IN THE SUPREME COURT OF THE STATE OF FLORIDA

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

CASE NO: SC02-1257
L.T. CASE NO: 2D00-4404

-vs-

PLAZA MATERIALS CORPORATION,

Respondent.

_____

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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Statement of the Case

The present controversy reaches this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). On March 8, 2002, the Second District Court of Appeal rendered its opinion in American Home Assurance Company v. Plaza Materials Corporation. On March 22, 2002, American Home Assurance Company served its Motion for Certification requesting that the Second District certify as a question of great public importance the issues raised in the appeal. On May 10, 2002, the Second District withdrew its March 8, 2002 Opinion, granted American Home Assurance Company's Motion for Certification and certified the following question as a matter of great public importance:

> IF A STATUTORY PAYMENT BOND DOES NOT CONTAIN REFERENCE TO THE NOTICE AND TIME LIMITATION PROVISIONS OF SECTION 255.05, AS REQUIRED BY SECTION 255.05(6), ARE THOSE NOTICE AND TIME LIMITATIONS NEVERTHELESS ENFORCEABLE BY THE SURETY, OR IS THE CLAIMANT ENTITLED TO RELY UPON THE NOTICE AND TIME LIMITATIONS APPLICABLE UNDER THE COMMON LAW?

On October 4, 2002, this Court issued its Order Postponing Decision on Jurisdiction and Briefing Schedule.

Statement of the Facts[1]

On December 14, 1998, Plaza Materials Corporation ("Plaza") filed its Complaint against Cone Constructors ("Cone"), Fulton Construction ("Fulton") and American Home Assurance Company ("AHAC"). (V.1:1-63) [2] In the Complaint, Plaza brought various claims against the entities arising out of a construction project wherein Cone contracted with the Department of Transportation ("DOT") to construct Sections 3A, 3B and 6A of the Polk County Parkway in Polk County, Florida. (V.1:1-63) Cone contracted with Fulton to, among other things, purchase and haul road base and crushed stone products for the sections. Fulton then ordered stone road base products from Plaza. (V.1:1-63)

On or about February 23, 1996, AHAC, as surety, and Cone, as principal, executed and delivered to the DOT a Performance and Payment Bond pertaining to Section 3A of the Polk County Parkway. On or about May 24, 1998, AHAC as surety, and Cone, as principal, executed and delivered to the DOT a Performance and

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[1]Unfortunately, Respondent is compelled to provide its own Statement of the Facts given the somewhat argumentative nature of the Statement of Case and Facts as provided by AHAC and the inaccuracies in AHAC's Statement of the Case and Facts which were made to the Second District Court of Appeal and again to this Court despite the fact such inaccuracies were brought to Petitioner's attention below.

[2]All references to the Record on Appeal before the Second District Court of Appeal as prepared by the Clerk of the Court of the Circuit Court of Polk County shall be (Volume number: page number).

Payment Bond pertaining to Section 3B of the Polk County Parkway. On or about October 24, 1998, AHAC as surety, and Cone, as principal, executed and delivered to the DOT a Performance and Payment Bond pertaining to Section 6A of the Polk County Parkway. (V.1:1-63)

Plaza was not paid by Fulton for the stone road base product which it supplied to Fulton for sections 3A, 3B and 6A. Plaza provided three Notices of Nonpayment to Cone with copies to AHAC. (V.1:1-63) When Plaza was not paid, it filed suit seeking coverage under the bonds as common law bonds. (V.1:1-63) Cone and AHAC moved to strike the Complaint as a sham pleading or to dismiss it based upon the argument that the bonds were statutory bonds and therefore subject to the notice requirements of § 255.05 (V.1:64-76, 77-88, 101-122, 123-135) On May 28, 1999, the trial court denied Cone and AHAC's Motions to Strike Sham Pleading, or in the Alternative, to Dismiss Plaza's Complaint specifically finding that the bonds in question were not subject to the statutory notice requirements of § 255.05 (V.1:138) The Complaint was then answered (V.1:139-145, 146-151), and replies thereto were filed. (V.1:152, 153)

Plaza then moved for summary judgment (V.2:158-271), which the trial court granted on December 14, 1999. (V.2:272-274) In its Order the trial court found that the bonds at issue were common law bonds not subject to the statutory provisions of

