IN THE SUPREME COURT OF FLORIDA

CASE NO.: 72-451

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,

Defendant/Petitioner,

v.

COASTAL CAISSON DRILL CO., INC.,

Plaintiff/Respondent.
_____/

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

PETITIONER'S REPLY BRIEF

SAMANTHA BOGE CUMMINGS
Florida Bar I.D. No.: 0197823
MARY M. PICCARD
Florida Bar I.D. No.: 320218
Cummings, Lawrence & Vezina, P.A.
Post Office Box 589
Tallahassee, Florida 32302
(904) 878-3700
Attorneys for: Defendant/Petitioner
American Casualty Company of
Reading, Pennsylvania

TABLE OF CONTENTS

INDEX OF CITATIONS

OTHER CITATIONS

ARGUMENT

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

As argued in the initial brief, Petitioner submits the District Court[1] wrongfully rejected the trial court's conclusion that the waiver provision in the subcontract was not ambiguous. That conclusion by the trial court was a legal conclusion which should have been sustained on appeal absent a showing that the conclusion was clearly erroneous. The fact that the trial court's decision was made in the context of ruling on a motion to dismiss the complaint rather than after a trial "where there had been testimony" (Respondent's brief page 6) is irrelevant. As Coastal points out, when ruling on a motion to dismiss, all material facts alleged in the complaint are presumed true. Because all the alleged facts are presumed true, the trial court did not require testimony to render a decision. Accordingly, whether the trial court's interpretation of a contract clause is made in the context of a proceeding on a motion to dismiss, or after hearing testimony and receiving evidence, the interpretation must be sustained unless clearly erroneous. The District Court did not find that the trial court's determination was clearly erroneous. Rather, the District Court simply substituted its own interpretation for that of the trial court. Because the validity of the trial court's ruling does not depend on whether the trial court's interpretation was based solely on the pleadings or was entered after an evidentiary hearing, the District Court's interpretation should be reversed.

---

[1] A copy of the District Court's opinion is found in the appendix to American's initial brief. The opinion is published at 523 So.2d 791.

Throughout this cause, Coastal has made much of its allegation that it never intended to waive its right on the bond. Coastal relies on this allegation to utilize certain well established principles of contract law for interpreting contracts. However, because the circuit court properly found the waiver unambiguous, Coastal's reliance on general principles of contract construction is misplaced. Moreover, Coastal's allegation that it did not intend to waive its rights is irrelevant. Courts will not consider the contemporaneous intent of the parties unless terms of the contract are ambiguous. When a contract is not ambiguous, all parties are bound by it and the courts are powerless to rewrite it. See, National Health Laboratories, Inc. v. Bailman, Inc., 444 So.2d 1078 (Fla. 3rd DCA 1984). Furthermore, where the language of a contract is clear and unambiguous, that language is controlling as to the intention of the parties regardless of whatever may have been in their minds when they entered into the contract. Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 138 So. 21 (Fla. 1931); Weatherby Insurance Co., 380 So.2d 432 (Fla. 1980). Thus, a party's subjective intent at the time the parties entered into the contract plays no proper role in a court's construction of a contract unless the terms of the contract are ambiguous. Because the trial court correctly found that the terms of the contract are not ambiguous, Coastal's alleged intent to the contrary is irrelevant even though the Court may have been obliged to find the allegations true.

Coastal has made no showing that the trial court's construction of the contract was clearly erroneous. Therefore, the District Court erred in substituting its construction of the contract for that of the circuit court. 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. 3rd DCA 1966). The fact that the foregoing cases involved decisions made after or during

trial is irrelevant because all facts alleged in the complaint are presumed true when ruling on a motion to dismiss. Thus, the standard of review is the same whether the trial court's determination was made in the context of ruling on a motion to dismiss or after hearing evidence. The determination of whether a contract is ambiguous or clear is based solely on the language of the contract. If that language is clear, an allegation that the party never intended to waive its rights is irrelevant. This is so because, when the contract is clear on its face, the courts will not look beyond the plain language to determine the parties' intent. Hurt, supra. Therefore, the court should reverse the District Court's finding that the contract is ambiguous, and disregard Coastal's arguments pertaining to its intent when the contract was executed.

