S165113

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

ANSWER BRIEF ON THE MERITS OF GREAT AMERICAN INSURANCE COMPANY

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American Financial Group

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INTRODUCTION

The Los Angeles Unified School District confuses tort law with contract law and seeks to impose an untenable standard which will abrogate the rights of contractors, and the sureties that bond them, to seek redress for damages incurred as a result of inaccurate plans and specifications which by law must be furnished free from defects by an owner.

The District mischaracterizes the factual underpinnings used to further its contentions and proffers an unsupported conclusion that the Court of Appeal decision in this matter would amount to strict liability for public owners.

It is respectfully submitted that this Court should reaffirm longstanding contract principles that afford contractors the opportunity to prove that a public owner failed to furnish adequate plans and specifications causing unanticipated increased costs to perform.

FACTUAL SUMMARY

Great American incorporates the factual summary by Hayward Construction Co., Inc. as if fully set forth hereat.

LEGAL ARGUMENTS

Great American incorporates the legal arguments submitted by Hayward Construction Co., Inc. and supports all of the contentions and arguments submitted by it. In further response, Great American submits the following.

I. AFFIRMING THE COURT OF APPEAL DECISION WILL NOT RESULT IN STRICT LIABILITY TO PUBLIC OWNERS.

The District claims that the underlying decision would impose liability without any showing of wrongdoing. That is simply not true. A contractor must

still prove negligence – i.e. that the public owner knew or should have known that the plans and specifications were either misleading or omitted material information.

The District argues that the case would provide a windfall for a contractor who was given an opportunity to review and inspect the site yet failed to include in its bid items which should have been discovered. But the underpinnings of such a contention is factual. And the law of contracts provides an ample safeguard for such an eventuality. If it can be shown that the contractor should have discovered or at least inquired into the possibility of unforeseen work, then there is no recovery. A showing that the contractor did not know of the undisclosed facts is an essential element of a cause of action for non-disclosure. *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285 at p. 294.

But to now establish that as a matter of law, a contractor cannot establish breach of warranty without active fraud or affirmative misrepresentation abrogates the right to even have such a factual issue litigated, and denies a fundamental right of contract.

II. PUBLIC ENTITIES ARE TREATED AS ANY OTHER CONTRACTING PARTY AND THE NORMAL RULES OF CONTRACT CONSTRUCTION APPLY.

The District, in essence, asserts that public entities are different from private owners and thus should enjoy a higher standard of proof in action where damages are sought, as the public fisc is at risk. The District ignores, though, the well established rule that when the government engages in proprietary activities, as opposed to its sovereign role, the government is treated as any other private party.

As the court in *Carruth v. Madera*, (1965) 233 Cal. App. 2d 688, 696-697 noted:

> That one party to the contract is a city does not prevent application of classic rules governing the interpretation of contracts. This we learn from Sawyer v. City of San Diego, 138 Cal.App.2d 652, at page 661 [292 P.2d 233], wherein the court said: "However, a contract entered into between a governmental body and an individual is to be construed by the same rules which apply to the construction of contracts between private persons, and in construing a contract, the primary object is to ascertain and give effect to the intention of the parties as it existed at the time of contracting."

[In accord, *Pacific Architects Collaborative v. State of California*, (1979) 100 Cal. App. 3d 110, 123]

And the distinction between proprietary activities and sovereign activities was highlighted in the case of *United States v. Georgia-Pacific Co.,* United States v. Georgia-Pacific Co. (9th Cir. Or. 1970) 421 F.2d 92, wherein the Court observed that:

> "When the government enters the market place, however, and puts itself in the position of one of its citizens seeking to enforce a contractual right (i.e., one arising from express consent rather than sovereignty), it submits to the same rules which govern legal relations among its subjects."

And as noted in Hayward's Response Brief on the Merits, implied warranty is a contract cause of action that does not require affirmative fraud or active concealment.

