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IN THE SUPREME COURT OF THE STATE OF FLORIDA

OBS COMPANY, INC.,

Plaintiff/Petitioner,

SUPREME COURT CASE NO: 73,296

v.

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

APPEAL NO: 87-295.

Defendants/Respondents,

\_\_\_\_\_

AMENDED JURISDICTIONAL BRIEF IN SUPPORT OF  
INVOKING DISCRETIONARY JURISDICTION  
FROM DECISION OF THE DISTRICT COURT OF APPEALS  
OF THE SECOND DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee/Plaintiff, OBS COMPANY, INC., is requesting this Court to invoke discretionary jurisdiction to review the decision of the District Court of Appeals of the Second District of Florida which reversed the Trial Court's entry of Final Summary Judgment in favor of Petitioner. A conformed copy of the decision of the Second District Court of Appeals is accompanied and attached hereto as an Appendix to this Jurisdictional Brief.

Petitioner, a Subcontractor, entered into a Subcontract with PACE CONSTRUCTION CORPORATION whereby OBS was to perform the framing, drywall, insulation and stucco work on a project known as "Outlet World of Pasco County". A Labor and Material Payment Bond was issued on the project where the General Contractor, PACE, was acting as Principal under the Bond, and TRANSAMERICA INSURANCE COMPANY and SEABOARD SURETY COMPANY were together acting as Surety. It is undisputed that OBS fully, faithfully and diligently performed all of its work and that OBS' work was satisfactory and accepted by the Owner and PACE; however, PACE refused to make final payment to OBS under the Subcontract Agreement in the amount of Forty-Seven Thousand Nine Hundred Seventeen Dollars Sixty Cents (\$47,917.60). In addition, PACE refused to make final payment under its separate and independent obligations as Principal under the Labor and Material Payment Bond. TRANSAMERICA and SEABOARD also refused final payment as Surety under the Payment Bond.

The sole and only basis for PACE, the General Contractor, refusing to make payment to OBS was the conditional language in the payment provision of the Subcontract Agreement which stated that a condition precedent to payment to the Subcontractor would be the General Contractor's receipt of final payment from the Owner. In a different portion of the Subcontract, however, the Owner's Contract with PACE was expressly incorporated and made a part of the Subcontract. The Owner's Contract stated that it was a Reimbursement Contract and that the Owner was only to reimburse PACE for amounts PACE first paid Subcontractors.

Since final payment was refused by PACE under the Subcontract Agreement and, additionally, since payment was being refused by both PACE as Principal and TRANSAMERICA and SEABOARD, as Sureties under the separate Labor and Material Payment Bond, Petitioner filed a two Count Complaint. Count I sought damages against PACE for breach of the Subcontract Agreement, and in a separate action on the payment bond, Count II sought damages directly against the Surety pursuant to Florida Statutes Section 713.23 and the Statutory Payment Bond. The Trial Court, finding the Subcontract Agreement to be ambiguous, granted Summary Judgment against PACE on Count I, and additionally granted Summary Judgment against the Surety on the Statutory Payment Bond action in Count II.

The District Court of Appeals for the Second District of Florida reversed the decision of the Trial Court by finding that the specific payment provision shifted the risk of non-payment to

the Subcontractor. In addition, the Court reversed the Trial Court's Judgment against the Surety on the Statutory Payment Bond by applying common law principals to defeat the statutory action. In so doing, the decision of the Second District Court of Appeals expressly and directly conflicts with the decision of Cohen v. Lunasford, 362 So. 2d 383 (Fla. 1st DCA 1978), the plain language of Florida Statute Section 713.23, the cases relating to that Statute, and further conflicts with this Court's decision in Peacock Construction Company v. Modern Air Conditioning, Inc., 353 So. 2d 840 (Fla. 1977).

#### SUMMARY OF ARGUMENT

This Court announced in The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988) that it has jurisdiction to review conflicting decisions between the District Courts of Appeals. The decision of the Second District Court of Appeals expressly and directly conflicts with the decision of the First District Court of Appeals in Cohen v. Lunasford, Supra. In Cohen, the First District Court of Appeals expressly held that a conditional payment provision would not and could not defeat a Subcontractor's claim on a Statutory Payment Bond. The Second District Court of Appeals, however, held exactly the opposite, finding that the same conditional payment provision would defeat the Subcontractor's claim on the Statutory Payment Bond.

