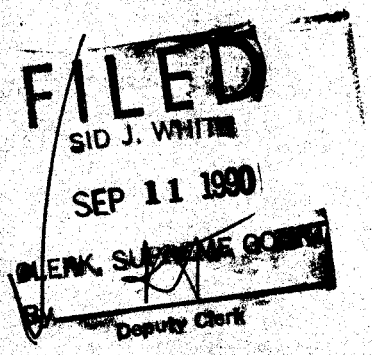
SUPREME COURT OF FLORIDA



CASE NO.: 76,353

DiSTEFANO CONSTRUCTION, INC., a Florida corporation,

Petitioner,

-vs-

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent

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

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
I. THE OPINIONS CERTIFIED ARE CONSISTENT AND DO NOT PRESENT A CONFLICT. THEREFORE, THIS COURT HAS NO JURISDICTION OVER THIS CAUSE	11
II. FLORIDA LAW DOES NOT PERMIT AN AWARD OF ATTORNEY'S FEES UNDER § 627.428, FLORIDA STATUTES, AGAINST A SURETY WHICH HAS ISSUED A TRANSFER OF LIEN BOND	13
III. FLORIDA LAW DOES NOT PERMIT AN INCREASE IN THE PENAL AMOUNT OF A TRANSFER OF LIEN BOND TO SATISFY AN UNSECURED AWARD OF ATTORNEY'S FEES	23
IV. THERE IS NO BASIS TO REVERSE THE TRIAL COURT'S RULING REDUCING THE AMOUNT OF FEES AWARDED	30
CONCLUSION	31
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

	PAGE
Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989).....	23
Brickell Bay Club, Inc. v. Ussery, 417 So.2d 692 (Fla. 3d DCA 1982).....	4,28
Financial Indemnity Co. v. Steel & Sons, Inc., 403 So.2d 600 (Fla. 4th DCA 1981).....	13
Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985).....	5,6
Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 1145 (Fla. 4th DCA 1982), **rev. denied**, 426 So.2d 27 (Fla. 1983).....	23,25
Government Employees Insurance Co. v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987).....	19
Government Employees Insurance Co. v. Gonzalez, 512 So.2d 269 (Fla. 3d DCA 1987).....	18
Gulfstream Pump & Equipment Co. v. Grosvenor Development, Inc., 487 So.2d 330 (Fla. 2d DCA 1986).....	24
Julian E. Johnson & Sons, Inc. v. Balboa Insurance Co., 408 So.2d 1044 (Fla. 1982).....	15
Kittel v. Kittel, 210 So.2d 1 (Fla. 1967).....	16
Laborers International Union of North America v. Burroughs, 541 So.2d 1160 (Fla. 1989).....	16
Lumbermens Mutual Insurance Co. v. American Arbitration Association, 398 So.2d 469 (Fla. 4th DCA 1981).....	19
Manufacturers Life Insurance Co. v. Cave, 295 So.2d 103 (Fla. 1974).....	19
Mesch v. Berry, 528 So.2d 1250 (Fla. 1st DCA 1988).....	23,29

Mitchell v. Gillespie,
161 So.2d 842 (Fla. 1st DCA 1964)..... 12

New York Life Insurance Co v. Shuster,
373 So.2d 916 (Fla. 1979)..... 19

Ohio Casualty Insurance Co. v. Oakhurst Homes, Inc., 512 So.2d 1156 (Fla. 2d DCA 1987)..... 28

Old General Insurance Co. v. E.R. Brownell & Associates, Inc.
499 So.2d 874 (Fla. 3d DCA 1986)..... 23

Parker Tampa Two, Inc. v. Somerset Development Corp.,
522 So.2d 1018 (Fla. 1989)..... 30

Sunbeam Enterprises, Inc. v. UptheGrove,
316 So.2d 34 (Fla. 1975)..... 14

Symons Corp. v. Tartan-Lavers Delray Beach, Inc.
456 So.2d 1254 (Fla. 4th DCA 1984)..... 23,29

Travelers Indemnity Co. v. Peacock Construction Co.,
423 F.2d 1153 (5th Cir. 1970)..... 19

Travelers Indemnity Co. v. Sotolong,
513 So.2d 1384 (Fla. 3d DCA 1987)..... 19

Triangle Distributors, Inc. v. Travelers Indemnity Co., 195 So.2d 237
(Fla. 3d DCA 1967)..... 21

Tuttle/White Constructors, Inc. v. Hughes Supply, Inc., 371 So.2d 559
(Fla. 4th DCA 1979)..... 24

U.S. Fire Ins. Co. v. Sheffield Steel Products, Inc.,
533 So.2d 782 (Fla. 5th DCA 1988)..... Passim

Val-Rich Corp. v. Tole Electric Corp.,
196 So.2d 486 (Fla. 3d DCA 1967)..... 21

Williams, Hatfield & Stoner, Inc. v. A&E Design, Inc., 538 So.2d 505
(Fla. 4th DCA 1989)..... 23

