IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Appellants,

Case No. SC04-1828
Lower Tribunal No. 03-13540

vs.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, ET AL.

Appellees.
_________________________________/

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

AMICUS CURIAE BRIEF OF THE SURETY ASSOCIATION
OF AMERICA IN SUPPORT OF APPELLEES ST. PAUL FIRE AND MARINE
INSURANCE COMPANY AND AMERICAN HOME ASSURANCE COMPANY

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INTEREST OF THE SURETY ASSOCIATION OF AMERICA

The Surety Association of America ("SAA") is a voluntary, non-profit corporation with approximately 500 member companies. Collectively, these companies write the overwhelming majority of performance and payment bonds furnished on construction projects in the United States and in Florida. The resolution of the first question certified to this Court by the United States Court of Appeals for the Eleventh Circuit will have a significant impact on SAA and its member companies, and on the procurement of bonds for Florida projects.

SUMMARY OF ARGUMENT

Section 624.155, Florida Statutes, is in derogation of the common law and must be strictly construed against the claimant. There is no indication in the statute that it was intended to apply to surety bonds, and the substantial differences between a tripartite surety bond and a two-party insurance policy render such application illogical and against public policy. This Court should hold that section 624.155 is inapplicable to Dadeland's claims. The remaining certified questions would then be moot.

ARGUMENT

Under Florida common law, a first-party insured had no extra-contractual remedy for bad faith by its insurer in the absence of fraud or an independent tort.

Section 624.155, Florida Statutes, is in derogation of the common law and must be strictly construed against the claimant. *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 753 So. 2d 1278, 1283 (Fla. 2000) (". . . the civil remedy provided in subdivision (1)(b)1 [of section 624.155] was not in existence for first-party insureds before the adoption of the civil remedy statute. . . . Because this statute is in derogation of the common law, it must be strictly construed."); *Time Insurance Company, Inc. v. Burger*, 712 So. 2d 389, 393 (Fla. 1998) ("A court will presume that such a statute was not intended to alter the common law other than as clearly and plainly specified in the statute.").

There is no indication in section 624.155[1] that it is intended to apply to surety bonds. There is no reference to sureties, bonds, principals or obligees. The statute refers only to insurers, insurance policies, liability coverages, and insureds. The section of the Florida Insurance Code dealing with sureties is Part XII, Surety Insurance Contracts, sections 627.751-759. It includes section 627.756(1) making the attorneys' fee provision of section 627.428 applicable to sureties. If the Legislature had intended for section 624.155 to apply to sureties, it would have said so either in

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[1] SAA also refers the Court to the legislative history of section 624.155, which is set forth in part in the Sureties' Answer Brief, footnote 6. There is simply nothing in the legislative history to suggest that the Legislature intended section 624.155 to apply to sureties.

the section itself or in Part XII.

Applying the rule of strict construction against changes in the common law, the Court should hold that section 624.155 does not apply to sureties. This would answer the first certified question in the negative and make it unnecessary to address the other questions.

The first question certified by the Eleventh Circuit is:

> 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 §624.155(1)(b)(1)?

Although the first certified question refers to subsection (1)(b)(1) of section 624.155, it can be answered in the negative because section 624.155 as a whole does not apply to surety bonds.

I. The Surety's Duty to the Obligee is Fundamentally Different From an Insurer's Duty to an Insured.

An insurance policy is a two-party contract in which the insurer assumes primary responsibility for a risk of loss. A surety bond is a three-party contract in which the principal remains primarily liable for the underlying obligation. The surety guarantees performance of the obligation, but the primary responsibility remains with the principal. If the surety is called upon to perform, it is entitled to indemnity from the principal.

In *Great American Ins. Co. v. North Austin Municipal Utility District No. 1*, 908 S.W.2d 415, 418 (Tex. 1995), the court stated:

> Second, concerns that a surety may take advantage of a bond obligee in the claims resolution process ignore the fundamental differences between a liability insurance contract and a surety bond. While a liability insurance contract involves only two parties, the insurer and the insured, suretyship involves a tripartite relationship between a surety, its principal, and the bond obligee, in which the obligation of the surety is intended to supplement an obligation of the principal owed to the bond obligee.

