W/OO/A

IN THE SUPREME COURT OF THE STATE OF FLORIDA

L. ROSS, INC., a
Florida Corporation,

Petitioner,

-vs-

CASE NO.: 66,607

R. W. ROBERTS CONSTRUCTION
COMPANY, INC., TRANSAMERICA
INSURANCE COMPANY, B. E.
McCALL and THOMAS ADAIR,

Respondents.

APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent, Transamerica Insurance Company ("TRANSAMERICA") adopts Petitioner, L. Ross, Inc.'s ("ROSS") statement of the case and facts with the following exceptions.

ROSS has stated that "the trial judge applied the statute as it existed on the date the suit was filed and limited Petitioners recovery to 12.5 percent of the Judgement." (Initial Brief of Petitioner, p.1) The record, however, does not show that the trial judges made an express ruling or whether the former or revised statute was to apply. The record shows that the trial judge took testimony, heard argument of counsel on the issue, and reserved ruling as to which version of the statute applied. (Roa 1-27) The record then shows a Final Judgement being entered in favor of ROSS subsequent to the hearing which, inter alia, provided for a "reasonable" attorneys fee in the amount of $6,809.95 (Roa 125). The record is silent as to any further activity prior to the filing of the Notice of Appeal by ROSS.

In addition, ROSS has stated that the only evidence presented at the referenced hearing was that the sum of $21,572.05 was a reasonable hourly fee under the circumstances. However, the record clearly shows that Mr. Joseph Lane testified as to the reasonableness of the attorneys fees expended by ROSS, but admitted that he had not make any attempt to segregate the work required with respect to the defense or prosecution of any particular defendant, and he also could not segregate as to whether the work related to a

claim, answer or defense. (ROA 7-8, 10)

SUMMARY OF ARGUMENT

TRANSAMERICA would state that since the Record on Appeal sub judice does not reflect an express ruling by the trial court as to whether the former or revised version of Section 627.756, Fla. Stat. applied to this case, the Supreme Court of Florida may not properly consider the points raised by Petitioner of appeal and must affirm the judgement of the lower court.

If the Supreme Court should address Petitioner's points of appeal, then the former version of Section 627.756, Fla. Stat. should be applied to the facts of this case because:

a) Attorneys fees are recoverable only as an incident to the underlying cause of action, and similarly the choice of law governing the amount of attorneys fees accrues and is limited by the law in effect at the time of the accrual of the underlying cause of action;

b) It is a facet of Constitutional due process that the Legislature cannot constitutionally increase as existing obligation, burden or penalty as to a set of facts after those facts have occured; and,

c) The Legislature clearly expressed its intention that the revision to Section 627.756 was to have prospective effect, and did not specify that the statute was to have retroactive effect.

Further, should the Supreme Court address the Petitioner's points of appeal, and it should be determined that reasonable attorneys fees are appropriate, then such fees should be segregated according to the time expended by beneficiary's attorney in obtaining a recovery under the performance bond statute, and attorneys fees for unrelated work should be non-compensable.

IT IS FUNDAMENTAL THAT THE RECORD ON APPEAL MUST CONTAIN EVERY ORDER, JUDGEMENT, OR DECREE WHICH FORMS THE SUBJECT OF ALLEGED ERROR, BUT THE RECORD SUB JUDICE DOES NOT INDICATE THAT THE TRIAL COURT MADE ANY RULING AS TO THE RETROACTIVE OR PROSPECTIVE APPLICATION OF THE REVISED SECTION 627.756, FLA. STAT. (1982). WITHOUT A SUFFICIENT RECORD, THE APPELLATE COURT MAY NOT PROPERLY CONSIDER POINTS ON APPEAL AND MUST AFFIRM THE JUDGEMENT OF THE LOWER COURT.

ARGUMENT

ROSS has predicated the entirety of this appeal on the presumption that the trial court "applied the statute as it existed on the date the suit was filed and limited Petitioner's recovery to 12.5 percent of the judgement." (Initial Brief of Petitioner, p. 1) However, the record is silent as to whether the trial court made such an express ruling on this issue.

