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MEMORANDUM

TO: RPPTL Construction Law Committee

FROM: Ty G. Thompson
Surety & Insurance Subcommittee

DATE: October 8, 2012

RE: Case Law Update

In *Bayview Construction Corp. v. Jomar Properties, LLC*, 2012 WL 3711508 (Fla. 4th DCA August 29, 2012), the Fourth District held that a contractor is not entitled to certiorari review where the trial court did not depart from the essential requirements of the law by reducing a transfer bond based on the evidence before it, even if the contractor may suffer injury for which there is no adequate remedy at law. There, the contractor sued for and won a judgment against the developer to foreclose the contractor's lien for roughly \$1.6 million. The developer moved to reduce the transfer bond amount, and set the hearing for a non-evidentiary motion, where the trial court refused to consider the contractor's newly introduced related affidavits, and reduced the bond – creating for the contractor a partially unsecured judgment. While the Fourth District held that a partially unsecured judgment is a harm irreparable on final appeal, it found that the trial court did not depart from the essential requirements of the law in not considering the contractor's affidavits because the hearing was non-evidentiary and the contractor should not have expected to be able to present its affidavits for the first time at the hearing. The court denied the contractor's petition for certiorari review.

In *Continental Cas. Co. v. A.W. Baylor Versapanel-Plastering, Inc.*, 2012 WL 3870415 (Fla. 5th DCA September 7, 2012), the Fifth District Court of Appeal reversed the trial court's order awarding attorneys' fees to the subcontractor in a post-arbitration proceeding. There, the surety furnished a section 713.23, Florida Statutes payment bond for a large project. After disputes arose, the subcontractor sued the general contractor and surety for amounts due to it for certain change orders. The subcontractor also sought

delay damages from the contractor. The case was stayed pursuant to the subcontract's arbitration provision.

Prior to the arbitration hearing, the parties stipulated that the panel was to determine the "assessment of attorneys' fees . . . under application of Fl. St. Section 713.29." After the evidentiary hearing, the panel awarded the subcontractor far less than what is sought and refused to order any attorneys' fees because it found there to be no prevailing party. The subcontractor then filed a motion in the circuit court to recover attorneys' fees under sections 627.756 and 627.428, Florida Statutes. The subcontractor did not challenge the panel's refusal to award fees under section 713.29, but instead argued that 627.756 and 627.428 provide an alternative basis to award fees.

The Fifth District ruled that the trial court erred in accepting the subcontractor's argument because the statutes apply conflicting standards in determining entitlement to fees, with section 713.29 being the controlling statute in actions involving lien and payment bond claims. As the court noted, unlike the "prevailing party" standard under section 713.29, sections 627.428 and 627.756 only require the claimant to "obtain a judgment – no matter how minimal the amount of damages awarded."