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IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners

v.

THE BURKE COMPANY, a California Corporation

Plaintiff/Respondent

Case No. 78,880

Accepted SJW 2-6-92

AMICUS CURIAE BRIEF ON MERITS OF CONE CONSTRUCTORS, INC.

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

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STATEMENT OF THE CASE AND FACTS

Cone Constructors, Inc. ("Cone") submits this brief with the consent of both Respondent and Petitioners. Further, it is served within the time stipulated to by the parties.

Cone is a Florida corporation which does general contracting work in connection with public construction projects within the State, and accordingly, has a vested interest in the outcome of this appeal. Further, Cone is a Defendant in an action involving the same issues of law as this case. The Essex Crane Rental Corporation is the Plaintiff in the action against Cone and has filed an Amicus Curiae brief herein. Cone obtained a Final Judgment of Dismissal in its favor at the trial court level based on the decision of Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990), which is in conflict with the First District Court of Appeal decision in this case. Because of the likelihood of an appeal being filed by Essex Crane Rental Corporation in that action, Cone will be directly affected by the decision of this court.

For purposes of its Amicus Curiae brief, Cone accepts the statement of the case and facts as set forth in the Petitioners' initial brief on the merits.

SUMMARY OF THE ARGUMENT

The ninety (90) day notice of non-payment requirement of Section 255.05(2), Florida Statutes, is clear and unambiguous. Equipment lessors must either provide a contractor notice of non-payment within ninety (90) days after the last piece of rental equipment is delivered to a public construction project or waive recovery under a public construction bond. However, the First District Court of Appeal erred in looking beyond Section 255.05(2) to interpret this statutory provision because the statute is unambiguous on its face.

Even if Section 255.05(2) is sufficiently ambiguous to justify looking outside of this statutory section to interpret the language contained therein, the district court misapplied the rules of statutory construction in reaching its holding that the ninety (90) day notice of non-payment requirement begins to run when rental equipment is last available for use on a public project. The court reaches this conclusion based on language contained in Chapter 713, Part I, Florida Statutes, (Florida's Construction Lien Law[1]). However, the language is taken out of context. Considering the language within the context of the Construction Lien Law, it becomes clear that there is no legislative intent embodied in either the Construction Lien Law or Section 255.05 to differentiate between equipment lessors and equipment sellers with respect to notice requirements.

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[1] Although this part of Chapter 713 did not become officially known as the Construction Lien law until the 1990 Florida Statutes, the term is used throughout this brief to reference Chapter 713, Part I, Florida Statutes (1989), the version of the statute apparently considered by the court below.

ARGUMENT

SECTION 255.05(2), FLORIDA STATUTES, UNAMBIGUOUSLY REQUIRES THAT AN EQUIPMENT LESSOR NOT IN PRIVITY WITH THE CONTRACTOR MUST PROVIDE NOTICE OF NON-PAYMENT WITHIN 90 DAYS OF FINAL DELIVERY OF RENTAL EQUIPMENT. HOWEVER, EVEN IF THE STATUTORY LANGUAGE IS AMBIGUOUS, THE CONSTRUCTION LIEN LAW DOES NOT EVIDENCE A LEGISLATIVE INTENT TO IMPOSE DIFFERENT NOTICE REQUIREMENTS ON EQUIPMENT LESSORS THAN ON EQUIPMENT SELLERS.

Section 255.05, Florida Statutes, sets forth the circumstances under which a party contracting with the State of Florida must obtain a payment and performance bond. Claimants not in privity with the state contractor must follow the procedural requirements of Section 255.05(2) before they can seek payment from the contractor or its surety for goods provided and services rendered in connection with the state contract. The latter provision recognizes two distinct categories of claimants: (i) those who furnish labor, and (ii) those who furnish materials or supplies.

In order to recover payment for labor from either the contractor or its surety, claimants must provide notice to the contractor that they intend to look to the bond for protection within 45 days after beginning to furnish labor and provide written notice of non-payment to both the contractor and surety "within 90 days after performance of the labor." To recover payment for materials or supplies, claimants must provide notice to the contractor of an intent to seek bond protection within 45 days after beginning to furnish materials or supplies and provide written notice of non-payment to both the contractor and surety "within 90 days ... after complete delivery of the materials or supplies." Accordingly, the notice requirements of a particular claimant depend upon what the

claimant provides to a public construction contract - labor, materials, or supplies.

