O.A. 10/2/91 047

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 24 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

AETNA CASUALTY AND SURETY COMPANY, a foreign insurance corporation, and **PAPPALARDO CONSTRUCTION COMPANY,** a Florida corporation,

Petitioners,

vs.

CASE NO.: 76,925

GORDON F. BUCK, P.E., d/b/a AMERICAN METAL FABRICATING,

Respondent.
_____/

REPONDENT'S ANSWER BRIEF ON THE MERITS

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Signals

Petitioners' Initial Brief on the Merits shall be referred to as "I.B." Respondent's Answer Brief on the Merits shall be referred to as "A.B." The Record shall be referred to as "R." The Transcript shall be referred to as "T." Each of these signals shall be followed by a page number(s) to identify the citation. Petitioners shall be referred to as AETNA and PAPPALARDO respectively, respondent as BUCK.

Table of Citations

Statutes

Publications

Statement of the Case and Facts

Buck substantially agrees with appellants' statement of the case. The decision of the Fourth District affirming the trial court's final judgment is found at Pappalardo Construction Company v. Buck, 568 So.2d 507 (Fla. 4th DCA 1990).

Buck does not agree with AETNA and Pappalardo's statement of the facts. A concise and accurate rendition of the facts is found in the Fourth District opinion, cited above. The following is meant to correct the statement. AETNA and Pappalardo, without citation to record, state that Vincent T. Pappalardo claimed that Buck had a problem in timely delivering fabricated steel (I.B., 3). Such a fact was not found by the trial court, and in large part, is irrelevant to AETNA's and Pappalardo's appeal, except to the extent it shows that Mr. Pappalardo had actual notice of Buck's contractual relationship to furnish materials to the construction project. Further, AETNA and Pappalardo's supposition that there is "no evidence" that Buck believed the joint venture owner had assumed a contractual obligation to pay him (I.B., 3-4) is incorrect, since an agent for the general contractor, Pappalardo, James A. Palermo, specifically told Buck that Mr. Pappalardo was also the owner of the project (T.,22-25,78). If the owner of the general contractor (Mr. Pappalardo) was also the owner of the project, as Buck was led to believe, Buck had an expectation to be paid by the person he was led to believe was serving a dual role (property owner and general contractor).

There was common identity/ownership between one of the owners of the project (Bay Colony Land Co.) and the general contractor (Pappalardo Construction Co.) via the president and sole owner of both, Mr. Pappalardo (I.B., 3). Furthermore, Mr. Pappalardo was not only the general contractor on the project, he also served as agent for the joint venture (R.,12, 84-92; T.,121). Accordingly, any knowledge he gained could be attributed to both of the owners of which the joint venture consisted.

The Notice of Commencement, listed Mr. Pappalardo as the conduit through which the owners could be reached (R.,12, 84-92). The statements made to Buck by the agent of Pappalardo, James Palermo, who told Buck that Mr. Pappalardo was the owner of the project (T.,22,78), caused Mr. Buck to believe that the owner and general contractor were one and the same.

Appellants' claim that Mr. Pappalardo and Buck never met until the day of trial (I.B.,4) is misleading, since Mr. Pappalardo acknowledged that he was: 1) specifically aware of Buck's contract (T.,121); 2) served as general contractor and agent for the joint venture owner on the project (T.,121); 3) had to approve any subcontracts, including that entered into by Buck (T.,122,124); 4) had independent knowledge that Buck was furnishing materials to the project (T.,124); and, 5) had seen Buck during the course of construction of the project (T.,168). Mr. Palermo acknowledged that Buck's contract with Pappalardo was personally approved by Mr. Pappalardo (R., 20-21) and that Mr. Pappalardo had knowledge Buck was producing materials for the project (R.,21).

The Joint Pre-Trial Stipulation states that the project to which appellee furnished materials was owned by Bay Colony, a joint venture between Bay Colony Land Company and First American Equity Juno Beach Corporation (R.,77). Bay Colony in turn contracted with Pappalardo for construction of improvements on the property (R.,77). The foregoing establishes that the president and sole owner of Pappalardo, Mr. Pappalardo, contracted with the person who acted as agent for the joint venture, the same Mr. Pappalardo (T.,121). In fact, the record contains unrebutted evidence that Mr. Pappalardo's relationship with the project ran the gamut from development, ownership, construction and sales (T.,24-25).

