

SUPREME COURT OF FLORIDA

Case No.: 76,353

DISTEFANO CONSTRUCTION, INC., a
Florida corporation,

Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a foreign corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

CASE NUMBER 89-1550

GOSSETT & GOSSETT, P.A.
3595 Sheridan Street, Suite 204
Hollywood, Florida 33021

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OTHER AUTHORITIES:

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Chapter 19.04 A.1.d.(5), p. 16 4

PREAMBLE

The parties will be referred to by the position they held in the trial court or by name. Petitioner will be referred to as Defendant or DISTEFANO CONSTRUCTION, INC. Respondent will be referred to as Plaintiff or FIDELITY & DEPOSIT COMPANY OF MARYLAND.

The record on appeal will be cited as (R. __).

The appendix filed by Petitioner with its initial brief will be cited as (App. __).

SUMMARY OF ARGUMENT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, is responsible for all of the attorney's fees incurred by DISTEFANO CONSTRUCTION, INC., in the lien foreclosure action under the Florida Mechanic's Lien law, as amended by 1987 LAWS OF FLORIDA, Chapter 87-74, § 6, having an effective date of October 1, 1987, in effect at the time of the award of attorneys' fees in favor of DISTEFANO CONSTRUCTION, INC., and against FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Prior to the enactment of Chapter 87-74, LAWS OF FLORIDA, the attorneys' fees obligation of the surety on a transfer of lien surety bond was held to be limited to \$100. The limitation was based upon the phrase "and costs not to exceed \$100.00" found in § 713.24 FLA. STAT. With the passage of Chapter 87-74, LAWS OF FLORIDA, the legislature deleted that phrase. The only rational explanation of the deletion is the intent to delete this limitation. As this court has previously held, in *Capella v. Gainesville*, 377 So.2d 658, 660 (Fla. 1979) the omission of a word in the amendment of a statute will be assumed to be intentional:

When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment.

Therefore, there was no limitation on the obligation of the surety on a transfer of lien surety bond for attorneys' fees at the time the trial court entered its order finding FIDELITY & DEPOSIT COMPANY OF MARYLAND directly responsible for 100% of the attorneys' fees of DISTEFANO CONSTRUCTION, INC. The opinion of the Third District under review, finding the attorneys' fees obligation to be limited to \$100, is in error, and should

be reversed by this Court.

The opinion under review should be reversed, with instructions to reinstate the judgment of the trial court except for that portion which reduces by 30% the hours found by the court to be otherwise reasonably expended. That portion should be reversed with directions to the trial court to enter a new order providing for no reduction in the hours found by the trial court to be reasonably expended. The trial court should be directed to modify its order to award \$59,500 for legal services in the circuit court, determined by multiplying \$175 per hour by 165 hours (being the 175 hours minus 10 hours), multiplying that lodestar figure of \$28,875 by the contingency risk multiplier of 2, and adding the 10 hours at \$175 per hour.

Additionally, this Court should award Petitioner its fees for this appeal.

ARGUMENT

1987 LAWS OF FLORIDA, Chapter 87-74, § 6¹, made the following changes² to § 713.24, FLA. STAT. (1985):

713.24 Transfer of liens to security.—

(1) Any lien claimed under Part I may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either:

(a) Depositing in the clerk's office a sum of money, or

(b) Filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state, either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate ~~6 percent per year~~ for 3 years, plus ~~\$500~~ ~~\$100~~ to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded, ~~and costs not to exceed \$100. . . .~~

Prior to those changes, the statute had been construed as limiting the obligation of the surety on a transfer of lien surety bond for attorneys' fees to \$100. *Gesco, Inc. v. Edward L. Nezelek, Inc.*, 414 So.2d 535 (Fla. 4th DCA 1982), *rev. denied*, 426 So.2d 27 (Fla. 1983). *See also Old General Insurance Co. v. E. R. Brownell & Assoc., Inc.*, 499 So.2d 874 (Fla. 3d DCA 1986); *Gulfstream Pump & Equip. Co. v. Grosevnor Dev., Inc.*, 487 So.2d 330 (Fla. 2d DCA 1986). This limitation was found in the phrase "and costs not to exceed \$100."

The legislature deleted that phrase in Chapter 87-74, LAWS OF FLORIDA. As this

¹1987 LAWS OF FLORIDA, Chapter 87-74, § 10, provides that the act shall take effect October 1, 1987.

²Additions to the prior version of the statute are indicated by highlighted text like this. Deletions from the prior version of the statute are indicated by struck-through text like this.

Court stated in *Capella v. Gainesville*, 377 So.2d 658, 660 (Fla. 1979):

When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment. *Carlisle v. Game and Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977); *Arnold v. Shumpert*, 217 So.2d 116 (Fla. 1968).

