

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FIREMEN'S INSURANCE COMPANY OF
NEWARK, NEW JERSEY, et al.,

Petitioners,

VS.

SUPREME COURT CASE
NO. 89,574

THE SOUTHWEST FLORIDA RETIREMENT
CENTER, INC., d/b/a THE VILLAGE
ON THE ISLE, et al.,

Respondents.

DISTRICT COURT CASE
NO. 95-02153

FILED

W. J. WHITE

APR 29 1997

Discretionary Proceeding to Review a
Decision of the Second District Court of Appeals

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of Newark, New Jersey's Initial Brief on the Merits

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STATEMENT OF CASE AND FACTS

This appeal arises out of claims brought on performance bonds for damages allegedly caused by latent defects in previously completed construction. Suit was filed more than a decade after completion of construction. The pertinent facts are as follows.

Respondent, The Southwest Florida Retirement Center ("the owner"), sued its general contractor for alleged latent defects in the construction of the owner's retirement facility, and it also sued the surety who had issued the contractor's performance bond on the project. (Op. at 3, A. 4).^{1/} The construction arose out of contracts executed in 1981 and 1983 and, according to the owner's complaint, construction of the two phases of the project was completed in 1982 and 1984, respectively. Id. The owner filed its suit in September 1994, more than ten years later, Id.

The general contractor in turn sued various subcontractors on the project and their sureties. [R. 91, A. 2]. Petitioner, Firemen's Insurance Company of Newark, New Jersey ("Firemen's"), had issued a performance and payment bond to Miles Plastering & Associates, Inc. ("Miles"), which was the subcontractor

^{1/} The record materials referred to in this brief are designated "R. __," and they are included in the accompanying appendix, which is designated "A. ____." The decision of the District Court below is included in the Appendix at Tab 4, and is referred to as "Op." ⁱⁱ All emphasis in quoted materials is supplied. To avoid unnecessary repetition, Firemen's adopts by reference the arguments set forth in the brief filed contemporaneously herewith by Federal Insurance Company.

performing work with regard to the exterior finish wall systems for Phase I of the project. [R. 91, Ex. C, A. 2]. Miles' work was completed by 1982. [R. 91, 99, A. 2]. The general contractor's third party claims against Miles and Firemen's were filed more than twelve (12) years after the completion of Miles' work. [R. 91, 99, A. 2]. All parties agreed that Florida Statutes Section 95.11(2)(b), governing suits on written contracts, was the applicable statute of limitations. [Op. at 2, A. 4].

The trial court dismissed the claims on the performance bonds, ruling that they were barred by the 5-year limitations period set forth in Section 95.11(2)(b). [R. 392, A. 3]. A sharply divided Second District reversed. Southwest Florida Retirement Center v. Federal Ins. Co., 682 So. 2d 1130 (Fla. 2d DCA 1996) [A. 4].

The majority held that the claims on the performance bonds were not barred by the statute of limitations, even though the construction had been completed more than 5 years before the owner's suit was brought. [Op. at 3, A. 4]. Instead, in the majority's view, "by incorporating the construction contract into the bond, the surety's liability becomes co-extensive with that of the general contractor and [hence] a timely contractual claim against the general contractor would result in a valid claim against the surety's bond." [Op. at 4-5, A. 4]. The majority specifically relied in this regard upon the Second District's earlier decision in School Board of Pinellas County v. St. Paul

Fire Ins. Co., 449 So. 2d 872, 874 (Fla. 2d DCA), ~~rev. denied~~, 458 So. 2d 274 (Fla. 1984), holding that the surety "may be held liable for such latent defects to the same extent that [the contractor] is liable therefor." [Op. at 8, A. 4]. The majority concluded that, "the contracts being co-extensive, the limitations period for an action against the surety did not begin to run until discovery of the latent defects constituting the breach of warranty." [Op. at 5, A. 4].