Summary of Argument

There is substantial competent evidence in the record to support the trial court's finding of privity between Buck and the owner, and therefore the trial court was correct to hold that Buck was not precluded from recovering a judgment for materials furnished based on a failure to furnish a notice to owner.

In addition, the trial court correctly construed the legislative revision to Section 713.24, Fla. Stat. (1987), which deleted the statutory cap on recovery of attorney's fees against sureties on bonds transferring a lien from realty. Since the legislature affirmatively acted to delete the statutory cap, the plain language of the statute, which is binding on courts, required the trial court to award a reasonable attorney's fee to appellee.

ARGUMENT

Point 1. There is substantial competent evidence in the record to support the trial court's finding that there was privity between the property owner and Buck, thereby excusing Buck's failure to serve a notice to the owner.

AETNA and Pappalardo attack the factual finding of the trial court that there was privity between Buck and the owner, and the trial court's conclusion that because of said fact Buck had no need to serve a notice to owner pursuant Section 713.06, Fla. Stat. (1987). Findings of fact by a trial court are clothed with a presumption of correctness and are entitled to the same weight as a jury verdict. Marsh v. Marsh, 419 So.2d 629 (Fla. 1982). So long as there is evidence to support the trial court's finding, appellate courts may not act as new fact finders in place of the trial court. Marcoux v. Marcoux, 475 So.2d 972 (Fla. 4th DCA 1985), rev. den., 486 So.2d 597 (Fla. 1986). Stated another way, an appellate court may not substitute its judgment for that of the trial court by re-evaluating the evidence. Del Gado v. Strong, 360 So.2d 73 (Fla. 1978).

Hence, the limited scope of review regarding AENTA and Pappalardo's point one is: is there evidence in the record to support the trial court's factual determination that Buck was in privity with the owner, thereby excusing Buck's failure to furnish notice to owner under Section 713.06, Fla. Stat. (1987)?

The trial court specifically found that the 100 percent owner of Pappalardo was also the president and sole shareholder of Bay

Colony, the owners of the construction project (R.,174).

From this finding, the trial court properly concluded that the notice to owner was unnecessary, since there was privity between the owner (Bay Colony) and appellee via Mr. Vincent Pappalardo, who was the president and sole shareholder of both the general contractor and president and sole stockholder of the owner of the project (Bay Colony). Further, the trial court found that appellee was led to believe by Mr. Pappalardo's agent,[1] James A. Palermo, that Pappalardo was the owner of the project to which Buck furnished materials (R.,175). This finding is not challenged by AETNA and Pappalardo and is supported by substantial competent evidence in the record (R.,22-25,78).

AETNA and Pappalardo's argument, in a nutshell, is that the trial court should have put on blinders and pretended that any knowledge that Mr. Pappalardo gained in his capacity as owner and president of Pappalardo should not be attributed to him when he is playing the role of owner and president of Bay Colony. The argument borders on the preposterous and would require the trial court to engage in the fiction that anything Mr. Pappalardo learns in one corporate capacity should not be attributed to him in his other corporate capacity. This Court should not engage in such schizophrenic compartmentalization, as there is no evidence in the

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[1]A materialman needn't provide notice to owner of lien where the materialman is in privity with owner's agent. King v. Brickellbanc Savings Association, 551 So.2d 604 (Fla. 5th DCA 1989). Mr. Palermo was the agent of Mr. Pappalardo. Hence because of Mr. Pappalardo's ownership of the project, the King case obviates the need for notice on the part of appelle.

record to suggest that Mr. Pappalardo engaged in such behavior himself.

AETNA and Pappalardo's position (that formal notice to owner was necessary) is curious in light of their trial counsel's admission at trial that "[o]bviously, we have notice to the owner who knew about it, even though there was no [formal] notice to owner. But we don't have any implied or express assumption on behalf of Bay Colony, Mr. Pappalardo, or any of the owners establishing that yes, the owner is going to pay Mr. Buck for the work he was performing." (T.,126 emphasis added). In other words, AETNA and Pappalardo are attempting to argue on appeal a matter their counsel admitted was a non-issue at trial. AETNA and Pappalardo should not be permitted to take one position at trial and a different position on appeal before this Court. The purpose of the notice to owner requirement is to put the owner on notice of potential claims, not just to comply with a rule for the sake of a blind compliance that serves no purpose. If "privity" is established via Mr. Pappalardo, arguing legal fictions to escape a legal indebtedness is an attempt to use the mechanic's lien law as a subterfuge, rather than as a rational and fair means to adjudicate disputes that are subject to the law.

