SUPREME COURT OF FLORIDA

DEC ELECTRIC, INC.,

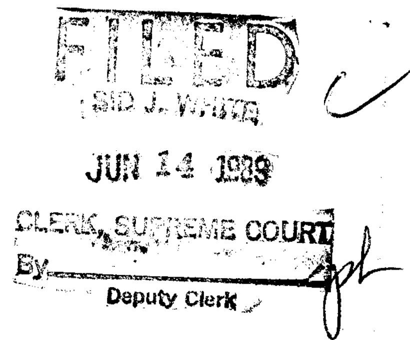
Petitioner,

vs.

RAPHAEL CONSTRUCTION CORP.,

Respondent.

CASE NO. 73,938
DCA CASE NO. 87-3164



REPLY BRIEF

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INTRODUCTION

Reference to the Record on Appeal shall be indicated by the designation (R-) and references to the Respondent's Brief shall be indicated by the designation (RB-).

SUMMARY OF REBUTTAL ARGUMENT

This Court should exercise its discretion, accept jurisdiction of this matter and address both the underlying issue of whether the subcontract payment provision is ambiguous and also answer the question certified by the Fourth District to be of great public importance and concern to the state's construction industry. Contrary to Respondent's position, the decision of the District Court will be effective no matter how this Court answers the certified question.

That is, if the Court answers the question in the affirmative, the District Court decision must be reversed for the decision indirectly conflicts with Peacock v. Modern Air Conditioning, **353** So.2d 840 (Fla. 1977). Or, if this Court should answer the question in the negative and reconsiders its rule set forth in Peacock, then the matter must be remanded to the trial court to take testimony on the parties intent surrounding this ambiguous provision.

Respondent suggests that the certified question must be answered only if the District Court's opinion is read as finding the provision ambiguous. Additionally, Respondent suggests that the certified question should limited to address ambiguous provisions.

Obviously, the certified question addresses only ambiguous provisions. Regardless, this Court should address the certified question and the Fourth District's concerns about Peacock's universal application. There is no doubt that the

District Court found the language to be ambiguous and somewhat confusing. That much is clear from the opinion. However, in apparent conflict with Peacock, the District Court, nevertheless, affirmed the trial court's determination that the provision constituted a condition precedent.

The public policy considerations pronounced in Peacock which were present in 1977, are present today more than ever in this state's booming construction industry. This Court should therefore reaffirm Peacock and not recede from the rule requiring judicial interpretation of ambiguous provisions for payment in subcontracts in favor of subcontractors. However, should the Court wish to reexamine or qualify its position in Peacock, and recede from what Respondent describes as a harsh and unnecessary rule, this matter would necessarily have to be remanded to the trial court. For, contrary to Respondent's position that the trial court has already made a finding of fact, that was an impossible event to achieve as there was no testimony offered by either party, on any issue, let alone on the issue of the parties intent surrounding this ambiguous provision.

Accordingly, this court should take jurisdiction over this matter, conclude that the subcontract provision is indeed ambiguous and in following Peacock, reverse the decision of the Fourth District and direct that judgment be entered in favor of Petitioner. Should the Court reconsider Peacock, further proceedings are required to determine the parties intent surrounding this ambiguous provision.

REBUTTAL ARGUMENT

POINT I

THE PAYMENT PROVISION IN THE SUBCONTRACT FAILED TO CLEARLY AND UNAMBIGUOUSLY EXPRESS AN ATTEMPT TO SHIFT THE RISK OF OWNER NONPAYMENT FROM RESPONDENT TO PETITIONER

As noted by this Court in Peacock, in order to shift the risk of owner nonpayment from Respondent to Petitioner, the subcontract language must clearly and unambiguously express that intention. Peacock, supra, at 842, 843. Respondent suggests that there can be no confusion regarding the intention of the parties as to the interpretation of this payment clause. To the contrary, the entire payment clause is riddled with confusing and unclear language. Indeed, the Fourth District had the same problem with the provision when it found that the language relied upon as condition precedent by Respondent to be "somewhat confusing and ambiguous." DEC Electric, Inc. v. Raphael Construction Corp., 538 So.2d 963, 965 (Fla. 4th DCA 1989).

