

TREAT AS ORIGINAL BRIEF.

01A9-7-89

679-2/adc/djs

FILED

IN THE SUPREME COURT OF THE STATE OF FLORIDA D. J. WHITE

JUN 5 1989

CLERK SUPREME COURT

BY _____
Deputy Clerk

OBS COMPANY, INC.,

Petitioner,

SUPREME COURT CASE NO. 73,296

VS

PACE CONSTRUCTION CORPORATION,
TRANSAMERICA INSURANCE COMPANY,
and SEABOARD SURETY COMPANY,

APPEAL NO. FROM SECOND
DISTRICT COURT OF APPEALS:
87-2954

Respondents.

PETITIONER'S INITIAL BRIEF

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PREFACE

In this Brief, Petitioner/Appellee/Plaintiff-Subcontractor OBS COMPANY, INC., will be referred to either by "OBS" or as the Subcontractor. Respondent/Appellant/Defendant, PACE CONSTRUCTION CORPORATION, TRANSAMERICA INSURANCE COMPANY and SEABOARD SURETY COMPANY will be referred to either as "PACE", "TRANSAMERICA" or "SEABOARD", respectively, or collectively as "Respondents."

The symbol "R" will denote the record-on-appeal and the symbol "App" will denote the appendix filed together with this Initial Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, OBS COMPANY, INC., was the Plaintiff in a two-count action based upon a breach of contract and a statutory payment bond due to Defendant/Respondent's refusal to pay for work fully performed and accepted without objection. The Trial Court granted Summary Judgment in favor of Petitioner on Count I for breach of contract against PACE CONSTRUCTION CORP., the general contractor, and additionally granted Summary Judgment on Count II an action against the surety, TRANSAMERICA INSURANCE COMPANY and SEABOARD SURETY COMPANY, based upon the statutory payment bond. The Second District Court of Appeals reversed the Trial Court's decision and in doing so rendered a decision which directly conflicted with the decisions of the other District Courts of Appeal in the State of Florida. Accordingly, the Supreme Court for the State of Florida has granted conflict jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure.

FACTS

The undisputed facts as found in the record are as follows. On March 28, 1985, Petitioner, OBS COMPANY, INC., entered into a Subcontract Agreement with Respondent, PACE CONSTRUCTION CORPORA-

TION, whereby OBS, as subcontractor, was to perform the framing, drywall, insulation and stucco work on a project known as "OUTLET WORLD OF PASCO COUNTY". (R - 061; App. 1.) In a wholly separate agreement from the Subcontract Agreement, PACE guaranteed payment to OBS and other claimants on the project by executing a Labor and Material Payment Bond as principal. (R-062-63; App. 12-13) TRANS-AMERICA INSURANCE COMPANY and SEABOARD SURETY COMPANY were together acting as surety under the Payment Bond. (R - 078-79; App. 12-13) Paragraph 2, Page 2, of the Payment Bond expressly states:

"The above-named PRINCIPAL (PACE) and SURETY (TRANS-AMERICA and SEABOARD) hereby jointly and severally agree with the owner that every claimant (OBS) as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date upon which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this Bond..." (Record - 079; App. 13)

It is undisputed in the record that OBS fully, faithfully and diligently performed all of its work, that such work has been completed for over ninety (90) days, and that OBS'S work was satisfactory and accepted by the owner, architect and PACE.

(R-061-64) The sole basis for PACE refusing to make final payment in the amount of Forty-seven Thousand Nine Hundred Seventeen Dollars and Sixty Cents (\$47,917.60) under the Subcontract Agreement or honor its guaranteed payment obligations under the separate payment bond was its reliance on Article 6 of its preprinted Subcontract Agreement which it drafted. Article 6 provides:

"Final Payment of the balance of the Subcontract Price shall be made as follows:

- 6.1 Final Payment shall be the unpaid balance of the Subcontract Price, and shall become due when the Work described in this Subcontract is fully completed and performed in accordance with this Subcontract and the contract Documents and is satisfactory to Owner, Architect and Contractor.
- 6.2 Subcontractor's application for Final Payment shall be in the same form specified in Article 5 of this Subcontract.
- 6.3 In addition to any other requirements of this Subcontract and the Contract Documents, Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied: (a) approval and acceptance of Subcontractor's work by Owner, Architect and Contractor, (b) delivery to Contractor of all manuals, "as-built" drawings, guarantees, and warranties for material and equipment furnished by Subcontractor, or any other documents required by the Contract Documents, (c) receipt of Final Payment for Subcontractor's work by contractor from Owner, (d) furnishing to Contractor of satisfactory evidence by Subcontractor that all labor and material accounts incurred by Subcontractor in connection with his work have been paid in full, (e) furnishings to Contractor a complete Affidavit, Release of Lien and Waiver of Claim by Subcontractor in the form attached hereto as Exhibit "D", and as required by the Contract Documents."

