

SUPREME COURT OF FLORIDA

Case No. 76,353

DISTEFANO CONSTRUCTION, INC. a
Florida corporation,

Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a foreign corporation

Respondent.

RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT**

CASE NUMBER 89-1550

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FACTUAL SUMMARY

FIDELITY AND DEPOSIT COMPANY OF MARYLAND'S bond at issue in this case was written in 1984, prior to the 1987 Legislative Amendment of §713.24. The cause of action out of which this appeal arises, and out of which Petitioner seeks to recover attorney's fees under the bond, accrued in 1984 and was filed in 1984 in the 11th Judicial Circuit in and for Dade County, Florida. Notwithstanding these facts, however, petitioner has filed a supplemental brief wherein it argues that this Court should give retroactive application to the 1987 Amendment of §713.24, Florida Statutes. This argument is contrary to law and should not be considered in determining the outcome of this appeal.

SUMMARY OF THE ARGUMENT

The cause of action out of which this appeal arises, and out of which petitioner seeks to recover attorney's fees under the bond, accrued in 1984 and was filed in 1984 in the 11th Judicial Circuit in and for Dade County, Florida. Nevertheless, petitioner has filed a Supplemental Brief wherein it argues that this court should give retroactive application to the 1987 Amendment of §713.24, Florida Statutes. This argument is incorrect. The laws of the State of Florida in existence at the time a contract is executed become a part of said contract. Hence the obligations and liabilities of F&D under the bond issued in 1984 and upon which an action accrued in 1984 are defined by the terms of the bond and by Florida law in effect in 1984.

Additionally, it is axiomatic that statutes providing for awards of attorney's fees to prevailing parties do not apply to causes of action which accrue prior to the date in which the statute or amendment providing for the fee sought became effective. Such an award would violate State and Federal prohibitions against ex post facto laws.

Finally, the provisions of the bond specifically limit the surety's liability to \$100.00. Hence, if this Court were to apply the 1987 amendment to §713.24, F.S. to this cause, such application would be deemed an unconstitutional impairment by subsequent legislation which impermissibly imposes additional contractual obligations upon F&D.

In short, neither the amendment to §713.24 nor the recent Fourth District Court of Appeal's interpretation thereof are relevant to the issues in this case.

ARGUMENT

Petitioner has filed a Supplemental Brief wherein it argues, for the first time in this litigation, that this Court should give retroactive application to the 1987 amendment of § 713.24 Florida Statutes.¹ Petitioner further argues that if the 1987 amendment is given effect, then Petitioner should prevail on this appeal. Petitioner's new argument must fail, because the 1987 amendment cannot be applied to the issues on appeal before this Court.

F & D's bond at issue in this case was written in 1984, prior to the 1987 legislative amendment of §713.24. The obligations, duties and liabilities of F & D under the bond issued in 1984 are defined by the terms of the bond and by Florida's Statutes in effect in 1984. It is axiomatic that the laws of the state of Florida become a part of every contract executed, at the time of execution. Department of Insurance v., Teachers Insurance Co., 404 So.2d 735 (Fla. 1981); Bedell v. Lassiter, 196 So. 699 (Fla. 1940); Empire State Insurance Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962). As the Fourth District Court of Appeal noted in the Pappalardo decision upon which Petitioner relies in its Supplemental Brief, prior to the 1987 amendment, 713.24 limited a lienor's recovery of attorney's fees to

¹The Amendment re-defined the formula to determine the amount of the transfer of lien bond and increased the amount "to apply on any court costs which may be taxed in any proceedings to enforce said lien" from \$100 to \$500. The legislature also deleted the following language "and costs not to exceed \$100."

