IN THE SUPREME COURT OF THE STATE OF FLORIDA

AMERICAN HOME ASSURANCE COMPANY,
Petitioner,

Case No. SC02-1257
Lower Tribunal No. 2D00-4404

vs.

PLAZA MATERIALS CORPORATION,
Respondent.
________________________________/

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF THE SURETY ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER, 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 more than 550 member companies. Collectively, these companies write the overwhelming majority of performance and payment bonds furnished on public works projects in the United States. SAA actively participates with Congress and the legislatures of all states in the development of legislation for public works surety bonds, and has a broad interest in ensuring that Florida courts follow the legislative mandate for the application of statutes affecting sureties. SAA also has a broad interest in ensuring that sureties are not unnecessarily exposed to liability for risks they did not contemplate or accept.

Section 255.05 of the Florida Statutes requires surety bonds for all state-sponsored public works projects exceeding $200,000. The underlying appeal is from a judgment entered in favor of a materials supplier on a Florida Department of Transportation ("FDOT") project and against a SAA member surety company that provided a bond pursuant to section 255.05, Florida Statues. Even though the supplier failed to serve timely notices required by the statute and failed to bring its action against the surety within the time period specified in the statute, the trial court allowed the supplier to recover from the surety.

The Second District Court of Appeal affirmed the trial court's ruling and refused to give full force and effect to the Legislature's express notice requirements and one year statute of limitations for claims against public works payment bonds as set forth in section 255.05. Other courts construing the exact same bond have reached the opposite result. See Florida Crushed Stone Co. v. American Home Assurance Co., 815 So. 2d 715 (Fla. 5th DCA 2002). Thus, confusion exists among trial courts and intermediate appellate courts as to how to apply the notice and time limitation requirements of section 255.05, and courts have reached various outcomes concerning the application of such requirements. The inconsistent application of section 255.05 has left contractors, subcontractors, materials suppliers, and sureties unsure of their respective rights and liabilities on public works projects. This uncertainty has led to increased litigation.

SAA respectfully submits that it is now appropriate for this Court to enforce the legislative scheme for the perfection of claims for payment against public works surety bonds. Such action will provide guidance not only to potential litigants but also to lower courts asked to adjudicate such claims.

INTRODUCTION

Generally, subcontractors and material suppliers on private construction projects can secure payment for their labor, services and materials by recording a construction lien on the improved real property. F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 122 (1974). Chapter 713, Florida Statutes, sets forth the legislative scheme for perfecting and enforcing a construction lien. A construction lien protects contractors, subcontractors, sub-subcontractors, laborers, and suppliers of materials to those entities. § 713.01(17), Fla. Stat. (2002). In the most general sense, a construction lien (formerly called a mechanics' lien in Florida) protects such persons or entities by "securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure, and as such attaches to the land as well as buildings and improvements erected thereon." Black's Law Dictionary 981 (6th ed. 1990).

A construction lien cannot, however, attach to real property owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision. § 713.01(25), Fla. Stat. (2002). Property belonging to the United States and to other states or their subdivisions is similarly exempt. This exemption has led Congress and every state legislature to enact

statutes requiring general contractors on public works projects to obtain payment bonds. Payment Bond Manual, Second Edition, (American Bar Association 1995) includes as an Appendix the public works payment bond statutes of all 50 states.

On federal projects, the Miller Act requires a general contractor to provide a payment bond to protect subcontractors and suppliers that provide services or materials for the project. 40 U.S.C. § 3131, et. seq. (Formerly 40 U.S.C. § 270a, et. seq.). Section 255.05, Florida Statutes, is patterned after the Miller Act and is known as Florida's "Little Miller Act." See Harvesters Group Inc. v. Westinghouse Elec. Corp., 527 So. 2d 257, 258 n. 3 (Fla. 3d DCA 1988); W. G. Mills. Inc, v. M & MA Corp., 465 So. 2d 1388 (Fla. 2d DCA 1985).

Section 255.05(l)(a), Florida Statutes, provides protection similar to a Chapter 713 construction lien on private projects. Coastal Caisson Drill Co. v. American Cas. Co., 523 So. 2d 791, 793 (Fla. 2d DCA 1988) ("[S]ection 255.05 was enacted to afford workmen on public projects protection similar to that provided on private works by the mechanics' lien in Chapter 713.") (citing Fulgham v. State, 109 So. 644 (Fla. 1926)).

Protection of subcontractors and suppliers by providing them with an alternative remedy to a construction lien on public projects is tempered by fairness to the contractor and the contractor's surety. The statute requires that claimants

not in privity with the contractor advise the contractor of their participation on the project and give written notice if they are not promptly paid. W.G. Mills, 465 So. 2d at 1391(quoting School Bd. of Palm Beach Cty. v. Vincent J. Fasano, Inc., 417 So. 2d 1063, 1065 (Fla. 4th DCA 1982)); see also Harvesters Group, 527 So. 2d at 259 ("Contractors should not be compelled to wait around with their liabilities unknown or unsettled for an indefinite length of time, at the convenience of those who may wish to give notice of a claim"). Without notice, the contractor faces double liability from a bond claim by a sub-subcontractor or a supplier to a subcontractor not in privity of contract with the contractor for labor or material for which the contractor has already paid the first tier subcontractor.

The statutory notice enables the prime contractor to avoid double liability by withholding further payments from the subcontractor, issuing joint checks, or taking other steps to make sure the subcontractor pays what it owes. Despite the Florida Legislature's effort to afford this protection to contractors and their sureties, the Second District's ruling in this case denied the surety the protection of the statute and allowed the claimant to recover even though it had not met the notice and suit limitation requirements.