§ 255.05. Subsequent to said Order, the Complaint was amended to seek attorney's fees based upon the trial court's ruling and summary judgment as to damages was entered. (V.3:425-426, 427-489) Final Judgment was then entered in favor of Plaza and against AHAC on September 29, 2000. (V.4:521-522)[3] AHAC appealed to the Second District Court of Appeal. (V.4:529-535)

The Second District denied pass through certification, allowed the parties to brief the issues, heard oral argument and rendered its Opinion on March 8, 2002. Originally, the district court did not certify a question of great public importance. Nevertheless, after the court's opinion, AHAC sought certification and the Second District withdrew its prior opinion substituting it with its May 10, 2002 Opinion which certified the above-mentioned question to this Court as a matter of great public importance.

As a point of clarification, AHAC represents to this Court that Plaza admitted it failed to comply with the notice provisions of § 255.05, as well as its limitations period. (See Initial Brief at p.2) As basis for such assertion, AHAC cites to Plaza's Answers to AHAC's Request for Admissions. Clearly, these Requests for Admissions and the Answers thereto were not read. With respect to Section 3A and

[3]In between Plaza's Motion for Entry of Final Judgment and the actual entry of Final Judgment, Cone filed a Suggestion of Bankruptcy. (V.4:513-514)

6A, Plaza's action was filed within one year of the last date Plaza supplied materials on the Polk County Parkway. Those two sections account for $34,713.44 of the $35,350.81 owed to Plaza. The fact that AHAC was aware of this is reflected in their Request for Admissions because the only request which addresses a one year statute of limitations violation deals with Section 3B and not Sections 3A or 6A. (V.1:96-101)

SUMMARY OF THE ARGUMENT

The certified question should be answered such that the Second District's Opinion is approved. The bonds in question do not comply with § 255.05 on several grounds and therefore are common law bonds not subject to the notice and time limitations of § 255.05(2).

The statute is clear that bonds entitled to the protection of § 255.05(2) must make specific reference to the notice and time limitations of subsection (2). Failing to do so renders the bonds common law bonds. Nothing in the statute or the case law, at least until Florida Crushed Stone, mandates any other finding. A claimant is not required to demonstrate prejudice in order to avoid the application of subsection (2). Reading a prejudice requirement into § 255.05 is contrary to the plain language of the statute and statutory interpretation.

Finally, subsection (4) does not trump subsection (6). If subsection (4) trumped subsection (6), thereby erasing the statute's specific requirement that bonds make specific reference to the notice and time limitations of subsection (2), subsection (6) would have been meaningless immediately upon being written. Clearly, that was not the legislature's intent.

The bonds in question are common law bonds due to their failure to comply with § 255.05 and, therefore, Plaza's claims against AHAC were valid and timely

brought. The trial court properly entered final summary judgment in favor of Plaza and the Second District appropriately affirmed such decision.

STANDARD OF REVIEW

Respondent does not dispute that the standard of review in this instance involving statutory construction and an interpretation of an insurance policy involves questions of law and therefore subject to *de novo* review. Nevertheless, even with *de novo* review, the decision of the trial court is presumed to be correct and an appellate court cannot substitute its judgment for that of the trial court. Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976).

ARGUMENT

I. A BOND FAILING TO SPECIFICALLY REFERENCE THE NOTICE AND TIME LIMITATIONS OF § 255.05 AS MANDATED BY § 255.05(6) IS A COMMON LAW BOND FOR WHICH A CLAIMANT SHOULD NOT BE BOUND BY THE NOTICE AND TIME LIMITATIONS APPLICABLE TO STATUTORY BONDS.

The certified question posed by the Second District cannot simply be answered with a yes or no. Nevertheless, this Court should answer the question in a way that approves the decision of the Second District below. A surety should not be entitled to enforce the notice and time limitations of § 255.05 when it issues a bond not in compliance with § 255.05, and § 255.05(6) in particular. In those instances in which a surety does not comply with the statutory requirements of § 255.05, it should not be entitled to the benefits conferred pursuant to § 255.05 for those that do comply with the statute's requirement.

