

SUPREME COURT OF FLORIDA

AMERICAN HOME
ASSURANCE COMPANY,

Petitioner,
vs.

CASE NO. SC02-1257
Lower Tribunal Case No.: 2D00-4404

PLAZA MATERIALS
CORPORATION,

Respondent,

**ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA**

***AMICUS CURIAE BRIEF*
ON BEHALF OF THE
APAC-FLORIDA, INC.**

Dana G. Toole
Florida Bar Number: 0437093
DUNLAP & TOOLE, P.A.
2057 Delta Way
Tallahassee, Florida 32302-4227
Ph: (850) 385-5000
Fax: (850) 385-7636

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Interest of the APAC-Florida, Inc. 1

Introduction 2

Summary of the Argument 5

Argument 6

Certificates of Service and Compliance as to Font Type/Size 12

TABLE OF AUTHORITIES

Cases

<u>Allstate Ins. Co. v. Rush,</u> 777 So. 2d 1027 (Fla. 4 th DCA 2000)	10
<u>American Home Assurance Co. v. Larkin General Hospital Ltd.,</u> 593 So. 2d 195 (Fla. 1992)	7
<u>City of Ft. Lauderdale v. Hardrives Co.,</u> 167 So. 2d 339 (Fla. 2 nd DCA 1969)	3
<u>Coastal Caisson Drill Co. v. American Cas. Co.,</u> 523 So. 2d 791 (Fla. 2 nd DCA 1988)	3
<u>Florida Crushed Stone v. American Home Assurance Co.,</u> 815 So. 2d 715 (Fla. 5 th DCA 2002)	passim
<u>In Re: Eli Witt Co.,</u> 2 B.R. 487 (Bankr. M.D. Fla. 1979)	8
<u>Inter-Continental Promotions, Inc. v. MacDonald,</u> 367 F. 2d 293 (5 th Cir., 1966)	10
<u>Kettles v. Charter Mortgage Co.,</u> 337 So. 2d 1012 (Fla. 3 rd DCA 1976)	3
<u>Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.,</u> 744 So. 2d 482 (Fla. 1 st DCA 1999)	8
<u>Martin Paving Co. v. United Pacific Ins. Co.,</u> 646 So. 2d 268 (Fla. 5 th DCA 1994)	passim
<u>National Fire Insurance of Hartford v. L. J. Clark Construction Co.,</u> 579 So. 2d 743 (Fla. 4 th DCA 1991)	8
<u>NK Fields v. Zinman,</u> 394 So. 2d 1133, 1135-6 (Fla. 4 th DCA 1981)	7
<u>Plaza Materials v. American Home Assurance Co.,</u> 2002 W.L. 940144 (Fla. 2 nd DCA 2002)	10, 11
<u>State ex rel Florida Jai Alai Inc. v. State Racing Commission,</u> 112 So. 2d 825 (Fla. 1959)	9

<u>Taylor Woodrow Construction Corp. v. Burke Co.,</u>	606 So. 2d 1154 (Fla. 1992)10
<u>Western World Ins. Co. v. Traveler’s Indemnity Co.,</u>	358 So. 2d 602 (Fla. 1 st DCA 1978)8
<u>WMS Construction Inc. v. Palm Springs Mile Associates, Ltd.,</u>	762 So. 2d 973, 974 (Fla. 3 rd DCA 2000)3

Statutes

Fla. Stat. 95.11	5
Fla. Stat. 255.05	passim
Fla. Stat. 255.05(2)	9
Fla. Stat. 255.05(4)	5, 6, 9
Fla. Stat. 255.05(6)	passim
Fla. Stat. 713.23	5

INTEREST OF APAC-FLORIDA, INC.

On February 6, 2001, APAC-FLORIDA, INC. (“APAC”) filed its Complaint against American Home Assurance Company (“AHAC”), seeking recovery for work furnished by APAC to Cone Constructors Inc., on the construction projects described as:

Polk County Parkway Section 6A
State Project No. 97160-3311

and

Polk County Parkway Section 3A
State Project No. 97160-3308

(“the Projects”).

Under the terms of the Payment Bond executed by AHAC, no notice or other limitations upon APAC’s right to bring suit were indicated, and the only condition of that bond which applied to APAC provided, in pertinent portion that:

...if the above bound Principal in all respects shall comply with Section 255.05 and 337.18, Florida Statutes, and shall promptly, faithfully and efficiently perform said Contract...and further, if such Contractor shall promptly make payment to all persons supplying labor, material, equipment and supplies...whose claims derive directly or indirectly from the prosecution of the work...then this obligation is to be void....