The record on appeal indicates that a final judgement was entered against TRANSAMERICA pursuant to Stipulation of Counsel without a jury. (ROA 3) A hearing was held before the trial court on December 14, 1983, at which time the only issue before the trial court was the amount of attorneys fees due to ROSS. (ROA 3,4) At this hearing, argument was made by counsel for ROSS and counsel for TRANSAMERICA as to whether the former or the revised statute was applicable to the action. (ROA 1-27) As to this issue the court expressly reserved ruling. (ROA 25)

The form of the final judgement entered by the trial court was submitted by counsel for ROSS, and stated as follows:

> Ordered and adjudged that the plaintiff do have and recover of and from the defendant, TRANSAMERICA INSURANCE COMPANY, upon the obligations of the bond involved herein, in the sum of $_____ together with interest in the amount of $_____, and the sum of $_____ as reasonable attorneys fees herein, together with $_____ as costs herein taxed, for all of which let execution issue.

The record does not indicate any further pleadings or hearings after the date of the above referenced hearing. On December 4, 1983, without further proceedings, the trial court set the amount of reasonable attorneys fees at $6, 809.95, and entered the final judgement, according to the form above, reflecting said amount. (ROA 125)

The question of whether the trial court made an express ruling as to whether Section 627.756, Fla. Stat. (1982) was to have prospective or retroactive application in this matter is critical to this Court's authority to determine whether error was committed. In Aetna Casualty and Surety Company v. Simpson, 128 So. 2d 420 (Fla. 1st DCA 1961), a motion for summary judgement was filed in the trial court with supporting affidavits, but the record was silent as to whether an order was entered denying said motion. The appellant/moving party asserted that, since the action was set for trial, tried before a jury, and a judgement entered on the jury verdict, this amounted to an "effective" denial of his motion for summary judgement even though a written order to that effect was never entered. The First District Court of Appeal for Florida rejected this "effective" denial theory as follows:

> It is fundamental that the record on appeal must contain every order, judgement or decree which forms the subject of the alleged error. An appellate court is not authorized to hold a trial court in error for its rendition of an order, judgement or decree alleged to be erroneous unless proof of the rendition of such ruling is incorporated in the record and made available for review. Id. at 423.

The Supreme Court of Florida subsequently cited this proposition of law with approval in Sroczyk v. Fritz, 220 So. 2d 908,913 (Fla. 1969) where the appellant/moving party appealed after his motion to dismiss for failure to prosecute was "effectively" denied by the trial court. In Sroczyk, no formal order was entered by the trial court denying the motion, although the cause was later set for trial, submitted to a jury, and a judgement entered on the jury's verdict. The Supreme Court rejected the "effective" denial theory, citing Aetna, and insisted that the record clearly show the ruling made by the trial court. Id. at 913.

ROSS is clearly attempting to accomplish what the appellant/moving parties could not in Aetna and Sroczyk. Having entered a final judgement for a "reasonable" attorneys fee of $6,809.95, ROSS is advocating that the trial court in this case "effectively" ruled that the 12.5 percent cap on attorneys fees under former Section 627.756 applied where the record clearly shows that no such express ruling was made. Under the clear rule of law, this Court has no authority to rule on this issue. See Vassar v. State, 190 So. 2d 434 (1939); Locke v. Brown, 194 So. 2d 45 (Fla. 2d DCA 1967); City of Pompano Beach v. Edwards, 129 So. 2d 144 (Fla. 2d DCA 1961).

It is the responsibility of an appellant to provide the appellate court with an adequate record to support his appeal. Sroczyk

v. Fritz, supra; Steinhauer v. Steinhauer, 336 So. 2d 665,666 (Fla. 4th DCA 1976). Unless a trial court deliberately and patently refuses to rule on an issue, an appellant's failure to secure a ruling on an issue constitutes a waiver of that issue. Vassar v. State, supra; Coffman v. Kelley, 256 So. 2d 79 (Fla. 1st DCA 1972). ROSS's failure to protect the record and secure a ruling from the trial court as to whether the 12.5 percent cap on attorneys fees applied to this case is fatal to its appeal, and ROSS therefore has waived this issue as a basis for appeal.

ROSS's failure to provide the appellate court with a record sufficient to review the ruling assigned as error requires an affirmance of the trial court's decision. Steinhauer v. Steinhauer, supra; Conlee Const. Co. v. Cay Const. Co., 221 So. 2d 792 (Fla. 4th DCA 1969). In Conlee, appellant's failure to provide the reviewing court with a copy of a supersedeas bond, which appellant had asserted the lower court vacated and cancelled in error, required affirmance of the lower court's decision since the reviewing court could not determine the extent and terms of the surety's obligation. Similarly, ROSS's failure to secure an express ruling from the trial court in this case requires affirmance of the lower court's ruling.

