SUPREME COURT OF FLORIDA
CASE # 73,938
DCA CASE # 87-3164



DEC ELECTRIC, INC.,
Petitioner

vs.

RAPHAEL CONSTRUCTION CORPORATION
Respondent

# ANSWER BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

## INTRODUCTION

Petitioner, DEC ELECTRIC, INC., the Plaintiff/Appellant below, was a subcontractor working for RAPHAEL CONSTRUCTION CORP., the Defendant/Appellee below. DEC will be referred to as either DEC, Petitioner, or subcontractor. RAPHAEL will be referred to as either RAPHAEL, Respondent, or general contractor throughout this Brief. References to the Record on Appeal shall be indicated by the designation (R- ) and references to the Initial Brief of Petitioner shall be indicated by the designation (PB- ). All emphasis is Respondent's, unless otherwise indicated.

Respondent accepts Petitioner's Statement of the Facts and of the Case, but adds that the parties stipulated, at the time of trial, that the Respondent had not been paid by the owner for Petitioner's work (R-6, 7, 9).

## SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction and refuse to answer the certified question, since the outcome of the instant case will not be affected, no matter how the question is answered. The question certified by the Fourth District Court of Appeal is:

> Must all payment provisions in contracts between contractors and subcontractors or suppliers that concern a condition or time of payment provision be construed as a matter of law?

It is beyond dispute that unambiguous contractual provisions are to be construed as a matter of law. The question put forth by the District Court, more appropriately, should be limited to ambiguous contractual provisions. The provision under scrutiny here, however, has been found by both the Circuit Court and the District Court to be unambiguous. Instanter, the contractual provision clearly and unambiguously made payment by the Owner to the Respondent general contractor a condition precedent to the general contractor's obligation of payment to the Petitioner subcontractor. Thus, whether this Court reaffirms or retreats from its holding in Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977), the District Court's affirmance of the Circuit Court would be unaffected.

The certified question need only be answered if the opinion of the District Court is read as finding the contractual provision at issue to be ambiguous. In such a case, the

certified question should be answered in the negative. In other words, ambiguous payment provisions should be treated just like other ambiguous contractual provisions, that is, submitted to the fact finder for resolution. The perceived rationale in Peacock, supra., for treating ambiguous payment provisions differently from other ambiguous contractual provisions cannot be defended and, to the extent necessary then, Peacock should be modified.

If this Court chooses to consider the certified question and agrees that the payment provision unambiguously creates a condition precedent to payment, the Fourth District opinion would, naturally, stand affirmed. Similarly, if this Court reaches the certified question, finds the payment provision to be ambiguous, and determines that the ambiguity is best resolved as a question of fact, rather than as one of law, then, the Circuit Court's finding in favor of the Respondent, general contractor should still stand, because the Circuit Court already heard the matter, sitting without a jury. Sending the matter back to the Circuit Court for it to reiterate its previous determination, that the payment provision should be read (and the ambiguity resolved) in favor of the Respondent would constitute a waste of judicial resources and should be avoided by simply affirming the Judgment, after clarifying the effect of Peacock.

Respondent urges this Court to affirm the Judgment below under any one of three scenarios:

1. Decline to exercise discretionary jurisdiction.

2. Find the contractual payment provision to be unambiguous, construed as a matter of law, consistent with Peacock and general law regarding interpretation of unambiguous contractual provisions.

3. Find the contractual payment provision to be ambiguous, but require resolution of the ambiguity by the trier of fact, consistent with general law regarding interpretation of ambiguous contractual provisions, retreating from Peacock. Affirmance under this scenario follows from the recognition that the trier of fact has already resolved the ambiguity in favor of Respondent.

## ARGUMENT

## POINT I

### AS A MATTER OF LAW, THE PAYMENT PROVISION IN THE SUBCONTRACT UNAMBIGUOUSLY MAKES PAYMENT BY THE OWNER TO RESPONDENT A CONDITION PRECEDENT TO THE RESPONDENT'S OBLIGATION TO MAKE PAYMENT TO THE PETITIONER

Where a contractual provision is unambiguous, its interpretation is a question of law, for the court. Pipkin v. FMC Corporation, 427 F.2d 353 (5th Cir. 1970). The payment provision of the subcontract which is at issue in this case, therefore, was properly interpreted by the Circuit and District Courts. The provision reads:

> 6. ...No funds will be owed to the subcontractor unless the General Contractor is is paid by the owner in accordance to the sworn statement. The subcontractor fully understands that in the event of non-payment by the owner to the General Contractor, the subcontractor has legal recourse against the owner through the Mechanics Lien Laws or other legal procedures for their correct monies due.