Writing in dissent, Judge Blue declared that the majority's decision "conflicts with prior decisions of the courts of our state" [Op. at 13, A. 4] because it "extends the liability on the bond by implication beyond the terms of the bond contract." [Op. at 17, A. 4]. Judge Blue pointed to this Court's decision in ~~American Home Assurance Co. v. Larkin General Hospital, Ltd.~~, 593 So. 2d 195 (Fla. 1992), where the Court "refused to hold the surety responsible for all damages for which the contractor was liable," even though the bond incorporated the construction contract. [Op. at 16, A. 4]. Judge Blue also reviewed the district court decisions that were disapproved in Larkin and noted that those decisions had held -- just like the majority here -- that the surety's liability was absolutely co-extensive with the contractor's liability under the construction contract because that contract was incorporated in the bond. [Op. at 13, A. 4].

Judge Blue further noted that "the majority decision directly conflicts" with the Fifth District's decision in School.

Board of Volusia County v. Fidelity Co. of Maryland, 468 So. 2d 431 (Fla. 5th DCA 1985). [Op. at 13, A. 4]. Contrary to the majority's decision here, the Fifth District held in Board of Volusia County that the limitations period established by Section 95.11(2)(b) for suits on bonds was not tolled until discovery of the alleged latent defects. Emphasizing that "the issue involved is one of great public importance because of the impact our decision will have on bonded construction and related industries," [Op. at 13, A. 4], Judge Blue declared that he would "certify conflict" with School Board of Volusia County and "certify the issue as one of great public importance.**" [Op. at 18, A. 43.

Firemen's and Federal Insurance Company requested the District Court to certify conflict and to certify the issue as one of great public importance. However, those motions were denied. Firemen's and Federal Insurance Company thereafter filed their respective petition for review pursuant to Article V, Section 3(b)(3) of the Florida Constitution. By order dated April 2, 1997, this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

By its decision below, the Second District has expanded the liability of sureties issuing standard performance bonds so as to be absolutely coincident with the contractor's liability under the construction contract itself, notwithstanding the terms of the bond limiting the surety's liability to completion of the construction. That decision is directly contrary to American Home Assur. Co. v. Larkin General Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992), where this Court expressly held that the surety's liability did not extend "beyond the terms of the performance bond." Since the purpose of such a bond is "to guarantee the completion of the contract upon default by the contractor," this Court determined that the surety was not liable for delay damages, even though the contractor was liable for such damages under the construction contract incorporated in the bond.

The decision below is also contrary to Florida Brd. of Resents v. Fidelity & Deposit Co. of Md., 416 So. 2d 30 (Fla. 5th DCA 1982), where the Fifth District held that a performance bond did not cover claims for defective workmanship discovered after completion of the project. That decision was specifically cited, with approval, by the Larkin Court. On the other hand, the Larkin Court specifically disapproved the decisions in American Home Assurance Co. v. Larkin General Hospital, Ltd., 571 So. 2d 124 (Fla. 3d DCA 1990) (Larkin I), St. Paul Fire & Marine Ins. Co. v. Woolley/Sweeney Hotel #5, 545 So. 2d 958 (Fla. 4th DCA 1989), and Arbor Club of Boca Raton, Inc., Ltd. v. Omega Const,

Co., Inc., 565 So. 2d 357 (Fla. 4th DCA), review dismissed, 576 so. 2d 294 (Fla. 1990), where the Third and Fourth Districts, respectively, held that the surety was liable for all damages for which the contractor was liable, including damages flowing from matters other than the surety's specific undertaking in the bond to complete the construction upon the contractor's default.

Significantly, in reaching its decision in Arbor Club, the Fourth District relied directly upon the Second District's earlier decision in School Board of Pinellas Cty. It goes without saying that the Larkin Court's disapproval of Arbor Club necessarily carried with it the Court's disapproval of School Brd of Pinellas Cty., since that decision held to exactly the same effect as Arbor Club. Nevertheless, the majority relied on School Board of Pinellas Cty. to reach exactly the same result as the Arbor Club decision which was disapproved in Larkin!

Not only does the majority's decision conflict with Larkin and Florida Brd. of Regents, it also conflicts with School Brd. of Volusia County v. Fidelity Co. of Maryland, 468 So. 2d 431 (Fla. 5th DCA 1985). The majority held below that the limitations period on a performance bond is tolled until the owner's discovery of latent defects in the construction. But that improperly inserts a tolling provision into the statute of limitations governing contracts in writing, and that is plainly wrong. As the Fifth District pointed out in School Brd. of Volusia County, the statute of limitations governing bonds does not contain a tolling provision like the one in the statute of

limitations governing contracts for the improvement of real property. The Fifth District correctly declined to toll the statute where the Legislature had not provided for such tolling.

