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APR 15 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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.

REPLY BRIEF OF PETITIONER

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

✓ **JOHN C. TAYLOR, JR., ESQUIRE**
Florida Bar No. 125100

✓ **MARSA S. BINION, ESQUIRE**
Florida Bar No. 058688

Barnett Center
50 N. Laura Street, Suite 3500
Jacksonville, Florida 32202
(904) 356-0700
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 3

 I. ONCE NICHOLS FILED SUIT AGAINST PREFERRED TO COLLECT UNDER THE BOND, PREFERRED HAD EVERY OPPORTUNITY IN THAT ACTION TO ASSERT ANY AND ALL DEFENSES OF ITS OWN OR ITS PRINCIPAL.

 II. NICHOLS NEED NOT AND DID NOT PURSUE A BAD FAITH ACTION AGAINST PREFERRED IN ORDER TO BE AWARDED ATTORNEY'S FEES UNDER § 627.428, FLA. STAT. OR TO HAVE THAT AWARD EXCEED THE PENAL SUM OF PREFERRED'S BOND. . .

 III. BECAUSE A SURETY IS INCLUDED WITHIN THE STATUTORY DEFINITION OF INSURER, §627.428(1) FLA. STAT. APPLIES TO PREFERRED'S ACTIONS DESPITE ANY DIFFERENCES BETWEEN A SURETY BOND AND AN INSURANCE POLICY. 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>American Surety Co. of New York v. Gedney,</u> 136 Fla. 10, 185 So, 844 (Fla. 1939)	6, 7
<u>Cincinnati Insurance Co. v. Palmer,</u> 297 so. 2d 96 (Fla. 4th DCA 1974)	7, 8
<u>Danis Industries Corp. v. Ground Improvement Techniques, Inc.,</u> 645 so. 2d 420 (Fla. 1994)	6, 9
<u>Employers' Liability Assurance Corp. v. Royals Farm Supply, Inc.,</u> 186 So. 2d 317, 321 (Fla. 2d DCA 1966)	7, 8
<u>Fitzgerald & Company, Inc. v. Roberts Electrical Contractors, Inc.,</u> 533 so. 2d 789 (Fla. 1st DCA 1988)	10
<u>Insurance Co. of North America v. Lexow,</u> 602 So. 2d 528, 531 (Fla. 1992)	6-8
<u>Shores Supply Co. v. Aetna Casualty & Surety Co., Inc.,</u> 524 So. 2d 722 (Fla. 3rd DCA 1988)	10
<u>State Farm Fire & Casualty Co. v. Palma,</u> 524 So. 2d 1035 (Fla. 4th DCA 1988) <u>aff'd.</u> , 555 So. 2d 836 (Fla. 1990)	7, 8
<u>Zac Smith & Company, Inc. v. Moonspinner Condominium Ass'n., Inc.,</u> 534 so. 2d 739 (Fla. 1st DCA 1988)	10

STATUTES AND RULES

Rule 1.530(b), Florida Rules of Civil Procedure 4

Rule 1.550(a), Florida Rules of Civil Procedure 4

Rule 1.550(b), Florida Rules of Civil Procedure , 4

Rule 9.310, Florida Rules of Appellate Procedure 4

§ 624.03, Florida Statutes 1, 8

§ 627,428, Florida Statutes 1, 2, 5-9, 11

§ 627.428(1), Florida Statutes 8

§ 627.756, Florida Statutes 9

§ 744,357, Florida Statutes 1, 10

SUMMARY OF ARGUMENT

Nichols' Complaint was not one for bad faith against Preferred, and her claim for attorney's fees is not grounded on bad faith. No allegation of bad faith need be made by any insured or beneficiary who seeks attorney's fees under § 627.428, Fla. Stat. The statute mandates the award of attorney's fees where an insured (or beneficiary) obtains a judgment against an insurer. Nichols obtained a Summary Final Judgment against Preferred, and therefore, under the statute, the trial court correctly awarded her attorney's fees, The First District Court of Appeal correctly affirmed this decision.

The trial court was also correct when it awarded Nichols all the attorney's fees she incurred in pursuing Preferred. Since these fees arose as a result of the surety's own actions in failing to pay its obligation under its Bond when due, they are not the result of the principal's actions, and thus not payable from the proceeds of the Bond. Therefore, § 744.357, Fla. Stat. does not apply, and this Court should reverse the decision of the First District Court of Appeal to the extent it limits the award of attorney's fees to the penal sum of Preferred's Bond.

