Supreme Court Copy

S165113

SUPREME COURT
FILED

FEB 18 2009

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

GREAT AMERICAN INSURANCE COMPANY;

HAYWARD CONSTRUCTION COMPANY, INC.

Defendants and Appellants.

After a Decision By The Court of Appeal
Second Appellate District, Division Two
Case No. B189133

ANSWER BRIEF ON THE MERITS

MONTELEONE & McCRORY, LLP
Joseph A. Miller (SB #99963)
John M. McGowan (SB #233940)
Scott R. Lane (SB #190891)
725 S. Figueroa Street, Ste. 3200
Los Angeles, CA 90017-5446
(213) 612-9900

Attorneys for Defendant and Appellant Hayward Construction Company, Inc.

S165113

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

GREAT AMERICAN INSURANCE COMPANY;

HAYWARD CONSTRUCTION COMPANY, INC.

Defendants and Appellants.

After a Decision By The Court of Appeal
Second Appellate District, Division Two
Case No. B189133

ANSWER BRIEF ON THE MERITS

MONTELEONE & McCRORY, LLP
Joseph A. Miller (SB #99963)
John M. McGowan (SB #233940)
Scott R. Lane (SB #190891)
725 S. Figueroa Street, Ste. 3200
Los Angeles, CA 90017-5446
(213) 612-9900

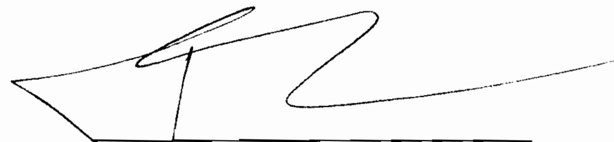
Attorneys for Defendant and Appellant Hayward Construction Company, Inc.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

The Estate of Bill Hayward

Dated: February 17, 2009



Joseph A. Miller
Attorney for Hayward
Construction Company, Inc.

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS AND HISTORY OF THE CASE 5

A. The Project and the Completion Contract 5

B. The Lawsuit and the Trial Court's Decision 8

C. The Evidence Relied on in the Trial Court 9

D. The Court of Appeal Reverses 11

LEGAL ARGUMENT 13

I THE IMPLIED WARRANTY IS A CONTRACT OBLIGATION LONG AGO DEVELOPED BY COURTS TO INSURE OWNERS PROVIDE FULL AND ACCURATE INFORMATION TO BIDDERS. THE INTENT TO DEFRAUD OR CONCEAL IS NOT AN ELEMENT OF A CAUSE OF ACTION FOR THE BREACH OF THAT PROMISE 13

A. Long Settled Precedent of this and other Courts Establishes that Implied Warranty Liability is based in Contract and does not depend on Fraudulent Intent 13

B. As a Contract and not a Tort Rule, the Implied Warranty is not Concerned with the Motives of a Breaching Party 16

C. Warranties are Implied to Insure their Inclusion in the Owner – Contractor Relationship. This Device is well Established in the Law of Contracts and Liability does not depend on the Warrantor's Intentions 19

II. THE *SPEARIN* DOCTRINE, ALTHOUGH JUDICIALLY DEVELOPED, IS LEGISLATIVELY RECOGNIZED IN THE *PUBLIC CONTRACT CODE,* WHICH AFFIXES LIABILITY WITHOUT FRAUDULENT INTENT 21

TABLE OF CONTENTS
(Cont'd)

A. Public Contract Code Section 1104 and the Warranty of Accuracy and Completeness 22

B. Section 1104 is not Unique 27

C. Public Contract Code Section 7104 and the Warranty of Indicated Site Conditions 28

III. THE TRIAL COURT WRONGLY REGARDED FRAUDULENT INTENT AS AN ESSENTIAL ELEMENT OF HAYWARD'S CLAIMS, AND DID SO RELYING ON *JASPER*. THIS COURT SHOULD AFFIRM THE COURT OF APPEAL IN *GREAT AMERICAN* AND OVERRULE *JASPER* 31

A. *Jasper Construction, Inc. v. Foothill Junior College Dist.* 32

B. *Thompson Pacific Construction, Inc. v. City of Sunnyvale* 34

IV. IMPLIED WARRANTY CLAIMS FOR THE NON-DISCLOSURE OF MATERIAL INFORMATION ARE CONTRACT CLAIMS. THIS COURT HAS NEVER HELD THAT AN OWNER BREACHES ITS CONTRACT ONLY IF IT INTENTIONALLY CONCEALS INFORMATION, AND IT SHOULD NOT CHANGE THIS RULE 38

A. The District's Arguments Notwithstanding, California Case Law does not Make Intent to Defraud or Conceal a Criteria of a Warranty Claim for Non-Disclosure 41

1) *E.H. Morrill Co. v. State of California* 41

2) *Wunderlich v. State of California* 42

3) *Weichmann Engineers v. State of California* 43

TABLE OF CONTENTS
(Cont'd)

V. ANALOGIES TO TORT DOCTRINES OFFER NO REASON TO CHANGE IMPLIED WARRANTY RULES TO REQUIRE PROOF OF FRAUDULENT INTENT 45

A. The Tort Concept of Concealment does not require Inclusion of an "Intent Element" in an Implied Warranty Claim 45

B. The Tort Concept of Strict Liability is out of place in a Discussion of the Implied Warranty 46

VI. THE PURPOSE OF THE PUBLIC CONTRACT CODE --- TO ASSURE COMPETITION AND TO PREVENT THE WASTE OF PUBLIC FUNDS --- IS PROMOTED BY AN IMPLIED WARRANTY WITHOUT INTENTIONAL AND FRAUDULENT MISCONDUCT 47

VII. THE IMPLIED WARRANTY WITHOUT AN INTENT ELEMENT HAS NOT, AND WILL NOT, ENCOURAGE UNDERBIDDING 49

VIII. THE DISTRICT'S POLICY CONCERNS ABOUT "MATERIALITY" AND "LITIGATION BURDENS" ARE OVERSTATED 51

A. Proof of Materiality does not depend on Intent 51

B. Litigation Burdens do not depend on Intent 52

CONCLUSION 53

TABLE OF AUTHORITIES

Page

Cases

Amelco Electric v. City of Thousand Oaks

(2002) 27 Cal.4th 228 .... 49, 50

Appeal of J.W. Bateson

(1978) VACAB No. 1148, 79-1 BCA ¶ 13573, 1978 WL 2700 .... 25, 26

Applied Equipment v. Litton Saudi Arabia

(1994) 7 Cal.4th 503 .... 17, 18, 45, 49

Carl M. Halvorson, Inc. v. United States

(Ct. Cl. 1972) 461 F.2d 1337 16

Castillo v. Express Escrow Company

(2007) 146 Cal.App.4th 1301 28

Chaney Building Co. v. City of Tucson

(1986) 148 Ariz. 571, 716 P.2d 28 15

Christie v. United States

(1915) 237 U.S. 234, 35 S.Ct. 565, 59 L.Ed. 933 15

City of Salinas v. Souza & McCue Constr. Co., Inc.

(1967) 66 Cal.2d 217 .... 17, 50

COAC, Inc. v. Kennedy Engineers

(1977) 67 Cal.App.3d 916 19

Condon-Johnson & Assoc., Inc. v. SMUD

(2007) 149 Cal.App.4th 1384 .... 29, 43

Dewey Jordan, Inc. v. Maryland-National Capital Park and Planning Comm.

(1970) 258 Md. 490, 265 A.2d 892 15

TABLE OF AUTHORITIES
(Cont'd)

E.H. Morrill Company v. State of California

(1967) 65 Cal.2d 787 . . . . passim

Erickson Shaver Contracting Corp. v. United States

(Cl. Ct. 1985) 9 Cl.Ct. 302 37

Foster Const. C.A. and Williams Bros. Co. v. United States

(Ct. Cl. 1970) 435 F.2d 873 . . . . 29, 30

Gagne v. Bertran

(1954) 43 Cal.2d 481 18

H.B. Mac, Inc. v. United States

C.A. Fed. 1998) 153 F.3d 1338 30

Hauter v. Zogarts

(1975) 14 Cal.3d 104 20

Helene Curtis Industries, Inc. v. United States

(Ct. Cl. 1963) 312 F.2d 774 . . . . 40, 41

Helfand v. Southern Cal. Rapid Transit Dist.

(1970) 2 Cal.3d 1 17

Hensler v. City of Los Angeles

(1954) 124 Cal.App.2d 71 19

Howard Contracting, Inc. v. G.A. MacDonald Const. Co.

(1998) 71 Cal.App.4th 38 . . . . 19, 40

Iacobelli Construction, Inc. v. City of Monroe

(C.A.2 N.Y. 1994) 32 F.3d 19 30

TABLE OF AUTHORITIES
(Cont'd)

In re Marriage of Morrison

(1978) 20 Cal.3d 437 52

J.L. Simmons Co. v. United States

(Ct. Cl. 1969) 412 F.2d 1360 15

Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara Co.

(1970) 91 Cal.App.3d 1 . . . . passim

Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority

(2000) 23 Cal.4th 305 48

Lazar v. Superior Court

(1996) 12 Cal.4th 631 . . . . 13, 18

LiMandri v. Judkins

(1997) 52 Cal.App.4th 326 46

Linear Technology Corp. v. Applied Materials, Inc.

(2007) 152 Cal.App.4th 115 . . . . 45, 46

Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny

(1997) 59 Cal.App.4th 676 . . . . 52, 53

Los Angeles Unified School District v. Great American Insurance Co.

(2008) 163 Cal.App.4th 944 . . . . passim

Macomber v State of California

(1967) 250 Cal.App.2d 391 27

Mary Pickford Co. v. Bayley Bros., Inc.

(1939) 12 Cal.2d 501 20

TABLE OF AUTHORITIES
(Cont'd)

Max Drill Inc. v. United States

(Cl. Ct. 1970) 427 F.2d 1233 37

Mayville-Portland School Dist. v. C.L. Linfoot Company

(ND 1978) 261 N.W.2d 907 15

Merritt v. J.A. Stafford Co.

