IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO. SC02-1257

AMERICAN HOME ASSURANCE COMPANY,	:
Appellant,	:
v.	:
PLAZA MATERIALS CORPORATION,	:
Appellee.	:

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

APPELLANT'S INITIAL BRIEF ON THE MERITS

Robert E. Morris, Esquire
Florida Bar No. 152137
ROBERT E. MORRIS, P.A.
5020 West Cypress Street
Suite 200
Tampa, Florida 33607
(813) 289-0440
(813) 289-7652 (Facsimile)

and

Hala A. Sandridge, Esquire
Florida Bar No. 454362
FOWLER WHITE BOGGS BANKER P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
(813) 229-8313 (Facsimile)
ATTORNEYS FOR APPELLANT

STATEMENT OF THE CASE AND OF THE FACTS

Cone Constructors, Inc. contracted with the Florida Department of Transportation to construct sections 3A, 3B, and 6A of the Polk County Parkway in Polk County, Florida. (V1:2-3)[1] Cone executed and delivered to DOT contract bond instruments which were payment and performance bonds for each of the sections. (V1:74-76) The bonds were on standard DOT bond forms. (V1:74-76) American Home Assurance Company was the surety for each bond. (V1:74-76) The bonds referenced Section 255.05, Fla. Stat. (V1:74-76) The bonds were recorded in the public records of Polk County. (V1:96-101)

Cone contracted with Fulton Construction to purchase and haul products for the sections. (V1:71) Fulton ordered the products from Plaza Materials Corporation. (V1:3-7) While Cone fully paid Fulton for its work, Fulton did not pay Plaza Materials. (V1:4, 71)

Florida law provided Plaza Materials the right to seek payment under the payment bonds. Under Section 255.05(2), Fla. Stat., a claimant (Plaza Materials) not in privity with a contractor (Cone) must furnish the contractor with preliminary notice that it intends to look to the bond for protection within 45 days after beginning to furnish the materials and a notice of

[1] All references are to the record on appeal before the Second District Court of Appeals.

non-payment within 90 days of the last delivery of material if it has not been paid. Section 255.05(2) also requires any party seeking recovery on the payment bond to file its lawsuit within one year after completion of delivery of the materials.

Plaza Materials did not timely comply with the notice provisions of Section 255.05(2). (V1:96-101) And, when Plaza sued the surety, the suit was filed more than one year after Plaza Materials furnished Fulton with the material for the DOT project. (V1:96-101) The surety raised the affirmative defense that Plaza Materials had failed to comply with the notice requirements and time limitations of Section 255.05. (V1:149-150)

Plaza Materials admitted that it failed to comply with the notice provisions of Section 255.05, as well as its limitation period. (V1:96-101) Nonetheless, Plaza Materials asserted it was entitled to recover on the bonds because the bonds failed to comply with Section 255.05(6), which required the bond to reference the notice and time limitation requirements of subsection (2) (the "reference requirement"). (V2:265-266) Plaza Materials argued that the bonds' failure to comply with the reference requirement converted the statutory bonds into common law bonds, which eliminated the notice requirement and extended the limitations period. (V2:265-266) Plaza Materials also argued that the bonds were common law bonds because they

did not contain the correct address or project description, and additionally contained broader provisions than required by Section 255.05. (V2:265-266)

The surety countered that it had signed the standard DOT bond form, which is a statutory bond. (V1:126, 150) The evidence also showed that any absence of the reference requirement did not prejudice Plaza Materials because Plaza Materials filed the notice (albeit untimely) when it received the bonds. (V3:388, 392) The surety further argued that Section 255.05(4) makes clear that ***payment*** provisions of all bonds furnished for public works contracts, regardless of form, shall be construed and deemed statutory bond provisions, subject to all the requirements of subsection (2). (V1:126, 150)

For the four reasons raised by Plaza Materials, the trial court agreed that the statutory bonds were common law bonds. (V3:520-522) The surety appealed to the Second District Court of Appeals. The parties argued the same legal arguments raised in the trial court. The Second District affirmed. American Home Assurance Co. v. Plaza Materials Corp., 27 Fla. L. Weekly D 571 (Fla. 2d DCA March 8, 2002).

