

SUPREME COURT OF FLORIDA

AMERICAN HOME
ASSURANCE COMPANY,

Petitioner,
vs.

CASE NO. SC02-1257
Lower Tribunal Case No.: 2D00-4404

PLAZA MATERIALS
CORPORATION,

Respondent,

**ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA**

***AMICUS CURIAE* BRIEF
ON BEHALF OF THE
FLORIDA TRANSPORTATION BUILDERS ASSOCIATION**

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TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Interest of the Florida Transportation Builders Association	1
Introduction	3
Summary of the Argument	5
Argument	6
Conclusion	21
Certificates of Service and Compliance as to Font Type/Size	22

TABLE OF AUTHORITIES

CASES

<u>Alex-Dex Corp. v. Nachon Enterprises, Inc.,</u> 641 So. 2d 858 (Fla. 1994)	15
<u>Allstar Building Materials Ltd. v. Donald F. Bronauer,</u> 724 So. 2d 616 (Fla. 5 th DCA 1998)	17
<u>Allstate Ins. Co. v. Rush,</u> 777 So. 2d 1027 (Fla. 4 th DCA 2000)	15
<u>American Cast Iron Pipe Co. v. Peabody-Peterson Co.,</u> 328 So. 2d 299 (Fla. 4 th DCA 1976)	6
<u>Carlile v. Game & Fresh Water Fish Comm'n,</u> 354 So. 2d 362 (Fla. 1977)	20
<u>City of Ft. Lauderdale v. Hardrives Co.,</u> 167 So. 2d 339 (Fla. 2 nd DCA 1969)	3
<u>Coastal Caisson Drill Co. v. American Cas. Co.,</u> 523 So. 2d 791 (Fla. 2 nd DCA 1988)	3
<u>Ferlita v. State,</u> 380 So. 2d 1118 (Fla. 1980)	16
<u>Florida Crushed Stone v. American Home Assurance Co.,</u> 815 So. 2d 715 (Fla. 5 th DCA 2002)	2, 12, 18, 19
<u>Florida Keys Community College v. Insurance Company of North America</u> 456 So. 2d 1250 (Fla. 3 rd DCA 1984)	9, 21
<u>Insurance Company of North America v. Metropolitan Dade County,</u> 705 So. 2d 33 (Fla. 3 rd DCA 1997)	13
<u>Inter-Continental Promotions, Inc. v. MacDonald,</u> 367 F. 2d 293 (5 th Cir., 1966)	15
<u>Kettles v. Charter Mortgage Co.,</u> 337 So. 2d 1012 (Fla. 3 rd DCA 1976)	3
<u>Martin Paving Co. v. United Pacific Ins. Co.,</u> 646 So. 2d 268 (Fla. 5 th DCA 1994)	1, 4, 10, 11, 12, 13, 19, 20, 21
<u>Mirror and Shower Door Products, Inc. v. Seabridge Inc.,</u>	

621 So.2d 486 (Fla. 4 th DCA 1993)	17
<u>Motor City Electric Co. v. Ohio Casualty Ins. Co.,</u> 374 So. 2d 1068 (Fla. 3 rd DCA 1979)	7
<u>Plaza Materials v. American Home Assurance Co.,</u> 2002 W.L. 940144 (Fla. 2 nd DCA 2002)	13, 19, 21
<u>Southwest Florida Management District v. Miller Construction,</u> 355 So. 2d 1258 (Fla. 2 nd DCA 1978)	6, 7, 8, 10
<u>State of Florida f/u/b/o Consolidated Pipe & Supply Co., Inc. vs. Houdaille Industries Inc.</u> 372 So. 2d 1177 (Fla. 1 st DCA 1979)	7, 8, 10, 11, 16
<u>State ex rel Florida Jai Alai Inc. v. State Racing Commission,</u> 112 So. 2d 825 (Fla. 1959)	15
<u>State v. Putnam County Dev. Auth.,</u> 249 So. 2d 6 (Fla. 1971)	15
<u>Taylor Woodrow Construction Corp. v. Burke Co.,</u> 606 So. 2d 1154 (Fla. 1992)	14, 16, 17
<u>United Bonding Ins. Co. v. City of Holly Hill,</u> 249 So. 2d 720 (Fla. 1 st DCA 1971)	6, 8
<u>Unruh v. State,</u> 669 So. 2d 242 (Fla. 1996)	15
<u>W.G. Mills, Inc. v. M&MA Corp.,</u> 465 So. 2d 1388 (Fla. 2 nd DCA 1985)	17
<u>WMS Construction Inc. v. Palm Springs Mile Associates, Inc.,</u> 762 So. 2d 973 (Fla. 3 rd DCA 2000)	3
<u>W.P.C. Inc. v. Hartford Accident & Indemnity Co.,</u> 698 So. 2d 1324 (Fla. 1 st DCA 1997)	13

