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 REPLY BRIEF ON THE MERITS

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REPLY STATEMENT OF THE CASE AND OF THE FACTS

Plaza Materials implies that it complied with the time ***and*** notice requirements as to all three project Sections. (ABR, p. 4) While Plaza Materials filed its lawsuit within one year as to Sections 3A and 6A, it did not comply with the notice requirements for those sections. (V1:96-97,101)

REPLY 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.

Plaza Materials first quarrels with the Second District's dicta ruling that the bond form's three-out-of-four technical statutory noncompliance does not render it a common law bond. (ABR, p. 11-12) While this Court might refuse to resolve these issues because they were not certified and are dicta,[1] if this Court addresses these issue, the Second District correctly resolved the effect the 1980 amendment to subsection (4) had on these three technical statutory noncompliance.

[1] Plaza Material admits that the Second District did not rule on the issue that it challenges. (ABR, p. 17)

The Second District analyzed the following technical bond form errors:

1. an inadequate address;

2. an improper project description; and

3. provisions broader than required by Section 255.05.

As to the first error in form, the bond described the surety's address as "New York, N.Y." The Second District noted that Plaza Materials never complained that it had difficulty making its claim because "this major insurance company listed only the city and state of its primary office." Plaza Materials does not suggest that the Second District incorrectly rejected this first reason for converting this statutory bond into a common law one. While Plaza Materials obliquely references this alleged incomplete address in a footnote (ABR, p. 13), it fails to refute the Second District's finding that the record did not disclose that this address was remotely insufficient for its intended purpose.

On the second bond form error, the bond identified the project by its state project bond number, and provided a description such as "From 1.9 Miles East of SR 572 to 0.6 Mile East of Harden." The Second District noted that no one suggested this address confused Plaza Materials. Plaza Materials fails to argue the error in this finding.

On the third error in form, the Second District recognized that the bond contained more expansive requirements than subsection (1) required. The court found that in light of the 1980 amendment to subsection (4), this additional language did not turn the statutory bond into a common law bond. Plaza Materials directly challenges this finding. (ABR, p.15)

As the Second District recognized, Plaza Materials' argument ignores the 1980 amendment to subsection (4). That subsection provides:

> 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). (emphasis added)

Thus, the legislature has expressly required the courts to deem the ***payment*** provisions of a public works contract to be statutory, ***no matter what the form of the bond***. So, if the form of the payment portion of the bond expands coverage or includes an incomplete address, it is deemed a statutory bond. Plaza Materials ignores the Second District's analysis of the effect of the 1980 amendment upon its "expanded-coverage" argument (ABR, p.17), instead relying upon cases that either: (1) precede

the amendment[2]; or (2) do not address the effect of subsection (4) on the payment provision of a public works contract.[3]

Although Plaza Materials does address subsection (4) as it relates to subsection (6) (ABR, p. 17, 19-25), Plaza Materials erroneously applies the same analysis to its "expanded coverage" argument. The principle that expanded coverage converts a statutory bond into a common law one is a judicial doctrine. Once the legislature enacted subsection (4), it vitiated this judicial doctrine as to the ***payment*** provisions of public works contracts. While this "expanded coverage" doctrine may apply to other portions of a public works bond, the Second District correctly held that the 1980 amendment to subsection (4) impaired the application of that doctrine to the payment provision of public works contracts.

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[2] State, Dept. of Transp. V. Houdaille Ind., Inc., 372 So.2d 1177 (Fla. 1st DCA 1979); Southwest Florida Water Mgmt Dist. V. Miller Constr. Co., 355 So. 2d 1258 (Fla. 2d DCA 1978); United Bonding Ins. Co. v. Martin, 249 So. 2d 720 (Fla. 1st DCA 1971); United Bonding Ins. v. City of Holly Hill, 249 So. 2d 720 (Fla. 1st DCA 1971).

[3] Centex-Rooney Const. Co. Inc. v. Martin County, 706 So. 2d 20, 28 (Fla. 4th DCA 1997)(addresses performance provision of the bond, not payment provisions); Ins. Co. of N. Am. v. Metropolitan Dade County, 705 So. 2d 33, 34 (Fla. 3d DCA 1997)(same); Florida Keys Community College v. Insurance Co. of North America, 456 So. 2d 1250, 1252 (Fla. 3d DCA 1984)(same) Martin Paving Co. v. United Pac. Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994)(court never found expanded coverage).

