

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 RESPONSE BRIEF
TO THE AMICUS CURIAE BRIEF OF STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION**

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RESPONSE

- I. RESPONDENT AGREES WITH THE FDOT'S ASSERTION THE BOND IN QUESTION IS NOT A § 255.05 BOND, BUT REGARDLESS OF THE FDOT'S POSITION, THE BOND FAILED TO COMPLY WITH § 255.05 AND THEREFORE THE CERTIFIED QUESTION SHOULD BE ANSWERED SUCH THAT THE SECOND DISTRICT'S OPINION IS APPROVED.

The Florida Department of Transportation ("FDOT"), although stating in its brief that it does not support either party on appeal, agrees with Respondent that the bond in question is not limited by the notice and time limitations of § 255.05. The road it follows, however, to reach that conclusion is different. The FDOT is of the opinion that § 337.18, Florida Statutes, and not § 255.05, governs bonds issued pursuant to road and bridge construction and maintenance projects. As such, its conclusion is that the bond in question which was issued pursuant to a road construction project was not issued pursuant to § 255.05. Obviously, Respondent agrees with the FDOT on that position.

Regardless, it has always been Respondent's position that even if the bond did fall within § 255.05, it failed to comply with § 255.05 and therefore is not entitled to the protections of § 255.05. Although the FDOT's opinion as to what statute should govern its projects and the bonds issued thereon, even if the FDOT was of the opinion

that § 255.05 applied to its projects, the bond in question simply does not meet the requirements of § 255.05 and therefore is not entitled to its protections.

It is anticipated that Petitioner will argue in response to the FDOT's Amicus Brief that it had to sign the bond in question and believed that the bond was governed by § 255.05. That obviously, is in complete contradiction to the FDOT's position. Regardless, the bond in question simply does not fall under § 255.05 and therefore if this Court rejects the FDOT's position, that still does not change the fact that the bond in question simply is not entitled to the protections of § 255.05.¹

Although the Amicus Brief of the Department of Transportation further demonstrates why the certified question to this Court should be answered in such a way that the Second District's Opinion is approved, irrespective of the assertions of the FDOT, the decision of the Second District should be approved because the bond in question failed to comply with § 255.05 and therefore constitutes a common law

¹It is curious that Petitioner has made the arguments it has made on appeal given the statements made in the FDOT's Amicus Brief. Specifically, the FDOT's statement "because at least one of the attorneys in the instant case was aware of the Department's reliance on and adherence to Section 337.18, Florida Statutes, the issue before this Court would not become the propriety of the Department's actions in allegedly not complying with Section 255.05, Florida Statutes." See Amicus Brief at pp. 7-8. Given the fact that neither the undersigned nor the attorney who submitted the Amicus Briefs in support of Respondent's position was privy to or aware of the Department's position, it can only be assumed that this comment is directed to counsel for Petitioner.

bond not entitled to the benefits and protections of § 255.05. The key factor in this case does not hinge upon the FDOT's opinion of the legal status of its bond, just as it does not hinge upon the Petitioner's opinion of their bond. On the contrary, this case should turn upon the surety's failure to meet its obligations by complying with Fla. Stat. § 255.05.

In any event, whether the Court grants deference to the FDOT's position or not, as a legal action on a contract, obligation or liability founded on a written instrument, the five (5) year limitations period prescribed by Fla. Stat. § 95.11(2) should apply.

CONCLUSION

Respondent respectfully requests this Court answer the certified question in such a way that the decision below is approved.

Respectfully submitted,

JAMIE BILLOTTE MOSES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on January ____, 2004, 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; Brett D. Divers, Esq., Mills Paskert Divers, P.A., 100 N. Tampa Street, Suite 2010, Tampa, FL 33602; and Pamela S. Leslie, Esq., and Marianne A. Trussell, Esq., Department of Transportation; Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458.

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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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