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IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. NICHOLS, as guardian  
of the property of BRITTANY ANN  
BOSS and MORGAN NICOLE BOSS, minors,

Petitioner,

VS.

CASE NO. 89,591

PREFERRED NATIONAL INSURANCE  
COMPANY,

Respondent.

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INITIAL BRIEF OF PETITIONER

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ON APPEAL FROM THE  
DISTRICT COURT OF APPEAL  
FOR THE FIRST DISTRICT  
STATE OF FLORIDA  
CASE NO. 95-04140

✓  
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PRELIMINARY STATEMENT

In this brief, the plaintiff/petitioner, Cynthia Nichols, as guardian of the property of Brittany Ann Boss and Morgan Nicole Boss, minors, will be referred to as "Cynthia Nichols" or "Nichols." The defendant/respondent, Preferred National Insurance Company, will be referred to as "Preferred." Brittany Ann Boss and Morgan Nicole Boss will be referred to, collectively, as "the Minors." Everett Lavoris Boss, the Minors' natural father and their original guardian, will be referred to as "Mr. Boss." The Court of Appeal for the First District, State of Florida, will be referred to as the "First District Court of Appeal." The Bond of Guardian issued by Preferred, as surety, on February 11, 1993, in the amount of \$66,000.00 will be referred to as "the Bond." The trial court's Order Granting Plaintiff's Motions for Award of Attorney's Fees and Costs dated October 20, 1995, will be referred to as "the Order." References to the record of the proceedings will be to the page of the record on which the reference appears, as follows: "R- . " References to documents within Petitioner's Appendix will be to the tab number under which the document appears with the page number contained on that document, as follows: "App. 1.1". All references to a statute will be to the version of the statute in effect on March 21, 1994, the date of Cynthia Nichols' demand for payment of the surety bond issued by Preferred.

**STATEMENT OF THE CASE AND THE FACTS**

Petitioner, Cynthia Nichols, appeals the decision of the First District Court of Appeal which affirmed in part and reversed in part the Order of the Honorable Charles Mitchell, Circuit Judge, Fourth Judicial Circuit, Duval County, Florida, dated October 20, 1995. That Order (App. 2) awarded attorney's fees and costs to Cynthia Nichols pursuant to § 627.428(1), Fla. Stat., following a final summary judgment rendered for Nichols in her capacity as successor guardian of the Minors on a guardianship bond issued by Preferred. (R-143-148) (App. 3) The trial court found that Preferred was an "insurer," and Nichols was entitled to reasonable attorney's fees under § 627.428(1) because she had obtained a summary judgment against Preferred. (R-146) (App. 2) The trial court based its award of attorney's fees on Preferred's fourteen-month delay of payment under the Bond, and therefore, found Preferred's liability for those attorney's fees was not limited by the penal amount of the Bond. (R-146) (App. 2) The First District Court of Appeal affirmed Nichols' entitlement to attorney's fees but found the amount of the award should be limited to the penal sum of the Bond and reversed that portion of the trial court's order. (App. 1)

In September, 1990, Vitrina Boss, mother of Brittany Ann Boss and Morgan Nicole Boss, died in University Medical Center, Jacksonville, Florida, several weeks after giving birth to Morgan Boss. (R-30) Everett L. Boss, the natural father of the two Minors, settled their claims arising from their mother's death for

\$100,000.00. (R-25,33) On October 2, 1992, Mr. Boss was appointed the guardian of the Minors by the Fourth Judicial Circuit, Duval County, Florida, (R-41, and the court ordered Mr. Boss to provide a guardian's bond. (R-4) On February 11, 1993, Preferred executed and delivered the Bond to Mr. Boss. (R-5,6) The condition for the Bond was that Mr, Boss "shall perform faithfully **all** duties by the guardian according to law." (R-5)

On March 18, 1993, Mr. Boss received \$64,818.75 on behalf of the Minors, representing their settlement for the death of their mother, less attorney's fees and costs. (R-25) Mr. Boss then proceeded to expend the funds entrusted to him without benefit to the wards and without court approval. (R-24-44)

