SUPREME COURT OF FLORIDA

FRANK J. TRYTEK, et al.,

Petitioners,

vs.

GALE INDUSTRIES, INC.,

Respondent.
_____/

Case No. SC07-1641

Lower Tribunal Case No. 5D06-1569

AMICUS CURIAE BRIEF OF
SOUTHEASTERN ASSOCIATION OF CREDIT MANAGEMENT and
FLORIDA INDEPENDENT CONCRETE & ASSOCIATED PRODUCTS, INC.
IN SUPPORT OF GALE INDUSTRIES, INC.

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Table of Contents

Table of Authorities

Cases **Page**

Other Authorities

This amicus brief is submitted on behalf of the SOUTHEASTERN ASSOCIATION OF CREDIT MANAGEMENT (hereinafter "SACM") and FLORIDA INDEPENDENT CONCRETE & ASSOCIATED PRODUCTS, INC. (hereinafter "FICAP"). SACM and FICAP (collectively "SACM/FICAP") support the position of Gale Industries, Inc. in the case.

SACM is an organization of more than five hundred (500) credit managers, many of whom are the "financial people" of construction contractors, subcontractors and suppliers ("Lienors") operating throughout the State of Florida. FICAP is a trade

organization of independent concrete and construction material suppliers throughout the State of Florida.

SACM/FICAP's Interest in the Proceedings

SACM/FICAP's interests in these proceedings are as follows:

(a) to ensure clarity regarding Lienors' entitlement to attorney's fees in construction lien cases so that proper reserves for collection efforts may be maintained by SACM/FICAP-related Lienors;

(b) to ensure clarity regarding Lienors' entitlement to attorney's fees in construction lien cases so that the pricing structure for services and materials offered by SACM/FICAP-related Lienors may accurately reflect cost of collection contingencies;

(c) to promote reasonable and economically viable construction costs throughout the State of Florida;

(d) to maintain the financial stability of the construction industry throughout the State of Florida;

(e) to promote a rule of law that is consistent with the economic realities of the Florida construction industry; and

(f) to ensure certainty on the issue of when Lienors are entitled to attorney's fees in construction lien foreclosures.

SUMMARY OF ARGUMENT

A.

SACM/FICAP supports all of the legal arguments made in the Brief of Gale Industries, Inc., but will endeavor not to repeat those arguments in this Brief.

B.

SACM/FICAP believes that the Court should refrain from exercising its discretionary jurisdiction and abstain from issuing an opinion on the question certified.

Due to the settled rule of law on the question certified, no opinion from this Court is "justified or required". Four of the five District Courts of Appeal adopted the rule announced by the Fifth District in this case. That settled rule has been utilized for over two decades. An opinion from this Court would engender instability and confusion in a settled area of law.

SACM/FICAP also believes that the Court should refrain from exercising its

discretionary jurisdiction and abstain from issuing an opinion because the case at bar is an anomaly and atypical of construction lien foreclosure actions. The great bulk of construction liens are recorded by non-privity subcontractors, sub-subcontractors and materialmen. Yet, none of those interests are represented in this action, nor does the record reflect the concerns of those interests or provide the basis for an informed decision. The present case essentially involves an action by an owner against his own contractor.

C.

Although no rule of law relating to attorney's fees can afford perfect justice in all cases, the settled rule as announced by the District Court below has merits. What the rule may lack in flexibility it gains in predictability. Further, the settled rule provides stability to the industry. Arguably, more equity results from a definite law that lets all players know the rules of the game before play begins than one that forces the referee to settle every individual dispute as his discretion dictates.

The settled rule, by uniformly depriving lienors of fees if their liens do not comply with the statute, may act as a self-regulating mechanism for the industry and a protection for owners. The consequences of sloppy notices and inaccurate or exaggerated liens are too great to encourage cutting corners.

A settled rule on fees also encourages settlement of cases. Parties who know for a certainty that they will be required to pay double legal fees if they lose a case are less likely to gamble on litigating weak claims and defenses. Alternatively, if there is

always the possibility of escaping fees through a judge's exercise of discretion, the litigation gamble is less ominous and more tempting.

D.

The settled rule is consistent with the two goals of the Florida Construction Lien Law, which are: (1) protecting owners from paying twice for building services (by providing them with notices) and (2) preventing unjust enrichment of owners at the

expense of lienors, thereby insuring the survival of small lienors.