OTHER AUTHORITIES

§ 627.428, Fla. Stat..... Passim

§ 627.727, Fla. Stat..... 8

Other Authorities - Continued

§ 627.736, Fla. Stat..... 8

§ 627.756, Fla. Stat..... Passim

§ 632.571, Fla. Stat..... 8

§ 713.24, Fla. Stat..... Passim

§ 713.29, Fla. Stat..... 9,15

§ 713.585, Fla. Stat..... 12

§ 713.76, Fla. Stat..... 11,12

STATEMENT OF THE CASE AND OF THE FACTS

This action involves the construction of dormitory facilities at Florida International University. Petitioner was a subcontractor holding a direct contract with Canreal Properties, Inc., the general contractor/developer (Canreal). A controversy arose between Petitioner and Canreal regarding the quality of the work and the amounts due the Petitioner for its work. As a consequence of this dispute, Petitioner filed a $22,000 claim of lien against the property. (R9-10) Pursuant to 713.24, Florida Statutes, Canreal obtained and caused a transfer of lien bond to be filed with the Clerk, thereby transferring Petitioner's claim of lien from the property to the bond. (R33) Fidelity & Deposit Company of Maryland was the surety on the lien transfer bond. Canreal was the principal. The Petitioner was the bond obligee under the lien transfer bond. (R33-34)

Early in the case, summary judgment was entered against the Petitioner on its lien foreclosure due to its counsel's failure to effect or allege delivery of a final contractor's affidavit. Although delivery of the final contractor's affidavit occurred more than one year after recording the claim of lien and after the lawsuit below was filed, the trial court allowed Petitioner to amend its complaint after the summary judgment was entered, and the matter proceeded to trial. Petitioner's counsel's failure to

assure delivery of the affidavit became an important aspect of the litigation, and formed the sole basis for a later appeal (to which Respondent was not a party). The case proceeded to a mixed trial of jury and non-jury issues. The jury resolved the breach of contract counts and the judge resolved the claim of lien count.

On January 29, 1988, the trial court entered a final judgment pursuant to the jury's verdict, awarding Canreal, the developer/contractor, $8,000.00 in damages upon a jury finding that Petitioner had breached its contract with Canreal. (RI) Petitioner was awarded $22,000.00 in damages. (RI) Setting off these amounts, the court ordered a net award of $14,000 as damages due Petitioner on the breach of contract counts, and interest of $6,568.11 to January 25, 1988, and granted a foreclosure of the lien against the lien transfer bond posted by Fidelity & Deposit Company of Maryland. (R2) Canreal, F&D's principal, who had been defending F&D during the trial, chose to appeal only the claims against itself and not the claim against the bond. Consequently, F&D promptly paid the net judgment entered by the trial court including the interest, as required by the transfer of lien bond, and applicable law. (R4)

Petitioner's counsel's admitted failure to serve a timely contractor's affidavit served as a basis for Canreal's aforesaid appeal to the Third District after trial. Petitioner was forced to defend the appeal and was faced with a difficult issue of law which

could have easily been averted had Petitioner's counsel acted properly prior to filing this litigation. What was in fact an "open and shut" lien foreclosure case turned into a difficult exercise in litigation solely as a result of Petitioner's counsel's failure to insure that Petitioner delivered the final contractor's affidavit prior to filing suit.

A. Attorney's Fees under § 627.428, F.S.

In the aforesaid appeal by Canreal, F&D was not a party to the appeal, and most importantly, no issues germane to F&D or its interests were argued or raised in Canreal's appeal. The Third District upheld the trial court's judgment and awarded Petitioner attorneys' fees for the appeal, to be set by the trial court. After the appeal, the Petitioner filed a motion to tax attorneys' fees against F&D, pursuant to Florida Statutes § 627.428, to tax attorneys' fees on appeal, and to require an increase in the penal amount of the transfer of lien bond to satisfy additional costs and attorneys' fees beyond the $100 limitation set forth in § 713.24 of the Florida Statutes, and in the bond. (R8-24)

The trial court entered an order wherein it expressed the opinion that "the law **should not** make Fidelity & Deposit Insurance Company of Maryland liable for those fees." (R50) (emphasis in original) Nevertheless, the court imposed the punitive fee

provisions of § 627.428, regretfully expressing the opinion that "no expression of the legislature suggests to the court that § 627.428 is not intended to apply to sureties on transfer of lien bonds." (R50)

The court further acknowledged that its interpretation of § 627.428 creates inconsistent treatments of parties in similar situations:

> where, if one posts a cash bond, then the lienor could be left with an unsecured judgment for attorneys' fees, but where the property owner posts a surety bond, the lienor could recover the totality of its fees from the surety company even if the amount exceeds the penal sum of the bond. (R50)

The court expressed the belief that such was an unwarranted and punitive situation. Despite its misgivings, the trial court entered an order granting Petitioner attorney's fees under § 627.428, against F&D. (R47-50)

B. <u>Increase of the Penal Sum of the Bond</u>

Further, the court ruled that based upon **Brickell Bay Club, Inc. v. Ussery**, 417 So.2d 692 (Fla. 3d DCA 1982), the court was bound to increase the amount of the bond to cover attorneys' fees awarded above and beyond the penal sum of the bond; and above and beyond the $100 limitation provided for in § 713.24, in order to cover the attorneys' fees awarded at both the appellate and trial levels. (R50) The court, however, did not determine what a

reasonable attorneys' fee would be at this point and left the question open for a subsequent hearing. (R50)

C. Award of $52,400.00 as Attorneys' Fees

In its Order dated May 24, 1989, the trial court awarded $52,400.00 to Petitioner's counsel as attorney's fees. On September 1, 1989, the trial court entered an Amended Order assessing attorney's fees, which was in all respects identical to the Order entered on May 24th, but additionally set forth the trial court's findings of fact justifying the contingency risk multiplier utilized in arriving at the court's award of attorney's fees. The court found that Petitioner's counsel had reasonably expended 165 hours on the litigation. The court attributed 30% of the hours reasonably expended to the issue of the late service of the contractor's affidavit, admittedly the fault of counsel for Petitioner. Hence, the court deducted 49.5 hours resulting in a finding of 115.5 hours reasonably expended on matters other than the issue of the service of the final contractor's affidavit. The court multiplied the 115.5 hours by the hourly rate of $175.00 resulting in a lodestar figure of $20,212.50. The court believed that two was a reasonable multiplier under **Florida Patients' Compensation Fund v. Rowe**, 472 So.2d 1145, 1151 (Fla. 1985). Consequently, the court increased the fee award to $40,250.00. As to attorney's fees for services performed in the Third District