II. A SUBCONTRACTOR'S WAIVER OF THE PROTECTIONS AFFORDED BY SECTION 225.05, FLORIDA STATUTES, DOES NOT VIOLATE PUBLIC POLICY.

Sections 225.05 and 337.18 of the Florida Statutes require prime contractors on public projects to post a surety bond to guarantee performance and payment. Section 337.18 provides for waiver of that requirement by the department under certain circumstances. Because the statute itself permits waiver under certain circumstances, the trial court logically concluded that a contractual waiver provision must not violate public policy. Coastal does not dispute the trial court's logic. Instead, Coastal resorts to a principle of statutory construction which the courts utilize in construing statutes challenged as being vague or ambiguous on their face. That principle of statutory construction is that the expression of one thing implies the exclusion of another. However, principles of statutory construction are to be resorted to only for the purpose of construing ambiguous statutory language. State v. Egan, 287 So.2d 1 (Fla. 1973). Thus, the principle has no application in the present proceedings because the present case has nothing to do with construing any alleged ambiguity in the statutes. Here, the issue is whether permitting a subcontractor to waive its right to sue under a payment bond violates public policy. Although the cited statute requires public contractors to post payment bonds, the meaning of that statute is not in question. Instead, the parties argue that the language of sections 225.05 and 337.18 is clear and unambiguous in requiring the general contractor to provide a surety bond. Nothing in that language prohibits a subcontractor from waiving its right to sue on the payment bond. In the absence of an argument that the statutory language is ambiguous and therefore in need of an interpretation, the use of statutory construction aids such as "expressio unis" is unwarranted. Therefore, Coastal's reliance on that principle in support of its argument that allowing the waiver violates public policy is misplaced. Because the statutory

language is clear and the statute contains no language restricting a subcontractor's entitlement to waive its right to sue on the payment bond, it follows that that right is indeed waivable.

American agrees with Coastal that sections 225.05 and 337.18 of the Florida Statutes benefit subcontractors. However, that fact in and of itself is not a reason to deny subcontractors the right to waive those benefits. Coastal apparently contends that no member of a class protected by statute can waive a statutory benefit. Florida law is clear that to the contrary, a party may waive any right to which he is entitled. See Rader v. Prather, 100 Fla. 591, 130 So. 15 (1930); Nelson v. Dwiggens, 111 Fla 298, 149 So. 613 (1933); Gilman v. Botzloff, 155 Fla. 888, 22 So.2d 263 (1945); Colonial Penn Communities, Inc. v. Crosley, 443 So.2d 1030 (Fla. 5th DCA 1983).

In arguing that public policy will be subverted if subcontractors are allowed to waive their rights under sections 337.18 and 255.05, Coastal suggests, as did the District Court, that the department could become involved in suits between contractors and subcontractors. However, this concern ignores the fact that the State of Florida and its agencies are immune from suits by subcontractors under section 337.11(1). See also, Southern Road Builders v. Lee County, 495 So.2d 189 (Fla. 2nd DCA 1986). Furthermore, while the department is immune from suit by subcontractors, there are other existing situations in which the department becomes involved in contractor/subcontractor disputes. The government is charged with the responsibility of monitoring contractors' relationships with their subcontractors under section 337.16, Florida Statutes, and the department's own Rule 14-22 of the Florida Administrative Code. Thus, the department is already somewhat involved in contractor/subcontractor disputes. Because the department is already somewhat involved by choice, further involvement surely cannot violate Florida's public policy. Furthermore, the state's sovereign immunity renders this

type of involvement remote. Certainly such a remote possibility of governmental involvement is insufficient reason to resort to the unbridled use of public policy as a tool for disrupting the freedom to contract. See, Atlantic Coast Line R.R. Co. v. Beazley, 54 Fla. 311, 45 So. 761 (1907).

