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

PETITIONERS' REPLY BRIEF ON MERITS

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

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ARGUMENT

SECTION 255.05(2), FLORIDA STATUTES, IS UNAMBIGUOUS AND SHOULD BE GIVEN ITS PLAIN MEANING. HOWEVER, EVEN IF THE STATUTE REQUIRES CONSTRUCTION, IT REVEALS THE LEGISLATIVE INTENT THAT PROVIDERS OF RENTAL EQUIPMENT TO PUBLIC CONSTRUCTION PROJECTS GIVE NOTICE OF NON-PAYMENT WITHIN 90 DAYS OF DELIVERING PROPERTY TO THE SITE.

Respondent and amicus argue that strict and literal construction of Section 255.05(2), Florida Statutes, works a hardship on suppliers of rental equipment and therefore must not have been intended by the legislature. Several courts have noted that while Section 255.05(1), Florida Statutes, protects subcontractors and suppliers to public projects,

> ". . . Section 255.05(2) protects the contractor and contractor's surety from having to account to unknown suppliers and subcontractors by putting the burden on claimants to advise the contractors and surety of their participation in the project and to advise if they are not promptly paid."

School Board of Palm Beach County v. Vincent J. Sasano, 417 So.2d 1063 (Fla. 4th DCA 1982) (emphasis added). See also, W.G. Mills, Inc. v. M. and M.A. Corp., 465 So.2d 1388 (Fla. 2d DCA 1985); Blosam Contractors, Inc. v. Joyce, 451 So.2d 545 (Fla. 2d DCA 1984). Thus, Section 255.05(2) should be construed in favor of protecting the contractor and surety from surprise rather than stretching the statute beyond the legislative intent to protect suppliers of rental equipment, who are themselves already in the best position to protect their interest. The strict and literal construction urged in Moretrench American Corp. v. Taylor Woodrow

Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990) accomplishes the legislative intent of protecting contractors from surprise.

Suppliers retain their common law causes of action to collect from the subcontractors with whom they contract. No legislative intent is evidenced or arguable that suppliers should be allowed to fail to conduct themselves in a businesslike manner and rely on the contractor's surety to be an unconditional guarantor of the subcontractor's payment obligations. Examples similar to those provided by respondent and amicus demonstrate the potential abuse which would result from upholding the First District's decision. A general contractor or surety may find themselves with a rental equipment company on site for 24 months only to discover in the 27th month that a fully paid subcontractor had failed to make a single payment to the equipment rental company. However, following the Moretrench decision, the rental equipment supplier is protected provided he gives notice of non-payment within 90 days of complete delivery of the equipment.

The legislature is presumed to be aware of the Second District's decision in Moretrench and has not amended the statute. State v. Quigley, 463 So.2d 224 (Fla. 1985). Therefore, the legislature's acquiescence in the Moretrench decision may be seen as ratifying the result. In re Smith, 21 B.R. 345 (M.D. Fla. 1982)

Neither the petitioner nor amicus adequately defends the First District's misplaced use of Section 713.01(6) to bolster the definition of materials in the rental context to refer to periods of "actual use". Petitioner fails to respond to the Third

District's opinion in Essex Crane Rental Corp. v. Millman Construction Co., 516 So.2d 1130 (Fla. 3d DCA 1987) that the "actual use" language in Section 713.01(1) refers to the amount of payment which will be protected. Amicus (Essex Crane) on the other hand ignores petitioner's argument and mischaracterizes the holding in Essex Crane which clearly rejects the argument that the "actual use" language in Section 713.01(1) determines the timing of notices by suppliers of rental equipment.

Further evidence that the Moretrench result is the correct one is the fact that the date of complete delivery is a definite and definable date while the period of actual use for purposes of determining when notice should be given is a much less concrete date. The period of actual use may become ambiguous because material may be left at the site long after it has been in "use". The date of "complete delivery" has the added benefit, therefore, of being easily defined for purposes of determining the date by which notice must be given.

CONCLUSION

The First District Court of Appeal's opinion improperly finds an ambiguity that does not exist in Section 255.05(2), Florida Statutes. The construction placed on the statute is unnecessary and not supported by legislative intent. That notice must be given within 90 days of "complete delivery" of materials is adequately demonstrated by the plain meaning of the words used in the statute. The First District's opinion should be reversed and summary judgment reinstated on the grounds stated in Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen A. Hould, Esquire, P.O. Box 50457, Jacksonville Beach, Florida 32240-0457 and Charles V. Choyce, Jr., Esquire, Rumberger, Kirk, Caldwell & Wechsler, P.A., P.O. Box 1873, Orlando, Florida 32802 and Robert B. Worman, Esquire, 105 East Robinson Street, P.O. Box 1764, Orlando, Florida 32802, on this 24th day of January 1992.

Margaret L. Mathews
Attorney