IN THE SUPREME COURT OF FLORIDA

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Defendant/Petitioner,

vs. Case No. 72,451

COASTAL CAISSON DRILL CO., INC.,

Plaintiff/Respondent.

An Appeal From the District Court of Appeal for the Second District of Florida

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INITIAL BRIEF OF PETITIONER

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INTRODUCTION

This is an appeal from a decision of the Second District Court of Appeal in which the court held invalid as against public policy a waiver provision in a subcontract between C-Way Construction Company, Inc. ("C-Way"), defendant below, and Coastal Caisson Drill Co., Inc. ("Coastal"), the respondent here and plaintiff below. Specifically, the surety on C-Way's payment bond, American Casualty Company of Reading, Pennsylvania ("American") the petitioner here and a defendant below, contends that Coastal expressly waived its right to sue American on C-Way's payment bond. Consequently, it is American's position that this waiver precludes Coastal from maintaining suit against American for C-Way's failure to comply with the terms of the subcontract. The Circuit Court found in favor of American and dismissed Coastal's suit against American, but the District Court reversed, thus prompting the present appeal.

This Court has jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(v). For ease of reference, the Defendant/Petitioner, American Casualty Company of Reading, Pennsylvania, shall be referred to throughout the brief as "American". The prime contractor, C-Way Construction Company, Inc., shall be referred to as "C-Way". Plaintiff/Respondent, Coastal Caisson Drill Co., Inc., the subcontractor, will be referred to as "Coastal". The Florida Department of Transportation will be referred to as the "Department." All references to the appendix will be cited as (A.__). All references to the record will be cited as (R.).

STATEMENT OF THE FACTS AND CASE

In 1983 the Florida Department of Transportation (the "Department") accepted bids for improvements to the New Pass Bridge in Sarasota County. C-Way competed for, and was awarded, the New Pass Bridge contract. As a condition of accepting the contract, C-Way was required to provide the Department with a performance and payment bond, in accordance with sections 255.05 and 337.18, Florida Statutes (1985). (R. 191)

Section 255.05(1) provides:

> (1)(a) Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work, to execute a payment and performance bond with a surety insurer authorized to do business in this state as surety. Such bond shall be be conditioned that the contractor perform the contract in the time and manner prescribed in the contract and promptly make payments to all persons defined in s. 713.01 whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. Any claimant may apply to the governmental entity having charge of the work for copies of the contract and bond and shall thereupon be furnished with a certified copy of the contract and bond. The claimant shall have a right of action against the contractor and surety for the amount due him. Such action shall not involve the public authority in any expense. When such work is done for the state and the contract is for $100,000 or less, no payment and performance bond shall be required. At the discretion of the official of board awarding such contract when such work is done for any county, city, political subdivision, or public authority, any person entering into such a contract which is for $200,000 or less may be exempted from executing the payment and performance bond. When such work is done for the state, the director of the Department of General Services may delegate to the state agencies the authority to exempt any person entering into such a contract amounting to more than $1000,000 but less than $200,000 from executing the

payment and performance bond. In the event such exemption is granted, the officer or officials shall be personally liable to persons suffering loss because of granting such exemption.

(b) The Department of General Services shall adopt rules with respect to all contracts for $2000,00 or less, to provide:

1. Procedures for retaining up to 10 percent of each request for payment submitted by a contractor and procedures for determining disbursements from the amount retained on a pro rata basis to laborers, materialmen, and subcontractors, as defined in s. 713.01.

2. Procedures for requiring certification from laborers, mateialmen, and subcontractors, as defined in s. 713.01, prior to final payment to the contractor that such laborers, materialmen, and subcontracotrs have no claims against the contractor resulting from the completion of the work provided for in the contract.

The state shall not be held liable to any laborer, materialman, or subcontractor for any amounts greater than the prorata share as determined under this section.

Section 337.18(1) states:

A surety bond shall be required of the successful bidder in an amount equal to the awarded contract price. For a project for which the contract price is $150,000 or less, the department may waive the requirement for all or a protion of a surety bond if it determines the project is of a noncritical nature and nonperformance will not endanger public health, safety, or property, The department may require alternate means of security oif a surety bond is waived. The surety on such bond shall be a surety company authorized to do business in the state. All bonds shall be payable to the Governor and his successors in office and conditioned for the prompt, faithful, and efficient performance of the contract according to plans and specifications and within the time period specified, and for the prompt payment of all persons furnishing labor, material, equipment, and supplies therfor; however, whenever an improvement, demolition, or removal contract price is $25,000 or less, the security may, in the descretion of the bidder, be in the form of a cashier's check, bank money order of any state or national bank, certified check, or postal money order.

C-Way furnished the bonds in accordance with the two statutes cited above.