The decision below should not be allowed to stand. It improperly expands the liability of all sureties on performance bonds beyond the terms of the bond -- which is simply to ensure the physical completion of the work upon default -- and it also expands the limitations period for filing suits on such bonds by tolling the statute until the discovery of the latent defects, even though the applicable statute does not contain a tolling provision. Florida law should not be so dramatically changed, and this Court should reverse the decision below, adhere to Larkin and the decisions approved therein, and approve School Board of Volusia County.

ARGUMENT

The District Court's expansion of sureties' liability on performance bonds rests on the mere fact of the incorporation by reference of the underlying construction contract into a performance bond. This is a practice universally employed by the bond industry [A. 5 at 6], and it is done not to expand the surety's liability on the bond beyond completion of the construction contract but rather to establish "in a simple manner" the limits of the surety's performance obligation in the event the contractor defaults and the surety is required to step in and complete the work in accordance with the construction contract. See St. Paul Fire & Marine Ins. Co. v. Woolley/Sweeney Hotel #5, 545 So. 2d 958, 959 (Fla. 4th DCA 1989) [Anstead, J., dissenting, citing Transamerica Ins. Co. v. Yonkers Contracting co., 49 Misc.2d 512, 267 N.Y.S.2d 669 (N.Y. Sup. Ct. 1966)], majority decision disapproved in American Home Assur. Co. v. Larkin General Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992).

There is, in short, nothing in a performance bond's general incorporation of the construction contract that overrides the express provisions of the bond which limit the surety's liability to completion of the construction contract. Quite to the contrary, the teachings of this Court establish, without doubt, that the decision below erroneously extends the surety's liability beyond the bond's express terms. Moreover, the applicable statute of limitations has no tolling provision in it, and hence this suit -- brought more than a decade after

completion of the construction -- is plainly time-barred.

Accordingly, the decision below must be reversed.

1. The surety is only liable under a performance bond for completion of the construction contract.

In American Home Assur. Co. v. Larkin General Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992), this Court -- dealing with a performance bond which, like the bonds at issue here, incorporated the construction contract by reference -- held that the terms of the bond controlled the surety's liability and that the surety's liability did not extend "beyond the terms of the performance bond." As this Court explained:

The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor. Florida Bd. of Regents v. Fidelity & Deposit Co., 416 So. 2d 30 (Fla. 5th DCA 1982). Ordinarily a performance bond only ensures the completion of the contract. The surety agrees to complete the construction or to pay the obligee the reasonable costs of completion if the contractor defaults.

Id. at 198.

The Larkin Court could not have been clearer in holding that "the surety's liability for damages is limited by the terms of the bond." Id. And, since the bond did not protect against delay, the Court refused to extend the surety's liability to include payment of delay damages. In the Court's words:

. . . The terms of the performance bond **control** the liability of American. The language in the performance bond, construed together with the purpose of the bond, clearly explains that the performance bond merely suaranteed the completion of the construction contract and nothing more., Upon

default, the terms of the performance bond required American to step in and either complete construction or pay Larkin the reasonable costs of completion. Because the terms of the performance bond control the liability of the surety, American's liability will not be extended beyond the terms of the performance bond. Therefore, American cannot be held liable for delay damages.

Id.

In so holding, this Court specifically disapproved the Third District's decision in Larkin I and the Fourth District's decisions in Arbor Club of Boca Raton v. Omeaa Const., 565 So. 2d 357 (Fla. 4th DCA 1990) and St. Paul Fire & Marine Ins. Co. v. Woolley/Sweeney Hotel #5, 545 So. 2d 958 (Fla. 4th DCA 1989) (Anstead, J., dissenting), review dismissed, 576 So. 2d 294 (Fla. 1990), where those courts had held that liability existed under a performance bond for delay damages since the bond incorporated the construction contract and that contract provided for timely performance. The Court's disapproval of Arbor Club is especially instructive here, because Arbor Club expressly relied upon the Second District's decision in School Brd. of Pinellas County v. St. Paul Fire and Marine Ins. Co., 449 So. 2d 872 (Fla. 2d DCA), rev. denied, 458 So. 2d 274 (Fla. 1984), just as the majority did in its decision below.