A. Bonds Failing to Comply with § 255.05(6) Are Common Law Bonds.

The bonds in dispute provide:

> KNOW ALL MEN BY THESE PRESENTS: That we, CONE CONSTRUCTORS, INC. (Entity Name) having its principal place of business at Tampa, Florida (Address) (hereinafter called Principal or Contractor) and AMERICAN HOME ASSURANCE COMPANY (hereinafter called Surety), duly authorized to do business in the State of Florida, pursuant to the laws of the State of Florida, having its principal place of business at (Home Office City, State) New York, N.Y. are held

and firmly bound unto the Governor of the State of Florida and his Successors in office in the full and just sum of [amount per project], lawful money of the United States of America, to be paid to the Florida Department of Transportation, to which payment will and truly be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally and firmly by these presents; WHEREAS, the above-bounden Principal has subscribed to a contract with the State of Florida Department of Transportation (hereinafter called the Department), to bear the date of [date for each project] for constructing or otherwise improving a road(s), bridge(s), and building(s) [description for each project] in Polk County(ies), particularly known as [project numbers] upon certain terms and conditions in said Contract more particularly mentioned; and WHEREAS, it was one of the conditions of said contract that these presents shall be executed; NOW, THEREFORE, the condition of this obligation is such that if the above-bounden Principal in all respects shall comply with Section 255.05 and 337.18, Florida Statutes, and shall promptly, faithfully and efficiently perform said Contract according to plans and specifications therein referred to and made a part thereof, and within the time period specified, and further, if such Contractor shall promptly make payment to all persons supplying labor, material, equipment and supplies, and all persons defined in Section 713.01, Florida Statutes, whose claims derive directly or indirectly from the prosecution of the work provided for in said Contract, and promptly shall pay all State Workers' Compensation and Unemployment Compensation taxes incurred in the performance of said Contract, and shall be liable to the State in a civil action instituted by the Department or any officer of the State authorized in such cases for double any amount in money or property the State may lose or be overcharged or otherwise defrauded of, by reason of any wrongful or criminal act, if any, of the Contractor, its agents, or employees, and should the Contractor be declared to be in default under the Contract the Department may in its sole option demand that the Surety take over the project and provide further that should the Department elect to have the Surety to take over the project, then in such event, the Surety may not select the Contractor or any affiliate of the Contractor to complete the project for and on behalf of the Surety without the Department's express

consent, then this obligation is to be void; otherwise to be and remain in full force and effect in law.

(V.2:213-219, 222)

The above-referenced bond form differs significantly from statutory bonds pursuant to § 255.05. The bonds in question clearly do not comply with § 255.05(1) and (6). Moreover, the bonds in question are more expansive than those that are required by § 255.05(1) and therefore constitute common law bonds as recognized by the courts of this state. See, e.g., Centex-Rooney Const. Co., Inc. v. Martin County, 706 So. 2d 20 (Fla. 4th DCA 1997); Insurance Co. of No. America v. Metropolitan Dade Co., 705 So. 2d 33 (Fla. 3d DCA 1997); Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994); Florida Keys Comm. College v. Insurance Co. of No. America, 456 So. 2d 1250 (Fla. 3d DCA 1984); State Dept. of Transportation v. Houdaille Ind., Inc., 372 So. 2d 1177 (Fla. 1st DCA 1979); Southwest Fla. Water Mgmt. Dist. v. Miller Const. Co., 355 So. 2d 1258 (Fla. 2d DCA 1978); United Bonding Ins. Co. v. Martin, 249 So. 2d 720 (Fla. 1st DCA 1971).[4]

[4]AHAC suggests these courts have "randomly and inconsistently converted statutory bonds into common law ones." (See Initial Brief at p.6) Such a comment completely disregards the genuine analysis these courts have gone through to reconcile an evolving statute with ever changing bond forms. To suggest these decisions are random demonstrates the desperation in AHAC's argument. AHAC has been on notice of the cases for years and still allows itself to be bound by a bond form not in compliance with these cases or the statute.