In addition, the Second District Court of Appeals' decision directly conflicts with the clear language of Florida Statute

Section 713.23 and with the Fourth District Court of Appeals' decision in Quin v. Hunt, Inc., infra. Florida Statutes Section 713.23 deals explicitly with recovery on Payment Bonds. The Statute requires every Payment Bond to be conditioned that the Contractor promptly pay all lienors (Subcontractors) and, where no such payment has been made, the Statute provides a direct right against the Surety. In Quin, the Fourth District Court of Appeals expressly stated that the Payment Bond merely substituted security from the real property to the Bond and that the Subcontractor's rights were vested. The decision of the Second District Court of Appeals clearly conflicts with the plain language of the Statute and the Court's decision in Quin by not allowing a direct action against the Surety on the Bond and by not finding that the Subcontractor's rights were vested.

Since the Second District Court of Appeals' decision clearly conflicts with other District Courts' opinions and with the plain language of the Statute, and has created great uncertainty in Florida's construction industry by defeating a valid Statutory Payment Bond action by inappropriately applying common law principals, this Court clearly has jurisdiction.

#### JURISDICTIONAL ARGUMENT

This Court clearly has jurisdiction to review the above-referenced decision of the Second District Court of Appeals pursuant to 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. This Court recently set

referenced decision of the Second District Court of Appeals pursuant to 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. This Court recently set forth its jurisdictional perimeters under Article V, Section (3)(b)(3) of the Florida Constitution in The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988). In The Florida Star, this Court held:

"Thus, it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. This is the only reasonable interpretation of this Constitutional provision." 530 So. 2d at 288.

This Court clearly has jurisdiction if there is a statement or citation in the Second District Court of Appeals' decision which conflicts with another decision reaching a different result. In the case at hand, there are several decisions which reach directly conflicting results creating great confusion to Florida's construction industry.

A. CONFLICT WITH COHEN V. LUNGSFORD

In Cohen v. Lungsford, <sup>362</sup>~~363~~ So. 2d 383 (Fla. 1st DCA 1978), the Court was faced with the same issue as to Surety's liability under the Statutory 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, General Contractor, pursuant to the terms of the Contract. In the case at hand, no such conditional provisions were additionally expressed in the Payment Bond nor was the Subcontract Agreement incorporated into the Payment Bond, but the General Contract was expressly incorporated into the Payment Bond and that Contract required PACE to first pay its Subcontractor.

In Cohen, where there were conditional payment provisions in both the Payment Bond and the Subcontract, the Court 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 stated:

"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 disrearded as surplusage." Id at 383 (following, Quin & Hunt, Inc. v. Huah Supply, Inc., 335 So. 2d 842 (Fla. 4th DCA 1976)).

In the case at hand, 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 defeated the independent Statutory Bond rights of the Subcontractor. Again, the Court in Cohen found that "the condition does not limit the rights of the Subcontract, if it did, the limitation would be invalid." Id. Moreover, in Cohen



Second District Court of Appeals, that such conditional payment language can not defeat the Statutory Bond action, for it if did then "the limitation would be invalid and would be disregarded as surplusage." *Id.* Such a clear, express and direct conflict between the decisions of the Second District Court of Appeal, (which finds that conditional payment language defeats Statutory Payment Bond actions) and the First District Court of Appeals, (which finds that such conditional payment language does not defeat a Statutory Payment action) established an express and direct conflict, and this Court has jurisdiction pursuant to the Florida Constitution.

B. CONFLICTS WITH STATUTE 713.23 AND OWIN V. HUNT, INC.

Florida Statute Section 713.23 (1)(a) requires that every private Payment Bond "shall be deemed to include the conditions of this Subsection." The condition of the subsection is that the Payment Bond shall be conditioned that the Contractor (PACE) pay promptly all lienors (Subcontractors). Florida Statute Section 713.23 (1)(a). Florida Statutes Section 713.23 (g) gives a direct right against the Surety when the Contractor does not satisfy the statutory condition of prompt payment. Indeed, the purpose for the Statutory Payment Bond is to exempt the Owner's property from liens by simply converting the security from the real property to the Bond so that all lienors have security for payment. Florida Statute Section 713.23 has set forth the minimum requirements for the Payment Bond to secure such payments.