"Privity" is not expressly defined in the mechanic's lien law, Tompkins Land Co., Inc. v. Edge, 341 So.2d 206, 207 (Fla. 4th DCA 1977); instead, courts have filled in the statutory gap with cases in which particular facts have given rise to privity between the owner and materialmen or subcontractors. Where the lienor has

privity with the owner, there is no need to supply a formal Section 713.06 notice.

The precedent of the Fourth District is clear on this issue: where the owner acts as his own contractor, as it did in this case, the lien claimant is relieved of the statutory requirement to file a notice to owner, since such circumstances will give rise to privity of contract between the lien claimant and owner. Broward Atlantic Plumbing v. R. L. P., Inc., 402 So.2d 464, 466 (Fla. 4th DCA 1981). Stated another way, a presumption of privity will arise where the owner, acting as his own contractor, contracts with the lien claimant. The Broward Atlantic rule was properly applied to the facts before this Court since the principal and president of the general contractor was also the principal and president of the owner to the project, Bay Colony. The fact that the individual who served in those dual capacities (Mr. Pappalardo) was wrapped in the corporate yolk of each of the aforementioned corporate entities, does not render the rule stated in the Broward Atlantic case inapplicable.

The purpose of the notice requirement of Section 713.06 is, as the trial court recognized, to "...protect an owner of real property who has had improvements made to his property from having to pay twice i.e. to the general contractor with whom he has a contract, and to subcontractors or other material suppliers who were not properly paid by the general contractor ...[i]n other words, the notice requirement is just that, a notice to the owner that those not in privity with the owner are in fact providing

improvements to the real property" (R.,175). See: Hardrives Company v. Tri-County Concrete Production, Inc., 489 So.2d 1211, 1212 (Fla. 4th DCA 1986); Boux v. East Hillsborough Apartments, Inc., 218 So.2d 202 (Fla. 2nd DCA 1969). It is absurd to suppose that Mr. Pappalardo, as principal and president of both the general contractor and owner, would inadvertently pay appellee twice; in fact, Mr. Pappalardo[2] didn't even pay appellee the full amount that was due once, which gave rise to the litigation before the trial court.

Other cases have recognized the Broward Atlantic rule that a lienor having a direct contract with a contractor need not serve a notice to owner, if the contractor and owner are, for all practical purposes, the same entity or have the same management. Boux v. East Hillsborough Apartments, Inc., supra; Approved Dry Wall Construction, Inc. v. Morgan Properties, Inc., 263 So.2d 243 (Fla. 3rd DCA 1972); Yell-for-Pennell, Inc. v. Joab, Inc., 243 So.2d 438 (Fla. 3rd DCA 1971); In re Twelve Oaks, Ltd., 59 B.R. 736, 741 (Bktcy. Ct. M.D. Fla. 1986).

Of the above cases, the Broward Atlantic case is particularly analogous to the facts before this Court. There, the Fourth District held that where the property owners were the sole stockholders, officers and directors of the contracting

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[2]Although not part of the record, this Court needs to know that Mr. Pappalardo has virtually shut down Pappalardo Construction Company, Inc. and ahs claimed in deposition it has virtually no assets. Mr. Pappalardo has about 30-50 separate corporations, partnerships, limited partnerships and other assorted entities under which he does business.

corporation, a subcontractor could recover as a privity lienor without service of a notice to owner, 402 So.2d at 466. Similarly here, this Court should hold that Buck is entitled to recover where the same person was the principal and owner of both the general contractor and an owner of the project. To do otherwise would be to permit the defaulting party to stiff Buck, which stiffing would be solely supported by an elaborate fiction: that Mr. Pappalardo can't transfer knowledge he gains in one corporate capacity to another corporate capacity.