As can be seen from the Second District's Opinion, the trial court found support for its ruling that the bonds were common law bonds based upon four distinct characteristics that these bonds had. First, the court found that the bonds described AHAC's business address incompletely. Second, the bonds did not adequately describe the project. Third, the bonds had more expansive payment and performance requirements than those required by § 255.05(1). Fourth, the bonds violated § 255.05(6) because they made no reference to the notice and time limitations of § 255.05(2). AHAC acknowledged below that these findings were factually correct. AHAC disputed, however, the significance of such findings. The Second District in affirming the trial court's findings questioned the significance of the first three findings but stated "we are not required to reach these issues because the fourth reason announced by the trial court is dispositive." Given this Court's ability to review the decision *de novo*, these findings by the trial court must not be ignored.

Section 255.05(1)(a) provides:

> The bond must state on its front page: the name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; the contract number assigned by the contracting public entity; and a description of the project sufficient to identify it, including, if applicable, a legal description and the street address of the property being improved, and a general description of the improvement.

Clearly, the bonds in question did not comply with § 255.05(1)(a). Initially, AHAC argued the bonds actually did comply although not necessarily exactly. On appeal to the Second District, the argument became that these discrepancies were "mere technicalities" which were not prejudicial to Plaza.[5]

The trial court found the bonds in question had more expansive payment and performance requirements than those required by § 255.05(1). It has long been the law in Florida that even if a bond is issued in connection with a public project, if it is more expansive than that required by a statutory bond, it will be construed as a common law bond. Southwest Florida Water Mgmt. Dist. v. Miller Constr. Co., 355 So. 2d 1258 (Fla. 2d DCA 1978). The bonds in question are clearly more expansive than those bonds contemplated by § 255.05. First and foremost, the statute provides that a surety bond pursuant to that section "shall be conditioned on the contractor properly making payments to all persons defined in s.713.01 which claims derive directly or indirectly from the prosecution of the work provided for it in the contract." The bonds in

[5]Although it is not the position of Plaza that prejudice must be required in this case, it has been repeatedly ignored by AHAC that Larry Longmuir, the corporate representative for Plaza, testified that Plaza was reassured several times it would be paid and it was denied copies of the bonds every time they were requested. (V.3, p.333-424) Again, it is not Plaza's position that prejudice must be demonstrated in this case. Nevertheless, it is still important to recognize the bonds in question did not provide the principal business address and phone number of Cone or AHAC and efforts to contact the appropriate parties were frustrated from the beginning.

question, however, expand the definition of claimant to include "all persons supplying labor, material, equipment and supplies, and all person defined by § 713.01, Florida Statutes, whose claims derive directly or indirectly from the prosecution of the work provided for in said Contract." (emphasis added) The bonds in question provide that not only are the claimants under the bond those defined in § 713.01, but also any other persons supplying labor, material, equipment and supplies. Under the bonds in question, a supplier, a third subcontractor, or a materials supplier to a third tier subcontractor would constitute a claimant. Section 713.01, however, specifically excludes a supplier and does not include a third tier subcontractor or materials supplier to a third tier subcontractor. Bracco v. Cardozo, 434 So. 2d 1024 (Fla. 2d DCA 1983). As such, the bonds' payment provisions are more expansive than the statute and are appropriately considered common law bonds.

Moreover, the bonds in question expand the bond conditions contained under § 255.05. Section 255.05(1) provided:

> Such bonds shall be conditioned that the contractor perform the contract in the time and manner prescribed in the contract and promptly make payment to all persons defined in s.713.01 which claims derive directly or indirectly from the prosecution of the work provided for in the contract.

In addition to requiring that the contractor perform the contract in the time and manner prescribed in the contract and make payments to all persons defined in § 713.01, the

bonds in question further require (1) payment to a class greater than those defined in § 713.01, (2) all state workers' compensation and unemployment taxes be paid, (3) the contractor be liable to the state in a civil action instituted by the department for overcharges or defrauding, and (4) provide a mechanism by which a project shall be taken over should the contractor be declared in default. These provisions expand the bonds to include more than just (1) compliance with the contract, and (2) payment to those defined under § 713.01.