(R - 071; App. 71)

It is clear from the record, however, that the separate payment bond executed by PACE, as principal, and TRANSAMERICA and SEABOARD as surety, did not incorporate the Subcontract Agreement.

(R-78; App. 12) The record is equally clear that PACE, as principal, and TRANSAMERICA and SEABOARD, as surety, under the payment bond promised to make payment within ninety (90) days after OBS had completed its work. (R-079; App. 13) Again, both PACE and the surety's sole defense for refusing to make payment to OBS was based

on the conflicting and separate language of the Subcontract Agreement.

The Subcontract Agreement also provides in Paragraph 1.1 that:

"The contract documents for this Subcontract consist of this Agreement and any exhibits attached hereto, the agreement between the owner and the contractor (PACE) of this project, the conditions of the contract between the owner and the contractor (General, supplemental and other conditions)..." (R - 065; App. 1)

Paragraph 11.2 of the contract between the owner and PACE states "all subcontracts shall conform to the requirements of the contract documents". (R - 089; App. 23) The contract between the owner and PACE was a cost-plus or "reimbursement" contract which, in Article 8, Paragraph 8.1.6, provides that the owner is to reimburse PACE for:

"Payments made by the contractor (PACE) to subcontractors for work performed pursuant to the subcontracts under this Agreement". (R - 087; App. 21)

Indeed, Article 5, Paragraph 5.1, provides that:

"The owner agrees to reimburse the contractor (PACE) for costs of work as defined in Article 8." (R - 086; App. 20)

Paragraph 9.9.2 of the General Conditions expressly provides that PACE is required to submit an:

"Affidavit that all payrolls, bills from materials and equipment, and other indebtedness connected with the work... have been paid..." before final payment from the owner became due. (App. 41)

Paragraph 14.2.1 of the General Conditions between the owner and PACE provided that PACE's failure to make prompt payment to subcontractors is a ground for termination by the owner. (App. 45)

Thus at one point, the Subcontract required the owner to pay

PACE before PACE was to pay OBS, however, in another portion of the Subcontract, required PACE to first pay OBS before the owner was required to pay PACE.

Moreover, Paragraph 5.3.1 of the General conditions requires PACE to:

"Identify to the subcontractor any term and condition of the proposed subcontract which may be at variance with the contract documents." (App. 36)

The record is silent and completely void of any notice that PACE informed or notified OBS in any form that Article 6 of the Subcontract Agreement, which required owner to first pay PACE before PACE was to pay OBS, was at variance with the remaining provisions of the Subcontract documents which required PACE to first pay OBS, before the owner was obligated to pay PACE. The terms of the Subcontract Agreement, therefore, clearly contains patent inconsistencies, ambiguities and repugnancies.

Since final payment was refused by PACE under the Subcontract Agreement and, additionally, under the separate payment bond, OBS filed a two count Complaint. (R-02-05) Count I sought damages against PACE for breach of the Subcontract Agreement. (R-02-03.) Count II was a separate action on the payment bond, and OBS sought damages directly against the surety. (R-03-05.) The Trial Court, after first considering three (3) separate Briefs from Respondents (R-096-102; 194-199; and 191-192) and two (2) Memorandums of Law from OBS (R-113-126; and 175-179), and further after an extensive hearing, found the Subcontract Agreement to be ambiguous, and granted summary judgement against PACE on Count I. (R-200-202.)

Additionally, the Trial Court granted summary judgement against the surety, TRANSAMERICA and SEABOARD, on the separate payment bond action in Count 11. (R-200-202.)

The District Court of Appeals for the Second District of Florida reversed the decision of the Trial Court by using the application of a common-law principle to defeat the statutory payment bond action. (App. 59-51) That decision directly conflicts with several decisions of other District Courts of Appeal in the State of Florida, including Cohen vs Lungsford, 362 So.2d 383 (Fla. 1st DCA 1978) and Guin and Hunt, Inc. vs Huahes Supply, Inc., 335 So.2d 842 (Fla. 4th DCA 1976). That decision also indirectly conflicts with countless other decisions involving Florida Mechanics Lien Act and has recently created great uncertainty and unrest in Florida's construction industry and is of great public concern.