Whether a surety's liability under its bond is a secondary source of monies does not control here. Since the legislature has included a surety within the definition of insurer under § 624.03, Fla. Stat., and applied § 627.428, Fla. Stat. to "insurers" without excepting sureties, the determination of an attorney's fee award under that statute should be the same for both entities. Insurance

companies do not pay attorney's fees awarded under § 627.428 from the proceeds of the applicable policies, and the fee awards are thus not limited by the policy limits. A surety is only liable to the penal sum of its bond for the debts or actions of its principal. However, attorney's fees awarded under § 627.428 against a surety arise from the surety's actions in not paying a valid claim against its bond, just as those fees are awarded against an insurance company which wrongly contests **coverage** under an insurance policy. Therefore, a beneficiary, like any other insured, who is successful in obtaining a judgment against his surety should receive the total amount of his reasonable attorney's fees incurred in pursuing his surety without regard to the penal sum of the bond in question. This Court should reverse the decision of the First District Court of Appeal limiting the attorney's fees to be paid by Preferred to the penal sum of the Bond.

ARGUMENT

I. ONCE NICHOLS FILED SUIT AGAINST PREFERRED TO COLLECT UNDER THE BOND, PREFERRED HAD EVERY OPPORTUNITY IN THAT ACTION TO ASSERT ANY AND ALL DEFENSES OF ITS OWN OR ITS PRINCIPAL.

Preferred asserts that since it had no opportunity to raise defenses in the guardianship action, as to it, Mr. Boss' liability did not become fixed with the Order Removing Guardian and therefore it had no obligation to pay the Minors' claim upon demand, Preferred seeks to have this Court ignore the fact that Nichols did not file her lawsuit against Preferred for almost seven months after her initial demand for payment of the Minors' claim under the Bond. Even assuming it would have asserted any defenses in the guardianship action, the record does not reflect what actions, if any, Preferred took during those seven months to investigate Mr. Boss' misappropriation of the Minors' funds or to "assert any defenses of its own or those of its principal" as to its liability under the Bond.

Once Nichols filed suit, Preferred had every opportunity in that action to raise any defenses it or its principal might have had to the Minors' claims. Preferred not only did not assert any such defenses, it admitted Nichols' Requests for Admission which laid out the history of Mr. Boss' actions in misappropriating the funds entrusted to his care. (R. 24-44, Vol. 1) Preferred did not file any affidavit in opposition to Nichols' affidavit in support of her motion for summary judgment. Thus, Preferred did not take advantage of yet another opportunity to raise defenses, if any, to the claim.

Preferred's duty to pay under its Bond for Mr. Boss' breach of that bond was confirmed when the Summary Final Judgment entered by the Circuit Court against Preferred (R. 62, Vol. 1; App. 3) became final: ten days after the date of the summary judgment when no motion for rehearing had been filed. Rules 1.530(b) and 1.550(a), Florida Rules of Civil Procedure. Preferred complains that Nichols enforced her summary judgment by garnishing Preferred's bank account before Preferred's time to appeal the summary judgment had run. However, if Preferred wished to prevent Nichols' execution on that summary judgment, it should have applied to the Circuit Court for a stay of execution. Rule 1.550(b), Florida Rules of Civil Procedure and Rule 9.310, Florida Rules of Appellate Procedure, Preferred never applied for such a stay and never appealed the summary judgment.

Preferred claims that Nichols should have pursued Mr. Boss for the missing funds, However, once the condition of the Bond had been breached, Nichols (on behalf of the Minors) had the right to the look to the surety for reimbursement. That was the very reason for the guardianship bond requirement by the Probate Court in the first place. Preferred states that its obligation to pay the Minors' claim under its Bond was not "judicially established" until the Summary Final Judgment became a final non-appealable order and therefore it had no duty to pay until that circumstance occurred. (Preferred's Brief, page 11). If this were true, then every beneficiary under every guardianship bond would be required to file suit in every instance where the bond was breached before a surety

would become obligated to pay. It is this very set of circumstances which the legislature wished to prevent by the enactment of § 627.428. Once the condition of the Bond was breached by Mr. Boss, Preferred had an obligation to reimburse the misappropriated funds to the Minors. When it did not do so, forcing Nichols to file suit to collect those funds on behalf of the Minors, Preferred became liable for attorney's fees under § 627.428 after the trial court entered Summary Final Judgment against it. This Court should reverse the limitation of those fees by the First District Court of Appeal.