On February 9, 1994, on its own motion, the court removed Mr. Boss as guardian, finding that he had failed to perform any duties required under Florida law, ignored orders of the court and may have depleted the guardianship assets without approval. (R-7) The court then appointed Cynthia Nichols guardian of the Minors. (R-2,60) On May 20, 1994, Mr. Boss was ordered to deliver the guardianship assets to Ms. Nichols; however, he turned over only \$1,589.55. (R-60)

On March 21, 1994, Cynthia Nichols made demand upon Preferred for payment of the \$64,023.45 of the Minors' funds misappropriated by Mr. Boss in breach of the surety agreement. (R-44) Preferred did not make payment (R-2), and Cynthia Nichols was forced to retain the law firm of Taylor, Day & Rio, Jacksonville, Florida, to file suit against Preferred on October 14, 1994, seeking damages, costs, pre-judgment interest and attorney's fees pursuant to §

627.428 Fla. Stat, (1993). (R-1-7) Nichols served Requests for Admission upon Preferred setting out the trail of Mr. Boss' misappropriations (R-24-44), all of which Preferred admitted except that it denied that it had not satisfied Nichols' demand, saying it had "been making investigation and diligent effort to determine the facts of this case." (R-45,46)

On March 3, 1995, Cynthia Nichols moved for summary judgment against Preferred (R-53-57), and, after hearing argument from counsel for both parties, on April 5, 1995, the Circuit Court entered Summary Final Judgment against Preferred in the amount of \$70,442.53, representing \$63,229.20 in principal and \$7,213.33 in prejudgment interest. (~-62-63) (App. 2) The court reserved jurisdiction to assess costs and attorney's fees. (R-63)

Nichols moved for the issuance of a writ of garnishment to Capital Bank, Coral Springs, Florida, to collect her judgment against Preferred. (~-64-65) The garnishee released \$70,999.91 to the trust account of Nichols' attorneys. (R-66) On May 19, 1995, on Nichols' petition, the Probate Division of the Duval County Circuit Court entered its order authorizing disbursement of the funds for payment of attorney's fees and costs, with the remainder for the benefit of the Minors. (R-159)

Pursuant to § 627.428, Fla. Stat. (1993), Nichols moved for an award of attorney's fees. (R-76-85) A hearing was held, and after consideration of memoranda of law and argument from both Preferred and Nichols (R-143), the court entered its order awarding attorney's fees to Nichols in the amount of \$26,637.00 and costs in the amount of \$707.25. (R-148) (App. 3) Preferred then filed its

Notice of Appeal on November 9, 1995. (R-149)

On October 22, 1996, the First District Court of Appeal affirmed the decision that Nichols was entitled to an award of attorney's fees under § 627.428, Fla. Stat., but found the amount of that award ~~was~~ limited by § 744.357, Fla. Stat, to the penal sum of the Bond. (App. 1) It reversed the trial court's award of attorney's fees and remanded the matter to the trial court for further proceedings. On November 4, 1996, Nichols moved for rehearing and for certification of the issue of the limitation of the amount of attorney's fees. These motions were denied on November 27, 1996, On December 26, 1996, Nichols filed with this Court a timely notice to invoke discretionary jurisdiction only as to the issue of limitation of the attorney's fee award.



