IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE FLORIDA

CASE NO. SC04-1828

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

Appellants,

-vs-

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

Appellees.
_____/

REPLY BRIEF OF APPELLANTS ON THE MERITS

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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PREFACE

This case is before the Court on five certified questions from the United States Circuit Court of Appeals for the Eleventh Circuit. Appellant, Dadeland station Associates, Ltd. and Dadeland Depot, Inc., will be referred to as collectively as ADadeland.@ Appellee, St. Paul Fire & Marine Insurance Company and American Home Assurance Company will be referred to as collectively as ASt. Paul.@ The following designations will be used:

(A) - Eleventh Circuit Opinion

(AB) - Appellees= Answer Brief

(IB) - Appellants= Initial Brief

(R) - Record-on-Appeal

This Court has Jurisdiction

St. Paul contends this Court does not have jurisdiction because the answers to the Certified Questions would not be determinative of the cause. However, that is an issue that the Eleventh Circuit is presumed to have considered and decided, since the Florida constitutional provision, statute, and rule of procedure regarding certified questions from federal courts are unambiguous in establishing that condition, see Article V, '3(b)(6), Florida Constitution, '25.031 (2003), Fla. Stat., and Fla.R.App.P. 9.150. Additionally, St. Paul=s contention is diametrically opposed to what it argued to the Eleventh Circuit with respect to the ruling of the trial court.

Contrary to St. Paul=s contention, Dadeland did challenge the dicta in Judge Hurley=s opinion which commented on the factual merits of Plaintiff=s bad faith claim. In Point V of Dadeland=s Initial Brief in the Eleventh Circuit, it challenged dicta of the trial court and expressed concern that it would Abe seized upon by the sureties as an alternative basis for affirmance@ (11th Cir. IB 41). In the context of that argument, Dadeland specifically addressed the trial court=s comments on the factual merits of Plaintiff=s bad faith claim (11th Cir. IB 44-46). St. Paul=s response included, inter alia, the following (11th Cir. AB 24, 25):

> As a general rule, the Court of Appeals should not consider issues the District Court did not decide. Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). In this case, the decision dismissing Plaintiffs= case rested on the grounds that Plaintiffs did not comply with the conditions precedent to bringing an action under Section 624.155, and that Plaintiffs= breach of contract claim is barred by res judicata (R-137).
>
> * * *

> Finally, at the end of the Initial Brief, Plaintiffs discuss briefly the merits of their bad faith claim (Initial Brief p.44-46). The District Court did not rule on this issue, and Plaintiffs have not framed it as an issue in their Initial Brief (R137-23). Therefore, this Court need not consider the merits of Plaintiffs= bad faith claim. [Emphasis supplied.]

St. Paul never argued to the Eleventh Circuit that Judge Hurley=s dicta regarding the factual merits of Plaintiffs= bad faith claim was an alternative basis for affirmance. Obviously the Eleventh Circuit has concluded that it was not. Additionally, St. Paul never argued to the Eleventh Circuit that certification of questions to this Court would be inappropriate because the case could be determined on other grounds. This Court should not Areview@ the Eleventh Circuit=s determination that resolution of the Certified Questions would be determinative in this case, especially when St. Paul never made that argument to the Eleventh Circuit.

QUESTION I

> IS THE OBLIGEE OF A SURETY CONTRACT CONSIDERED AN AINSURED@ SUCH THAT THE OBLIGEE HAS THE RIGHT TO SUE THE SURETY FOR BAD-FAITH REFUSAL TO SETTLE CLAIMS UNDER '624.155(1)(b)(1), FLA. STAT.

As noted in the Initial Brief, the issue before this Court is one of statutory construction, not an analysis of whether this Court should recognize a common law bad faith claim on behalf of an obligee against a surety. For that reason, Dadeland will address the statutory construction arguments raised by St. Paul, and then briefly dispose of the policy arguments and cases from other jurisdictions relied on by St. Paul.

