SUPREME COURT OF FLORIDA

CASE NO. 78,880

TAYLOR WOODROW CONSTRUCTION CORP., a Florida Corporation; and AMERICAN HOME ASSURANCE CO., a New York Corporation

Defendants/Petitioners

vs.

THE BURKE COMPANY, a California Corporation

Plaintiff/Respondent

_____/

AMICUS CURIAE ANSWER BRIEF ON MERITS OF
ESSEX CRANE RENTAL CORPORATION

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

ESSEX CRANE RENTAL (ESSEX) has sought to be heard in this Appeal to the Supreme Court by the filing of an Amicus Curiae Brief since, by virtue of the nature of its business throughout the State of Florida, that is the leasing of large construction cranes, it has a substantial interest in the outcome of this Appeal. In addition, ESSEX is presently the Plaintiff in ESSEX CRANE RENTAL CORPORATION v. CONE CONSTRUCTION, INC. and SEABOARD SURETY COMPANY, Hillsborough County Circuit Court Case No. 01-91-4786, Division O, wherein the Honorable Guy W. Spicola, Circuit Judge, has recently orally granted a Final Judgment of Dismissal of ESSEX' Complaint pursuant to Section 255.05, solely on the basis of Moretrench American Corporation v. Taylor Woodrow Construction Corporation, 565 So.2d 861 (Fla. 2d, DCA 1990), although in so ruling he specifically stated that he questioned the rationale of the Moretrench decision, but felt constrained and compelled to follow the precedent of the Second District wherein his circuit is located.

With respect to the instant case before this Court, ESSEX accepts the statement of the case and facts as set forth in the Petitioners' Initial Brief on Merits.

SUMMARY OF THE ARGUMENT

Without judicial interpretation of the term "complete delivery" in Section 255.05(2), Florida Statutes, it is impossible to determine the clear meaning of the Statute and the legislature's intent with respect to the obligations of an equipment lessor to serve its Notice of Non-payment such that it could qualify as a claimant under a public works construction project payment bond. The only reasonable interpretation of the statute which allows for the carrying out of the legislative intent of Section 255.05, Florida Statutes, is that provided under the decision of The Burke Company v. Taylor Woodrow Construction Corporation, 585 So.2d 382, (Fla. 1st DCA 1991), which provides that delivery is not completed until the equipment ceases being used on the project. Without such an interpretation, from a practical standpoint, the Statute would not afford any protection to equipment lessors nor allow them sufficient time to institute suit under the statute of limitations provision. The contrary ruling in Moretrench American Corporation v. Taylor Woodrow Construction Corporation, 565 So.2d 861 (Fla. 2d DCA 1990), ignores the often stated legislative intent behind the statute and creates an interpretation of the statute which would result in unintended and extremely harsh consequences for a significant portion of the construction industry which should otherwise be afforded the statutory protection.

ARGUMENT

AMBIGUITIES WITHIN SECTION 255.05, FLORIDA STATUTES (1990), NECESSITATE THE COURT INTERPRETING THE LEGISLATIVE INTENT OF THE COMMENCEMENT DATE OF THE NINETY DAY NOTICE OF NON-PAYMENT FOR EQUIPMENT LESSORS TO COMMENCE ON THE DATE THE EQUIPMENT IS LAST USED ON THE JOB SITE TO GIVE EFFECT TO THE INTENT OF THE LEGISLATURE TO PROTECT MATERIALMEN, LABORERS AND THE LIKE, WHOSE LABORS AND MATERIALS ARE PUT IN PUBLIC WORKS PROJECTS, UPON WHICH THEY CAN ACQUIRE NO LIEN.

This Court should uphold the First District Court of Appeals ruling in The Burke Company v. Bruce M. Ross Company, et al, 585 So.2d 382 (Fla. 1st DCA 1991), and reject the holding of the Second District Court of Appeal in Moretrench American Corporation v. Taylor Woodrow Construction Corporation, 565 So.2d 861 (Fla. 2d DCA 1990), because The Burke Company ruling supports the interpretation of Section 255.05(2), Florida Statutes (1990), in a manner consistent with the often cited legislative intent of the Statute:

> "Section 255.05, FSA, was patterned after the Federal Miller Act and has for its purpose the protection of materialmen, laborers and the like, whose labor and materials are put into public works projects, upon which they can acquire no lien by substituting a penal bond for the lien allowed by other statutes on private construction projects. Winchester v. State, Fla. app. 1961, 134 So.2d 826; Fulghum v. State, 1926, 92 Fla. 662, 109 So.644; J.B. McCrary v. Dade County, 1920 Fla.652, 86 So.612. It is remedial in nature and is entitled to a liberal construction to effect its intended purpose. Johnson Electric Company, Inc. v. Columbia Casualty Company, 1931, 101 Fla. 186, 133 So.850."
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> City of Ft. Lauderdale v. Hardrives Company, 167 So.2d 339, 340 (Fla. 2d DCA 1964).

