

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-842

NOBEL INSURANCE COMPANY and
TILBURY CONSTRUCTION, INC.,

Petitioners,

vs.

MCCARTHY BROTHERS COMPANY,

Respondent.

ON NOTICE TO INVOKE DISCRETIONARY
JURISDICTION FROM THE
FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The respondent, McCarthy Brothers Company, is referred to in this brief as "McCarthy." Petitioners Nobel Insurance Company and Tilbury Construction, Inc. are referred to respectively as "Nobel" and "Tilbury." Nobel's jurisdictional brief is cited as JB ____, according to page number.¹ The decision of the First District Court of Appeal, contained in the appendix to Nobel's jurisdictional brief, is cited as SO ____, according to the page number of the slip opinion.

STATEMENT OF THE CASE AND FACTS

McCarthy was the general contractor on a condominium project. SO 2. Tilbury was a subcontractor. Nobel was Tilbury's surety under a performance bond, with McCarthy as bond obligee. No contractual relationship existed between McCarthy and Nobel. SO 2-3.

Tilbury filed suit against McCarthy for breach of the subcontract. SO 3. McCarthy filed a counterclaim and also asserted a claim against Nobel under the performance bond. SO 3-4.

At trial, the jury awarded damages to Tilbury, rejecting both McCarthy's counterclaim and its claim against Nobel. SO 4. Following trial, the circuit court entered judgment against McCarthy on the merits, as well as two independent judgments against McCarthy awarding attorneys' fees to both Tilbury and Nobel, who were represented by separate counsel. SO 1, 4.

¹ Nobel was the only petitioner that filed, in the district court, a notice to invoke this court's discretionary jurisdiction. Tilbury filed a joinder in that notice under rule 9.360(a) of the Florida Rules of Appellate Procedure. Tilbury did not file its own jurisdictional brief; it instead served, on June 2, 2003, a notice adopting Nobel's jurisdictional brief. See Tri-County Produce Distributors, Inc. v. Northeast Production Credit Ass'n, 147 So. 2d 587, 588-89 (Fla. 1st DCA 1962).

Through two appeals, later consolidated, McCarthy appealed both the final judgment against it on the merits and the judgments against it for the attorneys' fees of Tilbury and Nobel. SO 1. In disposing of the first appeal, the district court reversed the denial of McCarthy's motion for a remittitur and remanded the case to the trial court with instructions to grant Tilbury the opportunity to accept a reduction in the verdict or, if Tilbury declined to do so, to conduct a new trial on damages. SO 4-5.

On the second appeal--concerning the attorneys' fees issues--the district court provisionally reversed the award of attorneys' fees to Tilbury. SO 5-6. The court also held that Nobel has no legal basis for recovering its attorneys' fees from McCarthy, and it therefore reversed that judgment in its entirety. SO 7-9.

In ruling against Nobel, the First District rejected two independent arguments that Nobel made in support of its contention that it is entitled to recover its attorneys' fees from McCarthy. One was based on Article 10.5 of the McCarthy-Tilbury subcontract, which reads as follows:

The prevailing party in any legal action between the parties relating to this Agreement shall recover from the other party reasonable legal costs, including attorney's and consultant's fees, in connection with such action. The prevailing party is a party who recovers at least 75% of its total claims in the action or who is required to pay no more than 25% of the other party's total claims in the action.

SO 7. The First District held that Article 10.5, contrary to Nobel's argument, "does not contemplate attorney's fees for any entity other than McCarthy or Tilbury." SO 8.

Nobel's second argument was based on Article Six of the McCarthy-Tilbury subcontract and section 57.105(6) of the Florida Statutes. SO 7-8. As the First District recognized, "Article Six defines the scope of the risk or coverage to which Tilbury's surety would be exposed if Tilbury defaulted." SO 7. That unilateral provision states that "McCarthy shall be paid by the surety any legal and court costs McCarthy incurs in the enforcement of its rights under said bonds." SO 7.

The First District disposed of Nobel's argument based on Article Six on two alternative grounds. First, it held that the reciprocity provisions of section 57.105(6) do not apply to "parties not in privity." SO 9. Second, it held that Article Six applies only "to costs, not attorney's fees. Thus, even if section 57.105(6), applied to Nobel, the language in Article Six would preclude its application here." SO 9.

The First District issued its decision on March 10, 2003. SO 1. Nobel filed a timely motion for rehearing and certification on March 25, 2003. See Fla. R. App. P. 9.330(a). The court denied that motion through an order rendered on April 22, 2003. Nobel timely filed a notice to invoke this court's discretionary jurisdiction on May 6, 2003. See Fla. R. App. P. 9.120(b).

