

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 31869 and 31870

WELLINGTON POWER CORPORATION
Plaintiff Below, Petitioner

v.

CNA SURETY CORPORATION d/b/a
CNA COMMERCIAL INSURANCE
Defendant Below, Respondent.

Case No.:03-C-52

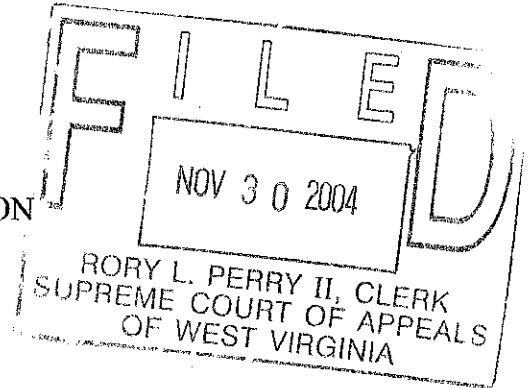
Consolidated with:

W.G. TOMKO, INCORPORATED
Plaintiff Below, Petitioner

v.

CNA SURETY CORPORATION d/b/a
CNA COMMERCIAL INSURANCE
Defendant Below, Respondent.

Case No.: 03-C-94



**REPLY BRIEF OF PETITIONERS WELLINGTON POWER CORPORATION AND
W.G. TOMKO, INCORPORATED TO CNA SURETY CORPORATION d/b/a CNA
COMMERCIAL INSURANCE'S BRIEF IN SUPPORT OF ITS POSITION ON
CERTIFIED QUESTION**

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I. DISCUSSION OF LAW

A. Public Policy Considerations Outweigh the Freedom of Contract And, Therefore, the "Pay-If-Paid" Clause in the Instant Action Is Unenforceable

The Defendant has argued that freedom of contract prevents the Plaintiffs from recovering under the Labor and Material Payment Bond (hereinafter "Bond") issued to Dick Corporation (hereinafter "Dick Corp.") because the Plaintiffs agreed to the inclusion of the "pay-if-paid" clause contained in their respective subcontract agreements with Dick Corp, and, therefore, they are precluded from seeking recovery on the Bond. The Defendant also alleges that the terms of the Bond incorporates the "pay-if-paid" clause contained in the contract between the Owner and Dick Corp.,¹ and thus bars Plaintiffs' recovery under the Bond. These arguments, however, are without merit as they fail to consider public policy concerns that arise when the "freedom of contract" is uncontrolled.

While there is no doubt that freedom of contract is an important concept in our society, this freedom cannot go unregulated.² "Freedom of contract" has been held to mean the freedom

¹Defendant claims that the contract between the Owner and Dick Corp. contains a "pay-if-paid" clause. The Plaintiffs dispute that allegation as there is no language in that contract that constitutes a "pay-if-paid" clause. On the contrary, the language contained in the Owner contract does not contain the express condition precedent language from the Thomas J. Dyer Co. v. Bishop International Eng. Co., 303 F.2d 655 (6th Cir. 1962), espoused by CNA.

²Ironically, the case cited by Defendant in support of its argument for freedom of contract, State v. Memorial Gardens Development Corp., 143 W.Va. 182, 101 S.E.2d 425 (1958), has been reversed by the Supreme Court of Appeals of West Virginia in the matter of Whitener v. West Virginia Board of Embalmers and Funeral Directors, 169 W.Va. 513, 288 S.E.2d 543 (1982). As stated in the Whitener opinion, "neither this court nor the United States Supreme Court has ever recognized that a right to pursue one's business in a certain way is fundamental and that laws effecting that right are subject to strict scrutiny. Instead, regulations about how businesses are conducted need only satisfy the less stringent standard that they bear a rational relationship to a legitimate state goal." Id. at 545-46 (citations omitted). Consequently, it is clear that the freedom of contract is not unfettered.

of a person:

to agree or assent; *not freedom to be forced to agree, to be presumed to have assented, to be cornered into something that one has not remotely considered, or to be denied meaningful choice.* This theoretical and philosophical argument underlies the evolution of contract law and this concurrence. 'Freedom of contract' does not vindicate tolerance of blatant inequities or unconscionable acts. Our society values fundamental fairness, equality, honesty, cooperation and ethics.

