

**IN THE SUPREME COURT
FOR THE STATE OF FLORIDA**

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

CLERK, SUPREME COURT
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Petitioners,

vs.

SUPREME COURT CASE NO. 89,574

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

DISTRICT COURT CASE
NO. 95-02153

Respondents.

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

Petitioner Fireman's **Insurance** Company
of Newark, New Jersey's Brief on Jurisdiction

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STATEMENT OF CASE AND FACTS

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. 3].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 were completed in 1982 and 1984, respectively. [Op. 3]. The owner filed its suit in September 1994, more than ten years later. [Op. 3].

The general contractor in turn sued various subcontractors on the project and their sureties. Firemen's had issued a performance and payment bond to Miles Plastering & Associates, Inc., which was the subcontractor performing work with regard to the exterior finish wall systems for Phase I of the project. [R. 196, A. 1]. Miles' work was completed by 1982. [R. 2, 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, A. 33.

¹ The record materials referred to in this brief are included in the accompanying appendix, which is designated "**A. ___**." The decision of the District Court as to which review is **sought** is included in the Appendix at Tab 5, and is referred to as "**Op. ___**." All emphasis in quoted materials is supplied. To avoid **unnecessary** repetition, Firemen's adopts by reference the arguments set forth in the jurisdictional brief filed by Federal Insurance Company.

The trial court ruled that the claims on the performance bonds were barred by the **5-year** limitations period set forth in Florida Statutes Section **95.11(2)(b)** governing suits on written contracts. The Second District reversed, by a 2-1 decision. Southwest Florida Retirement Center v. Federal Ins. Co., 21 Fla. L. Weekly D2207 (Fla. 2d **DCA** Oct. 9, 1996). [A. 53. The majority concluded 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. 31. Instead, in the majority's view, since the bonds incorporated the construction contract, **"the** limitations period for an action against the surety did not begin to run until discovery of the latent **defects"** by the owner. [Op. 5].

Writing in dissent, Judge Blue declared that this holding "conflicts with prior decisions of the courts of our state" because it **"extends** the liability on the bond by implication beyond the terms of the bond contract." [Op. 133. He further declared that the majority's holding involves a question of **"great** public importance because of the impact our decision will have on bonded construction and related industries." [Op. 133.

SUMMARY OF ARGUMENT

By the majority's decision, the Second District has expanded the liability of sureties issuing standard performance bonds so as to be 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. In American Home Assur. Co. v. Larkin General Hosp., Ltd., 593 **So.2d** 195, 198 (Fla. 1992), however, this Court held to the contrary, expressly concluding that the surety's liability did **not** extend "beyond the terms of the performance bond." In so holding, the Court specifically cited, with approval, Florida Brd. of Regents 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. As Judge Blue correctly recognized in dissent below, the majority's holding conflicts with those decisions.

There are, moreover, compelling public policy concerns far beyond this case which require the exercise of discretionary review by this Court. The incorporation by reference of the underlying construction contract into a performance bond is universally employed by the bond industry. [See Op. 13 (Blue, J., dissenting)]. Given this long-standing industry custom and practice, the Second District's decision not only broadly expands the liability of all sureties issuing performance bonds in this state, it also greatly expands the limitations period for filing suits on such bonds. If Florida law is to be so dramatically changed, this should be declared by this Court, not a district court of appeal. Hoffman v. Jones, 280 **So.2d** 431 (Fla. 1973).

ARGUMENT

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 emphasized at page 198:

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. Sobel, supra, at 137.

In short, this Court expressly held in Larkin that "the surety's liability for damages is limited by the terms of the bond." Id. Since the bond in Larkin did not protect against delay, the Court refused to extend the surety's liability to include payment for 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 guaranteed the completion of the construction contract and nothing more. Upon default, the terms of the performance bond required American to stew 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 disapproved earlier decisions of the Fourth District holding that liability existed under a performance bond for delay damages since the bond incorporated the construction contract and that contract provided for timely performance. On the other hand, it approved U.S. Fidelity and Guaranty Co. v. Gulf Florida Dev. Co., 365 So.2d 748 (Fla. 1st DCA 1978), where the First District held that the surety's liability depended upon its specific undertaking in the bond, which was completion of the construction contract. As Judge Blue put it, the Fourth District 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 this Court approved. [Op. 15]. Nevertheless, the Second District has now reached exactly the same result as the Fourth District did in the decisions that this Court expressly disapproved in Larkin.

