IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DADELAND STATION
ASSOCIATES LTD.
and DADELAND DEPOT, INC.,

Appellants,

CASE NO. SC04-1828

vs.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al,

Appellees.
____________________________________/

ON QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE

Florida AGC Council Inc.
Florida Transportation Builders' Association, Inc.
Associated Builders and Contractors of Florida

Filed with consent of all parties

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STATEMENT OF IDENTITY AND INTEREST

This Brief is filed on behalf of FLORIDA A.G.C. COUNCIL, INC. (Florida AGC), FLORIDA TRANSPORTATION BUILDERS' ASSOCIATION, INC. (FTBA), and ASSOCIATED BUILDERS AND CONTRACTORS OF FLORIDA (ABC of Florida) (collectively, the amicus). All parties to this appeal have consented to the appearance of the amicus curiae.

Florida AGC is an organization comprised of general contractor chapter members active in construction in the State of Florida, with associate memberships being afforded to specialty trade contractors active in construction within the state, and affiliate membership available to material suppliers and service providers who service general contractors.

FTBA is a nonprofit organization of individuals and business firms actively engaged in the construction of transportation systems or in furnishing materials, equipment or services for such construction.

ABC of Florida is a chapter organization of Associated Builders and Contractors, a national association representing 23,000 merit shop construction and construction-related firms in 79 chapters across the United States. ABC's membership represents all specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors of the industry.

The interest of the amicus in this Brief is to urge the Florida Supreme Court to address and answer in the negative the first two questions certified by the Eleventh Circuit in Dadeland Depot Inc. v. St. Paul Fire and Marine Insurance Co., 383 F.3d 1273 (11th Cir. 2004), with respect to potential claims against sureties for bad-faith refusal to settle claims under Section 624.155(1)(b)(1), Florida Statutes. The remaining certified questions will not be addressed by the amicus in this Brief.

The interests of the amicus align with those of the sureties, Appellees herein.

SUMMARY OF ARGUMENT

The position of the amicus is that the obligee of a surety bond is not and should not be considered an "insured" for purposes of bringing a bad-faith refusal-to-settle claim in Florida. If the Supreme Court of Florida answers the first question in the negative, then there is no need to address the second certified question. If, however, the Court answers the first question in the affirmative, then the amicus suggest that the applicable bad faith statutes require a claimant in a bad-faith refusal-to-settle claim to prove that the defendants engaged in unfair settlement practices frequently enough for the behavior to be considered a general business practice.

CERTIFIED QUESTION I

IS THE OBLIGEE OF A SURETY CONTRACT CONSIDERED AN "INSURED" SUCH THAT THE OBLIGEE HAS THE RIGHT TO SUE THE SURETY FOR BAD-FAITH REFUSAL TO SETTLE CLAIMS UNDER SECTION 624.155(1)(b)(1), FLORIDA STATUTES?

This certified question should be answered in the negative.

A surety contract or performance bond has been defined as a "contract entered into between a contractor (referred to as the 'principal') and a bonding company (referred to as a 'surety') whereby the bonding company guarantees to the project owner (referred to as the 'obligee') the contractor's faithful performance of its contractual duties and completion of the project." Aron J. Frakes, Note, *Surety Bad Faith: Tort Recovery for Breach of a Construction Performance Bond*, 2002 U.Ill. L. Rev. 497, 498 (2002).

A performance bond is *not* an insurance policy, and an obligee under a performance bond is *not* an "insured." See e.g., Western World Insurance Company v. Travelers Indemnity Company, 358 So.2d 602, 604 ("The distinctions between a general liability insurance policy and a statutory penal bond are obvious. 'The usual view, grounded in commercial practice, is that suretyship is not insurance.'"), quoting Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 n.19, 83 S.Ct. 232, 236, 9 L.Ed.2d

190(1962); <u>Shannon R. Ginn Construction Company v. Reliance Insurance Company</u>, 51 F.Supp.2d 1347, 1350 (S.D. Fla. 1999) (while "suretyship and insurance have similar characteristics and sometimes are discussed as related concepts; nonetheless, they are distinct."); <u>cf.</u>, <u>David Boland Incorporated v. Trans Coastal Roofing Company</u>, 851 So.2d 724 (Fla. 2003) (Wells, J., concurring)(the role of a construction contract surety "is sufficiently distinct from the role of insurers that issue insurance policies ….").