(1968) 68 Cal.2d 619 20

Michaelis, Montanari & Johnson v. Superior Court

(2006) 38 Cal.4th 1065 . . . . 47, 48

Murillo v. Superior Court

(2006) 143 Cal.App.4th 730 10

National R.V., Inc. v. Foreman

(1995) 34 Cal.App.4th 1072 23

Nomellini Const. Co. v. DWR

(1971) 19 Cal.App.3d 240 27

Pacific Feed Co. v. Kennel

(1923) 63 Cal.App. 108 20

PCL Construction Services, Inc. v. United States

(2000) 47 Fed.Cl. 745 40

Persson v. Smart Inventions, Inc.

(2005) 125 Cal.App.4th 1141 51

Robinson Helicopter Co., Inc. v. Dana Corp.

(2004) 34 Cal.4th 979 45

TABLE OF AUTHORITIES
(Cont'd)

Sanders Company Plumbing and Heating, Inc. v. City of Independence

(MO 1985) 694 S.W.2d 841 15

Scalf v. D.B. Log Homes, Inc.

(2005) 128 Cal.App.4th 1510 . . . . 10, 11

Small v. Fritz Companies, Inc.

(2003) 30 Cal.4th 167 18

Smith v. Lockheed Propulsion Company

(1967) 247 Cal.App.2d 774 47

Souza & McCue Construction, Co. Inc. v. Superior Court

(1962) 57 Cal.2d 508 . . . . passim

The Carpenter Steel Company v. Pellegrin

(1965) 237 Cal.App.2d 35 35

Thompson Pacific Const., Inc. v. City of Sunnyvale

(2007) 155 Cal.App.4th 525 . . . . passim

Tonkin Const. Co., v. Co. of Humboldt

(1987) 188 Cal.App.3d 828 . . . . 34, 39

United States v. Atlantic Dredging Co.

(1920) 253 U.S. 1, 40 S.Ct. 423, 64 L.Ed. 735 15

United States v. Spearin

(1918) 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 . . . . passim

Ventimiglia v. Board of Behavioral Sciences

(2008) 168 Cal.App.4th 296 23

TABLE OF AUTHORITIES
(Cont'd)

Vinnell Corporation v. State of New Mexico

(1973) 85 N.M. 311, 512 P.2d 71 15

Warner Construction Corp. v. City of Los Angeles

(1970) 2 Cal.3d 285 . . . . passim

Welch v. State of California

(1983) 139 Cal.App.3d 546 . . . . passim

Wunderlich v. State of California

(1967) 65 Cal.2d 777 . . . . passim

Weichmann Engineers v. State of California

(1973) 31 Cal.App.3d 741 . . . . 43, 44

Statutes

California Commercial Code

§2314(1) 19

§2314(2) 19

Civil Code

§1710(2) 18

§1710(3) 45

Evidence Code

§500 35

TABLE OF AUTHORITIES
(Cont'd)

Government Code

§818 18

§818.8 17

Public Contract Code

§100(c) 48

§1101 27

§1104 .... passim

§7104 .... passim

§10120 27

§10240 52

§10720 27

§20104 52

§22201 52

Other Authorities

Black's Law Dictionary

6th ed. (1990) 19

CEB, *California Construction Contracts, Defects and Litigation*

(2009) Vol.1, §6.73, p. 470 34

Gibbs & Hunt, California Construction Law

(16th ed. 2000) §6.11, p. 240 29

TABLE OF AUTHORITIES
(Cont'd)

Gibbs & Hunt, California Construction Law

(16th ed. 2000) §4.06, p. 148 34

Restatement of Contracts, Second, §1 19

Restatement of Torts, Second, § 519 47

Stein, "Construction Law"

(Mathew Bender, 2008) Vol. 5, ¶18.02[1] 15

INTRODUCTION

The Los Angeles Unified School District ("District") petitioned to establish a rule that excuses a public owner from contract liability (for breach of implied warranty) unless contractors, including Hayward Construction Company, Inc. ("Hayward"), prove the owner fraudulently conceals or affirmatively misrepresents information in the plans and specifications it supplies to bidders for public works contracts. [Petition for Review, "Issue Presented for Review", p. 2].[1]

Contrary to the District's presupposition, a rule that contractors must in effect prove the tort of intentional fraud (including knowledge of falsity and intent to deceive) for the breach of a contract will not protect the public, encourage competition, or reduce construction costs. More likely, costs will increase as bidders add contingencies against the risk of faulty plans and undisclosed information.

As evolved through case law and statutes, there are two primary warranties the government makes in every public works construction contract:

---

[1] The District's Opening Brief on the Merits expresses the issue differently: whether for a "nondisclosure, breach of implied warranty" claim a contractor must prove the owner "intentionally concealed or misrepresented material information, or had [an] intent to defraud". [Opening Brief on the Merits, "OBM", p. 1]. Elsewhere, the District proposes that warranty claimants must prove non-disclosure results from an owner's "affirmative misrepresentation or active concealment". [OBM 26]. No matter how framed, it appears the District would require some proof of intentional and knowing misconduct.

1. That the plans and specifications are accurate and complete and are suitable for construction; and
2. That material information known to the government is disclosed or made available to bidders.

Each implied warranty recognizes that the government is the contracting party best suited to provide the full and adequate information and direction necessary to economically and successfully build a project. And each warranty is made without regard for the government's good or bad intentions.

In the many years it has considered the government's responsibility for misleading contract documents or for the non-disclosure of material information, this Court has never required contractors to prove the tort of intentional fraud, mainly because the government's responsibility is contractual. Beginning with *Souza & McCue Construction, Co. Inc. v. Superior Court* (1962) 57 Cal.2d 508, the Court has consistently found that an owner has a contractual duty to provide accurate construction documents and to disclose material information. More recently, the *Public Contract Code* codified the promises case law has long implied. In so doing, the law has been careful to balance the rights of the public and its contractors. The District's proposal disregards this careful balance for no reason other than to make it easier for public agencies to escape responsibility for their mistakes in all but egregious circumstances.

The District mistakenly premises this proposition on the holdings of *Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara Co.* (1970) 91 Cal.App.3d 1, and (to a lesser extent) *Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, and suggests these cases articulate the mainstream view that a contract action on the implied warranty requires proof of affirmative misrepresentation or fraudulent concealment. [OBM 2]. In fact, the law is otherwise: *Jasper* and *Thompson* misinterpret Supreme Court precedent and conflict with *Public Contract Code* §1104 which requires no such proof. Instead, the Court of Appeal below in *Los Angeles Unified School District v. Great American Insurance Co.* (2008) 163 Cal.App.4th 944 (hereinafter *Great American*), correctly concluded that a contractor need not prove the government intends to commit fraud when it does not disclose material information. (*Id.* at pp. 964 – 966.)

For Hayward, inclusion of a "fraudulent or intentional misconduct requirement" will compound the already daunting task of proving breach of contract claims that are nearly ten years old. To recover for the cost of errors the District admits are in the bidding documents it supplied, and that result from material information the District admits it did not disclose, Hayward would need to prove the District knowingly and intentionally sought to deceive its bidders. This is a heavy burden to place on a company

whose only mistake was to provide an honest, competitively priced bid based on what it could see and what it was told.

For the broader construction community, knowing that it can no longer bid with confidence that governmental agencies must act with care in the preparation of contract materials, or must exercise any diligence in the collection and dissemination of vital information, the response will be far simpler: Contractors will add contingencies to their bids.

For the public, the consequence will be grave. Since public works construction costs will undoubtedly increase, the benefits supposed in the District's brief will not materialize.

There is no legal reason to change the rules of implied warranty, while there are compelling practical and policy reasons not to do so. This Court should affirm the Court of Appeal's ruling in *Great American*. The Court should clarify that the government is liable for breach of implied warranty where it prepares inaccurate or incomplete plans and specifications, or when it fails to disclose material information known or available to it but not to bidders. In so doing, the Court should overrule *Jasper* and *Thompson*.

STATEMENT OF FACTS AND HISTORY OF THE CASE

A. The Project and the Completion Contract

The District defaulted and terminated its original contractor, Lewis Jorge Construction Management ("LJCM") from the Queen Anne Place Elementary School ("Project") in February, 1999. [See, e.g., Hayward Appendix on Appeal ("HA"), 3 HA 664 - 666]. At the time, the District's last pay application represented LJCM's work was 93% complete; in fact, the District's architect was told by the District to intentionally overstate the percentage of completion. [4 HA 1066 – 1069; 1072 - 1073].

To facilitate completion of the Project, the District inspectors and architect prepare two "pre-punchlists" spanning 108 pages and consisting of countless, detailed notations. [1 HA 207 – 2 HA 315]. According to the District's inspector Michael Merritt, the pre-punchlists were given to bidders, including Hayward, for them to rely on when bidding. [2 HA 319 – 320].[2] The pre-printed form used for one of the lists noted that "minor corrective items" were not included. [1 HA 229]. There was no disclaimer of any sort made regarding major corrective items or, importantly, conditions that could not be detected visually during a Project site visit.

---

[2] Hayward was also provided LJCM's last, overstated payment application. [4 HA 988 – 998]. In discovery, the District's expert, Mr. Wexler, conceded the application was inaccurate. [4 HA 1060 – 1063].

After submitting a bid to finish the Project, Hayward and the District negotiated a completion contract. Per its terms, Hayward's work was to conform to requirements of both the original contract documents and the completion contract. [1 HA 68, par. 3]. The completion contract was generally described as a "guaranteed maximum" price agreement, meaning Hayward would be paid its costs (plus mark ups) for contract work, up to a set price. The completion contract limited Hayward's responsibility: Hayward was to finish work not performed by LJCM and to correct the "patent (evident) defective work done by [LJCM]...". [1 HA 73, par. 13]. To clarify Hayward's scope in this respect, the completion contract specifically referenced the pre-punchlists and provided that Hayward was responsible to correct LJCM's deficiencies "without limitation, as noted on" the lists. [1 HA 74, par. 15].