The findings and judgement of the trial court come to the appellate court clothed with a presumption of correctness and may not be disturbed on appeal in the absence of a record demonstrating errors of law. White v. White, 306 So. 2d 608 (Fla. 1st DCA 1975). Since the form of the final judgement was prepared by counsel for ROSS, and since the trial court entered an amount of $6,809.95 as "reasonable" attorneys fees, and since the record does not otherwise indicate a ruling by the court as to the issue of whether the former or revised version of Section

627.756, Fla. Stat., was applicable to the action, it may be reasonably presumed against ROSS that the sum indicated by the trial court was the amount it considered to be "reasonable" pursuant to the revised statute. In the absence of evidence in the record indicating that the award of of the court constituted an abuse of the court's discretion, this finding of "reasonable" attorneys fees should not be disturbed on appeal.

The Supreme Court of Florida may affirm the decision of the trial court based on an inadequate record even though the jurisdiction of the Court in this case has been based upon the alleged conflict between the District Court's ruling sub judice and American Cast Iron Company v. Foote Brothers Corporation, 458 So. 2d 409 (Fla. 4th DCA 1985). See Sroczyk v. Fritz, 220 So. 2d 908,912 (Fla. 1969).

ATTORNEYS FEES ARE RECOVERABLE ONLY AS AN INCIDENT TO THE UNDERLYING CAUSE OF ACTION, AND SIMILARLY THE CHOICE OF LAW GOVERNING THE AMOUNT OF ATTORNEYS FEES ACCRUES AND IS LIMITED BY THE LAW IN EFFECT AT THE TIME OF THE ACCRUAL OF THE UNDERLYING CAUSE OF ACTION.

ARGUMENT

ROSS has attempted to establish that Section 627.756 was not being applied retroactively, and further that the right to attorneys fees under the revised statute "accrued" upon the entry of the Final Judgement, but then failed to cite any competent authority that would support the proposition that the choice of applicable law would be determined as of the date of the Final Judgement. American Home Assurance Co. v. Keller Industries, 347 So. 2d 767, 772 (Fla. 3d. D.C.A. 1977). Midwest Mutual Insurance Co. v. Santiesteban, 287 So. 2d 665, 667 (Fla. 1974). Similarly, whether the entry of a Final Judgement is jurisdictional to the recovery of an attorneys fee is of no consequence as to the choice of applicable law in establishing the amount of such fee once the Final Judgement is entered. Travelers Indemnity Co. v. Chisolm, 384 So. 2d 1360, 1361 (Fla. 2d D.C.A. 1980).

ROSS has further attached special meaning to the statutory phrase "(u)pon the rendition of a Judgement ... the trial court... shall adjudge or decree... a reasonable sum as attorney's fees..." (Initial Brief of Petitioner, page 8 citing Section 627.428, Fla. Stat. (1983) to support the proposition that the entry of Final

Judgement is the "essential fact" which determines the choice of law, rather than the accrual of the underlying cause of action. Again ROSS has failed to cite any authority for this proposition. As to whether this "clear language" of the statute determines the choice of law, ROSS overlooks an essential factor regarding the accrual of attorneys fees which the District Court has aptly noted:

> (Attorneys fees) are ordinarily merely incidental to the other, underlying cause of action and, in a sense, the right to receive, as well as the reciprocal obligation to pay, attorney's fees, is merely ancillary to, and an incident of, the accrual of the underlying cause of action concerning which the right to recover attorney's fees is given. L. Ross, Inc. v. R. W. Roberts Const. Co., 466 So. 2d 1096, 1098 (Fla. 5th D.C.A. 1985).

ROSS has attempted to compare Section 627.428 with Sections 768.56 and 713.29, Fla. Stat., (1983) in order to establish that the right to attorneys fees accrued upon the entry of the Final Judgement in the trial court in this case. (Initial Brief of Petitioner, page 9). The distinction ROSS makes between "prevailing Plaintiffs" and "prevailing party", or the requirement that a "judgement or decree" be entered to create an entitlement to attorneys fees, lends no support whatsoever to the proposition that the statute should be applied retroactively to a cause of action that accrued prior to the change in the law. ROSS has further cited a number of recent opinions of this Court to support this comparison which either do not apply to this cause, or which

actually reinforce Respondent's position.