Statutory Language of §255.05(2) is Not Ambiguous

In this case, the First District Court of Appeal found the aforementioned statutory notice requirements ambiguous with respect to a claimant who provides rental equipment to a public construction project. Burke Co. v. Bruce M. Ross Co., 585 So.2d 382 (Fla. 1st DCA 1991). The court below stated:

> Because the equipment itself is "material," one might be mislead to treat the equipment the same as purchased materials for purposes of the notice provision. But with purchased materials, the date payment is due will generally be the date of delivery. Because a rental contract extends over time, and is severable by nature, it actually parallels more closely a contract for labor or services, which does not trigger the 90 day notice provision until the last of the labor is performed.

Id. at 384. Considering "the severable nature of the **rental contract** . . . as well as the **incongruity of the result** under an opposing rationale," the court found the term "materials" sufficiently ambiguous to warrant looking outside Section 255.05 for clarification. Id. (emphasis supplied). However, the district court's identification of a statutory ambiguity based upon (a) a review of the terms of Burke's contract, and (b) the deemed inequity that would result from a literal reading of Section 255.05, constitutes reversible error.

As this court stated in Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987), "[i]nquiry into legislative intent may begin only where the statute is ambiguous on its face." When the language of a statute is clear and not unreasonable or illogical in its operation, courts may not go outside the statute to give it another meaning. Reed ex rel. Lawrence v. Bowen, 503 So.2d 1265, 1267 (Fla. 2d DCA 1986) (citing In re Estate of Levy, 141 So.2d 803 (Fla. 2d DCA 1962)), aff'd, 512 So.2d 198 (Fla. 1987). If a term is not defined in a statute, its

common ordinary meaning applies. Department of Administration v. Moore, 524 So.2d 704, 707 (Fla. 1st DCA 1988) (citing Shell Harbor Group, Inc. v. Department of Business Regulations, 487 So.2d 1141, 1142 (Fla. 1st DCA 1986)); Simmons v. Schimmel, 476 So.2d 1342, 1344 (Fla. 3rd DCA 1985), rev. denied, 486 So.2d 597 (Fla. 1986). Further, "harshness does not in itself constitute ambiguity" in a statute. United States v. Second National Bank of North Miami, 502 F.2d 535, 540 (5th Cir. 1974) (citing First National City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779, 784 (5th Cir. 1968)) cert. denied, 421 U.S. 912 (1975).

The First District Court of Appeal acknowledged that rental equipment would commonly be understood to be "material." Nonetheless, the court found the term ambiguous in light of its unsupported conclusion that a "rental contract extends over time, and is severable by nature." The district court implies that a claimant's notice obligation under Section 255.05(2), Florida Statutes is controlled by the terms of an underlying contract and not the nature of what a claimant provides to a construction project. Clearly, this was not the legislature's intent. Nowhere in Section 255.05 does the statute distinguish between claimants based upon the payment terms contained in the contracts executed in connection with a public construction project. The distinction between claimants is based on what they provide to the project - labor, materials, or supplies.

Harsh Results of §255.05(2)
Self-Imposed by Equipment Lessors

Although irrelevant with respect to determining if a statute is ambiguous, the district court, Respondent, and Essex Crane Rental Corporation ("Essex," amicus curiae herein) all provide examples of the harsh results that will be

visited upon rental equipment providers if notice of non-payment must be made within 90 days of delivery of the rental equipment to the construction site. The court alleges that this "would tend to encourage materialmen who rent construction equipment to abandon governmental projects whenever non-payment occurs more than ninety days from the date of delivery of the equipment." Burke, 585 So.2d at 385. Respondent states that such a notice requirement would necessitate sending "a notice of non-payment . . . within ninety-days after the initial delivery of [rental equipment], even though, at that time, no monies may be due or owing." Respondent's Answer Brief on Merits at 8. Similarly, Essex envisions an equipment lessor becoming delinquent in rental payments long after the ninety day notice period had expired. Amicus Curiae Answer Brief on Merits of Essex Crane Rental Corporation (the "Essex Brief") at 5. However, each of these examples is based on the naked, unsupported and conclusory assumption that the underlying rental contract necessarily allocates payment over the duration of the equipment's use on the construction project. All of these scenarios could be avoided by the equipment lessors without this court having to contort the meaning of the term "materials" in the manner recommended by the Respondent and adopted by the court below.

Nothing prevents a lessor of construction equipment from requiring payment upon delivery instead of in installments. If the rental is for an indefinite period, successive contracts could be executed. Despite Essex' assertion that such an approach flies "in the face of the practical realities of the construction workplace economic realities, and the rental equipment industry," Essex Brief at 6, they provide no basis for this assertion. If the industry desires to rely on

public construction bonds in Florida, the industry will conform its contractual practice as necessary to permit recovery for non-payment under the bonds.