Statutory Construction

St. Paul=s brief ignores the statutory provisions which unequivocally establish the legislature=s intent that sureties are Ainsurers@ for purposes of the Florida Insurance Code, and that the rights of parties to surety contracts be governed by that statutory scheme. St. Paul=s brief never mentions '624.03, Fla. Stat., which unambiguously defines an Ainsurer@ as including, inter alia, a Asurety,@ nor does it address '624.02, Fla. Stat., which defines Ainsurance@ in a manner that clearly encompasses surety contracts. St. Paul also ignores '624.6011(5), Fla. Stat., and '624.606, Fla. Stat., which unambiguously express the legislature=s intent to regulate surety contracts under the Insurance Code.

St. Paul argues that '624.155, Fla. Stat., Adoes not mention owners, subcontractors, laborers, or materialmen; nor does it mention sureties, suretyship, or bonds@ (AB 19). However, it was unnecessary for the legislature to do so, since '624.155(1), Fla. Stat., provides that Aany person may bring a civil action against any insurer when such person is damaged...@ by violations of enumerated statutes or, by an insurer=s commission of specified acts. Since the legislature unambiguously defined the term Ainsurer@ as including a surety, and the statute provides that the suit can be brought by Aany person,@ there was no need for the legislature to enumerate every type of person or entity who could bring a claim under '624.155, Fla. Stat.

St. Paul also contends that the Florida Legislature Amade [it] clear when it intended '624.155 to apply,@ citing statutes specifically mentioning that remedy in the context of self-insurance funds, international health insurance policies, and assessable mutual insurers (AB 20-21). St. Paul=s argument ignores the statutory scheme relating to those

particular entities, since the legislature provided that those types of insurance were not subject to the Florida Insurance Code, except as specifically provided in the statutes addressing them, see '624.488, '624.123, '628.6016, Fla. Stat.[1] In that context, it was necessary for the legislature to explicitly provide that those types of insurance were subject to the civil remedy. The statute itself provides that it is applicable to Aany insurer,@ '624.155(1), Fla. Stat. That argument is also meritless, because it is indisputable that '624.155, Fla. Stat., has been applied to types of insurance other than those mentioned in the statutes relied upon by St. Paul, Auto-Owners Ins. Co. v. Conquest, 658 So.2d 928 (Fla. 1995) (homeowner=s policy); Vest v. Travelers Ins. Co., 753 So.2d 1270 (Fla. 2000) (uninsured motorist coverage); Talat Enter., Inc. v. Aetna Cas. & Surety Co., 753 So.2d 1278 (Fla. 2000), cert. quest. answered, 753 So.2d 1278 (Fla. 2000), aff=d, 217 F.3d 1318 (11th Cir. 2000) (commercial fire insurance policy).

St. Paul argues that since the legislature specified that owners, subcontractors, laborers, and materialmen would be insurers or beneficiaries for purposes of '627.756(1), Fla. Stat., they should not be deemed insureds or beneficiaries for any other purpose. However, simply because the legislature was more specific in that context does not justify that conclusion. As noted in the Initial Brief, and ignored by St. Paul, it would be

[1]/St. Paul also references '627.7283, Fla. Stat., which simply notes that '624.155(1)(a)6, Fla. Stat., is a remedy for violations of that statute.

unreasonable to conclude that while the legislature intended to treat surety contract as insurance, but did not intend any person nor entity to be considered an Ainsured.@

In Nichols v. Preferred National Ins. Co., 704 So.2d 1371 (Fla. 1997), this Court held that the obligee on a guardianship bond was entitled to an award of attorney=s fees under '627.428, Fla. Stat., even though that statutory provision does not specifically identify obligees of surety bonds as being entitled to such an award. This Court specifically noted that the term Ainsurer@ is clearly defined under the Florida Insurance Code to include a Asurety@ and, thus, the surety could be assessed fees under '627.428, Fla. Stat. Obviously, this Court concluded that the term Ainsured or the named beneficiary@ in '627.428(1), Fla. Stat., included an obligee under a surety contract.