In Florida Patient's Compensation Fund v. Rowe, _____ So. 2d _____ No. 64,459 (Fla. May 2, 1985), the Supreme Court of Florida upheld the constitutionality of Section 768.56, Fla. Stat. (1983), and further provided guidelines for the Judicial determination of reasonable attorneys fees. However, this opinion did not deal with whether the subject statute should be applied retroactively. Also note that the determination of reasonable attorneys fees using the "lodestar" approach as outlined in this opinion is only applicable after it has been decided that reasonable attorneys fees are indeed awardable.

The opinions in Young v. Altenhaus and Matthews v. Pohlman, _____ So. 2d _____ No's. 64,504 and 64,589 (Fla. May 2, 1985) were released simultaneously by this Court with the decision in Florida Patient's Compensation Fund v. Rowe, supra, and the Supreme Court of Florida therein held that Section 768.56, Fla. Stat. (1983) was not to be applied retroactively to causes of action accruing prior to the effective date of said statute because such a statutory requirement to pay attorneys fees constituted "a new obligation or duty", and was therefore substantive in nature. The District Court in this case recognized the substantive nature of a change in the statute requiring one party to be responsible for a greater portion of another's attorneys fees than such other party had been entitled to when his cause of action accrued. To paraphrase the Court's opinion in Young and Matthews, when ROSS'S cause of action accrued, TRANSAMERICA was not burdened with the potential responsibility to pay ROSS'S "reasonable" attorneys fees, and ROSS was not entitled to

that right; the only burden was to pay a statutory cap of 12.5% of the total recovery. See E & A Concrete v. Perry, 379 So. 2d 1015 (Fla. 1st D.C.A. 1980); Myers v. Carr Construction Company, 387 So. 2d 417 (Fla. 1st D.C.A. 1980).

IT IS A FACET OF CONSTITUTIONAL DUE PROCESS THAT THE LEGISLATURE CANNOT CONSTITUTIONALLY INCREASE AN EXISTING OBLIGATION, BURDEN OR PENALTY AS TO A SET OF FACTS AFTER THOSE FACTS HAVE OCCURRED.

ARGUMENT

Section 627.756, Fla. Stat., additionally, cannot be applied retroactively to attach liability for additional attorneys fees since the statute in effect at the time of the making of the insurance/bond contract did not so require. An insurance policy is a contract. Metropolitan Life Insurance Co. v. Fugate, 313 F. 2d 788 (5th Cir. 1963). It is well settled in Florida that the statute in effect at the time the insurance contract is executed governs any issues arising under that contract. Lumbermens Mutual Casualty Co. v. Ceballos, 440 So. 2d 612, 613 (Fla. 3rd D.C.A. 1983). To apply a revised statutory provision to contracts entered into prior to the effective date of the statute would constitute a legislative impairment of contract in violation of Article I, Section 10 of the Florida Constitution. Lumbermens Mutual Casualty Co. v. Ceballos, supra. Also see Pendas v. Equitable Life Assur. Soc., 176 So. 104 (1937).

The District Court in this case discussed, cogently and with authority, the Constitutional impact of applying Section 627,756, Fla. Stat. (1982) retroactively as follows:

> It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation. Likewise, but conversely, it is fundamentally unfair and unjust for the legislature to impose, ex post facto, a new or increased obligation, burden, or penalty as to a set of facts after those facts have occurred. For the same reason, re-

gardless of the intent of the legislature, the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred.

The elimination of a limitation on a substantive obligation or burden serves to increase that substantive obligation or burden just as the increase of a limitation on a substantive right serves to decrease that substantive right. In neither instance does the change give or change the procedural right or remedy to enforce the substantive burden or right itself. Accordingly, the legislative amendment of section 627. 756, Florida Statutes (1983), which repealed the twelve and a half percent limitation on the amount of attorney's fees recoverable from sureties under section 627.428, increased the substantive statutory obligation of the surty to pay attorney's fees. As to the due process limitation on the legislative power to retroactively enhance the statutory obligation of sureties to pay attorney's fees in actions on payment bonds, the crucial comparative date is not the date the payment bond was executed, nor the date of the filing if the action on the payment bond, nor the date of the judgement in the action on the payment bond. The crucial date is the date of the accrual of the particular cause of action on the particular payment bond because that is the date on which the essential facts occurred and were sealed beyond change by the surety and after that event the legislature can not, ex post facto, constitutionally enhance the obligation or penalty that results from those facts. The increased obligation for attorney's fees resulting from the statutory amendment repealing the limitation on that obligation, cannot be constitutionally applied as to causes of action in favor of subcontractors against sureties that were in existence on October 1, 1982, the effective date of the statutory amendment. L. Ross, Inc. v. R.W. Roberts Const, Co., 466 So. 2d 1096, 1098-1099 (Fla. 5th D.C.A. 1985). (citations omitted)