It is a well settled principle of law that contracts are made in legal contemplation of existing, applicable statutes. Belcher v. Belcher, 271 So.2d 7, 9 (Fla. 1972); see also Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771, 773 (Fla. 1st DCA 1983); Carter v. Government Employees Insurance Co., 377 So.2d 242, 243 (Fla. 1st DCA 1979), cert. denied, 389 So.2d 1108 (Fla. 1980). Applying this doctrine to the facts of this case, The Burke Company ("Burke") entered the equipment lease agreement with the Bruce M. Ross Company within the restrictions of Section 255.05, Florida Statutes. Having elected to obtain payment for the rental equipment on an installment basis, Burke assumed the risks associated with such a contractual arrangement. Namely, if installments due more than ninety days after final delivery of the rental equipment to the construction site were not made, recovery from the contractor or surety would not be available. Burke placed itself in the same position as would a seller of equipment who similarly agreed to installment payments. After the risk became reality, Burke appealed to the court below for relief from the negative effects of its contract.

Burke acknowledges that the rental equipment it supplied in the instant case is "material," but alleges that the term is ambiguous and argues that its notice of non-payment, provided more than 90 days after the last equipment was delivered to the construction site, was timely. The First District Court of Appeal agrees and its decision serves to assist Burke out of the predicament it contracted its way into. As discussed above, the First District Court of Appeal erred in looking outside Section 255.05(2), Florida Statutes, to interpret this

provision because it is not ambiguous on its face. However, even if this statute is sufficiently ambiguous to warrant such an endeavor, the district court misapplies the rules of statutory construction to reach its holding that "the ninety day notice period begin[s] to run from the last day of actual use of [] rental equipment on [a] public project." Burke Co., 585 So.2d. at 385.

Even if §255.05(2) is Ambiguous - District Court Misapplies Rules of Statutory Construction

Finding the term "materials" ambiguous in the context of Section 255.05(2), the Burke court points to the definition of "furnish materials" in "section 713.01(6), Florida Statutes, which [, according to the court,] states clearly that 'materials' in its analogous context: includes supplying tools, appliances, or machinery . . . to the extent of the reasonable rental value for the period of actual use . . . ." Id. at 384. The court interprets this language to mean that what an equipment lessor delivers to a construction project is a "period of actual use, as opposed to the physical equipment itself which is never 'delivered' over to the user in the sense of delivery to a buyer. . . ."[2] Id. Applying this interpretation to the rental equipment situation, the court finds "complete delivery of [rental] materials" to occur on "the last day of [their] actual use."

The First District Court of Appeals' interpretation of the statutory language of Section 713.01(6) is defective because it takes the language out of context. Although a court may assume that the exact same words in different statutory provisions were intended to mean the same thing, St. George Island,

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[2] This assertion defies logic. Physical equipment is delivered to a renter in the same sense as physical equipment is delivered to a buyer. The key distinction between a buyer and renter is that a buyer ultimately obtains ownership of the delivered equipment while a renter only obtains possession.

Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989) (citing Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1953)), app'd in part, 561 So.2d 253 (Fla. 1990); Schorb v. Schorb, 547 So.2d 985, 987 (Fla. 2d DCA 1989) (same), the meaning must be derived from the context of the material, Alsop v. Pierce, 155 Fla. 184, _____, 19 So.2d 799, 803 (Fla. 1944); DeSisto College, Inc. v. Town of Howey-In-The-Hills, 706 F.Supp. 1479, 1495 (M.D. Fla.), aff'd, 888 F.2d 766 (11th Cir. 1989). Since Section 713.01(6) is contained within the definition section of Florida's Construction Lien Law, it must be interpreted within the context of the Construction Lien Law. The Third District Court of Appeals conducted such a contextual interpretation in the case of Essex Crane Rental v. Millman Construction, 516 So.2d 1130 (Fla. 3rd DCA 1987), rev. denied, 525 So.2d 378 (Fla. 1988).

In Essex, a construction crane lessor sued on a payment bond posted under the Construction Lien Law. The issue before the court was whether the notice to the contractor of an intent to seek protection under the payment bond had to occur within 45 days of the delivery of the unassembled pieces of crane to the construction site or within 45 days of the assembled crane being put into actual use. The trial court held that the notice period began to run upon delivery of the unassembled pieces and, finding notice untimely, granted summary judgment in favor of the contractor and its surety. On appeal, the lessor argued that the Section 713.01(6) reference to "the supplying of machinery 'to the extent of the reasonable rental value for the period of actual use'" supported its position that the notice period only began once the crane was fully assembled and put to use. Id. at 1131. The Essex court stated that this argument was misplaced and that this language "refer[s] to the amount of

payment protected under the [construction] lien law rather than to the notice issue . . . ." Id. When the term "furnish materials" is viewed carefully within the context of the Construction Lien Law, the Essex court's conclusion is substantiated.