The Second District affirmed for the sole reason that the bond failed to contain the reference requirement. See Id. It simply decided that subsection (6) trumped subsection (4) because the point of subsection (6) was to inform claimants of

the notice and time requirements. See Id. In dicta, the Second District rejected that the claimed incomplete address, claimed inadequate project description or claimed broader provisions converted the statutory bond into a common law bond because Plaza Materials could not show the surety's failure to comply with these Section 255.05 requirements prejudiced Plaza Materials. See Id. The Second District did not apply a "causation" or "prejudice" analysis to the reference requirement. See Id.

The surety requested the Second District certify the issue to this Court. During the pendency of the motion to certify, the Fifth District Court of Appeals rendered Florida Crushed Stone Co. v. American Home Assurance Company, 815 So. 2d 715 (Fla. 5th DCA 2002), which addressed the same issue, under identical facts. The Fifth District disagreed with the Second District's interpretation of Section 255.05. The Fifth District noted that the express language of Section 255.05(4) effectively precluded the creation of a common law ***payment*** bond for public works projects. See Id. at 716. Nonetheless, the Fifth District announced a new test. It held that a surety should be estopped from asserting a claimant's non-compliance with the reference requirement ***if*** such non-compliance resulted from the failure of the bond to contain the information required by statute. See Id. at 717. The Fifth District certified the

issue as one of great public importance. See Id. The surety filed Florida Crushed Stone as supplemental authority with the Second District to support its pending certification motion.

Fifteen days after the Fifth District issued Florida Crushed Stone, the Second District granted the surety's motion to certify, withdrew its former opinion, and substituted a new one, which contained two new paragraphs and the following certified question:

> IF A STATUTORY PAYMENT BOND DOES NOT CONTAIN REFERENCE TO THE NOTICE AND TIME LIMITATION PROVISION 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?

American Home Assurance Co. v. Plaza Materials Corp., 826 So. 2d 358 (Fla. 2d DCA 2002). The Second District did not mention Florida Crushed Stone, nor did it note the conflict with the Fifth District. The Second District recognized that it did not apply a prejudice analysis to the reference requirement. See Id. at 361.

This timely appeal followed pursuant to *Fla.R.App.P.* 9.030(a)(2)(A)(v).

SUMMARY OF THE ARGUMENT

In answering the question certified by the Second District, this Court should enforce the legislative intent behind Section 255.05 and its amendments. Despite the legislature's numerous attempts to clarify that payment bonds for public works projects are statutory bonds, Florida courts have randomly and inconsistently converted statutory bonds into common law ones. Courts accomplished this transformation by noting the bond provided coverage broader than the statute required, thus inferring the surety did not provide a bond pursuant to the statute. While this analysis might find support if the bond provides coverage beyond the statutory requirement, its logic suffers when the only deviation is a technical failure to reference a provision of the statute. This failure does not convert the statutory bond into a common law one.

This conclusion is particularly true when the surety uses a bond supplied by DOT, which is, in turn, consistent in its payment provisions with the sample bond form approved by the legislature in subsection (3). Although courts have tangentially noted the statutory insufficiency of the sample and DOT bond forms, the Second District is among the few courts to unrealistically suggest the surety (not DOT or the legislature) should be faulted for the bond form's purported inadequacy. More likely and logically, the legislature and DOT understood

the bond to be a statutory one despite its failure to contain the reference requirement. This conclusion is bolstered where, as here, the bond does otherwise reference Section 255.05. This statutory bond should not be judicially reconstituted into a common law one, thereby relieving claimants from complying with subsection (2).

Florida courts who have held to the contrary have failed to consider two separate reasons to require claimants to comply with subsection (2). First, some Florida courts have failed to read Section 255.05(4) in *pari materia* with Section 255.05(6). While subsection (6) requires ***all*** bonds to contain the reference requirement, subsection(4) states that ***payment provisions*** of all bonds furnished for public work contracts, ***regardless of form***, shall be construed and deemed statutory bond provisions, subject to all the requirements of subsection (2). The only rational means to render both subsections meaningful is to conclude that while the legislature directed that bonds contain the reference requirement, the legislature prohibited any penalty for such omission. Otherwise, the legislature would be punishing surety's for signing a bond form which fails to advise claimants to follow the law, which they are presumed to know, like any other citizen.