The District Court's conclusion that the bidding process could be adversely affected by allowing the waiver is based on unsubstantiated hypothetical facts and ignores reality. Any contractor who insists on a waiver of the right to sue on a bond will either have to offer a quid pro quo, or the subcontractor will turn to other prime contractors who do not insist on the waiver. In spite of Coastal's complaint that it never intended to waive its rights, the law presumes that contracting parties are in equal bargaining positions. See Atlantic Coastline R.R. Co., supra. Any advantage inuring to a contractor who insists on a waiver is one for which the contractor will have to bargain. Accordingly, the ability to contractually waive the right to sue does not in and of itself affect the balance of the bidding process.

The District Court concluded, and Coastal argues, that because the legislature specified certain situations in which the government may waive bond requirements, the issue is more appropriately addressed in the legislative process. It may be true that "when the legislature has actively entered a field and clearly indicated its ability to deal with such a policy question, the more prudent course is for the court to defer to the legislative branch." Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987). Here, however, the creation of certain exemptions within the statute did not constitute entrance into the field of determining whether public policy precludes waiver of statutory rights. Had the legislature intended to establish public policy by allowing certain waivers, it would not have done so by permitting the waiver on smaller projects rather than large ones. If the presumed public policy is to afford subcontractors and

workmen on public projects protection similar to that provided on private works by the mechanics lien law, (see Second District Court slip opinion, page 6) it would be illogical to allow the government to waive that protection when small companies are involved, but absolutely command the paternalistic protection on large projects involving large companies. It follows that in creating certain exemptions, the legislature was not establishing public policy. Rather, the legislature created the exceptions for practical reasons that have nothing to do with protecting subcontractors or the public. Accordingly, the District Court erred to the extent it found that the legislature had actively entered the field of whether public policy permits waivers. Absent legislative preemption, the issue of waiver of rights on a payment bond is not an issue more appropriately determined in the legislative process.

The exceptions in the statute allow the government to do away with the bond requirements altogether under certain circumstances. If subcontractors may waive their rights to sue under the bond, contractors will still be required to post the bond and sureties may still be liable to materialmen and laborers, as well as subcontractors who do not waive their rights. Therefore, allowing waiver of the right to sue under the bond is not the equivalent of creating an additional exception. Instead, refusing to allow the waiver constitutes the very type of judicial encroachment into the legislature's province that the district court's decision purported to reject.

In support of the proposition that allowing the waiver would invade the legislative prerogative, Coastal relies on cases in which the courts refused to extend the protections of the bond requirements in Section 255.05 beyond the express language of the statutes. See, William H. Gulsby, Inc. v. Miller Construction Co., Inc., 351 So.2d 396 (Fla. 2nd DCA 1977); City of Ft. Lauderdale, ex rel. Bond Plumbing Supply, Inc. v. Hardrives Company, 167 So.2d 339 (Fla. 2nd DCA 1964); Santa Rosa County ex rel. J. E. Daniels, Inc. v.

Raymond Blanton Construction Co., 138 So.2d 518 (Fla. 1st DCA 1962). These decisions conform with well established principles of constitutional law pertaining to the powers of the courts when considering duly enacted legislation. As discussed previously in this brief, the first rule of statutory construction is that there is no room for construction where the statutory language is clear. Ervin v. Capital Weekley Post, Inc., 97 So.2d 464 (Fla. 1957). Accordingly, courts will not add to or take away from that which the legislature has done. Id. In fact, courts cannot amend or complete acts of the legislature in order to supply relief where the legislature has not provided such relief. Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984). Indeed, unlike the discretionary judicial policy of restraint discussed in Bankston, supra, the restriction on the court's authority to rewrite legislation is founded in the constitution. See, Metropolitan Dade County v. Birdges, 402 So.2d 411 (Fla. 1981). While the district court opinion acknowledges these principles, the court's action does not comply with them.