Finally, on the issue of statutory construction, St. Paul focuses exclusively on '624.155(1)(b)(1), Fla. Stat., in claiming that the term Ainsured@ in that context cannot include an obligee on a surety bond, but ignores that Dadeland also specifically alleged a statutory cause of action for violations of '624.9541(1)(I), Fla. Stat., which is specifically enforceable through '624.155(1)(a)1, Fla. Stat. St. Paul simply fails to address those claims and, thus, apparently concedes sub silentio that they are applicable to sureties.

Cases from Other Jurisdictions and Policy Considerations

In the Initial Brief, Dadeland cited authority from other jurisdictions to show that the Florida legislature=s creation of a statutory bad faith cause of action which applied, inter alia, to an obligee against a surety, was neither aberrational nor unreasonable. However, that was not intended to minimize the fact that the issue here is one of statutory

construction, not whether this Court should recognize a common law bad faith claim. Nonetheless, St. Paul relies heavily on cases from other jurisdictions to suggest that the result in this case should be governed by policy considerations independent of statutory construction. Those arguments should be rejected, especially since the authorities St. Paul relies upon are clearly distinguishable.

St. Paul relies on Cates Const., Inc. v. Talbot Partners, 980 P.2d 407 (Cal. 1999). There, the California Supreme Court addressed the issue of whether it should recognize a common law tort remedy of bad faith on behalf of an obligee against a surety on a performance bond. The court noted that the issue was separate from a statutory construction issue, but reviewed the California statutes as part of its discussion. It noted that the California Legislature had limited the definition of insurance to indemnity agreements (980 P.2d at 418); which is to be distinguished from the Florida statute defining insurance, which clearly includes surety agreements and performance bonds, see '624.02, Fla. Stat. The court in Cates noted that the California Legislature separately regulated sureties, and that there were statutory prohibitions against unfair and deceptive claims and settlement practices, albeit there was no private right of action for those statutory violations (980 P.2d at 420-21). However, the California court specifically noted that (980 P.2d at 420):

> The legislative branch is free to regulate suretyship, and, assuming a rational basis, may require sureties and surety bonds to adhere to the same regulations and requirements that apply to insurers and insurance policies

That is clearly what the Florida Legislature has done. More importantly, however, the policy analysis in Cates, supra, related to the issue of whether a common law bad faith claim should be recognized in the context of surety performance bonds, an issue that is not before this Court. Therefore, Cates is simply inapplicable.

The cases cited from other jurisdictions by St. Paul similarly address either common law claims, or statutory schemes that are not similar to the Florida Insurance Code, see Masterclean, Inc. v. Star Ins. Co., 556 S.E.2d 371 (S.C. 2001) (court rejects common law bad faith action for principal, but specifically declines to address viability of bad faith claim by obligee, see 556 S.E.2d at 337 n.4); Great Am. Ins. Co. v. North Austin Municipal Utility Dist. #1, 908 S.W.2d 415 (Tex. 1995) (court rejects common law bad faith action); Great Am. Ins. Co. v. General Builders, Inc., 934 P.2d 257 (Nev. 1997) (court rejects common law bad faith action); Institute of Mission Helpers of Baltimore City v. Reliance Ins. Co., 812 F.Supp. 72 (D.Md. 1992) (federal trail court concludes Maryland would not recognize common law bad faith action)[2]; Cincinnati Ins. Co. v. Centech Building Corp., 286 F.Supp.2d 669 (M.D.N.C. 2003) (federal trial court concludes no statutory nor common law action for bad faith); however, legislation in North Carolina treats insurers and sureties separately); Superior Precast, Inc. v. Safeco Ins. Co. of America, 71 F.Supp.2d 438 (E.D.P.A. 1999) (federal trial court concludes

[2]/The validity of the district court=s conclusion about Maryland law is doubtful, based on the decision in Atlantic Contracting & Material Co. Inc. v. Ulico Casualty Co., 844 A.2d 460 (Md. 2004).

that Pennsylvania statutes do not authorize bad faith action against surety, however, statutory scheme did not define the term Ainsurance@).