SUMMARY OF ARGUMENT

The First District Court of Appeal affirmed the trial court's determination that Nichols, on behalf of her minor wards, was entitled to attorney's fees from Preferred under § 627.428(1), Fla. Stat., and Nichols does not appeal that decision. However, this Court should reverse the decision of the First District Court of Appeal restricting the amount of attorney's fees awarded to Nichols to the penal sum of the Bond pursuant to § 744.357, Fla. Stat. As this Court found in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420 (Fla. 1994), the intent of the legislature in enacting § 627.428, Fla. Stat. (allowing attorney's fees to insureds or beneficiaries successfully enforcing claims against insurers) **was** to discourage insurers from denying or delaying payment of those valid claims in the first place. A surety is an "insurer" by virtue of § 624.03, Fla. Stat. An award of attorney's fees and costs in this case would not increase the surety's liability beyond its Bond because those fees should not be paid from the Bond proceeds. The attorney's fees and costs arose as a result of the surety's own actions in failing to pay its obligation under its Bond when it became due. The fees are not the result of the principal's misconduct and thus are not payable from bond proceeds or the property of the Minors, but directly from the surety itself. This Court should extend to the award of attorney's fees under § 627.428 (1) the distinction it made in American Surety co. of New York v. Gedney, 136 Fla. 10, 185 So. 844 (Fla. 1939)

between the misconduct of a principal and the misconduct of a surety.

The statute mandates the imposition of attorney's fees and costs against Preferred here. The trial court was correct in awarding them, and the First District Court of Appeal correctly affirmed that decision. However, § 744.357, Fla. Stat, does not apply to limit the amount of that award to the penal sum of the Bond because the fees should not be paid from the property of the Minors at all. Following the public policy behind the enactment of § 627.428(1), the long line of Florida court decisions applying this statute to insurance companies does not limit the sanction to the amount of the applicable policy. This case is analogous; the amount of attorney's fees awarded to Nichols on behalf of the Minors should not be limited to the penal sum of the Bond. Nichols respectfully urges this Court to apply § 627.428(1) to this surety on a guardianship bond as the statute is applied to other insurers and reverse the decision of the First District Court of Appeal insofar as it limits the award of attorney's fees against Preferred to the penal sum of the Bond at issue.

ARGUMENT

SINCE PREFERRED'S LIABILITY TO NICHOLS FOR ATTORNEY'S FEES UNDER § 627.428, FLA. STAT. ARISES FROM ITS OWN CONDUCT IN DELAYING PAYMENT OF A VALID CLAIM FOR FOURTEEN MONTHS, NOT FROM CONDUCT OF ITS PRINCIPAL, THE AMOUNT OF THOSE FEES IS NOT LIMITED UNDER § 744.357, FLA. STAT. TO THE PENAL SUM OF THE BOND.

In its decision in this matter dated October 22, 1996, (App. 1), the First District Court of Appeal correctly held that the general **attorney's** fee provision of the Insurance Code, § 627.428, Fla. Stat., applies to a surety in an action on a guardianship bond and affirmed the trial court's determination of Nichols' entitlement to attorney's fees from Preferred. Section 624.03, Fla. Stat. includes a surety within the definition of "insurer."<sup>1</sup> Section 627.428(1) provides that when an insured or named beneficiary of a policy obtains a judgment against an insurer, the court shall award reasonable attorney's fees against the insurer in favor of the insured." Under the clear language of § 627.428(1), Fla. Stat., upon the rendition by the trial court of summary

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<sup>1</sup>§ 624.03 Fla. Stat. "Insurer" defined.--"Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity. (Emphasis supplied.)

<sup>2</sup>The full text of subsection (1) of the statute is as follows:

627.428 Attorney's fee. --

(1) Upon the rendition of a judgment 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. (Emphasis supplied.)

judgment in favor of Nichols against Preferred, it was mandatory that the trial court award attorney's fees against Preferred. In affirming Nichols' entitlement to the award, the First District correctly held that § 627.428(1), the general attorney's fee provision, applied to sureties on guardianship bonds because there is no specific section regarding attorney's fees in Chapter 744. (App. 1.3) Nichols does not appeal this portion of the District Court's decision, although the District Court certified a question on the issue to this Court.

However, the District Court erroneously held that the amount of attorney's fees to be awarded against Preferred was restricted by § 744.357, Fla. Stat. and it, therefore, limited the amount of attorney's fees to the penal sum of the Bond. (App. 1.3) Section 627.428(1) limits the amount of attorney's fees awarded to a successful insured or beneficiary only by "reasonableness." Under the circumstances of this case, the First District has misapplied § 744.357. Moreover, the decision by the First District Court of Appeal here is a departure from existing Florida law applying § 627.428 to insurance companies and defeats the public policy behind the enactment of that statute.