There can be no confusion regarding the intention of the parties as to the interpretation of this payment clause. Clearly, the Petitioner was warned by the Respondent, general contractor, that the Petitioner was accepting the risk of owner non-payment. The trial court had no difficulty with this:

> THE COURT: It might be ambiguous to you. I understand it. If I understand it, man it must be simple (R-8).

Later during the trial, the Court was reading the payment provision from an unclear copy, but still expressed clear understanding (R-19):

> Mr. Williams: Here's a copy of the original if you would like.
>
> THE COURT: It's tough to read here. "The interim draws as we show you on our sworn statement with your percentage of completion as we estimated at the time of billing to the owner. This may not conform to your billing to us. No funds will be allowed." I'm not having a bit of trouble with that.

Similarly, the District Court wrote, in DEC Electric Inc., v. Raphael Construction Corp., 538 So.2d 963, 965 (Fla. 4 DCA 1989):

> It appears that the trial court utilized the plain meaning of the words used in determining that appellant (Petitioner) was not entitled to payment since the contractor (Respondent) had not been paid. We can find no fault with this construction.

This Court's ruling in Peacock did not foreclose the possibility of parties to construction contracts from shifting the risk of owner non-payment. As long as the intention to so shift the burden is unambiguously expressed, that intention will be given effect. Peacock, supra, at 842, 843.

Petitioner attempts to argue that the payment provision, paragraph 6 of the subcontract, is ambiguous because the clause addresses lien waivers, partial payments and final payments in the same paragraph (PB-11-13). The three areas addressed all clearly relate to the payment process, as a whole. Quite commonly, the subcontractor's payment request to the general is

incorporated in the General's payment request to the owner. The subcontractor's estimated percentages of completion may not agree with that submitted by the general or paid by the owner. The contract merely provides that, in such event, the subcontractor will be paid based on the percentage the general received from the owner.

Petitioner argues that the contract does not make clear to whom "no funds will be owed." Who, other than the subcontractor, could possibly be owed funds under the contract? This is not an agreement between the owner and the general or the owner and the subcontractor. To argue that the clause does not clearly apply to the subcontractor strains credibility and runs contrary to logic. Fanciful and absurd interpretations of plain language are always possible. Such an interpretation does not create or demonstrate an ambiguity. Indeed, it is the duty of the court to prevent such a strained interpretation. American Medical International, Inc. v. Scheller, 462 So.2d. 1 (Fla. 4 DCA 1984).

Next, Petitioner asserts that the clause "no funds will be owed" applies only to interim draws. The paragraph clearly encompasses both interim and final draws. No other provision of the contract addresses payment terms and both interim and final payments are addressed throughout the paragraph.

Petitioner also argues (PB 14) that affording the payment provision its plain meaning would lead to an "extreme absurdity." Petitioner naively asserts that "any reason the General Contractor is not paid to the letter of the Sworn Statement,

would excuse the General Contractor from paying the Subcontractor." Plainly, the provision allows no such result. Rather, if the owner pays the general, for example **65%** of the general's payment request, and such payment request contained **100%** of the subcontractor's payment request to the general, then the general would only be obligated to pay the subcontractor **65%** of the **100%** requested by the subcontractor. However, the general, under no scenario, could avoid its obligation to pay the subcontractor the amount which corresponds to the percentage of the request allowed by the owner.

Nothing in the contract allows or requires the general contractor to mix or combine draw requests of various subcontractors. Each subcontractor request is listed as a line item in the general's request to the owner. Whatever percentage of each line item that is allowed and paid by the owner is obviously then passed through to that subcontractor. Thus, Petitioner's **"illustration,"** which is not based on any evidence in the record or before the Court, and which admittedly "does not attempt to imply that this has occurred or may have occurred here," (PB **15)** does not demonstrate any ambiguity and cannot justify the relief sought by Petitioner.

