the plans and specifications in order for the contractor to recover." (*Id.* at p. 10 [citing *Wunderlich, supra,* 65 Cal.2d at p. 786; *Wiechmann Engineers v. State of California* (1973) 31 Cal.App.3d 741, 751].)[9] Conditioning its holding on two key factual determinations—whether the undisclosed information was reasonably discoverable by the contractor, and whether the nondisclosure pertained to *material* information—the court in *Jasper* correctly held that "there can be no liability of a public entity for extra work caused by plans and specifications that are merely 'incomplete.' Furthermore, recovery on this theory cannot be maintained upon a showing of a 'defect' unless that defect consists of *intentional concealment or positive assertions of material facts which prove to be false or misleading.*" (*Id.* at p. 11, emphasis added.)

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[9] In denying recovery to a contractor on a breach of warranty theory where there was no positive misrepresentation or concealment of fact, this Court in *Wunderlich* commented: "It is obvious that a governmental agency should not be put in the position of encouraging careless bidding by contractors who might anticipate that should conditions differ from optimistic expectations reflected in the bidding, the government will bear the costs of the bidder's error." (*Wunderlich v. State of California* (1967) 65 Cal.2d 777, 786.)

The Sixth District Court of Appeal, similarly considering the propriety of a jury instruction on a breach of warranty claim in a public construction contract dispute, recently upheld an instruction requiring that there be an affirmative misrepresentation or concealment of material facts in the plans and specifications at the time of the bid. (*Thompson*, *supra*, 155 Cal.App.4th at p. 551.) At issue was the alleged omission from the City of Sunnydale's plans and specifications of dimensions for certain structural steel members that, following inquiry by the contractor, resulted in a delay of the project's completion. Consistent with *Jasper*, the *Thompson* court held that "[i]n order to recover on such an action, the contractor must prove that the agency affirmatively misrepresented, or actively concealed, material facts which rendered the bid documents misleading, and that the contractor reasonably relied on such misrepresentations in preparing its bid." (*Ibid.*)

The Third District Court of Appeal reached a different conclusion. In *Welch*, the court considered whether a cause of action for breach of implied warranty could lie where a public works contractor was allegedly misled by the state's failure to disclose information regarding a similar repair on the same construction site six years earlier. Upon considering this issue, the *Welch* court altered course from the prevailing line of authority requiring affirmative misrepresentations or active concealment, and instead held that a cause of action for breach of contract may be based on mere nondisclosure, regardless of the presence or absence of "an affirmative fraudulent intent to conceal." (139 Cal.App.3d at pp. 555-557.) By imposing such a strict legal duty on public bodies to disclose any and all material information, *Welch* created an aberration in this State's existing precedent that greatly expanded liability for government agencies.

Relying on *Welch*, and consequently deepening the split of authority among appellate courts, the Second District Court of Appeal in this case

likewise concluded that even in the absence of active concealment or affirmative misrepresentation, and regardless of any justifiable reliance on the contractor's part, Hayward could maintain an action for breach of contract based on the nondisclosure of material information. (*Great American Ins. Co., supra*, 163 Cal.App.4th at pp. 964-966.) Given that four appellate courts of this State have reached two conflicting and inconsistent outcomes when presented with the same legal question, review by this Court is necessary to ensure uniformity of decision and resolution of this important question of law.

II. This Court Should Grant Review Because the Court of Appeal's Decision Creates an Untenable Precedent for Public Entities Throughout California

This Court should also grant review of the Court of Appeal's decision because of the far-reaching effect it will have on the relationship between public entities and public works contractors. The decision expands the potential liability of government agencies to such an extent that it risks impeding their effective operation. Where funding approved by California voters for the development of much needed public constructs such as schools, libraries, hospitals, and roadways is diverted to cover the cost of lawyer fees, expert witness fees, and other costs associated with protracted litigation common to public construction contract disputes, substantially less funding is then available to complete this necessary, and taxpayer financed, development. Absent a requirement of active concealment or affirmative misrepresentation, public agencies will become highly exposed to after-the-fact claims for breach of implied warranty based on their unique public status. The records, plans, specifications, and other related information upon which any public construction contract is based are themselves public records. Public works contractors thus can at any time obtain information not disclosed to them during bidding

negotiations and claim such information was sufficiently material to transfer liability for their own cost overruns to the public entity. Such a rule of law is problematic in three important respects (among others).

First, it encourages contractors to underbid projects—a practice this Court has sought to discourage when formulating decisions in public works cases—and also provides a disincentive for contractors to perform the type of due diligence the public expects and deserves. (See *Amelco, supra*, 27 Cal.4th at p. 240.) Contractors, in an effort to secure public construction contracts, will have an incentive to bid sufficiently low to guarantee award of the contract, and, upon experiencing cost overruns that they are unwilling to assume, can thereafter scour the large volumes of information public agencies collect and summarize as part of an invitation for bid. The aim of the review of public records would be to find the proverbial needle in the haystack—a piece of information in the public agency's files that the contractor could contend was not adequately summarized or otherwise disclosed to serve as a hook for a nondisclosure claim even in the absence of an affirmative misrepresentation or active concealment. There is no question that contractors will trumpet the Court of Appeal's decision in this case in their attempts to saddle public agencies with the cost of the contractors' overruns. Such a result places too great a financial burden on public entities and is inconsistent with the legislature's reluctance to expand the liability of public agencies. As the *Thompson* court explained, "[a]ffirmative misrepresentation or concealment is required to avoid burdening public entities 'with liability where the contractor underbids due to lack of diligence in examining specifications and plans which are themselves accurate.'" (155 Cal.App.4th at p. 551 [quoting *Jasper*, *supra*, 91 Cal.App.3d at p.10].)[10]

[10] As occurred here, contractors may wait until the end of a project to assert a breach of the implied warranty. In this way, the Court of Appeal's

Second, the Court of Appeal's decision imputes a duty on the public agency to determine what a contractor would or would not consider "material." But the public agency relies on the contractor's expertise to complete public construction contracts; it is for this very reason that the public entity hires the contractor in the first place. If the omission, regardless of intent, must both materially affect a contractor's bid and be known only to the public agency, then apart from creating a strict duty to disclose material information, the Court of Appeal's decision imposes the added responsibility on public entities to determine what a given contractor may or may not deem material. Such balancing of unknowable factors not only obviates any responsibility of the contractor to conduct due diligence, but also constitutes unsound public policy that should not be required. Such an unintended, unfair, and untenable rule affecting the relationships between parties to public works contracts, as well as the public interest, should be reviewed and, at the very least, depublished.[11]

Third, in light of the more than 70 billion[12] dollars in public funds that have been allocated to the completion of public works projects, a rule

(continued...)

standard makes it much more difficult for public agencies to budget for projects, yet another reason to reject the standard adopted by the Court of Appeal. In rejecting the abandonment doctrine, this Court stated "[p]ublic entities would not receive timely notice of claims that would allow them to make project management, budget, or procedural adjustments during the courts of construction. Rather, contractors would be permitted to wait until a project was completed before giving notice of 'too many' changes, thus creating intolerable uncertainty in the budgeting and financing of construction projects." (*Amelco, supra*, 27 Cal.4th 228 at 240.)

[11] See footnote 3.

[12] See footnote 2. In 2006 California voters approved a measure allocating more than 40 billion dollars to public works projects, and a proposal is in place to approve an additional 30 billion dollars in the 2008 and 2010 general elections.

of law that substantially increases the scope of liability that public agencies face when entering into these projects will significantly undermine the purpose for which this money is to be spent. When faced with such expansive liability exposure, public entities will be forced to divert, and thereby deplete, essential funding intended exclusively for the completion of public works development to litigate construction contract disputes where the public entity has engaged in no wrongdoing. (See *Amelco, supra*, 27 Cal.4th 228 at p. 240 ["Permitting such recovery would appear to unduly punish the tax-paying public."].) For this reason as well, it is imperative that this Court grant review to resolve this issue, which is of paramount public importance.