By holding that a subcontractor may not waives its right to sue under a bond, the court extended the protection of Section 255.05 beyond that required by the statute. Nothing in the statute prohibits the waiver of the right to sue. Therefore, when the district court found that the right to sue could not be waived, it effectively and improperly added to the statute. The result was a judicial amendment to the legislative act in order to supply relief the legislature has not provided. In short, the district court did that which it held it could not do. It created a regulation in an area over which the legislature has exercised its authority and extended the rights of subcontractors well beyond the limits stated in the statute. Allowing the waiver does not invade the province of the legislature; prohibiting the waiver does.

American relies on the foregoing arguments as well as the argument in its initial brief in support of its contention that the bond requirements of sections 337.18 and

225.05 Florida Statutes are not designed for protection of the public as owners of public projects. Rather, as the cases have held, those sections are designed for the protection of subcontractors. See Fulghum v. State, 92 Fla. 662, 109 So. 644 (1926); Board of County Commissioners of Okaloosa County v. Gulf Pipe Line Co., Inc., 168 So.2d 757 (Fla. 1st DCA 1964). That being the case, there is no justification for usurping the freedom to contract by refusing to allow subcontractors the right to waive that protection.

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

As the District Court observed, section 255.05 was enacted to afford subcontractors on public projects protection similar to that provided on private works by the mechanic's lien law; chapter 713 of the Florida Statutes.[2] Therefore, even though the two statutes are not identical or interchangeable, they admittedly serve a similar purpose. Accordingly, in determining whether to allow a waiver of those protections, it is appropriate to compare the two statutes. At the time the parties entered into the contract, subcontractors on private works could waive the right to a lien at any time. §713.20(2), Fla. Stat. (1987). Similarly, under the Miller Act, a Subcontractor may waive its rights. United States ex rel. B's Co. v. Cleveland Electric Co., 373 F.2d 585 (4th Cir. 1967); Yale's Town Welding & Engineering Co. v. Travelers Indemnity Co., 802 F.2d 1164 (9th Cir. 1986); Warrier Constructors, Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967); United States ex rel. Coppers Co. v. Five Boro Construction Corp., 310 F.2d 701 (4th Cir. 1962). Because section 255.05, Florida Statutes, was patterned after the Miller Act (see Petitioner's Initial Brief, pages 22-24) it is appropriate to look to decisions construing that act for guidance on the question of whether the protections afforded therein may be waived. Because the purpose of the Miller Act, the Mechanic's Lien Law, and section 255.05 is to protect subcontractors, it is illogical to prohibit the waiver of that protection when the source of the protection is section 255.05 rather than the Miller Act or the Mechanic's Lien Law.

---

[2]Section 713.20(2) was amended in 1988 to provide the right to claim on a lien may not be prospectively waived. Ch. 88-397 §5 Laws of Fla.

The 1988 amendment to section 713.20(2) is not applicable to the present case because, in the absence of clear legislative intent to the contrary, statutes are given prospective application only. State Dept. of Revenue v. Zuckerman-Vernon Corp, 354 So.2d 353 (Fla. 1977). Accordingly, the 1988 amendment to the Mechanics Lien Law would not have any impact on a contractual provision waiving rights thereunder prior to the effective date of the amendment. At the time the present contract was executed, the mechanics lien law expressly permitted waiver of the right to claim a lien. Therefore, it was reasonable to assume that the right to claim on a bond could also be waived at that time. The amendment to the mechanics lien law cannot be visited upon these parties any more than it could be if this dispute arose directly out of section 713.20(2).

After the effective date of the amendment to section 713.20(2) parties may no longer be able to analogize that section in support of the legality of waiving rights under section 255.05. However, the loss of that analogy does not necessarily invalidate waivers under section 255.05. As Coastal so ardently argues, the two statutes are not interchangeable. To date, the legislature has not expressly addressed the viability of a waiver of the right to sue a surety upon a contractor's payment bond on public projects. Whatever the legislature's reason for expressly regulating the right to waive a lien under chapter 713, it has not exercised similar control under section 255.05. As thoroughly argued under point two of the initial brief, and this brief, the express language of the statute is controlling, and there is nothing in that language prohibiting waivers.

