IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,016

Danis Industries Corp., and
Seaboard Surety Co.,

Petitioners,

vs.

Ground Improvement Techniques, Inc.
and Fidelity and Deposit Insurance
Company of Maryland,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FIFTH DISTRICT COURT OF APPEAL
CASE NO. 92-3127

ANSWER BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY

INTRODUCTION

This cause arises from the failure of a surety/insurer to fulfill its payment bond obligations to an unpaid subcontractor. Petitioners Danis Industries Corporation and Seaboard Surety Company appeal a Fifth District Court of Appeal's decision affirming a trial court judgment awarding Respondent Ground Improvement Techniques, Inc. entitlement to attorney's fees against Seaboard pursuant to sections 627.428 and 627.756 Florida Statutes. In affirming judgment against Seaboard, the Fifth District refused to relieve the surety/insurer from its statutory liability to the insured, GIT. In this appeal, Petitioners seek to absolve Seaboard of its statutory obligation as a surety/insurer under Florida Statutes sections 627.428 and 627.756 by use of this Court's decision in Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992). The Fifth District rejected Petitioners' arguments, but granted certification of the following question:

> Does the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), apply to an award of attorneys' fees made pursuant to sections 627.428 and 627.756, Florida Statutes?

Respondents Ground Improvement Techniques, Inc. and Fidelity and Deposit Insurance Company of Maryland are referred to collectively as "Respondents," and individually as "GIT" or "F&D" as appropriate. Petitioners Danis Industries Corporation and Seaboard Surety Company are referred to collectively as "Petitioners," and individually as "Danis" or "Seaboard" as appropriate. Citations to the record on appeal are indicated as (R __) with the appropriate page number inserted.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts provided by the Petitioners fails to mention a number of the critical facts necessary for the resolution of this appeal. As a result, Respondents provide this supplemental statement of the case and facts to present the court with the facts needed to decide the question certified by the Fifth District Court of Appeal.

In October 1989, Danis, as a general contractor, entered into a construction contract with Orange County, Florida to perform construction services on an Orange County landfill project (R 6-11). In November 1989, Danis and GIT entered into a construction subcontract agreement whereby GIT agreed to perform specified services on the project and Danis agreed to pay GIT for those services (R 12-21). After GIT completed its work on the project, GIT was owed a contract balance of $469,942.20 (R 197). However, Danis refused to make any further payments to GIT for its services.

In October of 1990, GIT filed a Demand for Arbitration with the American Arbitration Association initially seeking $298,230.00 against Danis (R 84-86). Danis reacted to GIT's demand by filing its own Demand for Arbitration (R 87-113). The arbitration claims were then joined and administered in a single proceeding.[1]

On December 17, 1990, GIT formally notified Danis' payment

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[1] Danis Industries Corp., claimant v. Ground Improvement Techniques, Inc., respondent; American Arbitration Association Case No. 33-110-00208-90.

bond surety, Seaboard, that Danis had failed to fully pay GIT for the work performed on the project (R 114). GIT alerted Seaboard that GIT was looking to the construction payment bond to immediately provide payment for GIT's work (R 114). On December 27, 1990, Seaboard acknowledged GIT's claim (R 116), but failed to otherwise respond.

On February 12, 1991, GIT again notified Seaboard of GIT's claims against the payment bond and requested that Seaboard participate in the upcoming arbitration hearings (R 117). On February 15, 1991, Seaboard flatly refused to participate in the resolution of GIT's claims (R 118). Seaboard would not attend or participate as a party to the arbitration.

At the close of the arbitration proceedings, the arbitrators awarded $498,456.12 in favor of GIT and against Danis[2] (R 27). The total award against Danis was offset by $215,588.00 therein allowing only a portion of $419,212.32 in backcharged amounts Danis had wrongfully assessed against GIT prior to the arbitration (R 198). Therefore, Danis was ordered to pay GIT a total of $282,868.12 (R 127, 198).

In June of 1991, GIT filed a civil remedy notice of insurer violation with Seaboard and the Florida Department of Insurance pursuant to section 624.155, Florida Statutes (R 315-323). GIT asserted its claim against Seaboard for the amounts due pursuant to the arbitration award. GIT's insurer violation notice also

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[2]The arbitration award in favor of GIT exceeded GIT's unpaid contract balance and therefore indicates that the arbitrators apparently found GIT entitled to additional monies.

raised Seaboard's statutory liability for GIT's attorneys' fees (R 316). Unfortunately, Seaboard again made no effort to resolve GIT's now liquidated claim of $282,868.12 against the payment bond.