SUMMARY OF ARGUMENT

Section 255.05, Florida Statutes, governs the requirements of public works bonds for government construction projects. Section 255.05(2) requires a claimant seeking to recover under the payment provisions of a public works bond to adhere to specific provisions to notify the contractor of its claim, and requires the claimant to file its lawsuit to recover against the bond within one year from the completion of its work. Respondent, Plaza Materials Corp., neither notified the contractor, nor sought to enforce its claim against the bond, as required by the notice and time limitation provisions of Section 255.05(2). Despite these failures, the Second District Court of Appeal allowed Plaza Materials to recover from the surety. The sole reason for the ruling was that FDOT's bond form did not, as section 255.05(6) purports to require, refer to the notice and time limitation provisions of section 255.05(2). This Court should reverse the Second District's decision for several reasons.

First, the Second District erroneously concluded that FDOT's bond form is a "common law" bond. The project at issue was a project for FDOT. It was, therefore, a public works project. FDOT mandated the specific bond form to be used. FDOT's bond specifically refers to section 255.05 Florida Statutes. It does not expand coverage with regard to the payment bond obligations under section

255.05(1)(a). Nothing in FDOT's bond states that a claimant need not serve the required notices or that the claimant can perfect a claim against the bond by serving different notices than those specified in section 255.05(2). Nothing in FDOT's bond leads a claimant to think it does not have to comply with the requirements of section 255.05(2). Construing the payment provisions of FDOT's bond as not subject to the requirements of section 255.05(2) is simply incorrect.

Second, the Legislature has unambiguously mandated that the payment provisions of <u>all</u> public works bonds, <u>regardless of form</u>, must be construed as subject to all requirements of section 255.05(2). § 255.05(4), Fla. Stat. (2002). Section 255.05(4) is clear and unambiguous. The Legislature gave the Second District no discretion to rule that FDOT's bond is not subject to the requirements of section 255.05(2). The Second District's ruling ignores the Legislature's intent to make the law uniform regarding claims against public works payment bonds.

Lack of a specific reference to the notice and time limitation provisions of section 255.05(2) does not render FDOT's bond form a "common law" bond. A specific reference to these provisions is not required. Even the sample bond form of section 255.05, which is set forth at section 255.05(3), does not contain a specific reference to the notice and time provisions of subsection (2). The

Legislature has deemed that this sample bond form is sufficient and that a specific reference to subsection (2) is not required.

Instead of following the Legislature's restrictions on the manner in which claimants seeking payment can recover against public works payment bonds, the Second District created a loophole to allow a claimant to escape the consequences of its own failure to act. The Legislature intended that subsection (4) eliminate the inconsistent application in the trial courts of the notice and timing requirements of payment bond claims on public work projects. Subsection (4) provides a bright line rule: it requires that the payment provisions of all public works bonds, without exception, are subject to the requirements of subsection (2). If a claimant fails to comply with the requirements of subsection (2), it cannot recover from the surety.

Perpetuation of the loophole the Second District created would undercut the effort to make the law uniform. It would benefit no one other than the claimant that slept on its rights and failed to follow the law. Enforcement of the Legislature's mandate will result in a uniform rule on public works projects, decrease the cost of such projects, reduce the burden on courts called upon to adjudicate claims in a variety of scenarios, and facilitate the timely closing out of public projects. Both the law and fairness compel a reversal of the Second District's holding.

ARGUMENT

I. THE SECOND DISTRICT IGNORED THE CLEAR LEGISLATIVE MANDATE THAT THE PAYMENT PROVISIONS OF ALL PUBLIC WORKS BONDS, REGARDLESS OF FORM, ARE SUBJECT TO THE NOTICE AND SUIT LIMITATION PROVISIONS OF SECTION 255.05(2).

A. The Second District Erred in Applying Principles Applicable to Common Law Bonds to the FDOT Bond.

Section 255.05(1)(a), Florida Statutes, requires any person entering a formal contract with the state, or any county, city, or political subdivision thereof, or other public authority, for the construction of a public building or public work, or for the repair of a public building or public work, to provide a payment and performance bond issued by a surety authorized to do business in Florida. The contractor is required to record the bond in the public records of the county where the project is located. § 255.05(1)(a), Fla. Stat. (2002).

Section 255.05(1)(a) public works bonds contain both performance and payment obligations.[1] Specifically, a section 255.05 bond:

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[1] A performance bond provides protection to the owner (or obligee) in the event the contractor fails to perform and complete the work required in the contract between the contractor and obligee. A payment bond guarantees the payment of certain suppliers of labor, services, or materials to a construction project. See Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A. 524 So. 2d 439, 441 (Fla. 5th DCA 1988), quashed on other grounds, 540 So. 2d 113 (Fla. 1989).

> shall be conditioned upon the contractor's performance of the construction work in the time and manner prescribed in the contract and promptly making payments to all persons defined in section 713.01 who furnish, labor, services or materials for the prosecution of the work provided for in the contract.

Id. at § 255.05(1)(a). (Emphasis added). This case deals with the construction and application of the payment provisions of a public works bond for a project for the Florida Department of Transportation ("FDOT"). The bond at issue is FDOT's standard contract bond form. Consistent with its typical practice, FDOT required the general contractor on the project to use this standard form and did not allow the contractor or its surety to alter the bond or furnish any other type of bond.

Respondent, Plaza Materials Corp. ("Plaza Materials"), supplied materials to a subcontractor of the general contractor on the project. The general contractor paid the subcontractor for the materials Plaza Materials furnished but the subcontractor did not pay Plaza Materials. After both the general contractor and subcontractor filed for bankruptcy, Plaza Materials sought payment under the bond from Petitioner, American Home Assurance Co. ("American Home"). American Home Assurance Co. v. Plaza Materials Corp., 826 So. 2d 358 (Fla. 2d DCA 2002).