A case heavily relied upon by AETNA and Pappalardo before the Fourth District, Tompkins Land Co., Inc. v. Edge, 341 So.2d 206 (Fla. 4th DCA 1976), is not applicable to the facts before this Court. In Tompkins, the owner and developer (Tompkins) was in no way, shape or form related to the contractor (Ramsey). Ramsey had subcontracted with Edge, who had failed to file a timely notice to owner, but who contended he had come into privity with the owner and was therefore excused from serving said notice. Id. at 206. The "privity" evidence in that case was limited to a one time conversation in which the owner asked the subcontractor to move a fire hydrant. Id. at 208. The Fourth District held that such evidence was insufficient as a matter of law to establish privity. Id. at 207. If there were not common ownership between the owner of the property and the general contractor in this case, AETNA and Pappalardo's reliance on Tompkins would be appropriate. However, the common ownership by Mr. Pappalardo here renders Tompkins irrelevant to this case. This case is illustrative that the Fourth

District's application of the principle of "privity" is fact sensitive, as it should be.

AETNA's and Pappalardo's reliance on First National Bank of Tampa v. Southern Lumber and Supply Company, 145 So. 594 (Fla. 1932), and Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1952) is misplaced since neither of those cases involved common ownership/identity between the owner and the party contracting with the lienor, as will be discussed shortly. AETNA and Pappalardo also discuss the Second District Court of Appeal's evolution regarding the concept of "privity" in the mechanic's lien law. Initially, in the seminal case of Boux v. East Hillsborough Apartments, supra, 218 So.2d 202 (Fla. 2nd DCA 1969), the Second District recognized that where there is common ownership/identity between the owner and the party contracting with the lienor, the lienor was excused from furnishing a notice to owner. Subsequent to Boux, the Second District has mistakenly retreated from its position by erroneously applying the definition of privity used by the Supreme Court in cases in which there is not common ownership/identity between the owner and the party contracting with the lienor. Hence in Floridaire Mechanical Systems, Inc. v. Alfred S. Austin-Daper Tampa, Inc., 470 So.2d 717 (Fla. 2nd DCA 1985), the Second District held that even where the property owner was a 96 per cent stockholder and president of the general contractor, there was no privity between the subcontractor and the owner sufficient to waive the notice requirement, since there was no express or implied assumption by the owner to pay for the subcontractor's

services. For this holding, the Second District erroneously relied upon the Supreme Court case of Foley Lumber Co. v. Koester, supra, 61 So.2d 634 (Fla. 1952).

In Foley, the materialman (Foley), and a tile subcontractor (Moyer), sought to enforce a lien against the home owners (the Koesters). Id. at 635. The Koesters had retained Leeds and Brinn as the contractors. Id. at 635. Leeds and Brinn then contracted with Foley to furnish materials to the job site. Id. at 636. Foley billed Leeds, one of the two contractors. Id. at 636. Foely never billed or dealt with the Koesters "in any way." Id. at 636. The Koesters did make one check payable directly to Foley. Id. at 636. When it was discovered that Foley was owed money for materials, the Koesters refused to pay; Foley filed a lien and then sued the Koesters, but without providing the cautionary notice. Id. at 636. This Court held that since Foley had neither filed a notice of intention to claim lien, nor a notice to owner, it could not proceed against the Koesters under the mechanic's lien law. Id. at 638. Further, the Court rejected Foley's claim that Leeds and Brinn were "agents" of the Koesters (and thereby Foley was in privity with the Koesters) since the contact between them was insufficient as a matter of law to establish privity. Id. at 638. As to the tile subcontractor, Moyer, the Court held that there was sufficient evidence that Moyer was in privity with the Koesters, and he was therefore excused from the notice requirements, since Moyer dealt directly with the Koesters, not through Leeds and Brinn. Id. at 639. In Foley, there was no common identity/owner-

ship between the owners and the general contractors. Accordingly, it would have been unfair to bind the owners merely by the actions of the general contractors. In this case, Mr. Pappalardo was the central figure of both the general contractor and the owner, regardless of how many layers of corporate wrap he was encased in.

Likewise, this Court's ruling in First National Bank of Tampa, supra, involved an owner (Halle), who contracted with a contractor (Anderson Investment Company), who in turn contracted with a material supplier (Southern Lumber and Supply Company). 145 So. at 595. The owner was in no way related to the contractor, nor was there a common identity through a conduct such as Mr. Pappalardo; accordingly, the material supplier, who never dealt with the owner but with the contractor, could not claim privity, and his lien was invalid for failure to serve a notice to owner.