Also at that time, GIT filed this lawsuit demanding confirmation of the arbitration award against Danis and Seaboard pursuant to section 682.12, Florida Statutes (R 1-27). GIT's complaint also included a payment bond claim demanding judgment against Seaboard for the full amount of the arbitration award plus an award of GIT's attorneys' fees under sections 627.428 and 627.756, Florida Statutes (R 4-5).

Subsequently, GIT filed a Motion for Summary Judgment seeking confirmation of the arbitration award against the Petitioners and an award of attorneys' fees against Seaboard (R 68-130). Shortly before the December 31, 1991 hearing on the motion, Danis paid GIT $282,868.00 to satisfy the arbitration award entered in favor of GIT (R 299-304). GIT regarded this last minute payment of the award as the functional equivalent of a confession of judgment against Seaboard (R 199, 299).

On February 26, 1992, the trial court granted Summary Judgment in favor of GIT (R 196-200). The trial court's order fully and finally confirmed the arbitration award in which GIT prevailed against Danis. Further, the Court entered judgment in favor of GIT and against Seaboard pursuant to the arbitration award and adjudged that GIT was entitled to recover attorney's fees pursuant to sections 627.428 and 627.756, Florida Statutes (R 199-200).

In June of 1992, GIT filed a Motion to Tax Attorneys' Fees and Costs against Seaboard (R 201-259). After conducting a hearing on the motion, the trial court entered a Summary Final Judgment that awarded GIT attorneys' fees, interest on attorneys' fees, and costs against Seaboard (R 324-25).

Seaboard and Danis[3] appealed the November 17, 1992 judgment entered in favor of GIT and against Seaboard to the Fifth District Court of Appeal. Danis Indus. Corp. and Seaboard Surety Co. v. Ground Improvement Techniques, 19 Fla. L. Weekly D20 (Fla. 5th DCA 1993). The Fifth District affirmed the trial court's decision that GIT properly obtained judgment against Seaboard and was entitled to an attorney's fees award under sections 627.428 and 627.756.[4] Id. at D21. In reaching this conclusion, the court specifically rejected the Petitioners' contention that the prevailing party test of Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992), could be applied to relieve Seaboard of its attorney's fees liability arising under sections 627.428 and 627.756. Id. The court went on to state that "under sections 627.428 and 627.756, a subcontractor who prevails in arbitration proceedings against a contractor or its surety is entitled to

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[3]The final judgment on appeal is not against Danis (R 324-25). However, despite its lack of standing, Danis has participated in the appellate process to continue its attack on the arbitration award entered in favor of GIT and against Danis.

[4]The appellate court reversed the judgment in part, but only as to the amount of fees and interest awarded in favor of GIT. The cause was remanded to the trial court for review of additional evidence addressing the allocability of the attorney's fees incurred by GIT in its successful efforts and recalculation of prejudgment interest. In this appeal, Petitioners are contesting Seaboard's liability as determined by the lower courts.

recover from the surety the attorney's fees incurred by the subcontractor during arbitration." Id. The court then certified the following question:

> Does the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), apply to an award of attorneys' fees made pursuant to sections 627.428 and 627.756, Florida Statutes?

SUMMARY OF THE ARGUMENT

The issue in this case is whether a surety/insurer can avoid its statutory obligation to pay the attorney's fees incurred by an insured in gaining a liability judgment against the insurer. The trial court granted GIT summary judgment against Seaboard on an arbitration award and found GIT entitled to an attorney's fees recovery pursuant to sections 627.428 and 627.756 of the Florida Insurance Code (R 196-200). The court rendered Summary Final Judgment in favor of GIT and against Seaboard awarding fees, costs, and prejudgment interest[5] (R 324-25). The Fifth District Court of Appeal affirmed the liability judgment entered in favor of GIT and against Seaboard. Danis Indus. Corp. and Seaboard Surety Co. v. Ground Improvement Techniques, 19 Fla. L. Weekly D20, D21 (Fla. 5th DCA 1993). This appeal is the last in a succession of unsuccessful attempts by Seaboard to avoid the statutory obligations that it incurred as an insurer under its payment bond. Seaboard argues that the prevailing party standard of Moritz should be applied to extinguish GIT's entitlement to judgment against Seaboard pursuant to sections 627.428 and 627.756. Seaboard's argument ignores the intent and clear statutory language of the Florida Insurance Code.