Even if subsection (4) is somehow rendered meaningless, courts should apply a prejudice analysis before concluding that the absence of the reference requirement from the bond results in a surety's forfeiture of the right to the protections of those provisions. As the Fifth District noted in Florida Crushed Stone, the Second District did not penalize the surety for failing to include required information in the bond when the claimant was not prejudiced by the absence of this information. Yet, the Second District did not apply this same prejudice analysis to the statute's reference requirement. There is no valid reason to apply a prejudice analysis to one requirement of Section 255.05, but not another. It is equally illogical to refuse to apply the notice and time requirements of Section 255.05(2) upon a claimant who is, or should be, knowledgeable of such requirements, but fails to comply with the statute, through no fault of the bond's language. This is especially true where, as here, the surety has no control over the language of the bond, and uses the mandated DOT form. The result of the Second District's analysis creates the opportunity for "gotcha" litigation.

STANDARD OF REVIEW

Because this appeal involves an issue of statutory interpretation based upon undisputed facts, this Court reviews the final judgment *de novo*. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000) ("The standard of review for a pure question of law is de novo").

ARGUMENT

I.

WHERE THE SURETY ISSUES A STATUTORY BOND PURSUANT TO SECTION 255.05, THE BOND'S FAILURE TO REFERENCE THE NOTICE AND TIME REQUIREMENTS OF SECTION 255.05(2) DOES NOT CONVERT THIS STATUTORY BOND INTO A COMMON LAW ONE.

Construction bonds given by contractors are a species of surety insurance. Section 624.606(2), Fla. Stat., defines surety insurance as insurance guaranteeing the performance of contracts. When surety insurance for a construction contract is ***not*** required by a specific statute, it is deemed to be a common law bond. As authoritatively noted:

> [A] bond not required by statute will be given effect as a common law obligation. A building contractor's bond, voluntarily entered into, for a valuable consideration, is good at common law whether required by statute or not.

Rakusin, Florida Construction Lien Manual, Chapter 30, §.02, *citing* Couch, Insurance 3D § 163.22 (3d ed. 1997), p. 163-33.

Florida requires contractors constructing public buildings or completing public works to provide a bond, and such bond is "required by statute." § 255.05, Fla. Stat. By Section 255.05(1)(a), such bonds must contain both a payment and performance portion. Because Florida law prohibits liens on public property, the payment portion of the bond under Section 255.05 affords to those supplying labor and materials on public

works projects a means of protection in lieu of the lien afforded them on the private work as provided by other statutes. Clutter Constr. Corp. v. State, 139 So. 2d 426, 429 (Fla. 1962).

Subsection (1)(a) delineates the specific coverage the payment and performance bond must contain. A bond that provides the minimum requirements of Section 255.05 is a "statutory bond." Florida Keys Community College v. Insurance Co. of North America, 456 So. 2d 1250 (Fla. 3d DCA 1984). If a bond provides coverage ***in excess*** of the minimum statutory requirements, then the bond is a common law bond. See Id.

This distinction is significant. Statutory bonds pursuant to Section 255.05 require a claimant to file a notice that it is providing materials or has commenced work 45 days after first furnishing material; a notice of non-payment 90 days after the final furnishing of materials; and to institute a lawsuit on the bond within one year after delivery of the material. §255.05(2)(a). Common law bonds may not typically contain analogous notice provisions and were subjected to a 5 year statute of limitations.[2] Thus, if a surety provides what it believed was a statutory bond, but a court converts it into a

[2] In 2001, 95.11(2)(b), Fla. Stat., was amended to provide a one year limitations period on common law bonds.

common law bond, the surety's liability is extended beyond that which it initially contemplated.

Over the years, numerous Florida courts addressed whether a bond issued pursuant to Section 255.05 was a statutory or common law bond. Courts focused on whether the bond provided coverage beyond that required by the statute; if it did, the court found it to be a common law bond. See e.g. Florida Keys Community College, at 1252. When the bond did not provide coverage beyond that required by Section 255.05, courts concluded that the bond was statutory, and that the claimants must comply with the notice and time provisions of Section 255.05(2). Quality Glass & Mirror, Inc. v. Ritch, 373 So.2d 723 (Fla. 1st DCA 1979). Courts also concluded that a bond that failed to reference the time and notice requirements of 255.05(2) were statutory bonds; they did not expand coverage, and were thus not common law bonds. State, Dept. of Transp. V. Houdaille Ind., Inc., 372 So.2d 1177 (Fla. 1st DCA 1979). But see Southwest Florida Water Mgmt Dist. V. Miller Constr. Co., 355 So. 2d 1258 (Fla. 2d DCA 1978)(public works bond was a common law bond where it had a broader class of claimants and where the bond failed to reference Section 255.05 or encompass any time limitations for making claims or filing suit).