Insurance contracts are contracts between an insurer and an insured in which the insurer agrees to pay damages to or on behalf of an insured for *tort-related* claims. As stated above, a performance bond or surety contract involves a three-party (or tripartite) relationship among a contractor (as principal), project owner (as obligee), and a bonding company (as surety), in which the surety guarantees performance of the principal's *contractual duties*. The principal, in turn, indemnifies the surety against losses the surety may sustain arising out of the issuance of a bond.

In this tripartite relationship, the surety's simultaneous obligation of good faith and fair dealing to *<u>both</u>* the principal and the obligee creates a "unique dilemma." Frakes, supra, at 513. To permit a separate cause of action for "bad-faith refusal to settle" ignores the fact that obligees under a performance bond already have an existing remedy against the surety under the implied covenant of good faith and fair dealing.

Creating a new cause of action against a surety for "bad-faith refusal to settle" and allowing a tort remedy for breach of the implied covenant of good faith and fair dealing "would be a drastic divergence from longstanding principles of contract law." Frakes, supra, at 527. Florida has never recognized a surety as an insurer for purposes of imposing liability for a supposed bad-faith refusal to settle, perhaps because there is no such thing as a bad-faith breach of contract. Either a contract is breached, or it is not. The intent or mindset of the breaching party is irrelevant.

Thus, we are not simply dealing with a nuance of existing case law or statutory authority. Let us be perfectly clear that in this appeal appellants seek to create a new cause of action and right of recovery against sureties that did not exist before. This Court should not assist appellants to create this new legal right. It is the responsibility of the legislature, not the courts, to enact new laws that would have such far-reaching ramifications to the construction and surety industries.

One commentator has explained:

> A tort remedy in this situation could substantially shift the balance in the tripartite relationship, resulting in a nonlevel "playing field." As the California Supreme Court suggested, the availability of a tort remedy "may allow obligees to gain additional leverage with sureties that principals do not have in contract disputes." Such a shift in the balance of the tripartite relationship may have several negative consequences. First, it may encourage a project owner to allege contractor default more readily than it would if only traditional contractual damages were

> available. Second, a tort remedy may compel sureties to pay questionable claims in order to avoid the risk of tort liability and large punitive damage awards. Third, such increased leverage by the obligee may give them "sufficient power to detrimentally affect the interests of principals when disagreements arise during construction." These concerns have no parallel in the insurance context because of the lack of a tripartite relationship. Therefore, it is clear that the unique relationship that exists in the performance bond context argues against extending the insurance exception to include sureties.

Frakes, supra, at 513, quoting Cates Constr. v. Talbot Partners, 980 P.2d 407 (Cal. 1999).

There are serious practical implications to the construction industry if sureties are to be subjected to bad-faith litigation and resulting damages. The lifeblood of the commercial construction industry is surety bonding. The creditworthiness of the contractor is often viewed as being equivalent to the ability to provide payment and performance bonds. Surety bonds are provided on both public and private commercial projects. In fact, surety bonds are statutorily required on state, county, and municipally owned projects where the contract price is in excess of $200,000.00. See generally Section 255.05, Florida Statutes.

There has been substantial constriction in the surety business over the last decade. Many bonding companies have ceased to write construction bonds altogether due to significant financial losses. With even fewer sureties and re-insurers willing to extend surety credit, any threat, either real or perceived, by the bonding companies or their reinsurers poses a very real threat to the commercial construction industry.

Bonding companies extend surety credit (i.e., bonds) to qualified contractors based on many factors. The net worth of the contractor as well as the type and size of the project significantly influence the line of bonding credit extended by the surety to the contractor. Any increased risk to the surety results in a tightening or reduction in the amount of surety credit extended.

In all instances, the contractor is required to execute a general indemnity agreement whereby the contractor and its owners personally indemnify the surety against losses the surety may sustain arising out of the issuance of a bond. In this way, suretyship is clearly different from insurance. With a bond, as compared to insurance, the relationship is one of financial guaranty with indemnity from the principal contractor and the individual owners of the contractor. An insurance company is in business to pay claims. Claims are expected and are statistically factored into premium. Bonds are written with the concept that payment of a claim will be rare (due to underwriting) with a correspondingly small premium.