Section 255.05 places several conditions on the right of a supplier of labor, services or materials that, like Plaza Materials, does not have a direct contract with

a prime contractor to recover from the contractor's payment bond. Specifically, section 255.05(2)(a)2 provides that such a claimant, as a condition precedent to recovery against a § 255.05 bond, shall:

> (1) provide written notice to the contractor of intent to look to the bond for protection within 45 days after commencing to furnish labor or materials on the project;
>
> (2) provide written notice of non-payment to both the contractor and the surety within 90 days after furnishing labor or materials; and
>
> (3) bring any legal action against the contractor or the surety within 1 year of the date the claimant last furnished labor or material.

Compliance with these requirements within the prescribed time is a condition precedent to maintaining an action under section 255.05. W.G. Mills, Inc. v. M & MA Corp., 465 So. 2d 1388, 1390 (Fla. 2d DCA 1985) ("It is clear that a condition precedent to the maintenance of an action of this kind is compliance with the statutory notice requirement within the prescribed time limit.") (citations omitted).

It is undisputed in this appeal that Plaza Materials failed to serve the statutory notices to entitle it to recover from the bond. It is also undisputed that Plaza Materials failed to bring its action against the surety within one year after last

furnishing its materials to the project. Plaza Materials, 826 So. 2d at 358 (Plaza Materials "did not comply with all of the notice and time requirements contained in Section 255.05(2)."). The Second District excused Plaza Materials' failure to comply with these statutory conditions precedent to recovery against the bond, and instead held that the Plaza Materials' claim should be enforced under the rules applicable to "common law bonds". Id.

The sole reason for the Second District's ruling was that FDOT's bond form did not, as section 255.05(6) purports to require, refer to the notice and time limitation provisions of section 255.05(2). Specifically, the court held:

> We conclude that a surety that issues a bond that does not contain notice of the restrictions as required by subsection (6) is simply not entitled to enforce those restrictions. To this extent, the violation of subsection (6) transforms the statutory bond into a common law bond, or at least renders the time restrictions in subsection (2) unenforceable.

Plaza Materials, 826 So. 2d at 361. Thus, even though the bond refers to section 255.05, because FDOT's bond did not refer to the notice and time limitation provisions of subsection (2), the Second District construed the bond to be a common law bond.

At least part of the rationale for the Second District's ruling reveals a fundamental misunderstanding about government contract work in Florida. The

court erroneously concluded that "American Home had the opportunity to demand that DOT utilize a bond form that complied with subsection (6). It chose not to do so." Id. This statement, respectfully, is simply wrong. By statute, FDOT is required to advertise its projects for competitive bids from contractors desiring to perform the advertised work. § 337.11(3), Fla. Stat. (2002). Contractors bid upon a set of specifications prepared by FDOT or its engineers. The bid specifications contain the specific form of bond required. If a contractor submits a bid that allowed it to provide a bond different from the bond specified in the bid documents, the bid would deviate from the bid specifications, which would render the bid non-responsive. See Robinson Electrical Co., Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

Moreover, FDOT, not sureties, mandates the type of bond to be provided on FDOT projects. FDOT's form is pre-printed. FDOT's logo appears on the bond. FDOT's form number is on the bond. FDOT specifies what bond is to be used on its projects, statewide. The Second District recognized this reality when noting the existence of ongoing litigation throughout the state concerning FDOT's bond. Plaza Materials, 826 So. 2d at 361. However, its suggestion that sureties can successfully demand the use of a different bond form ignores the reality of how public works contracting is bid.

Although FDOT's bond form includes provisions in addition to those in the above-quoted portion of section 255.05(1)(a), these additional provisions are not related to the payment obligations under the bond, and they do not expand coverage with regard to the payment bond obligations under section 255.05(1)(a). For example, the bond secures the contractor's obligations to pay worker's compensation and unemployment compensation taxes. It also includes a provision for the contractor's liability for double the damage caused by the contractor's fraud or overcharge. These provisions do not relate to the bond's payment obligations.

The payment provisions of FDOT's bond form protects the same class of claimants afforded protection in section 255.05(1)(a), which states that a public works bond "shall be conditioned upon the contractor's . . . promptly making payments to all persons defined in section 713.01 who furnish labor, services or materials for the prosecution of the work provided for in the contract." FDOT's bond provides that the contractor will promptly make payment to all persons supplying labor, materials, equipment and supplies, and all persons defined in section 713.01, Florida Statutes, whose claims derive directly or indirectly from the work provided for in the contract. The Second District found FDOT's bond to be a common law bond because the bond did not comply with section 255.05(6)

insofar as it does not refer to the notice and time limitation provisions of section 255.05(2).

Thus, the issue before this Court is not whether the surety could choose to provide more extensive coverage than the minimum required by the statute. Nothing in the FDOT bond form is inconsistent with the payment provisions of the statute. Specifically, nothing in the bond form says that no notice or a different notice will be required. Nothing in the bond form gives the claimant a longer period to sue on the bond. There is nothing in the bond itself to lead a claimant to think that it does not have to comply with the mandates of section 255.05(2).

The Second District correctly noted that FDOT's standard contract bond form is the subject of ongoing litigation throughout Florida and that trial courts have reached various results on the same issues that were before the court. Plaza Materials, 826 So. 2d at 361. The court correctly noted the importance of the application of a uniform rule to public works payment bonds. Accordingly, it certified the following question for determination by this Court:

> If a statutory payment bond does not contain reference to the notice and time limitation provisions of section 255.05, as required by section 255.05(6), are those notice and time limitations nevertheless

> enforceable by the surety, or is the claimant entitled to rely upon the notice and time limitations applicable under the common law? [2]

Id.