E.

Under the settled rule, lawyers know for certain that they will be able to collect fees in cases where the client/lienor has a "good" lien, even if the lien is partially reduced by defenses. That certainty evaporates if a rule of discretion is substituted. Small lienors will have difficulty finding representation.

Further, where it is conceded that the lienor has properly perfected his lien but the owner has small dollar defenses, the lienor is likely to be punished, rather than rewarded, for the very reason that he has complied with the statute. In such cases, the only "significant issue" litigated will be the owner's defenses, not the lien. Even if the defenses result in only a minor reduction of the lien, the lienor is deprived of fees. This may encourage useless "litigation" of concededly valid liens.

F.

While the concepts of flexibility and discretion have great appeal in the courtroom, they could play havoc in the field and on the industry that the Construction Lien Law was designed to regulate. Business thrives on stability, predictability, and definiteness. The settled rule on fees has those merits to recommend it over the new rule.

ARGUMENT

Point I

THE COURT SHOULD ABSTAIN FROM EXERCISING ITS DISCRETIONARY JURISDICTION

For the reasons articulated in this Brief, SACM/FICAP urge the Court to refrain from issuing an opinion on the certified question presented in the case.

. . . Whether this Court will in any given case render a decision under these three provisions of the Constitution is a matter solely for this Court in the exercise of its sound

judicial discretion to determine. . . . After jurisdiction attaches, the Constitution then brings into play the power of this Court to exercise its discretion and then to determine whether in that case an opinion is justified or required.

Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla.1961).

A. NO OPINION IS "JUSTIFIED OR REQUIRED"

No standard appears to guide appellate courts in determining whether to rule or

abstain on certified questions presented to them. However, one consideration appears to be that the issue be "one of constitutional magnitude and . . . one which is frequently raised but with inconsistent results in the lower tribunals". Star Casualty v. U.S.A. Diagnostics, Inc., 855 So.2d 251, 252 (Fla. 4th DCA 2003), quoting from Bradley v. State, 615 So.2d 854, 855 (Fla. 1st DCA 1993).

As shown in Gale's Brief (and on page 6 of the decision below), the Second, Third, Fourth and Fifth District Courts have all adopted the same "prevailing party"

definition for Section 713.29, Florida Statutes, in lien foreclosure cases. Hence, there is no issue here that is "frequently raised but with inconsistent results in the lower tribunals". Star Casualty, supra.[1]

B. BAD CASES MAKE BAD LAW

The case at bar is highly atypical in the area of construction lien litigation. The

[1] Nor does the instant certified question involve an issue of "first impression" in the District Courts, as the issue has been ruled upon repeatedly over the past twenty years. Cf. Duggan v. Tomlinson, 174 So.2d 393 (Fla. 1965) [procedure "is particularly applicable to decisions of the district courts of appeal of first impression"].

case involves a bazaar role reversal pitting an owner who performed the construction work against a contractor from whom payment is sought for the owner's work. This may be the only recorded case ever involving so unlikely a factual scenario. Moreover, the case involves a dispute between homeowners and their own contractor.[2].

[2] See Joint Pre-Trial Statement, contained in Tab 2 of Appellant's Appendix to Initial Brief, page 1, stating: "This case arises out of the construction of the Defendants/Counter-Plaintiffs, FRANK AND CATHY TRYTEK'S residence. The TRYTEK's (sic) hired the Plaintiff/Counter-Defendant GALE INDUSTRIES, INC. to perform the installation of insulation throughout their home" (e.s.). See, also, District Court opinion below stating, at page 2, first line: "Mr. and Mrs, Trytek were building a

By contrast, the vast majority of construction liens are not recorded by the owner's contractor, but by the numerous sub-contractors, sub-subcontractors and materialmen who work on construction projects and have no direct contact with the property owner. Generally, construction projects usually involve one contractor but many non-privity persons who perform work or supply materials.

The non-privity lienors normally seek payment from the contractor, who in the

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new residence. As part of that project, they contracted with Gale Industries, an insulation contractor, to provide insulation throughout the structure." (e.s.)

case of new construction is often a developer. Alternatively, the non-privity lienors seek recovery against a surety who has bonded the construction under Section 713.23 or 713.24, Florida Statutes.

