No. 15886.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DIXIE TANK & BRIDGE CO., a corporation,

*Appellant,*

*vs.*

COUNTY OF ORANGE, a County of the State of California, and WILLIS H. WARNER,

*Appellees.*

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## PETITION FOR REHEARING.

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*To the Honorable Stephens, Chambers and Barnes, Circuit Judges:*

Pursuant to Rule 23, Rules of the Ninth Circuit, this Petition for Rehearing is respectfully submitted. It is certified by counsel that in his judgment it is well founded and that it is not interposed for delay.

The rehearing is sought because the appellees believe there are incorrect statements of law and fact in the opinion as rendered and filed March 4, 1959.

## I.

## Error That Mr. Warner Might Be Liable.

The first and most important error we believe which is contained in the opinion is that the defendant Willis Warner as an individual might be liable and that this liability raises a genuine issue of fact. The Court concedes the general rule in footnote 5 that officers are *not* personally liable under the contracts unless the contract shows that the officer clearly intended to assume personal liability. Or as stated in the case of *New York-Charleston Steamship Company v. Harbison* (2d Cir.), 16 Fed. 688—one of the cases cited by this Court in that footnote—at page 690, that "Where it is sought to charge him with a personal responsibility, the facts and circumstances ought to be such as to show clearly that both parties acted upon the assumption that a personal liability was intended" or, to quote from another case used by the Court herein in that same footnote, which again, is representative of the general law on the subject, the *Sims Printing Company v. Kerby* case (106 P. 2d 197), at page 200, sums up the situation as follows:

> "We consider next the liability of defendant in his private capacity. There are three factual situations which may have existed. Both plaintiff and defendant may have believed in good faith, knowing all the facts of the case, that the latter had a right as a matter of law to enter into the contract on behalf of the state. Under the rule above stated, if both parties acted in good faith, with a full knowledge of the facts but were mistaken as to the law, there is no personal liability of the defendant. Or, it may be that both parties acted with full knowledge of the facts but in bad faith, knowing the law to be against them, but believing that they could 'put over something' on the auditor. In such a case, they are in

pari delicto, and plaintiff may not recover from defendant. On the other hand, it may be that defendant deliberately and intentionally misled plaintiff as to the fact that part of the copy covered the 1936 measures, and the plaintiff printed that part of the pamphlet relying upon the statements or acts of defendant, and believing in good faith that what it printed was part of the 1938 measures. In the latter case, an action for fraud would lie against defendant."

The appellant herein never once has alleged a fact, either by his complaint in any amendment or in his affidavit to support his own motion for summary judgment, that Mr. Warner either intended to be personally bound or acted upon the assumption that he was personally bound or that there were any facts or circumstances to show personal undertaking of liability. Rules 8 and 9, Federal Rules of Civil Procedure, require a statement of the specific grounds upon which relief is sought, and fraud must be specially pleaded. All the appellant can do is quote the alleged warranty and allege liability thereon. No case cited has ever held a public officer liable for an undertaking in his official capacity. The case of *Dawson v. Martin,* 150 Cal. App. 2d 379 at 382, 309 P. 2d 915 at 917, was cited by these appellees in their brief at page 4 as a California holding specifically on the point that a member of a Board of Supervisors is *not* liable in damages for his official acts, except as such liability is prescribed by statute. The alleged warranty herein merely stated two things:

1. That Mr. Warner was "fully authorized to sign, execute and deliver" the contract; and
2. That "all legal requirements have been fully complied with."

Number 1 is fully supported by the record herein showing that in truth a Minute Order adopted by the full Board authorized Mr. Warner to sign the contract. There was no falsity about the *authorization* he had received to sign the contract and none is alleged.