The District does not dispute that the pre-punchlist entries were incomplete and inaccurate. In interrogatory answers, the District acknowledges Hayward encountered and corrected defects not on the list. [4 HA 1006 – 1012, interrogatory numbers 13, 18]. In sworn admissions, the District concedes the lists given Hayward did not disclose the nature and extent of defects in, among others items of work, exterior stucco, ceramic tile setting beds, and "serving windows" throughout the Project. [4 HA 1014 – 1020, request numbers 14, 15, 36, 37, 58].

Bidding information was misleading in at least two different respects: The District's pre-punchlists were inaccurate, and the District did not disclose some material information at all. In the trial court, the District contended it did not know about some of the omissions and inaccuracies. Possibly, part of this is true (however, since there was never a trial of the disputed facts, this assertion was never tested). Some information regarding deficiencies in and the status of LJCM's work, though, clearly was known and misstated, and pertinent information clearly was undisclosed. For example:

In addition to the intentionally overstated payment application, Mr. Hayward testified the District possessed, but withheld, a report about stucco defects prepared by a consultant named Pruter. [4 HA 1080].[3] During contract negotiations, Hayward informed District representatives he intended to cure stucco discoloration (a condition stated on the pre-punchlists and visible by site inspection) by a method known as "fog coating". [4 HA 1077 – 1079]. The District knew this method had been tried by LJCM and that the results were unacceptable, but did not disclose this fact. [4 HA 1093 – 1094; 1097 – 1098]. Also by way of example, while the pre-punchlists did not disclose the condition or extent of

---

3 Mr. Harrington, an expert who was also a bidder on the Project, testified the undisclosed report contained material information and that it qualified information about stucco work recorded on the pre-punchlists. [4 HA 1082 – 1087].

problems with ceramic tile setting beds [4 HA 1018 – 1019], Mr. Merritt's superior, Walter Jones, admitted the District failed to inspect that work when it was performed. [4 HA 1103 – 1105]. Information of that kind would qualify the information disclosed, and put bidders like Hayward on notice to inquire further (and to perhaps conduct destructive testing, if allowed).

As hidden defects surfaced during the work, they were noted and repeatedly commented on by Hayward and the District. [2 HA 427 – 460]. Hayward was paid some additional money to correct the conditions, and the District "reserved its rights" to recoup the payments. After the Project was complete, the District contended for the first time that Hayward was responsible to discover and correct all defects of whatever nature. [2 HA 527 – 532; 536 – 541].

B. The Lawsuit and the Trial Court's Decision

The District sued Hayward to recover the payments it made. Hayward cross-complained for breach of contract, alleging that the completion contract only required correction of the patent (evident) defects represented on the pre-punchlists as part of the guaranteed maximum price. [1 HA 109]. Hayward also alleged that conditions on the Project differed materially from those indicated in the contract; that defects were concealed;

that conditions were misrepresented; and that conditions were not as impliedly warranted by the contract. [1 HA 109].

The trial court directed the parties to brief Hayward's contentions relevant to this appeal, and then decided them as matters of law. The trial court first decided that Hayward could not prove allegations of misrepresentation or non-disclosure unless the District "actively concealed" or "intentionally omitted" material information. [5 HA 1120 – 1121]. Later, the trial court decided that Hayward's breach of implied warranty allegations were identical and required a showing of "affirmative misrepresentation and/or intentional non-disclosure". [5 HA 1141].

Some time after these rulings, a $1,687,561 judgment (before attorneys' fees) was entered in favor of the District and against Hayward. [5 HA 1198 - 1201]. Hayward and its performance bond surety, Great American, appealed.[4]

C. The Evidence Relied on in the Trial Court

To support its decision that Hayward could not pursue implied warranty claims, the trial court found Mr. Hayward "admitted" he possessed no evidence the District actively concealed and intentionally omitted material information. [5 HA 1120 – 1121, 1141]. The Court of

[4] The Second District Court of Appeal in *Great American, supra,* 163 Cal.App.4th 944, reversed every aspect of the judgment against Hayward and remanded the case for trial.

Appeal noted this finding, but made no independent assessment. This was sensible: the Court of Appeal had no reason to reach the question, since the "admission" was immaterial to its decision that the trial court applied the incorrect legal standard when it dismissed Hayward's breach of warranty claims. (*Great American, supra,* 163 Cal.App.4th at p. 964.)

The District suggests in its Opening Brief that Mr. Hayward's deposition testimony offers a compelling reason why this Court should fashion a new rule that proof of intentional, knowing misconduct is a required element of a breach of implied warranty claim. However, reliance on this evidence is flawed.

First, what Mr. Hayward said is only significant if this Court overturns present law. Because intentional, fraudulent misconduct has never been, and should not be, an element of a warranty claim, it is immaterial whether Mr. Hayward possessed direct proof that the District intended to deceive him when it gave him inaccurate and incomplete information for bidding purposes.

Second, Mr. Hayward's deposition testimony was not an admission. Deposition responses are not accorded the "conclusive effect" of responses to requests for admissions, and are not "incontrovertible judicial admissions". (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520 – 1522; *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 736.) Rather, deposition testimony is weighed in conjunction with other

evidence. (*Scalf v. D.B. Log Homes, Inc., supra,* 128 Cal.App.4th at p. 1222.) The reason for this rule is that while written discovery admissions are studied and made under supervision of counsel, deposition answers can be glib, easily misunderstood, and are often fragmentary or equivocal. (*Id.*) Absent other corroborative evidence, there is a risk that issues may be unfairly decided if based solely on deposition testimony.

Finally, the evidence is not as one-sided as the District infers. Mr. Hayward was questioned regarding any belief that the District intentionally withheld information. [See, e.g., 4 HA 1075 – 1080]. In his deposition he discussed those beliefs, including that the District knowingly withheld the Pruter report. He testified about his experience with District inspection procedures and his reasonable expectation, based on that experience, that defects would be accurately described. He spoke of inferences drawn from the erroneous and incomplete pre-punchlists and the overstated LJCM pay application. [See, e.g., District Appendix on Appeal ("DA") 3 DA 565 – 586]. The testimony establishes directly and by inference that the District knew of material information that it misrepresented or did not disclose.

D. The Court of Appeal Reverses

The trial court premised its rulings on language from *Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara Co., supra,* 91 Cal.App.3d 1, a First District Court of Appeal case that

erroneously held that a contractor making a breach of implied warranty claim must prove a public agency affirmatively misrepresented or actively concealed material information. (*Id.* at p. 10.) The Second District Court of Appeal correctly concluded this standard conflicted with better reasoned authority, citing *Welch v. State of California* (1983) 139 Cal.App.3d 546, 556 (no requirement of fraudulent intent in implied warranty action for non-disclosure). (*Great American, supra,* 163 Cal.App.4th at pp. 964 – 965.) *Jasper* in fact conflicts with the *Public Contract Code*, and with California Supreme Court precedent and a long line of federal decisions that have consistently affirmed the rule that a contractor need not prove fraudulent intent.

Accordingly, the Court of Appeal reversed, deciding that Hayward could maintain an action for "breach of contract based on nondisclosure" so long as it could prove the District knew of but did not disclose material facts. (*Great American, supra,* 163 Cal.App.4th at p. 965.)[5]

---

[5] The Court of Appeal also reversed the trial court's ruling that Hayward could not maintain an action "based on breach of implied warranty." (*Great American, supra,* 163 Cal.App.4th at p. 965.)

LEGAL ARGUMENT

I. THE IMPLIED WARRANTY IS A CONTRACT OBLIGATION LONG AGO DEVELOPED BY COURTS TO INSURE OWNERS PROVIDE FULL AND ACCURATE INFORMATION TO BIDDERS. THE INTENT TO DEFRAUD OR CONCEAL IS NOT AN ELEMENT OF A CAUSE OF ACTION FOR THE BREACH OF THAT PROMISE

A. Long Settled Precedent of this and other Courts Establishes that Implied Warranty Liability is based in Contract and does not depend on Fraudulent Intent

The District blurs settled and well reasoned distinctions between contract and tort when it asks this Court to make the intent to conceal, defraud, or misrepresent an element of an action for breach of the implied warranty. [OBM 1][6]. It is a distinction recognized over 45 years ago when the Court defined the legal relationship between parties to public works contracts.

In *Souza & McCue Construction, Co. Inc. v. Superior Court, supra,* 57 Cal.2d 508, the contractor encountered unstable soils not indicated in the construction documents provided by the City of Salinas. Souza made two

---

[6] The District's Opening Brief does not define "intent". In a tort context the intent required for fraud includes the intent to induce reliance. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) By its very nature a solicitation for work (including plans and specifications) is made to induce reliance by inviting bids that reflect the cost of that work. (See, *E.H. Morrill Company v. State of California* (1967) 65 Cal.2d 787, 792 ["It is obvious that the entire set of plans and specifications. . . was presented by the state to bidders with the expectation that bids of necessity would be determined by consideration of such plans."]) Thus, it appears the District has something different in mind.

claims: one, for intentional misrepresentation of unstable soil conditions; and the other for unintentional failure to inform the contractor of unstable conditions. (*Id.* at p. 509.) The trial court sustained demurrers to both, but this Court reversed, holding 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 as represented. (*Id.* at p. 510 [emphasis added].)

The Court explained the rule was based mainly on the contractual theory of breach of implied warranty, established years earlier by the federal courts. (*Souza, supra,* 57 Cal.2d at pp. 510-511.) In *United States v. Spearin* (1918) 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166, the Supreme Court articulated two principal warranties: first, that an owner's documents accurately portray site conditions; and second that the plans and specifications are suitable for construction. (*Id.* at pp. 136-137.) The warranties were implied, the Supreme Court held, and bidders who were misled by incorrect information could recover in contract. (*Id.*)

Since then, the *"Spearin doctrine"* has been widely adopted to establish a contractual basis of liability for inaccurate plans or undisclosed

information. (See, e.g., *Dewey Jordan, Inc. v. Maryland-National Capital Park and Planning Comm.* (1970) 258 Md. 490, 497-498, 265 A.2d 892; *Mayville-Portland School Dist. v. C.L. Linfoot Company* (ND 1978) 261 N.W.2d 907, 909-910; *Sanders Company Plumbing and Heating, Inc. v. City of Independence* (MO 1985) 694 S.W.2d 841, 848; *Vinnell Corporation v. State of New Mexico* (1973) 85 N.M. 311, 312, 512 P.2d 71; *Chaney Building Co. v. City of Tucson* (1986) 148 Ariz. 571, 574, 716 P.2d 28. See also, Stein, *"Construction Law"*, (Mathew Bender, 2008) Vol. 5, ¶18.02[1].)