A lurking inconsistency in the statutory/common law bond treatment magnified with Martin Paving Co. v. United Pac. Ins.

Co., 646 So. 2d 268 (Fla. 5th DCA 1994). In Martin Paving, the Fifth District recognized that a common law bond is one that exceeds the minimum requirements of the statute. Despite this recognition, the Martin Paving court found the bond at issue to be a common law one because there had been a failure to record the bond in the public records. The Martin Court never found that the bond ***expanded coverage*** beyond what the statute required. The Martin Paving decision simply converted an obviously statutory bond into a common law one because it was not recorded in the public records, as required by statute. See also, WPC, Inc. v. Hartford Acc. & Indemnity Co., 698 So.2d 1324 (Fla. 1st DCA 1997) (following Martin Paving).

To the extent the Second District applied it here, this Court should reject the rule of law announced in Martin Paving.[3] A statutory bond does not "transmute" into a common law one simply because it failed to comply with all the technical requirements of Section 255.05. A bond is a common law one only when the surety did not sign a statutory bond.

[3] It is uncertain whether the Second District followed Martin Paving's common law bond analysis. While its opinion seems to suggest that it might not have followed Martin Paving, the question as certified by the Second District could be construed to request acceptance of the Martin Paving rule.

Sureties frequently use a bond substantially equivalent to the sample bond form the legislature provided in subsection (3).[4] The DOT form signed by the surety here parallels the sample bond form. Neither contain a reference to the time and notice requirements of Subsection (2). A bond issued in compliance with the sample form could only be a statutory bond. Similarly, when – as here – the bond form references Section 255.05, the bond is a statutory one.

This Court should reject the Martin Paving rule because it also ignores the realities of a surety's economics and position. If a surety issues a bond under Section 255.05, it does so in consideration of the protections afforded it under Section 255.05, including the subsection (2) notice and time limitations requirements. If a court converts a bond the surety issued as a statutory one, the court undermines the consideration given to the surety for the bond. Moreover, the Second District penalizes the ***surety for its alleged*** failure to comply with Section 255.05(2)'s reference requirement. The surety has no ability to demand a particular form be used on a public work

[4] Indeed, since the enactment of the sample forms, there have been several amendments to Section 255.05, but the legislature has not changed the bond form, despite criticism that it does not comply with the statute. Martin Paving Co. v. United Pac. Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994). It is presumed that the legislature is aware of a court's constructions of a statue when the legislature amends it. City of Hollywood v. Lombardi, 770 So. 2d 1196 (Fla. 2000).

projects. The form is supplied to it and mandated by the owner, in this case DOT.

In answering the question certified by the Second District, this Court should hold that, where the surety issues a statutory bond pursuant to Section 255.05, the bond's failure to reference the notice and time requirements of Section 255.05(2) does not convert this statutory bond into a common law one.

II.

THE PAYMENT PROVISION OF ALL PUBLIC WORK BONDS ARE STATUTORY BONDS BECAUSE THEY ARE DEEMED SO BY THE EXPRESS LANGUAGE OF SECTION 255.05(4), WHICH IS NOT TRUMPED BY THE GENERAL LANGUAGE OF SECTION 255.05(6).

Even if the surety's payment and performance bond could somehow be construed not to be a statutory bond for all types of public construction contracts, Section 255.05(4) provides that the payment portion of a bond on a public works project is deemed a statutory bond form. This subsection apparently emanated from a dispute amongst Florida district courts. Prior to 1980, Florida courts inconsistently resolved whether public works bonds that did not reference the time and notice requirements of Section 255.05(2) were common law bonds. *Compare* State v. Houdaille Industries, Inc., 372 So. 2d 1177 (Fla. 1st DCA 1979)(public works bond was a statutory bond) *with* Southwest Florida Water Mgmt Dist. V. Miller Constr. Co., 355 So. 2d 1258 (Fla. 2d DCA 1978)(public works bond was a common law bond). In 1980, the legislature addressed this inconsistency when it enacted Section 255.05(4), which states:

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

This language is clear on its face: it subjects the ***payment provision*** of a bond on a public works project or contract to ***all*** the notice and time provisions of subsection (2). As this Court noted in Taylor Woodrow Constr. Corp. v. Burke Co., 606 So. 2d 1154 (Fla. 1992), in its review of Section 255.05(2):

> Because section 255.05(2) is clear on its face, this Court must construe the words chosen by the legislature in their plain and ordinary meaning. See *Streeter v. Sullivan*, 509 So. 2d 268 (Fla. 1987). 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. See *Jones v. Utica Mutual Insurance Co.*, 463 So. 2d 1153 (Fla. 1985).