The Legislature, in response to prior authority construing bonds as common law bonds, has already mandated that the payment provisions of public works bonds are to be construed as subject to the notice and time limitation provisions of section 255.05(2), and not the notice and time limitations applicable under the common law, without regard to the form of bond used.

Before 1980, several Florida appellate decisions recognized a distinction between "common law" public works bonds and statutory bonds under section 255.05. However, the courts were inconsistent in deciding whether all public works bonds were statutory bonds and, if not, whether the enforcement of the statutory notice and limitations provisions of section 255.05 applied to non-statutory, “common law” bonds. Compare, for example, State Dept. of Transp. f/u/b/o Consolidated Pipe & Supply Co. v. Houdaille Industries, Inc., 372 So. 2d 1177, 1178 (Fla. 1st DCA 1979); Quality Glass & Mirror, Inc. v. Ritch, 373 So. 2d 723 (Fla. 1st DCA 1979), cert. denied, 385 So. 2d 760 (Fla. 1980); and Fuller Industries, Inc. v. R. Terry Blazier & Son, Inc., 188 So. 2d 2 (Fla. 2d DCA), cert. denied, 194

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[2] The third word of the certified question curiously acknowledges that, notwithstanding the court’s holding to the contrary, the bond is a statutory bond.

So. 2d 617 (1966), enforcing the statutory requirements, with United Bonding Ins. Co. v. City of Holly Hill, 249 So. 2d 720, 724 (Fla. 1st DCA 1971); and Southwest Fla. Water Mgmt. Dist. v. Miller Constr. Co., Inc. of Leesburg, 355 So. 2d 1258, 1260 (Fla. 2d DCA 1978).

B. Legislative Intent Requires a Ruling That the Notice and Time Limitation Provisions Apply to All Public Works Bonds.

In 1980, reacting to the case law involving "common law bonds," and in an obvious attempt to make the law uniform, the Legislature clarified the applicability of the statutory notice and suit limitations provisions for payment claims against public work bonds. Chapter 80-32, § 1, Laws of Florida. Specifically, it added subparagraph (4) to section 255.05, which provides,

> The payment provisions of all bonds furnished for public works contracts described in subsection (1) shall, regardless of form, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2).

§ 255.05(4), Fla. Stat. (2002) (Emphasis added). This amendment clarified that the payment provisions of all public works bonds are subject to the section 255.05(2) notice and time requirements. This amendment is noteworthy for four reasons.

First, subsection (4) clearly applies to the “payment provisions” of public works bonds. By limiting the scope to the payment provisions of public works bonds, the Legislature resolved any confusion about whether the payment

provisions of a public works bond were subject to the notice requirements of section 255.05(2). This amendment recognized the reality that public entities throughout Florida used, and continue to use, different bond forms. It recognized that public entities often required more expansive coverage for performance requirements. However, the Legislature intended to ensure that the notice and suit limitations provisions for payment claims set forth in section 255.05(2) applied to all public works bonds.

Second, the amendment clearly and unambiguously requires that the payment provisions of "all bonds" furnished for public works contracts be construed and deemed statutory bonds subject to the notice requirements of section 255.05(2). There is no ambiguity about the term "all bonds" and there can be no reasonable dispute about the scope of this language. It does not say that bonds complying with section 255.05(1)(a) shall be statutory bonds. It says that all bonds furnished for public projects described in subsection (1) shall be statutory bonds. Quite clearly, the Legislature intended that the law regarding the payment provisions on every bond on every public works project in Florida be uniform, and it required that all such bonds be subject to the statutory notice and time limitations requirements of section 255.05(2).

Third, the amendment clarified that "regardless of form", public works payment bonds are to be deemed and construed as subject to the notice and time requirements of section 255.05(2). This language rejected the cases holding that a public works bond became a common law bond if the bond form used varied from the statute, and it recognizes the reality that public bodies in Florida use different bond forms. However, no matter what the form, the Legislature requires that the provisions of section 255.05(2) apply.

Finally, the amendment mandates that payment provisions of the public works bonds be subject to the notice requirements and time limits of section 255.05(2). It states that such bonds "shall" be so construed. "Shall" is a mandatory term. See State v. Goode, 2002 WL 3137996 (Fla., Oct. 17, 2002). Had the Legislature intended to give courts any discretion, it would have used "may". City of Miami v. Save Brickell Avenue, Inc., 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983) ("In statutory construction, the word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall'.")

It is a fundamental principle of Florida law and public policy that legislative intent is the polestar that guides a court in statutory interpretation. Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987); Donato v. American Tel. & Tel. Co.,

767 So. 2d 1146, 1150 (Fla. 2000). The primary source for determining legislative intent is the language chosen by the Legislature to express its intent. Donato, 767 So. 2d at 1150. This Court has specifically held that when the language of a statute "is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglas, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1939)). A court may not construe an unambiguous statute in a way that would "extend, modify, or limit its express terms or its reasonable and obvious implications." To do so "would be an abrogation of legislative power." Id. (quoting American Bankers Life Assurance Co. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)).

Furthermore, as this Court has stated, "[W]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch." Bankston, 507 So. 2d at 1387. By enacting a statutory scheme to govern the issuance of public works bonds and the procedure for claims against them, the Legislature has actively entered into the field of public works bonds. The prudent

course for the Second District, according to this Court in Bankston, would have been to defer to the Legislature.

