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IN THE SUPREME COURT OF FLORIDA

TRANSAMERICA INSURANCE COMPANY, Defendant/Petitioner, vs. BARNETT BANK OF MARION COUNTY, N.A., Plaintiff/Respondent.	)	Supreme Court Case Number 72,531
	)	Fifth District Court of Appeal Case No. 86-1328

DISCRETIONARY PROCEEDING TO REVIEW
DECISION OF FIFTH DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION OF DEFENDANT/PETITIONER

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ISSUE PRESENTED

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN TRANSAMERICA INSURANCE COMPANY v. BARNETT BANK OF MARION COUNTY, N.A., FIFTH DISTRICT COURT OF APPEAL CASE NUMBER 86-1328 EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTIONS OF LAW.

TABLE OF CITATIONS

BASIS OF JURISDICTION AND STATEMENT OF THE FACTS

The Supreme Court of Florida has jurisdiction by virtue of Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and by virtue or Article V, Section 3(b)(3) of the Constitution of the State of Florida in that the majority decision of the Fifth District Court of Appeal is contrary to and expressly and directly conflicts with four (4) prior decisions of the Supreme Court of Florida.

On March 24, 1988, the Fifth District Court of Appeal filed its Opinion in this appellate matter, which decision was a 2-1 decision, with a written dissent by Chief Judge Sharp consisting of approximately seven (7) pages. The Petitioner and Appellant, TRANSAMERICA INSURANCE COMPANY, timely filed its Motion for Rehearing En Banc and Motion for Clarification; and by Order dated May 6, 1988, the Fifth District Court of Appeal denied Rehearing En Banc and further relief. The Petitioner and Appellant, TRANSAMERICA INSURANCE COMPANY, served its Motion for Certification of Issues in the Fifth District Court of Appeal action on May 16, 1988; and the Fifth District Court of Appeal has not ruled upon the same. On or about May 17, 1988, three (3) surety companies and insurance companies (through common counsel) filed their Motion to File Brief as Amicus Curaie; and the Fifth District Court of Appeal has not ruled upon the same.

On June 2, 1988, due to the absence of ruling by the Fifth District Court of Appeal on the above-referenced Motions, the Petitioner and Appellant, TRANSAMERICA INSURANCE COMPANY, timely filed its Notice to Invoke Discretionary Jurisdiction based upon

the majority decision of the Fifth District Court of Appeal expressly and directly conflicting with four (4) prior decisions of the Supreme Court of Florida.

SUMMARY OF ARGUMENT

The majority decision of the Fifth District Court of Appeal in the case of Transamerica Insurance Company v. Barnett Bank of Marion County, N.A., Fifth District Court of Appeal Case Number 86-1328, expressly and directly conflicts with four (4) prior decisions of the Supreme Court of Florida; and, therefore, the Supreme Court of Florida has discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The prior decisions by the Florida Supreme Court hold that a performing surety is entitled to priority to contract funds over an assignee bank; and the majority decision of the Fifth District Court of Appeal holds to the contrary.

The majority decision by the Fifth District Court of Appeal effectively cites no case law or precedent for its decision that under the doctrine of equitable subrogation a performing surety is not entitled to priority over an assignee bank; and the dissenting opinion by Chief Judge Sharp cites not only the four (4) prior decisions of the Supreme Court of Florida, but also decisions of Federal courts in Florida applying Florida suretyship law, and numerous other Federal and State court decisions and authorities.

The Supreme Court of Florida should exercise its discretion and entertain the case on the merits due to the prior conflicting case law, due to the issues being clearly of great public importance, affecting every surety and lender in the State of Florida, and due to the majority decision of the Fifth District Court of Appeal being contrary to virtually every other case in the nation decided on the same issues.

ISSUE AND ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN TRANSAMERICA INSURANCE COMPANY v. BARNETT BANK OF MARION COUNTY, N.A., FIFTH DISTRICT COURT OF APPEAL CASE NUMBER 86-1328 EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTIONS OF LAW.

In its majority Opinion, the Fifth District Court of Appeal ruled that a financing bank of a contractor has priority over a performing surety to earned but unpaid contract funds when the contractor defaults on a bonded construction project. In addition to such decision being contrary to the overwhelming and virtually unanimous authorities on the same issues, the decision is contrary to four (4) prior decisions of the Supreme Court of Florida.

It is interesting to note that the majority decision of the Fifth District Court of Appeal not only fails to attempt to distinguish the four (4) prior decisions from the Supreme Court of Florida; but also, the majority opinion does not even refer to or cite the decisions and authority. In the written dissent, Chief Judge Sharp referred to the "trilogy of three old Florida Supreme Court cases" for the principle that a surety is entitled to sums "earned but unpaid" at the time of default as against a bank which is an assignee of the defaulting contractor. Chief Judge Sharp also noted the 1951 decision by the Florida Supreme Court which ruled for a surety in a dispute with a bank-contract assignee, and further cited decisions of Federal courts in Florida, applying Florida suretyship law which are likewise contrary to the majority decision of the Fifth District Court of Appeal.