STATUTES

Fla. Stat. 95.11	5, 12, 17, 19, 21
Fla. Stat. 95.11(5)(e)	19
Fla. Stat. 255.05	passim
Fla. Stat. 255.05(1)	10, 20
Fla. Stat. 255.05(1)(a)	11

Fla. Stat. 255.05(2)	4, 9, 10, 11, 16, 18, 19, 20, 21
Fla. Stat. 255.05(4)	5, 8, 9, 10, 13, 14, 15, 17, 18, 19, 20, 21
Fla. Stat. 255.05(6)	passim
Fla. Stat. 713	17
Fla. Stat. 713.01	18
Fla. Stat. 713.06(2)(c)	17
Fla. Stat. 713.08(4)(a)	18
Fla. Stat. 713.23	5, 19

INTEREST OF THE FLORIDA TRANSPORTATION BUILDERS ASSOCIATION

The Florida Transportation Builders Association (“FTBA”) is a non-profit organization of individuals, and businesses, engaged in the construction of transportation systems and in furnishing materials, equipment and services for that construction. The FTBA has a broad interest in ensuring that Florida Courts properly apply the principles of law which affect claims involving actions against compensated sureties. As such, the FTBA also has a broad interest in ensuring that statutes, particularly statutes that are in derogation of common law, are properly applied so that its members can predictably be aware of their legal rights and responsibilities.

In this case, both the Petitioner and the American Surety Association (“ASA”) were:

1. Aware of the fact that the payment bond in question did not comply with Fla. Stat. 255.05; and were
2. Aware of the fact that the payment bond form did not comply with the requirements of that statute as specified in Fla. Stat. 255.05, and actively lobbied to ensure that this form did not become a mandated form.

The ASA, utilizing its self-described participation in the “development of legislation for public works surety bonds”, apparently took no step in the wake of the Fifth District’s decision in Martin Paving Co. v. United

1268 (Fla. 5th DCA 1994), to remedy those deficiencies, and the American Home Assurance Company.

(“AHAC”) chose to accept that risk by issuing the referenced bond. Now, both the Petitioner and the ASA urge upon this Court a result that would bypass and nullify legislative intent which is clear, both on the face, and from the legislative history pertaining to the 1980 Amendments to Fla. Stat. 255.05.

To do so would not only call into question both principles of *stare decisis* and the principles that govern the interpretation of statutes. Fla. Stat. 255.05(6) states, without equivocation, that:

All bonds executed pursuant to this section shall make reference to this section by number and shall contain reference to the notice and time limitation provisions of this section. (Emphasis supplied.)

Properly interpreting that language, the Second District has found that failure to comply with those requirements involves legal consequences. Ignoring that language, the Fifth District in Florida Crushed Stone v. American Home Assurance Co., 815 So. 2d 715 (Fla. 5th DCA 2002) urges an application

inconsistent with that mandated by the legislature, and which would impose an unspecified “prejudice” standard where none is specified by statute. If the Fifth District’s standard were to be adopted by this Court, it is respectfully submitted that uncertainty would continue and proliferate with respect to payment bond litigation.