Federal authorities applying the *Spearin* principle continue to recognize that warranty rights are contract based. (See, e.g., *United States v. Atlantic Dredging Co.* (1920) 253 U.S. 1, 12, 40 S.Ct. 423, 64 L.Ed. 735 [bad faith of government officer failing to disclose data immaterial as claim is warranty based].) Implicit in this rule is recognition that neither the intent to mislead nor negligence is an element of a claim. No "sinister purpose" must be proved when the government fails to disclose difficulties encountered in subsurface investigations. (*Christie v. United States* (1915) 237 U.S. 234, 242, 35 S.Ct. 565, 59 L.Ed. 933.) "[T]he 'Spearin' rule is not dependent on a finding of independent fault or negligence". (*J.L. Simmons Co. v. United States* (Ct. Cl. 1969) 412 F.2d 1360, 1382-1383.) If plans and specifications are defective, the government is at fault, and "[i]t is irrelevant whether defendant was or was not negligent in the preparation of

them". (*Carl M. Halvorson, Inc. v. United States* (Ct. Cl. 1972) 461 F.2d 1337, 1345.)

In the same way, California authorities since *Souza* continue to regard the contract between government and its public works contractor as the source of liability when plans and specifications are misleading and when material information is not shared. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 293 – 294.) It was with this precept in mind that the court in *Welch v. State of California, supra,* 139 Cal.App.3d 546 held that the State was liable in contract to a pier repair contractor for the State's failure to disclose information in its possession about difficulties encountered during the repair of an adjacent pier some years before. (*Id.* at pp. 555 – 556.) Continuing this pattern, the Second District in *Great American, supra,* 163 Cal.App.4th at pp. 964 - 965, relying on *Welch*, assessed Hayward's implied warranty claim as a contract claim. The logical consequence, as the Second District held, is that the District's liability does not depend on its intentions.

B. As a Contract and not a Tort Rule, the Implied Warranty is not Concerned with the Motives of a Breaching Party

Consistent with the *Spearin doctrine*, the *Souza* Court emphasized that liability "...is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach

of the implied warranty of their correctness. *The fact that a breach is fraudulent does not make the rule inapplicable*." (*Souza, supra,* 57 Cal.2d at pp. 510-511 [emphasis added].)

This only makes sense: Even though the District's conduct may have the hallmarks of the tort of fraud, its liability is only contractual. Otherwise, governmental immunity from tort (*Govt. Code* §818.8) would bar a contractor's suit. (*Souza, supra,* 57 Cal.2d at pp. 510-511; *E.H. Morrill Co. v. State of California, supra*, 65 Cal.2d 787, 793-794; *City of Salinas v. Souza & McCue Constr. Co., Inc.* (1967) 66 Cal.2d 217, 227-228 (overruled in part on other grounds in *Helfand v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 14) [cause of action is in contract despite the fact the City's conduct sounds in deceit]; *Warner Const. Corp. v. City of Los Angeles, supra,* 2 Cal.3d at pp. 293-294 [fraudulent concealment often comprises a tort, but against public agencies a contractor can only state a cause of action in contract].)

Because liability is in contract and not tort, traditional distinctions between the two branches of law dictate elements of an implied warranty claim. Contract law enforces promises; tort law vindicates social policy. (*Applied Equipment v. Litton Saudi Arabia* (1994) 7 Cal.4th 503, 514-515.) Contract damages are meant to approximate agreed-upon performance; tort damages compensate a victim for injury. (*Id.* at pp. 515 – 516.) As a result, traditional tort damages are not available to a warranty claimant

irrespective of a breaching agency's motives. (See, e.g., *Govt. Code* §818 [no punitive damages].)

When assessing the relative rights and duties of parties to a public works agreement, while the tort of fraud may require proof of intent, the "law generally does not distinguish between good and bad motives for breaching a contract. In traditional contract law, the *motive* of the breaching party generally has no bearing on the scope of damages…" and "…motives are immaterial." (*Applied Equipment, supra*, 7 Cal.4th at p. 516 [emphasis in original].)[7]

The courts (and later the *Public Contract Code* (Brief, sects. II A, B, C, *infra*)), rationally concluded that the government should not escape responsibility for its inaccurate or incomplete plans or undisclosed information. Since the government is immune in tort, liability is based in contract, and intent is not an element of a breach of contract claim.

---

7 While certain misrepresentations actionable in tort require intent and "knowledge of falsity" (*Lazar v. Superior Court, supra,* 12 Cal.4th 631, 638), others do not. (See, e.g., *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487 – 488 [action for deceit under *Civil Code* §1710(2)]; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 – 174 [negligent misrepresentation].) Regardless of tort distinctions, since motive is immaterial, whether the government knows or intends to mislead bidders is not significant for contract liability.

C. Warranties are Implied to Insure their Inclusion in the Owner – Contractor Relationship. This Device is well Established in the Law of Contracts and Liability does not depend on the Warrantor's Intentions

Judicial recognition of an implied warranty to affix contract responsibility for misrepresentation or non-disclosure is logical and not surprising. A warranty is no more than a "promise that a proposition of fact is true" (*Black's Law Dictionary*, 6th ed. (1990)), and the law of contract is about promises. (*Restatement of Contracts, Second*, §1.)

For example, in construction contracts the law implies a warranty that an owner will furnish the site so its contractor can carry out the work. (*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82 – 83; *Howard Contracting, Inc. v. G.A. MacDonald Const. Co.* (1998) 71 Cal.App.4th 38, 50; see, also, *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920 [implied promise that owner will furnish easements, permits, or other documentation reasonably required to proceed in an orderly manner].) Elsewhere, warranties of merchantability (*Cal.Comm.Cd.* §2314(1)) and of fitness for a particular purpose (*Cal.Comm.Cd.* §2314(2)) attach to goods and equipment often utilized in public and private construction.

The law also implies in every contract --- public or private --- a covenant of good faith and fair dealing that a party will not act to deprive another of the benefits he reasonably expects to obtain from the contract.

(*Merritt v. J.A. Stafford Co.* (1968) 68 Cal.2d 619, 626.) In this context, public agencies expect to receive a completed project that conforms to the plans, at the bid price, while contractors expect to profit because they are reasonably assured they set their prices according to those plans. When the agency, whether innocently, negligently, or intentionally misrepresents what is to be built or fails to disclose important information that qualifies building conditions, it deprives the contractor of the benefits it expected.

Centrally important to the analysis is the fact that warranty law does not rest responsibility on intent. (See, e.g., *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 117 [implied warranty liability turns on whether or not the product is merchantable]; *Mary Pickford Co. v. Bayley Bros., Inc.* (1939) 12 Cal.2d 501, 520 [in a case involving the sale of securities the Court said, "The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representation. Fraud, on the other hand, involves the additional requirement that the seller knew, or, in the exercise of reasonable diligence should have known, that his representations were false".]; *Pacific Feed Co. v. Kennel* (1923) 63 Cal.App. 108, 113 ["It is immaterial whether the warrantor did not know whether his statement was true or false".].)

Whether responsibility for the adequacy of construction documents and the disclosure of material data is express or implied, responsibility is still at its core contractual. The District, not Hayward, was best situated to

insure the accuracy and completeness of construction documents and to give access to material information. Hayward contracted to complete the Project in reference to information the District developed and disclosed, not the other way around.

The District's argument fails to recognize the difference between contract and tort, or to explain how Hayward (or any other bidder) could perform the duty to insure that accurate and complete materials are provided. To insure the government performs that duty, the law implies a promise that does not depend on the government's intentions.[8]

II. THE *SPEARIN* DOCTRINE, ALTHOUGH JUDICIALLY DEVELOPED, IS LEGISLATIVELY RECOGNIZED IN THE *PUBLIC CONTRACT CODE,* WHICH AFFIXES LIABILITY WITHOUT FRAUDULENT INTENT

Any question that *Souza* and *Spearin* are or should remain the policy in California was answered by the Legislature in two related *Public Contract Code* sections: *Section 1104* concerning the accuracy of plans and specifications, and *Section 7104*[9] concerning subsurface conditions

---

8 If warranties are not implied, unless there are express contract clauses that address the quality and completeness of representations and disclosures, bidders would be left to the mercy of owners. The *Spearin doctrine* prevents just this result.

9 All further statutory references are to the California Public Contract Code unless otherwise noted.

indicated in information made available to bidders. Combined, these statutes address the suitability and accuracy of materials the government gives to bidders --- key warranties *Spearin* and *Souza* found implied in public works contracts.[10]

A. Public Contract Code Section 1104 and the Warranty of Accuracy and Completeness

When it enacted *Section 1104* in 1999, the Legislature declared unambiguously that a public owner cannot:

> ...require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects. (*Section 1104.*)

Section 1104 results from Assembly Bill 1314 ("AB 1314"), and the legislative finding concerning the law is significant:

> The Legislature finds and declares that it is against public policy and of statewide concern on local public

---

[10] Implied warranty liability for non-disclosure is not addressed by statute, but instead remains the subject of judicial development. (See, e.g., *Warner Constr. Corp. v. City of Los Angeles, supra,* 2 Cal.3d 285; *Welch v. State of California, supra,* 139 Cal.App.3d 546.) There is, however, no reason why the policy implicit in the *Public Contract Code's* treatment of the warranty of accuracy and suitability should not apply to the warranty of disclosure. (Brief, sect. IV, *infra*).

> works projects to require a bidder to certify and be responsible for the completeness and accuracy of architectural or engineering plans and specifications, except on clearly designated design build projects. (See, Hayward's Motion for Judicial Notice [MJN] at Ex. 1, p. 16.)