Western World Ins. Co. v. Travelers Indemnity Co., 358 So. 2d 602, 604 (Fla. 1st DCA 1978) states:

> The surety on a bond is lending its credit to make certain, if the conditions of the bond are violated, that the aggrieved party will be protected in the event the principal is financially unable to comply with the conditions of the bond. If the principal can satisfy the obligation, the surety need not respond. The surety, unlike the liability insurer, however, is entitled to be indemnified by the one who should have performed the obligation."

The dispute in the instant case was between Dadeland Station Associates, Ltd. ("Dadeland") and Walbridge Aldinger Co. ("Walbridge"). The Sureties guaranteed Walbridge's performance. They did not take over the primary obligation to perform. In the construction contract, Walbridge and Dadeland agreed to settle their disputes by arbitration. When the arbitrators rendered a decision, Walbridge promptly paid what it owed, with interest.

Dadeland argues, in effect, that the Sureties should have pre-empted the arbitration process and paid Dadeland over Walbridge's objections. If the Sureties had been Walbridge's insurers instead of its sureties, they would have had the primary obligation to pay and the ability to protect Walbridge by settling the claim. As Walbridge's sureties, however, the Sureties could not settle the disputed claims without prejudicing Walbridge's ability to have the claims decided on their merits in the contractually mandated arbitration.

Dadeland does not claim a right to bad faith damages from Walbridge. Clearly, the Legislature did not intend for section 624.155 to apply to claims against construction contractors. By virtue of the Sureties' contractual and common law right to indemnity, the Sureties are entitled to recover any damages they suffer from Walbridge and any individual indemnitors. If Dadeland can assert such a claim against the Sureties, either Walbridge will have to indemnify the Sureties, and thus bear damages never intended by the Legislature, or the party secondarily liable for the underlying debt will be exposed to greater damages than the party primarily liable. This illogical result exposes the fallacy of treating a three-party surety bond as if it were a two-party insurance policy and treating the bond obligee as if it were an insured.

In *David Boland, Inc. v. Trans Coastal Roofing Co.,* 851 So. 2d 724, 727 (Fla.

2003), a concurring opinion by Justice Wells, joined by Justices Anstead, Pariente, Cantero and Bell, states:

> It is my view that the role of such a contract surety is sufficiently distinct from the role of insurers that issue insurance policies so that the attorney fee liability of a construction contract surety needs to be covered by a separate statute.

In the *Boland* case, the Court was bound by the parties' agreement that section 627.756 applied to the dispute. The concurring opinion, however, recognized the unique nature of suretyship and suggested that the Legislature reconsider section 627.756 and its application of section 627.428 to contract sureties. In the instant case, there is no statute similar to section 627.756, and the Court is free to determine the application of section 624.155 to contract sureties.

II. Sections 627.428 and 627.756, Florida Statutes, Do Not Support Dadeland's Claims.

At pages 13-14 of its Initial Brief, Dadeland argues that sections 627.428 and 627.756, Florida Statutes, support its argument that a performance bond obligee is an "insured" under section 624.155(1)(b)(1). SAA suggests that the opposite is true. Sections 627.428 and 627.756 show that if the Legislature intended an insurance civil remedy statute to apply to a surety it said so explicitly.

Section 627.428(1) states:

> Upon the rendition of a judgment or decree by any of the courts of this

> state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Section 627.756(1) states:

> Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.

Section 627.428 allows attorneys' fees to an insured or named beneficiary, and section 627.756 states that the owner suing the surety on a performance bond "shall be deemed to be" an insured or beneficiary for the purposes of section 627.428. Clearly, if "insured or beneficiary" already included a contract bond obligee, there would have been no need for section 627.756.

Moreover, the concluding phrase "for the purposes of this section" evidences the Legislature's intent to limit the inclusion of owners in the definition of "insureds" or "beneficiaries" to section 627.428. This Court has held that when a statute describes a particular situation in which something should apply, a court must infer that the Legislature intended to omit or exclude situations not specifically addressed.

Gay v. Singletary, 700 So. 2d 1200, 1201 (Fla. 1997). Thus, Dadeland's effort to use section 627.756(1) to support its assertion that section 624.155 applies to sureties must fail.

III. Dadeland's Argument Contradicts the Established Principle that an Insurer Cannot Subrogate Against its Insured.

It is well established, in Florida and elsewhere, that an insurer has no subrogation rights against its insured. *Bulone v. United Services Automobile Association*, 660 So. 2d 399, 404 (Fla. 2d DCA 1995) ("It is also important to consider that an insurance carrier has no right of subrogation against its own insured."); *Travelers Ins. Co. v. Warren*, 678 So. 2d 324 (Fla. 1996) (Concurring opinion: ". . . the fundamental principle of insurance law that an insurer cannot subrogate against its own insured."). Dadeland's argument is that the obligee of a performance bond is the surety's insured. If that were correct, then the surety would have no subrogation rights against the obligee.

