SUPREME COURT OF FLORIDA

DANIS INDUSTRIES CORPORATION, ET AL.,

Petitioners,

vs. Case No. 83,016

GROUND IMPROVEMENT TECHNIQUES, INC., ET AL.,

Respondents.

_____/

**On Petition for
Review of a Decision of
the District Court of Appeal, Fifth District
Case No. 92-3127**

INITIAL BRIEF OF PETITIONERS

Mike Piscitelli
Florida Bar No. 364967
Mary M. Piccard
Florida Bar No. 320218
Cummings, Lawrence & Vezina, P.A.
1004 DeSoto Park Drive
Post Office Box 589
Tallahassee, Florida 32302-0589
Telephone: (904) 878-3700

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

PRELIMINARY STATEMENT

This case is before the Court pursuant to a notice to invoke discretionary jurisdiction to review a decision of the Fifth District Court of Appeal. The Fifth District certified the following question of great public importance:

> Does the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), apply to an award of attorneys' fees made pursuant to sections 627.428 and 627.756, Florida Statutes?

Petitioners Danis Industries Corporation, and Seaboard Surety Company are referred to collectively as petitioners and individually as "Danis" or "Seaboard" as appropriate. Respondent Ground Improvement Techniques, Inc. is referred to as "GIT" and respondent Fidelity and Deposit Insurance Company of Maryland is referred to as "F&D." Citations to the record on appeal are indicated as R: ____ with the appropriate page number inserted. Citations to the transcript of the hearing held October 13, 1992, are indicated as T: ____ with the appropriate page number of the transcript inserted.

STATEMENT OF THE CASE AND FACTS

Danis contracted with Orange County, Florida to furnish labor, services and materials in connection with the construction of landfill and stormwater improvements at the Orange County Landfill (the "project"). R: 6-11. On October 23, 1989, Danis and GIT entered into a subcontract which obligated GIT to perform a portion of the work on the project. R: 12-21. During the course of GIT's performance of the subcontract, several disputes arose between Danis and GIT. Paragraph 32(c) of the subcontract provided that either party could demand arbitration of any disputes arising out of GIT's performance. R: 18. Pursuant to that section, Danis and GIT each filed a demand for arbitration. R: 60, 84. Danis' demand was filed first and Danis was identified as the claimant in the arbitration; GIT was the respondent. R: 27.

In its demand, Danis claimed that GIT breached the contract in numerous respects as a result of which Danis incurred damages. R: 60-65. Danis withheld the damages it claimed resulted from GIT's breaches of the contract which totaled $413,212.31. This back-charge was specifically authorized by the subcontract. R: 16. Danis also withheld $68,293.12 in retainage, pending payment from the owner pursuant to a "pay-when-paid" clause in the subcontract. Danis' demand for arbitration acknowledged GIT's dispute with regard to Danis' entitlement to withhold funds and requested resolution of the dispute by a panel of arbitrators in accordance with the subcontract agreement.

GIT's initial demand for arbitration recognized Danis' entitlement to a backcharge because GIT claimed that Danis owed only $298,230.00. R: 84. GIT subsequently amended its claim, however, alleging Danis breached the contract resulting in extra work and expense to GIT. GIT's amended claim sought all the money withheld by Danis plus breach of contract damages totalling almost $800,000.00 plus interest, costs and attorneys' fees. R: 121, 139. By the time of the arbitration, GIT's total claim exceeded $1.1 million.

After a nine day hearing, the arbitrators rejected entirely GIT's $800,000.00 breach of contract claim against Danis and expressly found that GIT was liable to Danis for $215,588.00 on Danis' breach of contract claims against GIT. R: 27. The arbitrators further found that Danis had withheld more than it was entitled to and required Danis to pay $214,575.00 of the disputed amounts it had withheld plus the $68,293.12 of retainage. Thus, the net result of the award was payment by Danis to GIT of $282,868.12. However, Danis was not required to pay the $68,293.12 until Danis received its retainage from the County. Danis had never disputed GIT's entitlement to the retainage once that amount was paid to Danis. R: 138.

On June 5, 1991, GIT filed the present action against Danis and Seaboard seeking to confirm the arbitrator's award pursuant to the Florida Arbitration Code. § 682 Fla. Stat. (1991). The complaint alleged that the action was against Seaboard on a construction payment bond (R: 1) and requested attorneys' fees

pursuant to sections 627.428 and 627.756 of the Florida Statutes. R: 1-5. Danis and Seaboard answered and Danis counterclaimed against GIT and its surety, F&D. R: 28. Danis likewise sought confirmation of the arbitration award and attorneys' fees against F&D. R: 33-34.