SUMMARY OF THE ARGUMENT

Nobel has mischaracterized the decisions of both the First District in this case and the Fifth District in Merchants Bonding Company v. City of Melbourne, 832 So. 2d 184 (Fla. 5th DCA 2002), the decision with which the First District is allegedly in conflict. In

fact, the question of law on which Nobel asserts the existence of conflict was not even addressed by either court.

Moreover, there is no actual conflict of decisions, as the constitution requires, because the Fifth District's discussion of whether a surety can recover attorneys' fees was pure obiter dictum. The actual holding of the Fifth District does not conflict in any way with the decision of the First District here.

Finally, even if a conflict of decisions existed here, this court should still decline review. The question of law on which Nobel asserts the existence of conflict is not one that was contested in the Fifth District, and it is neither significant nor likely to arise with frequency in the future.

ARGUMENT

A. THE CONFLICT ASSERTED BY NOBEL DOES NOT EXIST BECAUSE THE FIRST DISTRICT HERE DID NOT DECIDE THE SAME QUESTION OF LAW THAT THE FIFTH DISTRICT DISCUSSED

Nobel is seeking discretionary review under rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure and article V, section 3(b)(3), of the Florida Constitution. It argues that the district court's decision here expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Merchants Bonding Company v. City of Melbourne, 832 So. 2d 184 (Fla. 5th DCA 2002), on "the same question of law regarding the application of F.S. §57.105(6) and award of attorney's fees to a prevailing party Surety whose Performance Bond incorporates by reference the prevailing party attorney's fees provision of the contract between its bond principal and bond obligee." JB 5.

Nobel is mistaken, and its argument is predicated upon mischaracterizations of both the Fifth District's decision in Merchants Bonding and the First District's decision here.² In truth, the two decisions are not in conflict on the question that Nobel identifies. In fact, that question was not even addressed by either district court—and it certainly was not within the holdings of either court. Conflict jurisdiction is therefore not present here.

In this case, Nobel made two arguments for the recovery of its attorneys' fees from McCarthy. See SO 7-8. First, it argued that the prevailing-party attorneys' fees provision in the McCarthy-Tilbury subcontract, Article 10.5, entitled it to recover attorneys' fees from McCarthy. SO 7-8. Second, it argued that it could recover attorneys' fees by virtue of section 57.105(6) of the Florida Statutes and Article Six of the subcontract, a unilateral provision dealing only with costs, not attorneys' fees. SO 7-8. Contrary to Nobel's representations (see JB 2-3, 5, 6, 9), neither argument involved the application of section 57.105(6) to a prevailing-party attorneys' fees provision in a contract.

Nor did the First District address the application of section 57.105(6) to a contractual prevailing-party attorneys' fees provision. Instead, that court separately considered: (1) the question of whether Nobel can invoke the prevailing-party attorneys' fees provision in

² Nobel never brought Merchants Bonding to the First District's attention, either through a notice of supplemental authority or by citing that case in Nobel's motion for rehearing. Nobel's first reference to that case in the record appears in its notice to invoke this court's discretionary jurisdiction.

Article 10.5 (without regard to section 57.105(6)); and (2) the question of whether Article Six applies to attorneys' fees at all and, if so, whether Nobel was able to use section 57.105(6) as a basis for relying upon it. SO 8-9.

The Fifth District in Merchants Bonding likewise did not address any question concerning the application of section 57.105(6) to a contractual prevailing-party attorneys' fees provision. Instead, that court discussed only the application of section 57.105(6) to a unilateral attorneys' fees provision in a contract. See 832 So. 2d at 185. That discussion therefore concerned neither of the Nobel-related issues that the First District addressed here.

A cursory review of both Merchants Bonding and the First District's decision here reveals unequivocally that those decisions dealt with different issues of law--and neither decision involved the question of law on which Nobel asserts the existence of conflict. Under those circumstances, this court should decline review.

B. NO CONFLICT OF DECISIONS IS PRESENTED HERE

Further, even if the First District and Fifth District had addressed the same question of law, there would still be no actual conflict of decisions presented here. That fact provides an additional basis for this court to deny review.

"The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." Gandy v. State, 2003 WL 21087995 at *1 (Fla. May 15, 2003) (quoting Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976)). Before conflict jurisdiction exists, review must be

sought "from a district court decision 'that expressly addresses a question of law within the four corners of the opinion itself' by 'contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests.'" Persaud v. State, 838 So. 2d 529, 532 (Fla. 2003) (emphasis added) (quoting Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988)).