**A. Assessment of attorney's fees against Preferred for its own misconduct will not charge the surety beyond the property of the Minors.**

Section 744.357, Fla. Stat. provides as follows:

Liability of Surety. - No surety for a guardian shall be charged beyond the property of the ward.

In seeking an award of attorney's fees under § 627.428(1), Nichols is not seeking to increase the liability of Preferred, as surety

for the actions of Mr. Boss, the principal under the Bond, beyond the property of the Minors. Nichols is seeking reimbursement directly from Preferred itself of the attorney's fees she incurred as a result of having to force Preferred to perform its obligations under the Bond it issued to secure Mr. Boss' performance of his guardianship duties.

When the probate court determined that Mr. Boss had failed to perform any duties as guardian under Florida law (R-7), the liability of Preferred became fixed with respect to the actions of its principal, Mr. Boss. When Preferred refused to make payment of Nichols' valid claim under the Bond arising from the principal's failure to perform, Preferred's own actions generated its liability for attorney's fees and costs under § 627.428(1). The attorney's fees awarded to Nichols by the trial court are not damages under the Bond for the principal's failures, but damages against Preferred itself for delaying payment of its obligation under the Bond when that obligation became due. Therefore, since Nichols is not seeking attorney's fees from the Bond (the property of the Minors), but from Preferred's own funds, the restriction of § 744.357 does not apply here.

The issue in this case is the surety's misconduct in delaying payment under the Bond, not the misconduct of the principal. This Court recognized the distinction in American Surety Co. of New York v. Gedney, 136 Fla. 10, 185 So. 844 (Fla. 1939). That case involved a wife's claim against a surety on a bond to secure child support. The surety was ordered to pay interest on bond monies owed to the plaintiff which payment exceeded the amount of the

bond, The Court's opinion noted t-he difference between the misconduct of the principal, which the penal sum of the bond covers, and misconduct of the surety for delay in payment, which is covered by interest on the penal amount of the bond. Id. at 845. At the time the case was decided, the insurance code did not include "surety" in the definition of "insurer" as § 624.03, Fla. Stat. now does. Therefore, § 627.428 did not apply. However, this Court's recognition of the distinction between misconduct of the principal and misconduct of the surety is significant.

In its summary judgment against Preferred, the trial court awarded the principal amount of \$63,229.20 against the guardianship bond for Mr. Boss's failure to perform his guardianship duties according to law; plus \$7,213.33 in prejudgment interest on that amount which ran from the date of Nichols' demand upon Preferred for payment under the Bond. (~-62-63) (App. 2) Under the Gedney decision, Preferred was liable for this interest even though it exceeded the \$66,000.00 penal sum of the Bond. The interest was charged to Preferred based solely on its delay in making payment under the Bond for over one year, not on the misconduct of Preferred's principal, Mr. Boss. Preferred has never challenged its liability for this prejudgment interest and has already made payment beyond the penal sum of the Bond.

Although the decision of the First District Court of Appeal cites to Gedney and acknowledges that Preferred's liability to Nichols may be increased beyond the penal sum of the bond for interest, it ignores the distinction between misconduct of principal and surety recognized in Gedney as to Preferred's

liability to Nichols for attorney's fees. The attorney's fees Nichols is seeking fall into the same category as the interest penalty awarded against Preferred. They were incurred because Preferred refused to pay Nichols' valid claim under the Bond when the principal (Mr. Boss) failed to perform his guardianship duties.