\$100.00. Pappalardo Construction Company v. Buck, _____ So.2d. ____, 15 FLW D2596 (Fla. Fourth DCA Opinion issued October 17, 1990)

Moreover, the cause of action out of which this appeal arises, and concerning which Petitioner seeks to recover attorney's fees under the bond, accrued in 1984 and was filed in 1984 in the 11th Judicial Circuit in and for Dade County, Florida. Statutes providing for awards of attorney's fees to prevailing parties do not apply to causes of action which accrue prior to the date in which the statute or amendment providing for the fee sought became effective. Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985). Xanadu of Cocoa Beach, Inc. v. Lenz, 504 So.2d 518 (Fla. 5th DCA 1987). The Florida Supreme Court, interpreting a similar prevailing party attorney's fees statute has held that "damages and penalties including an award of attorney's fees for which a [party] may be held liable cannot be constitutionally enlarged after the date" in which the action accrues. Florida Patient's Compensation Fund v. Scherer, 558 So.2d 411 (Fla. 1990). The Court further held that to do so violates state and federal prohibitions against ex post facto laws. Id.

In both Altenhaus and Scherer, this Court ruled that statutory amendments creating [or increasing] a non-prevail party's liability to pay attorney's fees constitutes a new obligation or duty and is therefore substantive in nature and can be applied only prospectively. Altenhaus, 472 So.2d at 1154; Scherer, 558 So. 2d at 414. In Altenhaus, Plaintiff's cause of action accrued prior to the effective date of §768.56 F.S., which authorized an award of attorney's fees to prevailing parties in medical malpractice actions. The court held that the statutory fee provision could not be applied against a plaintiff who lost, on appeal, but whose cause of action had accrued prior to the effective date of the

statute. In Sherer, the court ruled that a plaintiff who had prevailed in a medical malpractice action, but whose action had accrued prior to the effective date of §768.56 was not entitled to the fee provision enacted therein. The court further stated that "damages and penalties, including an award of attorney's fees, for which a [litigant] may be held liable cannot be constitutionally enlarged after the date [on which the action accrues]." Scherer, 558 So. 2d at 414.

Many cases have held that in the absence of a clear legislative expression to the contrary, a law is presumed to operate only prospectively. Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). See also Department of Revenue v. Zuckerman-Vernon Corporation, 354 So. 2d 353 (Fla. 1978); American Motors Corporation v. Abrahantes, 474 So. 2d 271 (Fla. 3d DCA 1985). There is no expression from the Legislature concerning the 1987 Amendment to §713.24 to indicate that the Amendment should be given retroactive application. Hence, neither the Amendment to §713.24, Florida Statutes nor the Fourth District Court of Appeal's interpretation thereof found in Pappalardo Construction Company v. Buck, _____ So.2d. _____, 15 FLW D2596 (Fla. Fourth DCA Opinion issued October 17, 1990)(Case No. 89-2906), are relevant to the issues in this case.

Moreover, the provisions of the bond issued by F&D specifically limit the surety's liability to \$100.00. (Record p33-34). As the Pappalardo court noted, "...a trial court cannot increase the liability of a security company beyond the amount of the bond...." Hence, not only is the 1987 amendment to §713.24 inapplicable and irrelevant due to the prohibition against retroactive application but its application in this case would impose a new and

unexpected contractual obligation upon F&D and therefore constitute an unconstitutional impairment of a contractual obligation by subsequent legislation. See. Bedell v. Lassiter, 196 So. 699 (Florida, 1940).

CONCLUSION

Petitioner argues in its Supplemental Brief that this Court should give retroactive application to the 1987 Amendment of §713.24 Florida Statutes. This argument was not previously raised at the trial level, in the appeal before the Third District, nor in Petitioner's prior Briefs to this Court. The argument is also without basis in law and it is irrelevant to the issues on appeal before this Court.

The action out of which this litigation arises accrued, and was filed in 1984 prior to enactment of the statutory Amendment upon which Petitioner relies for his alleged entitlement to attorneys fees. The amendment cannot be given retroactive application.

Moreover, the bond issued by F&D expressly provides for a \$100.00 limitation on "costs", which is in harmony with Florida law as it existed at the time the contract was executed. To increase F&D's liability under its contract by the provisions of a subsequent act of the Florida legislature would constitute an impermissible impairment of F&D's contractual rights and obligations.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 14 day of December, 1990 to: Ronald P. Gossett, Esq., Gossett & Gossett, P.A., counsel for Petitioner, 3595 Sheridan Street, Suite 204, Hollywood, Florida 33021.

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