In addition, the Second District reversed the Trial Court's finding that the Subcontract Agreement was ambiguous and thus directly conflicts with this Court's decision in Peacock Construction Company vs Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977). Accordingly, this Court has granted conflict jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure. (App.52)

SUMMARY OF ARGUMENT

At issue are two different documents, the Payment Bond and the Subcontract Agreement. Liability under the Payment Bond is determined by the terms of the Payment Bond, and in constructing the terms of the Bond, they must be interpreted strictly against the bonding company which prepared them.

The express terms of the Payment Bond in the case at hand are clear, PACE who executed the bond as principal and TRANSAMERICA and SEABOARD who executed the bond together as surety, jointly and severally guaranteed payment to all claimants, including OBS, ninety (90) days after their work was complete. Accordingly, PACE as principal under the Bond and TRANSAMERICA and SEABOARD as surety are jointly and severally liable to OBS for payment.

In addition, there is no doubt that the Bond in question is a Florida Statute Section 713.23 payment bond, as found by the Second District Court of Appeals. Indeed, the legislature in 1980 amended the statute to set the minimum requirements for all payment bonds. The statute expressly requires that, "any form of (payment) bond ... shall be deemed to include the condition" that "the contractor shall promptly make payments ... to all lienors (sub-contractors)." Section 713.23(1)(a), Fla. Stat. (1985).

If the contractor does not promptly pay its subcontractor the statute guarantees "a direct riaht of action on the bond against the surety." Section 713.23(g), Fla. Stat. (1985). Since PACE did not make prompt payment to OBS, the surety is directly liable. Accordingly, under the express terms of the Bond, and pursuant to

Florida's Mechanic's Lien Act, both PACE, as Principal, and SEABOARD and TRANSAMERICA, as Surety, are jointly and severally liable to OBS.

The Second District Court of Appeals' decision confused the two separate obligations of PACE under the Payment Bond and under the Subcontract Agreement in applying a common-law suretyship principle which is, if the principal is not liable then neither is the surety. The Second District found that since payment was not yet due from PACE under the separate Subcontract Agreement, the surety was not liable. This Court, however, announced that common-law suretyship principle in Cone v. Benjamin, 8 So.2d 476, 480 (Fla. 1942), to wit:

"The liability of a surety is co-extensive with that of his principle, within the terms of the contract of Suretyship" (Emphasis added).

Within the "contract of suretyship," the payment bond, PACE the principal under the bond-suretyship contract is liable ninety (90) days after OBS completed its work. Since PACE, as principal under the payment bond-suretyship contract is liable, then so is the surety. Respondent's contention, therefore, raises no defense.

Indeed, Respondents contention also directly conflicts with the plain language of the statute. The statute mandates that PACE "shall promptly make payments" to all lienors, if it does not, a "direct right" on the bond exists against the surety. Sections 713.23(1)[a) and [g) respectively. Clearly, PACE and its surety are liable under the bond.

Since the Second District Court of Appeals failed to apply the express language of the statute and confused the application of the common-law suretyship principle, its decision directly conflicted with Cohen vs Lungsford, 362 So.2d 383 (Fla. 1st DCA 1978) and Guin and Hunt, Inc. vs Huahe Supply, Inc., 335 So.2d 842-844 (Fla. 4th DCA 1976). In fact in Cohen, a case which addresses the same identical issue, the court held that the conditional payment language in the subcontract agreement could not defeat, limit or effect the surety's liability to the subcontractor. The Second District Court of Appeals' decision held just the opposite that the language did defeat the surety's liability to the subcontractor. The Second District opinion also directly conflicts with Guin which held that the subcontractor's rights in the bond are vested and that the owner or lender's non-payment would not defeat that right. The Second District Court of Appeals' decision was directly opposite, that the owner's non-payment defeated the subcontractor's right in the payment bond. The Second District Court of Appeals decision is clearly in error and should be reversed.

On the issue of liability under the Subcontract Agreement, the Second District Court of Appeals also erred in reversing the Trial Court's decision that PACE did not shift the risk of non-payment to OBS in the Subcontract Agreement. The terms of the Subcontract clearly contradict; at one point it states the owner must pay PACE before PACE pays OBS and in other sections states that PACE must pay OBS before the owner is required to pay or reimburse PACE.

