No. S 165113

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 A Decision By The Court Of Appeal
Second Appellate District, Division Two
Case No. B1389133
Los Angeles County Superior Court, Honorable Wendell Mortimer
Case No. BC 247848

COMBINED APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND PROPOSED AMICUS BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE IN SUPPORT OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE:

Pursuant to Rule 8.520(f) of the California Rules of Court, the California School Boards Association ("CSBA") and its Education Legal Alliance ("Alliance") respectfully submit this application for permission to file the accompanying amicus curiae brief in support of Plaintiff-Respondent Los Angeles Unified School District ("Respondent"). CSBA is a non-profit organization that, through the Alliance, confronts legal issues of statewide concern to school districts and county offices of education. Among these issues is continued student enrollment and the need to replace woefully inadequate and aging schools. In view of CSBA's vast experience addressing issues surrounding school construction, amicus submits that its brief will assist the Court in deciding the public construction issue before it.

I. AS REPRESENTATIVE OF NEARLY 1,000 SCHOOL DISTRICT GOVERNING BOARDS THROUGHOUT CALIFORNIA, CSBA HAS A SIGNIFICANT INTEREST IN THE OUTCOME OF THIS APPEAL

CSBA is a non-profit, member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of the CSBA, the Alliance strives to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, nearly 800 of California's 1,000 school districts and county offices of education, by addressing issues of statewide concern to its members. The Alliance's activities include initiating and joining in litigation where the interests of public education are at stake.

Due to continued enrollment and the need to replace aging schools, California school districts will face the need to construct numerous schools

and modernize existing schools over the next several years. The need and estimated costs are authoritatively documented in a publication from the California Department of Education entitled *Fact Book 2008: Handbook of Education Information*.[1] The most salient data is the number of new classrooms required during a five year period from 2007-2012. According to this report, the total number is 29,214 classrooms—5,843 per year. For the period of 2006-2011, new construction needs (50% state share) are estimated at $8.7 billion, and modernization needs (60% state share) are estimated at $3.5 billion, totaling $12.2 billion. As these numbers reflect, much is at stake with respect to future school construction contracts. The outcome of this case will thus have a direct impact on CSBA member schools and the Alliance's advocacy efforts.

II. THE PROPOSED AMICUS BRIEF WILL ASSIST THE COURT IN DECIDING THE ISSUE ON REVIEW

The issue before this Court is whether a contractor must be required to prove active concealment or intentional misrepresentation in order to prevail on a contract claim for breach of implied warranty for nondisclosure. The CSBA's member schools have extensive experience contracting for the construction of public schools, and are familiar with the legal questions underlying this issue. CSBA believes that additional briefing is necessary to cover matters not fully developed in the parties' briefs, including the Court of Appeal's erroneous ruling on the implied warranty issue given the nature of the Completion Contract in this case.

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[1] The *Fact Book* is an annual publication of the California Department of Education that contains a compendium of statistics and information on a variety of subjects and issues concerning education in California. The publication is designed to assist educators, legislators, and the general public, and to aid reporters covering topics of education. (See <http://www.cde.ca.gov/re/pn/fb/documents/factbook2008.pdf>.)

III. RULE 8.520(F)(4) COMPLIANCE

The CSBA and the Alliance represent that Jones Day, counsel for the Respondent Los Angeles Unified School District, participated in the authoring of the proposed amicus brief. (See Cal. Rules of Court, rule 8.520(f)(4)(A)-(B).)

CONCLUSION

For all the foregoing reasons, the CSBA and its Alliance respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: May 1, 2009

Respectfully submitted,

By: _____

Richard L. Hamilton
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Counsel for Amicus Curiae
CALIFORNIA SCHOOL
BOARDS ASSOCIATION AND
ITS LEGAL ALLIANCE

CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS LEGAL ALLIANCE'S AMICUS BRIEF IN SUPPORT OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal set forth its broad strict liability reading of the implied warranty in the case of nondisclosure notwithstanding that the implied warranty does not even apply here for three simple reasons. *First*, Appellant Hayward Construction Company Inc. ("Hayward") was not claiming that the original plans and specifications were defective, but was instead challenging the completeness of the pre-punch list. The implied warranty, and the cases applying it like *Spearin*, apply only to design specifications, which simply are not at issue here. *Second*, the Completion Contract was tantamount to a performance specification that outlined the result Hayward was to achieve (i.e., complete and fix the work of the prior contractor), but did not specify how to do it. It is well-established that the implied warranty does not apply to performance specifications. *Third*, and relatedly, the Completion Contract, as the trial court found, required Hayward to fix all latent and patent defects in the work, and thus was akin to an "as is" contract. A contractor cannot use the implied warranty to trump express contract provisions outlining its agreed-upon scope of work. This Court can reverse the Court of Appeal's decision for any one of these reasons.

Moreover, allowing the Court of Appeal's decision to stand will result in a host of negative policy implications. Like other public entities, public school construction contracts are generally awarded through competitive bidding to the contractor submitting the lowest responsive bid. (See Pub. Contract Code, § 20111.) As part of the procurement process, school districts expect contractors to exercise diligence when reviewing plans and other related material. Yet under the Court of Appeal's holding,

contractors who carelessly bid a project may be able to shift any resulting loss to the public owner if the contractor later discovers purportedly material information not disclosed prior to bidding, even if the information was not deliberately withheld, and even if the contractor expressly agreed to fix all latent defects. Such a rule of law wholly fails to consider the effects it would have on public entities operating on increasingly limited budgets, and on the taxpaying public that funds these projects.

II. ARGUMENT

A. The Court of Appeal Should Be Reversed Because the Implied Warranty Does Not Even Apply Here

1. Hayward is not attacking the design specifications, and thus cannot benefit from the implied warranty

Unlike traditional breach of implied warranty claims involving a single contractor and public owner, completion contracts pose unique factors for consideration in determining the proper party with whom liability for any alleged defects should rest. As is evident from the briefing in this case, a chief factor for consideration by both the California Legislature (in enacting laws governing public construction contracts) and the judiciary (in interpreting those laws and applying decisional precedent) is proper risk allocation. That assessment necessarily differs between original and completion contracts where, as this case illustrates, the completion contractor's challenge is to a prior contractor's performance, not the project's original design. Accordingly, the issue warranting reversal in this case is a narrow one, limited to the terms of the Completion Contract that Hayward, an experienced contractor, knowingly executed.

Those terms expressly provided that Hayward was required to remedy any defects in the prior contractor's work, whether patent or latent. (See OB at p. 5; RB at pp. 5-6.) By agreeing to the terms of the Completion Contract, Hayward shouldered the risk that it might encounter

conditions different from those specified on the courtesy pre-punch list. Indeed, Hayward, as the construction expert, having reviewed the materials provided by the Respondent and having equal access to the project site before signing the Completion Contract, was in the best position to assess defects in the prior contractor's work. Because Hayward does not challenge the completeness of the original plans and specifications, the implied warranty of completeness does not apply to this case. Hayward cites no case to the contrary, and all of the pertinent cases that the parties cite discuss the application of the warranty to the original design plans and specifications. This is thus just like any other contract action, the outcome of which should turn on what Hayward agreed to do in its contract, not some implied warranty that does not apply.

Without an erroneous application and interpretation of the implied warranty, Hayward would have not have a contractual basis for more money. Hayward's contention that it understood the "pre-punch list" to constitute the full range of defects it could expect to encounter and be required to remediate (as though the pre-punch list was the functional equivalent of a final punch list) is belied by the fact that it entered into a time and materials contract. Time and materials contracts are generally used only when it is impracticable to estimate accurately "the extent or duration of work or to anticipate costs with any reasonable degree of confidence." (48 C.F.R. § 16.601(b).) By so agreeing, and also agreeing to a guaranteed maximum price, Hayward knowingly assumed the risk that it would encounter construction defects not listed on the pre-punch list. Had Hayward wanted additional safeguards in place, it could have insisted on such terms as part of the Completion Contract, but it did not.