CONCLUSION

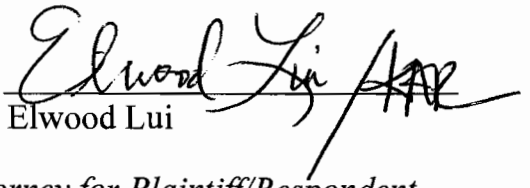
When presented with the question of whether a public works contractor can recover under contract against a public entity for breach of implied warranty based on nondisclosure, absent a showing of active concealment or affirmative misrepresentation, four California courts of appeal, including the court below, have reached two contrary and inconsistent outcomes. This split of authority warrants review by this Court in order to definitively address this issue and create decisional uniformity among the courts of this State. Moreover, review is necessary in light of the expansive and likely unintended adverse impact that the Court of Appeal's decision will have on public entities that, as a result of the court's ruling, will find that public funds will be depleted as they struggle to complete necessary educational, medical, and transportational development because much of the needed taxpayer approved funding required to complete such projects will have to be redirected to cover prohibitively expensive litigation costs. The public interests implicated by the Court of

Appeal's decision compel review by this Court. For these reasons, this Court should grant this petition.

Dated: July 14, 2008

Respectfully submitted,

Jones Day

By: 
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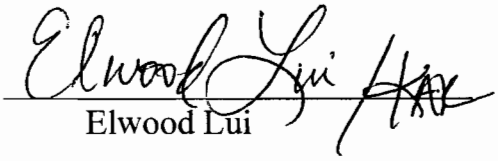
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.504(d)(1), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 5,075 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 14, 2008

Respectfully submitted,

JONES DAY

By: 
Elwood Lui

Attorney for Plaintiff/Respondent
LOS ANGELES UNIFIED
SCHOOL DISTRICT

Los Angeles Unified School Dist. v. Great American Ins. Co.
Cal.App. 2 Dist.,2008.

Court of Appeal, Second District, Division 2, California.
LOS ANGELES UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent,
v.
GREAT AMERICAN INSURANCE COMPANY et al., Defendants and Appellants.
No. B189133.

June 5, 2008.

Background: School district brought action against construction company and its surety, alleging breach of contract and breach of performance bond and seeking declaratory relief. Construction company cross-claimed for breach of contract, rescission, and declaratory relief. The Superior Court, Los Angeles County, No. BC247848,Wendell Mortimer, Jr., J., granted district summary judgment on the pleadings. Defendants appealed.

Holdings: The Court of Appeal, Chavez, J., held that:
(1) parol evidence rule did not exclude extrinsic evidence from company employees regarding obligations under completion agreement;
(2) completion agreement was not subject to statute that allowed for modification only as provided by the contract;
(3) company could maintain a cross-action against school district for breach of contract based on nondisclosure of material information; and
(4) district's emergency declaration was a valid basis for excepting completion agreement from competitive bidding requirements.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Trial court's determination of whether or not a contract provision is ambiguous is a question of law, subject to de novo review on appeal.

[2] Contracts 95 ⚿176(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(3) k. Extrinsic Facts. Most Cited Cases
Trial court's resolution of an ambiguity is a question of law if no extrinsic evidence is admitted to interpret the contract or if the extrinsic evidence is not in conflict.

[3] Evidence 157 ⚿397(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(1) k. In General. Most Cited Cases
Parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument. West's Ann.Cal.Civ.Code § 1625; West's Ann.Cal.C.C.P. § 1856.

[4] Evidence 157 ⚿448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of

Extrinsic Evidence. Most Cited Cases
The parol evidence rule does not prohibit the introduction of extrinsic evidence to explain the meaning of a written contract if the meaning urged is one to which the written contract terms are reasonably susceptible. West's Ann.Cal.Civ.Code § 1625; West's Ann.Cal.C.C.P. § 1856.

[5] Appeal and Error 30 ⚿1056.1(11)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)11 Exclusion of Evidence
30k1056 Prejudicial Effect
30k1056.1 In General
30k1056.1(11) k. Particular Types of Evidence. Most Cited Cases

Evidence 157 ⚿448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases
Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning; it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face.

[6] Evidence 157 ⚿448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases
The decision whether to admit extrinsic evidence to interpret contract involves a two-step process; first, the court provisionally receives without actually admitting all credible evidence concerning the parties' intentions to determine ambiguity, i.e., whether the language is reasonably susceptible to the interpretation urged by a party, and then, if in light of the extrinsic evidence the court decides the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-interpreting the contract.

[7] Contracts 95 ⚿143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases
When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is reasonably susceptible to the interpretation urged by the party; if it is not, the case is over.

[8] Evidence 157 ⚿450(7)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k450 In General
157k450(7) k. Contracts for Buildings and Other Works. Most Cited Cases
Construction contract for school building was ambiguous regarding construction company's obligations to correct defective work performed by previous contractor, and thus, parol evidence rule did not exclude extrinsic evidence from officer of company and a company employee regarding such obligations. West's Ann.Cal.Civ.Code § 1625; West's Ann.Cal.C.C.P. § 1856.

[9] Pleading 302 ⚿345(1.4)

302 Pleading
302XVI Motions
302k342 Judgment on Pleadings
302k345 Insufficient Cause of Action or

Defense
302k345(1.4) k. Complaint, Declaration, Petition or Statement of Claim. Most Cited Cases
A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action.

[10] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appeal and Error 30 ⚿895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases
A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review; all properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law, and judicially noticeable matters may be considered.

[11] Schools 345 ⚿80(2)

345 Schools
345II Public Schools
345II(E) District Contracts
345k80 Making, Requisites, and Validity
345k80(2) k. Proposals or Bids. Most Cited Cases
Continuing contract exception did not apply to completion agreement between school district and construction company for completion of school building so as to make agreement a competitively bid contract subject to statute that allowed for modification of such agreements only as provided by the contract; although the completion agreement incorporated the terms and conditions of previous contract that was subject to bidding, it did not state that it was a continuation or transfer of that contract, but rather the contract was entered into after district adopted a declaration of emergency authorizing it to enter into contracts for completion of project without competitive bidding. West's Ann.Cal.Pub.Con.Code §§ 7105(d)(2), 20113.

[12] Schools 345 ⚿86(2)

345 Schools
345II Public Schools
345II(E) District Contracts
345k86 Remedies of Parties
345k86(2) k. Contracts for Construction or Equipment of Schoolhouses. Most Cited Cases
Construction company could maintain a cross-action against school district for breach of contract based on nondisclosure of material information if it could establish that the district knew material facts concerning the project that would affect company's bid or performance and failed to disclose those facts to company.

[13] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Whether a contract is illegal is a question of law subject to de novo review.

[14] Public Contracts 316A ⚿6

316A Public Contracts
316AI In General
316Ak5 Proposals or Bids
316Ak6 k. Necessity for Submission to Competition. Most Cited Cases
Given the strong public policy favoring competitive bidding, the emergency exception thereto should be strictly construed and restricted to circumstances which truly satisfy the statutory criteria. West's Ann.Cal.Pub.Con.Code § 20113.