Subsequent to execution of its contract with the Department, C-Way subcontracted some of the work to Coastal Caisson Drill Co., Inc. ("Coastal"). Under the terms of the subcontract, Coastal agreed to look only to C-Way for payment by expressly waiving its

right to sue C-Way's surety, American. Coastal furnished materials, labor, and equipment as provided by the subcontract and billed C-Way for the amounts due. The total amount due on the subcontract was $171,497.07. When C-Way failed to make prompt payment to Coastal, Coastal sued both C-Way and American for the debt which, as of that date, remained unpaid. The circuit court found C-Way fully liable on the debt, and dismissed the complaint as to American, finding that Coastal waived its rights against American when it signed the subcontract. The circuit court permitted Coastal to amend its complaint twice, inviting Coastal to demonstrate a public policy basis for invalidating Coastal's waiver. When Coastal was unable to demonstrate the existence of such a policy, the circuit court dismissed Coastal's complaint against American with prejudice.

On appeal, the Second District Court of Appeal reversed the judgment of the circuit court. The District Court concluded that "allowing private waiver of the statutory right to sue on the construction bond required by Section 255.05 could frustrate the intent of the legislature by undermining the bidding process, and by risking state involvement in contractor/subcontractor disputes and the consequent delays of public works projects." (Emphasis added.) Based on this conclusion, the District Court held that such waiver was in "derogation" of Florida's public policy, and therefore unenforceable. However, the District Court certified the following question to this court as a matter of great public importance:

> May a subcontractor furnishing labor, services, or equipment worth over $200,000.00 on a public works project lawfully waive its rights to the contractor's bond required pursuant to sections 255.05 and 337.18, Florida Statutes (1985)

SUMMARY OF THE ARGUMENT

Unless expressly prohibited by statute or public policy, all stutory rights are waivable under Florida law. The waiver of statutory rights created by sections 255.05 and 337.18, Florida Statutes, is enforcable if the waiver is clear and unambiguous and is not against public policy. Because the payment bond waiver set forth in paragraph 6 of the C-Way/Coastal subcontract was clear and unambiguous, and because such waiver does not conflict with any established public policy, District Court erred in refusing to enforce the waiver.

In cases involving mechanics' liens, Florida Courts have upheld the language used in C-Way's subcontract as clear and unambiguous. When language in a contract is straight forward, it evidences the intent of the parties and must be enforced by courts.

The District Court incorrectly discovered an ambiguity in the subcontract, and then used the nonexistent ambiguity to nullify the waiver. The District Court's reliance on the ambiguity as a basis for its decision was erroneous. Furthermore, in the absence of a clearly erroneous construction of the subcontract by the trial court, the District Court was obliged to adopt that construction. The District Court's opinion lacks an analysis of the trial court's construction. Therefore, it was improper for the District Court to substitute its judgment for that of the trial judge.

Waiver of the protection of sections 255.05 and 337.18, Florida Statutes, does not violate the express language of either statute or Florida public policy. Neither statute expressly prohibits the waiver of a subcontractor's right to sue on a payment bond. Furthermore, apart from

the District Court's decision in this case, neither the legislature nor the courts recognize any public policy prohibiting waiver.

The District Court expressed concern that enforcement of such waivers could undermine the competitive bidding process. The Court's concern is based on conjecture, rather than fact. The type of waiver at issue in this case simply cannot affect the competitive bidding process.

The District Court's conclusion that such a waiver is contrary to public policy was based on assumptions that are not supported by facts in the record. Those faulty assumptions lead the District Court to erroneously conclude that section 255.05 was intended to protect the general public in the same manner that consumer protection statutes protect the general public. The District Court incorrectly characterized section 255.05 as a statute intended to protect the state, and therefore the public. The District Court then used that characterization as the basis for creating a public policy prohibiting a subcontractor from waiving its right to sue on a payment bond.

The District Court's reasoning is faulty for three reasons. First, the state's sovereign immunity protects the state from litigation, and that protection is unaffected by the waiver at issue. Second, the timely completion of state projects is guaranteed by performance bonds furnished pursuant to section 255.05. That protection is unaffected by the waiver at issue. Third, "subcontractors and suppliers" are not the same as the "general public". Therefore, they are not entitled to the same protection as the general public. Whereas encroachment on the public policy favoring freedom of contract may be justifiable to protect the general public, such

encroachment is not justified to benefit a small section of the public.

The District Court's assumption that section 255.05 protects the general public is erroneous. In determining whether subcontractors can waive the right to sue on a section 255.05 payment bond, the District Court improperly ignored case law construing the federal Miller Act. Because sections 255.05 and 337.18 are patterned after the Miller Act, 40 U.S.C. §270(a), judicial interpretations of that act are persuasive authority in the construction of section 255.05. Federal courts have held that the right to sue on a payment bond under the Miller Act is waivable. To date, Florida courts have manifested no intent to deviate from the federal policy on waiver of the right to sue on contractor's payment bonds. They should not do so now.

The District Court likewise improperly rejected the persuasive effect of the mechanics' lien law, chapter 713, Florida Statutes (1987). Since the purpose behind the enactment of sections 255.05 and 337.18 was to provide material men and suppliers on public contracts with the same protection given material men on private contracts through mechanics' liens, analogy to the mechanics' lien law is appropriate. Section 713.209(2), Florida Statutes expressly allows the waiver of mechanics' liens. Analogously, the policy underlying sections 255.05 and 337.18 permits this waiver.