III. THE DISTRICT MISCONSTRUES THE WELCH CASE WHEN IT SUBMITS THAT WELCH IS RECONCILABLE WITH JASPER AND ITS PROGENY.

The Court in *Welch v. State of California*, 139 Cal. App. 3d 546 (Cal. App. 3d Dist. 1983) held that nondisclosure does not require proof of active or intentional concealment, and overturned the trial court's contrary determination, stating, at pp. 555-556:

> "Even though Warner clearly refers to three independent situations in which liability may be imposed (see also generally 4 Witkin, Summary of Cal. Law (8th ed. 1973) Torts, §§ 462-464, pp. 2726-2728), the trial court apparently succumbed to the same misunderstanding, for it concluded that the State was not liable to Welch for "fraudulent concealment" because he "failed to prove that [CALTRANS] actively and intentionally concealed Pier 10 information." The court characterized the State's failure to disclose information as "careless" rather than intentional and rejected Welch's argument that, independent of any intent to conceal, a cause of action may arise for mere nondisclosure "when combined with statements of facts which are likely to mislead in the absence of such further disclosure . . . ." (citation)"

The *Welch* court went on, at p. 556:

> "The trial court's error of law requires reversal. It is well established that, in a tort context, the "supression 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." (emphasis added)

Contrary to the District's assertion the *Welch* court did not premise its ruling on intentional concealment by the State.

IV. THE DISTRICT'S CONTENTION THAT THE DECISION WILL PROMOTE UNDERBIDDING BY CONTRACTORS IS UNFOUNDED.

Quite contrary to the District's assertions, by requiring proof of fraudulent intent, the costs of public projects will increase. As noted in Hayward's brief, a contractor will include contingencies in its bid to cover unanticipated costs that result from inaccurate plans and specifications. Sureties will have the same concerns. A surety bond covers the contract between the contractor and the public owner. The performance bond of Great American provided:

> "The condition of this obligation is that if the Contractor shall in a workmanlike manner promptly and faithfully perform all the conditions of the contract in strict conformity with the terms and conditions set forth in all contract documents, then this obligation shall be null and void, otherwise it shall remain in full force and effect." (1 GAA 0101)[1]

And when one assumes liability as surety on a conditional obligation, his or

[1] "GAA" refers to Great American's Appendix on Appeal.

her liability is commensurate with that of the principal [Civ. Code § 2808; *see, e.g., National Technical Systems v. Superior Court* (2002) 97 Cal. App. 4th 415, 423-424. Accordingly, if unanticipated items increase the amount of work required to be performed under a construction contract, the surety's liability will likewise be increased.

If what the District proposes becomes the law, sureties will increase bond premiums and may require collateral from its principals to cover the increased costs that would now be unrecoverable given the stringent standard of proof. And this will make bonding for public works contracts much more difficult.

CONCLUSION

Contractors who are misled by incorrect plans and specifications, whether intended or not, deserve the opportunity to seek recovery of increased costs for which proof of some measure of malfeasance is still required. To foreclose the opportunity in the first place is contrary to our system of jurisprudence and sense of fairness. This Court should affirm the ruling of the Second District.

Respectfully submitted,

Dated: February 18, 2009

WILSON, ELSER, MOSKOWITZ,
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BY: _____
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.520(c)(1) of the California Rules of Court, that the enclosed brief was produced using 14-point type, including footnotes, and contains 1,269 words. Counsel relies on the word count of the Word computer program used to prepare this brief.

Dated: February 18, 2009

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address 555 South Flower Street, Suite 2900, Los Angeles, California 90071159086.1.

On February 18, 2009I served the within **ANSWER BRIEF ON THE MERITS OF GREAT AMERICAN INSURANCE COMPANY** on the interested parties in this action by placing [ ] the original [x] a true copy thereof, enclosed in a sealed envelope addressed as follows:

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(STATE COURT) 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.

Raquel Burgess
Raquel Burgess

LOS ANGELES UNIFIED SCHOOL DISTRICT v. GREAT AMERICAN INSURANCE COMPANY, et al.
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