The history of AB 1314 is telling. The report of the Senate Rules Committee, "Third Reading," contains arguments for and against the bill.[11] The "Arguments in Support" state:

> According to the author's office, this bill has been introduced in response to a recent trend by local entities to utilize contract provisions to transfer design liability from architects to general contractors. The author's office contends that such contract provisions run counter to the long standing division of responsibilities on construction projects which was formally recognized by the U.S. Supreme Court in The United States v. Spearin, 248 U.S. 132 (1918). The

---

[11] Statements in legislative committee reports concerning the statutory objectives and purposes in accord with a reasonable interpretation of statutes are legitimate aids in determining legislative intent. (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1083.) This includes Senate Rules Committee reports. (*Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 305.)

> author's office notes that efforts to shift design risk to contractors, other than on design-build contracts, are fundamentally inappropriate, unwarranted, and wasteful. (Sen. Rules Com., Off. of Sen. Floor Analyses, Third Reading on Ass. Bill No. 1314; See Hayward MJN at Ex. 8, p. 23.)

The "Arguments in Opposition" in the same report state, in pertinent part:

> Opponents note that in the past, contractor's attorneys, when suing public agencies, have attempted to include a cause of action for breach of an "implied warranty" of the agency's plans and specifications. For example, in Jasper Construction, Inc. v. Foothill Junior College District (1979) 91 Cal.App.3d 1, the court held that a public agency couldn't be liable for breach of implied warranty of plans and specifications unless the contractor proves some active misrepresentation. Opponents are of the opinion that this bill could have the effect of overturning the decision in Jasper. (*Id.*)

Proponents of the bill sought to restore *Spearin* and *Souza's* fair allocation of contract duties in reaction to *Jasper*, which eroded the contract warranty by the unwarranted insinuation of tort principles. Governmental

bodies, the main detractors of the bill, (and thus of implied warranty liability), correctly concluded that in its intended sense the warranty required no showing of intentional, knowing, or active conduct, and that legislative endorsement of this fact would spell the demise of cases, like *Jasper,* that unfairly tilted the balance in favor of owners.

The reason for this balance was well expressed by the federal Veterans Administration Contract Appeals Board in *Appeal of J.W. Bateson* (1978) VACAB No. 148, 79-1 BCA ¶ 13573, 1978 WL 2700.

> It is well established as a general rule that the Government warrants the adequacy of its plans and specifications. This responsibility is placed on the Government as a risk assumed by it as a part of the rights and obligations acquired by both parties entering into a contract. A showing of greater knowledge on the part of the Government over the contractor is not necessary, and it is not necessary to demonstrate negligence in drafting the defective contract documents when the rule is involved. A contractor can bid with confidence that the bidding documents have been examined for errors, and while he is responsible for bringing obvious errors to the attention of the Government, he is not required to analyze the plans and specifications for obscure errors. It would be burdensome and often impossible in the relatively brief

> bidding period, as well as idle repetition of work which has already, presumably, been done by the drafter and designer. (*Id.* at p. 66,492.)

Except in design-build arrangements, it is the owner, not the contractor, who controls the quality of the plans and specifications, and who has the time to insure their careful preparation. And, under implied warranty principles and *Section 1104,* it is the owner who ultimately stands to benefit from the exercise of that care. A contractor who cannot bid with confidence is more likely to include contingency costs, concerned that unless he proves intentional or knowing misconduct, (practically speaking, an onerous evidentiary burden), he will not be compensated for his agreed on performance.

A warranty of the type *Section 1104's* history suggests protects against higher costs to the public by giving assurance to bidders and incentive to owners to exercise care and acumen in the design phase. Thus, in a manner quite uncommon, the Legislature has in essence decided at least one part of the issue on this appeal: knowing and intentional misrepresentation is not an element of implied warranty liability when a public agency prepares inaccurate and incomplete plans and specifications.

B. Section 1104 is not Unique

Section 1104 extends implied warranty coverage to contracts of "local public entities, charter cities, and charter counties," and the definition of "local public entities" covers most agencies in California. (*Section 1101.*) However, the preference expressed by the Legislature is not limited to local public entities.

Beyond this substantial grouping, State agencies must also prepare "full, complete, and accurate plans and specifications," (*Section 10120*), and those that do not may suffer the consequences. (*Nomellini Const. Co. v. DWR* (1971) 19 Cal.App.3d 240, 243-244 [contractor not responsible for unsatisfactory result where he follows plans and specifications that are inaccurate].) [12] The warranty is also extended, for example, to the California State Universities under *Section 10720* (duty to prepare "full, complete, and accurate plans and specifications").

By encouraging careful preparation of accurate and complete plans and specifications, the Legislature enhances the likelihood public contracts will be let at the best price. This legislative goal is thwarted if, as the District argues, warranty liability arises only where there is intentional fraud.

[12] In at least one instance, the State did not question application of the implied warranty to it. *Macomber v State of California* (1967) 250 Cal.App.2d 391, 397.

C. Public Contract Code Section 7104 and the Warranty of Indicated Site Conditions

The second statute to codify the *Spearin* warranty of the accuracy of material given to bidders is *Section 7104*, the government's warranty that information concerning subsurface conditions is accurate. *Section 7104* provides, in part, that if a contractor encounters any:

> (1) Material that the contractor believes may be material that is hazardous waste. . . [or]
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids. [or]
>
> (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract,

then the owner will adjust the contract price. *Section 7104* requires inclusion of this "differing site conditions" ("DSC") clause in all local agency contracts to make certain that owners, not contractors, bear the risk of inaccurate subsurface information.[13]

---

[13] Under *Section 7104*, inclusion of a DSC clause is mandatory. While *Section 1104* is not expressed in like terms, it is still part of every contract with a local agency. All laws in existence at the time a contract is made become part of the contract. (*Castillo v. Express Escrow Company* (2007) 146 Cal.App.4th 1301, 1308.)

As recently observed in *Condon-Johnson & Assoc., Inc. v. SMUD* (2007) 149 Cal.App.4th 1384:

> The nature and accuracy of the information provided by the public entity manifestly bears on the risks to be undertaken by the bidder. *To that extent the risk affects the amount of the bid. The more risk the greater the bid.* Accordingly, it is to a public entity's advantage to provide information upon which the bidder can rely in order to obtain the lowest qualified bid (See Gibbs & Hunt, California Construction Law (16th ed. 2000) §6.11, p. 240). (*Id.* at pp. 857 – 858 [emphasis added].)

The policy considerations underlying *Section 7104* and explained in *Condon-Johnson* have long been recognized in federal law. In expressing the reasoning behind DSC clauses akin to *Section 7104,* the Court of Claims in *Foster Const. C.A. and Williams Bros. Co. v. United States* (Ct. Cl. 1970) 435 F.2d 873 stated:

> [Bidders] need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs. (*Id* at p. 887.)

The Court of Claims went on to explain that departures from these principles would "reintroduce the practice sought to be eradicated", namely unwanted contingency pricing. (*Foster, supra,* 435 F.2d at p. 887; See, also, *Iacobelli Construction, Inc. v. City of Monroe* (C.A.2 N.Y. 1994) 32 F.3d 19, 23 ["to prevent contractors from bidding on a worst-case scenario"; "reduces inflated bidding"]; *H.B. Mac, Inc. v. United States* (C.A. Fed. 1998) 153 F.3d 1338, 1343 [purpose is for contractors "to submit more accurate bids by eliminating the need for contractors to inflate their bids to account for contingencies that may not occur"].)

Like its federal counterpart, *Section 7104* lessens contract costs by warranting against the inaccurate reporting of geotechnical test results. Like the warranty implied by contract, the protection offered by *Section 7104* does not depend on the public agency's motives.

Given the *Public Contract Code's* strong preference for allocating the consequences of spotty design and investigative work to public agencies *regardless* of their intentions or knowledge, there is no discernable public policy reason for the District to promote a contrary rule, or for courts to created one.

III. THE TRIAL COURT WRONGLY REGARDED FRAUDULENT INTENT AS AN ESSENTIAL ELEMENT OF HAYWARD'S CLAIMS, AND DID SO RELYING ON *JASPER*. THIS COURT SHOULD AFFIRM THE COURT OF APPEAL IN *GREAT AMERICAN* AND OVERRULE *JASPER*

Since the implied warranty was recognized in California as the basis for contract liability by *Souza*, courts have addressed two situations in which breach occurs:

- The first, where the plans or specifications are inaccurate or incomplete ("misrepresentation"); and
- The second, where information that is not part of the plans and specifications qualifies or is material to understanding project conditions, but is not disclosed to bidders ("nondisclosure").

This Court has addressed the second kind of warranty claim in the context of an agency's non-disclosure of subsurface data. (See, *Warner Construction Corp. v. City of Los Angeles, supra,* 2 Cal.3d 285.) The Court has not recently considered circumstances where plans and specifications are incomplete and inaccurate, and certainly has not done so since the Legislature crafted *Section 1104.*

In the interim, *Jasper, supra,* 91 Cal.App.3d 1 and *Thompson, supra,* 155 Cal.App.4th 525, held that claims for inaccurate or incomplete plans and specifications are not valid without proof that the government affirmatively misrepresented or concealed material facts. From that, the

District petitions for a rule that proscribes implied warranty claims unless contractors prove intentional concealment or intent to defraud. *Jasper* and *Thompson* are at the hub of the District's argument, however, each was wrongly decided.[14] As neither supports the change the District advocates to implied warranty law, this Court should affirm the Court of Appeal in *Great* American and in the process overrule *Jasper* and *Thompson.*

A. *Jasper Construction, Inc. v. Foothill Junior College Dist.*

Jasper is a case about inaccurate and incomplete plans and specifications and not non-disclosure, as the District contends. [OBM 12 – 13]. The contractor, Jasper, sued for breach of contract claiming the community college district issued "inadequate and defective" plans for a performing arts center. (*Jasper, supra,* 91 Cal.App.3d at p. 6.) Specifically, the architectural plans omitted the location of construction joints while the structural plans indicated steel within concrete walls would run "floor-to-floor". Jasper, relying on the structural plans and on industry practice, concluded he could pour concrete "floor-to-floor" and designed his form work accordingly. The college district's architect rejected this approach, leaving Jasper with useless and costly forms. (*Id.* at pp. 6 – 7.)