The opinion of the First District Court of Appeal cites Aetna Casualty and Surety Co. v. Buck, 594 So. 2d 280, 283 (Fla. 1992) and DiStefano Construction, Inc. v. Fidelity and Deposit Co. of Maryland, 597 So. 2d 248 (Fla. 1992) in support of the decision to restrict the award of attorney's fees to Nichols to the penal sum of Preferred's bond. Those cases involved actions to foreclose mechanic's liens and the award of attorney's fees under lien-transfer bonds. Attorney's fees for enforcing mechanic's liens are specifically governed by Chapter 713, Fla. Stat. Section 713.24 allows a mechanic's lien to be transferred to a surety bond which is conditioned to pay any judgment on the lien, plus costs, to include attorney's fees. In Buck, this Court held that while, under the statute, a court could order the party providing a lien-transfer bond to increase the amount of the bond or provide an additional bond, it could not order an increase of the liability of the surety beyond the amount of a bond already in existence. Buck, 594 so. 2d at 283, The Court reiterated that holding in DiStefano: "Any part of the lien-transfer bond not included in the foreclosure judgment can be used for payment of costs, However, the cost recovery is limited to the face amount of the bond." DiStefano, 597 so. 2d at 250. However, there is no mention in either opinion that the lienor was seeking attorney's fees against the surety

itself for **any** claimed delay or bad faith by the surety in not making payment of a valid lien under the lien-transfer bond. In both Buck and DiStefano, this Court noted that the lienor had an unsecured judgment against the owner for costs which exceed the face amount of the bond, Buck, 594 so. 2d at 283; DiStefano, 597 so. 2d at 250. It was the owners, the principals on the bonds, which caused the lienors to incur fees to foreclose their liens, not the sureties. Additionally, the mechanic's lien statute at issue in those cases dealt specifically with attorney's fees, including them as costs. Section 744,357 does not refer to attorney's fees at all. This means that beneficiaries of guardianship bonds must look to § 627.428(1) for protection against sureties which refuse to pay their valid claims on their bonds.

The First District Court of Appeal also relied on its previous decision in Travelers Indemnity Co. v. Askew, 280 So. 2d 469 (Fla. 1st DCA 1973), in support of its limitation of the attorney's fee award to Nichols. In that decision, the First District stated that:

recovery on a penal bond is limited to the amount of the penalty named in the bond, with interest from the date of the breach. . . . The only exception to the general rule is in those instances where the wording of the bond or the statute pursuant to which it was given indicates an intention to extend the liability of the bond beyond the maximum sum stated therein.

Id. at 471. The rule certainly applies when an insured or a beneficiary of a surety bond is seeking to enforce the penal sum of a bond based on actions by the principal under that bond because a surety has assumed the risk that its principal will not perform only up to the amount of the bond it has issued (for which risk it



has charged a premium). However, that is not the case here.

Askew concerned a mortgage broker's bond, not a guardianship bond. The plaintiff sued the mortgage broker and its bonding company, alleging the broker had failed to perform its duties on four different loans. The surety agreed to pay the full penal sum of the bond, which was less than the total of the four claims. The main issue in Askew was whether a surety "should be liable in full penal amount for each and every claim filed by each and every person who may suffer damages as a result of the default of the principal named in the bond." Id. at 475. The court found that absent clear and unequivocal terms so providing in the statute, the surety should not be liable for the full amount of every claim made against the bond during its term, and limited the liability for the total of all claims to the penal sum stated in the bond. Id. at 473. There were no issues as to any delay in payment by the surety, which had offered the full amount of its bond proceeds. In contrast, here there is only one claim being made on the Bond, and it is for an amount less than the \$66,000.00 penal sum of the Bond. Moreover, Preferred never offered to make payment under the Bond. The attorney's fees being sought are being sought directly from the surety itself, based on its own actions, not from the funds available under the Bond, and not based upon actions by the principal on the Bond.

None of the **case** law cited by the First District Court of Appeal prevents this Court from affirming the amount of the trial court's award of attorney's fees to Nichols on behalf of the Minors. The award of attorney's fees arose as a result of

Preferred's misconduct in delaying payment of Nichols' valid claim on behalf of the Minors under the Bond. Since these fees did not arise from Mr. Boss' conduct, but from that of the surety itself, affirming the award will not increase Preferred's liability under its Bond. It will merely further the public policy behind § 627.428, Fla. Stat. by requiring Preferred, rather than the Minors, to bear the costs of Preferred's conduct here.