See also Bordelon Brothers Towing Company v. Piling Instructors, Inc., 906 F.2d 528 (11th Cir. 1990); D.I.C. Commercial Construction Corporation v. The Knight Erection and Fabrication, Inc., 547 So.2d 977 (Fla. 4th DCA, 1989), citing to Noland Company v. Allied Contractors, Inc., 273 F.2d 917 (4th Cir. 1959), at 980; and Gergora v. R. L. Lapp Forming, Inc., 619 F.2d 387, 389 (5th Cir. 1980).

In The Burke Company, the First District Court of Appeal recognized the need to make inquiry of the legislative intent because the Statue in question is ambiguous on its face as to the Notice of Non-Payment provision when dealing with applicability to the furnishing of rental equipment. As it stated in its opinion, the above-referenced statutory language regarding "performance of the labor" or "complete delivery of the materials" is ambiguous in its application to a contract for the providing of rental equipment to a construction project due to the "character of the rental contract". The Burke Company at 384. It thus ruled the ninety day period for serving the Notice of Non-Payment begins to run from the last date of actual use of the rental equipment on the project. Id. at 385.

In contrast to The Burke Company ruling, the Second District Court of Appeal in Moretrench American Corporation v. Taylor Woodrow Construction Corporation, 565 So.2d 861 (Fla. 2d DCA 1990), saw no statutory ambiguities or inconsistencies in ruling that the date for commencement of the serving of an

equipment lessor's ninety day Notice of Non-Payment commences upon the date the lessor completes delivery of the equipment at the project, prior to its actual use. Id. at 862.

Should the Moretrench decision be upheld by this Court, it will have a devastating impact on a significant portion of the construction industry in the State of Florida, that is, the rental equipment industry, and cause unnecessary confusion and unintended financial hardship to those who should otherwise be able to benefit by the protection intended to be afforded by the Statute.

Petitioners, arguing in support of Moretrench, would have this Court believe from their Initial Brief that no interpretation of legislative intent is necessary to construe "complete delivery of materials" because "those words are unambiguous, do not cause unfair or unintended harsh results and must be enforced by Florida courts". (Page 5) Petitioners overlook the inconsistencies in the Statute. First and foremost, Section 255.05(1)(a), Florida Statutes, refers for the definition of a protected party to Florida's Mechanic's Lien Law, (now known as Florida's Construction Lien Law), and in particular, Section 713.01, Florida Statutes (1990). Nowhere in this section of Florida's Mechanic's Lien Law is there a specific reference to equipment lessors, although by implication, they are included since this definitional section of the Mechanic's Lien Law does define "furnish materials" to include "supplying tools, appliances, or machinery used on a

particular improvement to the extent of the reasonable rental value for the period of actual use....", Section 713.01(6), Florida Statutes. There is no doubt that equipment lessors are are a protected class, but whether they are more like laborers supplying a service or materialmen supplying a product, rental equipment, unlike materials which are otherwise sold and delivered with title passing in the ordinary commercial business sense, never have an actual date of "completed delivery". As stated by the First District Court of Appeal in the instant case, the character of equipment rental contracts differ greatly from the nature of the contract to deliver materials which are physically incorporated into improvements to real property. The Burke Company, Supra. at 384. For example, a piece of lumber which is delivered to a job site is a tangible object which, when incorporated into the improvements, becomes a permanent part of the structure and the real property so improved. Conversely, property is not improved by the physical presence of rental equipment, but rather by the particular services or use of the equipment in improving the property. Thus, as the First District Court of Appeal pointed out in the instant case, "because a rental contract extends over time, it is severable by nature, and actually parallels more closely a contract for labor or services, which does not trigger the ninety day notice provision until the last of the labor is performed." Id. at 384. In fact, rental equipment could be deemed "delivered" to

the project every day the lessor allows the lessee to use its equipment in furtherance of the construction process.