2. Hayward agreed to performance specifications to which the implied warranty does not apply

Through its Completion Contract, Hayward agreed to provide a specific result: fix the prior contractor's incomplete and defective work. As the Respondent points out in its briefing, Hayward was provided a preliminary list of defects that required remediation (Opening Brief [hereinafter "OB"] at p.5; Reply Brief [hereinafter "RB"] at pp. 5-6); however, the Completion Contract did not dictate the means by which such remediation must be achieved. (See RB at p.5.) Rather, relying on the contractor's expertise in construction, as is common in the execution of public construction contracts, the Respondent contracted with Hayward to provide the end result of a complete school for its students free of construction defects. How Hayward achieved that end-result was within its expert discretion.

This case is thus akin to one involving performance specifications—not design specifications—to which the implied warranty does not apply. (See *Stuyvesant Dredging Co. v. United States* (Fed. Cir. 1987) 834 F.3d 1576, 1582 [distinguishing *United States v. Spearin* (1918) 248 U.S. 132 on the basis that it applies narrowly to design specifications, not to performance specifications, and noting that "[d]esign specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to determine how to achieve those results."]; see also *J.L. Simmons Co. v. United States* (Ct. Cl. 1969) 412 F.2d 1360, 1362.) Thus, the implied warranty simply does not apply given that Hayward assumed a performed-based obligation.

3. The Completion Contract is an "as is" contract to which the implied warrant does not apply

Hayward agreed to fix *all* defective and incomplete work, whether patent or latent, thereby taking the construction site "as is." (See OB at p. 5; RB at pp. 5-6) By agreeing to an "as is" contract, Hayward took on the

risk of which of it now complains and must fulfill the scope of work that it agreed to, which cannot be replaced with narrower obligations imposed by some implied warranty. (See *Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 333-334 ["as is" provision relieved seller from liability for defects]; *Roberts Distributing Co. v. Kaye-Halbert Corp.* (1954) 126 Cal.App.2d 664, 669 ["as is" provision in contract prevents the representations of the seller, although relied on by the buyer, from constituting express or implied warranties].) This is consistent with the general rule that an implied warranty cannot circumvent express contract terms. (See, e.g., *Tanner v. Title Ins. & Trust Co.* (1942) 20 Cal.2d 814, 824 [implied contract terms "are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed"].) For all of these reasons, the terms of the Completion Contract control, not the implied warranty, and federal cases like *Spearin* that discuss the implied warranty simply do not apply here.

What is more, even if *Spearin* could be held to apply to the facts of this case, the Court's holding rested on the determination that the governmental entity, as provider of the plans and specifications, was in the best position to evaluate inherent deficiencies in those plans. In that case, the United States Navy, which had at its disposal a host of in-house engineers who participated in preparing the drawings and specifications, issued a set of plans to be bid and constructed in strict accordance with federal government bidding practices. Upon these facts, the Supreme Court held that the Navy, with all its engineering capabilities, was in the best position to evaluate risks inherent in the project's design, and thus the contractor had no responsibility other than to perform in strict accordance with the plans. Applying that same reasoning to the facts of this case, it becomes evident that *Spearin* supports a rule of law that imposes implied warranty liability on the party best able to evaluate inherent construction

risks. Where, as here, the alleged defects concern the performance of construction, and not the construction's design, the contractor is logically in the best position to identify and evaluate any defects in construction.[2]

III. CONCLUSION

CSBA and its Alliance submit that where a public contractor knowingly agrees to complete construction of a project containing numerous construction defects, long-standing contract principles and sound public policy counsel that the contract's express terms should prevail over implied terms. Courts should not depart from legal precedent and extend the implied warranty into situations in which simply does not apply. The Court of Appeal's holding to the contrary constitutes reversible error. For this reason and those discussed above, CSBA and its Alliance respectfully request that this Court reverse the Court of Appeal's decision.

[2] In all events, this Court should be reluctant to adopt federal procurement law without considering the unique concerns of California's public policy as it relates to public works contracts. California law differs from federal law in how it regulates the performance of public construction contracts. For example, federal law provides that a contractor may recover in excess of the contract price when there is such a large number of change orders that the contract has been "abandoned." This Court has expressly rejected application of this abandonment theory to public contracts in California, even though the doctrine applies to federal contracts. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 238-239 [holding that the abandonment theory "is fundamentally inconsistent with the purposes of [California's] competitive bidding statutes".].)

Dated: May 1, 2009

Respectfully submitted,

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