Court concerning the appeal by Canreal, the Court found that 22.45 hours expended by Petitioner's counsel was reasonable. The Court multiplied the 22.45 hours by the hourly rate of $175.00 resulting in compensation to Petitioner's counsel of $3,928.75. The Court believed that a reasonable multiplier to apply under the lodestar method set forth in **Rowe**, was 2.5. Consequently, Petitioner's counsel's remuneration, for the appeal, was increased to $9,800.00.

D. The Appeal By Fidelity & Deposit Company of Maryland

Subsequent to entry of the aforesaid orders by the trial court, Fidelity & Deposit Company of Maryland successfully appealed the trial court's determination that Fidelity & Deposit Company of Maryland was responsible for the attorneys' fees of petitioner, under the Florida Insurance Code § 627.428; and was also successful in its appeal of the court's ruling that the penal sum of the bond could be increased, *post facto* and unilaterally, by the trial court, to cover the award of attorneys' fees beyond the amount provided for in § 713.24, Florida Statutes. Petitioner was unsuccessful on its cross-appeal of the trial court's finding of fact and the concomitant reduction in the reasonable hours to be used in computing the award of attorneys' fees.

SUMMARY OF THE ARGUMENT

This court purports to exercise jurisdiction over this matter pursuant to Art. V, Sec. 3(b)(4), Florida Constitution (1980) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The Third District believed that its holding in this cause was contrary to, and in conflict with **U.S. Fire Ins. Co. v. Sheffield Steel Products, Inc.**, 533 So.2d 782(Fla. 5th DCA 1988). Nevertheless, Respondent submits that the **Sheffield** opinion is distinguishable from the Third District Court's ruling in the case before this court and presents no conflict. Therefore, this court has no jurisdiction to entertain the present appeal, and the appeal should be dismissed.

The district court's decision concerning an award of attorneys' fees against F&D based on § 627.428 of the Florida Statutes is correct and should be upheld. First, as stated in the appellate opinion:

> Section 627.428 is part of a section of the Florida Statutes entitled "Insurance Rates and Contracts" and does not apply to proceedings on mechanic's liens, which are addressed by a separate section of the Florida Statutes, Chapter 713. Section 713.29 expressly provides that "[i]n any action brought to enforce a lien under Part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal, to be determined by the court which shall be taxed as part of his costs, as allowed in equitable actions." There is no need, therefore, to look to § 627.428 for authority to award

attorney's fees in an action to foreclose on a mechanic's lien.

Secondly, imposition of sanctions against F&D violates the purpose of the cited section -- to penalize insurers for failing to promptly settle with their insureds, and **wrongfully** causing their insureds to resort to litigation to resolve a conflict when it is within the insurer's power to effectuate a prompt resolution. Under the controlling provisions of section 627.428(1), Florida Statutes (1983), an insurer is liable for attorney's fees when, but only when, it has **wrongfully** withheld the proceeds of the policy. F&D paid the full amount it owed Petitioner as soon as it was legally permitted to do so. Consequently, it did nothing to warrant the punitive effects of § 627.428(1).

Thirdly, Florida Statutes section 627.428 clearly does not provide for an award of attorney's fees against sureties issuing transfer of lien bonds. Such awards are specifically mandated against sureties issuing payment bonds,[1] performance bonds,[2] against auto insurers contesting PIP policy benefits,[3] in controversies involving uninsured motorist benefits[4], and others[5].

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[1]**See**, section 627.756, Florida Statutes.

[2]**See**, section 627.756, Florida Statutes.

[3]**See**, section 627.736(8), Florida Statutes.

[4]**See** section 627.727(8), Florida Statutes.

[5]**See**, *e.g.*, section 632.571, Florida Statutes (Fraternal Benefit Societies).

Nevertheless, no similar statutory provision exists imposing the punitive fee award contained in section 627.428, against a surety issuing a transfer of lien bond. Petitioner has failed to cite such a statute; therefore, it is clear that Florida Legislative never intended § 627.428(1) to apply to transfer of lien bonds.

The district court was also correct to reverse the trial court's order increasing the penal sum of the bond beyond the statutorily set sum. Such an increase in the penal sum of a transfer of lien bond, *post facto,* is contrary to several Third District Court rulings which unequivocally assert that liens transferred to a surety bond may be increased to include costs, which may include the prevailing party's attorneys' fees, **but that such costs may not exceed $100.** The courts of Florida have further clarified that the lienor, in such cases where costs and attorneys' fees exceed $100, is left with an unsecured judgment for the balance against a proper party, **other than the surety.** Section 713.29 provides for an award of fees to a prevailing party. Further, the section 713.24 in effect at the time in question limited these fees, where a surety bond is filed, to $100.00. The statute creates and defines the remedy which is available. It is a remedy which is in derogation of the common law. Without Chapter 713, Petitioner would have no right to a lien on the real property. Likewise, without Chapter 713 Petitioner would have no right to

fees. Petitioner's statutorily created rights, which are in abrogation of the common law must be strictly construed.

Finally, the district court's finding concerning the cross-appeal is correct. The trial court made a finding of fact which led it to reduce the hours reasonably spent for compensation purposes. There is nothing in the record to support a reversal. The Third District found no merit to the cross-appeal. There is nothing in the record before this court to justify a reversal of the trial court's finding of fact, and resulting ruling.