McGinnis v. D.B. Clayton, 173 W.Va. 102, 109, 312 S.E.2d 765 (1984) (Harshbarger, J., concurring) (emphasis added). This Court has acknowledged that the freedom of contract does not mean freedom from "reasonable regulations and prohibitions imposed in the interests of the community." General Electric Co. v. A. Dandy Appliance Co., 143 W.Va. 491, 505-506, 103 S.E.2d 310 (1958) (quoting Chicago, Burlington & Quincy Railroad Co. v. McGuire, 219 U.S. 549, 567 (1911)). Thus, at some point, public policy concerns will regulate the freedom of contract to protect the general public.

The courts are charged with broad discretion to determine what actions violate public policy. Kanagy v. Fiesta Salons, Inc., 208 W.Va. 526, 529, 541 S.E.2d 616 (2000). "Public policy" is not a fixed concept and there are no guidelines or rules "to determine what is public policy." Id. (quoting Yoho v. Triangle PWC, Inc., 175 W.Va. 556, 561, 336 S.E.2d 204 (1985)). This Court in Yoho v. Triangle PWC, Inc., defined public policy as the "principle of law under which *freedom of contract or private dealings are restricted by law for the good of the community—the public good.*" Yoho v. Triangle PWC, Inc., 175 W.Va. 556, 561, 336 S.E.2d 204 (1985) (quoting Higgins v. McFarland, 196 Va. 889, 894, 86 S.E.2d 168,172 (1955)) (emphasis added). Thus, despite Defendant's allegations to the contrary, the "freedom of contract" is not absolute. General Electric Co., 143 W.Va., at 505-506 (1958) (quoting Chicago, 219 U.S. at 567).

~~In the instant action, public policy concerns abound and compel a finding by this~~
Honorable Court that the freedom of contract yields to these public policy concerns and that the instant “pay-if-paid” clause is void. Enforcement of the “pay-if-paid” clause at issue will undermine the West Virginia’s Bond Statute, see W.VA. CODE §38-2-39 (2002) (hereinafter “Bond Statute”), and render it useless. The Bond Statute provides, *inter alia*, that contractors on public jobs must provide a payment bond to ensure payment to subcontractors³ in the event the contractor fails to pay them for services rendered. Id. The purpose of the statute is to protect subcontractors on public construction projects from contractors who do not fulfill their obligations under the subcontract—to wit, payment—and to provide recourse other than seeking enforcement of the subcontract or the filing of a mechanic’s lien (which is prohibited under the Bond Statute). As stated by the Supreme Court of Appeals of West Virginia in a case cited by Defendant, Tug River Lumber Co. v. Smithey, 107 W.Va. 482, 148 S.E. 850 (1929):

The bond here required by the statute was manifestly intended by the Legislature for the protection of those furnishing labor and material on public buildings in lieu of the protection afforded by the lien of the statute in other cases. In construing a similar statute, the Supreme Court of Wisconsin said: “Obviously this statute was enacted for the purpose of protecting subcontractors furnishing labor and material entering into the construction of public buildings which are not subject to a lien as are buildings owned by private individuals.” Baumann v. City of West Allis, 181 Wis. 506, 204 N.W. 907. This being a remedial statute, it will be construed most liberally to suppress the mischief and advance the remedy.

Id. at 853. ⁴ It is this established public policy that the Circuit Court is attempting to protect. If

³While the Bond Statute contemplates suppliers as well as subcontractors, reference in this brief will only be made to subcontractors as both Plaintiffs entered into subcontracts with Dick Corp.