APAC moved for summary judgment, and the Trial Court entered orders in favor of APAC, and awarded to it damages, interest, costs and attorney’s fees totaling \$392,080.55. Both of these orders have been filed with this Court, along with APAC’s Motion to Appear and File Amicus Curiae, dated November 14, 2002.

Although as a contractor having privity with AHAC’s principal, APAC’s interest in this action is, in part, factually distinct from this action, APAC has a strong interest in any action which would construe or interpret the payment bond which is the

subject of this action. At the time that APAC filed its action, it was without question that AHAC's payment bond failed to comply with the requirements of Fla. Stat. 255.05(6). It was also without question at that time that, in order for a bond to be considered as a statutory bond:

1. The bond itself must be recorded in the County where the project is located; and
2. The bond itself must not only mention Fla. Stat. 255.05, but must also contain reference to the notice and time limitations contained within that statute.

Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994).

Although the bond in question was recorded, its failure to comply with Fla. Stat. 255.05(6) rendered it a common law bond.

AHAC has appealed those rulings in APAC's favor, and its appeal styled American Home Assurance Co. v. APAC-Florida, Inc., in the Second District Court of Appeal, Case No.: 2D02-4613, but to date, no written opinion has been received from the Second District Court of Appeal.

INTRODUCTION

It is well settled that the fundamental purpose of the Construction Lien Law is to protect those who have provided labor and materials for the improvement of real property. Kettles v. Charter Mortgage Co., 337 So. 2d 1012 (Fla. 3rd DCA 1976). As such, that body of law is to be construed favorably so as to give laborers and suppliers the greatest protection compatible with justice and equity. WMS Construction Inc. v. Palm Springs Mile Associates, Ltd., 762 So. 2d 973, 974 (Fla. 3rd DCA 2000). Because a construction lien cannot attach to publicly-owned property, Fla. Stat. 255.05 was enacted to afford payment protection to those who furnished labor and materials to public projects. Coastal Caisson Drill Co. v. American Cas. Co., 523 So. 2d 791 (Fla. 2nd DCA 1988). In that regard, it is well settled that the major purpose for Fla. Stat. 255.05 is to protect subcontractors and suppliers by providing them with an alternative remedy to a mechanic's lien on public projects. City of Ft. Lauderdale v. Hardrives Co., 167 So. 2d 339 (Fla. 2nd DCA 1969).

As was noted by the Third District in WMS Construction Inc., one of the questions that a subcontract must resolve, at the risk of losing its compensation, is to determine what type of bond applies to the project receiving the benefit of his labor and materials. In this case, it was without question that the payment bond issued by AHAC failed to comply with the requirements of Fla. Stat. 255.05(6), and therefore should not be construed as a statutory bond. It is similarly without question that the

controlling precedent at the time that suit was filed in this action established that:

...The amended statutory scheme is simple enough for the surety and principal to follow in order to insure the coveted protections of subsection (2) of 255.05. If they cannot follow the procedure, they cannot expect the claimant to do so either. In such a case, the claim is governed by the terms of the bond...

Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268, 271 (Fla. 5th DCA 1994). Consistent with the stated legislative purpose of the statute in question, the Second District has affirmed the plain language of the statute itself, and should be affirmed. Any other result would run contrary to the statute, and would reward sureties who knowingly ignore the requirements of the law.

SUMMARY OF ARGUMENT

The payment bond that is the subject of this action does not comply with the requirements of Fla. Stat. 255.05(6) and as such, must be construed as a common law bond by the terms of the bond itself. Because this bond must be construed as a common law bond, the five (5) year statute of limitations was properly applied by the Second District.

Through their respective briefing, both AHAC and ASA, as its *amicus curiae*:

1. Incorrectly argue that the requirements of Fla. Stat. 255.05(6) are nullified by the language contained within Fla. Stat. 255.05(4); and
2. Incorrectly argue that public policy and fairness impose standards that are available to the legislature but were not incorporated into the 1980 amendments to Fla. Stat. 255.05.