The interpretation of an ambiguous contract which attempts to shift risk of owner non-payment to the subcontractor, must be construed in favor of the subcontractor. Peacock Construction Company, Inc. vs Modern Air Conditioninu, Inc., 353 So.2d 840, 842-43 (Fla. 1977); Snead Construction Corporation vs Langerman, 369 So.2d 591 (Fla. 1st DCA 1978). Accordingly, the Second District Court of Appeals' decision conflicts with clear precedent.

Moreover, the Trial Court's interpretation of a contract should not be reversed by an appellate court unless it is clearly incorrect, unsupported by the evidence and no legal basis exists for the conclusion reached. The Second District never found that the Trial Court's decision was "clearly incorrect." The Trial Court's decision was clearly supported by the evidence, conflicting contract terms and legal authority. Clearly, the Second District Court of Appeals erred in reversing the Trial Court's correct decision.

The surety is directly liable under the payment bond, and PACE is additionally liable under the Subcontract Agreement, as the Trial Court found. It is respectfully requested that the Second District Court of Appeals' opinion be reversed and the Trial Court's decision be reinstated.

A R G U M E N T

POINT I: THE EXPRESS TERMS OF THE LABOR AND MATERIAL PAYMENT BOND AND THE SUPPLEMENTED CONDITIONS OF FLORIDA STATUTES SECTION 713.23 ARE DETERMINATIVE OF THE OBLIGATIONS OF PACE WHO EXECUTED THE BOND AS PRINCIPAL AND TRANSAMERICA AND SEABOARD WHO EXECUTED THE BOND AS SURETY.

At issue are two different documents. PACE, as principal, and TRANSAMERICA and SEABOARD together as surety, executed the payment bond which jointly and severally guaranteed payment to all claimants. (App. 12-13) PACE also executed a separate Subcontract Agreement as the general contractor. (App. 1-11) The issues relating to the Subcontract Agreement will be discussed in Point III.

OBS directly sued the surety, TRANSAMERICA and SEABOARD, in Count II of its Complaint for their liability under the express terms of the payment bond, and as statutorily permitted in Florida Statute Section 713.23(g) which states:

"Any lienor (subcontractor) shall have a direct riah of action on the bond against the surety."

The liability of TRANSAMERICA and SEABOARD, as surety, is plainly expressed within the payment bond. The bond states:

"2. The above named principal (PACE) and surety (TRANSAMERICA and SEABOARD) hereby jointly and severally agree with the owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished, may sue on this bond..." (R-079; App. 13)

There is no dispute that OBS is a claimant under the bond. OBS entered into a contract with PACE on or about March 28, 1985, and a claimant is defined within the bond as:

"one having a direct contract with the principal (PACE)..." (App. 13)

Accordingly, since there is no dispute that OBS is a claimant, the terms of the bond clearly require payment from the surety ninety (90) days after the work has been complete. Even if there were an ambiguity in the terms of the bond, it must be resolved against the surety.

"Florida has viewed construction bonds as contracts of insurance, and therefore in constructina the terms of these contracts, they must be read and interpreted strictly aagainst the bonding company which prepared them (citations omitted)". Travelers Indemnity Company vs Housina Authority of the City of Miami, 256 So.2d 230, 234 (Fla 3rd DCA 1972).

The terms of the payment bond-contract in the case at hand promised payment ninety (90) days after work was complete, if there is any ambiguity in that promise it must be strictly interpreted against the bonding company. There should be no issue that the surety, TRANSAMERICA and SEABOARD, is clearly liable.

Moreover, both the Trial Court and the Second District Court of Appeals agree that the payment bond issued by PACE, TRANSAMERICA and SEABOARD is a Florida Statute Section 713.23 payment bond, and as such contains the minimum requirements and conditions set forth in the Statute. Florida Statute Section 713.23(1)(a) provides:

"any form of bond given by a contractor conditioned to pay for labor, services and materials used to improve real property shall be deemed to include the condition of this Subsection." (Emphasis added)

The condition of that Subsection is that the payment bond shall be conditioned that "the contractor (PACE) shall promptly make payment...to all lienors (subcontractors) under the contractors direct contract." Florida Statute Section 713.23(1)(a) (1985). If the contractor fails to "promptly make payments" to all lienors, then a "lienor", as defined in Florida Statute Section 713.01(10) which includes "a subcontractor", is statutorily guaranteed "a direct right of action on the bond against the surety." (Emphasis added.) Florida Statute Section 713.23(g) (1985). Accordingly, not only do the terms of the payment bond contract guarantee payment to OBS within ninety (90) days after the work was performed, but the Statute also mandates a direct right of action on the bond against the surety since OBS did not receive prompt payment. Liability quite simply could not be clearer under the bond and the Statute.