Respondent labels the last portion of paragraph 6 of the subcontract as a "warning" and equates same to a waiver of Petitioner's rights against the Respondent. Apparently, Respondent, now argues for the very first time that in exchange for a waiver of rights, Petitioner received this notice from Respondent of rights available to Petitioner under the Florida Mechanics Lien Laws.

Respondent further suggests that a subcontractor who fails to protect itself by perfecting a Mechanic's Lien, cannot, under the express terms of this subcontract, complain that the risk

of nonpayment was not fully understood or expressed. (RB-12) Could Respondent be suggesting that if a subcontractor did protect itself by perfecting a Mechanic's Lien, it could under the express terms of the payment provision before the Court, complain that the risk of nonpayment was not fully understood or expressed. Certainly, Respondent is not attempting to mislead the Court by inferring that Petitioner failed to protect itself and perfect a Mechanic's Lien on this property. Indeed, the trial court was informed by both Petitioner and Respondent that the construction project property was the subject of a mortgage foreclosure proceeding and Petitioner was named as an interested party in that proceeding by virtue of its recorded Mechanic's Claim of Lien. (R-13, 14.)

Respondent's perception that Petitioner takes the position that certain magic words are needed in order to shift the risk of nonpayment. Petitioner was merely pointing out to this Court, as it did to the Fourth District, that decisions thus far have found a clear shifting of this risk only upon the use of such words as **"expressly** agreed", "condition precedent" or "contingent upon." See, e.g., Dyser Plumbing Company v. Ross Plumbing and Heating, Inc., 515 So.2d 250 (Fla. 2nd DCA **1987);** Robert F. Wilson, Inc., etc. v. Post-Tensioned Structures, Inc., 522 So.2d **79** (Fla. 3rd DCA March **8, 1988)** and Pace Construction Corp. v. OBS Company, Inc., 531 So.2d **737** (Fla. 2nd DCA **1988).** Clearly, Peacock requires only a clear and unambiguous expression of the intention to shift the risk. Respondent suggests that requiring magic words such as

"expressly agreed", "contingent upon" or "condition precedent" would serve only to confuse laymen contractors. Clearly, Respondent's concern is misplaced.

Respondent suggests that the language relied upon here, coupled with a "warning", has clear meaning and is easily understood. If that was the case, truly this matter would not be before this Honorable Court. Admittedly, the Respondent and Petitioner have vested interests in their different interpretations of the language. However, Judge Anstead, with Judge Downey and Associate Judge Rivkind concurring, found this language to be somewhat confusing and ambiguous. Indeed, one would almost need a degree in linguistics to determine the meaning and effect of paragraph 6.

POINT II

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION

The Fourth District's decision holding the language in question to be somewhat confusing and ambiguous but nevertheless affirming the trial court's decision determining same to constitute a condition precedent, is an apparent conflict with Peacock. Therefore, this Court should exercise its discretion, take jurisdiction of this matter, review the language in question for itself and address the question certified by the Fourth District for it poses a problem that is likely to reoccur throughout the courts in the state.

Truly, the public policy concerns present in 1977 when the Peacock court pronounced the rule concerning ambiguous payment

provisions, are present today, even more than ever. Indeed, this state's construction industry and growth management are presently of utmost concern to our local and state legislators. Therefore, Petitioner would respectfully submit that the need for the rule pronounced in Peacock is greater than ever. Petitioner would urge this Court to answer the certified question in the affirmative, reverse the decision of the District Court and direct that judgment be entered in favor of Petitioner.

Respondent, on the other hand, complains that the rule pronounced in Peacock is harsh, inflexible and results in injustice. No doubt, these arguments were advanced to the Peacock court. Twelve years later, nothing has changed. While the Peacock rule can be described as having a broad application; as noted by Peacock, this is the fairest way to deal with the situation where subcontractors would not ordinarily assume the risk of the owner's failure to pay the subcontractor. Peacock, supra, at 842.