Finally, section 255.05 expressly allows certain exemptions from the requirement of a contractor's payment bond these exemptions demonstrate that the right to sue on a payment bond is not an absolute right afforded all subcontractors and suppliers on every public project.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY PRINCIPLES JUDICIAL CONSTRUCTION WHEN IT NULLIFIED THE WAIVER PROVISION

When it granted American's motion to dismiss, the circuit court determined that the waiver provision in the C-Way/Coastal subcontract was clear and unambiguous. On appeal, the District Court rejected the trial court's analysis and found the provision ambiguous. The District Court erred both as to the proper application of rules of judicial construction, and as to the standard necessary to reverse a finding of the trial court.

The District Court explained its finding as follows:

> The parties had typed on the face of this form contract a provision expressly stating that performance was to be in accordance with applicable state regulations, without excepting any specific regulation or portion of the contract. This provision appears to conflict with the general waiver of rights contained in the list of conditions printed on the back of the contract. (Emphasis added)

(A.1-4). There is no mention, however, of "state regulations" anywhere in the subcontract. The subcontract does provide that:

> Performance of this work is to be in accordance with all applicable Florida Department of Transportation plans, specifications, and supplementals.

(R.5-6) This clause incorporates the documents forming the prime contract -- the plans, specifications and supplementals -- into the subcontract. Of these, only the specifications mention the payment bond, and then only to address the requisite form of the bond at the time the contract is awarded. No provision of the subcontract, whether expressly stated on the face of the contract, or incorporated by reference, purports to restrict the rights of either party to waive statutory rights. There simply is no conflict between the waiver provision and any other provision of the subcontract. Absent a

conflict in the subcontract language, it was improper for the court to resort to judicial construction to alter the legal effect of the subcontract provisions.

Where the language of a contract is clear and unambiguous, it is controlling as to the intention of the parties and, thus, as to the legal effect of the contract provisions. International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv., 400 F.2d 465 (5th Cir. 1968). One court has specifically stated: "The intention of the parties to a contract is to be deducted from language employed, and such intention, when expressed, is controlling, regardless of intention existing in the minds of parties." Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 138 So. 21, 23, (1931). Further, it is a well settled rule of contract construction that the words of a contract are the best possible evidence of the intent of the contracting parties and all words are to be given meaning, if possible. Schweitzer v. Seaman, 383 So.2d 1175 (Fla. 4th DCA 1980). When the terms of a contract are clear and unambiguous, the courts cannot engage in construction or interpretation of the plain meaning. Hurt v. Weatherby Ins. Co., 380 So.2d 432 (Fla. 1980).

The Court must give full legal effect to all provisions incorporated into the subcontract between Coastal and C-Way. Coastal cannot elect at a later date to be bound only by those terms of benefit. Once the parties have reduced their understanding to a written contract, their conduct is governed by the agreement and courts must look to the contract in determining the parties' rights and obligations. Fletcher v. Laguna Vista Corp., 275 So.2d 579 (Fla. 1st DCA 1973). In this case, just as C-Way was obligated to pay Coastal for its services, Coastal is clearly bound by the bond waiver provision.

In cases upholding waivers of mechanics' liens, Florida courts have held that language identical to that used in paragraph six of the subcontract is clear and unambiguous. See Orlando Cent. Park, Inc. v. Master Door Co., 303 So.2d 685 (Fla. 4th

DCA 1974). See also Jowein, Inc. v. Sudy Realty Corp., 73 So.2d 227 (Fla. 1954). It is irrelevant to the issue of ambiguity that these cases concern mechanics' liens rather than bonds for public works, since the contract provisions use the same language to accomplish the same objective waiver of a statutory right.

Where contract language is clear and unambiguous, a party is bound by, and a court is powerless to rewrite, the terms of the contract. See National Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078 (Fla. 3d DCA 1984) and cases cited therein. Coastal and C-Way voluntarily executed a subcontract with clear, unambiguous terms, including waiver, and Coastal is bound by these terms.

Paragraph 6 is straightforward, and the subcontract itself is clear and unambiguous as a whole. Even if a conflict had existed, principles of judicial construction obligated the court to reconcile the conflicting provisions if possible. In this case the court merely announced the existence of a conflict and an ambiguity. The court made no attempt to reconcile the perceived conflicts prior to effectively striking the bond waiver provision. The court's action flies in the face of judicial precedent established by this Court.

Additionally, the District Court made no finding that the trial court's construction of the subcontract was clearly erroneous. The District Court simply stated that there "appeared" to be a conflict between the waiver provision and some other provision, and then proceeded to substitute its judgment for that of the trial court. The District Court failed to analyze whether the trial court's construction of the subcontract was clearly erroneous before making this substitution. This action by the District Court violated the rule that the construction placed on a contract by the trial court must be sustained on appeal it is shown to be clearly erroneous. Williams v. Ray, 144 So. 679 (Fla. 1932); Howard v. Howard, 467 So.2d 768 (Fla. 1st DCA 1985); Discount Drugs, Inc. v. Tulip Realty Co., 396 So.2d 764 (Fla. 4th DCA 1981); Albert v. Albert, 186 So.2d 809 (Fla 3d

DCA 1966). Absent such showing, the District Court erred in constructing the subcontract to create an ambiguity.