INTRODUCTION

It is well settled that the fundamental purpose of the Construction Lien Law is to protect those who have provided labor and materials for the improvement of real property. Kettles v. Charter Mortgage Co., 337 So. 2d 1012 (Fla. 3rd DCA 1976). As such, that body of law is to be construed favorably so as to give laborers and suppliers the greatest protection compatible with justice and equity. WMS Construction Inc. v. Palm Springs Mile Associates, Ltd., 762 So. 2d 973, 974 (Fla. 3rd DCA 2000). Because a construction lien cannot attach to publicly-owned property, Fla. Stat. 255.05 was enacted to afford payment protection to those who furnished labor and materials to public projects. Coastal Caisson Drill Co. v. American Cas. Co., 523 So. 2d 791 (Fla. 2nd DCA 1988). In that regard, it is well settled that the major purpose for Fla. Stat. 255.05 is to protect subcontractors and suppliers by providing them with an alternative remedy to a mechanic’s lien on public projects. City of Ft. Lauderdale v. Hardrives Co., 167 So. 2d 339 (Fla. 2nd DCA 1969).

As was noted by the Third District in WMS Construction Inc., one of the questions that a subcontract must resolve, at the risk of losing its compensation, is to determine what type of bond applies to the project receiving the benefit of his labor and materials. In this case, it was without question that the payment bond issued by AHAC failed to comply with the requirements of Fla. Stat. 255.05(6), and therefore should not be construed as a statutory bond. It is similarly without question that the controlling precedent at the time that suit was filed in this action established that:

...The amended statutory scheme is simple enough for the surety and principal to follow in order to insure the coveted protections of subsection (2) of 255.05. If they cannot follow the procedure, they cannot expect the claimant to do so either.

In such a case, the claim is governed by the terms of the bond...

Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268, 271 (Fla. 5th DCA 1994). Consistent with the stated legislative purpose of the statute in question, the Second District has affirmed the plain language of the statute itself, and should be affirmed. Any other result would run contrary to the statute, and would reward sureties who knowingly ignore the requirements of the law.

SUMMARY OF ARGUMENT

The payment bond that is the subject of this action does not comply with the requirements of Fla. Stat. 255.05(6) and as such, must be construed as a common law bond by the terms of the bond itself. Because this bond must be construed as a common law bond, the five (5) year statute of limitations was properly applied by the Second District.

Through their respective briefing, both AHAC and ASA, as its *amicus curiae*:

1. Incorrectly argue that the requirements of Fla. Stat. 255.05(6) are nullified by the language contained within Fla. Stat. 255.05(4); and
2. Incorrectly argue that public policy and fairness impose standards that are available to the legislature but were not incorporated into the 1980 amendments to Fla. Stat. 255.05.

It is respectfully submitted that their arguments concurrently would:

1. Require this Court to ignore the requirements of Fla. Stat. 255.05(6) and its legislative history;
2. Require this Court to specifically disapprove decisions of the First, Second and Fourth District Courts of Appeal, as well as portions of two (2) decisions by the Fifth District Court of Appeal; and would
3. Require this Court to assume that the 2001 amendments to Fla. Stat. 95.11, 255.05, and 713.23 were enacted, for no reason whatsoever.

These arguments run contrary to both law and logic, and it is respectfully submitted that the decision of the Second District Court of Appeal should be affirmed.

ARGUMENT

In the beginning, the District Court of Appeal, in United Bonding Ins. Co. v. City of Holly Hill, 249 So. 2d 720 (Fla. 1st DCA 1971), considered the question of whether Fla. Stat. 255.05 would operate to bar an action filed on a bond, following the one year period prescribed by that statute. In finding that it did not, the Court in that case considered the language of the bond involved, and noted that:

- i. The Bond form referred to did not refer to Fla. Stat. 255.05, and did not indicate that it was furnished pursuant to that

statute;

- ii. The Bond form contained no limitation as to when suit could be filed against that bond; and that
- iii. The Bond form granted extensive coverages beyond those required by Fla. Stat. 255.05.

Based upon those findings, the Court agreed that the bond considered in that action was a common law bond, and agreed that the general statute of limitations of five years applied, as opposed to the one year period prescribed by Fla. Stat. 255.05.