The parties filed cross-motions for summary judgment. R: 53, 68. Danis argued that it was entitled to attorneys' fees as the prevailing party because the arbitrators' award contained the finding that GIT breached the subcontract and because Danis overall prevailed on the significant issues in dispute. R: 55. GIT argued that because it was the recipient of money, it was the prevailing party entitled to attorneys' fees under the statute. R: 68-76. Additionally, F&D filed a response in opposition to Danis' motion for summary judgment also arguing that Danis was not the prevailing party under the standard established by the Fifth District Court of Appeal in Casavan v. Land O'Lakes Realty, 542 So. 2d 371 (Fla. 5th DCA 1989). R: 168-176.

On February 26, 1992, Circuit Court Judge Lawrence R. Kirkwood entered an order granting GIT's motion for summary judgment. R: 196-200. Prior to the order, Danis had paid GIT the full $282,868.00 ordered by the arbitrators. R: 199. Therefore, the only remaining issues related to entitlement and amount of attorneys' fees. The court found GIT entitled to attorneys' fees pursuant to sections 627.428 and 627.756 and reserved jurisdiction to determine the amount. R: 200.

GIT did not file its motion to tax fees and costs until June 17, 1992. R: 201-259. Before the trial court ruled on the motion, this Court rendered its decision in Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992), where it disapproved Casavan and held that the definition of prevailing party for purposes of an attorneys' fee award is the party who prevailed on the significant issues in the case. Id. at 810. Based on that decision, Danis filed a motion for reconsideration of GIT's entitlement. R: 277-286. A hearing was held on October 13, 1992. On November 17, 1992, Judge Kirkwood denied the motion for reconsideration (R: 305) and entered summary final judgment in favor of GIT. R: 324. The final summary judgment awarded GIT $142,200.72 in attorneys' fees, $114.50 in costs, plus $25,598.00 in prejudgment interest on the fees and costs, for a total judgment of $167,913.22 in fees, costs and prejudgment interest.

Danis and Seaboard appealed the final judgment to the Fifth District Court of Appeal. GIT moved to dismiss, arguing that the appeal was an untimely effort to attack the underlying arbitration award and that Danis had no standing to challenge the fee award. Danis and Seaboard responded pointing out that the appeal was not an attack on the award, that the award was in Danis' favor and that the only error raised by the appeal concerned the award of attorneys' fees which was not final until November 17, 1992. The Fifth District summarily denied GIT's motion to dismiss.

On appeal, Danis and Seaboard argued that the standard for determining the prevailing party was established in Moritz and that

the trial court therefore erred in awarding GIT attorneys' fees. On October 22, 1993, the Fifth District entered an opinion rejecting the applicability of Moritz to cases in which an attorneys' fee award is authorized by sections 627.428 and 627.756 of the Florida Statutes. That decision rested in part on the decision of the Fourth District Court of Appeal in Prosperi v. Code Inc., 609 So. 2d 59 (Fla. 4th DCA 1992). In Prosperi, the Fourth District held that Moritz did not apply to mechanic's lien actions where Chapter 713.29 authorizes attorneys' fee awards. At the time, Prosperi was pending in this Court based on the Fourth District's certification that the following question was one of great public importance:

> Does the test of Moritz v. Hoyt for determining who is the prevailing party for the purposes of awarding attorneys' fees apply to fees awarded under section 713.29, Florida Statutes?

Danis and Seaboard timely filed a motion for reconsideration requesting that the Fifth District certify essentially the same question which had been certified by the Fourth District in Prosperi, substituting sections 627.428 and 627.756 for section 713.29. While that motion was pending, this Court reversed Prosperi and held that the Moritz standard does apply to awards for attorneys' fees in actions brought pursuant to Chapter 713. See Prosperi v. Code, Inc., 18 Fla. L. Weekly S607 (Fla. November 8, 1993).

On December 23, 1993, the Fifth District denied the motion for rehearing, but withdrew its original opinion in this case and

issued an amended opinion which certified the question as requested by Petitioners:

> Does the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), apply to an award of attorneys' fees made pursuant to sections 627.428 and 627.756, Florida Statutes.