B. The effect of the decision by the First District Court of Appeal is to defeat the intent of and the public policy behind § 627.428(1), Fla. Stat.

Section 627.428(1) is clear and unambiguous. It states, in essence, that an insured or beneficiary of an insurance policy who is forced to prosecute a lawsuit to recover its valid claim against an insurer (as defined by the statute) is entitled to attorney's fees for being forced to prosecute that lawsuit. As this Court has stated: "The apparent public policy underlying this aspect of the statute is to discourage insurers from contesting valid claims and to reimburse successful policyholders forced to sue to enforce their policies." Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420, 421 (Fla. 1994); see, also, Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992) ("Florida courts have consistently held that the purpose of section 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts."); Fewox v. McMerit Construction Co., 556 So. 2d 419, 423 (Fla. 2d DCA

1989), aff'd. sub nom. Ins. Co. of North America v. Acousti Engineering of Fla., 579 So. 2d 77 (Fla. 1991); Zac Smith & Co., Inc. v. Moonspinner Condominium Ass'n., Inc., 534 So. 2d 739, 743 (Fla. 1st DCA 1988).

In Danis, after holding the prevailing party test of Moritz v. Hoyt Enterprises, 604 So. 2d 807 (Fla. 1992), inapplicable to the award of attorney's fees under § 627.428 in a dispute over a construction subcontract, this Court went on to define how an insurer or surety could use a settlement offer to avoid the imposition of increased attorney's fees under § 627.428: it must offer its insured or beneficiary "the full amount which the insured or beneficiary would be entitled to recover from the insurer or surety at the time the offer is made." Danis, 645 So. 2d at 422. That would include damages and attorney's fees, costs and interest. Id. In other words, an insurer or surety cannot avoid attorney's fees simply "by making a belated offer of its insurance coverage or any amount which would be less than the insured or beneficiary could recover in a final judgment as of the date of that offer." Id. Obviously, this Court saw the attorney's fee statute as a means to make an insured whole when compelled by a recalcitrant insurer to litigate in order to receive what was due under the policy. The insured would receive the amount due for the claim under the policy, plus attorney's fees. Attorney's fees were not cut off by the limits of the applicable policy.

The case under review is the classic example of the very reason for the existence of § 627.428(1). The trial court pointed this out: "Preferred's fourteen month delay in satisfying its

obligation under the Bond of Guardian is an example of the actions sought to be prevented by the enactment of § 627.428 of the Florida Statutes." R-145-146. Nichols made demand, on behalf of the Minors, for payment of a valid claim against the Bond. Had Preferred made payment in response to Nichols' demand, then no prejudgment interest would have accrued nor would attorney's fees have been incurred. Preferred never denied the claim, but never made payment, compelling Nichols to file suit, obtain summary judgment and garnish Preferred's bank account in order to collect the Minors' claim against the Bond. If the decision of the First District Court of Appeal limiting the award of attorney's fees to Nichols is allowed to stand, Preferred will have circumvented the clear intent of § 627.428(1); it will have delayed payment of its obligation under its Bond while forcing the Minors to bear the cost of the resulting attorney's fees.

The attorney's fees necessitated by Preferred's unconscionable fourteen-month delay in paying this claim should not be paid from the Bond proceeds. But if the decision of the First District Court of Appeal is allowed to stand, the fees will be paid from the Bond proceeds, and the Minors will have to bear the cost of Preferred's delay. The summary judgment entered by the trial court was for only \$63,229.20 of the \$66,000 Bond amount. The decision under review here mandates payment of the remaining \$2,770.80 of Bond funds to the Minors for attorney's fees. However, these fees were generated, not by Mr. Bss' actions, but by Preferred's fourteen-month delay in making payment under the Bond, Because the attorney's fees at issue here total much more than \$2,770.80 (R-148

App. 3), Preferred will avoid the full sanction under §627.428(1) for its unjustified decision to delay payment to the Minors. Moreover, should Preferred decide to pursue Mr. Boss, its principal, to recoup any payments it made under the Bond, Mr. Boss would be forced to pay attorney's fees incurred due to Preferred's actions, not his own.