[15] Schools 345 ⚿80(2)

345 Schools
345II Public Schools
345II(E) District Contracts
345k80 Making, Requisites, and Validity
345k80(2) k. Proposals or Bids. Most Cited Cases
School district's emergency declaration pursuant to statute allowing suspension of competitive bidding process for emergency repairs or work on public school facilities was a valid and sufficient basis for excepting the completion agreement with construction company from competitive bidding requirements; the cessation of work on the project by the district's initial contractor was sudden and unexpected, requiring immediate action on the part of the district to prevent damage or deterioration to the partially completed facility and to mitigate the impairment of an essential public service-namely, public school classes. West's Ann.Cal.Pub.Con.Code § 20113.
See Cal. Jur. 3d, Public Works and Contracts, §§ 24, 35; Cal. Jur. 3d, Schools, § 129; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 983.
****101** Wilson Elser Moskowitz Edelman & Dicker, John J. Immordino and Susannah M. Dudley, Los Angeles, for Defendant ****102** and Appellant Great American Insurance Company.
Monteleone & McCrory, Joseph A. Miller, Los Angeles, and Leighton T. Brown II, for Defendant and Appellant Hayward Construction Company, Inc.
Bergman & Dacey, Inc., Gregory M. Bergman, John P. Dacey, and Jorge J. Luna, Los Angeles, for Plaintiff and Respondent.
CHAVEZ, J.
***947** In this consolidated appeal, defendants and appellants Hayward Construction Company, Inc. (Hayward) and Great American Insurance Company (Great American) (collectively, appellants) appeal from a final judgment entered after the trial court granted a motion for summary adjudication and motion for judgment on the pleadings in favor of plaintiff and respondent Los Angeles Unified School District (District), and entered dispositive rulings in favor of the District on remaining legal issues. Appellants also appeal from the trial court's award of attorney fees. We reverse the judgment and reverse the attorney fee award.

FACTUAL BACKGROUND

1. The Project

The Queen Anne Place school project (the project) involved construction of a new elementary school in Los Angeles. In March 1996, following competitive bids required by law, the District contracted with Lewis Jorge Construction Management, Inc. (Lewis Jorge) to construct the project for approximately $10.1 million. By late 1998, the District became dissatisfied with Lewis ***948** Jorge, and on February 9, 1999, the District declared Lewis Jorge to be in material breach and default. At that time, Lewis Jorge claimed it had completed work totaling $9.4 million, or approximately 93 percent of the original contract price. [FN1]

> FN1. The default precipitated a lawsuit among the District, Lewis Jorge, and various subcontractors, which was resolved by settlement in 2003.

On April 27, 1999, the District's governing board adopted a declaration of emergency pursuant to Public Contract Code section 20113,[FN2] which allowed the District to enter into a contract to complete the project without advertising for or inviting bids. The District then sought completion cost proposals from other general contractors. Completion of the project required correction of certain work performed by Lewis Jorge. To assist potential contractors, the District created a "pre-punch list" that identified the remaining work and work to be corrected. The District received cost estimates from three general contractors, including Hayward, and ultimately selected Hayward to complete the project.

> FN2. All further statutory references are to the Public Contract Code, unless otherwise stated.

2. The Completion Agreement Between Hayward and the District

In June 1999, Hayward and the District entered into a completion contract for the project (completion agreement). Paragraph 8 of the completion agreement states that the contract "can be generally described as 'a cost plus percentage fee (10%) with a guaranteed maximum,' " pursuant to which the District agreed to pay Hayward for cost of work, labor, and actual costs, plus a fee of 10 percent calculated as a markup on the

actual costs incurred. Paragraph 11 states:

> "Contractor guarantees that the maximum amount payable by the District for **103 the Cost of the Work plus the Contractor's Fee described in Paragraph 10 will not exceed Four Million Five Hundred Thousand Dollars ($4,500,000.00)."

In paragraph 15, the parties agreed that the scope of Hayward's work included the items listed on the pre-punch list. That paragraph states:

> "The Contractor's obligation to complete the work in accordance with this Completion Agreement and the Contract Documents shall include the responsibility to correct deficiencies in the work performed by the former contractor, without limitation, as noted on the current correction list issued by the District."

The "correction list" referred to in this paragraph consists of a 22-page pre-punch list prepared by the District's architect, and an 86-page pre-punch list prepared by the District's inspectors. The final entry on the architect's pre-punch list states: "Corrections or comments made in regard to the *949 pre-punch list during this review do not relieve the Contractor from compliance with the requirements of the drawings and specifications. This review is only for General Conformance with the design concept of this project and general compliance with the information given in the Contract Documents. The Contractor is responsible for confirming all quantities, dimensions and techniques of construction; coordinating all work with that of all other trades and performing his work in a safe, acceptable and satisfactory manner."

Each page of the pre-punch list prepared by the District's inspectors contains the following caption: "This is a courtesy pre-punch list and should not be taken as a final inspection punch list. This is not the punch list of minor corrective items made at the final inspection."

After Hayward and the District executed the completion agreement, Great American issued a performance bond for $4.5 million that guaranteed Hayward's performance of the contract.

3. Hayward's Work and the District's Advance of Sums Exceeding $4.5 Million

Not long after Hayward commenced work, a dispute arose between Hayward and the District concerning work that was not listed in either of the pre-punch lists. This work included correcting defects in the stucco work and subsurface defects in the bathroom tile work. In December 1999, Hayward advised the District that many unforeseen conditions made it necessary to increase the contract price beyond $4.5 million. In May 2000, the Board of Education allocated $3 million to complete the project. After the Board's action, the District issued a purchase order for $2 million to complete the project. Payment was made to Hayward under an express reservation of rights, which stated that "the advancing of costs to [Hayward is] without prejudice to all of the District's rights to recover the monies advanced against all responsible parties, including [Hayward] and its surety company if appropriate."

In early February 2001, the parties met to discuss the payments. On February 16, 2001, the District wrote Hayward a letter explaining the District's position that cost of the work in excess of $4.5 million, plus certain change orders, were Hayward's contractual responsibility. The District demanded that Hayward and its surety, Great American, return more than $1 million the District paid to Hayward over and above the $4.5 million contract price. Hayward and Great American refused, and in March 2001 the District commenced this action.

**104*950PROCEDURAL BACKGROUND

1. The Complaint

The District's complaint alleged breach of contract, breach of performance bond, and declaratory relief. The District sought a declaration that the completion agreement required Hayward to "complete construction of the Queen Anne Place Elementary School Project, including all deficiencies existing in the Project at the time [Hayward] commenced work thereat whether such deficiencies were latent or patent," and that Hayward "agreed to so perform, all for the guaranteed maximum price payable by the District of $4,500,000.00." Hayward and Great American filed answers to the complaint, and Hayward cross-complained for breach of contract, rescission, and declaratory relief.[FN3]

FN3. The action was consolidated with a related action, *Mobley v. Lewis Jorge Construction Manufacturing, Inc.*, case No. BC193087, which subsequently settled.

2. The District's Motion for Summary Adjudication

In June 2003, the District moved for summary adjudication on the issue of contract interpretation. Specifically, the District sought a ruling that Hayward was contractually obligated to complete all work on the project, including all deficiency corrections, for a guaranteed maximum cost of $4.5 million. In opposition, Hayward argued that triable issues of material fact precluded summary adjudication of this issue and that the completion agreement was ambiguous as to the scope of Hayward's obligation to correct deficient work. Hayward proffered extrinsic evidence to support its position and argued that the trial court was required to consider this evidence on a provisional basis before determining whether or not the contract was ambiguous. The District objected to Hayward's evidence as "inadmissible extrinsic evidence being presented to vary, alter and/or add to the terms of an integrated written instrument in violation of California law." The trial court agreed with the District, and on August 29, 2003, issued a minute order sustaining the District's objections to evidence in support of Hayward's opposition to the summary adjudication motion. Without indicating whether or not it had given provisional consideration to Hayward's evidence, the trial court concluded that "[t]he contract is not ambiguous." The trial court then granted the District's motion for summary adjudication on the issue of contract interpretation, concluding:

> "Hayward had a duty under the contract to complete the project by performing all work in conformance with the Completion Agreement and the Contract Documents including the responsibility to correct deficiencies in the work performed by the former contractors without limitation as notes on the then-current correction list issued by the District. In the ***951** contract each of the parties contracted for certain risks in exchange for certain benefits. Hayward was required to do the work for an amount not to exceed $4.5 million."