In this case, the Second District failed to enforce section 255.05(4) as the Legislature wrote it. FDOT's bond is a bond for a public works project. The payment provisions of all bonds issued for public works projects are required to be deemed statutory bond provisions. Therefore, the payment provisions of FDOT's bond are required to be deemed statutory bond provisions. The Legislature gave courts, including the Second District, no discretion to rule otherwise.

C. The Lack of a Specific Reference to the Notice and Suit Limitation Provisions of Section 255.05(2), Florida Statutes, Does Not Render the Bond a Common Law Bond.

Instead of adhering to the legislative mandate, the Second District held FDOT's bond to be a common law bond because it did not contain a reference to the notice and time limitation provisions of section 255.05(2). Plaza Materials, 826 So. 2d at 358. Section 255.05(6), Florida Statutes, states:

> 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.

Assuming arguendo that subsection (6) requires a statement such as "this bond is governed by section 255.05, Florida Statutes", or "reference is hereby made to the notice and time limitations of section 255.05 [or section 255.05(2)],

Florida Statutes", or similar words, the question becomes: what is the result if the bond form omits the required language? The answer to this question cannot be that the bond is a common law bond. Neither case law nor the Legislature's intent in section 255.05(4) allows such a result.

First, in State Dept. of Transp. f/u/b/o Consolidated Pipe & Supply Co. v. Houdaille Industries, Inc., 372 So. 2d 1177, 1178 (Fla. 1st DCA 1979), the court held that the failure of the bond to include a specific reference to the notice provisions and time limitations of Section 255.05(2) did not make the bond a common law bond. Moreover, as is exactly the case in this appeal, the surety there did not prepare the bond at issue, the State of Florida did. Id. The court held that if the bond contained any ambiguity, "it could hardly be construed against the surety which did not prepare the bond . . . . The bond's drafter, the State of Florida . . . is the only party that is subject to the rule of strict construction, not the surety." Id. The same rule applies here. FDOT, not American Home, drafted the bond. If there were a conflict between the bond and the statute, which, it is submitted, there is not, that conflict was not created by American Home.

Second, as noted above, section 255.05(4) mandates that the payment provisions of all public works bonds be deemed statutory and subject to the notice and time provisions of section 255.05(2). In addition, the Legislature's own sample

bond form does not contain a specific reference to the notice and time limitation provisions. Section 255.05(3), Florida Statutes, includes a sample bond form for use on public works projects. Like the bond at issue here, the sample form makes explicit reference to section 255.05, but does not expressly incorporate the notice and time provisions from section 255.05(2), even though section 255.05(6) suggests that the bond form should contain such a reference. It defies logic to suggest that if a public works bond were produced by photocopying the sample form from the statute book a court could find that bond was not a statutory bond. The more reasonable interpretation is that the Legislature expressly acknowledged that an explicit reference to section 255.05 is sufficient to forewarn claimants of the statute's written notice requirements and time limits.

Third, the Legislature amended section 255.05 to provide the sample bond form before the Legislature amended section 255.05 in 1980 to add subsections (4) and (6). Ch. 77-81, § 1, Laws of Florida. The Legislature left the sample bond form unchanged in the 1980 amendments. Obviously, the Legislature deemed that its sample form statutory bond was sufficient and that an express reference to the notice and time limitation provisions of section 255.05(2), as opposed to a reference to section 255.05 generally, was not required.

Other jurisdictions enforce statutory notice and limitations requirements even if they are not set out in the bond form. For example, the federal government's standard Miller Act payment bond form, Standard Form 25A (48 CFR 53.301-25-A) does not contain a specific reference to the Miller Act's notice and time limitation provisions. The Miller Act, however, requires a claimant not in privity with the contractor to notify the contractor of its claim and requires all claimants to file suit against the payment bond within one year. These notice and time provisions appear in the Miller Act itself, but not the government's standard payment bond form. Nonetheless, courts uniformly hold that the failure to comply with these requirements bars a claim against the bond. See e.g. United States ex rel. Georgia Electric Supply Co. v. United States Fidelity & Guaranty Co., 656, F. 2d 993, 995 (5th Cir. 1981); United States ex rel. John D. Ahern Company, Inc. v. W.J.F. White Contracting Co., 649 F. 2d 29, 30 (1st Cir. 1981). Section 255.05, Florida Statutes, was patterned after the Miller Act. Harvesters Group, Inc. v. Westinghouse Elec. Comp., 527 So. 2d 254, 258, n. 3 (Fla. 3d DCA 1988); W.G. Mills, Inc. v. M & MA Corp., 465 So. 2d 1388 (Fla. 2d DCA 1985).

This Court has previously held that when the Legislature, in reaction to a judicial trend to broaden liability, enacts a statute designed to limit that liability, it would be improper to assume that the limiting statute could create a new and

previously unrecognized cause of action. Specifically, in Bankston v. Brannan, 507 So. 2d 1385 (Fla. 1987), the Court considered whether section 768.125, Florida Statutes, allowed a cause of action against a social host in favor of a person injured by an intoxicated minor served alcoholic beverages by the social host. The Court traced the historical development of section 768.125 and case law concerning social host liability for serving alcoholic beverages to minors. Id. at 1386. The Court noted that cases decided before the Legislature enacted section 768.125 had broadened social host liability. Id. The Court found that section 768.125 limited the liability of a social host. Id. After an intoxicated minor collided with a car on the way home from the social host's home, the operator and passenger of the car sued the social host for their personal injuries. Id.

This Court held that the social host was not liable for the injuries. Id. at 1387. In doing so, the Court noted,

> It would . . . be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law . . . and which has heretofore been unrecognized by statute or judicial decree.

Id. at 1386-87.

Surety liability for payment bond claims on public works projects had been broadened by judicial decisions preceding the 1980 amendments to section 255.05.