Florida Statutes section 627.428 entitles an insured to attorney's fees upon rendition of a liability judgment against the insurer. Section 627.756 applies section 627.428 to actions by subcontractors as "insureds" against sureties on construction

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[5]The Summary Final Judgment on appeal (R 324-25) incorporates by reference the prior Summary Judgment Order (R 196-200).

bonds. This clear statutory scheme, relied on by the Fifth District Court of Appeal in affirming the trial court judgment against Seaboard, should likewise be recognized by this Court. The prevailing party standard of Moritz, appropriate in certain contract actions, has no logical applicability to this case against Seaboard. To permit such an application would contravene the statutory language of sections 627.428 and 627.756.

In an action brought pursuant to section 627.756, a subcontractor/insured is entitled to recover the attorney's fees incurred in obtaining a judgment against the insurer. Despite the Petitioners' arguments to the contrary, the underlying contract dispute, and any "prevailing party" issues associated with that action, can not be used to circumvent the obligations of the surety/insurer. To permit a surety to ignore its obligations after rendition of a judgment based on the surety/insurer's characterization of the underlying dispute is illogical, unfair, and completely ignores the statutory scheme established by the legislature.

Contrary to the Petitioners' arguments, neither this Court's decision in Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993), nor section 713.29, Florida Statutes have any application to this matter. Prosperi involved an action to foreclose a mechanic's lien pursuant to Florida Statute section 713.29. The lien statute specifically requires a trial court to determine the "prevailing party" in an underlying dispute. However, sections 627.428 and 627.756, which are at issue in this cause, concern the liability of an insurer for attorney's fees after a judgment

is rendered against the insurer. The statutory provisions applicable to each scenario are entirely different and there is no basis to apply either Prosperi or section 713.29 to the present matter.

Finally, Petitioners' desperate effort to recharacterize Danis as the prevailing party in the underlying arbitration is incorrect and irrelevant. Seaboard's obligation to GIT is completely unrelated to any self-serving characterization given to the arbitration results. Seaboard simply refused to participate in the arbitration (R 118). Danis now seeks to have this Court review the arbitration proceedings previously decided in favor of GIT and thereby divert attention from the question certified in this matter.

ARGUMENT

CERTIFIED QUESTION

> Does the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), apply to an award of attorneys' fees made pursuant to sections 627.428 and 627.756, Florida Statutes?

The question certified to this Court addresses the application of the Moritz prevailing party test to actions arising under sections 627.428 and 627.756. The statutory scheme applicable to this cause requires an award of attorney's fees in favor of an insured upon rendition of a judgment against the insurer. The insurer has no "prevailing party" entitlement pursuant to this statutory scheme. Therefore, under the facts of this case, Seaboard can not avoid its statutory liability to GIT. The question certified must be answered negatively.

A. UNDER FLORIDA STATUTES 627.428 AND 627.756, AN INSURED IS ENTITLED TO ATTORNEY'S FEES INCURRED IN OBTAINING A JUDGMENT AGAINST AN INSURER

The issue in this case is whether a surety should be able to avoid its statutory obligation to pay the attorney's fees incurred by an insured in gaining a judgment against the insurer. Throughout the lengthy history of this matter, Seaboard has continuously fought to deny its statutory obligations as an insurer. The trial court entered summary judgment in favor of GIT against Seaboard establishing liability and awarding attorney's fees pursuant to sections 627.428 and 627.756 (R 196-200). The Fifth District Court of Appeal affirmed the liability judgment against Seaboard, but it reversed for further review as to the amounts to be awarded GIT. See supra note 4.

Nevertheless, Seaboard is now attempting to resist its statutory liability to GIT by arguing that the prevailing party standard of Moritz relieves it of this statutory duty. Seaboard's argument must fail because it contradicts the applicable statutes.

In order to determine entitlement to attorney's fees under sections 627.428 and 627.756, the statutory language must first be examined. Section 627.428 concerns attorney's fees in insurance actions, and states in pertinent part:

> Upon the rendition of a judgement or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (1993). This unambiguous statute states that an insured is entitled to attorney's fees when a judgement is rendered against an insurer. The statutory authorization is extended to suits brought by subcontractors against a surety by virtue of section 627.756, which reads:

> Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.