⁴Consequently, CNA’s argument that the “statutory requirement of a payment bond in a case of public projects is intended to protect subcontractors and the State from the risk of insolvency of the general contractor or the general’s possible misallocation of funds it receives from the governmental owner” on page 30 of its brief is without basis in the legislative or case

the "pay-if-paid" clause contained in the subcontract between the Plaintiffs and Dick Corp. is permitted to be enforced, it will usurp the very purpose of the Bond Statute.

If the enforcement of this "pay-if-paid" clause abrogates the purpose of the Bond Statute, Plaintiffs will be denied any and all recourse against Dick Corp., who has failed to pay them for services rendered. Plaintiffs cannot sue on their respective subcontracts because the "pay-if-paid" clause prevents them from doing so successfully as the condition to payment has not been satisfied. Nor will they be able to lien the public property as the Bond Statute clearly prohibits the filing of any mechanic's lien on public buildings or the land on which said buildings are located. See W.Va. Code §38-2-39 (2002). Thus, there is no other remedy available to the Plaintiffs to recover moneys due and owing to it from Dick Corp. If the "pay-if-paid" clause was enforced, effectively denying Plaintiffs any relief when, during the course of this public project, Dick Corp. failed to pay them, it would work an injustice on these Plaintiffs by making them bear the entire risk of non-payment by the Owner. Again, the shifting of this burden would eviscerate the very purpose of the Bond statute.

CNA, instead, would have the Court believe that the Plaintiffs were somehow acting improperly in suing the surety. On page 24 of its Brief, CNA disingenuously argues that the Plaintiffs were making "an end run" in exercising their rights to sue the surety separately and that such an action would have the effect of driving up bonding costs. What the bonding company fails to advise the Court, however, is that the surety still has all of its rights to raise defenses other than the "pay-if-paid" clause. As such, if for some reason, Plaintiffs were not

history of West Virginia. The Tug River case is clear that the purpose of the bond statute is to replace the protection afforded by the lien statute, which makes no distinction between the ability of the owner to pay the general contractor or the general contractor's ability to pay the subcontractor.

owed the monies claimed for a substantive reason, CNA still has the right to raise those defenses. As a result, the State's interest in containing costs on public projects, which CNA is championing, will still be guarded. The surety only has an obligation to pay monies that are due to the subcontractors. Consequently, the State's interests are protected.⁵

Finally, the enforcement of the present "pay-if-paid" clause, and the resulting lack of remedies available to Plaintiffs, will be a disincentive to companies currently transacting business in West Virginia, as well as those companies that may conduct business within the State in the future. If businesses are not afforded some protection or provided a remedy to recover against a non-paying party to a contract, they will be reluctant to transact business in the State of West Virginia. This is particularly so with regard to business transactions involving the State of West Virginia. Absent a remedy available to a subcontractor either on a bond or in the form of a mechanic's lien when there exists a "pay-if-paid" clause in a contract, businesses will not want to shoulder the entire risk of non-payment by the Owner and will not conduct business in or with the State of West Virginia for fear of such an actual loss. Commerce in this State, therefore, will be crippled.

For these reasons and those set forth in Plaintiffs' Brief, this Honorable Court should find

⁵CNA makes reference to an administrative process mandated by the contract between WVU and the surety's principal, which would "require" that all claims be filed in the West Virginia Court of Claims. It is important to note that that provision is not contained in the bond issued by CNA. If CNA intended claimants to follow such a dispute resolution procedure, it was CNA's responsibility to put such language in the bond. By failing to do so, the Plaintiffs do not need to file suit against CNA in the West Virginia Court of Claims. See United States f/u/b/o B's Co. v. Cleveland Electric Co., 373 F.2d 585, 588 (4th Cir. 1967). There is simply no requirement under the law for the Plaintiffs to waive their right to sue the bonding company under the statutorily supplied bond and, instead, proceed before the Court of Claims. If the surety desired to require the Plaintiffs to do so, the bond within its four corners itself should have expressly required that procedure for resolving claims. It does not.

that the instant "pay-if-paid" clause is void as against public policy and should permit the Plaintiffs to proceed against Dick Corp.'s Bond for payment of services rendered on this public project.