Number 2 was an alleged warranty that the legal requirements for the contract were complied with. First of all, it must be conceded that in California, as elsewhere, the parties to a contract are presumed to have in mind and to know all the applicable laws pertaining to the contract, *Robertson v. Dodson,* 54 Cal. App. 2d 661 at 664, 129 P. 2d 726 at 728; *Mehlstedt v. Fugit,* 79 Cal. App. 2d 562 at 566, 180 P. 2d 777 at 779; *Monson v. Fischer,* 118 Cal. App. 503 at 516, 5 P. 2d 628 at 633; *Hays v. Bank of America,* 71 Cal. App. 2d 301 at 304, 162 P. 2d 679 at 681; *Traders and General Insurance Company v. Pacific Empire Insurance Company,* 130 Cal. App. 2d 158 at 164, 778 P. 2d 493 at 497; *Alpha Beta Food Markets, Inc. v. Retail Clerks Union Local No. 770,* 45 Cal. 2d 764 at 771, 291 P. 2d 433 at 437; even though those laws may affect the very validity of the contract, *Burke v. Meyerstein,* 94 Cal. App. 349 at 353, 271 Pac. 343 at 345; *Hales v. Snowden,* 19 Cal. App. 2d 366 at 369, 65 P. 2d 847 at 849. Second, the contract herein was a printed one on the form supplied by the Dixie Tank Company and, again, it is California as well as universal law that a contract is to be construed most strongly against the writer. *Payne v. Newval,* 155 Cal. 46 at 50, 99 Pac. 476 at 478; *Nerski v. Hammond Lbr. Co.,* 202 Cal. 643 at 645, 262 Pac. 755 at 756; *Hunt v. United Bank and Trust Co.,* 210 Cal. 108 at 116, 291 Pac. 184 at 188; *Marsh and Co. v. Tremper,* 210 Cal. 572 at 574, 292 Pac. 950 at 951; *Weil v. California Bank,* 219 Cal. 538 at 541, 27 P. 2d 904 at 905;

*Pac. Lbr. Co. v. Industrial Acc. Com.,* 22 Cal. 2d 410 at 422, 139 P. 2d 892 at 898; *Taylor v. Hill,* 31 Cal. 2d 373 at 374, 189 P. 2d 258 at 259.

Civil Code, Section 1654, specifically provides not only this rule of construction in ordinary contracts but that in a contract between a public officer or body and a private party, it is presumed "all uncertainty was caused by the private party."

If, then, Mr. Warner's "warranty" amounts to stating that the "legal requirements" were "complied with," and both he and the appellant knew the California law regarding adoption of plans and specifications (as the section is quoted in the Court's footnote No. 2, not merely "failure to have *adequate* plans and specifications," as the Court states at page 4 of its decision herein) and the California law requiring advertisements for bids, then the appellant had as much knowledge of the facts if not more; the appellant did not bid on any such adopted plans, and could not have, for there were none; the appellant did not bid in response to any such advertisement for bids, and could not have, for there was none.

In short, the appellant knew the significant facts as well as anyone else. This appears from the face of the Complaint; the appellant never once has alleged that Mr. Warner's knowledge was any superior to appellant's.

What appellant is seeking to do, in this alternative count against Mr. Warner, is to place a seventy-five hundred dollar loss on an innocent ministerial officer who was directed by a majority of the Board of Supervisors to sign a specific contract. The judgment should be against the Board in its entirety, if anyone. Of course, this is a transparent means of escaping the palpable intent and

mandate of the Government Code making the contract void.

If the contract is void for being contrary to the law, the alleged warranty is also void. 46 Am. Jur. 305 and 483, *Sales,* Secs. 124 and 299.

## II.

## Error That an Emergency Can Be Found.

The trial judge had nothing before him, and there is nothing before this Court, setting forth the necessary material facts to show that an emergency existed. It was incumbent upon the appellant, in its successive amendments to its Complaint, to state the material facts upon which it sought recovery. Rule 8, Federal Rules of Civil Procedure. Only in its original Complaint did it refer to "itemization" which the County was allegedly requiring [Par. VIII; R. 9]. This allegation was dropped in the subsequent versions of the Complaint. As pointed out in this appellee's brief (p. 11), this was a reference to the emergency statute, and the County had suggested that the appellant submit a bill based upon that section. If the appellant wishes to bill the County under *that* section, it is free to do so. It is unfair to base an appellate decision on the statute when the appellant has neither attempted to bill the County under it nor brought its action under it, particularly when the reference in the first Complaint was that the *appellee* suggested it be done.

## III.

## Conclusion.

We submit that the decision that Mr. Warner may be found liable is most serious and that a rehearing should be granted. It is disturbing that an individual member

of a Board of Supervisors, authorized by action of the full Board to sign a specific contract, stands to lose seventy-five hundred dollars simply because the appellant's printed form included a statement that he was thus agreeing that "legal requirements" had been complied with, particularly when the appellant must have known (there is no allegation to the contrary) that the legal requirements could *not* have been.

Secondly, if the appellant seeks recovery on the emergency statute, it should bill the appellee in that manner—listing the items as required by the Code section—and ground its action thereon. It is free to do so at any time.

Counsel hereby certifies that in their judgment this petition is well founded and not interposed for delay.

Respectfully submitted,

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*Assistant County Counsel,*

and

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*Assistant County Counsel,*

*Attorneys for Appellees.*

## Hearing En Banc.

Should a majority of this Court grant a rehearing, it is the suggestion of these parties that, pursuant to Rule 23, Rules of this Court, due to the seriousness of the issues herein, the case be heard by the Court *en banc*.

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