3. The District's Motion to Bifurcate Legal Issues and Motion for Judgment on the Pleadings

In September 2003, the District moved to bifurcate trial on six legal issues, and the trial court granted the District's request to try two of these issues: (1) whether contract modifications were required to be in writing, approved by the District's board, and signed by both parties; and (2) whether District field representatives had legal authority to modify the contract.

The District also filed a motion for judgment on the pleadings relating to Hayward's****105** rescission and declaratory relief claims. In its motion, the District argued that the completion agreement was a contract awarded pursuant to statutory competitive bidding requirements and could not be set aside as a matter of law. The District maintained that the completion agreement was a continuation of the competitively bid Lewis Jorge contract, which was never extinguished, but which had been "transitioned" to Hayward pursuant to article 16 of the Lewis Jorge contract.[FN4]

FN4. Article 16 of the Lewis Jorge contract provides in part: "If, in the opinion of the District, the Contractor at any time during the progress of the work refuses or neglects to supply a sufficiency of material and labor, or fails to perform any provision of this contract, including safety requirements, the District may without prejudice to any other remedy do any or all of the following: (1) make good such deficiencies or complete the contract by whatever method the District may deem expedient, and the cost and expense thereof shall be deducted from the contract amount; (2) initiate default procedures; and (3) initiate procedures to declare the Contractor a nonresponsible bidder for a period of from two to five years."

In January 2004, the trial court granted the District's motion for judgment on the pleadings, relying on California case law holding that a contractor may not abandon a public contract and seek recovery under equitable remedies, because public works contracts may only be made under prescribed modes. (See *Amelco Elec. v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 115 Cal.Rptr.2d 900, 38 P.3d 1120(*Amelco*).) The trial court stated:

"Hayward is subject to a public contract which arose initially by competitive bidding. It was altered and modified as required by Public Contract Code Section 7105(d)(2) through Article 16 [FN5] as well as Public Contract Code Section 20113. This transition does not exempt it from Public Contract Code Section 7105(d)(2).[FN6]***952** Neither Hayward nor the Court can, therefore, rescind the contract to invoke some form of equitable recovery."

FN5. Although unclear, the reference to "Article 16" appears to be to the default provisions set forth in article 16 of the Lewis Jorge contract, and not to paragraph 16 of the completion agreement, which governs contract modifications and changes.

FN6.Public Contract Code section 7105, subdivision (d)(2) provides, in part that contracts of public agencies "required to be let or awarded on the basis of competitive bids pursuant to any statute may be ... modified only if the ... modification is so provided in the contract or is authorized under provisions of law other than this subdivision."

On the two bifurcated legal issues, the trial court concluded "that all change orders for payment for extra work must be in writing and signed by the parties," and "that all change orders for extra work must be in writing and approved by [the District]." It also concluded that "the field representative [s] of the District did not have the authority to alter, amend, modify and/ or change in any way the Completion Agreement and the Contract Documents." The trial court then invited briefing on the question of whether or not there were any writings which conform to paragraph 16 of the completion agreement obligating the District to pay more than the $4.5 million plus executed change orders.

Hayward identified a purchase order which it claimed obligated the District to pay more than $4.5 million. On March 3, 2004, the trial court ruled against Hayward, finding, among other things, that the purchase order did not bind the parties because it was not signed. The trial court then concluded that the District "was only obligated to pay the $4.5 million contract price plus executed change orders." In its ***106** March 3, 2004 minute order, the trial court requested briefing by the parties identifying any remaining legal issues.

4. The Remaining Issues

In response to the trial court's March 3, 2004 order, the District submitted briefs on four legal issues: (1) whether Hayward was obligated to repay the District $1,144,738.15 in funds advanced over and above the $4.5 million contract price; (2) whether Great American was jointly and severally obligated to repay the $1,144,738.15; (3) whether Hayward's claims for interest, penalties, and attorney fees were no longer viable; and (4) whether Hayward's breach of contract cause of action based on misrepresentation was no longer viable. The District maintained that these issues could be decided as a matter of law, in light of the trial court's previous rulings on the District's motion for summary adjudication and motion for judgment on the pleadings. Hayward argued that the trial court's prior rulings were erroneous and that unresolved factual issues precluded the trial court from deciding, as a matter of law, the issues identified by the District.

Great American joined in Hayward's arguments and claimed the right to assert all of Hayward's affirmative defenses. Great American also identified the following remaining legal issues relating to the District's claim on the ***953** performance bond: (1) whether Hayward completed the projected and corrective work noted on the punch list for $4.5 million, thereby exonerating Great American's obligation on the performance bond; (2) whether the work performed by Hayward over the $4.5 million was outside the scope of the contract; (3) whether Great American is liable under the terms of the performance bond for sums paid by the District in excess of $4.5 million; (4) whether, in light of the trial court's ruling on the District's motion for summary adjudication that the contract was not ambiguous, Hayward's obligations under the completion agreement were limited to patent defects pursuant to paragraph 13 of that agreement; and (5) what preclusive effect, if any, the Consent of Surety had on Great American's defenses.

On May 19, 2004, the trial court ruled that Hayward could not maintain a cause of action for breach of contract based on misrepresentation, because "Hayward's recitation of the facts does not contain any showing that any omissions were actively concealed

or that material information was intentionally omitted by" the District. The trial court further determined that Great American was jointly and severally obligated to repay amounts owed by Hayward to the District. The court stated: "The issues raised by Great American regarding Hayward's obligations have been previously decided. Great American's performance bond is a broad form bond obligating it jointly and severally with Hayward to repay the [D]istrict the monies it overpaid Hayward under its reservation of rights." The trial court then ordered Hayward and the District to file briefs "setting forth any remaining legal issues."

In response, Hayward briefed two issues: (1) whether or not the District breached implied warranties that the plans and specifications were complete, accurate, and free from defects; and (2) whether the District breached the implied covenant of good faith and fair dealing. On September 1, 2004, the trial court ruled against Hayward on these two issues. The parties agreed to meet and confer and to file a joint statement on the remaining legal issues.

The parties agreed that certain issues involved factual questions to be presented ****107** to a jury at trial.[FN7] The parties also agreed that issues relating to the District's entitlement to prejudgment interest, attorney fees and costs should be resolved through posttrial motions. The parties were unable to reach agreement on a joint statement, however, and submitted separate briefs on the remaining legal issues.

> FN7. These issues concerned the District's claim on Hayward's license bond, the District's claims with regard to the HVAC system and the grass field, Hayward's claim for interest on allegedly late progress payments, and the dates of the checks issued for the $1,144,738.15 advanced by the District.

***954** In its brief, the District argued that several of Hayward's and Great American's affirmative defenses to the District's claim for repayment of $1,144,738.15 were based on undisputed facts that had been presented previously to and considered by the trial court in ruling on the District's motion for summary adjudication and motion for judgment on the pleadings. The District maintained that unless Hayward or Great American presented new facts supporting those affirmative defenses, the trial court's prior rulings were dispositive as a matter of law.