Due to the tripartite relationship with indemnity, the surety must be extremely careful responding to an obligee's demand under the bond. Suppose an obligee makes a claim under the bond and the principal disputes the claim or asserts defenses to the claim, a not uncommon scenario with construction payment and performance bonds. If the surety pays the obligee's claim too quickly due to the spectre of potential liability for a bad-faith refusal to settle, the surety may be considered to have paid the disputed claim as a volunteer, and lose the right of indemnity from the principal for paying the claim without sufficient time to investigate defenses. Such a result changes the surety's risk from one of financial guaranty with indemnity to one of absolute insurer, which was never intended, and creates a wholly different transaction from one of suretyship.

The consequences to the contractor are just as severe. Typically, a surety establishes a bonding limit with the contractor on both a per project and aggregate basis. The amount of surety credit extended is calculated as "backlog" or uncompleted work under contract. As work progresses on the projects, the surety credit available is replenished to allow for new projects to be bid and awarded. Any interruption in backlog or new projects will seriously impact the contractor. Obviously, claims can impact the amount of surety credit extended to contractors or eliminate the credit altogether.

Given the state of surety business as a whole, if the surety is to be routinely exposed to litigation involving claims of bad-faith or punitive damages, the sureties will likely exert overwhelming pressure on the contractor to settle the claim regardless of fault or, at a minimum, require the contractor to provide the surety with even greater protection via assets beyond those already pledged. Lacking additional assets or collateral, the surety would not likely extend further surety credit to the contractor.

As a result, any possibility of an interruption or outright denial of further surety credit will create unwarranted pressure on the contractor to settle disputed claims brought by obligees, even where the contractor may be entirely correct in its position. At a minimum, the necessity to provide even more collateral to guaranty the indemnification of the surety will adversely affect the contractor by further impacting its line of surety credit available, bank line credit, and its cash flow. Thus, the creation of a new cause of action against sureties will severely restrain not only the Florida surety industry, but the Florida construction industry as well.

Moreover, lenders and real estate developers all benefit from the availability of construction bonds, so as to assure a successful project in the unfortunate event of a default by the principal. If Florida imposes a new cause of action against sureties for bad-faith refusal to settle, the chilling effect on the construction industries and related industries cannot be underestimated.

In summary, because sureties are clearly distinguishable from insurers and because of the serious implications of a new cause of action against sureties for bad-faith refusal to settle, sureties should not be subject to any damages beyond those recoverable under the contract itself.

The first certified question should be answered in the negative.

CERTIFIED QUESTION II

DOES THE LANGUAGE IN SECTION 624.155(1)(b)(3) ELIMINATE SECTION 626.9541's REQUIREMENT OF PROOF OF A GENERAL BUSINESS PRACTICE WHEN THE PLAINTIFF IS PURSUING A SECTION 624.9541 CLAIM THROUGH THE RIGHT OF ACTION PROVIDED IN SECTION 624.155?

For all of the same reasoning and arguments outlined above concerning the first certified question, the second certified question should also be answered in the negative. The amicus join in any additional legal arguments advanced by the Appellees and the Surety Association of America in response to the second certified question.

CONCLUSION

This Court should not interpret Section 624.155(1)(b)(1), Florida Statutes, to permit a cause of action by an obligee under a surety contract to sue for a purported bad-faith refusal to settle claims. The first and second certified questions should be answered in the negative.

Respectfully submitted this __18th__ day of February, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. MAIL to: PHILIP M. BURLINGTON, ESQ., 2001 Professional Building/Suite 205, 2001 Palm Beach Lakes Blvd., West Palm Beach, FL 33409; VERONICA VELLINES, ESQ., 6200 Courtney Campbell Causeway, Suite 1100, Tampa, FL 33607-5946; BRETT D. DIVERS, ESQ., 100 N. Tampa Street, Suite 2010, Tampa, FL 33602; and STEPHEN A. MARINO, JR., ESQ., 100 Southeast Second Street, Suite 2150, Miami, FL 33131-2151, this __18th__ day of February, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared and printed in Times New Roman 14-point font, and therefore complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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