THE FLORIDA LEGISLATURE CLEARLY EXPRESSED ITS INTENTION THAT THE REVISION OF SECTION 627.756 FLORIDA STAT, WAS TO APPLY PROSPECTIVELY, THEREFORE PRECLUDING RETROACTIVE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE.

ARGUMENT

Should the Supreme Court of Florida determine that there is a sufficient record upon which to decide this case, then the issue may be framed as follows:

> Whether by the deletion of the limitation contained in Section 627.756, a plaintiff in an action pending on October 1, 1982, is entitled to a reasonable sum as attorney's fees, or whether the amendment to Section 627.756 applied only to actions brought after October 1, 1982.

ROSS'S primary position is that there was no clear legislative intent to apply this revision retroactively or prospectively, and thereby justifies the application of rules of construction that are maybe used in the absence of such clear legislative intent. However, the legislative intent was clearly stated at the time the revision was made in 1982, thereofre precluding the application of the ruled of construction that ROSS would have this court consider.

The revision to Section 627.756, Fla. Stat. (1982) was contained in Chapter 82-243, Laws of Florida, which contained numerous revisions to the insurance code made by the 1982 session of the Florida Legislature. Chapter 82-243, Section 813, Acts of Florida, states specifically as follows:

> except as otherwise provided herein, this act shall take effect October 1, 1982...Id.

This provision is a clear and express legislative intention that the revisions contained in Chapter 82-243, Acts of Florida, includ-

ing the revisions to Section 627.756, Florida Stat. (1982), should have prospective application only after October 1, 1982. It must necessarily follow that, since the legislature did not make a contrary provision for retroactive application in the specific revision of Section 627.756, Florida Stat. (1982), that such a contrary intention did not exist. It is a fundamental rule of construction that a statute be construed in such a way as to effecuate legislative intent. City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950); McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974).

The Supreme Court of Florida made the following observations as to legislative intent in Fleeman v. Case, 342 So. 3d 815 (Fla. 1976):

> We can restrict the debate on a legislative "intent" for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means, the forward or backward reach of proposed laws is irrevocably assigned in the form best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision. Id. at 816.

Similarly, in VanBibber v. Hartford Accident and Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983), the Supreme Court of Florida made the following observations regarding the attempted retroactive application of the recent "non-joinder" of insurance carriers statute to events occurring prior to the effective date of that statute:

> The regulation and supervision of insurance is a field in which the legislature has historically been deeply involved. See Chs. 624-632, Fla. Stat. While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement.... Id at 881-882 (citations omitted).

Similarly, the Supreme Court of Florida in McKibben v. Mallory, supra, stated as follows in construing the effects of the, then new, wrongful death act and its effect on rights of action under the repealed wrongful death statutes:

> ...(I)n determining legislative intent it is presumed that legislation is intended to act only prospectively and all statutes are to be construed as having a prospective operation unless the purpose and intention of the legislature to give them retroactive effect is expressly declared or necessarily implied....(W)here a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment or as the additions or changes are treated as amendments effective from the time the new statute goes into effect." Id. at 52-53

Therefore, the law of Florida as to legislative intent, as clearly set forth by the Supreme Court of Florida, as applied to Section 627.756, Fla. Stat., necessarily implies that any revision or amendment of the statute dealing with attorney's fees would have only prospective application in the absence of a clear intent to make such application retroactive.

ROSS has correctly stated that the well-established rule of construction is that, in the absence of a clear legislative expression to the contrary, a law is presumed to operate prospectively. Walker &

LaBerge, Inc. v. Halligan, 344 So. 2d 239, 241 (Fla. 1977). However, ROSS then states that:

> The underlying theory of this rule is that retroactive application of legislation would impair vested rights of persons litigating in the subject matter area before the new legislation was enacted.... (Initial Brief of Petitioner, page 12)

ROSS by this statement implies that a showing of no vested rights would somehow make the statute retroactive even in the absence of contrary legislative intent, or, as here, in direct contradiction to the expressed stated legislative intent that the revision should have prospective application only.