SUMMARY OF THE ARGUMENT

The issue in this case is whether the analysis for determining entitlement to attorneys' fees established by this Court in Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992) should be ignored because the action raises a claim on a construction bond. The Fifth District Court of Appeal rejected Moritz, ruling that the standard for determining prevailing party when fees are awarded pursuant to sections 67.428 and 67.756 of the Florida Statutes differs from the standard which applies in every other case. There is no legal or logical basis for the Fifth District's conclusion.

While this case was pending in the circuit court, this Court decided Moritz. While the case was pending in the district court, this Court decided Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993). In Prosperi, the Court overruled the Fourth District Court of Appeal and held that the prevailing party standard of Moritz applies to mechanic's lien actions. Mechanic's lien actions and actions brought under a public construction bond issued pursuant to Section 255.05 serve the same public purpose. Section 255.05 and Chapter 713, the mechanic's lien law, both are designed to protect laborers and suppliers on construction projects. A party who does not prevail on a mechanic's lien action should be treated the same as a party who does not prevail in an action on a construction bond. Under the Fifth District's decision in this case, they are treated differently.

The Fifth District relied on cases which concerned only a claim by an insured against an insurer where the insurer denies

liability on an insurance policy. In those cases, courts have held that where the insured rejects an offer and ultimately recovers less than or equal to the amount of the offer, the insured is not a prevailing party. The Fifth District construed the cases as holding that a party prevails against an insurer or a surety whenever no offer is made and some amount of recovery is obtained. The analysis is essentially a net recovery theory which the Fifth District had applied prior to being overruled by this Court in Moritz. Although the general rule established in the cases cited by the Fifth District may be sound when attorneys' fees are awarded solely because the action is one brought by an insured against an insurer, the result is not necessarily the same when the attorneys' fee is authorized by section 627.756 because the action arises out of a claim on a construction bond.

In actions which only involve section 627.428, there generally is no need to determine whether one party prevailed on the "significant issues" as discussed in Moritz. In those cases, there is only one claim, that of the insured against the insurer. The insurer has no affirmative claim for relief against the insured, nor is it likely that the insurer would be retaining funds of the insured. When actions are brought against a section 255.05 construction bond, however, the circumstances may be quite different. In such cases, it is likely that parties on both sides will be asserting affirmative claims because the cause of action is a traditional contract dispute. When there are affirmative claims

and partial recoveries on both sides, the significant issue analysis established in Moritz is applicable.

In the original opinion in this case, the Fifth District relied in part on Prosperi and other mechanic's lien cases as justifying its refusal to apply Moritz. While the original opinion was pending on rehearing, this court overruled the Fourth District's decision in Prosperi. In spite of the original reliance on the Fourth District's decision in Prosperi, the Fifth District virtually ignored this Court's rulings and carved out an exception to Moritz without any analytical or logical basis for doing so.

The Fifth District erred in rejecting the significant issue standard for determining prevailing party. Under that standard, it is indisputable that Danis prevailed. Therefore, the Court should reverse the District Court and remand with instructions that a final judgment be entered finding that GIT did not prevail in its action against the bond and therefore is not entitled to an award of attorneys' fees.

ARGUMENT

THE DISTRICT COURT ERRED IN REJECTING THE PREVAILING PARTY STANDARD ESTABLISHED BY THIS COURT IN MORITZ.

According to the Fifth District's decision in this case, a prevailing party in Florida is one thing when attorneys' fees are authorized by sections 627.428 and 627.756 of the Florida Statutes but is something altogether different in every other context. The District Court's conclusion is not supported by the cases it cited nor does any logical basis exist for the distinction.

Section 627.428 of the Florida Statutes authorizes the award of attorneys' fees when an insured prevails on a claim against an insurer. Lachance v. Saqumeri, 537 So. 2d 665 (Fla. 4th DCA 1989), rev. den. 545 So. 2d 1368 (Fla. 1989). Section 627.756 of the Florida Statutes makes section 627.428 applicable to suits against a surety on a construction bond. Section 255.05 of the Florida Statutes requires contractors on public construction projects to post a construction bond. This case concerns a claim against a construction bond issued pursuant to section 255.05.