Hayward contended that issues remained concerning several of its affirmative defenses. Great American joined in Hayward's contentions and in addition, claimed the following of its own affirmative defenses remained for trial: waiver, estoppel and unclean hands; fraud, misrepresentation and concealment; District's breach of contract and contract terms; mistake; mitigation of damages; fault of others; no proximate cause; and failure of conditions.

5. The November 10, 2004 Hearing

A hearing on the remaining legal issues was held on November 10, 2004. The minute order for that hearing states: "As to Hayward's and Great America[n]'s request for trial on the affirmative defenses to [the District's] breach of contract action, this Court has previously ruled. These issues were previously raised or could have been raised prior to the Court's rulings as reflected in the minute orders of August 29, 2003, January 14, 2004 and March 3, 2004." On November 19, 2004, Great American filed an exception to the trial court's November 10, 2004 ruling, claiming that the issues on the affirmative defenses were never determined, or were erroneously determined, in prior hearings and rulings, and that Great American had been denied due process because the trial court's November 10, 2004 ruling was without notice or opportunity to be heard.

At a status conference on September 2, 2005, the trial court granted Great American leave to file a motion for an order determining that the completion agreement was legally invalid because the District's emergency declaration pursuant to section 20113 was inadequate. Great American filed its brief in support of this motion on October 14, 2005. On October 14, 2005, Great American also filed a request for clarification on the trial court's ruling granting the District's motion for summary adjudication.

On November 22, 2005, the trial court stated that its ruling granting the District's motion for summary adjudication was based on both the District's emergency declaration pursuant to section 20113 and the trial court's determination that the completion agreement was not a separate contract but a continuation of the competitively bid Lewis Jorge contract. The trial court ***955** also concluded that the

completion agreement was not illegal but "was validly let and modified pursuant to Public Contract Code § 7102(d)(2) and Article 16 of the Lewis Jorge Contract as well as **108Public Contract Code § 20113, the emergency declaration statute."

A judgment in the amount of $1,333,696.38 ($1,144,738.15, less an offset of $11,041.77 pursuant to a stipulation of the parties), was entered against Hayward and Great American, jointly and severally. Prejudgment interest on the sum of $1,144,738.15 was also awarded to the District. Judgment was also entered in favor of the District on all causes of action asserted in Hayward's cross-complaint.

After entry of judgment, the District moved for its attorney fees and costs pursuant to section 7107. On April 4, 2006, the trial court granted the motion and awarded the District $849,354, jointly and severally against Hayward and the District.

This appeal followed.

CONTENTIONS

Hayward contends (1) the trial court erred in granting the District's motion for summary adjudication concerning the scope of Hayward's obligation under the completion agreement because the trial court failed to consider credible extrinsic evidence to determine if the contract is reasonably susceptible to Hayward's interpretation; (2) the trial court erred by concluding, as a matter of law, that the completion agreement could be modified by only one method and that, because this method was not followed, Hayward was precluded from pursuing a claim for extra work; (3) the trial court improperly granted the District's motion for judgment on the pleadings on the ground that Hayward could not maintain a cause of action for rescission; (4) the trial court erroneously concluded that Hayward could not sustain a breach of contract claim against the District based on the theory of implied warranty; and (5) the trial court erred by denying Hayward a right to trial of factual issues including alleged misrepresentations by the District. Hayward further contends that, because the underlying judgment must be reversed, the postjudgment fee award must also be reversed.

Great American adopts all of Hayward's contentions. In addition, Great American contends: (1) the trial court erred by concluding as a matter of law that Great American was jointly and severally liable with Hayward to repay to the District sums paid to Hayward over and above the $4.5 million contract price; (2) the trial court erred in determining that the completion agreement was legal and enforceable; and (3) the trial court erred in denying Great *956 American a jury trial on its affirmative defenses. Great American further contends the trial court erroneously concluded that Great American was jointly and severally obligated to pay the District's attorney fees under the terms of the performance bond; the amount of attorney fees awarded to the District was excessive; and, because the underlying judgment must be reversed, the attorney fee award must also be reversed.

DISCUSSION

I. Hayward's Contentions

A. Summary Adjudication of Contract Interpretation

1. Standard of Review

The standard of review for an order granting or denying a motion for summary adjudication is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The trial court's stated reasons for granting summary adjudication are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878, 116 Cal.Rptr.2d 158.)

**109[1][2] The trial court's determination of whether or not a contract provision is ambiguous is a question of law, subject to de novo review on appeal. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351, 8 Cal.Rptr.3d 649.) The trial court's resolution of an ambiguity is also a question of law if no extrinsic evidence is admitted to interpret the contract or if the extrinsic evidence is not in conflict. (*Ibid.*)

2. Extrinsic Evidence

Hayward and Great American contend the trial court committed reversible error by not considering, on a provisional basis, extrinsic evidence proffered in support of Hayward's interpretation of the completion agreement. The trial court concluded that the parol

evidence rule excluded such evidence because it was being offered to alter, vary, or add to the terms of an integrated contract.

[3][4]**957 The parol evidence rule is codified at Civil Code section 1625[FN8] and Code of Civil Procedure section 1856.[FN9] It "generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument. [Citations.]" (*Alling v. Universal Mfg. Corp.* (1992) 5 Cal.App.4th 1412, 1433, 7 Cal.Rptr.2d 718.) The parol evidence rule does not, however, prohibit the introduction of extrinsic evidence "to explain the meaning of a written contract ... [if] the meaning urged is one to which the written contract terms are reasonably susceptible. [Citations.]" (*BMW of N. Am. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990, fn. 4, 209 Cal.Rptr. 50.)

FN8.Civil Code section 1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

FN9.Code of Civil Procedure section 1856 states: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance. [¶] (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue. [¶] (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue. [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in [Code of Civil Procedure] Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud. [¶] (h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties."

[5] " 'Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. [Citations.] ... [I]t is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face.' " ****110**(*Wolf v. Superior Court, supra,* 114 Cal.App.4th at pp. 1350-1351, 8 Cal.Rptr.3d 649.)

[6][7] The decision whether to admit extrinsic evidence " 'involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the ***958** language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-interpreting the contract. [Citation.]' " (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1267, 35 Cal.Rptr.3d 343, citing *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, 6 Cal.Rptr.2d 554.) " ' "When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over. [Citation.]" '[Citation.]" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 524, 132 Cal.Rptr.2d

151, citing *Oceanside 84 v. Fid. Fed. Bank* (1997) 56 Cal.App.4th 1441, 1448, 66 Cal.Rptr.2d 487.)

The extrinsic evidence proffered by Hayward and rejected by the trial court included the declaration and deposition testimony of Toby Hayward, an officer of Hayward, and the deposition testimony of a Hayward employee named Jeff Bahr. In his deposition testimony, Mr. Hayward stated that during initial contract negotiations with the District, he discussed with District representatives the scope of Hayward's obligation to correct defective work performed by the previous contractor and expressed the view that Hayward's responsibility was limited to items listed on the pre-punch list. Mr. Hayward further testified that District representatives told him during initial meetings that Hayward would not be required to tear apart walls to view underlying conditions to determine whether they were constructed in accordance with the plans and specifications. Mr. Bahr testified that when Hayward encountered certain defects in the tile work early on during the project, District representatives Mike Merritt and Steve Olshan stated that correcting those defects was outside the scope of Hayward's work because they were not listed on the pre-punch list.

[8] The record does not indicate whether the trial court provisionally considered this extrinsic evidence before concluding that the contract was not ambiguous. The trial court did not expressly find that paragraph 15 of the contract was not reasonably susceptible to Hayward's interpretation. We cannot conclude, on the basis of the record before us, that it is not so susceptible.