Under that standard, conflict jurisdiction should not be predicated on dicta or a court's other collateral statements that form no foundation for a court's actual holding. That, however, is the situation presented here.

The Fifth District certainly discussed the question of whether the performance-bond surety in Merchants Bonding theoretically could have recovered its attorneys' fees from the bond obligee, based upon an attorneys' fees provision in the contract between the obligee and the bond principal. 832 So. 2d at 186. However, Nobel's repeated characterizations of that discussion as the holding or ruling of that court are flatly wrong. See JB 3, 5, 6, 7, 8, 9.

What the Fifth District actually held in Merchants Bonding was that the surety was entitled to no recovery of attorneys' fees, because it was not the prevailing party as against the obligee. Id. at 186-87. Thus, the court's entire discussion of the surety's possible entitlement to a recovery of attorneys' fees was pure obiter dictum.

"A decision encompasses the opinion and judgment and is generally regarded as determinative of the case, not merely a part of it." Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 596 (Fla. 1961) (emphasis in original; footnote omitted). Dictum, in contrast, is "a purely

gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination." Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 4th DCA 1975); see also Shaps v. Provident Life & Acc. Ins. Co., 826 So. 2d 250, 253 (Fla. 2002) (because case was not decided on the merits, any discussion of merits was dictum); Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) (discussion "not necessary for the holding" was dictum); Continental Assur. Co. v. Carroll, 485 So. 2d 406, 408 (Fla. 1986) (statements in opinion beyond finding of no jurisdiction were dicta).

Dictum, unlike an actual holding of a court, is not binding and has no precedential effect. See Department of Transportation v. Fortune Fed. Savings & Loan Ass'n, 532 So. 2d 1267, 1270 (Fla. 1988); In re Estate of Clibbon, 735 So. 2d 487, 489 n.1 (Fla. 4th DCA 1998); Soto v. State, 711 So. 2d 1275, 1276 n.2 (Fla. 4th DCA 1998). Thus, dictum, by definition, is not an adjudication of a question of law.

It is a conflict between "decisions"--not a conflict with anything else--that provides this court with discretionary jurisdiction. Because dictum is not a "decision" on a question of law, this court should not exercise discretionary jurisdiction merely by virtue of some gratuitous comment by a district court--like the Fifth District's dictum in Merchants Bonding--that may seem to be at variance with a rule of law or "decision" in another case. Dictum merely represents part of a court's discussion of the case pending before it, not an announcement of a "decision" that could form the jurisdictional predicate for this court's review.

C. EVEN IF CONFLICT JURISDICTION EXISTED HERE, THIS COURT SHOULD STILL DECLINE DISCRETIONARY REVIEW

Regardless of whether, as an academic matter, "dicta conflict" potentially vests this court with discretionary jurisdiction, this court should still decline review here. The question of law framed by Nobel lacks sufficient significance to warrant this court's exercise of discretionary jurisdiction.

The bond obligee in Merchants Bonding failed to dispute the surety's potential entitlement to attorneys' fees, thereby conceding that issue for purposes of that appeal. See 832 So. 2d at 185-86. Thus, the Fifth District's dictum on that point almost certainly resulted from the failure by anyone to demonstrate the flaws in the surety's argument. When a court is presented with only one side of an argument, it is not surprising when it concurs with that side, particularly when the issue in question is not central to the ultimate holding in the case.

Further, because the Fifth District's entire discussion of that issue was dictum--and therefore does not constitute binding precedent for any other court--there is little danger that the purported conflict between this case and Merchants Bonding will generate any division, uncertainty, or confusion in the law.

On the contrary, it is highly unlikely that the question proffered by Nobel will arise with any significant level of frequency. Both this case and Merchants Bonding presented rare situations in which the bond principal and the surety were represented by separate counsel; in the vast majority of construction cases involving suretyship claims, the

surety tenders the defense to the principal and both the principal and the surety are jointly represented by the same counsel. To grant discretionary review here--on a question that rarely arises--is not a productive or efficient exercise of this court's resources. Discretionary review should therefore be denied.

CONCLUSION

For the foregoing reasons, this court should decline discretionary review in this case.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by United States mail this ____ day of June, 2003, to: James G. Etheredge, Esq., counsel for Tilbury Construction, Inc., at Law Offices of James G. Etheredge, Chartered, 226 Troy Street N.E., Fort Walton Beach, Florida 32548; and Robert E. Bauman, Esq., counsel for Nobel Insurance Company, at Robert E. Morris, P.A., 5020 West Cypress Street, Suite 200, Tampa, Florida 33697.

John R. Hamilton

CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

John R. Hamilton