IV. THE WAIVER DOES NOT VIOLATE THE CONTRACT BETWEEN C-WAY AND THE DOT.

In section IV of its brief, Coastal has raised an argument which was not adopted by the District Court. Within this argument, Coastal maintains that C-Way breached its contract with the Department. Coastal does not specify the manner in which this breach occurred. Implicitly, Coastal argues that the existence of the waiver provision in the subcontract breached the provision in the prime contract requiring C-Way to furnish a bond in accordance with section 255.05, Florida Statutes. C-Way did furnish a bond in accordance with section 255.05, and therefore it did not breach its contract with DOT. Furthermore, C-Way maintained that bond for the protection of materialmen, suppliers, laborers and other subcontractors who did not waive their rights to bond protection. Coastal's argument under this point simply begs the question of whether, once the bond has been furnished, a subcontractor's right to sue the surety to recover under the bond may be waived. American does not dispute that absent such a waiver, the subcontractor may sue the surety. It is American's position that in this case, the subcontractor validly waived that right.

V. ASSUMING THAT THE WAIVER DID NOT VIOLATE PUBLIC POLICY AND WAS SUFFICIENTLY CLEAR, UNAMBIGUOUS AND UNEQUIVOCAL, AMERICAN CANNOT BE ESTOPPED TO ENFORCE THE WAIVER.

Silence can only provide a basis for invoking the doctrine of estoppel if the silent party has a duty to speak. In the absence of such a duty, even a negligent or culpable failure to speak will not provide a basis for estoppel. Pasco County v. Tampa Development Corp., 364 So.2d 850 (Fla. 2nd DCA 1978). A duty to speak arises only when a fiduciary or confidential relationship exists between two parties. Butts v. Drag Stem, 349 So.2d 1205 (Fla. 1st DCA 1977).

Although many types of relationships can be classified as fiduciary or confidential, nothing united Coastal and American in any sort of relationship, much less a fiduciary or confidential one. Indeed, Coastal does not allege there was any communication between it and American at all. Thus, American had no responsibility toward Coastal which would warrant estopping American to enforce the waiver of the bond provision.

Alternatively, in order for estoppel to lie, there must be proof of fraud, misrepresentation, or other affirmative deception. Rinker Materials Corp. v. Palmer First National Bank & Trust Co., 361 So.2d 156 (Fla. 1978); Gould v. National Bank, 421 So.2d 798 (Fla. 3rd DCA 1982). In order for misrepresentation to be negligent, much less willful or culpable, there must be proof that one party intended that the other party be induced to act on the misrepresentation, and, in turn, the other party must have been justified in relying on the misrepresentation. Atlantic National Bank v. Vest, 480 So.2d 1328 (Fla. 2nd DCA 1985), rev. den. 491 So.2d 281 (Fla. 1986).

Coastal presented no allegations showing that American took any action intended to influence Coastal's decisions. American's inaction cannot be construed as an affirmative deception which would support estoppel. Coastal does not allege that by its

misrepresentation American intended to induce Coastal to act. Coastal was not justified in relying on American's silence since Coastal itself made no direct or express inquiries for information about bond coverage. Coastal is a well established business represented by competent professionals; American owed it no duty to interpret the contract that Coastal executed with C-Way. There is no allegation American deceived Coastal with regard to its bond coverage in any way. Therefore, American cannot be estopped to enforce the waiver provision in C-Way's and Coastal's contract.

Respectfully submitted

Mary M Piccard

SAMANTHA BOGE CUMMINGS
Florida Bar I.D. No.: 0197823
MARY M. PICCARD
Florida Bar I.D. No.: 320218
Cummings, Lawrence & Vezina, P.A.
Post Office Box 589
Tallahassee, Florida 32302
(904) 878-3700
Attorneys for: American Casualty Company
of Reading, Pennsylvania

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail on this 29th day of August, 1988 to: DONALD E. HEMKE, ESQUIRE, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 3239, Tampa, Florida 33601 as Attorneys for Coastal Caisson Drill Co., Inc.

Mary M Piccard
Mary M. Piccard