In United Bonding Ins. v. City of Holly Hill, 249 So. 2d 720 (Fla. 1st DCA 1971), the bond at issue was deemed a common law bond because it granted extensive coverage in excess of that required by § 255.05. There, the bond went beyond the statutory requirements by being conditioned on payment of damages for wrongdoing, misconduct, negligence or default, including patent infringement by the contractor, costs of fuels, repairs to machinery, equipment and tools used on the project, including all insurance premiums, damages from defects and workmanship for one year from the date of acceptance of the work, and labor performed on the project. The court held that only surety bonds furnished for the stated sole purpose of complying with requirements of § 255.05 are entitled to the benefit and protection of that statute, including its notice and time limitations. Id. at 724. Bonds which are not furnished in accordance with, and for the sole purpose of complying with the requirements of

§ 255.05, are not affected by the time limitations for bringing suit set forth in the statute. Id. Given the expanded language of the bonds beyond the minimum requirements of § 255.05, the court found that had the surety intended the bond to be a statutory bond given for the sole purpose of meeting the minimum requirements of the statute, it would have so provided in the bond itself and specified the time limitation of one year within which suit could be brought against the bond as restricted by the statute. Id. Similar reasoning applies here. If the bonds were meant to be protected by the notice and time limitations of § 255.05(2), they should have stated such. Because they are not, they are not statutory bonds subject to the notice and time limitations of § 255.05(2).

Similarly, in Florida Keys Comm. College v. Insurance Co. of No. America, 456 So. 2d 1250 (Fla. 3d DCA 1984), the Third District found a bond which expanded the risk of the surety constituted a common law bond. In this case, AHAC's risk has been expanded as well. Most notably, should the contractor default on the project, the surety could be made to complete the project itself. The surety's risk has also been expanded to include payment of Workers' Compensation and Unemployment Compensation taxes and other additional risks. This is more than simply requiring a contractor to complete a job and pay those defined in § 713.01. Although the Second District was not "convinced that the additional payment or performance obligations

in this bond necessarily caused the payment provisions required by the Act to fall outside the notice and time requirements contained in section 255.05(2)," the court suggested this might be the type of distinction § 255.05(4) was intended to address. Of course, the Second District did not actually rule on the issue as it found the bonds' noncompliance with § 255.05(6) to be dispositive.

Section 255.05(6) provides:

> All bonds executed pursuant to this section shall make reference to this section by number and shall contain reference to the notice and time limitation provisions of this section. (emphasis supplied)

AHAC acknowledges the bonds in question do not expressly reference the notice and time limitations of subsection (2). Without explanation, however, AHAC argues that such an admission should not transform a statutory bond into a common law bond. Ironically, AHAC argues a bond that provides the minimum requirements of § 255.05 is a statutory bond, while if a bond provides coverage in excess of the minimum statutory requirements, then the bond is a common law bond. See Initial Brief at p.11. Nevertheless, as detailed above, the bonds in question are more expansive than those defined in § 255.05(1). As such, given its own argument, the bonds in question are common law bonds. What AHAC offers to get around the fact that the bonds do not comply with subsection (6) is the argument that subsection (6) is trumped or nullified by subsection (4). The problem with that argument will be discussed in the next

section of this brief. Nevertheless, it was evident from AHAC's brief that it can provide no basis whatsoever to refute the fact (1) that the bonds do not comply with subsection (6), and (2) such noncompliance renders the bonds common law bonds.

The best that AHAC has to offer is the case of State Dept. of Transportation v. Houdaille Ind., Inc., 372 So. 2d 1177 (Fla. 1st DCA 1979). Plaza acknowledges that the First District in Houdaille found that because the bond in that case simply referred to § 255.05, its failure to contain specific notice and time limitations would not render the bond a common law bond. Houdaille is distinguishable, however, for several reasons. First, the court made its determination based upon the fact that the bond in all other respects was clearly a statutory bond. In fact, the Houdaille court specifically distinguished cases which it should have followed because in those cases the bonds in question were not clearly statutory bonds but rather more expansive common law bonds. That is not the situation in this case. The bonds in question are not in total compliance with § 255.05 except for the mere omission of the notice or time limitations defined in § 255.05(2). Rather, as found by the trial court, and recognized by the Second District and AHAC, there are several areas where the bonds in question do not comply with § 255.05.

Moreover, the Houdaille decision predates the addition of subsection (6) to § 255.05. As such, AHAC's reliance upon Houdaille to suggest that the failure to

comply with subsection (6) has no effect on the bond is absurd. The Houdaille decision does not and cannot address the specific statutory directive of subsection (6) which states: "all bonds . . . shall contain reference to the notice and time limitation provision of this section," because that subsection was not even in existence at the time of the decision.