It is equally well established, however, that a surety, upon meeting its bond obligations, is subrogated to the rights of the persons paid and of the bond principal against the obligee. *Transamerica Ins. Co. v. Barnett Bank of Marion County*, 540 So. 2d 113, 116 (Fla. 1989) stated:

> These rights of the surety as subrogee are not inferior even to the rights of the obligee and may be asserted against the obligee.

Indeed, the most common use of the surety's subrogation rights is to sue the obligee for contract funds owed under the bonded contract, or for wrongfully disbursing such funds in violation of the surety's rights. *Balboa Ins. v. W.C.B. Associates, Inc.*, 390 So. 2d. 172, 173 (Fla. 5th DCA 1980); *Union Indemnity Co. v. City of New Smyrna*, 130 So. 453 (Fla. 1930); *School Board of Broward County v. J.V. Construction Corp.*, 2004 WL 1304058, 14 (S.D. Fla. April 23, 2004); *Insurance Company of the West v. United States*, 243 F.3d 1367 (Fed. Cir. 2001); *Transamerica Ins. Co. v. United* States, 989 F.2d 1188 (Fed. Cir. 1993); *Pennsylvania National Mutual Casualty Ins. Co. v. City of Pine Bluff*, 354 F.3d 945 (8th Cir. 2004).

The concurring opinion in *Travelers v. Warren, supra.*, interpreted section 627.727(3), Florida Statutes, not to allow a passenger in the insured vehicle to claim under both the liability and uninsured motorists coverages of the policy because an uninsured motorist carrier has a right of subrogation against the tortfeasor, and such an interpretation would have conflicted with the principle that an insurer cannot subrogate against its own insured. 678 So. 2d at 330. In *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L. Ed. 2d 190 (1962) the Court rejected an attempt to limit the surety's traditional subrogation rights. The Court stated:

> Among the problems which would be raised by a contrary result would be the unsettling of the usual view, grounded in commercial practice, that suretyship is not insurance.

(371 U.S. 140 at Footnote 19).

Since it is established beyond question that an insurer cannot subrogate against its own insured and that a surety can subrogate against the obligee of its bonds, it follows that the obligee cannot be an "insured."

IV. Law From Other Jurisdictions Does Not Support Dadeland's Argument.

At pages 14-16 of its Initial Brief, Dadeland cites case law from seven states which have allowed bad faith claims against sureties. Those cases relied on the fact that surety is regulated as a type of insurance and held that the common law bad faith action permitted against insurers would also be permitted against sureties. Dadeland does not mention the cases from other jurisdictions which have analyzed the reasons for bad faith remedies against insurers and held that they were not available against sureties.

Most notably, in *Cates Construction, Inc. v. Talbot Partners*, 980 P.2d 407 (Cal. 1999), the court analyzed the question of whether a contract performance bond surety should be subject to the common law bad faith remedies available to an insured under California law. The court concluded at 980 P.2d 427:

> A construction performance bond is not an insurance policy. Nor is it a contract otherwise marked by elements of adhesion, public interest or fiduciary responsibility, such that an extracontractual remedy is necessitated in the interests of social policy.

In *Masterclean, Inc. v. Star Ins. Co.*, 556 S.E.2d 371 (S.C. 2001), the South Carolina Supreme Court, in deciding a certified question from the United States District Court, held that a surety bond is not subject to the bad faith rules applicable to an insurance policy. The court rejected the argument advanced by Dadeland that regulation as an insurer makes a surety subject to a bad faith action and stated:

> However, the surety's presence in a regulatory scheme does not render common law duties on an insurer applicable to a surety. A bad faith tort action arises from the common law due to special characteristics of the insurance relationship, not simply because it is a regulated industry.

Similarly, in *Great American Ins. Co. v. North Austin Municipal Utilities District, supra.*, the Texas Supreme Court reversed an award of extra-contractual damages against a performance bond surety, holding that "there is no common law duty of good faith and fair dealing between the surety and the bond obligee comparable to that between a liability insurer and its insured." 908 S.W. 2d at 418. The court rejected cases relying solely on the fact that suretyship is a type of insurance under state insurance codes and examined the policy considerations supporting the imposition of such damages.