ARGUMENT

I. THE OPINIONS CERTIFIED ARE CONSISTENT AND DO NOT PRESENT A CONFLICT. THEREFORE, THIS COURT HAS NO JURISDICTION OVER THIS CAUSE.

The Third District held that fees could not be awarded against Respondent pursuant to § 627.428, Fla. Stat., where a transfer of lien bond had been issued under § 713.24, Fla. Stat. Therefore, the Third District believed its opinion to be in conflict with **U.S. Fire Ins. Co. v. Sheffield Steel Products, Inc.**, 533 So.2d 782 (Fla. 5th DCA 1988), and so certified. Nevertheless, the two opinions are not inconsistent, can be harmonized, and no conflict exists.

In **Sheffield**, the Fifth District merely clarified an opinion which stated that U.S. Fire Insurance Co., as surety, was liable to the appellee in that case "only to the extent of its obligation on the surety bond." **Id.** at 783. The opinion does not favor us with the factual context for this broad holding. The paucity of a factual context within which to place the broad rule enunciated effectively renders **Sheffield**, with its scant opinion, an unreliable authority. Nevertheless, the payment bond in **Sheffield** apparently provided that the surety would be liable to the bond obligee for a certain amount "plus costs" without limitation. The bond was posted to release the lien on personal property pursuant to § 713.76(1) which provides for posting of a bond "for the

payment of any judgment which may be recovered on said lien, with costs." Section 713.76 does not, as does 713.24 limit the amount of costs which may be recovered by the bond obligee. This difference is of significant importance in trying to determine whether the two statutes are so similar that the **Sheffield** decision must by necessity conflict with that of the Third District in this case.[6]

More importantly, however, the bond posted in the **Sheffield** case appears to have been posted by the surety, and interpreted by the court as a "contract payment bond." That is a payment bond to which the provisions of § 627.756 would be applicable thereby bringing the surety within the attorney fees provisions of § 672.428(1). Although **Sheffield** does not provide us with the context of the holding, two things suggest that this is the proper interpretation.

First, a review of the briefs filed in **Sheffield** show that the bond was believed to have been posted as a payment bond.[7]

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[6]On the other hand, Petitioner is wrong in his statement at page 15 of its brief that a major difference exists between Part I of Chapter 713 and Part II, because, ". . .Part II has no attorney's fee provision." In fact, attorney's fees are specifically provided for in §§ 713.585(5)(d) and 713.76(2). The fact that no allowance for attorney's fees is contained in the first part of 713.76, but is allowed in the second part is strong evidence that the legislature did not intend to provide for fees in Part I, contrary to the ruling of the Court in **Sheffield.**

[7]Although those briefs and the record in **Sheffield** are not part of the record in this case it has been held that Florida appellate courts may look to the record of other appellate cases to clarify and determine the applicability of holdings in such other cases to the facts which are under review. **See, e.g. Mitchell v. Gillespie**, 161 So.2d 842 (Fla. 1st DCA 1964). Should this court

Secondly, the Fifth District in **Sheffield** holds that § 627.428 applies to the surety in that case and cites as its only authority the case of **Financial Indemnity Co. v. Steel & Sons, Inc.**, 403 So.2d 600 (Fla. 4th DCA 1981). In **Steel & Sons, Inc.**, the Fourth District held that a surety which had issued a **payment** bond to a subcontractor was liable to the surety of the general contractor for the subcontractor's failure to pay its suppliers. As more fully discussed elsewhere, payment bonds are within the class of bonds to which the provisions of § 627.428 are specifically applicable by way of § 627.756, Florida Statutes. Hence, the authority which the Fifth District uses in support of its holding also suggests that it had before it a payment bond, or a bond which was construed as such, to which the provisions of § 627.428 are specifically applicable by way of § 627.756, Florida Statutes. Consequently, there is no conflict between these decisions, and this appeal should be dismissed.

II. FLORIDA LAW DOES NOT PERMIT AN AWARD OF ATTORNEY'S FEES UNDER § 627.428, FLORIDA STATUTES, AGAINST A SURETY WHICH HAS ISSUED A TRANSFER OF LIEN BOND.

The district court's reversal of the award of attorney's fees against F&D pursuant to section 627.428 of the Florida Statutes is

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believe that the briefs and record in the **Sheffield** case would be of assistance in the instant case, Petitioner would assist the court by filing said briefs and record with this court.

correct and should be affirmed. The merits of the court's ruling are manifold, and should be adopted in the event this Court determines to take jurisdiction to resolve the alleged conflict with the Fifth Circuit decision in **Sheffield.**

A. An Award Of Attorney's Fees Against A Transfer Lien Surety Is Governed By Florida Statutes, Chapter 713.

As the Third District held:

> Section 627.428 is part of a section of the Florida Statutes entitled "Insurance Rates and Contracts" and does not apply to proceedings on mechanic's liens, which are addressed by a separate section of the Florida Statutes, Chapter 713. Section 713.29 expressly provides that "[i]n any action brought to enforce a lien under Part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal, to be determined by the court, which shall be taxed as part of his costs, as allowed in equitable actions." There is no need, therefore, to look to § 627.428 for authority to award attorney's fees in an action to foreclose on a mechanic's lien.