The trial court found that the waiver provision was clear and unambiguous. The District Court erred by failing to apply principles rules of judicial construction, and by substituting its own judgment for that of the trial court without a showing that the trial court was clearly erroneous. Therefore, the District Court's decision should be reversed.

II. A SUBCONTRACTOR'S WAIVER OF THE PROTECTIONS AFFORDED BY SECTION 255.05, FLORIDA STATUTES, DOES NOT VIOLATE PUBLIC POLICY.

It is well established in Florida that "[a] party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution. Rader v. Prather, 100 Fla. 591, 130 So. 15,17 (1930); Nelson v. Dwiggins, 111 Fla 298, 149 So. 613 (1933); Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (Fla. 1945); Colonial Penn Communities, Inc. v. Crosley, 443 So.2d 1030 (Fla. 5th DCA 1983). The plain import of these decisions is that all statutory rights are waivable, unless waiver is expressly prohibited by statute. Sections 255.05(1) and 337.18(1), Florida Statutes, contain no language expressly restricting the right of a subcontractor or supplier to waive its right to sue on a payment bond. Section 255.05(1) merely requires the prime contractor, "before commencing work, to execute a payment . . . bond with a surety insurer authorized to do business in this state as a surety." C-Way complied with this requirement by obtaining a payment bond from American. Noticeably absent from this statute is any language limiting the right of subcontractors and suppliers to waive their rights to sue on the payment bond. Likewise, the only pertinent language in section 337.18(1) provides that "[a] surety shall be required of the successful bidder in an amount equal to the awarded contract price." Although this section requires the prime contractor to furnish the Department with a payment and performance bond, the statute

clearly does not restrict the rights of subcontractors to waive the right to sue on that bond.

Despite the absence of an express prohibition against waiver, the District Court held that such waivers are against public policy. The District Court reasoned that waiver of statutory bond rights afforded by section 255.05(1) could undermine the public bidding process because:

> Contractors requiring their subcontractors to waive statutory bond rights could thus reduce their own bond premiums and obtain a competitive advantage over other bidders.

(A.1-7) The District Court's speculation was unjustified in light of the facts before it. In this case the parties did not execute the subcontract containing the bond waiver until after the bidding process had concluded and the Department had awarded C-Way a contract. In this case C-Way's inclusion of the payment bond waiver in its subcontract with Coastal never gave C-Way a competitive advantage over other bidders. The District Court's apprehension is apparently based on some hypothetical case where a contractor might engage in "strong arm" tactics to force a subcontractor to waive its statutory protection prior to bidding. This hypothetical assumes that before a contractor submits his bid to the Department, when a potential subcontractor gives a price quotation to the contractor, the subcontractor is in a weaker bargaining position than the contractor. Accordingly, a contractor could then be in a position to demand the subcontractor waive its bond rights in order to have its bid considered favorably. This reasoning is erroneous for a number of reasons. First, the record contains nothing to support the District Court's assumption. Second, the law presumes that contracting parties are in equal bargaining positions. See, for example, Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761 (1907). It follows that if parties are in equal bargaining positions, the contractor will be unsuccessful in demanding concessions from a

subcontractor without a quid pro quo. Third, it is not the contractor who primarily affects a subcontractor's relative bargaining position. It is the presence of other subcontractors competing for the same work that determines whether or not an individual subcontractor must make concessions in its price quotation to the various bidding contractors. Finally, and perhaps most significantly in this case, at the time of the contractor's bid, the contractor had no binding subcontract with its potential subcontractors. The successful contractor must negotiate the actual terms of its subcontracts, other than price, and execute those subcontracts, after the bidding process is over and the contractor has been awarded the contract by the Department. Thus it is the subcontractor, and not the contractor, that is in a better position to insist upon the terms it desires. At the same time the subcontractor can strike the contractor's proposed terms it finds unacceptable. For all of the aforementioned reasons, a subcontractor's waiver of its protection under a contractor's payment bond does not affect the bidding process at all.

As further support for its conclusion that bond waivers could injure the bidding process, the District Court gratuitously observed that "subcontractors might well be reluctant to work on projects where the contractors require waiver of their statutory protection." A contractor who attempts to coerce its subcontractors to waive their statutory rights, as a condition of submitting a bid, will soon find that those subcontractors will simply refuse to submit bids to that contractor. If the contractor persists in his demands, he may face an inability to secure a necessary subcontractor. Furthermore, in its concern to protect the competitive bidding process, the District Court apparently assumed that a subcontractor who refuses to submit a bid to one contractor will simply withdraw from the bidding process altogether, rather than submit its bid to other competing contractors. Neither the record nor common sense justifies

such an assumption. So long as these subcontractors remain in the competitive bidding process, that process remains intact.