§ 627.756, Fla. Stat. (1993) (emphasis added). As with section 627.428, the statutory language could not be more clear. A subcontractor, deemed by this section to be an insured, shall

recover attorney's fees pursuant to section 627.428 after a judgment is rendered against the surety insurer.

The trial court granted GIT summary judgment against Seaboard pursuant to the arbitration award (R 199-200) and thereafter rendered final summary judgment (R 324-25). Therefore, GIT, an "insured" as defined by section 627.756, is entitled to attorney's fees under section 627.428 for the judgment rendered against the insurer, Seaboard. The Fifth District recognized the applicability of the above statutes in rendering its opinion; in fact, the court cited both sections to support its decision.[6] The application of the above statutes to the facts in this case was completely proper. The Fifth District was correct in explicitly rejecting the application of Moritz to relieve Seaboard from its attorney's fees liability under sections 627.428 and 627.756.[7]

Moritz involved a contract action that required a prevailing party test to determine entitlement to contractual attorney's fees. However, sections 627.428 and 627.756 do not involve a traditional contract dispute, but rather mandate an attorney's fees award after a judgment has been rendered against an insurer. The Florida Insurance Code leaves no room for an insurer to

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[6]The Fifth District clearly relied upon the statutory language as the basis for its opinion, notwithstanding Petitioners' statements to the contrary that "[t]here is no legal or logical basis for the Fifth District's conclusion." See Initial Brief of Petitioners at 8.

[7]As the Fifth District stated, "[w]e reject appellants' contention because the prevailing party standard of Moritz does not apply to an award of attorney's fees made pursuant to sections 627.428 and 627.756, Florida Statutes (1989)."

quibble with respect to "prevailing party" issues after judgment is rendered in favor of an insured. Actions brought pursuant to sections 627.428 and 627.756 concern the insurer's liability obligation. This obligation can not be avoided by an insurers' self-serving characterization of the underlying action. To hold otherwise would ignore the language of sections 627.428 and 627.756, and would open the door for insurers to contest responsibility for attorney's fees arising out of valid judgments entered against them.

The legal basis for Seaboard's liability in this case is well settled. In Insurance Co. of North America v. Acousti Engineering Co. of Florida, 579 So. 2d 77 (Fla. 1991), this Court specifically held that sections 627.428 and 627.756 authorized awarding attorney's fees to subcontractors that were incurred during arbitration against a construction bond surety. The Fifth District relied on the Acousti decision in affirming the trial court's judgment against Seaboard.[8] The Acousti decision specifically adopted the opinion in Fewox v. McMerit Construction Co., 556 So. 2d 419 (Fla. 2d DCA 1989) (en banc), approved by Insurance Co. of North America v. Accousti Engineering Co. of Florida, 579 So. 2d 77 (Fla. 1991), a case very similar to this matter.

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[8]Danis Indus. Corp. and Seaboard Surety Co. v. Ground Improvement Techniques, Inc., 19 Fla. L. Weekly D20, D21 (Fla. 5th DCA 1993) ("Thus, under sections 627.428 and 627.756, a subcontractor who prevails in arbitration proceedings against a contractor or its surety is entitled to recover from the surety the attorney's fees incurred by the subcontractor during arbitration. Insurance Co. of North America v. Acousti Engineering Co., 579 So. 2d 77 (Fla. 1991)").

In Fewox, the claimants filed suit seeking recovery against a construction surety bond because the surety's principal (the general contractor) failed to fulfill its contract duties on the project. Id. at 420. The lawsuit was stayed to permit the claimants to initiate arbitration against the general contractor, and the surety failed to participate in the arbitration proceedings. Id. The claimants obtained an arbitration award against the general contractor which the contractor satisfied before the trial court confirmed the award. Id. Claimants then demanded an award of attorneys' fees against the surety pursuant to sections 627.428 and 627.756. Id. The trial court denied the award, but the appellate court later reversed, ruling that the attorneys' fees recoverable under these statutes included those incurred during the arbitration. Id. at 425.