The legislative response to that trend was to limit liability with the enactment of section 255.05(4). Following the reasoning of this Court in Bankston, it would be anomalous and illogical to assume that section 255.05(6), which was enacted at the same time, would simultaneously create an entirely new loophole to restore the erroneous result the Legislature sought to avoid by enacting section 255.05(4). The Second District's holding that the lack of a recitation of the notice and time limitation provisions of section 255.05(2), as purportedly required by section 255.05(6), creates a new loophole to escape the results of failing to serve the required notices and institute a timely suit, is inconsistent with the plain purpose of the 1980 amendments, and, under the reasoning of Bankston, should be rejected.

The construction that gives force to subsections (2), (3), (4) and (6) of section 255.05 is that a reference to section 255.05 is a sufficient reference to the notice and suit limitations provisions of subsection (2). The bond form recommended in subsection (3), and the FDOT bond form at issue in this case, refer to section 255.05 but not separately to subsection (2). This is consistent with subsection (4), which unequivocally mandates that the bond is a statutory bond and subject to the notice and limitations provisions of subsection (2) regardless of the form of the bond.

An alternative construction is that subsection (6) requires a separate reference to subsection (2), but subsection (4) specifies that the sanction for omitting the separate reference does not include disregarding the notice and limitations provisions of subsection (2). This construction, however, is inconsistent with subsection (3), which recommends a bond form with no separate reference to subsection (2).

Under either construction, however, the result reached by the Second District is contrary to the intent of the Legislature. If a bond is provided to meet the statutory requirement of a bond on public works projects, a claimant has to provide the specified notices and file suit within the specified time period regardless of the form of the bond.

D. The Statute of Limitations on a Claim Seeking Payment Against a Payment Bond Is One Year.

The applicable statutes of limitation for surety bonds reveal a consistent legislative scheme to require payment bond claimants to file suit within one year from the date on which they last furnished labor, services, or materials to a project. In three separate provisions, the Legislature has left no doubt that a public works payment bond is subject to a one year statute of limitations.

First, section 255.05(2), which is applicable to the payment provisions of all public works bonds by virtue of the legislative mandate in section 255.05(4), Florida Statues, provides, in pertinent part,

> An action, except an action exclusively for recovery of retainage, must be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond within 1 year after the performance of the labor or completion of delivery of the materials or supplies.

This provision is clear and unambiguous: a suit against a public works bond must be filed within 1 year.

Second, to reinforce its intent that suits against public works bonds be brought within one year, the Legislature enacted section 95.11(5)(e), Florida Statutes, which became effective July 1, 2001. That section provides a one year statute of limitations for

> An action to enforce any claim against a payment bond on which the principal is a contractor, subcontractor, or sub-subcontractor as defined in § 713.01, for private work <u>as well as public work</u> from the last furnishing of labor, services or materials or from the last furnishing of labor, services, or materials by the contractor if the contractor is the principal on a bond on the same construction project, whichever is later.

§ 95.11(5)(e), Fla. Stat. (2002). (Emphasis added).

Third, section 95.11(2)(b) eliminates any suggestion that a payment bond claim can be subject to a statute of limitations other than one year. Section 95.11 (2)(b) provides for a five year statute of limitations for

> [a] legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of [sections] 255.05(2)(a)2. and 713.23(1)(e).

Id. at § 95.11(2)(b) (Emphasis added). Payment bonds are specifically carved out of this five year limitations provision.

Accordingly, in three places the Legislature mandates that a one year statute of limitations applies to payment bond claims in Florida. These three provisions encompass all conceivable payment bond claims. The Second District's opinion, which allows a claimant with an untimely claim to escape the application of the statute of limitations, simply does not comport with the law.

In fact, the legislative scheme is designed to eliminate confusion about when a claim must be brought against any payment bond, private or public, and is designed to make the law uniform with the law regarding the enforcement of a construction lien on a private project. As noted above, the Legislature designed the right of action allowed by section 255.05(1)(a) as an alternative to a construction lien, which cannot be secured against government owned land. W.G. Mills, 465 So.

2d at 1392 n.1. A construction lien under chapter 713, like a bond claim under section 255.05, has a duration of one year. § 713.22, Fla. Stat. (2002). If the lienor does not act to foreclose on the claim of lien before the expiration of one year from recording its claim of lien, the claim of lien is rendered unenforceable. Id.

Likewise, section 95.11(5)(b), Florida Statutes, provides a one year statute of limitations for actions "to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property."

The Legislature's intentions are clear in the statutes: the statute of limitations for claims against real property or a bond, public or private, is one year. The result places a supplier of labor, services, or materials on notice that, regardless of the type of project, public or private, if it wants to pursue a claim against one other than the party with whom it contracted, it must take action within one year from when it finishes its work on the project. This uniformity is what the Legislature intended. To treat a public works bond, such as the one here, as subject to a longer statute of limitations is contrary to the Legislature's clear mandate.

II THE SECOND DISTRICT ERRONEOUSLY FOLLOWED THE DECISION IN MARTIN PAVING CO. V. UNITED PACIFIC INS. CO.

Notwithstanding the Legislature's 1980 amendments to section 255.05, the Fifth District Court of Appeal, in Martin Paving Co. v. United Pacific Ins. Co., 646

So. 2d 268 (Fla. 5th DCA 1994), held that the enactment of section 255.05 (4) did not eliminate the judicially-created distinction between "common law bonds" and "statutory bonds." Its decision was largely driven by a set of circumstances that would have made it unfair to deny the claim of a materials supplier.