The non-privity lienor is forced to foreclose his or her lien against the property only when no bond exists and the contractor has defaulted in making payment. Often the lienor's first contact with the owner is during foreclosure litigation. Counterclaims are rare in straight forward non-privity lien foreclosures, since there is no contract

between these persons and the owner. Typically, the lienor forecloses, defenses are raised, and the owner is left to file a third party claim against his own contractor to recover for any perceived defects in workmanship. The present case does not fit the common mold of the great bulk of construction lien foreclosures suits.

SACM/FICAP believe that the Court should be wary about establishing a general rule of law for all construction lien cases based on an anomalous situation. There are considerations relating to fee shifting that have not, and cannot, be properly considered

on the present case record. Fee shifting questions necessarily involve issues of policy as well as law. On the present record, the Court does not have sufficient information and background to make a policy decision. For instance, in the vast majority of lien foreclosure cases the lienor is a small tradesman who is less able to bear the burden of legal fees than the large developer or surety from whom payment is sought. In a proper case, or in legislative hearings, evidence and statistics could be presented to support the SACM/FICAP position. Such evidence could well influence a policy decision.

However, there is no such evidence in the record at bar.

No non-privity lienor is party to the present action. No surety is party to the suit. No developer is party to suit. These parties are as much affected by fee shifting rulings in construction lien litigation as the property owner, and more so numerically than general contractors. The Court should have the views of these important groups and interests before making a major decision that could strongly affect the economic balance in a major Florida industry. A court should not consider changes in the law in a

vacuum, Gammon v. Cobb, 335 So.2d 261(Fla. 1976), and should consider the serious consequences of a decision for the affected parties and society in general. J.A.S. v. State, 705 So.2d 1381 (Fla. 1998).

In summary, SACM/FICAP would urge abstention by the Court on the basis of the old adages that "bad cases make bad law" and that a ruling in this anomalous case could result in allowing the proverbial "tail to wag the dog".

Point II

MERITS OF THE SETTLED RULE ON ATTORNEY'S FEES IN CONSTRUCTION LIEN LITIGATION

A. WHAT IS THE SETTLED RULE?

SACM/FICAP will refer to the rule announced by the Fifth District below the "settled rule" on attorney's fees in lien foreclosure cases. Four of the five District Courts of Appeal have adopted that rule and it has been utilized for over two decades. SACM/FICAP views the Tryteks' position as a bid to change current settled law and will

refer to Trytek's position as the "new rule".

B. MERITS OF THE SETTLED RULE

The settled rule announced by the District Court has the merit of having been the recognized, established rule for over two decades. Stability in the law is good for business. What the rule may lack in flexibility, it gains in predictability. Arguably, there is more equity in a fixed law that lets all players know the rules of the game before play begins than one that forces a referee to settle every dispute in a manner that his

discretion suggests. Chapter 713, Part I, Florida Statutes, the Florida Construction Lien Law, is amended almost annually -- it is a much tweaked statute. Lienor, owner, developer and surety groups constantly work to "improve" the statutes. Yet throughout the years there has been no great outcry to amend Section 713.29, Florida Statutes, the fee assignment provision. Throughout the industry, there appears to be satisfaction with the statute as defined by four of the five District Courts over time. Specifically, no attempt has been made to redefine by statute the words "prevailing

party" in order to overrule the many court decisions.

One practical merit of the settled rule is that it may act as a sort of self-regulatory mechanism in the construction trades. Example: a carpenter performing work on a construction project knows under the settled rule that if he is meticulous in serving his lien notices, in timely recording his lien and in honestly stating the amount owed, he is assured of fair compensation, even though there may be some reduction in his bill due

to owner complaints.[3] The carpenter is encouraged to be honest and fair knowing that a defective lien imposes on him the penalty of attorney's fees of two lawyers, his own

[3] By statute and case law, the filing of a lien that is not deliberately erroneous or exaggerated does not invalidate the lien, even where the amount is disputed by the parties. Scott v. Rolling Hills Place, 688 So.2d 937, 939 (Fla. 5th DCA 1996); Onionskin, Inc. v. DeCiccio, 720 So.2d 257 (Fla. 5th DCA 1998); Stevens v. Site Developers, Inc., 584 So.2d 1064 (Fla. 5th DCA 1991); Castiello v. Sweetwater Homes of Citrus, Inc., 843 So.2d 1019 (Fla. 5th DCA 2003). Section 713.31, Florida Statutes, states that: "minor mistake or error in a claim of lien, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid lien".