Thus, in Arbor Club, the Fourth District stated that the Second District had held in School Brd. of Pinellas County that "the bond involved incorporated by reference the provisions of the contract, which included the plans and specifications, and the bond was conditioned upon the contractor's faithful

performance of the construction **contract.**" Id. at 359. The Fourth District went on to quote from School Board of Pinellas County as follows:

"At the outset, we point out that St. Paul's performance bond must be interpreted in conjunction with the contract between Biltmore and the School Board. This is so because the contract between the parties is, by reference, made a part of the bond. Thus, since the bond requires the contractor to 'promptly and faithfully perform said contract,' St. Paul, as surety, may be liable for the contractor's breach of a contractual provision."

Id. at 359-360, quoting School Board of Pinellas County, 449 So. 2d at 873.

In Larkin, however, this Court specifically disapproved Arbor Club. By doing so, this Court necessarily expressed concomitant disapproval of the Second District's decision in School Board of Pinellas County, since that decision held to precisely the same effect as Arbor Club and was in fact specifically relied on by the Arbor Club Court **for** its disapproved holding. The Court's implicit disapproval of School Board of Pinellas County also follows from the fact that the Larkin Court specifically **approved** U.S. Fidelity and Guaranty Co. v. Gulf Florida Dev. Co., 365 So. 2d 748 (Fla. 1st DCA 1978) and Florida Brd. of Resents v. Fidelity & Deposit Co. of Maryland, 416 So. 2d 30 (Fla. 5th DCA 1982), where the First and Fifth Districts had held that the surety's liability depended upon **its specific undertaking in the bond**, which was simply completion of the construction contract upon the contractor's default.

By its decision in Larkin, then, this Court squarely resolved the conflict in the district court decisions on this issue. It did so by explicitly reiecting the holdings of the Third and Fourth Districts that the incorporation of the construction contract into the bond rendered the surety liable for damages other than its specific undertaking in the bond to complete the construction contract upon the contractor's default. The Court instead approved the First and Fifth Districts' holdings that the surety's liability was limited by the terms of the bond itself.

Larkin is dispositive. As Judge Blue correctly recognized in dissent, the Third and Fourth Districts held in the disapproved decisions that, as a result of the bond's incorporation of the construction contract, "the surety [is] equally responsible under the bond" for damages that could be recovered under the construction contract, whereas "the opposite result was reached" by the First District in the decision Larkin approved. [Op. at 15, A. 4]. Nevertheless, the Second District has now held to exactly the same effect as the Third and Fourth Districts did in the decisions that this Court disapproved in Larkin. Indeed, the majority reached that result by relying upon School Brd. of Pinellas County -- even though the Fourth District had similarly relied upon that decision in rendering the decision in Arbor Club that Larkin disapproved!

The majority sought to evade Larkin by noting that it involved claims for "delay damages" under a performance bond.

[Op. at 9, A. 4]. But Larkin's holding applies with equal force to claims for breach of warranty damages under a performance bond, and the majority's effort to distinguish Larkin improperly ignores the basic underpinning of that holding. Delay damages are imposed upon a contractor because of the breach of its contractual obligation to timely perform the contract work. But even though the construction contract was incorporated in the bond, Larkin held that the surety was not liable for delay damages caused by the contractor's breach of the construction contract. The Court reached that conclusion because the bond itself did not impose any obligation on the surety for delay damages.

By the same token, breach of warranty damages are imposed upon a contractor because of the breach of its contractual obligation to perform the contract work in a workmanlike manner, However, just as the bonds in Larkin did not impose any obligation on the surety for delay damages, the bonds at issue here did not impose any obligation on the surety for breach of warranty damages. Thus, even though the construction contract was incorporated in those bonds -- just as in Larkin -- the surety had no liability under the bond terms themselves for such warranty damages.