In Martin Paving, the general contractor on a FDOT project and its surety issued the FDOT's then-existing form performance and payment bond. Id. at 271. The claimant supplied materials to a subcontractor, and when it did not get paid, it sought to recover against the bond. Unlike Plaza Materials here, the claimant in Martin Paving diligently tried to discover the existence of the payment bond and to perfect its claim against the bond. Specifically, the claimant requested a copy of the bond from FDOT. FDOT first ignored the claimant's request, then told the claimant that there was no bond. The claimant searched the public records, but no copy of the bond had been recorded. Months later, after the time for it to perfect its bond claim expired, the claimant discovered the existence of the bond and immediately sought protection under the bond. Thus, the claimant in Martin Paving tried to comply with the statute, but the failures of FDOT and the contractor prevented it from doing so. Id. at 269-71.

Because the bond was not recorded in the public records as section 255.05(l) required, the Fifth District ruled that the bond was not a statutory bond.

Id. at 271. The holding in Martin Paving is a quintessential example of bad facts leading to the creation of bad law to avoid an inequitable result. It simply does not seem that it would have been fair to deny the claimant its right to pursue a claim against the bond since it had done everything it reasonably could do to discover the bond and perfect its rights. Instead of creating a loophole for claimants to use to avoid the application of section 255.05(2), the court could have used equitable tolling or equitable estoppel to extend the time for the claimant to file suit. See e.g. Cada v. Baxter Healthcare Corporation, 920 F.2d 446 (7th Cir. 1990); Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1998).

Instead, the court read a condition into section 255.05(4) that the Legislature did not include. Specifically, the court held that "unless subsection (1) is complied with, subsection (4) does not operate to require a claimant's compliance with subsection (2)." Id. That condition simply does not exist in section 255.05. It is a judicially created condition. If the Legislature, which was abundantly clear in its mandate in subsection (4), had intended to condition compliance with the notice and time limitation provisions of subsection (2) on performance of one or more of the actions described in subsections (1) or (6), it would have so stated. Instead, in subsection (4) it simply, but quite clearly, stated, "the payment provisions of all bonds furnished for public work contracts described in subsection (1) shall,

regardless of form, be subject to the requirements of subsection (2)." § 255.05(4), Fla. Stat. (2002). The reference to subsection (1) is a reference to the types of bonds subject to the ambit of section 255.05(4). It does not condition the applicability of subsection (4) on compliance with subsection (1). Had the Legislature intended to limit the applicability of subsection (4) to bond forms containing all of the information in subsection (1) and (6), it would not have stated that subsection (2) applies to public works bonds, "regardless of form."

III. THIS COURT SHOULD NOT ADOPT THE DICTA REGARDING PREJUDICE IN THE FIFTH DISTRICT'S FLORIDA CRUSHED STONE DECISION.

The Fifth District recently retreated from its holding in Martin Paving, which further undermines the Second District's holding in Plaza Materials. In Florida Crushed Stone Co. v. American Home Assurance Co., 815 So. 2d 715 (Fla. 5th DCA 2002), the court considered the exact same bond on the exact same project that is at issue in this appeal.[3] There, as here, the claimant failed to comply with the requirements of section 255.05(2) to perfect its claim against the bond. In contrast to Plaza Materials, the court denied recovery to the claimant. Id. at 717.

[3] The case emanates from the Fifth District instead of the Second because the FDOT project, the "Polk Parkway", was constructed in both jurisdictions. Florida Crushed Stone, 815 So. 2d at 715.

As its rationale for denying recovery, the court first noted that Florida "no longer recognizes a common law payment bond given on a public works project." Id. at 716 (emphasis in original). Further, the court stated, "The payment provisions of all bonds given on a public works project regardless of form, the legislature tells us, shall be construed as statutory bond provisions subject to the requirements of subsection (2)." Id. Thus, the court reached the result mandated by section 255.05(4), Florida Statutes.

The Fifth District, like the Second District, however, failed to reconcile what it believed was a conflict between subsections (4) and (6). In Florida Crushed Stone the Fifth District stated:

> Subsection (6) mandates a final warning; it is not a 'get out of jail free' card. Subsection (2) which mandates written notice within 45 days and sets a statute of limitation of one year is itself the first warning. If the claimant knows of the requirements of subsection (2) but does not comply, the fact that the final (redundant) warning does not appear in the bond should not excuse the claimant's non-compliance. However, if the claimant is unaware of the requirements of subsection (2) and relies on a bond which does not include the final (fail-safe) warning, then claimant's non-compliance with subsection (2) should not be a defense to the claim.

Id. at 717 n. 2.

With all due respect, the Fifth District misunderstood the legislative mandate. Everyone is held to know the law. That principle is especially appropriate when

dealing with commercial enterprises working on state construction projects. There is no room in the statute, and no basis in equity, for the Fifth District's dicta that a claimant in ignorance of the provisions of section 255.05(2) need not comply with them.

An analysis of prejudice to the claimant is simply unnecessary under the statute's clear and unambiguous scheme. Again, section 255.05(4) requires that the payment provisions of "all bonds" on public works projects be subject to the notice and time limitation provisions of subsection (2) "regardless of form." The Legislature did not leave a loophole for claimants who can convince the court they were in ignorance of the law. Since all bonds are subject to these requirements, a claimant on a public works bond necessarily is aware of them.

If a loophole were created so claimants could argue prejudice whenever a particular state agency left something out of its bond form, every claimant who failed to give notice or filed an untimely suit could seek to avoid the statute by alleging prejudice. Contractors and sureties would be forced to litigate barred claims, and, since prejudice is likely to be an issue of fact, incur substantial fees. A loophole for prejudice would undercut the uniform, bright line test mandated by the Legislature.