II* NICHOLS NEED NOT AND DID NOT PURSUE A BAD FAITH ACTION AGAINST PREFERRED IN ORDER TO BE AWARDED ATTORNEY'S FEES UNDER § 627.428, FLA. STAT. OR TO HAVE THAT AWARD EXCEED THE PENAL SUM OF PREFERRED'S BOND.

Contrary to Preferred's argument in Section III of its brief, Nichols' Complaint did not need to assert "bad faith" in order to set forth a cause of action against Preferred. The condition of the Bond had been breached by Mr. Boss (R. 7, Vol. 1), demand had been made for payment of the Bond proceeds (R. 44, Vol. 1), and Preferred did not pay the claim. The cases cited by Nichols which discuss the public policy behind § 627,428, Fla. Stat. are unquestionably applicable to Nichols' action against Preferred and to the appeals. Under its clear terms, § 627.428 applies to a surety when a bond beneficiary obtains a judgment against that surety; the statute does not require a finding of bad faith for an award of attorney's fees, The statute is designed to prevent delay in payment of valid claims by sureties as well as by insurance companies and to reimburse insureds and beneficiaries for

attorney's fees incurred when they are compelled to sue to enforce a bond or insurance policy. See, Danis Industries Corp. v'. Ground Improvement Techniques, Inc., 645 so. 2d 420 (Fla. 1994); and Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992).

Preferred's conduct in this case exemplifies exactly what the sanctions of § 627.428 were intended to prevent. The trial court's finding in its Order of October 20, 1995, that "the award of attorney's fees is based on Preferred's own actions in failing to make payment under the Bond. . . ." (R. 146, Vol. 1; App.2) is supported by the attorney's fee statute and is based on the distinction 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 that of the surety itself. Contrary to Preferred's argument on page 12 of its Brief, the Gedney Court did not hold that an award of damages against a surety may not exceed the penal sum of a bond. The issue in that case was "whether the surety can be held liable for interest on the principal amount due where the effect is to exceed the penalty named in the bond." Id. at 845. The Court affirmed the lower court's award of interest against a surety even though it exceeded the penal sum of the bond and stated:

The interest is allowed only by way of damages for delay upon the part of the surety in making payment after he should have done so, so that all obligee recovers is the penalty, or rather what it would have been if paid at the proper time.

Id. The issue of attorney's fees did not arise in that case. At the time, sureties were not defined as insurers for the application of § 627.428. Yet, like American Surety Company of New York, Preferred should have to pay damages for its delay in making payment to the Minors. Section 627.428 mandates the inclusion of attorney's fees in those damages, and the Gednev distinction applies to allow Nichols to collect the entire amount of the fees incurred.

The application of § 627.428 sanctions to an insurer (including a surety) does not require a finding of bad faith on the part of the insurer. As the Second District Court of Appeal stated in Employers' Liability Assurance Corp. v. Royals Farm Supply, Inc., 186 So. 2d 317, 321 (Fla. 2d DCA 1966):

The Florida Statute . . . merely provides that upon the rendition of a judgment or decree against an insurer in favor of an insured or a named beneficiary, the trial Judge shall award a reasonable attorney's fee against the insurer and in favor of the insured or beneficiary. This Statute has been interpreted as conferring upon the beneficiary an affirmative statutory right to recover reasonable attorneys' fees even though payment was contested in good faith and upon reasonable grounds.

(Citations omitted.) See, also, Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992) (Insurer's good faith in bringing suit on claim reasonably expected to be resolved in a court is irrelevant.)

Preferred has mischaracterized the opinions in Employers' Liability Assurance Corp. v. Royals Farm Supply, Inc., Cincinnati Insurance Co. v. Palmer and State Farm Fire & Casualty Co. v. Palma as dealing with "bad faith" claims. None of these are "bad faith"

cases. They involve coverage disputes where insureds sued their carriers to recover under policies issued by those carriers after claims were denied. Nichols' action against Preferred is like those in Employer's, Cincinnati and Palma: she made demand for payment of a valid claim under Preferred's Bond, and Preferred did not pay the claim, forcing Nichols to file suit to collect under the Bond. Once that action resulted in a judgment against Preferred, § 627.428 became applicable, irrespective of whether Preferred acted (or failed to act) in good or in bad faith. See, Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992) ("If the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees. ")

III. BECAUSE A SURETY IS INCLUDED WITHIN THE STATUTORY DEFINITION OF INSURER, §627.428(1) FLA. STAT. APPLIES TO PREFERRED'S ACTIONS DESPITE ANY DIFFERENCES BETWEEN A SURETY BOND AND AN INSURANCE POLICY.