The contract language itself is not so clear and explicit that it is unambiguous on its face. It states that Hayward's obligation to complete the work "shall include the responsibility to correct deficiencies in the work performed by the former contractor, without limitation, as noted on the current ***959** correction list issued by the District." Hayward contends that the phrase "as noted on the current correction list issued by the District" refers to Hayward's "responsibility to correct deficiencies in the work performed by the former contractor." The District maintains that the phrase "as noted on the current correction list issued by the District" unambiguously refers to the two words immediately preceding it-"without limitation." The "current correction list" mentioned in paragraph 15, however, does not state that Hayward's obligation to correct defective work performed by the previous contractor ****111** was "without limitation" and encompassed both patent and latent defects. The architect's pre-punch list contains the general disclaimer that the items listed therein are the result of a review "only for General Conformance with the design concept of this project and general compliance with the information given in the Contract Documents." It further states that "[c]orrections or comments made in regard to the pre-punch list during this review do not relieve the Contractor from compliance with the requirements of the drawings and specifications." The District inspectors' pre-punch list states that "[t]his is a courtesy pre-punch list and should not be taken as a final inspection punch list. This is not the punch list of minor corrective items made at the final inspection." The following corrections and omissions are noted to prevent their being overlooked and should not be construed to be the punch list of minor corrective items made at the final inspection. Neither document states that Hayward's obligation to correct defective work included latent as well as patent defects in the work performed by the previous contractor.

We reverse the trial court's order granting summary adjudication in the District's favor and remand the matter for the trial court to consider extrinsic evidence relevant to interpretation of the contract. Because the trial court, on remand, will determine the scope and extent of Hayward's contractual obligation to correct defective work performed by the previous contractor, we need not, at this juncture, address Hayward's argument as to whether the contract was or could be modified to allow payment for additional work.

B. Motion for Judgment on the Pleadings

1. Standard of Review

[9][10] "A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]" (*Kapsimallis v. Allstate Ins. Co.* (2002)

104 Cal.App.4th 667, 672, 128 Cal.Rptr.2d 358.) Further, the court reviews the complaint liberally, giving it a reasonable interpretation, reading it as a whole and its parts in their context. (Code Civ. Proc., § 452; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1323, 58 Cal.Rptr.2d 308.)

***960** 2. Trial Court's Ruling and the Parties' Contentions

The trial court granted the District's motion for judgment on the pleadings as to the third, fourth, and fifth causes of action for rescission and declaratory relief in Hayward's cross-complaint [FN10] on the grounds that the completion agreement was "a public contract which arose initially by competitive bidding" subject to section 7105, subdivision (d)(2), and that "[n]either Hayward nor the Court can, therefore, rescind the contract to invoke some form ****112** of equitable recovery." Hayward contends the trial court's decision was erroneous because it adjudicated matters beyond those pleaded in the cross-complaint, and because, as a matter of law, the remedy of rescission is available when a public entity's misrepresentation and concealment of material information constitute a breach of contract.

> FN10. The third and fourth causes of action in Hayward's cross-complaint seek rescission of the completion agreement, "restoration of the benefits of performance provided by the parties and other appropriate restitutionary relief," based on the District's alleged concealment of material information concerning the scope of work and contract price, and on Hayward's allegedly mistaken belief concerning the scope of work. The fifth cause of action seeks a declaration that the completion agreement "should be rescinded and restitution of the value of each parties' performance ordered."

The District contends that section 7105, subdivision (d)(2) applies, because the completion agreement was not a separate contract, but merely a continuation of the Lewis Jorge contract, which had been competitively bid pursuant to section 20111. The District claims that it "transitioned" the Lewis Jorge contract to Hayward pursuant to Article 16 of that contract, which accorded the District the right, in the event of a contractor default, to "complete the contract by whatever method the District may deem expedient." [FN11] The District maintains that its emergency declaration under section 20113 was simply an independent basis for transferring the contract from Lewis Jorge to Hayward. As support for its argument, the District relies on the common law doctrine known as the continuing contract exception. (See, e.g., *Shore v. Central Contra Costa Sanitary Dist.* (1962) 208 Cal.App.2d 465, 25 Cal.Rptr. 419(*Shore*), and *Garvey School Dist. v. Paul* (1920) 50 Cal.App. 75, 194 P. 711(*Garvey*).)

> FN11. Article 16 of the Lewis Jorge contract provides in relevant part: "If, in the opinion of the District, the Contractor at any time during the progress of the work refuses or neglects to supply a sufficiency of material and labor, or fails to perform any provision of this contract, including safety requirements, the District may without prejudice to any other remedy do any or all of the following: (1) make good such deficiencies or complete the contract by whatever method the District may deem expedient, and the cost and expense thereof shall be deducted from the contract amount; (2) initiate default procedures; and (3) initiate procedures to declare the Contractor a nonresponsible bidder for a period of from two to five years."

***961** 3. Applicable Law

a. Sections 20111 and 20113

Section 20111 requires school districts to award contracts for public projects by competitive bidding. Subdivision (b) of that statute provides in part: "The governing board shall let any contract for a public project ... involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids."

The competitive bidding requirements of section 20111 do not apply to all public projects. (1 Acret, Cal. Construction Contracts and Disputes (3d ed.2006) § 4.14, p. 353.) Section 20113 excepts from competitive bidding requirements certain contracts entered into in emergency situations: "In an emergency when any repairs, alterations, work, or improvement is necessary to any facility of public school to permit the

continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, ... [¶][m]ake a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids."(§ 20113, subd. (a)(1).)

b. Section 7105, Subdivision (d)

Section 7105, subdivision (d), governs the termination, amendment, and modification of contracts entered into by public agencies. Subdivision (d)(1) of that statute states: "Where authority to contract is vested in any public agency, excluding the ****113** state, the authority shall include the power, by mutual consent of the contracting parties, to terminate, amend, or modify any contract within the scope of such authority." Section 7105, subdivision (d)(2) states that subdivision (d)(1) of the statute does not apply to contracts that are subject to competitive bidding requirements: "Paragraph (1) shall not apply to contracts entered into pursuant to any statute expressly requiring that contracts be let or awarded on the basis of competitive bids. Contracts of public agencies, excluding the state, required to be let or awarded on the basis of competitive bids pursuant to any statute may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision. The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract."(§ 7105, subd. (d)(2).)

***962** 4. Section 7105, Subdivision (d)(2) Does Not Apply

Section 7105, subdivision (d)(2), by its terms, applies to public contracts "required to be let or awarded on the basis of competitive bids pursuant to any statute." The parties do not dispute that the completion agreement was not entered into pursuant to statutory competitive bidding requirements. Section 7105, subdivision (d)(2) accordingly does not apply.

[11] The District's contention that its contract with Hayward was not a separate contract, but merely a continuation of the competitively bid Lewis Jorge contract, is not supported by the record. Before entering into the completion agreement, the District's Board of Education adopted a declaration of emergency under section 20113, authorizing the District to enter into contracts for the completion of the project without competitive bidding. The completion agreement itself refers to that emergency declaration. It makes no reference to Article 16 of the Lewis Jorge contract, the provision now invoked by the District as the means for transferring the Lewis Jorge contract to Hayward. Although the completion agreement incorporates the terms and conditions of the Lewis Jorge contract, it does not state that it is a continuation of, or transfer of the Lewis Jorge contract, nor has the District provided any evidence of the parties' intent to do so.