While it is true that Larkin involved the right to recovery delay damages under a performance bond, its holding applies here with equal force. As Judge Blue observed, "[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. 16]. The

same must also be true here, for exactly the same reasons. Just as the incorporation of the construction contract in the performance bond at issue in Larkin did not render the surety's liability co-extensive with the contractor's liability 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.

Indeed, 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 held that a performance bond did **not** cover claims for defective workmanship discovered after completion **of** the project. The Fifth District reasoned as follows:

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. Hudner 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.

This Court's approval in Larkin of the Fifth District's decision in Florida Brd. of Regents makes it clear that Larkin cannot be read narrowly to only address claims for delay damages. Rather, as Judge Blue correctly recognized in dissent below, 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. 17 (Blue, J., dissenting)] -- something that this Court held in Larkin could not be done.

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). There, 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 construction. The Fifth District concluded that, although the suit might have been timely as to the contractor under Florida Statute Section **95.11(3)(c)** -- the statute of limitations for an action founded on the "construction of an improvement to real property" -- a suit against the surety on the performance bond was "**an** action on a 'contract, obligation, or liability founded on a written instrument,'" which was governed by Section **95.11(2)(b)**. Id. at 432. And, "**[t]here** is no comparable deferral **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.

Given the plain terms of section **95.11(2)(b)**, the Fifth District correctly held that this establishes the applicable limitations period for a suit on a performance bond and this limitations period is **not** tolled until discovery of latent defects. Had the Legislature intended the limitations period of section **95.11(2)(b)** to begin running only upon discovery of a claim under the contract, it would have said so. The Legislature did not say 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 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 Fifth District did in **School Brd. of Volusia**.

The majority refused to follow **School Brd. of Volusia County**, noting that the decision there had alternative holdings and further stating that the decision was **"in error"** if it held that action was time-barred **"even** if the surety contract makes provisions for such liability of the surety." [Op. 2]. But the bonds here were only deemed to make provision for **"such** liability of the surety" by virtue **of** their incorporation of the construction contract by reference, and that general practice was squarely held in **Larkin** and **School Brd. of Volusia County** **not** to impose the same liability upon the surety that is imposed upon the contractor under the construction contract.

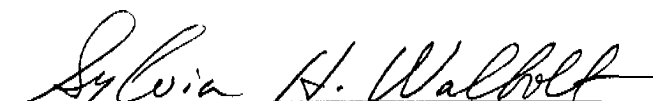
Simply put, even though the contractor may be liable for damages under the construction contract, the surety is not responsible for such damage6 unless the term6 of the bond itself provide for such liability. Furthermore, even if such liability were to be imposed through implication as a result of the incorporation of the construction contract, the applicable statute of limitation6 is section **95.11(2)(b)**, which has no tolling provision. The decision below directly and expressly conflicts with the decisions cited above, and hence this Court has jurisdiction under Article V, Section **3(b)(3)** of the Florida Constitution. Jenkins v. State, 385 **So.2d** 1356 (Fla. 1980).

It is important from a public policy standpoint that this Court exercise its jurisdiction to review the decision below. The owner has conceded that "the practice of incorporating by reference construction contracts into performance bonds is a practice universally employed in the construction industry." [Op. 6]. The owner nevertheless contends that the Second District's decision did not involve a question of great public importance -but rather "simply adopts a well-settled principle of contract law that liability exists where parties to a surety contract freely enter into an agreement where the potential for such liability is accepted by the parties." Id. But this argument would equally require imposition of liability for delay damages upon the surety in Larkin -- a result this Court refused to countenance.

Indeed, the owner's argument begs the question, because the very question is whether a surety accepted liability for construction defects discovered more than a decade after the construction was completed, **even** though the bond itself "**only** ensures the completion of the **contract.**" Larkin at 198. Plainly the surety did **not** bargain for such extended, uncertain liability after completion of the contract, and the imposition of such liability upon sureties doing business in this state has **far-**reaching ramifications for this state's construction industry. As Judge Blue put it, "**perhaps** this should be the law of the state of Florida; however, the implications arising from such an application should be carefully **studied.**" [Op. 18 (Blue, J., dissenting)].

CONCLUSION

For all the foregoing reasons, this Court has jurisdiction and this petition for review should **be granted.**



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to all counsel on the attached service list **this 24th day** of December, 1996.



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