Unlike Boux and its progeny, the Foley and First National Bank of Tampa cases did not involve common ownership/identity between the owner and the party contracting with the lienor; therefore the standard for privity applied in Foley and First National Bank of Tampa should not have been applied in Floridaire, where there was common ownership/identity between the owner and the party which contracted with the lienor. To apply the two prong "privity" test to a common ownership/identity fact scenario as AETNA and Pappalardo urge, is to engage in form over substance, resulting in injury to lien creditors and a windfall to owners who are not prejudiced by the failure to receive the notice. The formalism urged here retards rather than advances the law, ignoring the

reality in favor of the disguises.

A case argued to the Fourth District but which AETNA and Pappalardo do not discuss with this Court, Capital Construction Services, Inc. v. Rubinson, 541 So.2d 748 (Fla. 3rd DCA 1989), is distinguishable from the facts here. In Capital, the homeowner (Rubinson) entered into a written contract with J. Kelley, Inc. for home improvements. Id. at 749. Capital then began to perform work, without Rubinson having contracted with it and without her consent, at which time Rubinson ordered Capital to stop work. Id. at 749. Capital filed mechanic's liens, and Rubinson filed an action for declaratory relief to vacate the liens for failure to furnish notice to owner. Id. at 749. Capital answered, claiming privity as a affirmative defense, and counterclaimed for enforcement of liens and other remedies. Id. at 749. The Third District affirmed the vacation of the liens by the trial court because Capital was not in privity with Rubinson and had not complied with the notice to owner requirement. Id. at 750. The Third District held that furnishing of labor and materials to the owner, in the presence of the owner, and after the owner was told such was being furnished, were insufficient to establish privity between Rubinson and Capital. Id. at 750. Unlike this case however, there were no facts in the Capital case that the owner (Rubinson, a private homeowner) had a common ownership/identity with the party (J. Kelley, Inc.) which had contracted with the lienor (Capital). The Third District in another case has recognized this common sense distinction:

> The case of Boux v. East Hillsborough Apartments, Inc., supra, is not applicable because the owner of the property in the present case is not a corporation wholly owned by the contracting party nor were the managing officers alleged to be so identical that notice to one would serve as notice to the other.
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> Approved Dry Wall Construction, Inc. v. Morgan Properties, Inc., 263 So.2d 243, 244 (Fla. 3rd DCA 1972)

Without making the foregoing distinction, AETNA and Pappalardo criticize the Third and Fourth Districts' well established rule, as expressed in Broward Atlantic, supra, and Symon Corporation v. Tartan-Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984), that common identity/ownership between the owner and party contracting with the lienor, excuses the notice to owner requirement. AETNA and Pappalardo's criticism is based on their and the Second District's recent misapplication of the law. The two prong test for privity urged by AETNA and Pappalardo is appropriate where common identity/ownership does not exist between the owner and the party contracting with the lienor; however, it is inappropriately applied in a situation such as exists here where there is common identity/ownership. While the Second District has failed to recognize this distinction in the recent case of Floridaire, the trial court was bound, by the doctrine of stare decisis, to follow the sound precedent of the Fourth District, not the unfortunate departure from precedent recently engaged in by the Second District. See: State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976).

The Second District's strayings from Boux were repeated in New Image Carpets, Inc. v. Sandery Construction, Inc., 541 So.2d 1235 (Fla. 2nd DCA 1989) in which it, again incorrectly, applied the wrong privity standard to a fact situation in which there was identity of interest/ownership between the owner and the party contracting with the lienor. Again, said case conflicts with Fourth District precedent and common sense, and the trial court was not required to follow it. Moreover, despite protests to the contrary, the Second District's New Image decision is devoid of any rational analysis explaning why notice to one member of a joint venture, would not constitute "notice" to the joint venture as a whole. Again, it is submitted that New Image encourages legal fictionalizing and gamesmanship rather than conforming to the realities of the construction industry and the just adjudication of meritorious claims.

AETNA and Pappalardo's final argument on this point, made expressly to the Fourth District and implicitly here (I.B., p.12), is that even if owner Bay Colony had notice through Mr. Pappalardo, the other "owner" in the joint venture, First American Equity Corporation (a subsidiary of the construction lender First American Bank and Trust, which has long since had a celebrated dissolution), did not have said notice. The Notice of Commencement, Buck's Exhibit #1 at trial (R., 84-92), designates the owner's address as "c/o Vincent J. Pappalardo, 4440 P.G.A. Blvd., Suite 501, Palm Beach Gardens, FL 33410." Clearly, it was intended between the "owners" that Mr. Pappalardo was to serve as the conduit through