In Phifer State Bank v. Detroit Fidelity & Surety Co., 121

So. 571 (Fla. 1929), the Florida Supreme Court, following the established doctrine of equitable subrogation, ruled that a performing surety has priority to the unpaid contract funds, superior to an assignee bank. It appears that Phifer State Bank v. Detroit Fidelity & Surety Co., supra, was the first Florida decision on that exact question in that the Florida Supreme Court stated:

> The law in the case is well settled in this country, though it appears that the exact question here presented has never been directly determined by this court. (At 572).

In the subject case, Ladd Construction Company had made application for a surety bond and an agreement of indemnity was made between Ladd Construction Company and the surety company. Subsequently, Ladd Construction Company executed an instrument which stated "Please pay to the Phifer State Bank on demand the sum of $10,000.00 Ten Thousand Dollars and charge to my account." Mr. Ladd died; and the surety company completed the contract. The property owner (the City of Gainesville) filed an interpleader action because contract monies were claimed by both the bank and by the surety company. Decision was in favor of the surety company; and the bank appealed. In upholding the surety's priority to the contract funds, the Florida Supreme Court relied upon previous decisions by the United States Supreme Court, the Supreme Court of Michigan, the Supreme Court of Ohio and the Supreme Court of Massachusetts.

In Florida East Coast Railway Co. v. Eno, 128 So. 622 (Fla. 1930), the Florida Supreme Court, again applying the doctrine of equitable subrogation, ruled that a performing surety is entitled

to earned but unpaid contract funds. The Court stated that the surety has first claim to such funds because it is subrogated to the position of the owner. After default, the owner has the right to retain unpaid contract funds and apply them to complete the contract. The assignee bank has no greater rights than the contractor to the funds; and the surety, stepping into the position of the owner, can apply any unpaid funds to complete the construction project.

In Union Indemnity Co. v. City of New Smyrna, 130 So. 453 (Fla. 1930), the Florida Supreme Court again held that the performing surety has a prior right to the balance of the contract funds. The Florida Supreme Court stated:

> When the surety undertook the completion of the construction, it became subrogated, to the extent necessary to protect it from loss, to all the rights which the city might have asserted as against the funds in its hands. Such right attached at the time the contract of surety was made, and is one of the valuable rights which accrued to the surety upon its becoming obligated as such, and these rights could not be defeated by an assignment of the fund in the hands of the owner to secure a loan of money. The assignee of the contractor [the bank] could acquire no greater right by reason of an assignment than that which the contractor himself might assert against the owner.

In Commercial Bank in Panama City v. Board of Public Instruction of Okaloosa County, 55 So.2d 552 (Fla. 1951), the Florida Supreme Court cited Phifer State Bank v. Detroit Fidelity & Surety Co., supra, Florida East Coast Railway Co. v. Eno, supra, and Union Indemnity Co. v. City of New Smyrna, supra, and ruled that the performing surety has priority to unpaid contract funds over an assignee bank. In this case, the contractor, Andy C. McNeil

Company, entered into an agreement of indemnity on August 15, 1949, and on November 2, 1949, transferred and assigned to Commercial Bank in Panama City all funds due it under the construction contract. Andy C. McNeil Company defaulted in the payment of accounts for labor, materials, and subcontracts employed in the completion of the construction; and the surety paid the valid accounts and claims. The surety contended that it was, as a matter of law, subrogated and entitled to the balance due under the building contract; and the Florida Supreme Court agreed.

The decision of the Fifth District Court of Appeal is contrary to and expressly and directly conflicts with the above-cited four (4) decisions of the Supreme Court of Florida, although the lower tribunal did not even cite the subject prior decisions by the Supreme Court of Florida. Of course, as previously indicated, Chief Judge Sharp, in the written dissent, noted the conflict and additionally pointed out that the majority decision is contrary to the well-established principle "that the surety was entitled to sums 'earned but unpaid' at the time of default as against bank, who was an assignee of the contract" and contrary to the "overwhelming and essentially unanimous" decisions in the country.

Further, the express and direct conflict is exemplified in the Opinion of the Fifth District Court of Appeal. The majority decision effectively fails to cite even a single case in support of its decision that a financing bank has priority over a performing surety to earned but unpaid contract funds. On the other hand, the dissenting opinion cites four (4) Florida Supreme Court cases, Federal court cases in Florida applying Florida suretyship

law, and numerous other cases and authorities.

Although the Fifth District Court of Appeal has failed to certify the issues as being of "great public importance" (Suggestion for Certification served August 6, 1986, and Motion for Certification of Issues served May 16, 1988), the matters are obviously of great public importance based upon the decisions and authorities cited in the written dissent.

CONCLUSION

Based upon the foregoing, the Supreme Court of Florida has jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida. In addition, the Supreme Court of the State of Florida should exercise its discretion and entertain the case on the merits due to the significant impact and great public importance of the issues presented, impacting and affecting every surety and lender in the State of Florida, due to the apparently unprecedented majority decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail, postage prepaid, to TIM HAINES, ESQUIRE, and to YOUNG J. SIMMONS, ESQUIRE, of Green, Simmons, Green, Hightower & Gray, P.A., 125 Northeast First Avenue, Suite 1, Ocala, Florida, 32670, Attorneys for Plaintiff/Respondent, this 10th day of June, 1988.

ROBERT E. MORRIS