A significant error in the cases cited by Dadeland is their belief that obligees require bonds to protect against catastrophic loss rather than to secure a commercial advantage. By contrast, *Cates Construction v. Talbot Partners*, *supra.*, quoting from Shattuck, *Bad Faith: Does It Apply to Sureties in Alabama*, 57 Ala. Law 241 (1996), found:

> In requiring a performance bond, then, the obligee "seeks the commercial advantage of obtaining a contract with the principal which provides additional financial security."

An obligee requires a bond for the commercial advantage of having a deep pocket guarantor available to pay if the principal becomes insolvent. A performance bond obligee does not expect the surety to protect it from litigation. The obligee would still have to resolve its disputes with the principal. The obligee does not expect the surety itself to complete the work. The surety is, after all, a financial institution not a construction contractor. The obligee does not even expect the surety necessarily to arrange completion. In the instant case, the bond stated in paragraph 4.4.2 that the Sureties could waive their right to complete the work and deny liability.

Construction contracts provide for progress payments as the work is performed. If a contractor defaults after completing 50% of the work, the obligee should have at least 50% of the contract price left to finish the work. Even if there are cost overruns, the obligee is not in the position of an insured that purchased insurance to protect against an unlikely but horrendous loss. The obligee has experience letting contracts (it let the bonded contract after all), the remaining contract funds, and its rights against the principal as well as against the surety. This case demonstrates the value of recourse against the principal. It was Walbridge that paid all of Dadeland's damages, plus interest and attorneys' fees, not the Sureties. Indeed, the Sureties would not have issued their bond in the first place if they did not believe that Walbridge could and would meet its obligations as it did here. Thus, a bond obligee simply is not in the vulnerable position occupied by many insureds after a loss has occurred.

In addition, several of the cases cited by Dadeland, rely on a California intermediate appellate court decision, *General Ins. Co. v. Mammoth Vista Owners' Association*, 220 Cal. Rptr. 291 (Cal. App. 1985), which was explicitly rejected by the California Supreme Court in *Cates, supra*, 980 P. 2d at 416-417.

Of course, if the issue in this appeal were a matter of common law, there would be nothing to decide. Under Florida common law, there was no bad faith remedy available to a first party insured against its insurer. Therefore, applying the same rules to sureties would lead to the same result. Under Florida law, there could be no common law bad faith remedy against a surety.

Of more relevance to the issue in this case are decisions from other jurisdictions with bad faith statutes. For example, 42 Pa. Cons. Stat. Ann. §8371 states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions . . . .

Courts in Pennsylvania have consistently held that there is no cause of action against a surety under section 8371. *Superior Precast, Inc. v. Safeco Ins. Co. of America*, 71 F. Supp.2d 438, 448-454 (E.D. Pa. 1999); *Pullman Power Products Corp. v. Fidelity and Guaranty Ins. Co.*, 1997 WL 33425288 (W.D. Pa. February 21, 1997); *M.A. Bruder & Sons, Inc. v. Williams*, 47 Pa. D. & C. 4th 243 (Pa. Com. Pl. 2000); *Pennsy Supply Inc. v. Mountbatten Surety Co. Inc.*, 37 Pa. D. & C. 4th 449 (Pa. Com. Pl. 1997); *Collier Development Co. Inc. v. Jeffco Construction Co.*, 25 Pa. D. & C. 4th 193 (Pa. Com. Pl. 1995); and *Ferrick Construction Company v. One Beacon Ins. Co.*, 2004 WL 3051443 (Pa. Com. Pl. December 27, 2004).

Article 21.21 of the Texas Insurance Code prohibits unfair methods of competition and unfair or deceptive practices or acts in the "business of insurance." In *Great American Ins. Co. v. North Austin Municipal Utilities District, supra.*, at 908 S.W.2d 424, the Texas Supreme Court held:

> Given the unique character, rights, and obligations of suretyship, and the complexities that would result by the imposition of liability under 21.21, we cannot conclude that the Legislature intended to include

> suretyship in the definition of the business of insurance under article 21.21. Absent a clear legislative directive, we conclude that suretyship, as historically understood in the insurance and suretyship fields, does not constitute the business of insurance under article 21.21.

The Texas Supreme Court recently reiterated its holding that suretyship is not the business of insurance under Article 21.21 in *Dallas Fire Ins. Co. v. Texas Contractors Surety and Casualty Agency*, 2004 WL 2913657 (Tex. December 17, 2004).