B. Even If the "Pay-If-Paid" Clause Is Not Void for Public Policy Reasons, Plaintiffs Should Be Permitted to Recover Against the Bond Because Strict Construction of the Contract Prevents Forfeiture of the Plaintiffs' Right to Recovery

Even if this Honorable Court finds that the "pay-if-paid" clause is not void for public policy reasons, this Court should still find that Plaintiffs can seek recovery under the Bond so as to avoid a forfeiture of outstanding monies due them pursuant to their terms of the subcontract for work performed on the Project. Without clear and express language in the Bond upon which forfeiture is conditioned, such a forfeiture would be unjust and unfair to the Plaintiffs as it forces the Plaintiffs to bear the risk of loss of non-payment by the Owner.

When faced with a possible forfeiture for failure to satisfy a condition precedent, courts favor the waiver of a condition rather than causing the forfeiture. It would be inequitable to "enforce[] a penalty or forfeiture [upon a party] *if such [forfeiture] can be avoided.*" Fraley v. Family Dollar Stores of Marlinton, West Virginia, Inc., 188 W.Va. 35, 38, 422 S.E.2d 512, 515 (1992) (quoting Sun Lumber Co. v. Thompson Land & Coal Co., 138 W.Va. 68, 76 S.E.2d 105, 109 (1953)) (emphasis added). Consequently, the Supreme Court of West Virginia has stated that contractual provisions, which effect a forfeiture or inflict a penalty against a party, shall be strictly construed against the party for whose benefit the provisions were incorporated into the contract. Peerless Carbon Black Co. v. Gillespie, 87 W.Va. 441, 105 S.E. 517, 552 (1920). More specifically, "a high degree of certainty and definiteness is an obvious requirement of the rule of strict construction. That rule as well as reason, conscience, legal policy and fundamental

principles demand it in the condition or covenant constituting the basis of a forfeiture clause.”

Peerless, 87 W.Va. 441, 105 S.E. at 552.

The case of Brown & Kerr, Inc. v. St. Paul Fire & Marine Ins. Co., 940 F. Supp. 1245 (N.D. Ill. 1996) is illustrative of this concept in a situation almost on point with that before this court. In Brown & Kerr, a subcontractor brought suit against the surety of the general contractor and not the general contractor itself. The bonding company raised as a defense a “pay-when-paid” clause that was contained within the subcontract. In applying Illinois law, the court not only agreed with the subcontractor that the surety’s argument “runs counter to the underlying purpose of the payment bond, i.e., the assurance of payment to subcontractors,” it also ruled that a “pay-when-paid” clause is an invalid condition precedent to payment under the subcontract. Id. at 1249-1250. On the issue of forfeiture, the court quoted the case of A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp., 132 Ill. App.3d 325, 477 N.E.2d 30 (1985) stating “that conditions precedent are not generally favored and courts will not construe stipulations to be a condition precedent when such a construction would result in forfeiture.” Id. The Brown & Kerr court went on to state that it would “not construe [the pay-when-paid clause] as a valid condition precedent to payment because such a construction would work a significant forfeiture of [the subcontractors’] rights under the subcontract and, more importantly, the payment Bond. Id. at 1250.

The Courts of West Virginia have been similarly clear with regard to bonds issued by for-profit sureties that contained implied conditions precedent. In the Tug River case, cited supra, the court opined “the authorities are in agreement that, where the insuring is done for profit, the contract, when there is room for construction, is to be most strongly construed against the surety and in favor of the indemnity which the obligee had reasonable grounds to expect.”

Tug River, 148 S.E. at 852. The Tug River court continued by stating:

So a bond given under the statute must be construed, as to the scope of its obligations, to cover the object of the statute in requiring it, if its words at all allow such construction, and the statute is to be regarded as part of it. . . . The courts are equally in unison in holding that whatever is included in a statutory bond, and is not required by the law, must be read out of it.