Except to raise its “expanded coverage” argument, Plaza Materials does not otherwise respond to the surety’s argument 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).

For the first time, Plaza Materials argues that subsection (4) does not apply because of limiting language contained in that section:

> 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). (emphasis added)

Plaza Materials argues the highlighted language demonstrates that subsection (4) only applies to public works bonds described in subsection (1). According to Plaza Materials, the surety did not issue a bond "described" in subsection (1). (ABR, p. 20-21)

Initially, although Plaza Materials argues that the surety concedes the bond is not the type described in subsection (1)(ABR, p. 21), the surety made no such concession.

Other than to rely upon this alleged concession, Plaza Materials cites no other reason to support its assertion that the bond was not a subsection (1) bond. To accept Plaza Materials' argument, the language "described in subsection (1)" must relate to the ***coverage*** of the bond. The express language of subsection (1) certainly does not support Plaza Materials'

argument. The express language of subsection (1) can only be construed to describe the ***type*** of bond, i.e. payment bonds for public works contracts. The DOT's bond form signed by the surety was a payment and performance bond for a public works contract, thereby satisfying subsection (4).

Plaza Materials then argues that the legislative intent supports it argument that subsection (4) does not carve out an exception to subsection (6)'s reference requirement. Plaza Materials references unidentified scribblings to argue legislative intent. (ABR, p. 22; Fla. Tran. Br., p. 9) While this Court and others have recognized that a staff analysis may assist in determining final legislative intent, White v. State, 714 So. 2d 440 (Fla. 1998) and Ellsworth v. Ins. Co. of N. Am., 508 So. 2d 395 (Fla. 1st DCA 1987), there is simply no authority to elevate unidentified notes to the level of legislative intent. Even if these notes somehow lent themselves to support legislative intent, employing these notes to show that sureties may not like mandatory bond forms does not answer the question raised in this appeal.

Moreover, Plaza Materials somehow manages to overlook the Staff Analysis included in the legislative history. Nonetheless, the Staff Analysis ***does*** provide guidance as to legislative intent behind the interaction of subsections (4) and (6). (App.1.42) Consistent with the surety's argument, the 1980

amendment was enacted because the courts had been construing public works construction bonds as common law bonds, rather than statutory ones. (App.1.42) Significantly, the Staff Analysis noted the effect of the proposed change:

> Would provide that the ***payment provision*** of bonds for public work projects ***shall be construed as statutory bond*** provision ***and shall be subject to the notice and time limitations in the statute.***

(App.1.42)(emphasis added) In short, then, the Staff Analysis proves that the legislature enacted subsection (4) to subject the payment provisions of public work projects to the notice and time limitations of the statute. Although Plaza Materials claims to the contrary (ABR, p.24), nothing in the rest of the analysis demonstrates that the legislature believed the time and notice requirements should not apply if the bond failed to contain the reference requirement.

Plaza Materials derides the surety for arguing that a surety should not be penalized when it is forced to use the DOT bond form. (ABR, p. 22-23)[4] Plaza Materials improperly attaches DOT bond forms never produced before to argue that DOT has made efforts to draft a form that complies with subsection (6). While this strategy might be effective if the dispute were between Plaza Materials and DOT, this argument is illogical when

[4] The Amicus Curiae brief submitted by APAC-Florida, Inc. makes the same argument.

applied to the surety, a stranger to the drafting of the bond, and which is forced to use whatever bond DOT requires. If, as Plaza suggests, surety companies should not use the DOT bond forms, then the DOT public work projects would come to a screeching halt in Florida.

Once again, the staff analysis supports this argument. While Plaza Materials and its supporting amicus party briefs argue that the purpose of Section 255.05 is to protect subcontractors and suppliers, the Staff Analysis expressly states that the concern behind the ***1980 amendment*** was to prevent such parties from making untimely claims:

> ***The implementation of strict statutory notice requirements*** will reduce the likelihood of litigation based on claims by suppliers and sub tier contractors. These claimants are sometimes able to initiate litigation long after the contractor has received payment and, in turn, paid his subcontractor.
>
> This would allow Sureties to bond contractors at lower rates. Savings on bond premiums would reduce the cost of public works projects for contractor.