As an aside to its conclusion that a subcontractor's statutory bond waiver violates public policy by undermining the bidding process, the District Court casually observed that enforcing such waiver would risk "state involvement in contractor/subcontractor disputes and the consequent delays of public work projects." (A.1-9) Once again, the court's concerns are unfounded in the record of this case. Reality dictates that these fears are ill-founded in several additional respects. First, the Department enjoys sovereign immunity from suit by anyone except its contractors. Section 337.19(1), Florida Statutes, provides:

> Suits at law and in equity may be brought and maintained by and against the department on any claim under contract for work done; provided, that no suit sounding in tort shall be maintained against the department.

See also Southern Road Builders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986), where the court held that claims not founded on an express written contract are barred by the doctrine of sovereign immunity. Furthermore, section 337.11(1) includes the following restriction, regarding construction contracts:

> . . . [N]o such contract shall create any third-party beneficiary rights in any person not a party to the contract.

In view of these statutory restrictions, the Department, and therefore, the public, remains immune from suit, regardless of whether or not a subcontractor asserts his statutory rights on a section 255.05 payment bond. Absent exposure to litigation by the subcontractors, the public suffers no cost, either financially or in terms of delays to construction, as a result of the subcontractor's waiver of its statutory rights.

Second, the existence of a section 255.05 payment bond simply affords a subcontractor an additional remedy in the event of default in payment by the

contractor. Loss of that remedy does not give the subcontractor rights against the Department. Accordingly, waiver of that additional remedy has no impact whatsoever on the state's involvement in contractor/subcontractor disputes.

Third, the Department already has a responsibility to be involved in contractor/subcontractor disputes under section 337.16, Florida Statutes, and Department rule 14-22. Both authorize the Department to bid on Department projects if the Department determines that the contractor has not fulfilled his obligations to subcontractors and suppliers. Section 337.16(2), Florida Statutes, provides in pertinent part:

> For reasons other than delinquency in progress, the department, for good cause, may deny or suspend for a specified period of time or revoke any certificate of qualification. Good cause includes, but is not limited to circumstances in which a contractor or his official representative:
> . . .
>
> (c) Fails to comply with contract requirements, in terms of payment or performance record, . . .

Rule 14-22.012(1), Florida Administrative Code, provides, in pertinent part:

> The Department may suspend, for a specified period of time, or revoke for good cause any Certificate of Qualification. A suspension or revocation for good cause shall prohibit the contractor from bidding on any Department construction contract regardless of the dollar amount of the bid, and from acting as a material supplier, subcontractor or a consultant on any department contract or project during the period of suspension or revocation. Such good cause shall include, but shall not be limited to the following:
> . . .
>
> (d) The contractor's performance or payment record in connection with contract work becomes unsatisfactory.

Charged with the responsibility for monitoring a contractor's payment relationship with its subcontractors, the Department necessarily is somewhat involved in contractor/subcontractor disputes.

Finally, although the District Court opinion connects "state involvement in contractor/subcontractor disputes" with delays of public work projects, the opinion does not reveal how this connection exists. Because of the performance bond furnished to the Department by the contractor pursuant to section 255.05, the contractor must complete the contract or risk being declared in default. In that case, the surety is obligated to complete the contract. In addition to the threat of default, delays to completion occasioned by the contractor expose the contractor and the surety to liquidated damages. Fla. Stat. §337.18(2) (1987).

Coupled with its fear that waiver of section 255.05 payment bond rights would undermine the bidding process, the District Court based its conclusion that the waiver violates public policy on its belief that paragraph 6 purports to waive a right enacted for protection of the public. The court concluded that such statutory rights are unwaivable. The District Court's analysis is erroneous.

In Florida's seminal case regarding the public policy exception to the right of freedom to contract, this Court warned against the unbridled use of public policy as a tool for disrupting contractual liabilities. "Public policy has been described as an unruly horse, and, when once you get astride, you never know where it will carry you." Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 785 (1907). The Court admonished that "[i]t may well be that plaintiff made a rather hard bargain with defendant; but with that we have nothing to do, so long as no fraud or deception was practiced and the contract was legal in all respects." Id. at 787, citing Scotch Manufacturing Co. v. Carr, 43 So. 427 (Fla. 1907).

It is now well settled law in Florida that when a particular contract, transaction, or course of dealing is not prohibited under a constitutional or statutory provision, or prior judicial decision, it should not be struck down as contrary to public policy unless it is

clearly injurious to the public good, or contravenes some established interest of society. Bituminous Cas. Corp. v. Williams, 17 So.2d 98 (Fla. 1944); City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87 (1934). The waiver provision at issue in this case is not prohibited by either our federal or state constitution, nor is it prohibited by any statutory provision. Furthermore, no prior judicial decision recognized the public policy upon which the District Court seized to strike down the waiver provision. Therefore, the only foundation upon which the District Court could rest its decision was a finding that the waiver provision was clearly injurious to the public good, or that the waiver contravenes some established interest of society. In recent years, the Court has reaffirmed its commitment to the rule laid down in Bituminous, stating:

> Courts . . . should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris.

Gulf Ins. Co. v. Dolan, Fertig and Curtis, 433 So.2d 515 (Fla. 1983) quoting Bituminous.