If a claimant is kept in ignorance of the identity of the surety or some other fact necessary to file a timely suit, as in Martin Paving, then equitable tolling or equitable estoppel may be appropriate to allow the claimant to avoid the consequences of its failure to timely perfect or pursue its claim. Ignorance of the clear requirements of the statute, however, should not be an excuse for failure to comply with the law. The Florida Statutes are readily available to anyone. The contractor and its surety do not write the bond form. If the bond form omits a reference to the notice and suit limitations, it is the procuring agency's fault. As between the innocent contractor and surety on the one hand and the claimant that failed to comply with the statute on the other hand, the loss should fall where the Legislature placed it: on the claimant who did not give notice or did not file a timely suit.

IV. PUBLIC POLICY FAVORS ENFORCEMENT OF THE STATUTORY SCHEME.

When the Legislature amended section 255.05 in 1980, it wanted to standardize, limit, and make more certain the scope of coverage under public works bonds. See Martin Paving, 646 So. 2d at 271. It added subsections (4) and (6) to address the complaint voiced by prime contractors and their sureties about the "common law bond" argument that left them without the benefits of subsection (2).

These complaints stemmed from the reality that contractors were unfairly saddled with liability to pay claims long after they had made final payment to their subcontractor who disappeared or dissipated the final payment without paying its sub-subcontractors or suppliers. The Second District's decision in Plaza Materials would strip contractors and their sureties of the protection intended by the Legislature. Plaza Materials benefits no one other than the one who least deserves a benefit: the claimant that slept on its rights.

If the claimant gives the prime contractor timely notice, the contractor can take steps to assure that its subcontractor pays the claimant. If the contractor does not get timely notice, it has no way of knowing that the subcontractor is not paying its debts. Indeed, since notice is mandated by statute, a lack of notice suggests that the subcontractor is paying for the materials it is furnishing on the project. Lack of notice needlessly increases the contractor's cost to perform the work.

Failure to enforce the one year suit limitation of section 255.05(2) will similarly increase losses to contractors and sureties and increase the financial burden on taxpayers who ultimately bear the cost of public projects. Bonds are required for all state-sponsored public works projects costing more than $200,000. The cost of these bonds is included in each contractor's bid. By providing a relatively short limitation period, the Legislature reduces the cost of such bonds,

while giving adequate protection to persons who work on public projects where construction liens are unavailable. Not only does the shorter limitation provision reduce project cost, it reduces litigation and requires claims to be promptly asserted so projects can be timely closed out.

If the requirements of section 255.05(2) are not enforced, the prime contractor's cost of performing state work will increase without any counter-balancing benefit to the state or its taxpayers. Instead, the benefit accrues to defaulting subcontractors who collected payment from the prime contractor but did not pay their debts, and to suppliers to subcontractors, who will be paid even though they failed to give timely notice of their claims and thus permitted the defaulting subcontractor to continue to receive payments without settling its own debts.

It should be emphasized that the prime contractor and its surety must use the form of bond mandated by the state agency. Both Martin Paving and Plaza Materials try to rationalize their results by suggesting that sureties should simply refuse to sign FDOT's bond and offer a different bond. The court in Martin Paving stated, "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." 646 So. 2d at 271. The results of such surety action would: (1) render the

bids of its principal nonconforming, thus reducing competition for state work and putting the principal out of business; and (2) bring public road construction to a standstill since FDOT insists upon the execution of its bond form without revision or amendment.

None of the scenarios resulting from the perpetuation of the rule of Martin Paving and Plaza Materials is desirable. The statutory scheme allows sub-subcontractors and suppliers to subcontractors recourse against the prime contractor and its surety, but the recourse is limited to give the prime contractor the ability to protect itself from double payments. This scheme reduces the prime contractor's costs, reduces the cost of the bonds, and benefits the taxpayers who ultimately bear those costs. This Court should end the current uncertainty over public works payment bond claims and hold that a bond furnished to comply with the Little Miller Act is a statutory bond subject to the notice and suit limitations set out in section 255.05(2). This Court should answer the question certified from the Second District by holding that the statutory notice and suit limitations in section 255.05(2) control and can be asserted by the contractor and its surety without regard to the form of bond used by the state agency.

CONCLUSION

When the Legislature amended section 255.05, Florida Statutes, to add subsection (4), it intended to standardize the law regarding payment bond claims and eliminate confusion in the trial and appellate courts about how such claims must be perfected and when they must be brought. In short, the Legislature, in reaction to case law broadening surety liability, amended section 255.05 by adding subsection (4) to limit surety liability.

Subsection (4) is clear and unambiguous. It mandates that the payment provisions of all bonds on public works projects are subject to the notice and time provisions of section 25.05(2). The Second District below ignored this clear legislative mandate and gave claimants a new way to avoid the consequences of their failure to act. Its decision excuses ignorance of the law by a claimant seeking payment on a public works bond. It sanctions the very result the Legislature intended to eliminate: confusion about when a claim against a public works payment bond must be perfected and brought.

The law, public policy, and principles of fairness, compel a reversal of the Second District's holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing amicus brief has been furnished by U.S. Mail to Hala A. Sandridge, Fowler White Boggs Banker P.A., P. O. Box 1438, Tampa, FL 33601-1438, and Robert E. Morris, Esq., 5020 West Cypress Street, Suite 200, Tampa, FL 33607, attorneys for Petitioner; and by Federal Express to Jamie Billotte Moses, Esq., Fisher, Rushmer, Werrenrath, Wack & Dickson, P.A., 20 North Orange Ave., Suite 1500, Orlando, FL 32802, attorney for Respondent; on this ____ day of November 2002.

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Brett D. Divers, Esquire

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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Brett D. Divers, Esquire