(App.1.42)(emphasis added) Keeping in mind that the government, not the surety, drafts the bond form (a fact that Plaza Materials and its amicus parties ignore), this history removes any possible conflict behind paragraphs subsection (4) and (6). The intent of the 1980 amendment was not to protect claimants, it was to end the common law bond line of cases through two

consistent amendments: (1) state agencies, as drafters of the bond forms, were required to include the notice and limitations provisions; and (2) if they did not, the bond was deemed to be a statutory bond subject to the time and notice limitations provision regardless of the form.

Plaza Materials claims that the surety argues that common law bonds no longer exist on public works projects. (ABR, p. 24-25) Plaza Materials misconstrues the surety and Fifth District's reading of subsection (4). Subsection (4) is limited to the ***payment*** portion of public work bonds. The Staff Analysis supplied by Plaza Materials supports this conclusion. See *supra*, p. 7. Common law ***performance*** bonds can still exist.[5]

Finally, the Florida Transportation Builders Association asserts that the 2001 amendments imposing a one year limitation for suits on common law bonds shows that, prior to 2001, the legislature intended a five year limitation for statutory payment bond claims. (Fla. Trans. Br., p. 20-21) In fact, as the Florida Transportation Builders Association itself states:

> When these amendments were passed, the current state of the law was typified by Martin Paving and its progeny. By enacting material amendments to three different statutes in a single legislative session,

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[5] This point also resolves the argument made by the Amicus Curiae parties (APAC-Florida Br., p. 9; Fla. Trans. Br., p. 5, 18) that subsection 6 is stripped of any meaning if this Court accepts the surety's argument.

> the legislature is presumed, in authoring those amendments, to have intended to change the law.

(Fla. Trans. Br., p. 20) That statement is accurate. Martin Paving and its progeny highlighted the district courts of appeal failure follow the intent of the 1980 amendments. So, the legislature acted, again, to change the current state of the law as typified by Martin Paving. The 2001 amendments were not designed to change the 1980 amendments; they were designed to change the district courts of appeals misconstruction typified by Martin Paving and obtain the same results intended in 1980.

III.

THE SURETY'S ARGUMENT IS CONSISTENT WITH ITS POSITIONS BELOW, THE STATUTE, AND COMMON SENSE.

Plaza Materials argues that the surety has taken inconsistent positions. (ABR, p. 26-27) In the trial court, 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) The surety argued that it had signed the standard DOT bond form, which is a statutory bond. (V1:126, 150) 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) The

surety's arguments here are consistent with these arguments below.

Moreover, Plaza Materials and its amicus parties are the ones taking an inconsistent position. Although they argue that the surety's position nullifies subsection (6)[6], the surety has shown that its interpretation of subsections (4) and (6) renders both of them meaningful. Plaza Materials and the amicus parties, on the other hand, ask this Court to disregard subsection (4). Plaza Materials and its cohorts notably fail to explain how this Court can apply the rule they propose, without rendering subsection (4) meaningless.

Plaza Materials then attacks the surety's request that this court consider the Fifth District's prejudice requirement as an alternative to its first two arguments. (ABR, p. 27) According to Plaza Materials, if the Legislature wanted a prejudice requirement, it would have drafted one into Section 255.05, as it did in Chapter 713. (ABR, p. 27) Interestingly, the Staff Analysis to the 1980 amendment supplied by Plaza Materials show that it was the Legislature's intent to establish notice requirements in Section 255.05 that comport with those of Chapter 713. (App. 1.42)

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[6] (ABR, p.18; APAC-Fla Br., p. 9; Fla. Trans. Br., p. 5)

Equally important, Chapter 713's prejudice requirement further establishes the Legislature's recognition that technical non-compliances with a statute should not result in a penalty when there is no prejudice to any of the parties involved in the noncompliance. Plaza Materials notably fails to explain why a prejudice requirement would be unfair or contrary to public policy. The Second District's refusal to apply the prejudice analysis to the reference requirement fails to comport with public policy and the goals underpinning the 1980 amendment to Section 255.05, particularly when the bond form is authored by DOT.

Respectfully Submitted

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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; Counsel for Amicus Curiae **DANA G. TOOLE, Esquire**, Dunlap & Toole, P.A., 2057 Delta Way, Tallahassee, FL 32302-4227; and to Counsel for Amicus Curiae, **BRETT DIVERS, Esquire**, 100 N. Tampa Street, Suite 2010, Tampa, Florida 33602 on December 27, 2002.

By:_____

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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.

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