Unless "great prejudice to the dominant public interest" is clearly shown, the fundamental public policy in favor of freedom to contract must prevail over policy considerations based solely on conjecture.

Florida courts have jealously protected the freedom to contract. See, for example, Home Dev. Co. v. Bursani, 178 So.2d 113, 117 (Fla. 1965); Aetna Cas. Sur. Co. v. Beane, 385 So.2d 1087 (Fla. 4th DCA 1980), (citations omitted). Over the years courts have adhered to the general rule that all rights granted by statute are subject to waiver. Courts have created a public policy exception to this rule by refusing to permit waiver of certain rights created by "consumer protection" statutes. This exception, however, has traditionally been available only to individuals to protect them from unfair practices of

corporations. The effect of the District Court's decision is to broaden that exception to include inter-corporate contracts.

The District Court determined to apply the public policy exception to the freedom to contract in this case because it concluded that the public has a compelling interest in providing protection for subcontractors on public projects. (A.1-5) The Court reasoned that a waiver of this protection violates the public's interest, and is therefore void. As support for its rationale, the court cited two consumer protection cases, Asbury Arms Dev. Corp. v. Florida Dep't of Business Regulation, 456 So.2d 1291 (Fla. 2d DCA 1984) and Lynch-Davidson Motors v. Griffin, 171 So.2d 911 (Fla. 1st DCA 1965), quashed on other grounds, 182 So.2d 7 (Fla. 1966).

The District Court's reliance on the decisions in Asbury Arms and Lynch-Davidson is misplaced because both decisions focus on protection of the Florida consumer as an individual member of the public. Because every individual is necessarily a consumer, the decisions in these cases reflect those courts' determination that the public in general has a distinct interest in enforcing the statutory rights apart from the individual consumer involved in the transaction. Consequently the decisions hold that attempted waiver or circumvention of such rights is void. In Asbury Arms, the court was asked to rule on the validity of a waiver of rights under chapter 718, Florida Statutes, regulating the sale of condominiums. The statute in question required that any contract for sale of a residential condominium unit include a provision allowing the buyer to cancel the contract anytime within fifteen (15) days of the execution of the contract. The seller of a unit at auction required all bidders to waive recission rights under the statute as a prerequisite to bidding. When the successful bidder attempted to rescind the contract thirteen (13) days later, the seller refused to return the buyer's deposit, claiming that the buyer had waived the right to rescind. The Second District Court declared the waiver

invalid, stating:

> In our view, the fifteen (15) day right to void is designed as a cooling off period to protect the public in general from high pressure condominium sales situations. It allows the purchaser to review or check out the contents of the prospectus or offering statement required by Section 718.504, to seek the advice of an attorney or simply to reconsider the decision. The protection of a statute designed to protect the public as well as the individual cannot be waived by the individual.

Asbury Arms, at 1293. The statute in Asbury Arms directly and primarily protects the general public, and the buyer is protected by that statute as a member of the public. The court utilized similar reasoning in Lynch-Davidson, where the court held that a statute which was intended to protect the general public from underinsured motorists could not be circumvented by the inclusion in an insurance policy of a clause which limited liability only to the insured and not his permitted operators.

In both Asbury Arms and Lynch-Davidson the court interpreted statutes that were designed to protect the general public as individuals. Those courts reasoned that the waiver by an individual of statutory rights intended to protect the public in general may directly injure the individual and in so doing, injure the public.

Understandably, courts will not enforce waiver of such rights. The legislature created section 255.05 to afford workmen on public projects protection similar to that made available on private works by the mechanics' lien provisions of chapter 713, Florida Statutes. Fulghum v. State, 92 Fla. 662, 109 So. 644 (1928). See also, Board of County Comm'rs v. Gulf Pipeline Co., 168 So.2d 757, 760 (Fla. 1st DCA 1964). Moreover, it is only those rights secured by a payment bond, as contrasted from a performance bond, that protect workmen, subcontractors and materialmen or suppliers, by guaranteeing a public contractor's payment to these individuals. Because most individual members of the public are not, and never will be, subcontractors, suppliers or workmen on public projects, the statutory rights under a section 255.05 payment bond were not created to

protect the public.

Despite the differences between a consumer and a workman, subcontractor or supplier, the District Court applied the rationale of Asbury Arms and Lynch-Davidson to conclude that a subcontractor's waiver of rights under a section 255.05 payment bond is unenforceable. To bolster its finding that the legislature established the payment bond rights in section 255.05 to protect the public in general, the District Court relied on dicta from two other decisions. (A.1-6, citing: Florida Bd. of Regents v. Fidelity & Deposit Co., 416 So.2d 30 (Fla 5th DCA 1982); Clutter Constr. Corp. v. Baker Bros., 168 So.2d 576, 578 (Fla. 1st DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965)). In both of these cases cited by the District Court, the courts reasoned that public payment and performance bonds required by section 255.05 benefit the public simply because the public owns all public projects. This reasoning is faulty. No doubt the public, as owner of a public construction project, benefits from a performance bond supplied by a contractor because a performance bond obligates the bonding surety to guarantee completion of the project. For the reasons stated earlier in this brief, however, the owner of a public project enjoys no benefit or protection from a payment bond guaranteeing payment to subcontractors, suppliers and laborers. Should the Court adapt the District Court's opinion that the payment bond rights established by section 255.05 were created to protect the general public, it will establish a precedent that will have consequences far beyond those felt by sureties on public projects. The payment bond provisions of section 255.05 benefit the public good no more nor less that any other regulatory provision enacted pursuant to the state's police power. Every such regulation must benefit the welfare of the whole people or public to be valid. See Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855 (Fla. 1952). If the Court refuses to enforce the waiver of bond rights in this case, judicial consistency will require similar treatment of