Judge Blue made this precise point, observing that "[i]n spite of the fact the bond incorporated the construction contract, the supreme court refused (in Larkin) to hold the surety responsible for all damages for which the contractor was

liable." [Op. at 16, A. 43. Rather, the surety was simply responsible for completion of the project upon a default by the contractor, which was the surety's only specific undertaking in the bond. The same is true here. It follows, then, that just as incorporation of the construction contract in the performance bond in Larkin did not render the surety's liability co-extensive with the contractor's liability for delay damages under the construction contract, so too here the incorporation of the construction contract in these performance bonds does not render the sureties liable for defects in workmanship discovered long after completion of the project.

That is especially manifest from the fact the Larkin Court specifically cited -- with approval -- Florida Brd. of Regents v. Fidelity & Deposit Co. of Maryland, 416 So. 2d 30 (Fla. 5th DCA 1982), where the Fifth District expressly held that a performance bond did not cover claims for defective workmanship discovered after completion of the project. In Florida Brd. of Regents, the Fifth District began by emphasizing that:

A payment and performance bond is an agreement to protect the owner of a building from two particular defaults by a builder. The payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract to build the building (or road, or utility transmission lines, etc.) will be fully performed. When the architect certifies the building is substantially completed, and the owner accepts the building, then the contractor is deemed to have fully performed and any lawsuit which could be brought against the

surety under the bond must be brought within (the applicable statute of limitations].

Id. at 31. The Fifth District then went on to hold as follows:

As we said earlier, the bond in this case would not cover the claims made by the appellant even if suit had been brought within the one year limitation period. The appellant claims there were latent defects in the materials and workmanship which were discovered after the architect had certified substantial completion and after the statute of limitations had run. The appellant contends that the appellee, the surety under the performance bond, is liable for payment because of those defects. We disagree. Once the building is completed, or as we have said using the words of art in the construction industry, "substantially completed," then the surety under the performance bond is relieved of any further responsibility. The purpose of a performance bond is "to ensure the physical completion of the work upon default," Guin & Hunt, Inc. v. Hushes Supply, Inc., 335 So. 2d 842 (Fla. 4th DCA 1976), and to insure against any losses which the owner may suffer if performance default occurs.

Id., at 32.

In sum, the Fifth District squarely held in Florida Brd. of Regents that the surety's obligation under the bond was to guarantee completion of the construction contract and, once the contract was completed, "the surety under the performance bond is relieved of any further responsibility." Id. at 32. This Court's approval in Larkin of the Fifth District's decision in Florida Brd. of Regents -- which involved precisely the type of claims for latent defect damages as those asserted here -- makes it clear that Larkin cannot be read narrowly to only address claims for delay damages.

Indeed, this Court could not have been clearer in holding in Larkin that "[t]he language in the performance bond, construed together with the purpose of the bond, . . . merely guaranteed the completion of the construction contract and nothing more. Upon default, the terms of the performance bond required [the surety] to step in and either complete construction or pay [the owner] the reasonable costs of **completion.**" Larkin at 198. Hence, the majority's decision to reinstate the plaintiff's claims for defective workmanship resulting in latent defects discovered years after completion of the project conflicts with Larkin because it "extends the liability on the bond by implication beyond the terms of the bond contract," (Op. at 17, A. 4 (Blue, **J.**, dissenting)) -- something that this Court held in Larkin could not be done.

The majority also attempted to evade Larkin's holding by suggesting that "if the terms of the performance bond **do** cover the damages sought, the liability of the surety should be enforced." [Op. at 9, A. 4] [Emphasis in opinion]. As the majority viewed it, "[p]arties to a surety contract or performance bond, unless prohibited by statute, are as free to contract for the coverage desired as are parties to any other type of contract, and when they do so, basic contract law applies." Id. But that truism begs the question, which is whether the surety **did** agree to accept liability for construction defects discovered more than a decade after the construction was completed, even though the performance bond by its terms "only.

ensures the completion of the contract . . . if the contractor defaults." Larkin at 198. Under the teachings of Larkin, the answer to that question is plainly no.