The continuing contract exception, on which the District relies as the basis for claiming the completion contract was subject to competitive bidding requirements, is inapplicable. The continuing contract exception is a common law doctrine courts have applied to uphold the validity of a contract entered into by a public agency without complying with statutory notice and competitive bidding requirements in certain emergency situations. For example, in *Garvey, supra,* 50 Cal.App. 75, 194 P. 711, the court determined that a school district could, without publishing notice for competitive bids, enter into contracts necessary to complete a project initially undertaken by a contractor to whom the work had been awarded by competitive bid. The court reasoned that competitive bids were not necessary because the initial contract had not been abandoned, and the school district "was proceeding in accordance with the terms of a contract still in existence, which had been let according to law, and which by its terms provided for the then existing emergency." (*Id.* at pp. 79-80, 194 P. 711.) In *Shore, supra,* 208 Cal.App.2d 465, 25 Cal.Rptr. 419, the continuing contract exception was applied to uphold the validity of a contract let by a county sanitation district to complete a sewer project left unfinished by a defaulting****114** contractor. The court in *Shore* reasoned that the subsequent contract was "a mere continuation of [the county's] existing, and admittedly legal, contract" with the previous contractor. (*Id.* at p. 469, 25 Cal.Rptr. 419.)

Garvey and *Shore* are inapposite. Neither case addressed rescission of a public contract under section 7105, subdivision (d). Moreover, both *Garvey****963** and *Shore* predate the enactment of section 20113,

which excepts contracts entered into by a school district in emergency circumstances from the statutory competitive bidding requirements relied upon by the District in this case. (Added by Stats.1982, ch. 465, p.1915, § 11; Derivation: Educ.Code, former § 39648, enacted by Stats.1976, ch. 1010, p. 3197, § 2; Educ.Code 1959, former § 15956, enacted by Stats.1959, ch. 2, p. 1095, § 15956; Educ.Code 1943, former § 18056, enacted by Stats.1943, ch. 71, p. 661; former School Code 1929, § 6.35; former Political Code 1927, § 1612, enacted by Stats.1927, ch. 109, § 1.) [FN12] The continuing contract exception does not support the conclusion that the completion agreement was a competitively bid contract subject to section 7105, subdivision (d)(2). The trial court erred by concluding that section 7105, subdivision (d)(2) bars Hayward's rescission causes of action as a matter of law.

> FN12. Moreover, because the contracting agency in *Shore* was a county sanitation district, and not a school district, the statutory provisions governing emergency contracts for school facilities in effect at that time (Educ.Code 1959, former § 15956, from which § 20113 was derived), would not have applied.

5. *Amelco* Does Not Bar Hayward's Rescission Claims

The District contends that *Amelco, supra,* 27 Cal.4th 228, 115 Cal.Rptr.2d 900, 38 P.3d 1120 bars Hayward's rescission causes of action. That case, however, is inapposite. *Amelco* concerned a contractor's claim to set aside a public works contract awarded pursuant to competitive bid on the theory that the parties had abandoned the contract's change order process, and to recover in quantum meruit for the actual cost of the project. The court in *Amelco* concluded that "allowing contractors to recover in quantum meruit for the actual as opposed to the bid cost of a project would encourage contractors to bid unrealistically low, with the hope of prevailing on an abandonment claim," and would be "fundamentally inconsistent with the competitive purpose of the bidding statutes." (*Id.* at pp. 239-240, 115 Cal.Rptr.2d 900, 38 P.3d 1120.)

The completion agreement at issue here was not entered into pursuant to the competitive bidding statutes, nor is Hayward seeking to recover its actual costs under an abandonment theory of liability. The court in *Amelco* did not hold that rescission claims may never be asserted against a public entity, or that a contractor may never recover for extra work caused by a breach of contract. *Amelco* accordingly does not bar the rescission causes of action asserted in Hayward's cross-complaint.

We reverse the trial court's order granting the District's motion for judgment on the pleadings as to the causes of action for rescission and declaratory relief in Hayward's cross-complaint

***964** *C. Hayward's Misrepresentation/Breach of Implied Warranty Claims*

The trial court concluded that Hayward could not maintain a cross-action for breach of contract based on misrepresentation or nondisclosure of material facts because "Hayward's recitation of the facts does not contain any showing that any ****115** omissions were actively concealed or that material information was intentionally omitted by the [District]." Citing *Jasper Construction, Inc. v. Foothill Junior College Dist.* (1979) 91 Cal.App.3d 1, 10, 153 Cal.Rptr. 767(*Jasper*), the trial court stated that "[a] breach of contract action for misrepresentation or non-disclosure against a public entity must involve an affirmative misrepresentation or an intentional non-disclosure." The trial court further noted that Hayward admitted in deposition that it neither possesses nor is aware of any evidence of such affirmative misrepresentation or intentional concealment.

There is a conflict in authority as to whether a contractor must prove intentional concealment by the public agency in order to recover on a claim for nondisclosure of material facts. (Compare *Jasper, supra,* 91 Cal.App.3d at p. 10, 153 Cal.Rptr. 767(*Jasper*) and *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551, 66 Cal.Rptr.3d 175(*Thompson*) with *Welch v. State of California* (1983) 139 Cal.App.3d 546, 556, 188 Cal.Rptr. 726(*Welch*); see also 1 Acret, Cal. Construction Contracts and Disputes, *supra,* § 4.55, p. 393.) The First and Sixth District Courts of Appeal have concluded that a showing of intentional concealment is necessary. In *Jasper, supra,* 91 Cal.App.3d at page 10, 153 Cal.Rptr. 767, the First

Appellate District stated that "there must be an affirmative misrepresentation or concealment of material facts in the plans and specifications in order for the contractor to recover" on a breach of implied warranty claim. The Sixth Appellate District is in accord: "In order to recover on such an action, the contractor must prove that the agency affirmatively misrepresented, or actively concealed, material facts which rendered the bid documents misleading." (*Thompson, supra,* 155 Cal.App.4th at p. 551, 66 Cal.Rptr.3d 175.) Both courts reasoned that affirmative misrepresentation or concealment is required "to avoid burdening public entities 'with liability where the contractor underbids due to lack of diligence in examining specifications and plans which are themselves accurate.' [Citation.]" (*Thompson, supra,* at p. 551, 66 Cal.Rptr.3d 175, quoting *Jasper, supra,* at p. 10, 153 Cal.Rptr. 767.)

The Third District Court of Appeal, on the other hand, has rejected a requirement of affirmative misrepresentation or active concealment. In *Welch, supra,* 139 Cal.App.3d 546, 188 Cal.Rptr. 726, the trial court concluded that a state agency was not liable for misrepresentation or nondisclosure in an action by a public works contractor because the contractor failed to prove that the agency actively and intentionally concealed information concerning site conditions that significantly increased the cost of repairing an underwater pier. The Third ***965** District reversed the judgment, reasoning as follows: "It is well established that, in a tort context, the 'suppression of a fact by one ... who gives information of other facts which are likely to mislead for want of communication of that fact ...' is actionable. [Citations.] In such context, there is no requirement of proving an affirmative fraudulent intent to conceal. [Citation.] The same premise applies logically to public construction contracts where liability is based on breach of an implied warranty instead of a tort theory. [Citation.] Hence, the State had a legal duty to disclose ... information if to do so would have eliminated or materially qualified the misleading effect of the misrepresentation...."(*Id.* at p. 556, 188 Cal.Rptr. 726.)

One authority has suggested that this conflict in the case law "can perhaps be reconciled by" the following "careful elucidation:" "Non disclosure of a material fact ****116** is itself an affirmative act sufficient to constitute active misrepresentation." (1 Acret, Cal. Construction Contracts and Disputes, *supra,* § 4.55, p. 393.) The same authority notes, however, that "[i]f this reasoning is not persuasive, *Welch* appears to be the better authority. *Jasper* appears to be contrary to the weight of authority across the United States, at least insofar as it limits liability to instances of positive misrepresentation." (*Ibid.*)

[12] We agree that the standard set forth in *Welch* is the better one and apply that standard here. Hayward may maintain a cross-action for breach of contract based on nondisclosure of material information if it can establish that the District knew material facts concerning the project that would affect Hayward's bid or performance and failed to disclose those facts to Hayward. We therefore reverse the trial court's ruling that Hayward cannot, as a matter of law, maintain a cross-action against the District for breach of contract based on breach of implied warranty.