The bonds in question are clearly common law bonds for several reasons. First, the bonds do not comply with § 255.05(1). Second, the bonds are more expansive than the bonds contemplated in § 255.05. Third, the bonds in question do not comply with § 255.05(6). Under the language of the statute and the law of Florida, the bonds in question are not statutory bonds entitled to the protection of § 255.05(2).

B. Common Law Bonds on Public Works are not Subject to the Notice and Time Limitations of § 255.05(2) by Mere Operation of § 255.05(4).

Obviously, acknowledging the bonds' non-compliance with §§ 255.05(1) and (6), AHAC argues § 255.05(4) means that regardless of the bond form, the payment provisions of such bond shall be subject to the notice and time limitations of subsection (2). Section 255.05(4) provides:

> The payment provisions of all bonds furnished for public work contracts described in subsection (1) shall, regardless of form, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2). (emphasis supplied)

AHAC argues this subsection trumps all other subsections of § 255.05. AHAC refuses to acknowledge, however, the limiting language in subsection (4). Subsection (4) does not simply provide that all public works bonds, regardless of form, are deemed statutory bonds subject to the requirements of subsection (2). Rather, subsection (4) provides that only those public works bonds described in subsection (1) shall, regardless of form, be subject to all requirements of subsection (2). This is exactly what the Fifth District found in Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994). The Fifth District, however, has been criticized by AHAC for its Martin Paving holding. Nevertheless, a simple reading of the language of the statute demonstrates the Fifth District was not reading into the statute a requirement that was not already placed there by the legislature. The legislature specifically stated the public works bonds that would be subject to all the requirements of subsection (2) were only those bonds described in subsection (1).

As demonstrated earlier in this brief and conceded by Petitioner, the bonds in question are not of the type described in subsection (1). Consequently, the bonds in question are not subject to subsection (4) and the suggestion that subsection (4) somehow vitiates all of the other requirements within the statute itself is in complete contravention of legislative intent and statutory construction.

If all public works bonds were to be statutory bonds subject to the notice provision of § 255.05(2), it has to be assumed the legislature would have said so. Nevertheless, the legislature specifically qualified the type of public works bonds subject to subsection (4); it is only those described in subsection (1). Moreover, at the same time it added subsection (4), the legislature added subsection (6). Given the fact that subsection (6) unequivocally requires a specific reference to the notice and time limitations of subsection (2), if all public works bonds in general were subject to the requirements of subsection (2), there would be no need for subsection (6).

As referenced above, subsections (4) and (6) were added to § 255.05 at the same time. The Staff Analysis of this legislative action reflects:

> . . . . Cos. don't like forms - Cos. wouldn't like to use a mandated form. Require reference and time limitations. Sureties won't mind this so much.

(App.1.36)[6] This analysis demonstrates that the surety industry was in communication with the legislature with respect to § 255.05 and communicated to the legislature that mandatory bond forms were not desired by the industry.[7] Given the industry's own

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[6]Attached hereto as an appendix is the Legislative History to the 1980 Amendment to Florida Statutes § 255.05.

[7]This also belies AHAC's complaint that it should not be faulted for the bond's inadequacy because it was a DOT form. The surety industry gave its two cents when § 255.05 was amended and was on notice as to what the legislature required in bonds purportedly issued pursuant to § 255.05 to be protected by it.

resistance to a mandatory bond form, the legislature had no choice but to specify what must be included in individually drafted bond forms in order to be entitled to the protection of § 255.05(2). As such, it only makes sense that the legislature specifically states in the statute that if a surety wishes to rely upon the notice and time limitations of § 255.05(2), then it must make specific reference to those notice and time limitations in order for them to be enforceable. Given the Martin Paving decision, the legislature's directives in the statute itself and the industry's comments and participation in the statute's amendment, AHAC's arguments are incredible. As stated by the Fifth District in Martin Paving:

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

Id. at 272.

Furthermore, the Fifth District completely rejected any suggestion by the surety that it should not be penalized for a DOT drafted form. Nevertheless, the Fifth District stated:

> [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.