It should be noted that Cates, supra, has not met with unqualified acceptance. In fact, its reasoning was rejected in United States v. Atul Const. Co., 85 F.Supp.2d 414 (D.N.J. 2000), and International Fidelity Ins. Co. v. Delmarva Systems Corp., 2001 WL 541469 (Del.Super.). St. Paul has only demonstrated that two states, California and Texas, have unambiguously rejected common law bad faith claims by an obligee against a surety. That showing does not in any way undermine Dadeland=s assertion that a majority of jurisdictions have approved such a claim, finding it to be a reasonable remedy based on the inherent relationship between the parties, Dodge v. Fidelity and Deposit Co. of Maryland, 778 P.2d 1240 (Ariz. 1989); TransAmerica Premier Ins. Co. v. Brighton School District 27J, 940 P.2d 348 (Col. 1997); Suver v. Personal Service Ins. Co., 462 N.E.2d 415 (Ohio 1984); Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co., 797 P.2d 622 (AK 1990); Board of Directors of Association of Apartment Owners v. United Pacific Ins. Co., 884 P.2d 1134 (Haw. 1994); Delmarva Systems Corp., supra; Atul Const, supra. St. Paul clearly seeks to limit its exposure in all cases and to characterize its liability as simply guaranteeing that the contractor can satisfy any money judgment entered against it for malfeasance or a failure to perform. That, however, is not an accurate characterization of a surety=s undertaking in this context as explained in, United Bonding Ins. Co. v. General Cable Corp., 381 F.2d 753, 755 (5th Cir. 1967):

> The Creditors with a debt admittedly in default and admittedly guaranteed by the Surety must stand around while the contested liability, of the Prime Contractor, both substantive and in dollar amount, is litigated. In the meantime if the Surety=s position is maintained, the Creditors have only the unsecured promise of the Surety that it will pay if - - and the if is or may be a big one - - the recovery for the Creditors against the Prime Contractor is totally or partially inadequate. On the Surety=s theory the Acompensation@ for this suspension of its admitted obligations to the Creditor is the Creditor=s right to collect legal interest. But a surety contract is the businessman=s recognition that the protection is to enable people to continue in business. The bond is not to afford to the creditor security for satisfaction of a judgment wrought out by prolonged litigation. It is to assure prompt payment to a creditor of sums admittedly due and as to which the principal has no defenses. [Emphasis supplied.]

The bottom line is that the decision of the Florida Legislature to include sureties within the definition of Ainsurer@ and to regulate them under the Insurance Code, including the availability of the statutory cause of action in '624.155, Fla. Stat., was neither aberrational, nor unreasonable. This Court=s evaluation of the issue in this case is one of statutory construction, not one in which it should evaluate the policy considerations nor second guess the legislature=s decisions. For these reasons, this Certified Question should be answered Ayes.@

QUESTION II

> DOES THE LANGUAGE IN '624.155(1)(b)(3), FLA. STAT., ELIMINATE '626.9541, FLA. STAT.=S REQUIREMENT OF PROOF OF A GENERAL BUSINESS PRACTICE WHEN THE PLAINTIFF IS PURSUING A '626.9541, FLA. STAT., CLAIM THROUGH THE RIGHT OF ACTION PROVIDED IN '624.155, FLA. STAT.?

St. Paul again seeks to avoid resolution of the Certified Question by claiming it is not determinative of the case, in contradiction to the Eleventh Circuit=s decision to certify

the question to this Court. It should be noted that St. Paul did not raise this Awaiver@ issue at any time in the Eleventh Circuit. Moreover, in context, the only reasonable construction of the District Court=s language is that it deemed the claim waived because Dadeland did not present proof that St. Paul=s conduct in this case constituted a general business practice, since there was extensive evidence and argument presented in support of Dadeland=s substantive claims of unfair settlement practice including, inter alia, depositions, documents, and other discovery (R71, 75). Moreover, contrary to the trial court=s statement as discussed in Question III, infra, Dadeland could not raise the '626.9541, Fla. Stat., claims in arbitration because they were premature. Therefore, this Court should address Question III as certified by the Eleventh Circuit.