II. Great American's Contentions

A. Joint and Several Liability for Sums Exceeding $4.5 Million

Great American contends the trial court erred by concluding that the terms of the performance bond obligated Great American "jointly and severally with Hayward to repay the [D]istrict the monies it overpaid Hayward under its reservation of rights." [FN13] Great American's liability under the terms of its performance bond is dependent upon Hayward's liability ***966** under the terms of the completion agreement. (*Cypress v. New Amsterdam Casualty Co.* (1968) 259 Cal.App.2d 219, 225, 66 Cal.Rptr. 357;Civ.Code, § 2809 [liability of a surety is coextensive with that of the principal].) Because we reverse the order summarily adjudicating the scope of Hayward's obligation under the completion agreement, and its liability to the District for amounts paid in excess of $4.5 million, we also reverse the order determining that Great American is jointly and severally obligated with Hayward to repay such sums to the District.

> FN13. In a January 14, 2004 minute order denying Great American's motion for judgment on the pleadings, the trial court had previously ruled that the performance bond was a " 'broad forum' performance bond for prompt and faithful performance of all terms and conditions of the contract." In its January 14, 2004 order, the trial court noted that

> "[t]here is an ongoing dispute as to whether or not Hayward complied with the terms and conditions of the contract; that is, did they complete the work for $4.5 million dollars."

B. Legality of Completion Contract

[13] Great American contends the trial court incorrectly ruled that the completion agreement was not illegal. Whether a contract is illegal is a question of law subject to de novo review. (*Kashani v. Tsann Kuen China Enter. Co.* (2004) 118 Cal.App.4th 531, 540, 13 Cal.Rptr.3d 174.)

[14][15] The trial court offered two independent bases for its ruling on the legality of the completion agreement, which was not awarded pursuant to statutory competitive bidding requirements-the District's emergency declaration under section 20113, and the trial court's determination that the completion agreement was not a separate contract but a continuation of the Lewis Jorge contract. We hold that the District's emergency declaration pursuant to section 20113 was a valid and sufficient basis for excepting the completion agreement from the statutory competitive bidding requirements and affirm the trial court's ruling. As discussed, section 20113 excepts from statutory competitive bidding requirements certain contracts entered into in the event of an "emergency."**117[FN14] The term "emergency," as used in section 20113, is defined in section 1102 as follows: " 'Emergency,' as used in this code, means a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."(§ 1102; *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254-1256, 15 Cal.Rptr.3d 344(*Marshall*).) "[G]iven the strong public policy favoring competitive bidding, the emergency exception thereto should be strictly construed and restricted to circumstances which truly satisfy the statutory criteria." (*Marshall*, at p. 1256, 15 Cal.Rptr.3d 344.)

> FN14.Section 20113, subdivision (a)(1), provides: "In an emergency when any repairs, alterations, work, or improvement is necessary to any facility of public schools to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, ...:[¶][m]ake a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids."

Great American contends that the trial court erred, as a matter of law, by concluding that the completion agreement was a valid emergency contract ***967** entered into pursuant to section 20113, and that the court should have afforded Great American the opportunity to have a jury determine the factual issue of whether an emergency existed within the meaning of the statute. The pertinent facts, as stated in the District's emergency declaration, are undisputed. In light of the undisputed facts, the trial court could properly determine, as a matter of law, whether an emergency existed within the meaning of section 20113. (*Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1179, 105 Cal.Rptr.2d 172 [court considers the proper construction of a statute and its application to undisputed facts as a matter of law].)

The District's emergency declaration states in relevant part: "The new facilities being constructed for Queen Anne Elementary School were near completion when the general contractor walked off the job and was subsequently defaulted by the District on February 9, 1999. The project is approximately 93 percent complete. District representatives are currently working with the defaulted contractor's surety to obtain an agreement on completing the project. In the meantime, the facility stands empty and is a target for vandalism and deterioration. The District could take over the project and complete it in the quickest possible time by declaring an emergency. This would provide the best chance to protect our facility."

The facts stated in the District's emergency declaration meet the statutory definition of an "emergency." The cessation of work on the project by Lewis Jorge, the District's initial contractor, was sudden and unexpected, requiring immediate action on the part of the District to prevent damage or deterioration to the partially completed facility and to mitigate the impairment of an essential public service-namely, public school classes. *Marshall, supra*, 119 Cal.App.4th 1241, 15 Cal.Rptr.3d 344, on which

Great American relies in support of its argument that no valid emergency existed, is distinguishable. In that case, the Pasadena School District exercised its contractual right to terminate, for the district's own convenience, a construction contract entered into with a prior contractor. The school district then issued an emergency declaration authorizing the award of a separate contract, without**118 complying with statutory bidding requirements, to another contractor. The court in *Marshall* determined that the school district's decision to terminate the contract for its own convenience "did not come close to meeting" the statutory standard for an emergency. (*Id.* at p. 1258, 15 Cal.Rptr.3d 344.) Here, in contrast, the District's emergency declaration was precipitated by Lewis Jorge's abandonment of the project and the need to protect the unfinished facility.

We affirm the trial court's ruling that the completion agreement was not illegal.

*968 III. Contentions of both Hayward and Great American

A. Affirmative Defenses

Both Hayward and Great American appeal the trial court's November 10, 2004 order denying their respective requests for trial on the affirmative defenses to the District's breach of contract action. The trial court denied the request on the ground that "[t]hese issues were previously raised or could have been raised prior to the ... rulings ... reflected in the minute orders of August 29, 2003, January 14, 2004 and March 3, 2004." Because we reverse the rulings reflected in those orders, we also reverse the order dismissing the relevant affirmative defenses.

B. Attorney Fees

Hayward and Great American both appeal the award of attorney fees to the District as the prevailing party under section 7104, subdivision (f). Because we reverse the underlying judgment, we also reverse the attorney fee award.

DISPOSITION

We reverse the order granting the District's motion for summary adjudication on the issue of contract interpretation. We remand the matter to the trial court to consider extrinsic evidence relevant to interpretation of the contract and to determine the scope and extent of Hayward's contractual obligations in light of any admissible extrinsic evidence.

We reverse the order granting the District's motion for judgment on the pleadings and barring Hayward's causes of action for rescission.

We reverse the order precluding Hayward from maintaining, as a matter of law, a cross-action for breach of contract based on misrepresentation or nondisclosure of material facts.

We reverse the order concluding that Great American is jointly and severally obligated with Hayward to repay the District sums paid in excess of $4.5 million.

We affirm the order determining that the completion agreement was not illegal.

We reverse the order dismissing Hayward's and Great American's affirmative defenses.

*969 We reverse the attorney fee award.

The parties will bear their respective costs on appeal.

We concur: BOREN, P.J., and DOI TODD, J.
Cal.App. 2 Dist.,2008.
Los Angeles Unified School Dist. v. Great American Ins. Co.
163 Cal.App.4th 944, 78 Cal.Rptr.3d 99, 08 Cal. Daily Op. Serv. 6885

END OF DOCUMENT

PROOF OF SERVICE BY MAIL

I, Beatrice E. Thompkins, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On July 14, 2008, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

Petition for Review

in a sealed envelope, postage fully paid, addressed as follows:

-SEE ATTACHED SERVICE LIST-

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on July 14, 2008, at Los Angeles, California.

Beatrice E. Thompkins

Service List

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