The United Bonding decision was followed and adopted by the Fourth District in American Cast Iron Pipe Co. v. Peabody-Peterson Co., 328 So. 2d 229 (Fla. 4th DCA 1976), and by the Second District in Southwest Florida Management District v. Miller Construction, 355 So. 2d 1258 (Fla. 2nd DCA 1978). Significantly, the Second District in Miller noted that, like the bond in this action, the bond it was considering had:

...No specific notice requirement, nor time limitations for filing claims or bringing action on the bond as prescribed were included...

See Miller, *supra*, at pp. 1259-60. Further, the Miller Court noted that the bond considered in that action contained more expansive coverage than that required by Fla. Stat. 255.05, and based upon those findings, construed the bond associated with that action as a common law bond.

In the wake of those decisions, the First District, in State of Florida f/u/b/o Consolidated Pipe & Supply Co., Inc. vs. Houdaille Industries Inc., 372 So. 2d 1177 (Fla. 1st DCA 1979), initially noted that:

...the primary test in ascertaining whether a bond is a statutory one or one at common law is determined if the minimal obligation placed upon the principal and its surety by statute has been expanded by the bond... (emphasis supplied)

However, the Court then noted that the bond it was considering (unlike United and Miller) made mention of Fla. Stat. 255.05, and based upon that fact, the Court in that case construed the bond as a statutory bond under that section.

In contrast to that decision, the Third District in Motor City Electric Co. v. Ohio Casualty Insurance Co., 374 So. 2d 1068 (Fla. 3rd DCA 1979), found that it did not

automatically follow that a simple bond reference to Fla. Stat. 255.05 applied to render a bond statutory, because:

... a bond, even though furnished pursuant to a public works contract, will be construed as a common law bond if it is written on a more expanded basis than required by Section 255.05

In 1980, in an apparent attempt to reconcile decisions of the Second, Fourth and Third Districts with that of the First District, Fla. Stat. 255.05 was amended to add two (2) relevant provisions, including:

1. Subsection 4, which provides that:
... The payment provisions of all bonds furnished for public work contracts described in subsection (1) shall, regardless of form, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2); and
2. Subsection 6, which provides that:
... All bonds executed pursuant to this section shall make reference to this section by number and shall contain reference to the notice and time limitation provisions of this section. (Emphasis supplied.)

It is significant to note that the legislative history which applies to these amendments reflected the legislature's consideration of United, Miller, and Houdaille (App. 1.6-1.23). It is also significant to note that this legislative history concerned an evolutionary pattern which provides guidance with respect to the issue that is before this Court. In that regard, the 1980 legislature first intended to amend Fla. Stat. 255.05(4) by adding language which would:

... make the bond form in the statute mandatory and not permissive. The bill would also require that notice be given to the contractor by any person claiming under the bond. Payment under the bond would be made conditional upon the notice requirements. A mandatory bond form would also implement the one year statute of limitations on all public works projects.

(App. 1.29). That same Staff Analysis also indicated that this proposed change would "make the bond in the statute [255.05] mandatory and not permissive...". (App. 1.29) However, as the process continued, it was observed that

... Cos. don't like forms – cos. wouldn't like to use a mandated form. Require reference and time limitations. Sureties wouldn't mind this so much.

(Emphasis supplied.) (App. 1.36).

To effectuate this compromise, the next contemplated revision to Fla. Stat. 255.05 contemplated not only the addition of new language for Fla. Stat. 255.05(4) (App. 1.35), but also the addition

of language to be added as Fla. Stat. 255.05(6), providing that:

(6) All bonds executed pursuant to this section shall make reference to this section by number and shall contain reference to the notice and time limitation provisions of this section.

(Emphasis supplied.) (App. 1.38). This language was, in fact, part of the bill which was signed into law, and it was clearly intended by the legislature that reference to the statute and reference to the notice and time limitations was intended as a requirement, and not as an option, in order for a bond to obtain the one (1) year limitations period allowed by Fla. Stat. 255.05(2). (App. 1.42).