Because the Second District Court of Appeals found that the separate Subcontract Agreement had a condition precedent to PACE'S obligation to pay OBS, namely the owners payment to PACE, the Court incorrectly found that the surety could not be liable under the separate statutory payment bond action. The Second District Court of Appeals confused the two separate obligations of PACE in applying a common-law suretyship principle to defeat the statutory payment bond action.

The common-law suretyship principle asserted by Respondent is simple where the principal is not liable, then neither is the surety. This court announced this common-law suretyship in prin-

ciple in Cone vs Benjamin, 8 So.2d 476 (Fla. 1942) when Justice Chapman explained:

"The liability of a surety is co-extensive with that of his principal, within the terms of the contract of Suretyship..." (Emphasis added) Id. at 480.

Respondents assertion, therefore, provides no defense to the bond payment claim and was misunderstood by the Second District Court of Appeals.

PACE is the principal under the bond and is liable under the terms of the bond-contract. That is, PACE, under the express terms of the "contract for suretyship", also guaranteed payment ninety (90) days after OBS completed its work. (App. 13) Again, there is no issue that OBS faithfully and timely completed all of its work and that OBS'S work was accepted by the owner, architect and PACE, and that the ninety day period has passed. PACE'S obligation in guaranteeing payment to OBS as principal under the payment bond suretyship contract is different than PACE'S obligations under the separate Subcontract Agreement. PACE, as principal under the "contract for suretyship", is liable for payment ninety (90) days after OBS completed its work, although PACE, as general contractor, may be liable for payment at a different point in time under the separate Subcontract Agreement. The time in which PACE becomes obligated to make payment under the two different documents is different. PACE executed both documents and is obligated by the terms it agreed upon in each document.

Accordingly, since PACE, as principal under the express terms of the suretyship contract/bond and pursuant to the Statute is

liable, then so is the surety, TRANSAMERICA and SEABOARD. Respondent's common-law suretyship defense is not applicable to defeat OBS'S claim but to support the claim.

Apparently, since OBS did not sue PACE as principal under the bond in Count 11, the Second District Court of Appeals confused PACE'S two separate obligations, that is PACE as principal under the bond/suretyship contract, and PACE as general contractor under the Subcontract Agreement. In Count 11, OBS only sued the surety, TRANSAMERICA and SEABOARD, since the surety was "~~jointly and~~ severally" liable under the terms of the bond, and OBS had a direct right on the bond against the surety pursuant to Florida Statute Section 713.23(g). Again, PACE is liable as principal under the bond, even though they were not sued in their capacity as principal. Accordingly, the common-law suretyship principle confirms that the surety is also liable.

Secondly, Respondents contention is in direct conflict with the plain language of the Statute. The Legislature in 1980 amended Florida Statute Section 713.23(1)(a) dealing with payment bonds to require that "any form of bond... shall be deemed to include the condition of this Subsection." The condition is that "the contractor (PACE) shall promptly make payments", if he does not, a "direct right" on the bond exists against the surety. Florida Statute Section 713.23(1)(a) and Florida Statute Section 713.23(g), respectively. Accordingly, Respondents suggestion that PACE is not required to make payment until the owner pays PACE is in direct conflict with the Statute. In other words, Respondents suggest

they are not required to make prompt payment. Respondents suggestion directly conflicts with the plain language of the Statute which mandates that "the contractor shall promptly make payments" to OBS a lienor. Accordingly, the plain language of the Statute flatly rejects Respondent's defense on the bond.

The Second District Court of Appeals apparently ignored the express language of the Statute and therefore its decision directly conflicts with other District Courts of Appeal. In Cohen vs Lunasford, 362 So.2d 383 (Fla. 1st DCA 1978), the Court expressly held that a subcontractor's rights in a payment bond cannot be limited or defeated by conditional payment language. In Cohen, the Court addressed the same identical issue as to the Subcontractor's rights in the payment bond as we are faced with in the case at hand. In Cohen, like the case at hand, the Subcontract Agreement conditioned payment to the subcontractor on the general contractor's receipt of payment from the owner. In addition, in Cohen, the statutory payment bond itself expressly stated that the surety would not be liable under the payment bond to the subcontractor unless the owner and lender first made payment to the principal pursuant to the terms of the contract. In the case at hand, no additional conditional payment provision was added to the payment bond itself, nor was the Subcontract Agreement incorporated into the payment bond. However, in Cohen, where the additional conditional payment language was both in the payment bond and in the separate Subcontract Agreement, the Court nevertheless held that neither the condition for payment in the Subcontract Agreement nor

the condition expressly stated in the payment bond would effect the surety's liability to the subcontractor under the statutory payment bond. The Court expressly held:

"The condition may effect the surety's liability to the owner, but it does not effect the surety's liability to the lienor (subcontractor).