Id. at 853.

In the instant action, Defendant seeks to shift the risk of non-payment by the Owner from it to the Plaintiffs and to effect a forfeiture against the Plaintiffs by claiming that the Bond contains a “pay-if-paid” clause allegedly contained in the contract between Owner and Dick Corp. However, the “pay-if-paid” terminology clearly benefits the Defendant and, therefore, the language must be strictly construed against the Defendant, a surety for profit.

If Plaintiffs stand to lose payment for services rendered because of the failure of a condition precedent to said payment, i.e., payment by the Owner to Dick Corp., this language must be expressly set forth in the terms of the Bond. In the Bond at issue, however, there is no express language that clearly states a forfeiture will occur absent the happening of the condition precedent. Even if Defendant’s contention that the contract between Owner and Dick Corp. contains a “pay-if-paid” clause and was subsequently incorporated into the terms of the Bond, which Plaintiffs dispute, there still remains no express language stating that a forfeiture will take place if certain conditions are not met. Thus, the Bond must be strictly construed against the Defendant and forfeiture should not be forced upon the Plaintiffs. To do so would be unfair and inequitable, particularly when there is an alternative to effecting the forfeiture: recovery on the Bond.

Moreover, the forfeiture of Plaintiffs’ recovery for services performed would shift the risk of loss of payment by the Owner from Dick Corp. to the Plaintiffs. Such a shift of the risk of loss, however, would be inequitable and unconscionable given that Plaintiffs rendered their

~~services as set forth in their respective subcontracts with Dick Corp.~~ As Plaintiffs fully performed under the terms of their contracts, they should be fully compensated for the work performed. They should not be forced to assume the risk of non-payment by the Owner. Indeed, the Bond Statute enacted by the West Virginia legislature clearly contemplates that the contractor Dick Corp. bear the risk of loss by providing payment bonds on public jobs.

C. Defendant's Attempt to Distinguish Plaintiffs' Precedent From Other Jurisdictions Based on the Word "Failure" is Without Merit

Defendant would have the Court believe that the use of the word "failure" in the bond statute somehow creates magical words different from that contained in other bond statutes around the nation and creates a statutory "pay-if-paid" condition when read in conjunction with the "pay-if-paid" clause allegedly contained within the subcontracts. In doing so, it cites to cases that it claims define the word "failure." These cases do not define "failure" within the context of a breach of contract action. For example, the case of Smith v. Godby, 154 W. Va. 190, 174 S.E.2d 165 (1970), is a case involving a proceeding by voters to remove a county assessor due to that officer's knowing and willful "failure," neglect or refusal to assess all property in compliance with the applicable statute. Id. at 167. The court stated in Smith that the voters were required to make a showing of either failure or refusal of the officer's duties with refusal requiring a deliberate action and a failure requiring inaction. Id. at 171. The context in which the court defines terms, however, must be taken into consideration and cannot be read as a blanket definition for the word "failure." See also Williams v. Taylor, 529 U.S. 420 (2000)(which attempts to define the word "fail" in the context of a *habeas corpus* proceeding). As Justice Kennedy states in his opinion in Williams:

we do not deny "fail" is sometimes used in a neutral way, not importing fault or want of diligence. So the phrase "we fail to understand his argument" can mean simply "we cannot understand his argument." This is not the sense in which the

word "fail" is used here, however.

Id. at 1487. Consequently, one must look at the purpose of the statute in which the word appears and not blindly attempt to cobble together a definition from distinguishable case law.

Still, due to the statute's use of the word "failure," CNA attempts to argue that the West Virginia Public Bond Statute has critical differences from those found in other jurisdictions, especially those in which they have ruled that a "pay-if-paid" clause would not apply against the surety. CNA essentially argues that a subcontractor cannot recover against the surety if the surety's principal does not yet owe money to the subcontractor given the conditional payment requirements of the subcontract. In other words, CNA asserts that the monies are not yet due and, therefore, there has been no failure to pay.