Following that amendment, the Courts have not automatically regarded all bonds which pertain to public works as statutory bonds. See, Florida Keys Community College v. Insurance Company of North America, 456 So. 2d 1250 (Fla. 3rd DCA 1984). By requiring more than a mere mention of Fla. Stat. 255.05 (as had been approved by Houdaille), the Legislature obviously intended full compliance with Fla. Stat. 255.05(6) as a precondition to obtaining statutory bond status. Recognizing this fact and more to the point, the Fifth District in Martin Paving Co. v. United Pacific Insurance Co., 646 So. 2d 268 (Fla. 5th DCA 1994), considered a bond form that is remarkably similar to the bond which is considered by the Court in this action (App. 2.4).

In Martin Paving, the Fifth District found “notable” the fact that the 1980 Amendments added both subsection (4) and subsection (6), and rejected the contention that a public works bond is a 255.05 bond, regardless of form. Based upon those observations, the Martin Paving court adopted the Miller decision through its consideration of subsection (6) to s.255.05. Through that consideration, the Martin Paving Court observed that the bond “lacked the required express reference to the notice and time limitations of 255.05(2)”, and explicitly rejected the contention that a bonding company “...cannot be faulted for issuing a bond that does not comply with 255.05(1) and (6) because it used the form DOT requires.” Martin Paving at 271. Indeed, the Court found that “...in order to insure the coveted protection of subsection (2),...” the clear statutory scheme must be complied with.

Martin Paving, at 271.

Based upon the foregoing analysis, Martin Paving is therefore accurately read to reflect that, in order for a bond to be considered a statutory bond:

1. The bond itself must be recorded in the County where the project is located; and
2. The bond itself must not only mention Fla. Stat. 255.05, but must also contain reference to the notice and time limitations contained within that statute.

Following that decision, the FDOT itself made numerous revisions to its Contract Bond forms in the wake of Martin Paving (App. 3.) To resolve the first element of the Martin Paving reasoning, beginning with its 02/95 version, the FDOT added the following language to its Contract Bond forms:

...Contractor shall record this bond in the public records of the County where the improvement is located prior to commencing the work in accordance with Section 255.05(1)(a), Florida Statutes....

(App. 3.7 and following).

Respecting the second element of the Martin Paving decision, it must be noted that the bond considered in that decision already mentioned Fla. Stat. 255.05 (App. 2), and every bond form utilized by the FDOT made similar mention of that enactment. (App. 3). In going beyond the “mere mention” reasoning contained within Houdaille, the Martin Paving Court found that merely mentioning the statute did not comply with Fla. Stat. 255.05(6), and the 02/95 Contract Bond forms - at least at one point - attempted to comply with that section by adding language indicating that:

Specific reference is made to the notice and time limitations in Section 255.05(2), Florida Statutes.

(App. 3.3 - 3.8). This language is not contained within the 12/95 Contract Bond form which concerns this action, thereby reflecting that the FDOT knew of the statute's requirements but chose not to utilize it. Similarly, the use of this language – considered together with the explicit text contained within the Martin Paving decision, fairly put ASA, its member sureties, and AHAC on notice with respect to what had been done to achieve statutory bond status, but for whatever reasons, AHAC chose not to comply.

That being said, the failure of the Contract Bond at issue in this action to comply with Fla. Stat. 255.05(6) renders it, by definition, as a common law bond subject to the five (5) year limitations period prescribed by Fla. Stat. 95.11. It is interesting to note that both AHAC and its *amicus curiae* ASA, argue that they had no choice respecting the form of the bond in question. However, although the Fifth District in Florida Crushed Stone Co. v. American Home Assurance Co., 815 So. 2d 715 (Fla. 5th DCA 2002) receded from portions of its opinion in Martin Paving, it did not re-examine that portion of its opinion which held that:

...[T]he form DOT chooses to use and the procedures DOT chooses to follow are not controlling on the question of United's and Martin's rights and obligations under Florida Statutes. Even if DOT were to refuse to accept a bond written in compliance with section 255.05, the surety has the option of refusing to write a nonconforming bond.

Martin Paving at 271. Martin Paving has been cited with approval by the First, Second and Third Districts, in Insurance Company of North America v. Metropolitan Dade County, 705 So. 2d 33 (Fla. 3rd DCA 1997); W.P.C. Inc. v. Hartford Accident & Indemnity Co., 698 So. 2d 1324 (Fla. 1st DCA 1997); and Plaza Materials v. American Home Assurance

Co., 2002 W. L. 940144 (Fla. 2nd DCA 2002).