...

The condition does not limit the rights of the subcontractor, if it did, the limitation would be invalid and would be disregarded as surplusage." (Emphasis added) Id. at 383 (following, Guin and Hunt, Inc. vs Hughes Supply, Inc., 335 So.2d 842 Fla 4th DCA 1976).

Indeed, for the Cohen Court to hold otherwise would effectively violate the very purpose of the payment bond and the express language of the Statute.

The Second District Court of Appeals, however, reached a completely contradictory and conflicting result by holding that the same conditional payment language as existed in Cohen acted to defeat the independent payment bond right of the subcontractor, where the Cohen Court found that "the condition does not limit the rights of the subcontractor, if it did, the limitation would be invalid". Id. Obviously the reason the limitation would be invalid is due to the fact that it would clearly violate the mandatory condition of the Statute and the very purpose of the payment bond which is to guarantee that subcontractors and suppliers "will be paid". Florida Board of Reagents vs Fidelity and Deposit Company, 416 So.2d 30, 31 (Fla. 5th DCA 1982).

The Fourth District Court of Appeals in Guin and Hunt, Inc., vs Hughes Supply, Inc., 335 So.2d 842-844 (Fla. 4th DCA 1976) found

that a subcontractor's right in the payment bond is vested. In Guin the bond conditioned payment to the subcontractor on payment from the owner. The Court, however, wholly rejected such a contention that the condition could defeat the subcontractor's right even if the language were found in the payment bond. The Court expressly held:

"The effect of the bond (statutory payment bond) is to exempt the owner's property from lien foreclosure and substitute the security of the bond in lieu thereof. That being the case, Appellee, as a subcontractor, is a third party donee obligee of the bond. His rights as such are vested and may not subsequently be defeated by the failure of the owner or lender to comply with the special conditions of the bond." (Emphasis added) Id.

Again, the Second District Court of Appeals decision directly conflicts with Guin by defeating the subcontractor, OBS'S, vested rights in the bond due solely to the owners refusal to pay.

Since the Second District Court of Appeals misunderstood or misapplied the common-law suretyship principle and further ignored both the plain language of the bond and the Statute, the Court rendered a decision which directly conflicts with the other District Courts of Appeal.

Pace, as principal, is liable according to the express terms of the payment bond, as well as the required conditions of the Statute. It is, therefore, abundantly clear that the surety, TRANSAMERICA and SEABOARD, are equally liable to OBS as the Trial court correctly held.

POINT 11: PUBLIC POLICY PROHIBITS A SUBCONTRACTOR'S CLAIM UNDER A STATUTORY PAYMENT BOND FROM BEING DEFEATED OR LIMITED BY ACTIONS OF AN OWNER, LENDER OR GENERAL CONTRACTOR.

As Justice Roberts of this Court stated in *Crane Company vs Fine*, 221 So.2d 145,152 (Fla. 1969):

"The fundamental purpose of the (Mechanics Lien) Act remains the same, that is, to protect those whose materials, labor and skills improve the land of others..".

It is designed primarily to protect the lienor (OBS), not the owner or the surety. Florida's Mechanics Lien Act allows an owner to exempt his property from mechanic's liens by providing adequate alternative security in a payment bond. Florida Statute Section 713.23(1)(a). If the owner elects to exempt his property from liens under a payment bond, this clearly does not act to limit or restrict the rights of hard working subcontractors and suppliers. Accordingly, the lienor's rights in the bond are vested and not subject to defeat by the failure of an owner or lender to make payment. Guin and Cohen, supra. Respondent's suggestion that an owner who has exempted his property from liens by virtue of the payment bond, may thereafter refuse to make payment for a subcontractor's work, and that such refusal to make payment is the event or condition which prohibits the subcontractor from recovering his guaranteed payment under the bond is clearly contrary to common sense and public policy. Indeed, Respondent's contention makes the bond illusory and Florida's Mechanic's Lien Act hollow.