In the cases cited by Plaintiffs in their Brief, however, the courts were faced with bonds that contained similar language as the Bond here. While the other bonds did not use the word "failure," the language makes it clear that the surety would not be responsible to the subcontractor unless sums were justly due the claimant. See Brown & Kerr, Inc., 940 F. Supp. at 1246 (in which the bond provided that the subcontractor could only receive judgment against the surety "for such sum or sums as may be justly due claimant..."); Moore Brothers Co. v. Brown & Root, Inc., 207 F.3d 717, 720 (4th Cir. 2000) (containing same bond language as in Brown & Kerr), and OBS Co., Inc. v. Pace Construction Corp., 558 So.2d 404, 407 (Fl.1990) (same).

Defendant is attempting to make a distinction where one does not exist.⁶

⁶CNA claims that since Dick, its principal, is not in default, there is no liability to the Plaintiffs under the bond. In doing so, it follows the "general rule" that the liability of the surety is coextensive with that of the principal. Gateway Communications, Inc. v. John R. Hess, Inc., 208 W.Va. 505, 541 S.E. 2d 595, 598-99 (2000). As the Gateway case made clear, this is a "general rule." The other courts which have dealt with this specific question of "pay-if-paid" and public policy have followed this general rule as well and have carved out an exception relating to such conditional payment clauses, as detailed on pages 17-19 of Plaintiffs' Brief.

For the above reasons, this Honorable Court should find that the terms of the Bond do not include a forfeiture clause and should permit the Plaintiffs to seek recovery on the Bond at issue.

D. If the Rule Advocated by the Plaintiffs Is Adopted, it Should Be Applied Retroactively Under the Bradley Ruling.

In CNA's last attempt to grasp at any straw, it argues that under the case of Bradley v. Appalachian Power Co., 163 W.Va. 332, 256 S.E.2d 879 (1979), this Court should apply any decision in favor of Plaintiffs prospectively only. In doing so, CNA misreads the Bradley decision. The Bradley case involved the court's decision on whether or not to apply retroactively a major change in the law relating to the doctrine of contributory negligence. Id. at 885. In deciding whether to apply that decision retroactively, the court recognized that it was dealing with "the outright reversal of a prior case," which it acknowledged was a "rather uncommon occurrence." Id. at 888. Similarly, the other cases cited by Plaintiffs, for this point State ex rel. Mitchem v. Kirkpatrick, 199 W.Va. 501, 485 S.E.2d 445 (1997) and Daily Gazette Co. v. Committee on Legal Ethics, 176 W.Va. 550, 346 S.E.2d 341 (1985), dealt with departures from previous substantive law. As the Court stated in Daily Gazette Co., there was a "clear departure from prior precedent." Id. at 343. Defendant ignores this requirement even though, in Bradley, the first factor requires there to be an overruling of earlier precedent. Bradley, 256 S.E.2d at 889.

CNA's analysis also disregards the third factor required by Bradley. As stated by the Bradley court, the third factor is "common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties." Though this factor is on point, CNA does not deem it "worthy of special note." See page 33 of CNA's Brief.

Finally, CNA does address the fifth factor of the Bradley considerations. In doing so, it

cavalierly determines that the ruling in favor of Plaintiffs would constitute a “radical” departure from previous substantive law. If it had fully reviewed the three cases that it cites in this section of its Brief, however, it would have seen what the courts of West Virginia deem to be “radical.” These cases deal with weighty issues such as a change in the law associated with contributory negligence (Bradley), a change in the statute relating to transfers and venues (Mitchem) and public access to attorney disciplinary proceedings (Daily Gazette). These are the radical departures referenced in the fifth factor listed by the Bradley court.