Finally, in search of any possible, even remote, ambiguity, Petitioner tries to minimize the last portion of the paragraph. The last portion clearly and emphatically warns the subcontractor to take necessary steps under the Mechanic's Lien Law to protect itself from the risk of owner non-payment. This is consistent only with the Subcontractor giving up the right to sue the

general contractor for payment in those instances where the owner has not yet paid the general. The subcontractor is admonished that its right of action is against the owner, under the lien laws and not against the general, under the contract. Therefore, the subcontractor is on notice to take all necessary steps to protect itself, with respect to the owner, by protecting its lien rights. The subcontractor who fails to protect itself, by perfecting a mechanic's lien, cannot, under the express terms of the payment provision before the Court, complain that the risk of non-payment was not fully understood or expressed.

Petitioner takes the position that the payment provision is ambiguous because it "does not contain words such as 'expressly agreed,' 'condition precedent,' or 'contingent,'" (PB 13). Neither Peacock nor any case before or after suggests that any magic words need be used in order to shift the risk of non-payment. Peacock requires only "clear expression" of the intention to shift the risk.

Respondent urges that this Court recognize the context in which the contractual provision is used. To require magic words or terms of art would serve only to confuse laymen contractors whose rights are governed by the sub-contractual language. Terms such as "condition precedent" do not have clear meaning to laymen who are not trained in the law. Terms such as "No funds will be owed to the subcontractor unless the General Contractor is paid by the owner..." have clear meaning and are easily understood. No legal training is required to comprehend the

intention of such language. Furthermore, if terms of art are to be required in order to give the provision legal effect, then how is the exhaustive list of acceptable phrases to be compiled? If, for example, the use of the word **"unless,"** by itself is determined to be insufficient to accomplish the risk shifting, is the use of the word **"unless,"** when accompanied by an express warning for the Subcontractor to protect its lien rights sufficient? The better, more well-reasoned and more workable rule is that already enunciated by this Court:

> [I]n order to make such a shift the contract must unambiguously express that intention. And the burden of such clear expression is on the general contractor. Peacock, supra. at 842, **843.**

Petitioner says that the language in the subject contract is "akin to the language before the Snead **court,"** which was held to be ambiguous. An important distinction between the language here and the language before the Snead court is that in Snead, the particular provision provided that **"no** payment**...**shall be made...until the Owner shall have paid the contractor...", Snead v. Langerman, **369** So.2d. **591, 592** (Fla. **1** DCA, **1978).** Until has a temporal connotation. In this case, the clause in question did not use the word **"until".** Rather, the word **"unless"** was used. Unless has a conditional, not temporal, connotation. The Fifth Edition of Black's Law Dictionary defines the word **"until"** as:

> a word of limitation...and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist.

Thus, until is temporal. The Snead court was correct in refusing to construe the provision before it as having created a condition precedent. To the contrary, Black's Law Dictionary, 5th Edition, defines **"unless"** as "a conditional promise." **"Unless"** is, by definition, conditional. Its use in the contractual provision under consideration in this case, along with the express warning that the subcontractor should protect its lien rights against the owner meets the Peacock requirement of clearly and unambiguously expressing the intention of the parties **sub judice** to shift the risk of owner non-payment from the Respondent, general contractor, to the Petitioner, subcontractor.

There is no ambiguity in the contractual payment provision before this Court. The "trial court utilized the plain meaning of the words used," and the District Court could "find no fault with this construction." DEC Electric, Inc. v. Raphael Construction Corp., **538** So.2d **963, 965** (Fla. **4** DCA, **1989).**

Peacock requires "judicial interpretation of ambiguous provisions for final payments in subcontracts in favor of Subcontractors," 353 So. 2d at **842.** The payment provision before the Peacock Court was ambiguous. The provision at issue here is clearly unambiguous. Unambiguous provisions have always been construed as matters of law, even without the guidance of Peacock. Thus, the certified question does not even address the facts of this case and the Court, for that reason, may wish to decline jurisdiction to answer it. It would be more properly addressed in a case where the payment provision is ambiguous.