In § 624.03, Fla. Stat., the legislature chose to include a surety within the definition of insurer, and then applied § 627.428 to "insurers." Nichols does not suggest that surety bonds and insurance policies are the same types of obligations. But since the legislature has chosen to treat sureties as insurers for the imposition of attorney's fees where an insured or beneficiary obtains a judgment against an insurer, Nichols, on behalf of the Minors, has a clear statutory right to attorney's fees against Preferred because she has obtained a judgment against Preferred, whether Preferred's Bond is a source of secondary liability or not.

Preferred claims that should this Court affirm attorney's fees

against Preferred in excess of the penal sum of its Bond, it would lead to the creation of "unimaginable chaos in the insurance/surety community." This is unlikely. As an example, § 627.756, Fla. Stat.¹ provides that § 627.428 applies to performance bonds issued in the construction arena. Nothing in that statute limits the amount of attorney's fees to be awarded to the penal sum of the relevant performance bond. Indeed, in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420 (Fla. 1994), an action by a subcontractor against a general contractor and its surety, this Court discussed how an offer of settlement by a surety could be effective, stating that:

We emphasize, however, that any offer of settlement shall be construed to include all damages, attorney fees, taxable costs and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement. We make this point so that it is plain that the insurer ~~or surety~~ relieves itself from further exposure to the insured or beneficiary's attorney fees at the point in time that the insurer ~~or surety~~ offers in settlement ~~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.

Id. at 421-422 (emphasis supplied). Nowhere in this opinion does the Court refer to the fact that any final judgment would be limited by the penal sum of the performance bond. See, also,

¹627.756. Bonds for construction contracts; attorney fees in case of suit, --

(1) 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.

Fitzgerald & Company, Inc. v. Roberts Electrical Contractors, Inc., 533 so. 2d 789 (Fla. 1st DCA 1988) (affirming trial court's award of attorney's fees and remanding for assessment of appellate attorney's fees; no mention that fees will be limited by penal sum of construction bond); Shores Supply Co. v. Aetna Casualty & Surety Co., Inc., 524 So. 2d 722 (Fla. 3rd DCA 1988); Zac Smith & Company, Inc. v. Moonspinner Condominium Ass'n., Inc., 534 so. 2d 739 (Fla. 1st DCA 1988).

Although Mr. Boss' actions caused the breach of the Bond, clearly, it was the actions of Preferred, not those of Mr. Boss, which caused the delay in payment of Nichols' resulting claim under the Bond on behalf of the Minors. Therefore, since the attorney's fees should not be paid from the Bond, they will not cause an increase in Preferred's liability beyond the property of the Minors and § 744.357, Florida Statutes does not apply. Nichols is entitled to attorney's fees under § 627.428(1), Fla. Stat., and should be awarded the full amount of the fees she incurred due to Preferred's delay. This Court should reverse the decision of the First District Court of Appeal insofar as it limits Nichols' recovery of attorney's fees to the penal sum of Preferred's Bond.

CONCLUSION

The intent of § 627.428, Fla. Stat. is to discourage, through the award of attorney's fees, the very actions engaged in by Preferred in this case. Preferred did not make payment of a valid claim under its Bond, forcing Nichols, on behalf of the Minors, to file suit to collect their claim. The trial court awarded a Summary Final Judgment against Preferred, and thus § 627.428 applied. The First District Court of Appeal agreed and affirmed the trial court's decision that § 627.428 applied to a surety in these circumstances. Because the attorney's fees were incurred as a result of Preferred's actions, they should not be paid from the Bond proceeds, but directly from Preferred. If the Minors' attorney's fees under § 627.428 are limited to the penal sum of the bond, the Minors are not made whole, and Preferred effectively avoids the purpose behind the statute. This Court should reverse that portion of the decision of the 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,

TAYLOR, DAY, CURRIE & BURNETT


JOHN C. TAYLOR, JR.

Florida Bar No. 125100

MARSA S. BINION

Florida Bar No. 058688

50 N. Laura Street, Suite 3500

Jacksonville, Florida 32202

(904) 356-0700

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Koko Head, Esquire**, 2970 Hartley Road, Suite 104, Jacksonville, Florida 32257 and **Lawrence C. Rolfe, Esquire**, 720 Blackstone Building, Jacksonville, Florida 32202, attorneys for respondent Preferred National Insurance Company, by Hand Delivery this 14th day of April, 1997.



Attorney