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.
_____/

SUPPLEMENTAL REPLY 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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PREAMBLE

The parties will be referred to by the position they held in the trial court or by name. Petitioner will be referred to as Defendant or DISTEFANO CONSTRUCTION, INC. Respondent will be referred to as Plaintiff or FIDELITY & DEPOSIT COMPANY OF MARYLAND.

The record on appeal will be cited as (R. __).

The appendix filed by Petitioner with its initial brief will be cited as (App. __).

SUMMARY OF ARGUMENT

A statute similar in effect to the statute in question was held to have prospective application. However, the distinction between *L. Ross, Inc.*, and the case under review is that the obligation of the surety for attorneys' fees directly under the Construction Lien Law (as opposed to under the Florida Insurance Code as argued in the main briefing) does not contain an absolute limit in § 713.24(1), similar to the absolute limit contained in § 627.756, FLA. STAT. (1983) involved in *L. Ross, Inc.* Section 713.24(3) provides that the court may, upon application, order an increase in the amount of the bond.

Accordingly, the amount of attorneys' fees payable by the surety is not limited by § 713.24, and modification of that section works no substantive harm on Respondent.

ARGUMENT

The issue raised by the response to the supplemental brief is whether or not the amendment to § 713.24, FLA. STAT. (1985) by enactment of 1987 LAWS OF FLORIDA, Chapter 87-74, § 6[1], applies to an award of attorneys' fees made after the effective date of the statute, but made in connection with a cause of action that accrued prior to the effective date of the change. In other words, is the statute substantive, thereby precluding any retroactive application, or is it procedural, thereby allowing the immediate application of the statute upon enactment.

None of the cases cited by Respondent answer that question because each of them concerns the enactment of a ***new*** requirement to pay attorneys' fees as opposed to the removal of what has been otherwise determined to be a limitation on the amount to be paid. *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985) and *Florida Patients Compensation Fund v. Scherer*, 558 So.2d 411 (Fla. 1990) both concern the attorney fee statute for malpractice actions, which statute ***created*** an obligation to pay attorneys' fees.

However, this Court's decision in *L. Ross, Inc. v. R. W. Roberts Const. Co.*, 481 So.2d 484 (Fla. 1986) involves a modification of an attorneys' fees statute that removes a limitation on liability. This Court affirmed the decision of the Fifth District in holding that the modification of the attorneys' fee statute was substantive, and therefore, could have only prospective application. The opinion of the Fifth District, found at *L. Ross, Inc. v. R. W. Roberts Const. Co.*, 466 So.2d 1096 (Fla. 5th DCA 1985), was authored by Judge Cowart.

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[1]1987 LAWS OF FLORIDA, Chapter 87-74, § 10, provides that the act shall take effect October 1, 1987.

The opinion contains a thorough discussion of the substantive versus procedural argument.

The only, and important, distinction between *L. Ross, Inc.*, and the case under review is that the obligation of the surety for attorneys' fees directly under the Construction Lien Law (as opposed to under the Florida Insurance Code as argued in the main briefing) does not contain an absolute limit in § 713.24(1), similar to the absolute limit contained in § 627.756, FLA. STAT. (1983) involved in *L. Ross, Inc.* Section 713.24(3) provides that the court may, upon application, order an increase in the amount of the bond.

As pointed out in the initial brief, pages 20–24, the Third District interpreted that provision in *Brickell Bay Club, Inc. v. Ussery*, 417 So.2d 692 (Fla. 3d DCA 1982), holding:

> As to the failure to increase the security bond to which the lien was transferred, we reverse. At the time the lien was transferred to bond, the statute authorizing the transfer read as follows:
>
> [Citation of Statute omitted.]
>
> The statutes further provided that the bond could be increased. [Citation of Statute omitted.]
>
> All statutes in effect upon the date of the execution of a contract are a part of the contract. [Case citation omitted.] The surety company, Continental Casualty Company, at the time it entered into the undertaking transferring the lien to bond was on notice that the amount of the bond could be increased. Counsel urges that the trial court was correct in denying the increase in bond, relying on *Schonfeld v. Hughes Supply, Inc.* 392 So.2d 324 (Fla. 1st DCA 1981). We find this case not to be controlling as it involved a request to increase a bond when the amount in question was still unliquidated. *Tuttle/White Constructors, Inc. v. Hughes Supply, Inc.*, 371 So.2d 559 (Fla. 4th DCA 1979).
>
> In the instant case, all amounts due were liquidated at the time the trial judge entered the order denying the motion to increase the bond, although it was apparent on the record that monies due to plaintiff exceeded the amount of the bond previously posted. Although the motion may have been premature when

> filed, it was timely when denied and the bond should have been increased to cover the total amount awarded. The lienor originally had a lien against a substantial asset, a multiple unit condominium development. The owner elected to transfer the lien to bond, the lienor was entitled to a bond sufficient to guarantee his payment the same as he would have been if the lien had not been transferred but remained an encumbrance against the real estate.

Brickell Bay Club, Inc. v. Ussery, supra, at 694–5.

This Court denied a petition for review of *Brickell Bay Club*. *Brickell Bay Club* has never been overturned or receded from.

Therefore, construing the modification to § 713.24, in light of both *Brickell Bay Club* and *L. Ross, Inc.*, should lead to a different result. As the Third District said in *Brickell Bay Club*, "the surety company, at the time it entered into the undeertaking transferring the lien to bond was on notice that the amount of the bond could be increased."

In modifying § 713.24, the legislature most likely was removing the cause of misinterpretation of the statute which initially lead to the line of cases finding a limitation on attorneys' fees in the first place.

CONCLUSION

The opinion under review should be reversed, with instructions to reinstate the judgment of the trial court except for that portion which reduces by 30% the hours found by the court to be otherwise reasonably expended. That portion should be reversed with directions to the trial court to enter a new order providing for no reduction in the hours found by the trial court to be reasonably expended. The trial court should be directed to modify its order to award to $59,500 for legal services in the circuit court, determined by multiplying $175 per hour by 165 hours (being the 175 hours minus 10 hours), multiplying that lodestar figure of $28,875 by the contingency risk multiplier of 2, and adding the 10 hours at $175 per hour.

Additionally, this Court should award Petitioner its fees for this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 19th day of February, 1991, to: UBALDO J. PEREZ, JR., ESQUIRE, Attorney for Respondent, Popham, Haik, Schnobrich & Kaufman, Ltd., Suite 4100, One CenTrust Financial Center, 100 S.E. Second Street, Miami, Florida 33131.

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