every attempt to waive by contract any statutorily created right. At the same time, this Court has historically refused to interfere in contractual relationships absent the existence of the conditions enunciated in the Bituminous opinion. The threat of such judicial interference will confuse long-established principles of contract law in this state and cannot be in the public interest.

As noted previously, a public payment bond merely affords those persons protected by the bond another remedy in the event of the contractor's default. While of great benefit to those persons falling within the protected class, the payment bond affords neither the Department nor the public any protection or benefit. Therefore, under the principles set forth in Bituminous the Court should not interfere with the parties' constitutional freedom to contract by refusing to enforce Coastal's contractual waiver of its payment bond rights.

III. THE COURT ERRED BY IGNORING BOTH THE MILLER ACT AND FLORIDA'S MECHANICS' LIEN STATUTE IN CONSTRUING THE RIGHTS CREATED BY SECTION 255.05

Florida's public payment bond statute, section 255.05, is patterned after the federal Miller Act, the bonding statute for federal public works. Waiver of the right to sue on the payment bond is permitted by the Miller Act. The District Court should have considered a subcontractor's right to waiver under the Miller Act when it construed section 255.05. Futhermore, since a section 255.05 payment bond is the public works counterpart to the mechanics' lien available on private works, the District Court should have considered a subcontractor's right to waive a lien under the mechanics' lien statute when it construed section 255.05. The District Court's decision not to construe section 255.05 in light of two such similar statutes was erroneous.

This court, other Florida courts, and a federal court have long recognized that section 255.05 is patterned after the federal Miller Act. Kidd v. City of Jacksonville, 97 Fla. 297, 120 So. 556 (1929); J.B. McCrary Co. v. Dade County, 86 So. 612 (Fla. 1920); Blosam Contractors, Inc. v. Joyce, 451 So.2d 545 (Fla 2d DCA 1984); Gorman Co. v. Frank Maio Gen. Contractor, Inc., 438 So.2d 1018 (Fla. 4th DCA 1983); Miller v. Knob Constr. Co., 368 So.2d 891 (Fla. 2d DCA 1979); Winchester v. State, 134 So.2d 826 (Fla. 2d DCA 1961); Delduca v. U.S. Fidelity & Guar. Co., 357 F.2d 204 (5th Cir. 1966) rehearing denied, 362 F.2d 1012 (1966). Because section 255.05 is silent as to whether a right of action against a surety may be waived, it is appropriate to turn to federal law for guidance. Courts have interpreted the Miller Act as permitting a subcontractor to waive its right of action against a prime contractor's surety. For instance, in United States ex rel. B's Co. v. Cleveland Elec. Co., 373 F.2d 585, 588 (4th Cir. 1967), the court stated that the right to sue under the Miller Act could be waived by a clear and express provision in the contract documents. See also, Youngstown Welding & Eng. Co. v.

Travelers Indem. Co., 802 F.2d 1164 (9th Cir. 1986); Warrier Constructors, Inc. v. Harders, Inc., 387 F.2d 727, 729 (5th Cir. 1967); United States ex rel. Koppers Co. v. Five Boro Const. Corp., 310 F.2d 701 (4th Cir. 1962). Section 255.05 was patterned after the federal Miller Act. Federal courts recognize that the right to sue on a payment bond under the Miller Act may be waived. Therefore, the Court should enforce Coastal's waiver of its rights under section 255.05.

Despite the judicially recognized value of the Miller Act as a guide for interpretation of rights under 255.05, the District Court refused to analogize the two laws. In doing so, the court stated:

> Moreover, the provisions of section 255.05 here at issue originated in 1915, and thus predated the Miller Act, which did not become effective until 1935, by some twenty years.

(A.1-8) With that statement the District Court rejected out of hand any relevance of the Miller Act to rights created by section 255.05.

Contrary to the court's observation Florida's public bonding statute has historically tracked the corresponding federal statute. When the predecessor to section 255.05 was adopted by the legislature in 1915 as Laws of Florida Chapter 6867, (A.2-1) the law was copied from the federal public bonding statute, Act of Congress, Chapter 28, enacted on August 13, 1894. (A.2-2) Kidd v. City of Jacksonville, 97 Fla. 297, 120 So. 556 (1929). In 1935, Congress enacted the Miller Act to replace the 1894 Act. (A.2-3,4,5,6) Subsequently, Florida adopted its own "little Miller Act," providing similar requirements and conditions to those set forth in the Miller Act. (A.2-7,8) Because the Florida bonding statute has always tracked the federal statute in one form or another, and because the issue of waiver of rights under section 255.05 has apparently never been addressed by a Florida court, the District Court should have considered federal judicial precedent on waiver in making its decision. The District Court erred in refusing to construe case law

under the Miller Act to assist the court in its determination of whether the right to sue on a section 255.05 bond can be waived. The Miller Act decisions clearly demonstrate that such rights can be waived.