which the owners of the joint venture could be reached. Moreover, the joint venture was doing business as Bay Colony (I.B.,7). Accordingly, notice to Mr. Pappalardo served as notice to Bay Colony and to First American Equity Corporation. In light of the fact that Buck was actively misled by Mr. Pappalardo's agent (Mr. Palermo) to believe that Mr. Pappalardo owned the project (R.,22-25,78), and since the sole owner of Pappalardo, Mr. Pappalardo, served as developer, owner, builder and salesperson on said project (R.,24-25), it is ludicrous for AETNA and Pappalardo to suggest that First American Equity Corporation did not have actual and/or constructive notice that Buck was furnishing materials to the project. Such notice would have been gained through the conduit of the joint venture, Mr. Pappalardo. See: Symons Corporation v. Tartan-Lavers Delray Beach, supra. Mr. Pappalardo was the maestro[3] through which the joint venture conducted business, and the knowledge that he gained in said role is properly attributable to both members of the joint venture.

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[3]It is also important to note that the bond transferring the lien listed Mr. Pappalardo as principal on it (R.,8). Section 713.24(1) requires that the lien transfer may be effected "...by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed..." The fact that Mr. Pappalardo, not the joint venture and/or the individual corporate "owners" were listed as principal(s) on said bond, shows who the real party in interest was with respect to ownership of the property. Further, instead of naming the general contractor as principal, Mr. Pappalardo named himself. Mr. Pappalardo cannot hide behind the corporate shields for the purpose of arguing that the owners did not have notice, and at the same time represent himself individually as the owner and/or the individual who contracted with Buck to the clerk of courts for the purpose of effecting the transfer from the lien on property to a bond.

Point 2. The trial court was correct to award Buck a reasonable attorney's fees against AETNA based on the legislative repeal of the attorney's fees cap in Section 713.24(1)(b), Fla. Stat. (1987).

AETNA also seeks review of the trial court's order rendered January 8, 1990 awarding Buck its full attorney's fees against AETNA pursuant to Section 713.24, Fla. Stat. (1987). AETNA's argument is that the statutory revision to said section, which struck the $100 cost[4] limitation, did not evince a legislative intent to make sureties such as AETNA liable for full attorney's fees such as were awarded to Buck in this case by the trial court.

The trial court, reviewing the legislative action removing the cap on liability for costs in actions in which property liens are transferred to bond, properly reasoned:

> The Plaintiff and Defendants agree that Florida Statute 713.24 prior to October 1, 1987 had a $100.00 cost deposit requirement, but that the present action is controlled by Florida Statute 713.24, as amended, which became effective October 1, 1987, and which requires a $500.00 cost deposit. Further, the present statute as amended eliminated the language limiting a costs award to $100.00. The Court recognizes that attorney's fees are considered costs as defined in Chapter 713.
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> In the pre-October 1, 1987 statute, the Legislature violated its own reasoning and rationale in the Statute by limiting the attorney's fee to $100.00 once a lien is transferred to bond pursuant to Section 713.24, and apparently the Legislature thought to correct the mistake by deleting the words "and costs not to exceed $100.00" in the October 1, 1987 amendment. Why there should be a difference in the lienors (sic) ability

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[4]"Costs" under the mechanic's lien law includes attorney's fees. See Section 713.29, Fla. Stat. (1987).

> to satisfy the attorney's fees when a lien has been transferred to bond is without reason. Accordingly, the Plaintiff is entitled to all of the attorney's fees that it has incurred. Plaintiff's rationale is, as has been pointed out to the court, that the bonding company's contract with the owner or whoever purchased the bond in favor of the property recognizes that Aetna is responsible for not just the amount of the lien and costs, but also all attorney's fees. The Court agrees. It has also been pointed out to the court that it has the inherent authority to increase or decrease the surety bond depending on the value therein or lack of full value of the lien amount, and this increase or decrease can be done at any time upon reasonable notice and opportunity for all parties to be heard. The court finds that the bonding company is liable for all Plaintiff's costs, which under the statutory scheme include attorney's fees.
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> Accordingly, Defendants' Motion to Limit Entitlement to Attorney's Fees is in part granted and in part denied. Granted as to PAPPALARDO CONSTRUCTION COMPANY in that no attorney's fees are applicable as to it, and it is denied as to AETNA CASUALTY AND SURETY COMPANY.
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> (Appellee's Appendix 1 to Fourth District).