Here, the Court is faced with an issue of first impression. Moreover, it is not overruling a decision, and CNA cannot argue that it relied upon earlier precedent in issuing a bond to its principal. While the decision of the court is indeed important, it does not have the impact of a change in the State’s view of contributory negligence or *forum non conveniens*. It is simply a narrower issue. Given that there was no prior precedent relating to the issue of “pay-if-paid” applicability in a payment bond on a public project, the Bradley factors do not apply. This is simply not a “traditionally settled area of the law.” Bradley, 256 S.E.2d at 889. Consequently, any ruling in the Plaintiffs’ favor by this Court should be applied retroactively to CNA.

E. Under the Rule Relating to Certified Questions There Is No Requirement That the Petitioner Be the Entity That Was Adverse to the Decision Below.

Under Rule 13 of the West Virginia Rules of Appellate Procedure, there is no rule setting forth which party has to present the certified question to the Court. Instead, the only reference is to “the party presenting the certified questions.” Rule 13(a). Consequently, there is no obligation on the part of either party to await the other party’s petition. As a result, the party that files its petition first must be deemed the petitioner. Once the Court grants the petition, the certified questions are to then proceed as provided in Rules 10, 11 and 12. Rule 13(g). In doing so, the

petitioner must be treated as the appellant, in designation only, because, in reality, there is no appellant or appellee in a situation involving a certified question. If the Supreme Court of West Virginia intended to treat the certified question as an appeal, it had the option to do so in this Rule.

In this matter before the court, Plaintiffs were the petitioners on the certified question. The Court has already recognized Plaintiffs right to be the nominal "appellant" in its order of September 16, 2004, in designating Plaintiffs as the entity to file the first brief on the certified question as well as giving Plaintiffs the right to file the present reply brief.⁷ Consequently, Plaintiffs' counsel must be entitled to open and close the argument under Rule 12. Therefore, Plaintiffs respectfully requests that this Court deny Defendant's request to be designated the "appellant" for the purposes of Rule 12.

II. CONCLUSION

On page 12 of its Brief, CNA attempts to state the position of the Plaintiffs in this matter. It claims that "the Plaintiffs here advocate that West Virginia should adopt a blanket position holding void as against public policy any agreement to make the owner's payment to the general contractor a condition precedent to a subcontractor's entitlement to payment on a construction project." Defendant is attempting to obfuscate the issue as the certified question deals solely with the issue of whether or not a surety can rely upon a "pay-if-paid" clause contained in the

⁷Plaintiffs note that Defendant CNA railed throughout its Brief that Plaintiffs "ignored" the cases it cited in its Petition for Docketing of Certified Question. See Defendant's Brief at pages 21 and 31. While doing so, CNA has not cited to any rule requiring Plaintiffs to respond to arguments made in the Petition for Docketing of Certified Question. Plaintiffs would simply like to point out that they were under no obligation to respond to CNA's Petition for Docketing of Certified Question. On the contrary, this court permitted Plaintiffs to present a reply brief for that very purpose.

subcontract. This Court need not determine that "pay-if-paid" clauses are violative of public policy in general. On the contrary, the only issue before the Court is whether a surety's reliance upon such a clause contained in a subcontract is improper.

The Tug River case made it clear that the purpose of the bond statute is to protect the subcontractors and suppliers of the general contractor. CNA, a for-profit surety, however, would argue that if the general contractor is never paid by the owner, the surety's obligations would never become ripe. If so, the subcontractors would be left without a remedy and could never make use of the statutory protection afforded to them by the Legislature of West Virginia. As with the subcontractor in West Fair Electric Contractors v. Aetna Casualty Ins. Co., 638 N.Y.S.2d 394, 661 N.E.2d 967 (NY 1995), the Plaintiffs here would not be able to make use of a statutory remedy, the statutory bond has become worthless and no protection has been afforded to the subcontractors. Consequently, Plaintiffs respectfully request that this Honorable Court affirm the decision of the Circuit Court of Monogalia County and answer the certified question in the affirmative.

Respectfully submitted,

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