Relying on Westinghouse Electric Corp. v. Schaffer & Miller, Inc., 515 So. 2d 248 (Fla. 3rd DCA 1987), rev. den. 525 So. 2d 881 (Fla. 1988) and Greenough v. Aetna Casualty and Surety Company, 449 So. 2d 1001 (Fla. 4th DCA 1984)[1] the Fifth District concluded that a claimant on a construction bond prevails if there is a flow of

---

[1]In its original opinion the Fifth District also relied on C.U. Associates v. R.B. Grove, Inc., 472 So. 2d 1177 (Fla. 1985), a mechanic's lien case implicitly overruled by Prosperi. In the substituted opinion, the Fifth District omitted the citation to C.U. Associates.

dollars to the claimant and no prior settlement offer. Technically, the court misstates the rule of law established by the cited case, but more importantly, the analytical basis for those decisions simply does not apply to the present circumstance.

The District Court stated that the rule of Greenough is that "a prevailing insured is one who obtains judgment in its favor and against an insurer in an amount which is greater than any offer of settlement previously tendered by the insurer." Because Seaboard did not tender a settlement offer and GIT recovered dollars, the court concluded that GIT obtained a judgment greater than any offer of settlement previously tendered.

First, what Greenough and Westinghouse actually establish is that an insured who rejects a settlement offer and ultimately recovers an amount less than or equal to the offer shall not be considered the prevailing party. The rule is not as stated by the Fifth District that any time an insured recovers an amount where there has been no offer, the insured prevails. Greenough and Westinghouse concerned only section 627.428, the statute which authorizes fees when an insured prevails against an insurer. The opinions did not consider the effect of section 627.756 which makes 627.428 applicable to actions by a claimant on a construction bond. It is true that in cases such as Greenough and Westinghouse, where section 672.756 is not a factor, the insured who recovers money generally will prevail. Where, as here however, the attorneys' fees are authorized by section 627.756 because the case is one

involving a construction contract for which a bond was issued, that is not necessarily the result.

In actions such as Greenough and Westinghouse between an insured and insurer, the fundamental issue is whether coverage exists. The insured claims entitlement to funds and the insurer denies that entitlement. The insurer has no affirmative claim for relief against the insured, nor is it likely to be holding retainage or other funds from the insured. In those cases, there usually is no reason or need to analyze which side prevails. If the insured recovers, he prevails. The only time there is a question is if the insurer makes an offer which is rejected and the insured ultimately fares worse than he would have had he accepted. In those cases, the courts have determined that the insured is not the prevailing party.

When the authorization for attorneys' fees is triggered by section 627.756 however, the analysis is quite different. If section 627.756 applies, it is because the case arises out of a construction contract dispute and a claim has been made against the bond. In such cases it is not unusual to have parties on both sides asserting affirmative claims because the cause of action is a traditional contract dispute. There will likely be issues regarding retainage and contract payments. Such cases require a determination of who prevailed on the significant issues as established by this Court in Moritz.

Prior to Moritz, a conflict existed among the district courts with respect to determining who prevails when there are multiple

claims among the parties and partial recoveries or relief on both sides. The majority of the districts held, as this Court ultimately did, that in such situations fairness requires a determination of who prevails on the significant issues. The Fifth District, however, held that the party obtaining a net recovery, i.e., the party to whom dollars flowed was the prevailing party. Casavan v. Land O'Lakes Realty, Inc., 542 So. 2d 371 (Fla. 5th DCA 1989).

A variation of the net recovery analysis also had been applied in actions under the mechanic's lien law prior to this Court's decision in Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993). The rule had been that an owner who prevailed on a mechanics lien claim but against whom a judgment for breach of contract was rendered did not enjoy a net recovery and therefore was not the prevailing party entitled to attorneys' fees pursuant to section 713.29. Prosperi v. Code, Inc., 609 So. 2d 59 (Fla. 4th DCA 1992). The Fifth District's original opinion in this case relied on the Fourth District's Prosperi decision as support for its effort to avoid the Moritz standard. Like the Fourth District in Prosperi, the Fifth District concluded that the net recovery standard should be applied to actions involving construction bonds. The Fifth District recognized that its ruling was inconsistent with Moritz but analogized this case to Prosperi because Moritz also preceded the Fourth District's decision in Prosperi.

When this Court reversed the Fourth District's ruling in Prosperi, it became clear that superficial application of the net

recovery rule will not be permitted in breach of contract actions. Rather, courts must determine which party prevailed on the significant issues before awarding or denying attorneys' fees.