See Id. at 1155-1156.

Despite this Court's mandate in Taylor Woodrow to enforce Section 255.05 as written to properly reflect legislative intent, the Second District skirted the clear language of subsection (4) by focusing on subsection (6), which 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.

The Second District presumably found subsection (6) controlled over subsection (4). Yet the Second District's analysis ignores the rule of statutory construction that strives for a construction harmonizing two subsections. As this Court noted in Unruh v. State, 669 So. 2d 242 (Fla. 1996):

> As a fundamental rule of statutory instruction, courts should avoid readings that would render part of statute meaningless, and whenever possible must give full effect to all statutory provisions and construe related statutory provisions in harmony with another.

See Id. at 245. Subsections (4) and (6) should be construed in a manner that reconciles any possible inconsistencies. Jordan v. Food Lion, Inc., 670 So. 2d 138 (Fla. 1st DCA 1996). The most logical construction of subsections (4) and (6) is that, although the legislature directs Section 255.05 bonds to contain the reference requirement, the payment portion of such bonds will be deemed statutory even without it. After all, written notice of the reference requirements is nothing more than a redundant courtesy extended to claimants since, regardless of the presence of subsection (6), claimants must comply with subsection (2).

Assuming subsection (6) renders subsection (4) meaningless, bond claimants should be bound by the subsection (2) notice and time requirements ***unless*** they can show that the bond's failure to reference those provisions caused them not to comply with those requirements. The Fifth District adopted this rule in Florida Crushed Stone. It did so because applying subsection (6) to benefit claimants aware of the subsection (2) requirements created an inequitable result. Florida Crushed Stone, 815 So. 2d at 717. The Fifth District held that a bond's

failure to reference the notice requirements of Section 255.05 should not excuse the claimants from complying with the notice requirements ***unless*** non-compliance resulted from the bond's failure to contain the reference to the information required by the statute. See Id. 716. If a claimant can show it had no knowledge of, and could not reasonably have knowledge of, the notice requirements of Section 255.05, then the failure of the bond to advise the claimant of it actually caused the non-compliance with the statute. See Id. If, on the other hand, the claimant is knowledgeable of the notice requirements of Section 255.05, or should have been knowledgeable of the requirements, the failure of the bond to reference the notice requirements would not be the cause of the claimant's failure to do so. See Id.

While the Second District, in dicta, adopted a prejudice analysis as to some portions of Section 255.05, the Second District inexplicably did not apply it to the reference requirement. Beyond its internal inconsistency, the Second District's conclusion is contrary to Florida Law. Florida courts have been reluctant to enforce technical statutory requirements when no prejudice occurred by the non-enforcement. For instance, in School Bd. v. Vincent J. Fasano, Inc., 417 So. 2d 1063 (Fla. 4th DCA 1992), the court addressed the failure of a claimant to comply with the statutory requirement that the

notice under Section 255.05(2) express that claimant intended to look to the bond for protection. The Fourth District stated:

> [W]here it is conceded that the only possible legal consequence of putting the contractor and surety on written notice of appellant's participation in the project was to secure appellant's rights under the provisions of Section 255.05(2), we think that an obvious implication of the notice is the expression of such an intent. We do not think the surety and the contractor were entitled to ignore this implication. We conclude that this notice, ***subject to any claim by the appellees that they have actually been prejudiced by the omissions alleged***, constituted substantial compliance with the requirements of Section 255.05(2).

See Id. at 1066. (emphasis added). See also Walter E. Heller & Co. S.E. v. Palmer-Smith, 504 So. 2d 511 (Fla. 5th DCA 1987); Haskell Co. v. Peeples Constr. Co., 648 So. 2d 833, 834, n.1 (Fla. 1st DCA 1985). Claimants knowledgeable of the notice and time provisions of subsection (2), or who should have been knowledgeable of the provisions, should not be rewarded by employing the fiction that the claimant was deprived of the right to comply with that statute solely because of a technical glitch in the bond form. This conclusion is reinforced when the bond form is mandated and promulgated by the public authority.