Additional ambiguity in Section 255.05, Florida Statutes, is apparent when an attempt is made to interpret the Statute of Limitations provision provided in the Statute in light of the Moretrench ruling pertaining to completed delivery applying to rental equipment. The applicable portion of Section 255.05(2), Florida Statutes, states:

> "No action shall be instituted against a contractor or the surety on the bond after one year from the performance of the labor or completion of delivery of the materials or supplies". (emphasis added)

While Petitioners may argue that the Statute is clear and unambiguous, and the Moretrench holding as such does not work a hardship on equipment lessors, the absurdity of such a position clearly shows when analyzing this statute of limitations section. It should be intuitively obvious to even the most casual observer that more often than not, large commercial projects, especially ones involving public buildings, take longer than one year to complete. It is also easy to conceive situations involving the leasing of equipment can create circumstances where non-payment may not develop until close to or the end of the project, which could be anywhere from 12 to 24 months after the equipment was first brought to the project. If the Moretrench holding's rationale of legislative intent is upheld by this Court as urged by Petitioners, then this Court would likewise have to construe

the legislative intent with respect to the statute of limitations to mean that equipment lessors were not intended to have the right to file suit and seek protection under the payment bond if they allowed their equipment to remain in use on the project for more than one year. Such an interpretation would emasculate the concept of the one year statute of limitations. It is doubtful that was the intentions of the legislature in creating the statute of limitations.

Finally, to give the commencement date for the Notice of Non-Payment the interpretation urged by Moretrench would require an equipment lessor to serve its Notice of Non-Payment at a time when it is conceivable no money would be past due (the first ninety days after the equipment was furnished to the job site), and therefore if towards the end of the job when monies are more likely to become past due, it would be too late, for the ninety days would have passed!

Petitioners, in their Initial Brief in the instant case, suggests that these problems do not work a hardship on equipment lessors since they can protect themselves by retaking possession of the equipment in the event of default; by charging advance payment of monthly rental charges; or by a series of ninety day leases with new deliveries. Petitioners' Initial Brief, Page 10. Unfortunately, all of these suggestions fly in the face of the practical realities of the construction workplace, economic realities, and the rental equipment industry. Retaking possession might limit the loss

of an equipment lessor; however, what is it supposed to do about the rental payments which have accrued and are unpaid precipitating the default in a situation where the lessee has not received payment from the contractor? Does the contractor then get a windfall by having received the benefits of the use of the equipment on the project without having to pay for same? As for the series of ninety day leases, many items of rental equipment, such as scaffolding and, especially ESSEX, construction cranes, take days and sometimes weeks to assemble and disassemble. Petitioners expect ESSEX to come out every three months and stop the job for three or four days while its crane or cranes are disassembled and pulled off of the job site, only to be brought back the next day and reassembled. In addition to the unnecessary delay, the cost associated with the manpower and additional equipment, i.e., smaller cranes needed to hoist parts and erect large construction cranes, make this an economic absurdity.

With these ambiguities and inconsistencies in mind, and considering the economic hardship which a literal interpretation of the applicable portions of Section 255.05(2) create based upon the Moretrench decision, it is clear that the better reasoned opinion is found in The Burke Company, and the First District Court of Appeal's rationale for judicially interpreting the legislative intent of the Statute. The existence of even a slight ambiguity in the statutory language allows for examination of legislative history and statutory

construction. Streeter v. Sullivan, 509 So.2d 268, 271 (Florida, 1987). In Bordelon Brothers Towing Company v. Piling Instructors, Inc., 906 Fd.2d 528 (11th Cir. 1990), the ninety day notice of non-payment provision of Section 255.05, Florida Statutes, was interpreted by the federal court in relation to whether a sub-subcontractor's notice of non-payment was timely served. In passing upon why the Circuit Court of Appeal believed that it had the right to interpret the legislative intent behind the Statute, the Bordelon court stated:

> "Here, we belive it is necessary to look somewhat beyond statutory language in order to apply the statute to the circumstances of the case at bar. (Streeter v. Sullivan, 590 So.2d 268, 271 (Florida 1987), where provisions were "even slightly ambiguous, plain meaning rule does not apply; Bailey v. USX, 850 Fed.2d 1506, 1509 (11th Cir.), (noting that the "plain meaning rule should not applied to produce a result which is actually inconsistent with the policies underlying the statute.") Supra. at 531.