---

[14] *Jasper, supra,* 91 Cal.App.3d 1, is the sole legal authority for the trial court's decision that Hayward could not pursue breach of contract claims based on the implied warranty. [5 HA 1120 – 1121; 1141].

The First District reversed a verdict in Jasper's favor, holding the trial court erred when instructing the jury, in language reminiscent of *Spearin* and that prefigured *Section 1104*, that the college district "impliedly warrant[ed] that the plans and specifications are free from defects, are complete, and will, if followed by the contractor, result in construction of the project intended". The appellate court instead concluded there could be no liability "caused by plans and specifications that are merely 'incomplete,'" or for a defect in the plans unless it consists of "intentional concealment or positive assertions[15] of material facts that prove to be false or misleading". (*Jasper, supra,* 91 Cal.App.3d at p. 11.)

After *Section 1104,* enacted in 1999, *Jasper* simply is no longer good law. "Intentional concealment" is not a consideration when analyzing whether plans and specifications are inaccurate or incomplete. Under *Section 1104,* there is no meaningful distinction between plans that are "incomplete" or "merely incomplete", or between plans and specifications that are "inaccurate" and those that "positively" but erroneously represent

---

15 *Jasper, supra,* 91 Cal.App.3d 1, did not define "positive assertion". However, several years before, *E.H. Morrill Co. v. State of California, supra,* 65 Cal.2d 787, drew a distinction between "positive representations" which "flatly assert" conditions bidders could expect, and an owner's "mere presentation" of data from a subsurface investigation. (*Id.* at p. 792.) In *Jasper,* the community college district's structural plans regarding "floor-to-floor steel" positively represented how to build the project, while its architectural plans were incomplete in their depiction of construction joints. From this, a jury could find the college district breached the implied warranty.

how to build a project. If assertions, representations, or omissions make the contract documents misleading, there is a breach of the implied warranty, and owners are prevented by statute from allocating the resulting risk of loss to contractors. Since the essence of *Jasper* is to do just that, *Jasper* is irreconcilable with *Section 7104* and must be overruled.[16] As the trial court below dismissed Hayward's warranty claims based solely on *Jasper*, the Court of Appeal was correct in reversing that dismissal.

B. *Thompson Pacific Construction, Inc. v. City of Sunnyvale*

Thompson, supra, 155 Cal.App.4th 525, like *Jasper,* was about inaccurate and incomplete plans and specifications, and not about non-disclosure. *Thompson* involved a claim that incomplete plans lacked certain structural steel dimensions, causing a four month delay in construction. (*Thompson, supra,* 155 Cal.App.4th at p. 551.) The Sixth District began its analysis by recognizing *Souza's* holding that by

---

16 Not only is *Jasper* the subject of scholarly criticism (Gibbs & Hunt, *California Construction Law* (16th ed. 2000) §4.06, p.148; CEB, *California Construction Contracts, Defects and Litigation* (2009) Vol.1, § 6.73, p.470) but it appears that the First District may have rethought this precedent some years later. In *Tonkin Const. Co., v. Co. of Humboldt* (1987) 188 Cal.App.3d 828, the Court of Appeal held that the County of Humboldt breached the implied warranty when a dredge its contract "implied" would be available failed to show up on time, causing Tonkin to incur delay damages. (*Id.* at p. 832.) The *Tonkin* court observed the County warranted the implied representation in the contract schedule of performance, a result that is a far cry from *Jasper's* holding that liability only attaches for "misleading positive assertions".

furnishing misleading plans and specifications an owner is liable in contract for breach of the implied warranty. But, the Sixth District continued, to establish liability Thompson had to prove the City "affirmatively misrepresented or actively concealed" material facts, citing *Jasper* as the sole authority for this proposition. (*Thompson, supra,*. 155 Cal.App.4th at p. 551.)

When confronted with the clear wording of *Section 1104*, the *Thompson* court failed to recognize that *Jasper* was no longer good law, particularly in light of *Section 1104's* history. Rather, the appellate court reasoned that while the statute prevented public entities from placing the risk of accuracy and completeness of the plans and specifications on the contractor, "[i]t says nothing about the contractor's burden to prove that the public entity breached the warranty." (*Thompson, supra,* 155 Cal.App.4th at p. 553.) This effort to distance the City's failure to include dimensions on a set of plans from the coverage of the *Public Contract Code* is unconvincing for at least two reasons.

First, *Section 1104* does not concern the "burden of proof". A plaintiff claiming a breach of warranty has the burden to prove the facts essential to that claim. (*Evid.Code* §500; *The Carpenter Steel Company v. Pellegrin* (1965) 237 Cal.App.2d 35, 41 [burden on buyer to show seller's

breach in warranty action for the sale of goods.]) Instead of shifting the burden of proof, *Section 1104* is a substantive rule that allocates responsibility to an owner *if* a contractor proves that plans and specifications are inaccurate or incomplete. Neither *Section 1104* nor <u>any</u> implied warranty case has ever shifted the burden of proof to an owner. *Section 1104* concerns *what* must be proved, not *who* must prove it, and *Section 1104* does *not* require proof of affirmative or active misrepresentation or concealment.

Second, *Thompson*, like *Jasper*, appears result oriented. Both courts thought proof of affirmative misrepresentation was necessary 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 omitted]." (*Thompson, supra,* 155 Cal.App.4th at p. 551.) But, the concern is overstated: if the plans and specifications are "themselves accurate", then there is no liability under either *Section 1104* or *any* judicial formulation of the implied warranty. It is only if the plans and specifications are *inaccurate* or *incomplete* that liability arises, and a contractor who underbids is not rewarded if the

bidding materials are not problematic.[17]

The trial court in this matter succumbed to the same mistake made by the *Jasper* and *Thompson* courts. In dismissing implied warranty claims that the construction documents were not free from defects, were incomplete, and were inaccurate, the trial court did so in the belief that Hayward had to show intentional non-disclosure or affirmative misrepresentation. [5 HA 1141 – 1142]. As neither condition is a necessary element under this Court's prior holdings or the *Public Contract Code*, the Court of Appeal correctly reversed the ruling against Hayward. Since *Jasper* and *Thompson* require these conditions as elements of a warranty claim that plans and specifications are inaccurate and incomplete, they should be overruled.

---

[17] *Section 1104* does not leave to chance the possibility that an owner will be penalized for a contractor's "lack of diligence in examining" bidding documents. Rather, it provides that bidders can be required to review the materials and report errors or omissions noted before bid. The review is in a bidder's capacity as a contractor, not as a "licensed design professional". This "reasonable contractor" standard is akin to that used by federal courts to assess a bidder's reliance. (See, *Erickson Shaver Contracting Corp. v. United States* (Cl. Ct. 1985) 9 Cl.Ct. 302, 304; *Max Drill, Inc. v. United States* (Cl. Ct. 1970) 427 F.2d 1233, 1245.)

IV. IMPLIED WARRANTY CLAIMS FOR THE NON-DISCLOSURE OF MATERIAL INFORMATION ARE CONTRACT CLAIMS. THIS COURT HAS NEVER HELD THAT AN OWNER BREACHES ITS CONTRACT ONLY IF IT INTENTIONALLY CONCEALS INFORMATION, AND IT SHOULD NOT CHANGE THIS RULE

An implied warranty claim exists when an owner fails to disclose material information, intentionally or otherwise. (*Souza, supra,* 57 Cal.2d at pp. 509 – 510.) This rule was amplified eight years after *Souza* by *Warner Const. Corp. v. City of Los Angeles, supra,* 2 Cal.3d 285, when this Court explained that a non-disclosure giving rise to warranty liability may, but need not be intentional.

In *Warner,* the City had access to important information about its subsurface investigation but did not either include it as part of the plans and specifications or make it available to bidders so that they could draw their own conclusions from it. (*Warner, supra,* 2 Cal.3d at pp. 291-293.) Warner alleged a contract cause of action because subsurface conditions differed from those indicated in the plans and specifications (regarding a suggested drilling method); and for "fraudulent concealment" because the City failed to disclose that cave-ins had occurred in test borings, the logs of which the City provided to bidders. (*Id.* at pp. 290 – 291.)

Concerning the "fraudulent concealment" claim, this Court first reaffirmed *Souza,* holding that the claim was in contract, even if "fraudulent". (*Warner, supra,* 2 Cal.3d at p. 294.) Next, the Court

examined the circumstances under which non-disclosure was a breach of implied warranty. *Warner* established that an owner is liable "in *at least* three instances":

> (1) the [owner] makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead;
>
> (2) the facts are known or accessible only to [the owner], and [the owner] knows they are not known or reasonably discoverable by the [contractor];
>
> (3) the [owner] actively conceals discovery from the [contractor]. (*Id.* at p. 294 [emphasis added].)[18]

Warner did not require proof the City intentionally concealed material information except in the last case, of active concealment. (*Warner, supra*, 2 Cal.3d at pp. 294 – 295.) While "active concealment" is one type (possibly the most reprehensible type) of non-disclosure, it is not the only type, as *Warner* makes clear. Later implied warranty cases that concern non-disclosure, either directly or by implication, are in accord. (See, *Welch, supra,* 139 Cal.App.3d at p. 556 ["no requirement of proving an affirmative fraudulent intent to conceal"]; *Tonkin, supra,* 188 Cal.App.3d at pp. 832-833 [non-disclosure of information pertaining to availability of

---

[18] The three situations are independent, not conjunctive. (*Welch, supra,* 139 Cal.App.3d at p. 556.)

necessary barge, known to County but unknown to bidder]; *Howard Contracting, supra,* 71 Cal.App.4th at pp. 55 - 56 [city aware of, but does not disclose regulatory restriction adversely affecting ability to perform].)[19]

The rule is rational and prudent: the government has access to information, while the contractor must generally rely on what he is given. If information is omitted, then the contractor's bid will not accurately reflect the true cost of the work, and he will incur contract losses without fault. This is what happened to Hayward: because material information regarding, for example, stucco and tile, was not disclosed *whatever the District's intentions*, Hayward's bid price was lower than it should have been. There is no logical reason why the District should retain the value of Hayward's work at an unintended, low price in circumstances where the District possessed information that, if disclosed, would have resulted in an accurate and fair contract price.