In the case at hand, the owner exempted his property from OBS'S liens by having the payment bond issued. The owner then refused final payment for OBS'S work, and the surety, TRANSAMERICA and SEABOARD, who were paid a fair premium for their bond to guarantee payment to OBS and others, now suggest that the owners refusal to pay for OBS'S work is the event which acts to relieve them of guaranteeing payment to OBS. In other words, Respondents suggest the payment bond only guarantees payment until you need to collect on it. Respondents suggestion is illogical and clearly defeats the purpose of the payment bond. The purpose of the bond is to guarantee payment where it has been refused.

"The payment portion of the Bond contains the insurers undertaking to guarantee that all subcontractors and materialmen will be paid." (Emphasis added.) Florida Board of Reagents vs Fidelity and Deposit Company, 416 So.2d 30,31 (Fla 5th DCA 1982).

Again, it is the owners nonpayment that requires the need to obtain payment under the bond. Common sense dictates that Respondent's contention that owner's refusal to make payment is the condition or event which stops the surety's guarantee of payment, is void as against public policy.

In addition, the plain language of the Statute flatly rejects Respondent's suggestion. The Statute requires prompt payment otherwise a direct right of action on the bond exists against the surety. Florida Statute Section 713.23(1)(a) and 713.23(g), respectively. Respondent's suggestion is that prompt payment is not required but rather payment may never be required. Respondents suggestion directly violates the plain language of Florida Statute

Section 713.23, which expressly requires "that the contractor shall promptly make payment for labor, services and materials to all lienors...". (Emphasis added.) Respondent's suggestion also directly contradicts the policy underlying the Statute, which is to guarantee that all subcontractors and suppliers "will be paid". Florida Board of Regents vs Fidelity and Deposit Company, supra.

It is, accordingly, abundantly clear that the policy behind Florida's Mechanics Lien Act is to allow an owner to exempt his property from mechanics lien without jeopardizing the adequate payment security to those subcontractors and suppliers who loyally perform construction services on the project. Such security in the bond is vested and is not subject to being subsequently defeated, nor are such rights subject to limitation. Common sense rejects Respondent's suggestion that the very event for which the bond was created to guarantee against, that is nonpayment, is the event which would act to prohibit recovery under the bond. That is precisely why the legislators mandated prompt payment from the contractor. Since prompt payment was not made by PACE, the surety, TRANSAMERICA and SEABOARD, are directly liable under the payment bond.

POINT 111: BECAUSE OF THE AMBIGUITIES AND INCONSISTENCIES IN THE SUBCONTRACT AGREEMENT, THIS COURT'S HOLDING IN PEACOCK CONSTRUCTION COMPANY v. MODERN AIR CONDITIONING, INC. MANDATES THAT THE GENERAL CONTRACTOR DID NOT SATISFY HIS BURDEN OF SHIFTING THE RISK OF OWNER NONPAYMENT TO THE SUBCONTRACTOR.

PACE is also liable as General Contractor under the Subcontract Agreement. The record establishes that the Subcontract

Agreement contains inconsistent and ambiguous provisions. The General Contract between PACE and the owner as well as the accompanying General Conditions were expressly incorporated into the Subcontract Agreement. See Paragraph 1.1 (App. 1). The express terms of the general contract states that it is a cost-plus or "reimbursement" contract requiring PACE to first pay it's subcontractors before the owner reimburses PACE. Paragraph 5 of the general contract states that PACE will be "reimbursed" for costs as defined in Article 8. (App. 20) Article 8.1 expressly states that the term "cost" means costs incurred "and paid by the contractor". (App. 21) Likewise, Paragraph 8.1.6 of the General Contract provides that the owner is to "reimburse" PACE for"

"Payments made by the contractor to subcontractors for work performed pursuant to the subcontractors under this agreement." (App. 21)

In fact, according to General Condition 9.9.2 PACE shall submit an Affidavit to the owner certifying "all payrolls, bills for materials and equipment and other ... indebtedness connected with the work.. .have been paid.." before final payment from the owner shall become due. (App. 46) Obviously, PACE must pay its subcontractor before executing such an Affidavit. Moreover, if PACE fails to make prompt payment to a subcontractor that is grounds for termination under General Condition 14.2.1. (App. 45)

All of the foregoing makes clear that the terms of the Contract Documents which were expressly incorporated in the Subcontract Agreement prepared by PACE requires PACE to pay its subcontractor's before the owner must pay or reimburses PACE.