The same logic should apply to the instant action. Clearly, the mere mention of Fla. Stat. 255.05 fails to satisfy the requirements of Fla. Stat. 255.05(6), and clearly the bond that is the subject of this action fails to meet the statutory standard contained within subsection (6). In that Martin Paving explicitly found that a non-compliance with subsection (1) violated the application of subsection (4), it follows that noncompliance with subsection (6) mandates the same result. It is precisely this same logic which was followed by the Second District in the instant appeal, and this logic should control in this action.

Through their briefing, both AHAC and the ASA undertake the improbable task of :

1. Attempting to demonstrate that Fla. Stat. 255.05(4) establishes a “bright line” rule, while conveniently arguing that Fla. Stat. 255.05(6) does not; and by
2. Arguing that the Second District, in applying the clear language of both Fla. Stat. 255.05 and Martin Paving, in some way created a “loophole”.

Each of these contentions is in error. As noted above, it is clear that:

1. The ASA participated in the drafting effort which culminated in the enactment of the 1980 amendments to Fla. Stat. 255.05;
2. As part of that effort, the ASA made clear that it did not want the legislature to proscribe mandatory forms, as the first draft of those amendments would have provided; and that, instead
3. It was agreed, as a compromise, that bond forms would not be mandated, but that compliance with new language contained within Fla. Stat. 255.05(6) would be required.

Respecting those amendments, ASA concedes that those amendments are clear and unambiguous, and correctly notes – in the context of its analysis of Fla. Stat. 255.05(4) – that the term “shall” constitutes a mandatory term. However, both ASA and AHAC discount the similarly mandatory language contained in Fla. Stat. 255.05(6), blithely concluding that a failure to comply with that subsection’s requirements are of no moment, given the language contained in Fla. Stat. 255.05(4).

It is well settled that the legislature’s intent is found in the plain language of the

statute, and trial courts should look to the legislative history only if that statute's language is ambiguous. Taylor Woodrow Construction Corp. v. Burke Co., 606 So. 2d 1154 (Fla. 1992). In determining the threshold issue of whether Fla. Stat. 255.05 is clear on its face, both Petitioner and Respondent argue that the statute's language is clear and unambiguous. However, both parties urge differing results from the same language: AHAC and ASA claim that subsection (4) requires that the bond in question be interpreted as statutory even if a surety does not comply with subsection (6), while Respondent argues that subsection (4) is qualified by the requirements of subsection (6). Obviously, both parties cannot be correct.

In resolving this issue, it is well settled that a statute should not be interpreted in a manner which would deem legislative action to be useless. Alex-Dex Corp. v. Nachon Enterprises, Inc., 641 So. 2d 858 (Fla. 1994)- was to constitute a qualification or restraint upon the generality contained within Fla. Stat. 255.05(4). See *e.g.*, State ex rel Florida Jai Alai Inc. v. State Racing Commission, 112 So. 2d 825 (Fla. 1959). It was not by accident that the proviso contained in Fla. Stat. 255.05(6) was placed subsequent in order of arrangement to the language chosen for Fla. Stat. 255.05(4), and it is well settled that, to the extent that Subsection (4) and Subsection (6) are in conflict, the Courts should provide deference to the provision which is last in order of arrangement. Inter-Continental Promotions Inc. v. MacDonald, 367 F. 2d 293 (5th Cir. 1966); Allstate Ins. Co. v. Rush, 777 So. 2d 1027 (Fla. 4th DCA 2000).

In challenging these principles of statutory construction by ignoring them, both ASA and AHAC seek safe refuge upon several bases. First, neither seriously challenged the fact that the bond in question did not contain the language required by Fla. Stat. 255.05(6), but they both suggest that its mere mention of Fla. Stat. 255.05 suffices. These arguments, in turn, are based upon their reading of and reliance upon the First District's 1979 decision in Houdaille. Unfortunately for that argument, Houdaille

pre-dated the 1980 amendments, through which the legislature chose language that went far beyond that which was permitted by the Houdaille decision. Although both ASA and AHAC would suggest that the bond form substantially complies with subsection (6), the mandatory language contained in that subsection allows no room for that contention. Ferlita v. State, 380 So. 2d 1118 (Fla. 1980).