As mentioned above, the Burke court concluded that the 90-day non-payment notice requirement begins to run from the last day of use of rental equipment because, "'materials' in its analogous context: includes supplying tools, appliances, or machinery . . . to the extent of the reasonable rental value for the period of actual use . . . ." Burke Co., 585 So.2d at 384. By replacing the term "furnish materials" in the Construction Lien Law with this excerpt from the Section 713.01(6) definition of the term, it becomes clear that the reference to "rental value for the period of actual use" is relevant only in connection with the amount of payment protected under the Construction Lien Law and not in the context of notice requirements. Looking first to the language relating to payment protection, this exercise provides the following result:

> 713.06 Liens of persons not in privity; proper payment.-
> (1) A materialman . . . shall have a lien on the real property improved for any money that is owed to him for **[supplying tools, appliances, or machinery . . . to the extent of the reasonable rental value for the period of actual use . . . .]**

If the excerpt relating to a claimant's notice requirement is inserted into the Construction Lien Law, the statute reads as follows:

> 713.23 Payment Bond. -
> 1(d) Either before beginning or within 45 days after beginning to **[supply[ ] tools, appliances, or machinery . . . to the extent of the reasonable rental value for the period of actual use . . .]**, a lienor who is not in privity with the contractor, except a laborer, shall serve the contractor with notice in writing that the

> lienor will look to the contractor's bond for protection in the work.

Clearly, the reference to rental value is relevant in the former statutory provision and extraneous in the latter. Accordingly, the Burke court's conclusion that the actual use of rental equipment controls the notice requirements of Section 255.05, Florida Statutes is unsupported.

Finally, adopting the position that "actual use" of rental equipment controls the notice provision under both Section 255.05 and the Construction Lien Law[3] would lead to absurd results. Under the Construction Lien Law, the 90-day notice of non-payment period is triggered by any single failure to make payment. FLA. STAT. §713.23(e)(1989). However, if the 90 day notice requirement does not begin on a public construction project until the last day rental equipment is used, an equipment lessor could go unpaid for the duration of a project and have no obligation to give notice. Indeed, notice before the end of the equipment's use could be deemed premature. See Harvester's Group, Inc. v. Westinghouse Electric Corp., 527 So.2d 257 (Fla. 3rd DCA) (notice of claim prior to complete delivery of materials premature under Section 255.05, Florida Statutes), rev. denied, 536 So.2d 246 (Fla. 1988). Further, tying notice to actual use would allow an equipment lessor to delay giving notice of its intent to seek protection under a bond until up to 45 days after the equipment is finally put to use on either a public or private construction project. This means overturning Essex Crane Rental v. Millman Construction Co., 516 So.2d 1130

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[3] Because the decision of the First District Court of Appeals is based on an interpretation of the term "materials" in the context of the Construction Lien Law, if this court adopts this interpretation, it would affect future decisions under both Section 255.05 and the Construction Lien Law.

(Fla. 3rd DCA 1987), rev. denied, 525 So.2d 878 (Fla. 1988), because that case held that delivery of rental equipment and not actual use triggered the notice provision of the Construction Lien Law. Each of these results is contrary to the purpose of the notice requirement: "to advise the contractor and surety of [unknown suppliers' and subcontractors'] participation in the project and to advise if they are not promptly paid." School Board of Palm Beach v. Vincent J. Sasano, 417 So.2d 1063, 1065 (Fla. 4th DCA 1982).

CONCLUSION

The decision of the First District Court of Appeal is erroneous. Section 255.05(2) is clear and unambiguous, and requires notice of non-payment be made by an equipment lessor within ninety (90) days of delivery of the rental equipment to the construction site. Even if it is appropriate to refer to the Construction Lien law to assist in the interpretation of Section 255.05, nothing in this section of the Florida Statutes supports a different conclusion. The Second District Court of Appeal decision in Moretrench should be upheld and the decision of the First District Court of Appeal in this case reversed.

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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 to Margaret D. Matthews, Esq. and Frazier Carraway, Esq., Stagg, Hardy, Ferguson, Murnaghan & Matthews, P.A., P.O. Box 959, Tampa, FL 33601-0959; Charles V. Choyce, Jr., Esq., Rumberger, Kirk, Caldwell & Wechsler, P.A., 11 E. Pine Street, P.O. Box 1873, Orlando, Florida 32802; Stephen A. Hould, Esq., Jensen & Hould, 708 North Third Street, P.O. Box 50457, Jacksonville Beach, Florida 33240-0457; and Robert B. Worman, P.O. Box 1764, Orlando, Florida 32802, on this 4th day of February, 1992.

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