While it is true that a public owner is not a fiduciary towards its contractors, where the balance of knowledge is on the owner's side, it can "no more betray a contractor into a ruinous course of action by silence than by the written or spoken word". (*Helene Curtis Industries, Inc. v. United*

---

[19] The rule in federal "superior knowledge" cases is similar. (*PCL Construction Services, Inc. v. United States* (2000) 47 Fed.Cl. 745, 792 [where government possesses special knowledge which is vital to performance, and government is aware contractor does not know of and has no reason to obtain the information, government must disclose or be liable for breach of contract].) The intent to defraud is not an element of the claim.

States (Ct. Cl. 1963) 312 F.2d 774, 778.) The intent to conceal or defraud is not and should not be a element of an implied warranty claim based on non-disclosure.

A. The District's Arguments Notwithstanding, California Case Law does not Make Intent to Defraud or Conceal a Criteria of a Warranty Claim for Non-Disclosure

The District suggests that California cases support its argument that knowing and intentional misconduct is necessary to a non-disclosure claim, and for support it excerpts phrases from case law meant to leave that impression. On closer inspection though, the authorities do not provide the support the District claims.

1) *E.H. Morrill Co. v. State of California*

For example, references in *E.H. Morrill Co. v. State of California, supra,* 65 Cal.2d 787, to "positive representations" have nothing to do with either non-disclosure or intent, but have to do with the *materiality* of the State's representations. The State's contract in *E.H. Morrill* described the size and dispersion of boulders a bidder might encounter. (*Id.* at pp. 789 – 790.) In fact, boulders were substantially larger and more concentrated than described, causing the contractor to sue for "misrepresentation of site conditions" and on the "theory of implied warranty". (*Id.*)

In approving the contractor's right to pursue these theories, the Court took care to distinguish the facts from those in *Wunderlich v. State of California* (1967) 65 Cal.2d 777, decide by the Court that same day. Whereas in *Wunderlich* the Court concluded that the State was not responsible for making "positive assertions of fact" by simply reporting the results of its site investigation and allowing bidders to draw their own conclusions *(E.H. Morrill, supra,* 65 Cal.2d at p. 791), the State in *E.H. Morrill* instead "flatly assert[ed] that bidders could expect to confront only the specified conditions. It [was] clearly a 'positive and material representation as to conditions presumably within the knowledge of the government'... [citation omitted]". (*E.H. Morrill, supra,* 65 Cal.2d at pp. 791 – 792.)

2) *Wunderlich v. State of California*

In *Wunderlich, supra,* 65 Cal.2d 777, the State's contract informed bidders that sampling indicated that material satisfactory for the production of base and aggregate could be obtained at a pit close-by the project, and that the bidders should satisfy themselves about quantity and quality. The contract also informed bidders that if test samples were made at other locations, the results were available to bidders upon inquiry. (*Id.* at p. 780.) When production at the pit proved disappointing, the contractor sued for breach of contract. After first reaffirming that an implied warranty existed

in the contract, this Court observed that *"the crucial question is thus one of justified reliance"*, and distinguished between "positive and material misrepresentations" on which a bidder could rely, and statements that were "suggestive only". (*Id.* at p. 783 [emphasis added].) Because the State did "little more than report the results of its testing", the "mere indications" did not justify reliance when other available data counter-indicated conclusions that the bidder formed from test pit data alone. (*Id.* at p. 784.)[20]

Neither *E.H. Morrill* nor *Wunderlich* considered much less turned on the State's intentions or knowledge that its contract or its disclosures could mislead bidders. To the contrary, the cases show that *intent* is irrelevant and liability depends instead on the materiality of represented and undisclosed information and a bidder's justifiable reliance.

3) *Weichmann Engineers v. State of California*

While the District places great reliance on *Weichmann Engineers v. State of* California (1973) 31 Cal.App.3d 741, support is mainly drawn from dicta. During a pre-job site visit the bidder in *Weichmann* inspected

---

[20] In light of *Section 7104,* enacted after the decision, the legal significance of *Wunderlich's* distinction between "positive representations" and "mere indications" is subject to reexamination insofar as subsurface projects go. (See, *Condon-Johnson & Assoc., Inc. v. SMUD, supra,* 149 Cal.App.4th at p. 1395 ["It follows that section 7104 establishes, as the public policy of California, that a contractor may draw reasonable deductions from the 'indications' in a contract of the subsurface conditions that might be found at the site."].)

the very conditions that he later claimed were misrepresented by the contract. The bidder also made assumptions about subsurface conditions but made no effort to review the State's boring data which was available to him on request. (*Id.* at pp. 744 – 745.)

Against this factual setting, the Third District concluded there were no partial disclosures or disclosures of half-truths likely to mislead. Rather, it appeared that "the sum total of all facts known or to be known about the project were readily discoverable by plaintiff; they were not known and accessible only to the state". (*Weichmann, supra,* 31 Cal.App.3d at p. 749.) Clearly, and like *E.H. Morrill* and *Wunderlich* before it, *Weichmann* concerned materiality and reliance, and not the State's intentions. Any language in the Third District's decision that is read to suggest fraudulent intent is a prerequisite to an implied warranty claim is at best dicta.[21]

These authorities are not good support for the District's contention that the Supreme Court should, for the first time, require that Hayward or any other contractor prove the government intended to actively conceal, omit, or affirmatively misrepresent matters as an element of an implied warranty claim.

---

[21] This conclusion is supported by the Third District's holding ten years later in *Welch, supra,* 139 Cal.App.3d 546, that a warranty claim based on non-disclosure includes "no requirement of proving an affirmative fraudulent intent to conceal". (*Id.* at p. 556.)

V. ANALOGIES TO TORT DOCTRINES OFFER NO REASON TO CHANGE IMPLIED WARRANTY RULES TO REQUIRE PROOF OF FRAUDULENT INTENT

A. The Tort Concept of Concealment does not require an "Intent Element" in an Implied Warranty Claim

The District draws on tort principles when it asserts that "public interest warrant[s] application of an intent element in breach of implied warranty cases based on nondisclosure." [OBM 17]. The District premises this assertion on the rule that fraud actions are to advance "the public interest in punishing intentional misrepresentations and deterring such misrepresentations in the future." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 992.) But the goals of punishment and deterrence are out of place in contract actions; the goal of contract actions is to enforce promises and not vindicate social policy. (*Applied Equipment v. Litton Saudi Arabia, supra,* 7 Cal.4th at pp. 514-515.)

Further, while it is true, as the District claims, that the tort of fraudulent concealment includes the element of "intentional concealment or suppression" (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131), that rule applies to claims under *Civil Code* §1710(3) whereas this Court has recognized that an action for breach of implied warranty for non-disclosure may arise in broader circumstances. (*Warner Const. Corp. v. City of Los Angeles, supra,* 2 Cal.3d at p. 294.) Indeed, even in a tort and not contract context, liability for non-disclosure is

not limited to circumstances where a party intentionally conceals matters from another party to a transaction that is not fiduciary in nature. (See, *Linear Technology Corp., supra,* 152 Cal.App.4th at p. 132; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.)

Thus, it is not the case, as the District contends, that imposition of liability for non-disclosure without the intent to defraud punishes the government for "mere silence." [OBM 17]. To the contrary, when the government as a party to a transaction gives information to bidders in the form of plans, specifications, and subsurface data, it has spoken, and thus consistent with both contract *and* tort law should speak fully.

B. The Tort Concept of Strict Liability is out of place in a Discussion of the Implied Warranty

The District also invokes a tort analogy when it argues implied warranty liability without fraudulent intent is tantamount to strict liability. The argument is suspect first from an empirical point of view: The *Spearin doctrine* has existed in California for nearly half a century without such an element, and public agencies have avoided liability because, as many reported cases show, agencies either accurately prepared their plans and disclosed available information, or because undisclosed information was not material.

From a purely analytical view, strict liability does not fit into a discussion of contract law. Strict liability is a tort theory that disposes of the typical tort element of a failure to exercise due care because the activity undertaken is abnormally dangerous. (See, *Restatement of Torts, Second*, § 519; *Smith v. Lockheed Propulsion Company* (1967) 247 Cal.App.2d 774, 785.)

The implied warranty, conversely, concerns promises. Its breach gives rise to different damages. In contrast to strict liability, where liability depends only on the tortfeasor's conduct and not on the conduct of the person harmed, implied warranty liability depends also on the conduct (reliance) of the contractor who claims he is harmed. (*Wunderlich v. State of California*, *supra*, 65 Cal.2d 777, 783.)

As the analogy to strict liability is incomplete and flawed, it offers no good reason to change implied warranty law.

VI. THE PURPOSE OF THE PUBLIC CONTRACT CODE --- TO ASSURE COMPETITION AND TO PREVENT THE WASTE OF PUBLIC FUNDS --- IS PROMOTED BY AN IMPLIED WARRANTY WITHOUT INTENTIONAL AND FRAUDULENT MISCONDUCT

As the District notes, a central purpose behind enacting the *Public Contract Code* in 1984 was to "assure a healthy degree of competition" conducive to sound fiscal practices and a fair opportunity to bid. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th

1065, 1073; *Pub.Cont.Code* §100(c).) This objective goes hand in hand with the elimination of fraud and favoritism, and protection against the misuse of public funds. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 314.) With these objectives in mind, the Legislature enacted, first, *Section 7104* in 1989 and, ten years later, *Section 1104.*

These statutes embody implied warranty principles, and as they are part of the *Public Contract Code*, they were not enacted for "the benefit or enrichment of bidders", but "with sole reference to the public interest". (*Kajima/Ray Wilson, supra,* 23 Cal.4th at pp. 316 – 317.) The Legislature must have had in mind the policy that places all bidders on an even playing field and that obtains for the public the lowest responsible bid price when it made agencies, not bidders, responsible for inaccuracies and omissions in plans, specifications, and subsurface indications. Thus, enforcement of the implied warranty without regard to a pubic owner's fraudulent intent achieves these goals.