PACE, however, points to a conflicting provision of its Subcontract Agreement which states that the owner must first pay PACE before PACE is to pay its subcontractors.

Under PACE'S suggested interpretation of the conflicting provisions, PACE will never be obligated to pay subcontractors because the owner will never be obligated to PACE until PACE first pays its subcontractors. The condition for payment to subcontractors is like a dog chasing his own tail under the Contract Documents. The condition will simply never occur.

Moreover, Paragraph 5.3.1 of the General Conditions requires PACE to:

"Identify to the subcontractor any term and condition of the proposed subcontract which may be at variance with the contract documents". (Emphasis added) (App. 36)

The record is clear that PACE never identified conflicting contract provisions or that its interpretation of Article 6 was at variance with the remaining Contract Documents, nor did PACE inform OBS that its condition for payment would not occur under the Contract Documents.

Finally, the contract between the owner and PACE requires in Paragraph 11.2 that:

"All subcontracts shall conform to the requirements of the contract documents". (App. 23)

The requirements of the contract documents are that PACE pay its subcontractor before the owner must reimburse PACE. Clearly, a contract must be construed from its four corners, not one isolated

provision which conflicts with the remaining provisions. At the very best, the contract is ambiguous.

This Court, in Peacock Construction Company, Inc. v. Modern Air Conditionina, Inc., 353 So.2d 840, 842-43 (Fla. 1977), held that it was the general contractors burden to clearly and unambiguously shift the risk of non-payment to the subcontractor. In Snead Construction Corporation v. Lanaerman, 369 So.2d 591 (Fla. 1st DCA 1978) the court following this Court's holding in Peacock held in favor of the subcontractor because:

"The provisions in this case are ambiguous and must be construed in favor of the subcontractor." Id. at 593.

There is little question the Contract Documents conflict. Indeed, the trial court in the case at hand, after reviewing all the evidence, affidavits and documents, expressly found that the Subcontract did not "clearly and unequivocally accomplish the shift of risk," (Emphasis added). (App. 47). Accordingly, the Second District Court of Appeals' decision directly conflicts with this Court's holding in Peacock and with the First District Court of Appeals' decision in Snead.

Moreover, the law is well settled that:

"The interpretation by a trial court of a contract between the parties should not be reversed by an appellate court unless it is clearly incorrect and unsupported by the evidence in the cause." (Citations omitted). Safeco Insurance Company v. Rochow, 384 So.2d 163,164 (Fla. 5th DCA 1980).

See also, General Insurance Company of America v. Semtry Indemnity Company, 384 So.2d 1305,1306 (Fla. 5th DCA 1980). The court in

Spurrier v. United Bank, 359 So.2d 908,910 (Fla. 1st DCA 1978)

likewise held:

"The trial court's construction of an ambiguous contract cannot be disturbed by an appellate court ... unless no legal basis exists for the conclusion reached."
(Citations omitted).

The Trial Court in the case at hand expressly followed this Court's holding in Peacock and the First District Court of Appeals' holding in Snead. (App. 47). It, therefore, cannot be said that the Trial Court's decision was without any legal basis. Accordingly, the Second District Court of Appeals clearly erred in disturbing and reversing that decision.

Moreover, given the numerous patently conflicting provisions in the Subcontract Agreement, the decision of the Trial Court was well supported by the evidence. In fact in reviewing the Second District Court of Appeals' decision the court never considered whether the evidence supported the Trial Court's decision or whether its decision was "clearly incorrect", nor did the Second District find that the Trial Court's decision was without any legal basis. The Second District Court of Appeals clearly applied the incorrect standard in reversing the Trial Court's well supported decision.

Since the Second District Court of Appeals' decision conflicts with Peacock, Snead and the Trial Court's well supported decision, and further since the Second District clearly applied the incorrect standard in reversing the Trial Court, the Second District Court

of Appeals' decision should be reversed and the Trial Court's decision should be reinstated.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the District Court of Appeals' decision be reversed and the trial court's decision be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, postage prepaid, this 3 day of June, 1989, to J. M. Crowder, Esq. and John B. Grandoff, III., Esq., Allen, Dell, Frank & Trinkle, Suite 1240, Barnett Plaza, 101 East Kennedy Boulevard, Tampa, FL 33601; and to J.D. Humphries, 111, Esq., Varner, Stephens, Wingfield, McIntyre & Humphries, 1000 Grant Building, Atlanta, GA 30303.

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