It must be stressed in this regard that the majority's reasoning would equally require imposition of liability for delay damages upon the surety in Larkin. The terms of the bonds here were only deemed by the majority to cover breach of warranty damages because of the bonds' incorporation of the underlying construction contract. Yet the contractor in Larkin was likewise liable for delay damages under the contract incorporated into the bond. Nevertheless, this Court held that, even though the contractor may be liable for damages under the construction contract, the surety is not responsible for such damages unless the bond itself specifically provides for such liability.

It is that exact holding in Larkin that the majority impermissably ignores. In Larkin, this Court recognized that the parties contracted in the performance bond for "completion" of the construction contract upon default of the contractor "and nothing more." Id. at 198. As a result, this Court concluded that the surety was not liable for delay damages because the parties had not specifically contracted for that coverage under the performance bond.

Likewise, the bonds issued here did not specifically provide for liability of the surety upon the contractor's breach of its warranty obligations under the construction contract, nor did the surety bargain for such extended, uncertain liability after

completion of the contract **work.**^{2'} Judge Blue was absolutely right when he concluded that the majority's decision "extends the liability on the bond by implication beyond the terms of the bond contract. This additional burden is in derogation of the analysis provided by our supreme **court**" in **Larkin**. [Op. at 17, A. 4].

2. The statute **of** limitations bars claims **brought on a performance bond** more than **5** years after completion of construction.

As Judge Blue further recognized, by allowing the plaintiff's suit to be brought more than 10 years after completion of construction, the majority's decision also conflicts with the Fifth District's decision in School Brd. of Volusia County v. Fidelity Co. of Md., 468 So. 2d 431 (Fla. 5th DCA 1985). In fact, the majority expressly declined to follow the Fifth District's decision, deeming it to be **"in error."** [Op. at 6, A. 4]. That decision is, however, eminently correct and in full accord with earlier precedents of the Second District itself.

In School Brd. of Volusia County, the Fifth District held that a suit against the surety for latent defects was time-barred because it was filed more than five years after completion of

^{2'} Because a performance bond simply guarantees **"the** completion of the contract . . . if the contractor defaults," **Larkin** at 198, the surety is assured that its exposure under the bond will be limited to the construction contract price, Premiums would obviously have to be increased if sureties are to also be responsible for future damages caused by defects in construction.

construction. Id. at 433. The suit might have been timely as to the contractor under Florida Statute Section 95.11(3)(c), which is the statute of limitations for an action founded on the **construction of an improvement to real property." But the parties agreed that this suit on the performance bond was "an action on a 'contract, obligation, or liability founded on a written instrument,'" and hence it was governed by Section 95.11(2)(b). Id. at 432. And, "[t]here is no comparable deferral of accrual of a cause of action for latent undiscovered defects in section 95.11(2)(b), unlike the four year statute of limitations found in section 95.11(3)(c)." Id.

In reaching this conclusion, the Fifth District specifically cited its earlier decision in Florida Brd. of Resents and to the Second District's decision in District School Brd. of DeSoto Cty. v. Safeco Ins. Co., 434 so. 2d 38 (Fla. 2d DCA 1983). In Safeco, the Second District had also followed Florida Brd. of Resents and held that a "certificate of substantial completion and the acceptance of a constructed building by the owner becrins the one-year statute of limitations period provided by section 255.05(2) for actions against the surety on the bond."^{3/} Safeco, 434 So. 2d at 39. The Safeco Court went on to say that:

. . .had (the legislature] intended that the existence of latent defects in the building would toll the beginning of that naturally-understood statute of limitations period as to actions against the surety, we must

^{3/} Florida Statutes Section 255.05(2) governs performance bonds on public construction projects.

presume that the legislature would have said so as it did in section **95.11(3)(c)**, Florida Statutes (1981), relating to actions on the design, planning or construction of an improvement to real property.

Id.

Consistent with Safeco and Florida Brd. of Resents, the Fifth District held in School Brd. of Volusia County that section **95.11(2)(b)** establishes the applicable limitations period for a suit on a performance bond and this limitations period is **not** tolled until discovery of latent defects. That decision is eminently correct: had the Legislature intended the limitations period of section **95.11(2)(b)** to begin running only upon discovery of latent defects, it would have said so. It is settled that:

this Court must construe the words chosen by the legislature in their plain and ordinary meaning. . . . [citation omitted]. Where the statutory provision is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.