Likewise, the District Court should have considered Florida's Mechanics' Lien statute, section 713.20(2), in construing the waivability of rights under 255.05. As early as 1926, when construing the public policy underlying a predecessor to the present section 255.05(1), this Court stated that "[t]he broad general purpose of the statute is to afford a means of protection to those supplying labor and material in public work in lieu of the lien afforded by other statutes on private work." Fulghum v. State, 92 Fla. 662, 109 So. 644, 647 (1926) (emphasis added). More recently, courts have reaffirmed this statement of public policy in reference to section 255.05, stating that its chief purpose is to protect subcontractors and suppliers on public construction projects by providing them with an alternate remedy to the mechanics' lien available on private construction project. See Blosam Contractors, Inc. v, Joyce, 451 So.2d 545, 547 (Fla. 2d DCA 1984); Gorman Co. v. Frank Maio Gen. Contractor, Inc., 438 So.2d 1018, 1019 (Fla. 4th DCA 1983). See also City of Ft. Lauderdale v. Hardrives Co., 167 So.2d 339 (Fla. 2d DCA 1964). (Section 255.05 substitutes a penal bond for lien allowed by other statutes on private construction projects.) Clearly, the primary purpose of section 255.05(1) is to place subcontractors and suppliers on public projects in a position in all respects equal to that of subcontractors and suppliers on private projects.

Subcontractors and suppliers on private projects can waive the right to a lien on private construction projects. In fact, the legislature expressly restricts only laborers from waiving their statutory rights. Fla. Stat. §713.20(2) (1987). It is beyond dispute that if the C-Way/Coastal subcontract had been executed in furtherance of private construction project, the subcontractor's waiver of a lien would have been valid. Because

a payment bond furnished pursuant to section 255.05 exists merely as a "substitute" or "alternative" to the mechanics' lien; and because a subcontractor is free to waive its mechanics' lien, the court erred in refusing to enforce Coastal's waiver of its statutory bond rights.

Although no Florida court has expressly enforced a waiver of rights under section 255.05(1), the Second District Court has previously acknowledged that those rights may be waived. In Settacasi v. Board of Pub. Instruction, 156 So.2d 652 (Fla. 2d DCA 1963), the court evaluated the sufficiency of an affirmative defense that the right to sue under the payment bond required by section 255.05 had been waived. The court stated that an effective waiver of this right requires an "agreement, expressed or implied, on the part of the materialman which could constitute a waiver of its rights." Id. at 655. In this case, Coastal expressly waived its right to sue under the payment bond. The waiver meets the requirement set out in Settacasi and is enforceable.

Not only does the Settacasi case indicate that such rights are waivable, nothing in section 255.05(1) bars waiver of the protections provided by a payment bond. In fact, the wording of the statute itself indicates that absolute protection was never intended. Section 255.05(1) explicitly provides for exemptions by which the state itself or its subdivisions can deny the subcontractor or materialmen the protection of the payment bond. For example, on a construction contract for $200,000 or less, the prime contractor is not required to obtain a payment bond if the appropriate state entity approves such exemption. On state construction projects of $100,000 or less, the exemption is automatic, requiring no action from any state entity whatsoever. Additionally, any supplier or subcontractor who is not in privity with the contractor automatically loses his rights under the payment bond unless he timely complies with two separate notice requirements. Fla. Stat. §255.05(2) (1987).

The District Court's conclusion that the right to sue on a payment bond is an

unwaivable right presumes that the legislature intended that large subcontractors working on the state's largest projects can absolutely command the paternalistic protection of the payment bond, while smaller subcontractors working on the state's smallest projects are denied such protection. This presumption makes little sense. If public policy does not require that an absolute right to sue on a payment bond exists for smaller subcontractors who most need protection, the same policy cannot demand that larger subcontractors, who often as not may be the equal of those with whom they contract, be afforded such absolute rights.

Florida courts have long recognized that the purpose of section 255.05 is to protect subcontractors on public works. A subcontractor may waive that protection under the Miller Act. Furthermore, a subcontractor may also waive the protection of Florida's Mechanics' Lien statute. Because section 255.05 mimics the Miller Act, and serves as a substitute for the mechanics' lien, the right to sue on a payment bond is waivable. Therefore, the District Court erred in rejecting both the Miller Act and the Mechanics' Lien statute as being of no consequence in construing section 255.05.

CONCLUSION

American requests this Court to reverse the order of the Second District Court of Appeal and to remand to the Circuit Court with directions to reinstate the order of dismissal with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Donald Hemke, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 3239, Tampa, Florida 33601, the 20th day of June, 1988.

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