The Fewox court also ruled that voluntary payment of the arbitration award by the contractor or the surety was the "functional equivalent" of a confession of judgment. Id. at 424. The surety could not escape liability for attorneys' fees simply by allowing its principal to pay the award prior to rendition of a judgment. Id. In addition, although the surety was not a party to the arbitration, the court held that

> where a surety has actual notice of arbitration proceedings instituted against its principal, the surety will be bound by an arbitration determination against its principal and the recipient of the award will be entitled to an order confirming the arbitration award in its favor, not only against the principal but also against the surety.

Id. at 425.

This case is almost identical to Fewox. GIT initiated an

arbitration against the general contractor, Danis, in which the surety, Seaboard, although notified of the proceedings, refused to participate. At the conclusion of the arbitration proceedings, GIT obtained an award against Danis. Danis' payment of the award was the functional equivalent of a confession of judgment against Seaboard. Therefore, pursuant to section 627.428 and section 627.756, GIT is entitled to recover attorney's fees against Seaboard for the legal costs incurred in the arbitration proceedings and the confirmation action.

Numerous other Florida cases provide additional support for the final judgment entered in this case. See Park Shore Development Co. v. Higley South, Inc., 556 So. 2d 439 (Fla. 2d DCA 1990) (Sections 627.428 and 627.756 authorized subcontractor's award of attorneys' fees incurred in arbitration proceedings against surety insurer), approved by Insurance Co. of North America v. Accousti Engineering Co. of Florida, 579 So. 2d 77 (Fla. 1991); Fitzgerald & Co. v. Roberts Electrical Contractors, Inc., 533 So. 2d 789 (Fla. 1st DCA 1988) (subcontractor can recover attorneys' fees and costs against payment bond surety under sections 627.428 and 627.756 after arbitrating claims against general contractor); Kidder Electric of Florida, Inc. v. United States Fidelity & Guaranty Co., 530 So. 2d 475 (Fla. 5th DCA 1988) (surety under payment bond is bound by arbitration determination that subcontractor is entitled to payment from surety's principal (the contractor)); Von Engineering Co. v. R. W. Roberts Construction Co., 457 So. 2d 1080 (Fla. 5th DCA 1984) (payment bond surety's failure to

participate in arbitration between surety's principal and unpaid subcontractor will not insulate the insurer from liability).

As the above discussion has indicated, Seaboard's liability to GIT was mandated by this Court's decision in Acousti. Numerous other Florida cases also support the Fifth District's decision. Seaboard's statutory liability can not be circumvented by applying Moritz to actions arising under sections 627.428 and 627.756.

B. THE PETITIONERS' ARGUMENT THAT THE PREVAILING PARTY TEST SHOULD APPLY TO ACTIONS ARISING UNDER SECTION 627.756 IS WITHOUT MERIT

Petitioners urge this court to recognize a distinction between actions brought under section 627.428, and actions where section 627.428 is invoked pursuant to section 627.756. The Petitioners' argument, devoid of any case law or statutory basis, is as follows: "Although the general rule established in the cases cited by the Fifth District may be sound when attorneys' fees are awarded solely because the action is one brought by an insured against an insurer [in other words, an action brought under section 627.428], the result is not necessarily the same when attorneys' fees are authorized by section 627.756 because the action arises out of a claim on a construction bond."[9]

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[9]Petitioners boldly state that "[t]here is no legal or logical basis for the Fifth District's conclusion" that Moritz does not apply to section 627.428 actions. Initial Brief of Petitioners at 8. Petitioners then directly contradict this statement one page later by stating that "the general rule established in cases cited by the Fifth District may be sound when attorneys' fees are awarded solely because the action is one brought by an insured against an insurer," i.e., a section 627.428 action. Initial Brief of Petitioners at 9.

Initial Brief of Petitioners at 9. In making this argument, the petitioners misinterpret and mischaracterize the nature of an award of attorney's fees under section 627.756, which is, by definition, an action by an insured against an insurer.

Section 627.756 requires attorney's fees to be awarded after a judgment has been rendered against a surety in a construction bond dispute. Issues involving attorney's fees against other parties in the underlying action are not addressed by this section, and indeed could not be sought under this section.[10] For example, neither Danis nor GIT were entitled to seek attorney's fees against the other in this case. Although the underlying dispute involved a construction matter, the statutory scheme applied against Seaboard does not exempt it from liability.