It is respectfully submitted that their arguments concurrently would:

1. Ignore the language contained within the bond itself;
2. Would require this Court to ignore the requirements of Fla. Stat. 255.05(6) and its legislative history;
3. Would require this Court to specifically disapprove decisions of the First, Second and Fourth District Courts of Appeal, as well as portions of two (2) decisions by the Fifth District Court of Appeal; and would
4. Require this Court to assume that the 2001 amendments to Fla. Stat. 95.11, 255.05, and 713.23 were enacted, for no reason whatsoever.

ARGUMENT

In the interest of brevity, APAC adopts by reference, the *amicus curiae* brief filed on behalf of the Florida Transportation Builders Association of even date. As described in that briefing,

1. The enactment of Fla. Stat. 255.05(4) was, and is qualified by the proviso language contained within Fla. Stat. 255.05(6);
2. Fla. Stat. 255.05(6) requires all statutory bonds to contain reference to the notice and time limitations;
3. Because the payment bond executed by AHAC did not comply with the requirements of Fla. Stat. 255.05(6), those requirements do not operate as a condition of AHAC's payment bond.

Through its briefing, AHAC urges - among other things - the adoption of the Fifth District's recent ruling in Florida Crushed Stone v. American Home Assurance Co., 815 So. 2d 715 (Fla. 5th DCA 2002). It is significant to note that, while the Fifth District's decision in Florida Crushed Stone receded from its earlier decision in Martin Paving, several of the Court's findings in Martin Paving remain intact.

First is the language chosen by the Fifth District in Martin Paving, which provides that:

...[T]he form DOT chooses to use and the procedures DOT chooses to follow are not controlling on the question of United's and Martin's rights and obligations under Florida Statutes. Even if DOT were to refuse to accept a bond written in compliance with section 255.05, the

surety has the option of refusing to write a nonconforming bond.

Martin Paving, at 271. Despite this uncontroverted language, both AHAC and ASA attempt to place blame upon the FDOT, arguing that the FDOT “understood” its bond to be a statutory bond (AHAC Initial Brief, p. 6). Obviously, these unsupported statements with respect to the claimed subjective intent of the FDOT do not rise to the level of evidence, and have nothing to do with the proper interpretation of Fla. Stat. 255.05. NK Fields v. Zinman, 394 So. 2d 1133, 1135-6 (Fla. 4th DCA 1981)

Similarly, the Fifth District’s decision in Florida Crushed Stone does not take issue with additional language contained within the Martin Paving decision, which provides that:

...The amended statutory scheme is simple enough for the surety and principal to follow in order to insure the coveted protections of subsection (2) of 255.05. If they cannot follow the procedure, they cannot expect the claimant to do so either. In such a case, the claim is governed by the terms of the bond.

Martin Paving at 271. In addition to confirming the responsibilities of a surety (as opposed to the FDOT) with respect to a bond which fails to comply with Fla. Stat. 255.05(6), this language confirms case law which both pre- and post-dates the 1980 amendments to Fla. Stat. 255.05. That case law stands for the proposition that a surety’s liability is determined by the terms and conditions of the bond. American Home Assurance Co. v. Larkin General Hospital Ltd., 593 So. 2d 195 (Fla. 1992). In short, in exchange for a premium, a surety lends its financial strength and credit to

a principal upon certain conditions, becoming the principal's guarantor, subject only to the terms and conditions of the bond. Western World Ins. Co. v. Traveler's Indemnity Co., 358 So. 2d 602 (Fla. 1st DCA 1978); In Re: Eli Witt Co., 2 B.R. 487 (Bankr. M.D. Fla. 1979).

As noted above, AHAC's payment bond does not comply with Fla. Stat. 255.05(6), but both AHAC and ASA cry foul, because they wish to obtain the benefit of language which (a) is not specifically described as a condition of that bond, and (b) which AHAC failed to specifically refer to, as required by a statute which ASA participated in drafting. Providing to AHAC the benefit of the doubt – twice as requested by Respondents – would not be consistent with the language of the bond, or the language chosen by the 1980 legislature. In that same regard, such a construction runs contrary to the well established concept that ambiguities in bonds should be construed to grant the greatest possible coverage to those protected by the bond. Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc., 744 So. 2d 482 (Fla. 1st DCA 1999); National Fire Insurance of Hartford v. L. J. Clark Construction Co., 579 So. 2d 743 (Fla. 4th DCA 1991).