Second, both AHAC and the ASA contend that applying the literal requirements of Fla. Stat. 255.05(6) would work a hardship upon the surety industry. In Taylor Woodrow, this Court rejected the contention by a material supplier that the plain language of Fla. Stat. 255.05(2) should not preclude its recovery upon a payment bond, observing that:

...Because section 255.05(2) is clear on its face, this Court must construe the words chosen by the legislature in their plain and ordinary meaning.... Where the statutory provision is clear and not unreasonable, or illogical in its operation, the Court may not go outside the statute to give it a different meaning....

(Citations omitted.) Taylor Woodrow at 1155-56. Having made those findings, the Court went on to find that the remedy for any dissatisfaction in cases of that sort would lie with the legislature, and not with the Courts.

It is perhaps in this context that the FTBA's interests are brought to the foreground. In their briefing, both AHAC and ASA provide numerous citations to stand for the proposition that claimants who do not strictly comply with the requirements of statute should lose their right to a recovery. On a general level, this can occur by failing to provide timely and proper notices, or by failing to file suit on time. See W.G. Mills, Inc. v. M&MA Corp., 465 So. 2d 1388 (Fla. 2nd DCA 1985). By way of example, reference is made to the 1991 amendments to Chapter 713, the Construction Lien Law. In that session, the legislature required non-privity claimants to include all of the several warnings contained in Fla. Stat. 713.06(2)(c). Although no precise penalty for a failure to comply with those requirements was specified, the Courts have uniformly found that an otherwise timely notice without those

mandatory warnings did not comply, and was fatal to any attempt to establish a construction lien. Mirror and Shower Door Products, Inc. v. Seabridge Inc., 621 So. 2d 486 (Fla. 4th DCA 1993); Allstar Building Materials Ltd. v. Donald F. Bronauer, 724 So. 2d 616 (Fla. 5th DCA 1998).

As noted above, if the major purpose of the Construction Lien Law and Fla. Stat. 255.05 is to protect subcontractors and suppliers, how can it be argued that it is fair to require strict compliance of those parties, while excusing requirements that were expressly aimed at the surety industry, with that industry's participation and consent? To suggest that Fla. Stat. 255.05(6) is to be given no practical effect runs contrary to each and every element of the statute, its legislative history, and the axioms of statutory construction which govern its interpretation. Similarly, to suggest – as the Fifth District has in Florida Crushed Stone – that the mandatory language contained in subsection (6) is in some way tempered by an unwritten “prejudice” exception, would work to effectively amend the statute by adding language which was never enacted, or even considered by the legislature.

To its credit, with respect to the latter point, ASA correctly recognizes that the Florida Crushed Stone Court missed the point of the 1980 amendments. As stated by ASA, everyone (including sureties) are held to know the law, and there is no basis for the Fifth District's creation of a “loophole for prejudice”. In the context of the Construction Lien Law, the legislature is aware of, and knows how to draft language which would excuse a non-compliance where there was a lack of prejudice. For example, after prescribing a form for a Claim of Lien, Fla. Stat. 713.08(4)(a) goes on to say that:

... The omission of any of the foregoing details or errors in such Claim of Lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error ...
(Emphasis supplied.)

Fla. Stat. 255.05(6) does not contain any such “get out of jail free” card for a non-compliant surety, and an analysis of prejudice and its impact has no place in the statutory scheme. To suggest otherwise, would not only depart from the bright line requirements of Fla. Stat. 255.05(6), but would also operate to create differing standards for sophisticated contractors, and those who are less sophisticated.