Although the Fifth District modified its reference to Prosperi when it filed its substituted opinion, the opinion includes no rationale for differentiating between cases such as the present one brought under a section 255.05 construction bond, and cases such as Prosperi brought under the mechanic's lien law. In fact, no rational justification for the disparity exists. Because public property cannot be liened, the legislature created section 255.05 to afford workers and suppliers on public projects the same kind of protection available on private jobs under the mechanic's lien provisions of Chapter 713. Miller v. Knob Const. Co., 368 So. 2d 891 (Fla. 2d DCA 1979). In spite of the identity of purpose in actions authorized by section 255.05 and actions authorized by chapter 713, the Fifth District clings to the net recovery standard it established in Casavan. For the reasons explained in Moritz, that standard is not appropriate when there are affirmative claims for relief on both sides.

Indeed, in its original opinion below, the Fifth District recognized that the prevailing party analysis should be applied consistently to cases arising under the mechanic's lien law and actions on a construction bond. As noted above, the Fifth District originally relied on the Fourth District's conclusion that Moritz did not apply to mechanic's lien actions. Also, the Fifth District originally cited C.U. Associates v. R.B. Grove, Inc., 472 So. 2d

1177 (Fla. 1985), a mechanic's lien case, as support for the proposition that a prevailing party is one who recovers more than that which is offered. The reliance by the Fifth District in its original opinion on mechanic's lien cases was entirely correct. The standard for determining prevailing party status in mechanic's lien actions and the standard to be applied in construction bond cases should be the same. The lower court simply erred in failing to heed this Court's decision that the Moritz standard does apply to these types of cases.

In Moritz, as here, both parties claimed that the other party breached a contract. Ultimately, the Moritzes were deemed to have breached the contract but they obtained return of deposit monies which excluded the damages awarded to Hoyt. This resulted in a net payment to the Moritzes of $45,525.90.

The trial court concluded and this Court agreed that Hoyt was the prevailing party in spite of the net outcome being an affirmative payment by Hoyt to the Moritzes.[2] Even though Hoyt was required to pay back more than two thirds of the amount he had withheld, and even though the Moritzes would not have recovered their deposit absent the litigation, the court concluded that Hoyt had prevailed on the significant issues. Therefore, Hoyt properly was found to be the prevailing party.

---

[2]Notably, Hoyt held approximately three and a half times the amount to which the court found he was entitled. Danis in comparison withheld less than twice what the arbitrators ordered returned.

In reaching its decision, this Court expressly rejected the theory that the prevailing party is the party who recovers an affirmative judgment. The Court's decision was based on notions of fairness. The party who breaches a contract should not be awarded fees for pursuing its unsuccessful claims even if that party ultimately receives payment it would not have received but for the litigation.

Here, as in Hoyt, the arbitrators necessarily found that GIT breached the contract because Danis was entitled to retain over $200,000.00 of the money it had held as compensation for GIT's breaches. Likewise, the arbitrators rejected entirely GIT's claims for $800,000.00 in breach of contract damages against Danis. Thus, Danis prevailed on the significant issues. Fees should not flow to GIT.

In summary, Danis was the prevailing party in the arbitration because Danis prevailed on the significant issues in dispute. GIT was not a prevailing party because there can be only one prevailing party. Reinhart v. Miller, 548 So. 2d 1176, 1177 (Fla. 4th DCA 1989). Because GIT did not prevail, it was error for the trial court to award attorneys' fees to it. The decision in this case cannot be reconciled with the rationale and express holdings in Moritz and Prosperi.

CONCLUSION

There is no statutory or logical reason for mechanic's lien cases and public construction bond cases to have a different standard for recovery of attorneys' fees. As did Hoyt and

Prosperi, Danis prevailed on the significant issues. Fees should not have been awarded to GIT. This court should reverse and remand with instructions to deny GIT's motion to tax fees and costs.

Respectfully submitted,

Mary M. Piccard

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven R. Schooley, Holland & Knight, 200 S. Orange Avenue, Suite 2600, Post Office Box 1526, Orlando, Florida 32802 this 7th day of February, 1994.

Mary M. Piccard

Mike Piscitelli
Florida Bar No. 364967
Mary M. Piccard
Florida Bar No. 320218
Cummings, Lawrence & Vezina, P.A.
1004 DeSoto Park Drive
Post Office Box 589
Tallahassee, Florida 32302-0589
Telephone: (904) 878-3700

Attorneys for Danis Industries Corporation

DANIS.BRF