Id. at 271. The DOT, however, has been well aware of the statute's requirement. As can be seen from the various bond forms attached to this brief as an appendix, the DOT (1) has been aware of subsection (6)'s mandatory language and (2) has made efforts to draft bonds in compliance with it. The bonds in question, however, do not comply with subsection (6) despite all of this. Given the surety association's knowledge of what is required as well as the DOT, to suggest that the surety association is being made to pay for Plaza or the DOT's mistakes is comical.[8]

Ironically, although AHAC argues the subsections of the statute must be read in conjunction with each other, it then completely disregards subsection (6) and claims it is trumped by subsection (4). Nevertheless, when the two subsections are read together, it is clear the legislature intended that in order to get the protections of subsection (2) you must have the type of public works bond described in subsection (1) and you must refer to § 255.05 in general and specifically to the notice and time limitations of subsection (2). If that is not done, the surety, at its own risk, loses the benefits which the legislature provided for it if it simply follows the legislature's

[8]Additionally, it is important to note that it is not the surety or the DOT that is intended to be protected by § 255.05. The major purpose behind § 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. 2d DCA 1969).

statutory guidelines. If, however, bonds not in compliance with the statute are used, that is the risk the surety takes. That risk was taken in this case and AHAC should not now be allowed to enforce the statute's notice requirements when its own bond form does not entitle it to do so.[9]

AHAC suggests to this Court and apparently convinced the Fifth District that Florida no longer recognizes common law bonds given on public works projects. The Fifth District stated: "The payment provisions of all bonds given on a public works project regardless of form, the legislature tells us, shall be construed as statutory bond provisions subject to the requirements of section 255.05(2)." Florida Crushed Stone Co. v. American Home Assurance Co., 815 So. 2d 715, 716 (Fla. 5th DCA 2002). If this is so, then in 1980, with the passage of subsection (4) there would be no dispute that the notice and time limitations of subsection (2) applied to all bonds issued for public works. Nevertheless, recent amendments to §§ 95.11, 255.05 and 713.23, Florida Statutes, strongly suggest otherwise. Specifically, § 95.11(5)(e) was amended to provide:

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[9]Again, given the industry's knowledge of the extensive case law rendering common law bonds and the statute's amendments, it seems logical sureties take the risks associated with nonconforming DOT bond forms into consideration when writing risks throughout the state. Notably, AHAC did not offer anything to the trial court, the Second District or this Court to suggest otherwise.

> An action to enforce any claim against a payment bond on which the principal is a contractor, subcontractor, or sub-subcontractor as defined in s.713.01, for private work as well as public work, from the last furnishing of labor, services or materials or from the last furnishing of labor, services or materials by the contractor if the contractor is the principal on a bond or the same construction project, whichever is latter. (emphasis added)

Basically, it was not until 2001, when the legislature amended all of these statutes, that the legislature specifically found that all public works bonds would be subject to a one year statute of limitations. Had all public works bonds been subject to a one year statute of limitations prior to that time by the enactment of § 255.05(4), there would be no need to amend § 95.11 to incorporate a specific one year statute of limitations for all public works bonds.[10]

C. Every Argument Offered by AHAC to Call Into Question the Second District's Decision is Contrary to the Plain Language of the Statute, Statutory Construction and Common Sense.

The arguments made by AHAC to the trial court, the Second District and now this Court contradict themselves. Initially, AHAC argued that there was nothing wrong with the bonds and that they complied with § 255.05. That argument then transformed

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[10]AHAC acknowledges the significance of § 95.11(2)(b) as amended by stating "In 2001, 95.11(2)(b), Fla. Stat., was amended to provide a one year limitations period on common law bonds." (See Initial Brief at p.11, n2) Ironically, this completely contradicts AHAC's argument common law bonds are no longer recognized in Florida.

into the position that if they did not comply, the noncompliance was mere a technicality and therefore irrelevant to the statute's application. Realizing the deficiencies were not just "mere technicalities," AHAC then argued that the requirement of subsection (6), namely to specifically refer to the notice and time limitations of subsection (2), really did not mean anything in light of subsection (4). Basically, AHAC argues subsection (6) was added to the statute for no reason whatsoever. AHAC goes so far as to argue that although the legislature made a specific requirement that the bond reference the notice and time limitations of subsection (2), the failure to do so really does not matter. See Initial Brief at p.7.