If that were not enough, the Fifth District’s decision in Florida Crushed Stone is similarly flawed in its pronouncement that Florida “...no longer recognizes a common law payment bond given on a public works project.” Id. at 716. As noted above, this finding is not only in stark contrast to the Fifth District’s previous decision in Martin Paving, but also runs contrary to the decisions of the other Districts who have adopted Martin Paving. Perhaps more importantly, the legislature itself has recognized that the enactment of Fla. Stat. 255.05(4) did not automatically operate to apply the one year statute of limitations to all payment bond claims, as has been suggested by both AHAC and ASA. In the 2001 legislative session, Fla. Stat. 95.11, Fla. Stat. 255.05, and Fla. Stat. 713.23 were all amended. Fla. Stat. 95.11(5)(e) was specifically added to provide a one (1) year limitation period for:

(5)(e) An action to enforce any claim against a payment bond on which the principal is a contractor, subcontractor, or sub-subcontractor as defined in s.713.01, for private work as well as public work, from the last furnishing of labor, services or materials (Emphasis supplied.)

These revisions, which took effect last year, directly impact the consideration of the issues before the Court in that:

1. If all bonds were to be regarded as statutory, even if they failed to comply with Fla. Stat. 255.05(1);
2. If all bonds were to be regarded as statutory, even if they failed to comply with Fla. Stat. 255.05(6);

then, by virtue of the application of Fla. Stat. 255.05(4), the 2001 amendments would not have been needed to apply a one (1) year limitation to claims on those bonds. When these amendments were passed, the current state of the law was typified by Martin Paving and its progeny. By enacting material amendments to three different statutes in a single legislative session, the legislature is presumed, in authoring those amendments, to have intended to change the law. Carlile v. Game & Fresh Water Fish

Comm'n, 354 So. 2d 362 (Fla. 1977). That being the case, these amendments cannot be seriously characterized as an effort to “reinforce” the public policy of the “statutory scheme”. On the contrary, the 2001 amendments resulted from the sort of legislative action which AHAC and ASA now request from this Court.

Given all of the foregoing, it is clear that in 1980, the legislature intended the limitations and notice provisions contained in Fla. Stat. 255.05(2) to apply to all publicly bonded projects if – and only if – the surety in question complied with Fla. Stat. 255.05(6). If the bond in question did not comply with that subsection:

1. The five year limitations period provided by Fla. Stat. 95.11 would apply to claims on that bond; and
2. A claimant’s other obligations would be governed by the terms of the bond, as opposed to obligations imposed by Fla. Stat. 255.05(2).

These consequences were recognized by the Fifth District in Martin Paving, the First District in Florida Keys, and by the Second District in Plaza Materials.

Twenty-one (21) years later, a different legislature made the decision to apply a one (1) year statute of limitations to all payment bond claims (public or private), thereby dispensing with the first of these consequences, but leaving intact the second. The 2001 legislature did not repeal Fla. Stat. 255.05(6), and Fla. Stat. 255.05(4) remains tempered by that subsection. Further, the legislature made no effort to provide for the retroactive operation of its 2001 amendments, but ASA argues – in essence – that it should be so applied “to reinforce” the intent behind the 1980 amendments.

Such sophistry is not warranted by the statutes, the legislative history, or by the case authorities. The statutory scheme chosen by the legislature is simple, in requiring

reference to the time and notice limitations contained within Fla. Stat. 255.05. If a surety chooses to write a bond that does not comply with the legislative requirements, it loses the coveted protection of those notice and time limitations. No number of conclusions should vary these facts, for to do so would erode the principle that contractors, like others, can expect the application of the laws as drafted by the legislature.

CONCLUSION

The bond in question did not comply with the requirements of Fla. Stat. 255.05(6), and there is no rule of law, or standard which excuses this non-compliance. Accordingly, this Court should adopt the Second District's holding, and should disapprove the Fifth District's decision in Florida Crushed Stone. That decision, not only ignores the requirements of case and statutory authorities, but also would impose standards of prejudice which are nowhere within the requirements of the statute. The bond in question was authored upon the understanding that the responsibilities flowing from that bond would be determined by the bond, and the bond does not incorporate any notice requirements, or the one year statute of limitations urged by the Petitioner. For the Petitioner, and the American Surety Association to suggest otherwise, is to ignore not only the requirements of the law, but also their own actions and undertakings.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AMICUS CURIAE BRIEF has been furnished, on this ____ day of December 2002, by U.S.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing meets the font and type size requirements of Rule 9.100(1) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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