Respondent would like the trial courts to entertain testimony as to the size and bargaining position of the subcontractor and general contractor. One would expect then that the parties would offer their financial statements in order to support or rebut a suggestion of financial superiority. The Peacock rule eliminates such a circus of events and puts the burden on the general contractor to express an intent to shift this risk by clear and unambiguous language.

Respondent argues that while there was no evidence that Respondent was bigger than Petitioner and no evidence of

Petitioner's bargaining power, there was evidence that the contracts were "actively" negotiated. Respondent's suggestions are misleading and improper. True, some of the language in the subcontracts is crossed through. However, there is no evidence of who initiated these eliminations. Certainly, there is no evidence of active participation or negotiation in the subcontracts or the record below. Additionally, it is just as easy to infer that the payment provision was one clause Respondent absolutely refused to delete from the subcontract. Further, can it be inferred that Respondent told Petitioner to "sign the subcontract" with the payment provision in the subcontract "or you do not get the job." Thus, Respondent is both incorrect and inaccurate, suggesting that the record before the Court demonstrates active negotiation of the contractual terms.

Respondent further complains that under the Peacock, it would be precluded from proving that Petitioner, or any subcontractor for that matter, actually, in fact, knew and agreed that the risk of nonpayment was being shifted. Respondent appears to be reading Peacock with blinders on. There is nothing contained within Peacock that would suggest actual evidence of an agreement to accept the risk of nonpayment who would not satisfy the requirement of clear and unambiguous expression. What more of a clear and unambiguous expression can there be than if the subcontractor actually agreed to the risk. Of course, Petitioner did not agree to such a risk here or the parties would not be before this Court. No doubt, had there been such evidence to be

advanced by Respondent, that would have been advanced at the lower court.

In either event, should the Court feel it appropriate to expound upon the rule enunciated in Peacock in a manner suggested by the District Court or as suggested by Respondent, the District Court's decision must still be reversed. As pointed out by Respondent, the District Court wanted the trier of fact to resolve the ambiguity contained within this provision. However, Respondent suggests that since the District Court considered Peacock and was obligated to follow it but did not reverse the trial court's decision, the District Court must have concluded that the provision was not ambiguous. Unless there are two District Court opinions issued on this case, Petitioner would suggest that Judge Anstead was quite clear when he wrote that the Court found the language to be "somewhat confusing and ambiguous." DEC, supra, at page 965.

Respondent suggests that should this Court decide to modify Peacock and require testimony on the parties intent surrounding ambiguous payment provision, then the decision of the District Court and trial court must stand. Respondent mistakenly believes that the trial court made a finding of fact on the issue of the parties intent surroundings this ambiguous payment provision. Plainly, the record contains no testimony by either party concerning any issue, let alone the issue of the parties' intent surrounding this ambiguous payment provision. As noted by the District Court, the fact finder taking evidence on the issue of the parties' intent on the ambiguous payment provision may have

been indeed foreclosed by Peacock. Regardless, the trial court found the language to be unambiguous and therefore would have refused to entertain evidence on the issue of the parties' intent. Thus, Petitioner suggests that if this Court modifies Peacock, this matter must be remanded for further fact finding on the issue of the parties' intent.

CONCLUSION

In summary, this Court should exercise discretion and hear the issues presented **by** this appeal and **by** the Fourth District's certified question. This Court should conclude that the language relied upon **by** Respondent is indeed ambiguous and reverse the decision of the lower court. Additionally, this Court should answer the certified question in the affirmative and reverse the decision of the Fourth District. Alternatively, should the Court answer the certified question in the negative and modify Peacock, this matter should be remanded for further proceedings.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Stuart H. Sobel, Esq., Sobel & Sobel, P.A., 155 South Miami Avenue, PH 1, Miami, FL 33130 this 12th day of June, 1989.

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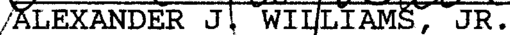

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\- and -

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