- C. **This case is analogous to cases applying § 627.428(1) to other types of insurers where the amount of attorney's fees is limited only by reasonableness.**

In a colossal departure from the multitude of other decisions regarding attorney's fees under § 627.428, Fla. Stat., the decision of the First District Court of Appeal to be reviewed here applies a limit other than reasonableness to the award of those fees against an insurer. The First District Court of Appeal found that Nichols was entitled to an award of attorney's fees from Preferred. However, the court then departed from existing Florida **case** law on the application of § 627.428 based on § 744.357, Fla. Stat., and limited the surety's liability for those fees to the penal sum of the bond, Section 744.357, Fla. Stat. does not apply here because Preferred's liability for attorney's fees would not be satisfied out of the Bond proceeds, which are the property of the Minors (the wards). (Any other finding would mean that the principal could be charged with attorney's fees caused by the surety.) Therefore, since it has misapplied § 744.357, the limitation by the First District Court of Appeal of the attorney's fees owed by Preferred to Nichols is directly contrary to previous decisions by this Court

and other district courts of appeal in applying the sanction of § 627.428 to insurance companies. In those cases, where § 627.428 was found to apply, the fees were limited only by the "reasonableness" standard of the statute itself.

This Court and other district courts of appeal have found the liability for attorney's fees under § 627.428(1) is not limited by the amount of insurance coverage available from the carrier. Under the statute, those courts have required carriers to pay attorney's fees in amounts beyond the entire policy limits. In Employers' Liability Assurance Corp. v. Royals Farm Supply, Inc., 186 So. 2d 317 (Fla. 2d DCA 1966), the Second District Court of Appeal decided the issue of attorney's fees as applied to an insurance claim for property loss due to fire. After many months of demand for payment by the insured, the various insurers offered their policy limits, but the insured refused the offer and filed suit seeking interest, attorney's fees and costs. Although the insurers had ultimately offered to pay the policy limits (but without interest), the court found that under § 627.0127, Fla. Stat. (predecessor to § 627.428, Fla. Stat.), "[a]n undue delay in offering to pay the amount due under an insurance contract amounts to a wrongful withholding and justifies an award of attorney's fees." Id. at 321. The court affirmed the trial court's summary judgment for the insured of \$3,700.00 in attorney's fees in addition to the \$30,000.00 in insurance proceeds.

Like the plaintiffs in Employers, Nichols and the Minors had to endure many months of delay by Preferred. Preferred wrongfully withheld the proceeds of the Bond after the Minors had made a valid

claim for them. Preferred, not the Minors, should have to pay for its wrongful withholding.

In deciding entitlement to attorney's fees under § 627.428 with regard to a claim under a fire loss policy, the Fourth District Court of Appeal, in Cincinnati Insurance Co. v. Palmer, 297 So. 2d 96 (Fla. 4th DCA 1974), found that an insurer could not avoid its liability for fees by paying the insurance proceeds to the insured after suit was filed but before judgment was entered in order to avoid entry of a judgment. Id. at 99. The court then went on to say that:

The terms of the statute are a part of every insurance policy issued in Florida. . . . [U]pon the suit being filed, the relief sought was both the policy proceeds and attorney's fees, and so long as the insurer failed to voluntarily pay any part of the relief sought, it continued to contest the policy.

Id. (citations omitted, emphasis in original). No mention is made of restricting those attorney's fees based on the policy limits. The court only limited the fees to those incurred in collecting the policy proceeds, as opposed to the fees incurred in attempts to collect the fees themselves.

Like the plaintiff in Cincinnati, Nichols, on behalf of the Minors, is seeking from Preferred both the Bond proceeds and all the attorney's fees incurred in collecting those proceeds. Unlike the insurer in Cincinnati, Preferred never even made a settlement offer. Under the decision by the First District Court of Appeal, the Minors will receive the benefit of only that portion of the Bond proceeds not expended on attorney's fees.