ROSS cites in support of the retroactive application of the revised statute the case of Department of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981). However, a reading of the Knowles case reveals that the case stands for the proposition that the state legislature in the context of its legislation cannot make such legislation effective retroactively so as to interfere with the "vested rights" of a private party whose cause of action arose prior to legislative passage of the subject act. This is fundamental constitutional law dealing with the prohibition of the passage of "expost facto" legislation. Such a situation is not raised in the case at bar insofar as the Florida Legislature, in passing the amended Section 627.756, Fla. Stat., did not intend and did not specify that the legislation was to be retroactive. To the contrary, the legislature, as noted above, specified prospective application only. The Knowles case, and each of the cases cited within it, provides rules of construction to assist the courts

when the legislature itself attempts to make a provision retroactive, such rules helping to define whether the legislature has passed an "expost facto" law in conflict with an individual's vested rights.

ROSS further cited Walker & LaBerge, Inc. v. Halligan, supra, to state that a reviewing court may apply a statute retroactively when that statute only affects "the measure of damages for vindication of a substantive right". However, such a retroactive application of a statute may be made by a reviewing court only in the absence of any clear legislative expression. Walker & LaBerge, Inc. v. Halligan, supra, at 242-243. A reviewing court cannot retroactively apply the "reasonable attorneys fees" provision of Section 627.756, Fla. Stat., in the presence of the clear legislative statement made in Chap. 82-243, Section 813, Acts of Florida, that the revisions of Section 627.756, Fla. Stat., shall not be effective until October 1, 1982 "unless otherwise provided for". Since the legislature did not make specific provisions for retroactive application of this section, it clearly was the legislative intent that the subject section only take effect on October 1, 1982. In view of the cited authority on point, Walker & LaBerge carries little authority under the facts presented at bar.

ROSS cited a number of cases in its brief whereby the Supreme Court of Florida retroactively applied several statutes which, under the facts of those cases, the amount of the plaintiff's recovery was increased. (Initial Brief of Petitioner, pp. 13-15). However, it should be noted that ROSS has not cited to this Court any Florida case whereby attorneys fees were retroactively award-

ed, only cases where other elements of damages were at issue: Tel Service Co. v. General Capital Corporation, 227 So. 2d 667 (Fla. 1969) (recovery of principal and interest under revised usury statute); Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978) (equitable distribution of ultimate liability among tortfeasors); Florida Patient's Compensation Fund v. Von Stentina, _____ So. 2d _____, No's. 64, 237, 64, 251, and 64,252 (Fla. May 16, 1985) (limitations of payments made under Florida Patient's Compensation Fund); Senfield v. Bank of Nova Scotia Trust Company, 450 So. 2d 1157 (Fla. 3d D.C.A. 1984) (treble damages for civil conversion). ROSS has, in fact, cited no binding authority to this Court by which an award of attorneys fees has either been awarded retroactively, or where attorneys fees have been classified as "remedial" or "substantive" for the purpose of permitting retroactive application. In the absence of clear, binding authority, the application of reasonable attorneys fees pursuant to Section 627.756 should be given only prospective effect.

It should also be noted that ROSS'S citation of Young v. Altenhaus and Matthews v. Pohlman, supra, and Florida Patient's Compensation Fund v. Rowe, supra, and ROSS'S comparison of Section 627.756 with Section 768.56, Fla. Stat., is inappropriate insofar as the cited cases and the statute reflected an express statement by the legislative that Section 768.56 should have retroactive application, whereas the legislature made no such express declaration of retroactivity in regard to Section 627.756.

In determining legislative intent, it is presumed that legislation is intended to act only prospectively and all statutes are to be construed as having a prospective operation unless the purpose and intention of the legislature to give them retroactive effect is expressly declared or necessarily implied. McKibben v. Mallory, supra. Since prospective application of a statutory provision creates such a presumption, this presumption must be overcome by clear and convincing evidence of a legislative mandate to the contrary. Bell v. Isthmian Lines, Inc., 363 Fed. Supp. 156 (M. D. Fla. 1973). ROSS has not presented such clear and convincing evidence of a contrary legislative mandate that would demonstrate that the Florida Legislature, in passing Chap. 82-243, Acts of Florida, which amended Section 627.756, Fla. Stat., intended any other application of the revised provisions other than prospectively. In the absence of evidence clearly expressing a contrary intention, the stated legislative intent should be followed, giving the statute only prospective application. Hassett v. Welch, 303 U.S. 303, 58 S. Ct. 559, 82 L. Ed. 858 (1938).