Moreover, it is under Chapter 713 that the right to a lien and the right to attorney's fees for foreclosing that lien arise. Both the right to secure a lien and the entitlement to fees are statutorily created and in derogation of the common law. Hence, they must be strictly construed. **Sunbeam Enterprises, Inc. v. UptheGrove**, 316 So.2d 34 (Fla. 1975). The question then becomes which section applies. The Third District has correctly held that

it is the mechanic's lien statute, giving rise to the transfer of lien bond, which clearly applies. As stated in Petitioner's brief, § 627.428, and its predecessors were enacted long before § 713.29 ever became law. Section 713.29 relating to the award of attorney's fees for the enforcement of a lien became law in 1963. As the Supreme Court has previously stated:[8]

> It would seem that any conflict between these two statutes should be resolved in favor of the latter legislative enactment. Such resolution . . . requires the presence of two initial elements: a conflict between the two statutes and the lack of any legislative action to clarify the difference. **Julian E. Johnson & Sons, Inc. v. Balboa Insurance Co.**, 408 So.2d 1044, 1045-47 (Fla. 1982).

In our case, there clearly is a conflict between § 713.29 as applied in this case by virtue of § 713.24, and the liberal and punitive provisions of § 627.428. On the one hand the legislature, for policy reasons, is specifically restricting the award of costs, which includes fees, against the surety to $100.00. On the other hand, Petitioner argues that § 627.428 provides for open season on transfer of lien sureties. Clearly, the latter, more specific statute is applicable to this situation, not the earlier more general enactment.

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[8]The following discussion concerned § 627.756 and its predecessor, but the rationale holds.

B. The Punitive Provisions of Section 627.428 Do Not Apply to a Surety Issuing a Transfer of Lien Bond.

It is an elemental principle of law in Florida that attorney's fees may be awarded a prevailing party only under three circumstances: (1) where authorized by contract; (2) where authorized by a legislative enactment; (3) where awarded for services performed by an attorney in creating or bringing into court a fund or other property. **Kittel v. Kittel**, 210 So. 2d 1, 3 (Fla. 1967). **See also, Laborers International Union of North America v. Burroughs**, 541 So. 2d 1160, 1163 (Fla. 1989). In this case, Petitioner argued at the trial level that section 627.428 mandated an award of fees against F&D, a surety issuing a transfer of lien bond. F&D's role in the underlying case was simply to grant the contractor's request for issuance of a transfer of lien bond after a dispute had arisen between the contractor and its subcontractor (Petitioner). The transfer of lien bond was posted pursuant to section 713.24, Florida Statutes. When Petitioner prevailed and obtained a net judgment in its favor, it argued to the trial court that because F&D was an insurance company, the Petitioner was somehow entitled to attorney's fees under section 627.428. Petitioner candidly admitted that it had found no cases in which a court awarded attorney's fees pursuant to the provisions of section 627.428 against a surety issuing a transfer of lien bond. Nevertheless, it argued that the Appellant, F&D, was an

insurance company and must therefore somehow be liable under the attorney's fees insurance statute. Additionally, Petitioner made certain irrelevant and clearly distinguishable analogies to § 627.756, which provides that § 627.428 is applicable to insurers issuing payment and performance bonds.

The court had no authority before it upon which to base an award of attorney's fees under section 627.428 against a surety issuing a transfer of lien bond. Nevertheless, the court improperly assumed that because there was no specific legislative expression forbidding such an award, it was compelled to award attorney's fees under section 627.428. (R.50) The court's reasoning was incorrect in that it awarded attorney's fees against F&D not because the legislature had mandated such an award, but rather because the legislature had failed to forbid such an action. The Third District properly reversed the award of fees under § 627.428. It is clearly contrary to law.

Moreover, Petitioner's analogy to awards of fees against sureties on payment and performance bonds is clearly not applicable to our situation. Under § 627.756, the legislature has expressly provided that sureties issuing payment and performance bonds may be subjected to the punitive fee provisions of section 627.428. Similar statutory authority for application of the punitive fee provisions contained in § 627.428 apply to insurers who contest coverage under PIP provisions, in controversies involving uninsured

motorist benefits, and in other situations.[9] The same does not hold true for sureties issuing transfer of lien bonds. Moreover, the intent and purpose of the punitive provisions of 627.428 do not serve a valid purpose when applied to sureties who issue transfer of lien bonds.

C. Appellant Was Legally Prohibited From Settling Petitioner's Claim Prior to a Judgment. Hence, the Punitive Sanctions are Not Applicable to Petitioner.

Under the controlling provisions of section 627.428(1), Florida Statutes (1983), an insurer is liable for attorney's fees when, but only when, it has **wrongfully** withheld the proceeds of the policy. **Government Employees Insurance Co. v. Gonzalez**, 512 So. 2d 269, 270 (Fla. 3d DCA 1987). In relevant part, section 627.428 reads as follows:

> (1) Upon the rendition of a judgment or decree . . . against an insurer and in favor of any named or omnibus insured . . . the trial court . . . shall adjudge or decree against the insurer and in favor of the insured . . . a reasonable sum as fees or compensation for the insured's or beneficiary's prosecuting the suit in which the recovery is had.

The purpose of this section is to penalize insurers for failing to promptly settle with their insureds, and wrongfully causing their insureds to resort to litigation to resolve the conflict when it

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[9] **See** footnotes 1-5, **supra.**

was within the carriers' power to effectuate a prompt resolution. **Government Employees Insurance Company v. Battaglia**, 503 So. 2d 358, 360 (Fla. 5th DCA 1987). **See also New York Life Insurance Co. v. Shuster**, 373 So. 2d 916 (Fla. 1979); **Manufacturers Life Insurance Co. v. Cave**, 295 So. 2d 103 (Fla. 1974); **Travelers Indemnity Co. v. Peacock Construction Co.**, 423 F.2d 1153 (5th Cir. 1970).