With the best of intentions, the Fifth District in Florida Crushed Stone attempted to provide a compromise solution, but that solution is not authorized by statute. Indeed, if this Court were to accept AHAC's position, and adopt the reasoning contained within Florida Crushed Stone:

1. Fla. Stat. 255.05(6) would effectively be stripped of any meaning; unless

2. A claimant can prove prejudice resulting from a surety's failure to comply with the legislature's requirements.

Obviously, such a result is not contained within the language chosen by the legislature for Fla. Stat. 255.05.

From APAC's perspective, the Fifth District has improperly interpreted Fla. Stat. 255.05 by:

1. Characterizing Fla. Stat. 255.05(4) as "the most unambiguous portion of the statute" (Florida Crushed Stone at 715)
2. Conceding that the requirements of Fla. Stat. 255.05(2) are "every bit as mandatory as the requirements of subsection (6)" (Florida Crushed Stone at 717, fn 5); but
3. Finding that the application of subsection (6) is subject to fact-based exceptions which would leave the court "free to fashion a remedy which does not require compliance with subsection (2)..." (Florida Crushed Stone, at 717).

In so doing, the Fifth District has provided differing weights to differing portions of the same statute. Far from a "final warning", as characterized by the Florida Crushed Stone court, the requirements of Fla. Stat. 255.05(6) constitute a proviso upon the application of Fla. Stat. 255.05(4). State ex rel Florida Jai Alai Inc. v. State Racing Commission, 829 F.2d 959 (11th Cir. 1987), aff'd, 966 F.2d 1027 (11th Cir. 1992), cert. denied, 508 U.S. 1027 (Fla. 4th DCA 2000).

While the ASA correctly notes in its *amicus curiae* brief that the “...Fifth District misunderstood the legislative mandate...” in its decision, the ASA incorrectly characterizes that portion of Florida Crushed Stone as *dicta*. In fact, the language which ASA characterizes as *dicta* constitutes the basis for the “remedy” which the Fifth District chose to “fashion”. The Fifth District should not be left unconstrained to re-write the language that was chosen by the legislature. Taylor Woodrow Construction Corp. v. Burke Co., 606 So. 2d 1154 (Fla. 1992).

In contrast to this construction, APAC would respectfully submit that the construction utilized by the Second District in Plaza Materials v. American Home Assurance Co., 2002 W.L. 940144 (Fla. 2nd DCA 2002), should be adopted by this Court. Instead of shifting weight from one statutory subsection to another, and instead of imposing a prejudice standard where none exists by statute, its rule is simple:

...A surety that issues a bond that does not contain notice of the restrictions as required by subsection (6) is simply not entitled to enforce those restrictions. To this extent, the violation of subsection (6) transforms the statutory bond into a common law bond, or at least renders the time restrictions in subsection (2) unenforceable.

This language is consistent with Fla. Stat. 255.05, is consistent with the general law of suretyship and statutory construction, and removes as a factor, fact based issues of prejudice that would destroy predictability of results to claimants such as APAC.

That being said, the remedy which should be fashioned by this Court has

already been fashioned by common law, the legislature, the Martin Paving Court, and the Plaza Materials Court below. If a payment bond does not comply with Fla. Stat. 255.05(6), then it should be interpreted according to its terms. Sureties gauge their underwriting risks – and determine their premiums – from the face of their undertakings, and the bond at issue did not provide for any statutory notice requirements or limitations periods. Similarly, contractors such as Plaza Materials and APAC gauge their rights and responsibilities from the face of those same undertakings, and a compensated surety, such as AHAC, should not be entitled to reap the benefits of its defalcations.

Dana G. Toole

FBN: 0437093

DUNLAP & TOOLE, P.A.

2057 Delta Way

Tallahassee, Florida 32303-4227

Ph: (850) 385-5000

Fax: (850) 385-7636

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AMICUS CURIAE BRIEF has been furnished, on this ___ day of December 2002, by U.S.

Mail to:

AS COUNSEL FOR PLAZA
Jamie B. Moses
Fisher Rushmer Werrenrath
Post Office Box 712

AS COUNSEL FOR AHAC:
Robert E. Morris
The Morris Law Firm
5020 W. Cypress Street, Suite 200

AS COUNSEL FOR *AMICUS CURIAE*
American Surety Association:
Brett D. Divers
Mills, Paskert & Divers

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing meets the font and type size requirements of Rule 9.100(1) and 9.210(a)(2), Florida Rules of Appellate Procedure.

Dana G. Toole