Even if it may somehow be construed that the revision to Section 627.756, Fla. Stat., was intended to be a remedial measure, it should be emphasized that retroactivity of a statute, even where permissible, is not favored by the courts except under clearest mandate. Claridge Apartments Co. v. C.I.R., 323 U.S. 141, 164, 65 S. Ct. 172, 89 L. Ed. 139 (1944).

IF REASONABLE ATTORNEYS FEES ARE RECOVERABLE PURSUANT TO SECTION 627.756, FLA. STAT., THE ATTORNEYS FEES SO RECOVERABLE MUST BE SEGREGATED ACCORDING TO THE EFFORT EXPENDED BY BENEFICIARY'S ATTORNEY IN OBTAINING A RECOVERY UNDER THAT STATUTE, AND ATTORNEYS FEES IN TIME EXPENDED UPON MATTERS UNRELATED TO THE PERFORMANCE BOND ARE NON-COMPENSABLE.

ARGUMENT

Section 627.756, Fla. Stat. incorporates and applies the provisions of Section 627.428, Fla. Stat., regarding recovery of attorneys fees to statutory performance bond actions. Section 627.428 specifically provides, inter alia, that a reasonable attorneys fee will be awarded to "beneficiary's attorney prosecuting the suit in which recovery is had." This language necessarily implies that the time and fees of beneficiary's attorney that are spent prosecuting matters that are extraneous to the suit in which recovery is had are not compensable or recoverable by a beneficiary at the close of the action. Therefore, ROSS is not entitled to be compensated for reasonable attorneys fees that were unrelated to prosecuting the claim relating to TRANSAMERICA and the performance bond if this Court should rule that "reasonable" attorneys fees are indeed recoverable in this action.

The amended complaint in the case sub judice contained five counts. Count I stated a cause of action as to the performance bond, and Count II stated a cause of action in quantum meruit, both said counts relating to TRANSAMERICA. However, Count II of the complaint alleged willful and malicious withholding of payments and made a claim for punitive damages against other defendants in the action, but not against TRANSAMERICA. Similarly, Count IV alleged libel and slander

against certain named defendants, but not against TRANSAMERICA. Again, Count V alleged embezzlement and conversion of funds against certain named defendants, but did not join TRANSAMERICA. (ROA 28-33) ROSS was further compelled to defend the counterclaim of R.W. Roberts Construction Company for breach of subcontract, defamation, fradulent misrepresentation, false statements, and conspiracy (ROA 28-33), none of said counterclaims having involved TRASAMERICA or a claim against the performance bond.

In Adler v. Seligman of Florida, Inc., 438 So. 2d 1063 (Fla. 4th DCA 1983) the Fourth District Court of Appeal for Florida determined that a builder was permitted to recover his attorneys fees for his successful defense of a mechanic's lien foreclosure action pursuant to the mechanics lien statute, but that the statutory attorneys fees provided by that statute were not appropriate in the successful prosecution of his counterclaim against the subcontractors for conspiracy and breach of fiduciary duty. The court held in part as follows:

> It was error for the trial court to award fees in Seligman's favor for the prosecution of the counterclaim against all of the counter-defendants. This award of attorneys fees was not on the mechanics lien action; it was instead for the prosecution of a claim for conspiracy and breach of a fiduciary duty. There is no indication as to why attorneys fees would be allowable on such claims. Id. at 1067

Similarly, in Estate of Hampton v. Fairchild-Florida Const. Co., 341 So. 2d 759 (Fla. 1977), the Supreme Court of Florida ruled that proceedings to establish a statutory way of necessity were not on the same footing as condemnation actions by the state in its sovereign

capacity, and therefore there was no basis for an award of attorneys fees in such actions. In making this ruling, the Court cited with favor the well established rule for the award of attorneys fees in any action as set forth in Kittel v. Kittel, 210 So. 2d 1 (Fla. 1967):

> It is an elemental principal of law in this State that attorneys fees may be awarded a prevailing party only under three circumstances, viz: (1) where authorized by contract; (2) where authorized by constitutional legislative enactment; and (3) where awarded for services performed by an attorney in creating or bringing into court a fund or other property. Id. at 3 (citations omitted)

In the case sub judice, ROSS is attempting to recover attorneys fees for the prosecution of its entire case based on the performance bond statute alone, even though an undetermined amount of the claimed attorneys time was spent in the prosecution or defense of matters outside the purview of this statute.