Indeed, if the security were not converted from the real

property to the Bond, and final payment were not made whether by the Owner or General Contractor, then pursuant to Florida's Mechanic's Lien Act, the Subcontractor in such a situation may foreclose on the Owner's property due to the Owner's refusal to pay. The decision of the Second District Court of Appeals completely contradicts the Statute and each case interpreting the purpose of Statutory Payment Bonds by prohibiting a direct action against the Surety for Owner's non-payment. Indeed, the decision allows an Owner to convert the security from the real property to a Bond thus exempting his property from Subcontractor's liens and, since the security is in the form of a Bond, prohibits Subcontractor's final payment against Surety if the Owner decides not to make payment. Such a holding directly conflicts with Quin v. Hunt, Inc., 335 So. 2d 842-844 (Fla. 4th DCA 1976), where 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."

By not holding that the Subcontractor's rights in the Bond were vested, the decision of the Second District Court of Appeals directly conflicts with the Court's holding in Quin. Due to the glaring conflicts in the Second District Court of Appeals' decision with the foregoing, great confusion and unrest has been created as to the rights and security of Bond Claimants. Indeed, the primary reason the Second District's opinion so glaringly

conflicts with the other District Court's decisions is due to the improper application of a common law principal to defeat a Statutory action. Moreover, the Appellate Court misapplied the common law in that PACE, as Principal under the terms of the Payment Bond, is liable, notwithstanding its liability under the separate Subcontract. The Second District's misunderstanding has created mass confusion in Florida's construction industry.

C. CONFLICT WITH PEACOCK CONSTRUCTION COMPANY V. MODERN AIR CONDITIONING COMPANY, INC.

It is undisputed that the payment portion of the Subcontract Agreement requires the Owner to first pay the General Contractor before the General Contractor is required to pay the Subcontractor, however, in a separate part of the Subcontract which incorporates the Owner's Contract with PACE, the Contract states that the Owner is only to "reimburse" or pay PACE for costs incurred "AND PAID" by PACE to Subcontractors. There is, therefore, clear ambiguity with the payment provision of the Contract.

Indeed, the Trial Court held that "the provisions of Article 6 (Payment Provision) do not clearly and unequivocally accomplish the shift of risk to the Subcontractor." Peacock Construction Co. v. Modern Air Conditioning Co., Inc., 353 So.2d 840 (Fla. 1977) states that:

In order to make such a shift the contract must unambiguously express that intention and the burden of clear expression is on the general contractor.  
353 So.2d at 842-43.

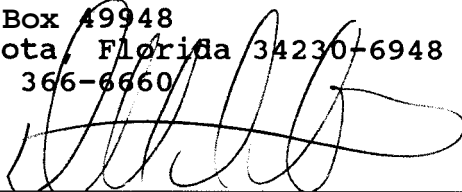
The opinion of the Second District Court of Appeals clearly

conflicts with the express language in Peacock.

CONCLUSION

Since the decision of the Second District Court of Appeal expressly and directly conflicts with the decisions of the other District Courts of Appeals, this Court clearly has jurisdiction. In addition, due to the extreme confusion which the Second District Court of Appeal's decision is and will continue to have on Florida's Construction Industry by creating great uncertainty as to Subcontractor's Statutory Bond rights, and, further, the great injustice such a decision is having by allowing an Owner to exempt his property from liens by a Payment Bond, and then defeat valid Statutory Bond claims by refusing to make final payment to the Contractor, it is respectfully and urgently requested that this Court exercise its discretionary review by granting this Petition.

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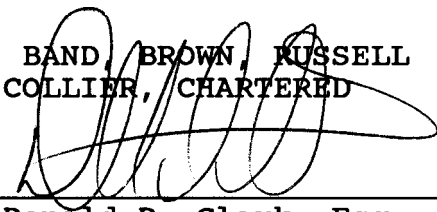
BY:   
DONALD D. CLARK, ESQ.

CERT OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, postage prepaid, to J. M. CROWDER, ESQ./JOHN B. GRANDOFF, 111, ESQ., Allen Dell, Frank & Trinkle, Suite 1240, Barnett Plaza, 101 East Kennedy Boulevard, Tampa, FL 33601; and to J. D. HUMPHRIES, III, ESQ., Varner, Stephens, Wingfield, McIntyre & Humphries, 1000 Grant Building, Atlanta, GA 30303 this 22nd day of November, 1988.

ABEL, BAND, BROWN, RUSSELL  
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By

  
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