Petitioners explain that in a typical section 627.428 action,

> The insured claims entitlement to funds and the insurer denies that entitlement. The insurer has no affirmative claim for relief against the insured, nor is it likely to be holding retainage or other funds from the insured. In those cases, there usually is no reason to analyze which side prevails. **If the insured recovers, he prevails.**[11]

Initial Brief of Petitioners at 13 (emphasis added). Petitioners' explanation is equally applicable to an action

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[10]Section 627.756 governs only attorney's fees sought by an insured against an insurer.

[11]Petitioners, by this statement, are effectively admitting that the prevailing party test of Moritz does not apply to section 627.428 actions. The Petitioners' succinct explanation again directly contradicts their earlier statements that no logical basis exists for not applying Moritz to 627.428 and 627.756 actions.

brought under section 627.756. As noted above, a 627.756 action is brought by a party, defined in the statute as an "insured," against a surety. Petitioners' observation that section 627.756 actions can arise out of construction contract disputes may be true, but it has no relevance to the disposition of this matter. A surety insurer can not escape its statutory liability simply because the successful insured is seeking payment under a payment bond policy.

C. PETITIONERS' ARGUMENT THAT THE PREVAILING PARTY TEST SHOULD APPLY TO ACTIONS ARISING UNDER SECTIONS 627.428 AND 627.756 BECAUSE IT APPLIES TO ACTIONS ARISING UNDER SECTION 713.29 IS WITHOUT MERIT

Petitioners also argue that Justice Grimes' decision in Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993), in which this Court applied the Moritz test to attorney's fees issues arising under section 713.29, mandates that the Moritz prevailing party test be applied in actions under sections 627.428 and 627.756. This argument ignores the clear language of the statutes in question. The attorney's fees entitlement in section 713.29 is vastly different from the entitlement under sections 627.428 and 627.756. However, Petitioners ignore the relevant statutes in their Initial Brief.

Section 713.29, relied upon by this Court in Prosperi, specifically states that the "prevailing party" may recover

attorney's fees.[12] The statute therefore requires the trial court to determine the prevailing party. Prosperi merely clarified the standard that courts should use in making this statutorily mandated determination under section 713.29. Attorney's fees entitlements arising under sections 627.428 and 627.756 are of an entirely different nature.

Sections 627.428 and 627.756 of the Florida Insurance Code apply after a judgment is rendered against the insurer. The statutes do not call on the trial court to determine who the prevailing party is, but rather state that the insurer is liable.

In addition to the clear differences in statutory language, the underlying policy for sections 627.428 and 627.756 does not endorse a "prevailing party" analysis. The policy behind section 627.428 was stated in the Fewox decision, and subsequently approved by this Court. Fewox explained that:

> [t]he policy underlying section 627.428 is to discourage the contesting of coverage by insurers and to reimburse successful policy holders when they are compelled to sue to enforce their policies.

Fewox v. McMerit Construction Co., 556 So. 2d 419, 423 (Fla. 2d DCA 1989) (en banc), approved by Insurance Co. of North America v. Accousti Engineering Co. of Florida, 579 So. 2d 77 (Fla. 1991). Therefore, the policy behind section 627.428 concerns insurers' responsibilities to their insureds, a vastly different

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[12]Section 713.29 reads: "In any action brought to enforce a lien under this part, the prevailing party is entitled to recover a reasonable fee for the services of his attorney for trial and appeal or for arbitration, in an amount to be determined by the court which fee must be taxed as part of his costs, as allowed in equitable actions." § 713.29, Fla. Stat. (1993) (emphasis added).

concern from a mechanic's lien dispute subject to section 713.29.

These differences further illuminate the weaknesses of Petitioner's argument that because Moritz applies to attorney's fees in mechanic's lien cases, it should also apply to attorney's fees issues under sections 627.428 and 627.756. The statutory authorities for attorney's fees in each type of action are quite different, despite Petitioners' contentions to the contrary.[13]

The fact that GIT was the "prevailing party" in the underlying arbitration dispute is irrelevant to the insurer's obligation. Seaboard's liability arises from the judgment the trial court entered against Seaboard. To allow an insurer to avoid a judgment in the manner that Seaboard attempts in this appeal would be contrary to both logic and statutory authority. The Fifth District was entirely correct in recognizing that the Prosperi holding and the Moritz prevailing party test do not apply to section 627.428 and 627.756 actions. This Court should likewise recognize this clear distinction.