Taylor Woodrow Construction Corp. v. The Burke Co., 606 So. 2d 1154, 1155-56 (Fla. 1992) (construing Section 255.05). That is exactly what the Second District did in Safeco, and it is exactly what the Fifth District subsequently did in School Brd. of Volusia, in express reliance upon Safeco.

Nonetheless, the majority refused to follow School Brd. of Volusia County. The majority first noted that School Brd. of Volusia County had alternative holdings, and it then stated that the decision was "**in error**" if it held that an action was **time-**

barred "even if the surety contract makes provisions for such liability of the surety." [Op. at 6, A. 4] [Emphasis in Opinion]. But, once again, the majority ignored that the bonds here were only deemed to have made provision for "such liability of the surety" by virtue of their general incorporation of the construction contract by reference, and that practice was squarely held in Larkin not to impose the same liability upon the surety that is imposed upon the contractor under the construction contract.

Simply put, the majority erroneously boot-strapped a tolling provision into Section 95.11(2)(b), based upon nothing more than the bond's general incorporation of the construction contract.

As Judge Blue bluntly put it:

[the majority's] analysis purely and simply attaches a tolling period to the statute of limitations applicable to the bond. It is the tolling provision in section 95.11(3)(c) which permits a cause of action beyond the four-year limitations period in this section. To make the latent defects actionable against the bonding company requires imposing a tolling period within section 95.11(2)(b), which School Board of Volusia County and this court [in Safeco] have held is a legislative determination.

[Op. at 17, A. 4]. Since the Legislature did not impose a tolling provision within section 95.11(2)(b), which concededly governs the claim on Firemen's bond, this suit -- brought approximately twelve (12) years after the contractor completed its work -- is time-barred.

CONCLUSION

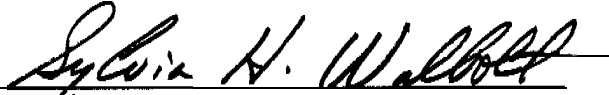
It is important from the standpoint of the consistency of this State's decisional law, as well as from a public policy standpoint, that this Court reverse the decision below. As the owner has conceded, "the practice of incorporating by reference construction contracts into performance bonds is a practice universally employed in the construction industry." [A. 5 at 63. Hence, the ramifications of the decision below, unless reversed, are far-reaching.

It is clear, however, that the Second District's decision must be reversed. The incorporation of construction contracts by reference in performance bonds -- which is the cornerstone of the Second District's decision -- simply defines the limits of the surety's obligation to complete the construction in the event the contractor defaults. Wooley/Sweeney Hotel #5, 545 So. 2d 958 at 959 (Fla. 4th DCA 1989) [Anstead, J., dissenting], majority opinion disapproved in Larkin. And, as Larkin and the District Court decisions approved there -- including Florida Board of Regents, which the majority expressly refused to follow -- make clear, that practice does not expand the surety's liability beyond the terms of the performance bond. Rather, just as in those cases, the sureties here were relieved, under the plain terms of their performance bonds, from any further responsibility once construction was completed.

Furthermore, even if such liability were to be imposed through implication as a result of the incorporation of the

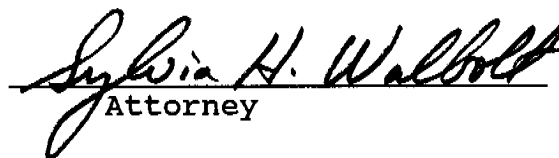
construction contract, this suit is nonetheless time-barred. The applicable statute of limitations is section 95.11(2)(b), which is a 5 year statute, with no tolling provision. The bond itself adopts completion of construction as the triggering event for the statute of limitations and, as Judge Blue observed, "[c]learly, it was not the intent to have [the] extended period of limitations [applicable to the construction contract] applicable to this bond." [Op. at 16-17, A. 4].

The Second District's decision is contrary to settled precedents of this Court and other Florida courts. It should be reversed and the cause remanded with directions to reinstate the trial court's order of dismissal.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and appendix has been furnished by United States Mail to all counsel on the attached service list this 4 day o f April, 1997.


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