There are no cases expressly construing the legislative revision to this section; resolution of this issue turns on principles of statutory construction, not on how courts previously construed the since repealed statutory provision, as appellants suggest by their discussion of pre-1987 case law.

The legislative intent, which is the primary factor of importance in construing statutes, Devin v. Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976), must be determined primarily from the language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978). Further, if the intent of the legislature is clear and unmistakable from the language used (or in

this case, the language deleted), it is the court's duty to give effect to that intent. Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2nd DCA 1976).

The statutory revision at issue here is not ambiguous. It provides, inter alia, that

> [a]ny lien claimed under part I may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either:
>
> (a) ..., or
> (b) Filing in the clerk's office a bond ..., either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate [6 percent per year] for 3 years, plus $500 [$100] to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded [, and costs not to exceed $100]...
>
> Section 713.24, Fla. Stat. (1987)

[The underlined portions above are the relevant 1987 statutory additions; the bracketed sections are the relevant 1987 statutory deletions. A copy of the portion of Ch.87-74 detailing said revisions and deletions is included in Appellee's Appendix 2 to Fourth District].

The plain meaning of the above statutory provision does not support AETNA's argument. The legislature specifically struck the cost limitation provision; moreover, the revision increasing the bond amount for court costs from $100 to $500 does not limit recovery to this amount, rather it specifies the amount required to

be furnished to the clerk for court costs in order to effect the transfer of lien from the real property to a bond. Had the legislature merely intended to increase the recovery from $100 to $500, it could have very easily said so, instead it chose to strike the limitation language altogether.

AETNA is seeking that this Court create a limitation on the recovery of costs, which include attorney's fees, that the legislature itself decided to repeal. Courts may not, in the process of construction, insert words or phrases in a statute, or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. Devin v. Hollywood, 351 so.2d 1022 (Fla. 4th DCA 1976); Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963). Similarly, courts cannot amend or complete acts of the legislature said to intend to supply relief in instances where the legislature itself has not so provided. Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984). Further, the omission of a standard provision in a particular act establishes a presumption that the legislature did not intend to include the provision. Florida Industrial Com. ex rel. Special Disability Fund v. National Trucking Co., 107 So.2d 397 (Fla. 1st DCA 1958).

When there is a statutory amendment, the rule of construction is to assume that the legislature intended the amendment to serve a useful purpose. Carlile v. Game & Fresh Water Fish Com., 354 So.2d 362 (Fla. 1977). In making material changes in the language of a statute, the legislature is presumed to have intended some

objective, Blount v. State, 102 Fla. 1100, 138 So. 2 (Fla. 1931); Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3rd DCA 1960), or alteration of the law unless the contrary is clear from all the enactments on the subject. The courts should give appropriate effect to the amendment. State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61 (Fla. 1920); Atlantic C. L. R. Co. v. Amos, 94 Fla. 588, 115 So. 315 (Fla. 1927); Kelly v. Retail Liquor Dealers Asso., 126 So.2d 299 (Fla. 3rd DCA 1961). The omission of a word in the amendment of a statute will be assumed to have been intentional, so when the legislature amends a statute by omitting words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment. Capella v. Gainesville, 377 So.2d 658 (Fla. 1979). Moreover, where it is apparent that substantive portions of a statute have been omitted by the process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential. Davis v. Florida Power Co., 64 Fla. 246, 60 So. 759 (Fla. 1912); Carlile v. Game & Fresh Water Fish Com., 354 So.2d 362 (Fla. 1977); Kelley v. Retail Liquor Dealers Asso., 126 So.2d 299 (Fla. 3rd DCA 1961).[5]

It is clear from the foregoing that the legislative repeal of the $100 cost (attorney's fees) recovery limitation cannot be

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[5]The foregoing discussion is adapted from 49 Fla. Jur. 2d, "Statutes" Section 134 (1984).