Petitioners have argued that the phrase "complete delivery of materials" does not need construction by the courts and that the cited statutory language is clear and unabmiguous. In support of this position, Petitioners have cited Harvester's Group, Inc. v. Westinghouse Electric Corporation, 527 So.2d 257 (Fla. 3d DCA, 1988), for the proposition that statutory construction of Section 255.05(2) is unnecessary since the wording "complete delivery" was deemed by the Third District Court of appeals to be clear and unambiguous when applied to the purchase of building materials. However, in the instant appeal, the First District has correctly ruled that the severable nature of a contract for the use of rental equipment

on a construction project is different from the sale of products when applied to the express provision of Section 255.05(2) for notice after "complete delivery of material", evidences a sufficient ambiguity to permit statutory construction of this provision.

The Petitioner further argues that the First District has improperly cited, Section 713.01(6), Florida Statutes, for the porposition that "materials delivered", in the rental context, refers to each period of actual use and disagrees with the First District's ruling that delivlery of rental equipment should be deemed complete upon the completion of actual use on the construction project. However, Petitioner's reliance upon the holding in Essex Crane Rental Corporation .v Millman Construction Company, 516 So.2d 1130 (Fla. 3d DCA, 1987), is misplaced for purposes of the instant case. In Millman, the Third District Court of Appeals considered the statutory requirements for service of a Preliminary Notice to Contractor for purposes of a private construction bond under Chapter 713, Florida Statutes, (1983). The Millman decision is distinguishable from the instant case in that the Millman court ruled that Sect6ion 713.23(1)(d) requires a lienor to serve a Preliminary Notice to Contractor "either before beginning or within 45 days after beginning to furnish labor, materials or supplies,..." (emphasis added). This statute does not contain the ambiguous language of Section 255.05(2) which differentiates between "complete delivery of materials" and

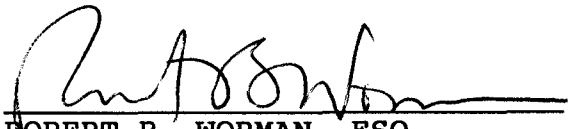
"performance of labor", as stated by the First District in the instant appeal.

Finally, those cases cited by Petitioner in its Initial Brief standing for propositions of statutory construction deal with statutes and factual issues which have no relevance to the instant case. Nothing contained in Stresscon v. Madiedo, 581 So.2d 158 (Fla. 1991), or Home Electric from Dade County, Inc. v. Gonas, 547 So.2d 109 (Fla., 1989), are pertinent to the issues before this Court since these cases deal with Florida's Mechanic's Lien Law, (now known as Florida's Construction Lien Law), Chapter 713, Florida Statutes, and are specifically governed by the rule of construction provision provided in Section 713.37, Florida Statutes, which states: "This part shall not be subject to a rule of liberal construction in favor of any person to whom it applies". By contrast, as previously cited hereinabove, Florida's public construction projects bond statute, Section 255.05, Florida Statutes, being remedial in nature, is entitled to liberal construction to effect its intended purpose of protecting materialmen, laborers and the like, whose labor and materials are put into public works projects upon which they can acquire no Mechanic's Lien.

CONCLUSION

The ninety day statutory notice provision language of Section 255.05(2), Florida Statutes, is ambiguous when applied to the facts associated with the supplying of rental equipment to a public construction project. Questions of the protection afforded equipment lessors by the statute and their right to seek recovery from public works payment bonds cannot be reconciled without judicial interpretation of the legislature's intent.

The First District properly held that the ninety day notice period begins to run from the last date of actual use of rental equipment on public projects. To rule otherwise would cause the statute to be a nullity to a significant segment of the construction industry to whom the statutory protection was directed. The First District's ruling in the instant appeal should be affirmed and the decision of Moretrench American Corporation v. Taylor Woodrow Construction Corporation, 565 So.2d 861 (Fla. 2nd DCA, 1990), should be expressly reversed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to MARGARET D. MATHEWS, ESQ., P.O. BHox 959, Tampa, Florida 33601-0959; STEPHEN A. HOULD, ESQ., P.O. Box 50457, Jacksonville Beach, Florida 32240-0457; CHARLES V. CHOYCE, JR., ESQ., P.O. Box 1873, Orlando, Florida 32802; this 2 day of January, 1992.

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