In **Government Employees Insurance Company v. Battaglia**, 503 So. 2d 358 (Fla. 5th DCA 1987), the court further clarified that "when the claim is one that the carrier can reasonably expect to be resolved by a court, rather than by itself, then section 627.428 does not generate a punitive fee." **Battaglia**, 503 So. 2d at 360. (citations omitted)

In **Lumbermens Mutual Insurance Co. v. American Arbitration Association**, 398 So. 2d 469 (Fla. 4th DCA 1981), the court noted that section 627.428 must be strictly construed, and authorizes the recovery of attorney's fees from the insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy. **Id.** at 471. (emphasis supplied) **See also New York Life Insurance Co. v. Shuster**, 373 So.2d 916 (Fla. 1979); **Manufacturers Life Insurance Co. v. Cave**, 295 So. 2d 103 (Fla. 1974); **Travelers Insurance Co. v. Peacock Construction Co.**, 423 F.2d 1153 (5th Cir. 1970).

In the instant case, it is important to note that the bond issued by F&D is a transfer of lien bond pursuant to section 713.24

of the Florida Statutes. Pursuant to section 713.24, transfer of lien bonds are "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." Section 713.24(1)(b). Transfer of lien bonds, including the bond at issue in this case, are expressly conditioned, by statute and the language of the bonds, to payment only upon entry of a judgment or decree rendered for the satisfaction of the lien which was transferred to such bond.[10] For the above cited reasons, transfer of lien bonds must be distinguished from payment and performance bonds.

In the typical payment and performance bond situation, a surety is aware of disagreements and problems arising between the contractor and subcontractor, and is in many instances ideally situated to effectuate a prompt settlement of any disputes. The payment and performance bonds are obtained prior to the genesis of problems which they are intended to address.

On the other hand, in a transfer of lien situation, as is the case in the instant litigation, the surety becomes involved only after a dispute has arisen between the parties, and a lien placed on the property. The surety's limited obligation as dictated by

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[10]The applicable language of the bond reads as follows:

> The condition of this bond is that if any judgment be rendered ... for enforcement of the claim of lien recorded by DiStefano, Inc.

See Record on Appeal at 33-34.

the statute is to issue a bond sufficient to insure payment of any judgment or decree which may be subsequently entered upon foreclosure of that lien. The surety is joined as a proper party to insure that any judgment rendered is satisfied; the surety does not become involved in the underlying lien foreclosure action; nor does the surety contest the merits thereof. **Val-Rich Corp. v. Tole Electric Corp.**, 196 So. 2d 486 (Fla. 3d DCA 1967); **Triangle Distributors, Inc. v. Travelers Indemnity Co.**, 195 So. 2d 237 (Fla. 3d DCA 1967). In fact, and by law, the surety is prohibited from settling the controversy until a judgment has been entered by the trial court.

In sum, a surety on a payment or performance bond has a choice and is free to obviate the need for litigation by paying such amounts as may be due under its bond.[11]

On the other hand, a surety on a transfer of lien bond is at the mercy of the other parties, their attorneys, the court and the law and cannot, under any circumstances, pay the lienor absent a judgment or a decree foreclosing the lien. For this reason, and under the precedent established in a long line of cases, the punitive provisions of section 627.428 cannot be applied to sureties in transfer of lien bond situations.

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[11]The same rationale applies to controversies over PIP insurance benefits; uninsured motorists benefits, and others.

Pursuant to the terms of the bond and section 713.24 of the Florida Statutes, F&D had no choice but to await a judicial determination in the contested lien foreclosure action, prior to disbursement of any funds which might have become payable under its transfer of lien bond. In this case, F&D's actions were more than reasonable in its expectation that the court resolve the dispute between Canreal (developer/contractor) and DiStefano (subcontractor). F&D had more than an expectation, it had a statutory and legal obligation to await a judicial determination or decree prior to paying on the transfer of lien bond. The final judgment which awarded the contractor $8,000 and found Petitioner to have breached its contract evinces the fact that judicial intervention was necessary; and it was reasonable for F&D to have awaited a judicial determination prior to paying on the bond. Even if it was not such a hotly contested suit, however, F&D was forbidden to pay on its bond as a matter of law, as discussed above.

For these policy reasons, the punitive fee provision contained in section 627.428 is not applicable to F&D. To hold otherwise would violate the intent and purpose of section 627.428 and would result in the inequitable imposition of statutory sanctions against a party which had no control over the behavior being sanctioned. F&D was expressly precluded by statute and the provisions of its

bond from undertaking the actions which the punitive provisions of section 627.428 are intended to encourage.

III. FLORIDA LAW DOES NOT PERMIT AN INCREASE IN THE PENAL AMOUNT OF A TRANSFER OF LIEN BOND TO SATISFY AN UNSECURED AWARD OF ATTORNEY'S FEES.

The trial court ordered an increase in the penal amount of the bond to cover the unsecured attorney's fees awarded at both the appellate and trial levels. This order was contrary to Florida law and was properly reversed. The law in Florida, as enunciated by the Third District Court of Appeal, is that mechanic's liens transferred to surety bonds may be increased to include costs which include the prevailing party's attorney's fees, but that such costs may not exceed $100.[12] **Old General Insurance Co. v. E.R. Brownell & Associates, Inc.**, 499 So. 2d 874 (Fla. 3d DCA 1986).[13] The Third District Court of Appeal further clarified that a lienor, in cases where the costs exceed $100, is left with an unsecured judgment for the balance. **Id.** at 875, *citing* **Gesco, Inc. v. Edward L. Nezelek, Inc.**, 414 So. 2d 535 (Fla. 4th DCA 1982), **rev. denied**, 426 So.2d 27 (Fla.1983); **Symons Corp. v. Tartan-Delray Beach, Inc.,**

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[12]Section 713.24 has since been amended to provide for costs "not to exceed $500.00."