and that of the property owner. Since the fees of two lawyers may, as in the case at bar, dwarf his substantive recovery and result in bankruptcy, the tradesman is encouraged to take care in following lien procedures and in being honest in his dealings. The message is clear to tradesmen -- honesty is the best policy.[4] A rule that allows individual judges to decide on a case-by-case basis which party should be

[4] Because of the difficulty of proving fraud, Section 712.31, Florida Statutes [damages for fraudulent lien] is less of a disincentive to dishonest lienors than the fees provision.

awarded fees does not send the same clear message.[5]

Another merit of the settled rule is that it probably encourages the settlement of cases, particularly those involving low dollar amount construction liens. Parties who know for a certainty that they will be required to pay double legal fees if they lose the case are less likely to gamble on litigating weak claims and defenses. Owners are

[5] It is a fact of life that most judges are homeowners but few are construction tradesmen. With a perception that sympathies lie against them, and with no bright line rule to rely on, the self- regulatory message of the settled fee rule is diminished.

discouraged from conjuring up perceived defects in work, or holding lienors ransom over minor problems. Lienors' attorneys are more likely to reject lienor cases involving weak liens. If the possibility exists of escaping fees through a judge's exercise of discretion, the litigation gamble is less ominous.

The Tryteks argue that adoption of the new rule will discourage negligent work by contractors. See Tryteks's Initial Brief, pp. 22-23. SACM/FICAP disagree. The carpenter in the field does not consider attorney's fees when nailing boards on a job

site. However, when preparing notices and a claim of lien back in his office the same carpenter may well dwell on the possibility of future litigation and attorney's fees. It is at this stage, when deliberation is at play, that the settled rule may work to keep him diligent and honest. Negligent work in the building trades is best combatted by the state licensing and regulatory procedures contained in Chapter 489, Florida Statutes.

Point III

THE SETTLED RULE IS CONSISTENT WITH THE OBJECTIVES OF THE CONSTRUCTION LIEN LAW

The purposes of the construction lien law were expressed by this Court in Florida Steel Corp. v. Adaptable Developments, Inc., 503 So.2d 1232, 1234 (Fla. 1986), as follows:

> Adaptable argues that the purpose of chapter 713 is to protect owners by placing limits on their liability to lienors. This is indeed one of the purposes of the Mechanics' Lien Act [now the Construction Lien Law], but the legislature had another purpose in enacting mechanics' lien legislation, i.e., preventing unjust enrichment of owners at the expense of lienors. Florida's Mechanics' Lien Act is an attempt to reconcile these conflicting purposes. . . . (e.s.).

As a practical matter, owners are generally better able to protect themselves than materialmen. They can distribute risks by requiring a bond from the contractor conditioned on the full faith and performance of all lien claims. It is not possible for subcontractors and materialmen to spread risks the way an ordinary merchant does. As we have noted, in the building trades considerable labor and material go into a single operation, generally for an extended period of time. As a result, materialmen and subcontractors cannot take on numerous projects because of the amount of capital tied

up in each project. Because of the vulnerable position materialmen are in and because of the importance of their survival to the construction industry, we cannot make a rule which would allow them to be taken advantage of by irresponsible owners or contractors.

See, also, WMS Construction, Inc. v. Palm Springs Mile Associates, Ltd., 762 So.2d 973, 974 (Fla. 3rd DCA 2000) (holding that the fundamental purpose of the Construction Lien Law is to afford laborers and materialmen the "greatest protection compatible with

justice and equity")

Because the settled rule on attorney's fees in lien foreclosure cases protects the lienor who follows the statutory procedure, while also protecting owners when the rules are not followed, it is consistent with the two objectives of the lien law. If a lienor does not follow the notice procedures of the statute, the lienor runs the risk of the owner paying funds to his insolvent or absconding contractor, rather than to the lienor. Making the lienor bear the burden of fees when he attempts to collect on an unperfected lien

achieves the goal of "placing limits on [the owner's] liability to lienors".

On the other hand, rewarding with attorney's fees the diligent and honest lienor who provides proper notices and warnings to the owner achieves the goal of protecting the survival of small tradesmen in the construction industry. Many of the smaller tradesmen would be out of business if they had to pay their lawyers each time they went to court to collect on a lien -- even if they won every case filed.