## POINT II

### ASSUMING ARGUENDO THAT THE PAYMENT PROVISION IS AMBIGUOUS, THEN RESOLUTION OF THAT AMBIGUITY SHOULD NOT BE AUTOMATICALLY IN FAVOR OF THE SUBCONTRACTOR, BUT SHOULD BE RESOLVED BY THE TRIER-OF-FACT, AS IS ANY OTHER AMBIGUOUS CONTRACTUAL PROVISION, AND TO THAT EXTENT THIS COURT SHOULD RECONSIDER PEACOCK V. MODERN AIR CONDITIONING, INC., 353 SO.2D 840 (FLA. 1977)

The general rule of law is that ambiguous contractual provisions are resolved as matters of fact, not as matters of law. Neumann v. Brigman, 475 So.2d 1247 (Fla. 2 DCA, 1985); Laufer v. Norma Fashions, Inc., 418 So.2d 437 (Fla. 3 DCA, 1982). In Peacock, however, this Court ruled that where the "nature of the transaction lends itself to judicial interpretation," then the Court may interpret an ambiguous contractual provision concerning the intention of the parties as a matter of law. Peacock, supra. at 842. The Court found that "contracts between small subcontractors and general contractors on large construction projects are such **transactions."** The expressed rationale was that the relationship is common and that "usually their intent will not differ from transaction to transaction." The Court then announced a rule, geared to protecting small subcontractors, with little bargaining power over large general contractors. The infirmity in the rule comes from its blanket applicability to even those situations where the subcontractor is bigger than the general, and needs no such protection.

Applying the broad rule prevents any inquiry into the actual intention of the parties to an ambiguous contractual payment provision, even if their particular intent differs from the usual. Similarly, even if the subcontractor is bigger than the general, and even if the contractual provision was drafted by the subcontractor, once it was determined to be ambiguous by the Court, actual intention of the parties would not even be considered. Rather, Peacock would automatically require a ruling in favor of the subcontractor and against the general. If the Court's purpose in enunciating the rule in Peacock was to afford some measure of protection to the party that lacked bargaining power, that purpose is not accomplished by the rule as it stands.

In the case at bar, there is no evidence that Respondent is bigger than Petitioner. There is no evidence that Petitioner lacked bargaining power, or that the terms of the contract were dictated to the Petitioner by the Respondent on a take it or leave it, coercive, basis. To the contrary, the contracts that are of record reflect the elimination of several important contractual clauses. Thus, the record before this Court demonstrates that the Petitioner actively negotiated the contractual terms with the Respondent.

In light of the Court's assertion that contracts between small subcontractors and general contractors on large jobs are transactions which lend themselves to judicial interpretation, Respondent respectfully suggests that the rule of Peacock be limited to those cases where the record reflects some inequality

in size or bargaining power which justifies the Court's intervention on behalf of the smaller contracting party. It is only in such a situation where deviation from the general rule of interpretation of ambiguous contractual provisions might be defended.

Where the record is silent on the inequality of size or bargaining power of the parties, or where, as here, the record actually reflects active negotiating, the perceived justification for judicial interpretation is lacking. The nature of this particular transaction does not lend itself to judicial interpretation. Thus, in such a case, the general rule should apply and the resolution of the parties' intent should be left to the fact finder.

Under Peacock as it presently stands, if the payment provision is found by this Court to be ambiguous, the Respondent would be deprived of any opportunity to prove that the Petitioner actually, in fact, knew and agreed that the risk of non-payment was being shifted, and that owner payment to the general was a condition precedent to the obligation of the general to pay the subcontractor. Since the record here reflects evidence of a negotiated contract, such a result would be particularly onerous. Presumably, if the Respondent could not meet its burden of proof, then the fact finder would reach the same result that would follow from applying Peacock and finding against the Respondent, as a matter of law. If, however, Respondent were able to prove that this transaction was not "a common one" and that, in fact,

the parties' intent did differ from that conclusively presumed by the Court in Peacock, then the fact finder would prevent an otherwise unjust result.

Respondent urges that Peacock's conclusive presumption against the general contractor inappropriately invades the proper province of the fact finder. A much more sensible, situationally sensitive approach would call for a rebuttable presumption against the general contractor, that could be overcome where the fact-finder is presented with sufficient evidence of the parties' actual intent. In this way, the injustice that may result from a lockstep application of Peacock could be avoided, while still affording safeguards to the small subcontractor that lacks bargaining power.