The Fourth District found that the deletion of that phrase indicated an intention of the legislature to eliminate any restriction on the amount of court costs (including attorneys' fees) for which the surety could be held liable. *Pappalardo Construction Company v. Buck*, --- So.2d ---, 15 FLW D2596 (Fla. 4th DCA Opinion issued October 17, 1990). The court reasoned:

Appellee asserts that the 1987 revision not only increased the amount the surety was required to post for any imposition of court costs, but also eliminated any restriction on the amount of court costs for which the surety could be held liable. Appellee offers two reasons for this view, which the trial court recounted in its order and which we find persuasive. The first reason is the inconsistency in allowing a lienor to recover attorney's fees on a mechanic's lien and limiting the recovery to \$100 in costs once the lien is transferred. No apparent reason for the discrepancy exists, particularly since the purpose of the mechanic's lien law is to protect subcontractors and materialmen.

The second reason follows from the first. The legislature sought to correct the discrepancy by omitting the language "and costs not to exceed \$100.00" in the 1987 revisions. . . .

Following this view leads to the conclusion that while the amendment increased to \$500 from \$100 the amount the surety had to post toward any imposition of costs, it repealed the \$100 cost recovery limitation so that no limitation now exists on section 713.24 bonds. Appellee notes that a leading treatise on the Florida Mechanic's Lien Law takes this view. *Rakusin, FLORIDA MECHANIC'S LIEN LAW MANUAL* 16³.

With the removal of the \$100 limitation on cost recovery, this Court needs to look

³In actuality, the statement appears at Chapter 19.04 A.1.d.(5), page 16.

no further than the Mechanic's Lien Law to find that the surety is directly obligated for 100% of the fees awarded by the trial court.

The legislative intent, which is the primary factor of importance in construing statutes, *Devin v. Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976), must be determined primarily from the language of the statute. *S.R.G. Corp. v. Department of Revenue*, 365 So.2d 687 (Fla. 1978). Further, if the intent of the legislature is clear and unmistakable from the language used (or in this case, from the language deleted), it is the court's duty to give effect to that intent. *Englewood Water District v. Tate*, 334 So.2d 626 (Fla. 2nd DCA 1976).

The statutory revision here is not ambiguous. It is clear and unmistakable.

When there is a statutory amendment, the rule of construction is to assume that the legislature intended the amendment to serve a useful purpose. *Carlisle v. Game and Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977). In making material changes in the language of a statute, the legislature is presumed to have intended some objective, *Blount v. State*, 102 Fla. 1100, 138 So. 2 (1931); *Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822 (Fla. 1964); *Sunshine State News Co. v. State*, 121 So.2d 705 (Fla. 3d DCA 1960), or alteration of the law unless the contrary is clear from all the enactments on the subject. The courts should give appropriate effect to the amendment. *State ex rel. Triay v. Burr*, 79 Fla. 290, 84 So. 61 (Fla. 1920); *Atlantic C. L. R. Co. v. Amos*, 94 Fla. 588, 115 So. 315 (1927); *Kelly v. Retail Liquor Dealers Assoc.*, 126 So.2d 299 (Fla. 3d DCA 1961).

The effect to be given to the 1987 amendment to § 713.24, FLA. STAT. is to acknowledge the removal of the limitation on costs recovery from the surety on a transfer of lien surety bond, holding the surety responsible for 100% of the attorneys' fees.

CONCLUSION

The opinion under review should be reversed, with instructions to reinstate the judgment of the trial court except for that portion which reduces by 30% the hours found by the court to be otherwise reasonably expended. That portion should be reversed with directions to the trial court to enter a new order providing for no reduction in the hours found by the trial court to be reasonably expended. The trial court should be directed to modify its order to award to \$59,500 for legal services in the circuit court, determined by multiplying \$175 per hour by 165 hours (being the 175 hours minus 10 hours), multiplying that lodestar figure of \$28,875 by the contingency risk multiplier of 2, and adding the 10 hours at \$175 per hour.

Additionally, this Court should award Petitioner its fees for this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 8th day of November, 1990, to: UBALDO J. PEREZ, JR., ESQUIRE, Attorney for Respondent, Popham, Haik, Schnobrich & Kaufman, Ltd., Suite 4100, One CenTrust Financial Center, 100 S.E. Second Street, Miami, Florida 33131.

GOSSETT & GOSSETT, P.A.
Attorneys for Petitioner
3595 Sheridan St., Ste. 204
Hollywood, FL 33021
(305) 983-2828
Dade: 621-2828
Fla. Bar No. 210811

By: 

RONALD P. GOSSETT
For the Firm

RPG/ms