Point IV

ADVERSE EFFECTS OF THE NEW RULE

(a) Ability to enforce lien. One practical consideration in any change in the settled rule on fees is the effect on the small lienor's ability to enforce his lien. If construction liens cannot be enforced through foreclosure proceedings, they are worthless and lienors are not afforded the protection discussed in Florida Steel Corp., supra.

To defeat a construction lien, the property owner merely has to wait out the one

year statute of limitations, at which time the lien disappears and the owner has his improvements free of charge -- unless the lienor can find an attorney to file suit.[6] Currently, small lienors are able to obtain counsel to enforce their liens. An attorney can assess whether the lienor complied with notices and lien recording procedures and

[6] See Section 713.22(1), Florida Statutes - Duration of lien - which reads: "(1) No lien provided by this part shall continue for a longer period than 1 year after the claim of lien has been recorded..., unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. . . ."

reach a degree of comfort as to the value of the work performed. He can then make a reasonable determination of whether the owner's complaints are real or imagined. Once the attorney determines that the lien is "good" and that there will be a recovery in some amount (albeit possibly not in the full amount), he is virtually assured of getting his fees under the settled rule -- fees which a small carpenter, plumber or electrician could probably not pay. By contrast, under the new rule the lawyer will know that there is always the possibility of a fight over fees, since fees will always be at the discretion of

the judge. He will know that every case harbors the possibility of double litigation, viz.: the battle over the merits and the battle over fees. In the typical small lien case, the fee battle may swallow up the merits of the case.

(b) Discourages settlement. Just as the settled rule encourages settlement of cases, the new rule may have the adverse effect of discouraging settlement. Under the settled rule, the owner is discouraged from pressing minor complaints concerning workmanship and encouraged to work these out through price bargaining, since he may

be stuck with attorney's fees if he presses unreasonably. Owners are also encouraged to purchase statutory payment bonds. Under the new rule, owners will be encouraged to press their complaints and to litigate them, since there is always the chance they will be awarded fees, even if the lienor has a properly perfected lien.

(c) Punishes Diligent Lienors. Another adverse effect of the new rule is that it punishes "good" lienors who comply with the statutory notice requirements, whereas the purpose of the statute is to promote and reward full notice and disclosure to owners. In

cases where the lienor has admittedly complied with the statute but the owner has a small dollar set-off, the lienor is likely to be punished rather than rewarded for the very reason that he has complied with the law and provided all required disclosure. In such cases, the only "significant issue" tried will be the owner's set-off, as the lien's validity is conceded. Even if the set-off results in only a minor reduction of the lien, the lienor is deprived of fees. For example, assume here that Gale's undisputed lien was for $900,000 and the Trytek's set-off only $1,500. Under the trial court's ruling, Gale who

properly perfected an $898,500 lien, must pay $50,000 in fees to an owner with a mere $1,500 set-off. Hardly seems equitable.

(d) Encourages needless litigation. If the trial court is upheld and the rule announced there made law, as a practical matter this could be the last case in which a lienor ever agrees to summary judgment (or stipulates) as to the validity of his lien. He is better off litigating the uncontested lien, even over objections by the owner or surety, in order to make the lien a "significant issue" at trial and preserve his right to fees. Such

a result would be inimical to the stated goal of this Court ". . . to secure the just, speedy, and inexpensive determination of every action". Rule 1.010, Florida Rules of Civil Procedure. The cost of litigating an otherwise undisputed issue will thus bloat legal fees for whoever is eventually required to foot the bill.

Conclusion

The Court should decline to exercise its discretionary jurisdiction in this case and abstain from issuing an opinion because the interests of parties principally affected by

any decision on the issue are not represented in the record.

The settled rule has withstood the test of time. While the concepts of flexibility and discretion have great appeal in the courtroom, they could play havoc in the field on the industry that the Construction Lien Law is designed to regulate. Business thrives on stability, predictability, and definiteness. The settled rule has those merits to recommend it over the new rule.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae

Brief has been furnished by U.S. Mail to Edward M. Baird, Esquire, P.O. Box 2828,Orlando, FL 32802 and Michael R. D'Lugo, Esquire, P.O. Box 2753,Orlando, FL 32802-2753 this 21st day of November, 2007.

Certificate of Compliance with Rule 9.210(a)(2)

I hereby certify that the foregoing brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. Pro.

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