In State Farm Fire & Casualty Co. v. Palma, 555 So. 2d 836

(Fla. 1990), this Court affirmed an award of \$253,500.00 in attorney's fees under § 627.428 against an insurance company pursuant to a claim made for personal injury protection benefits under an automobile insurance policy. In the Palma litigation, which was the subject of several appeals to the Fourth District Court of Appeal and two decisions of this Court, the plaintiff, insured by State Farm, submitted a \$600.00 bill under the personal injury protection portion of her policy. When State Farm refused to pay the bill, the plaintiff sued and was eventually awarded attorney's fees for both the trial of the case and various appeals. The trial court ultimately awarded fees of \$253,500.00, far in excess of the \$600.00 bill sued upon or the \$10,000 statutory personal injury protection limits. The Fourth District Court of Appeal had affirmed this fee in State Farm Fire & Casualty Co. v. Palma, 524 So. 2d 1035 (Fla. 4th DCA 1988), which decision was affirmed by this Court in State Farm Fire & Casualty Co. v. Palma, 555 so. 2d 836 (Fla. 1990). These courts obviously deemed this fee to be reasonable, and neither court ever suggested that the fee amount should be limited by the statutory policy limits of \$10,000.00.

This case is analogous to the scenarios in the above-cited cases where attorney's fees have been assessed against insurance companies. Preferred, a surety, is an "insurer" for purposes of the statute. The terms of the statute are implicit in the bond issued by Preferred, and the recovery sought by Nichols is the proceeds of the bond, plus the reasonable attorney's fees she incurred because of Preferred's unjustified refusal to pay over



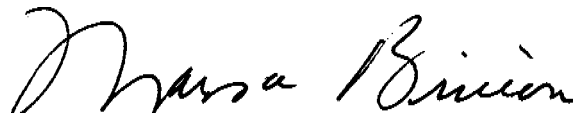
those proceeds. When the First District Court of Appeal limited Nichols' attorney's fees to the penal sum of the bond, its decision was in direct contradiction to the above-cited decisions. That decision essentially holds that there is a finite fund (the penal sum of the bond) from which the beneficiary of a guardianship bond must recover her damages from breach of the bond by the principal and her attorney's fees incurred from breach of the bond by the surety, despite the clear language of § 627.428 and the long line of Florida case law interpreting it to the contrary.

CONCLUSION

The intent of § 627.428(1) Fla. Stat. is to discourage through the award of attorney's fees the very actions engaged in by Preferred in this case. Nichols made demand for payment of a valid claim under Preferred's Bond. Preferred never challenged the validity of that claim, but forced Nichols to file suit and garnish Preferred's bank account to obtain the Bond proceeds. Because the fees and costs incurred by Nichols in pursuing the Minors' claim were caused by Preferred's conduct, not its principal's, they should not be awarded from the Bond proceeds, but directly from Preferred. There is no statute or **case** law which provides that the award of attorney's fees may not go beyond the penal sum of a guardianship bond when the surety's conduct generates those fees. Therefore, based on the case law and argument set out above, this Court should reverse that portion of the decision of First District Court of Appeal which limits the attorney's fees awarded to Nichols on behalf of the Minors to the penal sum of the guardianship bond and reinstate the trial court's award of attorney's fees.

Respectfully submitted,

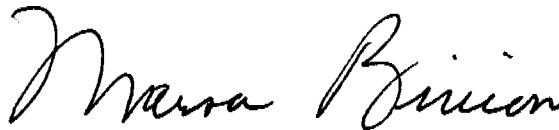
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Koko Head, Esquire**, 24 N. Market Street, Suite 405, Jacksonville, Florida 32202 and **Lawrence C. Rolfe, Esquire**, 720 Blackstone Building, Jacksonville, Florida 32202, by U.S. Mail this 20<sup>th</sup> of February, 1997.



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Attorney