reinstated, as AETNA urges, by judicial action. The legislature has abolished the cost recovery limitation on Section 713.24 bonds, which, as the trial court recognized, never made much sense and conflicted with the legislative goal of making materialmen and subcontractors whole (Appellee's Appendix, 1). In fact, it is absurd for parties who short materialmen such as Buck to escape liability for the costs of recovering the funds due to them. Previously, a party could arrogantly thumb its nose at a materialman such as Buck and say "go ahead and sue me, I've transferred your lien to bond, and your recovery for having to go to the trouble and expense of bringing suit is limited to $100." This undoubtedly resulted in many lienors surrendering their meritorious claims and the creation of windfalls for shrewd and unscrupulous general contractors and/or owners seeking to stiff the lienor. This of course was <u>not</u> the case for situations in which a transfer of lien to bond was not effected, since full recovery of attorney's fees was available. The legislature has merely acted to correct the incongruity and to ensure that subcontractors/materialmen who are stiffed are made whole. Further, it is curious to note that AETNA is seeking its full attorney's fees, should it prevail in this matter, under Section 713.29. It would be incongruous and unjust if a large insurance company could, were it to prevail, be entitled to full attorney's fees, while a small materials supplier, if it prevailed, would be limited to $500 in fees and costs. Such uneven standing before the law, if it continued to exist, would not only be unfair, but

violative of principles of due process and equal protection under the Florida and United States Constitutions.

The legislature has specifically repealed by amendment the provision which courts had previously relied upon to limit recovery of costs, including attorney's fees, to $100. See: Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982), rev. den. 426 So.2d 27 (Fla. 1983) (surety bond); Symons Corporation v. Jartan - Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984) (cash deposit); Gulfstream Pump and Equipment Company v. Grosvenor Development, Inc., 487 So.2d 330 (Fla. 2nd DCA 1986); Old General Insurance Company v. E. R. Brownell & Associates, Inc., 499 So.2d 874 (Fla. 3rd DCA 1987). All of the above cases, correctly construed Section 713.24 as it existed prior to October 1, 1987; however, with the legislative revision, the cases are no longer the law since the body which makes the law has seen fit to change it. A leading treatise on the Florida mechanic's lien law agrees that the $100 cap on attorney's fees was eliminated by the legislature in 1987 and that "[p]resently a reasonable attorney's fees can be recovered in an action on a Section 713.24 bond." Rakusin, Florida Mechanic's Lien Manual, Chapter 19, p.16 (D & S Publications). Since the legislature has struck the attorney's fees cap, the trial court was correct in awarding Buck a reasonable attorney's fees.

The amount of the bond on this case was originally $9,510.00 (R.,8). The trial court, pursuant to Section 713.24(3), increased the bond amount on the ore tenus motion of appellee (T., 215-228), to which ruling AETNA's counsel did not object. It is ludicrous

for AETNA to now complain that the trial court erred in increasing the bond when counsel for AETNA did not object to said increase at the hearing, held December 14, 1989 (R., 215-228). It is fundamental that a party cannot fail to object to a ruling of a trial court and then raise the issue as error in the appellate court. AETNA's failure to object when the trial court announced an intention to increase the bond estops it from complaining now about said increase on appeal. Besides, even if an objection had been timely lodged, Section 713.24(3), empowers the trial court, "at any time" to enter an order to require additional security. AETNA does not demonstrate that this ruling by the trial court constituted an abuse of discretion or that is was contrary to law.

CONCLUSION

There is substantial competent evidence in the record to support the trial court's finding that there was privity between the property owner and Buck. Accordingly, this Court must affirm the trial court's judgment, based on said finding, that Buck recover from AETNA and Pappalardo the sum of $6,000 together with interest accrued since September 9, 1987, for materials furnished by Buck which were not paid for. The two-prong privity test urged by AETNA and Pappalardo is appropriate to fact situations in which there is not common identity/ownership between the owner and the party contracting with the lienor; it is not appropriate to facts such as were established at this trial where Mr. Pappalardo was the conduit through which information flowed to the owner and was in fact the owner of both the property and general contractor, after

the corporate masks were stripped away.

Secondly, this court should affirm the trial court's holding that because of the legislative revision to Section 713.24, Buck is entitled to a reasonable attorney's fees, in the amount stipulated by the parties ($8,553.55), together with interest accrued since January 8, 1990 and further order AETNA to pay Buck's attorney's fees for work performed before the Fourth District. In addition, appellee is entitled to a reasonable attorney's fees for defending this appeal pursuant to Section 713.29.

Respectfully submitted,

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BY _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U. S. Mail this 22nd day of July, 1991 to JOHN M. JORGENSEN, ESQUIRE, Scott, Royce, Harris, Bryan & Hyland, P.A., 4400 PGA Boulevard, Suite 900, Palm Beach Gardens, FL 33410.

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ISIDRO M. GARCIA, ESQUIRE