By refusing to apply a prejudice analysis, the Second District has inexplicably found an unlikely legislative intent: to punish sureties who sign bonds which do not contain the required reference to the time and notice provisions of

subsection (2) (“we conclude that 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.”) The Second District failed to explain this conclusion, other than to note that the statute said it should be done. Yet, this Court has held that a statute’s use of the term “shall” does not require courts to automatically concoct a punishment for it:

> Although section 120.59(1) says that final orders ***shall*** be rendered within 90 days, it does not specify any sanction for violation of the time requirement. Other parts of chapter 120, however, do provide sanctions or other consequences where there is a failure by either an agency or an affected party to act within the prescribed time limits. *See* §§§§ 120.53(5)(b), 120.54(11)(b), 120.545(6) and (7), 120.58(3), 120.60(2), (3), and (4). If the legislature had intended that untimely orders rendered in proceedings in which the agency is the protagonist would always be unenforceable, we believe that it would have included the necessary language in section 120.59(1) to impose such sanction as it did in other parts of chapter 120.

Department of Business Regulation v. Hyman, 417 So. 2d 671, 673 (Fla.1982)(emphasis added). In short, according to the context and surrounding circumstances, a statutory "shall" is to be read as "may" and vice versa. See Schneider v. Gustafson Industries, Inc., 139 So.2d 423 (Fla. 1962); Allied Fidelity Ins. Co. v. State, 415 So.2d 109 (Fla. 3d DCA 1982). In light of the

context and surrounding circumstances noted above, the "shall" contained in subsection (6) is merely directive, not mandatory.

The Second District's determination that sureties should be punished when the reference requirements are absent from a bond becomes even less palatable given broader policy concerns. According to the Second District:

> the justification for 'deeming' a bond subject to the subsection (2) requirements rests in the fact that the bond informs the claimant of these requirements.

The Second District has presumably overlooked that subsection (6) requires bonds to do nothing more than reference the law. Nonetheless, all citizens are presumed to know the law. Munoz v. State, 629 So. 2d 90, 93 (Fla. 1999). This Court has held that parties must comply with statutory provisions even in the absence of express notification of the law's provisions. Florida Welding & Erection Service, Inc. v. American Mut. Ins. Co. of Boston, 285 So. 2d 386 (Fla. 1973). This Court has also found that a party who brought suit to foreclose a lien was charged with knowledge of the law of the time limits for prosecuting the case. Elmer A. Yelvington & Son v. Sheridan, 65 So. 2d 44 (Fla. 1953). By construing subsection (6) as it did, the Second District has afforded claimants a right no other citizen has in the state of Florida; a reward for not knowing the law.

CONCLUSION

For all the foregoing reasons, this Court should answer the question certified by the Second District and hold that where the surety issues a statutory bond pursuant to Section 255.05, the bond's technical failure to contain the reference requirement of Section 255.05(2) does not convert the bond into a common law one. Alternatively, this Court should enforce subsection (4) to require claimants seeking recovery under the payment portion of a public works contract to comply with subsection (2) even if the reference requirement is absent from the bond.

Alternatively, this Court should adopt the rule of the Fifth District in Florida Crushed Stone and hold that bond claimants should be bound by the subsection (2) notice and time requirements ***unless*** they can show that the bond's failure to reference those provisions caused them not to comply with those requirements.

Respectfully Submitted

Robert E. Morris, Esquire
Florida Bar No. 152137
ROBERT E. MORRIS, P.A.
5020 West Cypress Street
Suite 200
Tampa, Florida 33607
(813) 289-0440
(813) 289-7652 (Facsimile)

and

Hala A. Sandridge, Esquire
Florida Bar No. 454362
FOWLER WHITE BOGGS BANKER P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
(813) 229-8313 (Facsimile)
ATTORNEYS FOR APPELLANT

By:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Initial Brief on the Merits was furnished by U.S. Mail to Counsel for Appellee, **FRANCIS X. RAPPRICH, III, Esquire**, and **JAMIE BILLOTTE MOSES, Esquire**, Post Office Box 712, Orlando, Florida 32802-0712; and to Counsel for Amicus Curiae, **BRETT DIVERS, Esquire**, 100 N. Tampa Street, Suite 2010, Tampa, Florida 33602 on November 8, 2002.

By:_____

Hala Sandridge, Esquire

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certify that this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

By:_____
Hala Sandridge, Esquire

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