On the merits, St. Paul=s argument makes no sense. The only provision referenced in '624.155(1), Fla. Stat., which mentions a Ageneral business practice@ requirement is '626.9541, Fla. Sta. Therefore, the only reasonable construction of the Aflush left@ language is to eliminate that element of proof for claims brought pursuant to that provision.

Contrary to St. Paul=s contention, Ticor Title Ins. Co. v. University Creek, Inc., 767 F.Supp. 1127 (N.D. Fla. 1991), does not support its position; it is contrary to it. The court there simply held that the plaintiffs were not entitled to punitive damages under '624.155, Fla. Stat., because subsection (1)(b)(4) prevented such an award in the absence of proof of a general business practice (767 F.Supp. at 1139). Subsequently, the court held that the plaintiff was not entitled to compensatory damages under

'624.155(1)(a)(1), Fla. Stat., because such an award would have been duplicative of its recovery under Count I of its counterclaim, not because the Plaintiff needed to prove a general business practice.

St. Paul=s argument that the Aflush left@ language solely relates to '624.155(1)(b), Fla. Stat., makes no sense, because there is no mention of a need to prove a general business practice in the language of that subsection. Therefore, the plain meaning of the statutory language compels the conclusion that the Plaintiff was not required to prove a general business practice in order to establish its claim under '624.155(1)(a)1, Fla. Stat.

QUESTION III

> IS AN ARBITRATOR=S FINDING THAT A SURETY=S PRINCIPAL HAS BREACHED ITS DUTY TO THE OBLIGEE, AND THAT THE SURETY IS BOUND TO THE ARBITRATION AWARD TO THE EXTENT THAT ITS PRINCIPAL IS BOUND, SUFFICIENT TO SATISFY THE CONDITION PRECEDENT TO A LATER BAD-FAITH REFUSAL TO SETTLE CLAIM THAT THERE BE A PRIOR ADJUDICATION THAT THE PLAINTIFFS WERE ENTITLED TO A PAYMENT OF A CLAIM FROM THE SURETIES?

St. Paul cites Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla. 1991), as holding that a prerequisite to the accrual of a cause of action under '624.155, Fla. Stat., is a determination Aby way of judgment or settlement, that the insurer breached the insurance contract.@ That is not what Blanchard held. Blanchard stated that (575 So.2d at 1291):

> Thus, an insured=s underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith and settlement negotiations can accrue.

See also, Vest, supra (AIn order to state a cause of action for bad faith, Imhof had to allege that there had been a determination of the extent of his damages covered by the underlying insurance contract@).

That does not require a breach of an obligation under the insurance contract; only a determination of entitlement to benefits under the insurance contract which, in the case sub judice, was a determination made by the arbitrators. The arbitrators specifically found that St. Paul=s defenses were without merit, and that it was jointly liable with Walbridge for the amount of the award

The majority of St. Paul=s response addresses the facts of the case sub judice, which are irrelevant to this Court=s resolution of certified questions. St. Paul contends that it had a contractual right to deny liability under &4.4.2 of the bond, and that, as a result, it is immune from any claim that it acted in bad faith. However, under its construction of the bond, it could deny liability in all cases, and rely on that provision as support for its actions. Obviously, that makes no sense. Moreover, the fact that Dadeland did not obtain all the damages it sought in arbitration does not mean that St. Paul could act cavalierly and in bad faith with respect to the over $1 million in damages for which the principal and St. Paul were ultimately held liable. More importantly, however, the factual issues are not before this Court and, therefore, this Court need not address them.

QUESTION IV

IS THE ARBITRATOR=S DECISION RES JUDICATA BARRING DADELAND=S LATER CLAIM AGAINST THE SURETIES FOR BAD-FAITH REFUSAL TO SETTLE?