[13]More recent cases similarly limiting recovery of costs and attorney's fees are: **Acquisition Corp. of America v. American Cast Iron Pipe Co.**, 543 So. 2d 878 (Fla. 4th DCA 1989); **Williams, Hatfield & Stoner, Inc. v. A&E Design, Inc.**, 538 So. 2d 505 (Fla. 4th DCA 1989); **Mesch v. Berry**, 528 So. 2d 1250 (Fla. 1st DCA 1988).

456 So. 2d 1254 (Fla. 4th DCA 1984). **See also Gulfstream Pump & Equipment Co. v. Grosvenor Development, Inc.**, 487 So. 2d 330 (Fla. 2d DCA 1986).

Petitioner argues that the unsecured judgment for the balance "has to be against Fidelity & Deposit Company of Maryland." (Petitioner's Initial Brief, p. 11). This contention is contrary to law and common sense. Under the statutory scheme, the responsibility of the surety is limited to the amount provided for by its bond contract and by the statute governing that contract.[14] For Petitioner to argue that despite the clear and unequivocal language of the statute, it is entitled to obtain a judgment for fees and costs, secured or unsecured, against the surety would render the statutory limitation meaningless. Decisional authority also reveals that Petitioner's argument is without merit.

For example, in **Tuttle/White Constructors, Inc. v. Hughes Supply, Inc.**, 371 So.2d 559 (Fla. 4th DCA 1979), the Fourth District held that:

> The amount of the transfer bond is expressly established by statute. Section 713.24, Florida Statutes . . . we find nothing in the statutes, however, to prevent the entry of an unsecured judgment in an amount appropriate to cover such expenses against a losing party **other than the surety.** A surety may not,

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[14]In fact, it should be contrary to public policy to allow Petitioner to unilaterally modify the terms of the contract negotiated between Canreal and F&D in accordance with the exiting statutory and case law specifically governing that contract at the time of its making.

> however, be held liable for an amount in excess of the bond posted.

Likewise, in **Gesco, Inc. v. Nezelek, Inc.**, 414 So.2d 535 (Fla. 4th DCA 1982), the court adopted the language of **Tuttle/White** holding that the statutory limitation "is a legislative matter and one which is controlled by § 713.24, Florida Statutes . . ." Further, and very importantly, the court in **Gesco** stated that neither the surety which posted the bond nor the principal/owner which did not have a direct contract with the subcontractor

> [was] responsible for the dispute between Gesco and Nezelek [contractor and subcontractor], and neither significantly contributed to Nezelek's court costs. Transfer bonds such as the one in question served the public's interest in that they free real property from judicial 'limbo' and allow for its alienation. Logically, the amount of the bond limits the principal's liability where such liability arises solely from the bond.

In our case, the surety's liability under the bond is same as the then existing statutory limitation of $100.00.

Analyzing the cases in which an unsecured judgment for the excess above the penal sum of the bond is awarded, it is clear that such unsecured judgment is collectible against proper parties, **other than the sureties.** In this case, Canreal, the contractor/developer who had a contract with Petitioner is the proper party against whom this unsecured judgment may be pursued. Petitioner's argument that the "proper" and only party subject to this unsecured judgment is F&D is without merit in fact or law.

Petitioner argues that F&D is the only party to whom it may enforce its judgment. This is simply incorrect. The judgment of the trial court (R.1-3) holds Canreal, the developer, responsible for costs and fees. Petitioner seeks to mislead this court when it suggests that only F&D can be held responsible for the "unsecured" award of costs and attorney's fees.

Petitioner also argues incorrectly when it states that because it gave up "valuable" security in the form of a lien on real property, its entire claim, including attorney's fees should be secured by the bond. Petitioner offers no evidence in order for this Court to consider the value, if any, of its lien claim. Assuming the dormitory property improved by Petitioner was not owned by Florida International University and, therefore, incapable of being liened, Petitioner has not offered proof at any level of these proceedings that its lien claim was of first priority on the property in question, or that Petitioner was capable of buying out or maintaining any prior liens concerning the property, which would by their size render the "security" afforded by Petitioner's lien worthless. In fact, it is more than likely that by having its lien bonded off, Petitioner was much better off, than if it had only its lien on the real estate in question.

Petitioner's argument concerning the "additional security" provision of the statute is also erroneous. The "additional security" provision of section 713.24 has been clarified by a

holding that upon motion "a trial court can order the party providing the bond to **purchase** either an additional bond or an increase in the existing bond, or to otherwise provide increased security for the loan [sic]." **Ohio Casualty Insurance Co. v. Oakhurst Homes, Inc.**, 512 So. 2d 1156, 1157 (Fla. 2d DCA 1987) (emphasis supplied). It is clear, however, that the trial court cannot unilaterally and *post facto* increase the surety's liability under the bond; and cannot increase the liability for "costs" beyond that specifically provided by law. **Id.** To hold otherwise would be unjust, inequitable and unconscionable. Such a holding would in effect subject transfer of lien sureties to unknown and unanticipated liabilities without opportunity to adjust the rates and premiums accordingly. In fact, it is on the issue of whether the surety can protect itself in the underwriting and pricing of release of lien bonds that Petitioner strays most from the record and from reality. There is no evidence in the record as to what F&D obtained from Canreal in the form of indemnification or collateral when it issued the bond in question. Petitioner also over simplifies the nature of the underwriting process attendant to the surety business. This case is a perfect illustration. How could F&D have foreseen when it wrote the $26,000.00 bond in question what the obligee's attorney's fees would be, or that the fees would be more than double the amount of the bond? How much

collateral should it have obtained to protect itself against the unlimited and unknown?