The implied warranty, as presently constituted, takes the gamble out of bidding and the public receives a low, responsible bid without contingencies for potential but unknown errors. The government promises bidders that should conditions differ from those indicated, should the plans prove inaccurate, or should material information be omitted or go undisclosed, the contractor will be compensated. There is nothing unfair

about the arrangement: had matters been accurately disclosed at the time of bid, then the contract price in the first instance would have reflected the true cost of the work.

VII. THE IMPLIED WARRANTY WITHOUT AN INTENT ELEMENT HAS NOT, AND WILL NOT, ENCOURAGE UNDERBIDDING

The District notes that *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, disapproved of the abandonment of a competitively bid contract and quantum meruit recovery of *all* of a contractor's costs out of concern that contractors might be encouraged to "bid unrealistically low". (*Id.* at p. 240.) The District then analogizes abandonment to implied warranty liability, raising similar concerns.

Of course, a breach of implied warranty claim is far different, as it is a claim *on* the contract, not an abandonment of the contract. *Amelco* itself recognized that distinction: For breach of the implied warranty, a contractor can only recover "those damages attributable to the breach, not the contractor's total costs under the entire contract." (*Id.* at p. 247.)[22]

The District's argument --- 'implied warranty claims without proof of fraudulent intent encourages underbidding' --- ignores this rule of

---

[22] Amelco's comment on implied warranty damages reflects an understanding of the fundamental differences between tort and contract. (See, e.g., *Applied Equipment v. Litton Saudi Arabia, supra,* 7 Cal.4th at pp. 515 – 516.)

contract damages. The hypothetical bidder who detects a plan error or knows of vital but undisclosed information and underbids as a result can still only recover the difference between the cost of the work as represented and the cost of the work as it would have been priced but for the error or omission. (*City of Salinas, supra,* 66 Cal.2d at p. 225.) Therefore, there is scant incentive to underbid whether or not an error or omission is intentional.

Practically speaking, given "the time and expense of completing [a project], with the intention of thereafter incurring the high cost… of modern litigation…" underbidding in the hope of recovering costs that only reflect the true value of the work to begin with is not a sensible or likely bidding strategy. (See, e.g., *Amelco, supra,* 27 Cal.4th at p. 252 [Dis. Opn. of Werdegar, J.)[23]

---

23 The hypothetical strategy is also fraught with risk, since bidders must prove "justifiable reliance" to recover for breach of the implied warranty. (*Souza, supra,* 57 Cal.2d at p. 510 ["A contractor of public works who, acting reasonably is misled…" (emphasis added)]; *Wunderlich, supra,* 65 Cal.2d at p. 783 ["The crucial question is one of justified reliance."].) If the bidder knows of an error or of undisclosed information, reliance is unjustified and a warranty claim must fail.

VIII. THE DISTRICT'S POLICY CONCERNS ABOUT "MATERIALITY" AND "LITIGATION BURDENS" ARE OVERSTATED

A. Proof of Materiality does not depend on Intent

The District conjures up fears that contractors will "deem" minor errors or trifling undisclosed data "material", and then argues that only by making contractors prove the government's intentional and knowing misconduct can this fear be allayed. [OBM 25 – 26]. Yet, no case holds that an agency is liable merely because a contractor "deems" a fact material, and the argument falsely assumes that judges and juries will accept without question a contractor's claim.

Materiality is not subjective; it is objective --- whether a reasonable person would attach importance to something --- and it is question of fact. (*Warner, supra,* 2 Cal.3d at pp. 292 – 293; *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1163.) If an error or undisclosed fact is not material, a judge or jury will know it, and the existence or non-existence of an agency's fraudulent intentions do not change that dynamic.

Nor is the fear that the government will be unfairly tasked with assessing information for materiality believable. It hardly burdens an agency to disclose information it possesses or knows of, whether or not the information is deemed material by a bidder. Less harm comes of full disclosure compared with the alternative, as full disclosure will foster low,

competitive bids. A corollary benefit is that by making full disclosure rather than culling through data to assess what might or might not be material, an agency can confidently defend against a careless bidder's claim. Simply, a policy of complete disclosure benefits the public, and the District's fears are irrational.

B. Litigation Burdens do not depend on Intent

The District conjectures that unless proof of fraudulent intent is required of warranty claimants, more litigation will ensue than has occurred over the past 45 years. [OBM 22 – 23]. While reducing the volume of litigation is a desirable end, it should not be achieved by disenfranchising legitimate claims. (See, e.g., *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 450.)

This is not to suggest that the government cannot ease the burden of litigation. Sophisticated owners find ways to do that through mediation, arbitration, and "Disputes Resolution Board" provisions in contracts. In many cases, the Legislature has provided outlets to reduce litigation and resolve claims. (See, e.g., *Pub.Cont.Code §* 10240 [requiring arbitration for claims resolution for certain State contracts]; *Pub.Cont.Code §* 22201 [permitting arbitration clauses in public works contracts]; *Pub.Cont.Code §* 20104 et seq. [mediation and arbitration procedures for local public agency claims]; *Los Angeles County Metropolitan Transportation Authority v.*

Shea-Kiewit-Kenny (1997) 59 Cal.App.4th 676, 678 – 679 [discussing three-member Disputes Resolution Boards on public works projects].)

Owners can proactively address implied warranty claims through careful preparation of contract documents and disclosure of available information. Even in circumstances where errors or omissions seep into the contract, the government can fashion efficient dispute resolution mechanisms for warranty claims the same as any other type of construction claim. Inclusion of a fraudulent intent element will not dampen the amount of litigation but will only suppress recovery of legitimate claims.

CONCLUSION

Both the government and its contractors deserve a public contracting scheme that is transparent and fair and that yields the best price for quality work. For nearly fifty years the implied warranty that attaches to the government's plans, specifications and disclosures has promoted these goals, and has done so successfully regardless of whether the government intended or did not intend to misrepresent or conceal matters.

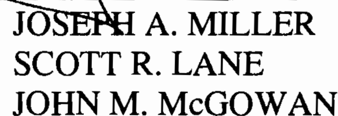
The proposition the District puts forth would change that scheme without good reason. It would in turn unfairly burden Hayward and others in efforts to recover additional costs absorbed *only* because the government made a mistake, and it would surely burden the taxpayers of California as they absorb higher bid prices for public works.

The Court should affirm the ruling of the Second District in *Great American.* The Court should reaffirm that contractors need not prove an agency intends to defraud bidders by its representations or non-disclosures, but that the government is liable for breach of implied warranty if it prepares inaccurate or incomplete plans and specifications or if it fails to disclose material information known or available to it but not to bidders. Last, as *Jasper* and *Thompson* do not correctly state the law of implied warranty, they should be overruled.

Respectfully Submitted,

Dated: February 17, 2009

MONTELEONE & McCRORY, LLP



By ______________________
JOSEPH A. MILLER
SCOTT R. LANE
JOHN M. McGOWAN
Attorneys for Defendant and Appellant Hayward Construction Company, Inc.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

The undersigned counsel of record for Hayward Construction Company, Inc. certifies that this answering brief including footnotes, consists of approximately 11, 903 words as counted by the Microsoft Word program used to prepare this brief.

Dated: February 17, 2009

MONTELEONE & McCRORY, LLP

By________________________
JOSEPH A. MILLER
SCOTT R. LANE
JOHN M. McGOWAN
Attorneys for Defendant and Appellant Hayward Construction Company, Inc.

Proof of Service

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 725 S. Figueroa Street, Suite 3200, Los Angeles, California 90017.

On February 18, 2009, I placed a true and correct copy of the within document entitled, **ANSWER BRIEF ON THE MERITS**, in a sealed envelope, addressed as set forth on the attached service list and deposited with this firm at the above address for delivery by the United States Postal Service, as indicated on the attached service list. Following ordinary business practices, the envelopes were 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.

On February 18, 2009, I caused the above-entitled document to be delivered by hand as set forth on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 18, 2009, at Los Angeles, California.

ANGELA LEONARD

Service List

Supreme Court of California Ronald Reagan Building 300 South Spring Street Los Angeles, CA 90013	Original and 13 copies *Via hand delivery*
California Court of Appeal Second Appellate District Division 2 300 S. Spring Street, 2nd Floor, N. Tower Los Angeles, CA 90013-1213	1 copy *via hand delivery*
Hon. Wendell Mortimer Los Angeles Superior Court Central Civil West Courthouse Division 307, Room 1402 600 S. Commonwealth Avenue Los Angeles, CA 90005	1 copy *via hand delivery*
John J. Immordino, Esq. Wilson, Elser, Moskowitz, Edelman & Dicker 555 S. Flower Street, Suite 2900 Los Angeles, CA 90071 Tel: (213) 624-3044 Fax: (213) 624-8060	1 copy *Attorneys for Great American Ins. Co. – via US mail*
Elwood Lui, Esq. Daniel D. McMillan, Esq. Katie A. Richardson, Esq. Jones Day 555 S. Flower Street, 50th Floor Los Angeles, CA 90071-2300	1 copy *Attorneys for Plaintiff and Respondent Los Angeles Unified School District – via US mail*
Roberta M. Fesler General Counsel Los Angeles Unified School District 333 South Beaudry Avenue 23rd Floor, Suite 194 Los Angeles, CA 90017	1 copy *Attorneys for Plaintiff and Respondent Los Angeles Unified School District – via US mail*

Gregory M. Bergman, Esq. John P. Dacey, Esq. Jorge J. Luna, Esq. Bergman & Dacey, Inc. 10880 Wilshire Boulevard Suite 900 Los Angeles, CA 90024-4101	1 copy *Attorneys for Plaintiff and Respondent Los Angeles Unified School District – via US mail*
Toby B. Hayward Hayward Construction Company 1951 S. Myrtle Avenue Monrovia, CA 91016	1 copy *Hayward Construction Company — via U.S. mail*