St. Paul concedes that Dadeland=s '624.155, Fla. Stat., claim is not barred by res judicata, because it could not have been raised in the arbitration proceeding. That should be dispositive of this question, but St. Paul then argues that Dadeland could have litigated similar issues in arbitration. Even assuming arguendo any merit to that contention, it is legally irrelevant. The doctrine of res judicata relates solely to the preclusion of causes of action, not particular issues, see Topps v. State, 865 So.2d 1253 (Fla. 2004). St. Paul also claims Dadeland cannot recover duplicative damages (which Dadeland argues), but that also has nothing to with res judicata. Clearly Dadeland will not be entitled to recover the same damages twice, nor is it attempting to do so in this lawsuit. St. Paul=s argument that Dadeland=s damages are duplicative is without merit. Dadeland is claiming damages in this action that it did not claim in arbitration, and presented evidence of such damages, including, inter alia, loss of use of monies which consists of using the monthly rents from the project to pay for the necessary repairs, the costs and interest associated with monies borrowed to underwrite the ongoing repairs, the loss of use of such monies as a result, the loss of other business opportunities resulting from the requirement to fund the ongoing repairs to the project, see Sivilla v State Farm Mut. Auto. Ins. Co., 614 So.2d 553 (Fla. 3rd DCA 1993).

The trial court below claimed that the Plaintiff raised issues similar to the statutory

bad faith claims simply because they noted in their arbitration complaint that Athe sureties have not taken any action to correct the defects and deficiencies@ (R137-22). However, that assertion simply established that the surety had not corrected any of the defects or deficiencies which might have reduced the award to which Dadeland would be entitled in arbitration; it did not constitute an allegation that St. Paul breached the statutory duties enforceable under '624.155, Fla. Stat. St. Paul=s argument has a fundamental flaw in its logic; it is apparently arguing that when an insured seeks to establish damages under the underlying insurance contract, it necessarily raises the same issues that could be pursued in claims under '624.155, Fla. Stat. If that were true, the statute would never have any application. To accept St. Paul=s argument would effectively abrogate '624.155, Fla. Stat., claims because they would be premature in the underlying litigation, yet barred because they raise (allegedly) similar issues. Clearly, that makes no sense and was not the legislature=s intent.

QUESTION V

WILL AN ARBITRATOR=S DENIAL OF THE DEFENDANT=S AFFIRMATIVE DEFENSES IN A BREACH OF CONTRACT CLAIM COLLATERALLY ESTOP THE SAME DEFENDANTS FROM RAISING THE SAME DEFENSES IN A SUBSEQUENT BAD-FAITH REFUSAL TO SETTLE CLAIM AGAINST THE SAME PLAINTIFF?

St. Paul essentially concedes this point, because it acknowledges that it is precluded from relitigating defenses raised in the arbitration (AB 48). Instead, St. Paul argues that in the bad faith case it should be entitled to present evidence that it believed it had defenses which excused performance under the bond (AB 48). Dadeland does not dispute that. However, that does not permit St. Paul to re-raise those claims as affirmative defenses to the bad faith claims; that only constitutes evidence relevant to St. Paul=s denial that it acted in bad faith, see State v. Cohen, 568 So.2d 49, 51-52 (Fla. 1990) (affirmative defense assumes allegations of complaint are true, but raises justification, immunity, or right to engage in that conduct). Dadeland has never claimed that St. Paul could not do that, only that its affirmative defenses to the bad faith claim were meritless because they had been resolved in the arbitration against St. Paul and it was collaterally estopped by that determination. Since St. Paul has essentially conceded this point, this Question must be answered in the affirmative.

CONCLUSION

For the reasons stated above, the Certified Questions should be answered in the affirmative, except Question IV, which should be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on attached service list, by mail, on April 11, 2005.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Reply Brief of Appellants on the Merits is Times New Roman 14pt.

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