The public policy urged by Petitioner would have sureties strap owners and contractors with unreasonably high demands for collateral in order to bond off small, and clearly contested liens. It is probable that many owners and contractors could not afford to post collateral two to three times (or maybe more) than the lien amount, especially if more than one lien on a job is bonded off.

Clearly, the lienor protection afforded by the legislature in the clear language of § 713.24, Florida Statutes, is the appropriate balancing of public policy on the issue, rather than that advanced by Petitioner.

In acting as it did, the trial court relied on **Brickell Bay Club, Inc. v. Ussery**, 417 So. 2d 692 (Fla. 3d DCA 1982). **Ussery** appears to be an unexplained deviation from the settled law on this issue as followed in subsequent Third District Court of Appeal decisions and decisions from other districts. Moreover, **Ussery** can be distinguished from the case at bar in that the **Ussery** opinion does not clarify whether the increase requested was intended to cover the amounts awarded to satisfy the lien, or was intended to satisfy the attorney's fee award. Hence, it does not constitute precedential authority for the argument that the bond amount may be increased to pay an award of attorney's fees, exceeding $100.00. Additionally, the language of **Ussery** suggests that the motion to

increase bond was properly filed prior to the entry of judgment and through unknown circumstances was not heard until the judgment was entered. **Ussery**, 417 So.2d at 695.[15] All case law which clearly addresses the issue of increasing the bond amount to pay attorney's fees has held against the increase, and in accordance with section 713.24(1)(b) by limiting recovery of such fees to $100.00.

There are cases in which attorney's fees have been awarded, exceeding the amount of a bond. In each of those cases, however, the excess amount is only an unsecured judgment against the owner of the property, if the owner is in privity with the plaintiff. **See, e.g., Mesch v. Berry**, 528 So. 2d 1250 (Fla. 1st DCA 1988); **Symons Corp. v. Tartan-Lavers Delray Beach**, 456 So. 2d 1254 (Fla. 4th DCA 1984). The excess award is never recoverable against the surety posting a transfer of lien bond.

Even if **Ussery** is not distinguishable, it is nevertheless contrary to subsequent Third District Court of Appeal opinions and those on-point decisions from other districts. For these reasons, the trial court's ruling that the amount of the bond must be increased to satisfy the unsecured attorney's fee award is

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[15]The opinion reads:

> . . .the motion may have been premature when filed, it was [however] timely when denied and the bond should have been increased to cover the total amount awarded.

improper, contrary to law, not supported by statutory or decisional authority, and must be reversed.[16]

IV. THERE IS NO BASIS TO REVERSE THE TRIAL COURT'S RULING REDUCING THE AMOUNT OF FEES AWARDED.

The trial court attributed thirty percent of the hours reasonably expended to the issue of the late service of the contractor's affidavit, admittedly the fault of counsel for Petitioner. Although Petitioner argues that it was the Respondent who raised this issue to the level of a hard fought controversy, it must be pointed out that the Respondent was not an active participant in the litigation and was merely named as a party to payment of the foreclosure judgment if one were entered. The only attorney representing a party other than Petitioner was the attorney for Canreal, the general contractor.

Petitioner made the same argument before the Third District that it makes here concerning the reduction of its attorney's fee claim and the Third District ruled that Petitioner's cross-appeal on this issue was without merit. A review of the record shows that there is nothing which supports a reversal of the trial court's

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[16] A transfer of lien bond is akin to other "judicial bonds" such as supersedeas bonds and injunction bonds. This Court has noted in connection with an injunction bond, that ". . . regardless of whether the liability of the party seeking the injunction is limited to bond amount, the bond surety's liability is so limited." **Parker Tampa Two, Inc. v., Somerset Development Corporation**, 544 So.2d 1018, 1021 n.3 (Fla. 1989). This Court should similarly limit F&Ds maximum liability in this case to the amount of its bond.

findings of fact concerning the time expended at trial and appellate levels. Therefore, this aspect of the appeal must be affirmed.

CONCLUSION

To award attorney's fees against F&D based on § 627.428 of the Florida Statutes would be incorrect for two reasons: (1) the Florida legislature clearly never intended this section to apply to sureties on transfers of lien bonds; and (2) imposition of sanctions against F&D violates the purpose of the cited section -- to penalize insurers for failing to promptly settle with their insureds, and wrongfully causing their insureds to resort to litigation to resolve a conflict when it is within the insured's power to effectuate a prompt resolution. Further, Florida law does not permit an increase in the penal sum of a transfer lien bond beyond the statutorily set sum in order to satisfy a claimant's unsecured award of attorney's fees and costs. Such an increase in the penal sum of a transfer of lien bond would be contrary to law and public policy.

The District Court's ruling concerning the cross-appeal is correct. The trial court made a finding of fact which led it to reduce the hours reasonably spent for compensation purposes. There is nothing in the record to support a reversal of the factual finding made by the trial court, which was upheld on appeal. The

Third District found no merit to the cross-appeal. The Third District's ruling should be affirmed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by United States mail, this 10th day of September, 1990, to RONALD P. GOSSETT, ESQUIRE, Attorney for Petitioner, 3595 Sheridan Street, Hollywood, Florida 33021.

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