Both Pennsylvania and Texas regulate suretyship as a type of insurance, and the claimants in the cases cited above argued that definitions from other sections of the insurance code should control. The courts rejected this argument and looked to the language of the statute involved and the differences between a two party insurance policy and a tripartite surety bond to determine the intent of the legislature.

V. Reason, Economics and Public Policy Require a Negative Answer to the First Certified Question.

A surety bond assures that the obligee will receive the benefit of its bargain in the underlying contract. In the instant case, Dadeland contracted with Walbridge, and the contract provided for arbitration of any disputes. When the dispute arose, Walbridge largely, but not entirely, prevailed in the arbitration. Walbridge paid the arbitration award plus interest and attorneys' fees. This matter should be over, but it continues in litigation four and a half years after the arbitration award because

Dadeland is attempting to assert claims against Walbridge's guarantors on which it did not prevail against Walbridge.

A decision by this Court making contract bond sureties subject to statutory bad faith claims every time the principal is less than 100% successful in a dispute would have at least three unintended, adverse consequences. First, contractors would be placed at a serious disadvantage in any dispute with the bond obligee. The surety would owe the obligee a statutory duty of good faith, and every dispute would soon include a bad faith allegation against the contractor's surety as a way to pressure the contractor. If the contractor were less than 100% successful in resolution of the dispute, it would face the costs of defending and indemnifying its surety against the obligee's bad faith suit. In enacting a statue to assure that insurers act fairly and honestly toward their insureds, the Legislature did not intend to create a way for owners of construction projects to coerce their contractors. As this Court said in *State Farm Fire & Casualty Company v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997),[2] "We are confident that in enacting this section, the legislature did not intend this result."

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[2]In that case, the Court considered the dilemma that would have been created by holding that an insurer owed good-faith obligations to adverse parties.

Section 627.756(1) already gives obligees a substantial advantage over bonded contractors and their sureties by subjecting sureties to payment of attorneys' fees under section 627.428. This is certainly an incentive for contractors and sureties to pay claims and avoid litigation with an obligee.[3] If the Legislature had intended also to give the obligee rights under section 624.155, it surely would have said so in a provision comparable to section 627.756(1).

Second, sureties for even solvent contractors would have to anticipate bad faith actions and retain engineers, consultants and attorneys to build a record of a duplicate investigation of every claim. That is, in addition to the bond principal's investigation and preparation of its position on a contested claim, the surety would have to duplicate these efforts, and, consequently, duplicate the investigative expense. This duplicate expense, while not only wasteful, will ultimately be borne by the principal and any indemnitors of the principal. The result is that the principal will end up paying twice for the essentially identical investigation.

Third, the public interest in bringing disputes to a conclusion would be harmed by adding another category of litigation. Even though Walbridge timely paid the

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[3]In the *Boland v. Trans Coastal* case, for example, the obligee, after two trials, obtained a judgment of $31,654.42 and claimed $357,121.52 of attorneys fees (of which the trial court awarded $276,950.33). This Court eventually held that the penal sum of the bond was not a limit on the surety's liability for the fees. 824 So. 2d at 727.

arbitration award plus interest and attorneys' fees, litigation continues over four years after entry of the Award. By alleging bad faith against Sureties, Dadeland apparently seeks to obtain what the arbitrators determined it was not owed. Under Dadeland's theory, after a determination and payment of the principal's obligation, any obligee can simply re-classify its claims as bad faith and file suit against the surety.

At paragraph 19 of its Complaint in this action, Dadeland alleged four categories of damages against the Sureties: (a) costs of repairing inadequate work on the aforesaid project; (b) costs and attorneys fees incurred in the arbitration proceeding; (c) loss of use of monies; and (d) loss of business opportunities. Each of these categories of damages were, or could have been, claimed against Walbridge in the arbitration, and to the extent Dadeland was entitled to recover, it was paid by Walbridge. The current bad faith action against Walbridge's sureties is simply an attempt to re-litigate the arbitrators' determinations that were adverse to Dadeland.

CONCLUSION

The first question certified by the Eleventh Circuit of Appeals should be answered in the negative because section 624.155 does not apply to claims on surety bonds. This answer renders the rest of the certified questions moot, and the Court should decline to answer them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I CERTIFY that this Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is printed in Times New Roman 14-point font.

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