In the case at bar, the District Court cryptically found both "that the trial court utilized the plain meaning of the words used," finding no fault with that construction, and that "the language relied upon as a condition precedent is somewhat confusing and ambiguous." As such, the District Court wanted to have the trier of fact resolve that ambiguity. Clearly, either the language was or was not ambiguous. Since the District Court considered Peacock and was obligated to follow it, but did not reverse the trial court, the District Court must have determined, conclusively, that the provision was **not** ambiguous. Point I of this Brief demonstrates that the District Court was eminently correct, and that the provision is, in fact, unambiguous.

However, any uncertainty caused by the District Court's ruling illustrates the harshness of the result which would follow when Peacock is broadly construed. Applying the general rule of construction of ambiguous contractual provisions by allowing the fact finder to resolve ambiguous payment provisions serves to avoid such a harsh result, while still accomplishing the goal of the Court enunciated in Peacock.

## POINT III

### THE OPINION OF THE DISTRICT COURT SHOULD BE AFFIRMED WHETHER OR NOT THIS COURT FINDS THE PAYMENT PROVISION TO BE AMBIGUOUS, NO MATTER HOW THE CERTIFIED QUESTION IS ANSWERED

Obviously, if this Court declines jurisdiction or if it agrees that the contractual payment provision clearly and unambiguously created a condition precedent to the Respondent, general contractor's obligation to pay the Petitioner, subcontractor, then the Opinion of the District Court must be affirmed. Respondent submits that such is the proper conclusion of this matter. If, however, the Court wishes to address the certified question and finds the payment provision presented in this case to be ambiguous, the Court should re-examine its reasoning in Peacock, and recede from its harsh and unnecessary rule. The fact finder should be empowered to examine the intentions of the parties to the contract and resolve the ambiguity.

In the case at bar, the fact finder was the trial court. The record of the proceedings demonstrates that the trial court was convinced beyond question that the intention of the parties was plainly to agree that payment by the owner to the Respondent, general contractor was, indeed, a condition precedent to the Respondent's obligation to pay the Petitioner, subcontractor.

Therefore, in this particular case, since the fact finder has already made the finding of fact crucial to the resolution of the issue, no remand is necessary. Thus, this Court could find the payment provision ambiguous, recede from Peacock, and adopt the trial court's finding of fact. Affirmance would follow, without the need for further proceedings.

## CONCLUSION

The payment provision contained in Paragraph 6 of the contracts between Petitioner, subcontractor, and Respondent, general contractor, is clear and unambiguous. Peacock v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977) does not address and has no application to such a provision. The certified question actually contains two parts. All unambiguous payment provisions have always been construed as matters of law, just as any unambiguous contractual provision. However, because of Peacock, ambiguous payment provisions are not construed as matters of fact, like other ambiguous contractual provisions. Peacock requires that ambiguous payment provisions be construed as matters of law.

In the instant case, the unambiguous provision was construed as a matter of law, and nothing is added to or subtracted from the law by this Court declining to exercise its discretionary jurisdiction. If, however, this Court finds the provision to be ambiguous, then the second part of the certified question does require this Court's attention. Ambiguous payment provisions should be construed, not as matters of law, but as matters of fact. The rationale for treating the ambiguous payment provision as an exception to the general rule is faulty and should be revisited. The certified question, then, should be answered in the negative.

The matter is of great significance to the construction industry. Requiring magic words or enunciating a bright line rule where any deviation, no matter how slight can result in a ruling which thwarts, rather than enforces, the parties' actual intent, would be a great disservice to the industry. Instead, a rule of reason, allowing for the fact finder to determine actual intent, and thereafter construe the ambiguous provision, provides the maximum opportunity for achieving justice, with no adverse consequence.

Since the trial court indicated its understanding of the parties' intent, and ruled in favor of the Respondent, even if this Court entertains the certified question, the question should be answered in the NEGATIVE and this Court should AFFIRM the judgment below.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF was mailed to Alexander J. Williams, Jr. and Alan C. (Peter) Brandt, Jr. both of CHAPPELL & BRANDT, P.A., 420 N.E. 3rd Street, Ft. Lauderdale, Florida 33301, this 22 day of May, 1989.

Respectfully submitted,

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