D. PETITIONERS' ARGUMENT THAT DANIS WAS THE PREVAILING PARTY IN THE UNDERLYING ARBITRATION IS IRRELEVANT AND INCORRECT

Petitioners assert that Danis was the prevailing party in the arbitration, and therefore it was error for the trial court to award attorney's fees to GIT. This argument lacks any and all merit because it is irrelevant and incorrect.

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[13]In arguing that Moritz should apply to the present matter because it is applied to mechanic's lien actions, Petitioners again confuse the issue by relying not on the language or rationale of section 627.756, but on section 255.05, Florida Statutes. Section 255.05 has no relevance to the attorney's fees sought pursuant to sections 627.428 and 627.756 in this case.

First, Petitioners' argument completely misses the central basis of the final judgment against Seaboard. As discussed at length above, Seaboard's liability to GIT as a surety insurer under the construction payment bond is completely unrelated to whatever characterization is given to Danis' unsuccessful arbitration result. Seaboard's liability for GIT's attorney's fees arose from the surety's bond obligation for GIT's payment. The fatal defect in the Petitioners' argument is the presumption that the judgment enforcing Seaboard's bonded obligation to pay the $282,868.12 awarded in favor of GIT will go away by simply relabeling Danis the prevailing party in the arbitration.

Even if this Court were to accept Danis' improper invitation to rewrite or recharacterize the arbitration result, it cannot insulate Seaboard from its obligations under the payment bond or sections 627.428 and 627.756 of the Florida Insurance Code. For example, Seaboard was liable for all amounts awarded GIT under the arbitration award, including retainages. As Justice McDonald explained in OBS Co. v. Pace Construction Corp., 558 So. 2d 404, 407-08 (Fla. 1990), a payment bond surety can not escape liability for all payments due a subcontractor even if there exists a "pay when paid" provision benefitting the general contractor. A payment bond surety's obligations and liabilities under its bond policy are separate from the obligations imposed on the general contractor.

Secondly, even though this fact is not germane to Seaboard's obligations, GIT was the prevailing party in the arbitration. The trial court deemed this to be the case, a fact acknowledged

by Petitioners' counsel when it stated that the trial court found **"that GIT was the prevailing party in the arbitration dispute"** (Transcript of Trial Proceedings Beginning October 13, 1992 at 10:40 at 2, ln 10-11).[14] Further, the Moritz decision, relied on by Petitioners, does not support Danis' effort to be considered the prevailing party. A party can prevail in a dispute although it may have breached the contract and been properly subjected to set off damages. See Entropic Landscapes, Inc. v. Brown, 615 So. 2d 799 (Fla. 1st DCA 1993). GIT prevailed on the significant issues litigated against Danis. Nevertheless, the focus of this appeal should be on Seaboard's statutory liability, not Danis' unsuccessful arbitration result.

Desperate to create some basis to justify Seaboard's continued disregard for GIT's right to recover against the payment bond surety, the Petitioners now argue that Danis should have prevailed at the arbitration. This argument is not a proper issue to be considered on this appeal, as it is irrelevant to the issues surrounding Seaboard's liability. Seaboard's liability to GIT will not change regardless of the label placed on Danis' unsuccessful arbitration effort.

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[14]Petitioners also acknowledged that the "District Court . . . concluded that GIT was the prevailing party" in their Motion For Attorneys' Fees filed with this Court. See Petitioners' Motion For Attorneys' Fees at 2, n. 1.

CONCLUSION

Florida Statutes sections 627.428 and 627.756 clearly mandate a subcontractor's/insured's entitlement to reasonable attorney's fees after a judgment is rendered against a surety/insurer. GIT, the prevailing insured, is clearly entitled to recover such attorney's fees against Seaboard pursuant to the Florida Insurance Code. Seaboard's efforts to escape this statutory liability through a contorted application of Moritz and section 713.29 ignores the basis for its liability in this cause. Therefore, this Court should affirm the decision of the Fifth District Court of Appeal and answer the certified question as applied in this case in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to Mary M. Piccard, Cummings,

Lawrence & Vezina, P.A., 1004 DeSoto Park Drive, Post Office Box 589, Tallahassee, Florida 32399-0589, counsel for Petitioners, this 28th day of February, 1994.

Susan L. Turner
Attorney

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