Realizing the absurdity with that argument, AHAC then argues the mandatory language selected by the legislature really is not mandatory. Basically, AHAC argues although the legislature says in subsection (6) that the bonds shall contain specific reference to the notice and time limitations of subsection (2), the legislature really meant the bonds could make reference to such notice and time limitations. Both arguments are contrary to statutory interpretation.[11] AHAC basically wants this Court to render one entire subsection of the statute meaningless because it is either trumped

[11]Moreover, the amicus brief filed in support of AHAC argues throughout its brief the statutory language is unambiguous and mandatory and should be enforced as such.

by another subsection or the language contained therein really is not what the legislature meant.

Finally, acknowledging that the bonds do not comply with the statute and acknowledging that the statute says what it says, AHAC asks this Court to read into the statute a prejudice requirement that does not exist. Clearly, the legislature knew how to draft a statute which requires a prejudice finding in order for it to apply. For example, in Chapter 713 regarding construction liens, the legislature provided in § 713.08:

> (1) For the purpose of perfecting her or his lien under this part, every lienor, including laborers and persons in privity, shall record a claim of lien which shall state:
>
> (a) The name of the lienor and the address where notices or process under this part may be served on the lienor.
>
> (b) The name of the person with whom the lienor contracted or by who she or he was employed.
>
> (c) The labor, services, or materials furnished and the contract price or value thereof. Materials specifically fabricated at a place other than the site of the improvements for incorporation in the improvement but not so incorporated in the contract price or value thereof shall be separately stated in the claim of lien.
>
> (d) A description of the real property sufficient for identification.
>
> * * *

(4) (a) The omission of any of the foregoing details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error.

(b) Any claim of lien recorded as provided in this part may be amended at any time during the period allowed for recording such claim of lien, provided that such amendment shall not cause any person to suffer any detriment by having acted in good faith in reliance upon such claim of lien as originally recorded. Any amendment of the claim of lien shall be recorded in the same manner as provided for recording the original claim of lien.

(c) Failure to serve any claim of lien in the manner provided in s.713.18 before recording or within 15 days after recording shall render the claim of lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service.

Had the legislature intended to impose a prejudice standard in § 255.05, and § 255.05(6) in particular, it would have done so. Clearly, it did not.[12]

There is not a prejudice requirement in § 255.05. AHAC did convince the Fifth District in Florida Crushed Stone Company v. American Home Assurance Company, 815 So. 2d 715 (Fla. 5th DCA 2002), that prejudice should be found and argues to this Court that the Second District might have recognized one "*in dicta*" in the decision

[12]Even the amicus brief filed in support of AHAC recognizes the impropriety of reading a prejudice standard into § 255.05 when one clearly does not exist. (See Amicus Curiae Brief of the Surety Association of America, p.33-36)

below. Nevertheless, a clear reading of the Second District's Opinion shows that it did not make this finding. More importantly, however, is that fact that it specifically rejected such finding with respect to the bonds' noncompliance with subsection (6).

The bonds in question are common law bonds because they fail to comply with § 255.05. Any argument to overcome the bond's basic deficiencies requires this Court to ignore the plain language of the statute, several years of case law and the rules of statutory construction.

CONCLUSION

The question certified by the Second District should be answered in such a way that the decision below is approved. Bonds not in compliance with § 255.05 are not entitled to the notice and time limitations protection of § 255.05. The bonds in this case did not comply with the statute and, therefore, Plaza's action was both proper and timely.

Respectfully submitted,

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JAMIE BILLOTTE MOSES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on December 9, 2002, to Robert E. Morris, Esq., Robert E. Morris, P.A., 5020 W. Cypress Street, #200, Tampa, FL 33607; Dana G. Toole, Esq., Dunlap & Toole, P.A., 253 Pinewood Drive, Tallahassee, FL 32302; Hala A. Sandridge, Esq., Fowler, White, Boggs & Banker, 501 E. Kennedy Blvd., Suite 1700, Tampa, FL 33601; and Brett D. Divers, Esq., Mills Paskert Divers, P.A., 100 N. Tampa Street, Suite 2010, Tampa, FL 33602.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I hereby certify that the typeface used for Respondent's Answer Brief is Times New Roman 14 pt.

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