Mr. Joseph Lane testified as to the reasonableness of the attorneys fees expended by ROSS, but admitted that he had not made any attempt to segregate the work required with respect to the defense or prosecution of any particular defendant, and he also could not segregate as to whether the work related to a counterclaim, answer or defense. (ROA 7-8,10)

It should also be noted that counsel for ROSS testified that the billing summary included time for staff time with no breakdown between work expended by paralegals and secretaries. (ROA 17-19) In fact, counsel for ROSS admitted to the court that he was submitting time for attorneys time and staff time because some courts would not allow recovery of attorneys fees for staff time. (ROA 18)

In Hampton, supra, recovery of attorneys fees was sought pursuant to Section 73.091, Fla. Stat., which was limited to eminent domain proceedings, whereas the action in that case was brought and recovery was made pursuant to Section 704.01, Fla. Stat., which dealt with statutory ways of necessity, said statute being silent on the subject of attorneys fees. As applied to the facts of this case, if a reasonable attorneys fee is appropriate and recoverable, it must necessarily be limited to the efforts and actions of beneficiary's attorney in prosecuting the claim on the performance bond only, and not upon other extraneous issues.

It is also worthy of note that the final judgement appealed from in this case (ROA 125) was only against TRANSAMERICA pursuant to Stipulation of Counsel, and not against any of the other named defendants in the action. Therefore, any recovery of attorneys fees pursuant to Section 627.756 would necessarily and by implication be limited to those allegations made against TRANSAMERICA alone. (ROA 3)

Further, since Section 627.756 is in the nature of a penalty, it must be strictly construed. American National Insurance Co. v. De Cardenas, supra. Since the statute is to be construed narrowly, such fees must be limited to the efforts of "beneficiary's attorney prosecuting the suit in which recovery is had." Section 627.756, Fla. Stat. (1982). It does not follow, and the statute does not contemplate, that TRANSAMERICA, as surety, is responsible for paying the entirety of ROSS's attorneys fees in conducting the entire lawsuit against all defendants. The penal purposes of the statute are not furthered by

making such an award, and to attempt to do so only serves to burden a single party in the lawsuit with excessive costs that were beyond its ability to influence or control.

CONCLUSION

In conclusion, TRANSAMERICA INSURANCE COMPANY would state that since the Record on Appeal sub judice does not reflect an express ruling by the trial court as to whether the former or revised version of Section 627.756, Fla. Stat. applied to this case, the Supreme Court may not properly consider the points raised by Petitioner on appeal and must affirm the judgement of the lower court.

If the Supreme Court should address Petitioner's points on appeal, then the former version of Section 627.756, Fla. Stat. should be applied to the facts of this case because:

a) Attorneys fees are recoverable only as an incident to the underlying cause of action, and similarly the choice of law governing the amount of attorneys fees accrues and is limited by the law in effect at the time of the accrual of the underlying cause of action.

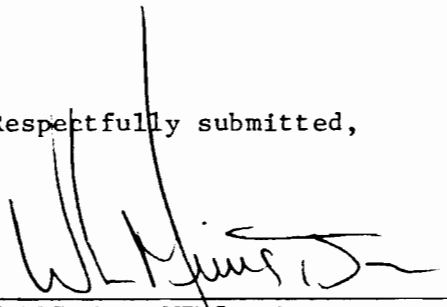
b) It is a facet of Constitutional due process that the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred; and,

c) The Florida Legislature clearly expressed its intention that the revision to Section 627.756 was to have prospective effect, and did not specify that the statute was to have retrospective effect.

Further, should the Supreme Court address the Petitioner's point of appeal, and it should be determined that reasonable attorneys fees are appropriate, then such fees should be segregated according to the time expended by beneficiary's attorney in obtaining a recovery under the performance bond statute, and attorneys fees

for time expended on matters unrelated to this recovery should be non-compensable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to CHARLES E. DAVIS, ESQUIRE, and FREDERICK B. KARL, JR., ESQUIRE, of Fishback, Davis, Dominick, Bennett, Foster, Owens & Watts, 170 East Washington Street, Orlando, Florida 32801, this 22 day of July, 1985.

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