IN THE SUPREME COURT
OF THE STATE OF FLORIDA

KATHRYN HUBBEL,

Petitioner,

vs.

AETNA CASUALTY &
SURETY COMPANY,

Respondent.

Case No. 92,532
5th DCA Case No. 97-2108

C. B. HERBERT, et al.,

Petitioners,

vs.

AETNA CASUALTY &
SURETY COMPANY,

Respondent.

Case No. 92-848
5th DCA Case No. 97-2314

**DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT**

PETITIONERS, C. B. HERBERT, et al.'s, INITIAL BRIEF ON MERITS

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STATEMENT OF CASE AND FACTS

This case is based upon a certified conflict of decisions from the Fifth District Court of Appeal in, *Aetna Casualty & Surety Co. v. Hubbel,* 704 So. 2d 1141 (Fla. 5th DCA 1998) which certified conflict with *Marshall v. W & L. Enterprises Corp.*, 360 So. 2d 1147 (Fla. 1st DCA 1978). Appendix 1. In this case the Fifth District quashed the trial court judgment awarding attorneys fees, stating that this case raised the same issue previously decided by *Hubbel. Aetna Casualty & Surety Co. v. Herbert,* 706 So. 2d 417 (Fla. 5th DCA 1998). Appendix 2.

On June 22, 1995, Petitioner C.B. and Annie Herbert filed a Statement of Claim in the County Court of the Ninth Judicial Circuit, Orange County, against a surety on a motor vehicle dealer's bond, Aetna Casualty & Surety Company, and a motor vehicle dealer, Southern Truck Sales, Inc. This Claim with its amendment charged the dealer with violations of Chapter 320, also constituting unfair and deceptive trade practices pursuant to part II of Florida Statutes Chapter 501. The surety was sued based upon the statutory bond it provided to the dealer pursuant to F.S. §320.27(10) (1995). Attorneys fees were claimed based upon the bond, the relationship between Herbert and Aetna as insured and surety, F.S. §501.2105 (1995), and Chapter 320. Appendix 3. A copy of the bond is attached as Appendix 4.

The case proceded to non jury trial and resulted in a finding that the dealer had engaged in unfair and deceptive trade practices. The dealer failed to provide Petitioners with a Buyer's Guide which

included the name and address of the dealer and information about whom to contact regarding post-sale problems. In addition, the dealer increased the purchase price of the subject car after having accepted a contract for the vehicle. Appendix 5. Final Judgment was entered in favor of Petitioners on January 10, 1996. Appendix 6. A hearing was held on the issue of attorneys fees before the Orange County Court on February 21 1996, and a judgment for fees and costs was entered on March 12, 1996. Appendix 7.

Aetna appealed the attorney fee order to the Ninth Judicial Circuit Court, in and for Orange County. On July 8, 1997 Judge William C. Gridley entered his Order Affirming Trial Court. Appendix 8. Next, Aetna petitioned the Fifth District Court of Appeal for certiorari review.[1] Aetna was successful and the Fifth District quashed the Circuit Court decision, finding that the motor vehicle bond issued by Aetna did not provide for attorney fees. Appendix 2.

Petitioner Hubbel timely filed her Notice to Invoke the Discretionary Jurisdiction of this Court based upon a certified conflict of decisions and these proceedings ensued. This case has been consoliated with the *Hubbel* case, Supreme Court Case No. 92, 532.

[1]Aetna did not provide a transcript of either the County Court or Circuit Court hearings.

SUMMARY OF ARGUMENT

With the exception of attorney fees incurred in litigation, the loss caused to an individual injured by a motor vehicle dealer's violation of Florida Statutes Chapter 320, is often quite small. No individual can afford to pay an attorney hourly fees to recover such a small amount, and no attorney can afford to take the case for a percentage of such a small amount as a fee. Unless fees are included as part of the loss, enforcement will stop because the cost outweighs the gain. *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990). The legislation will be effectively emasculated and the general public will pay the price.

F.S. §320.27(10) requires motor vehicle dealers to post surety bonds to protect the car buying public from unscrupulous insolvent dealers who prey upon the poorest of people. The Fifth District Court of Appeal has ruled that such bonds do not cover attorney fees. *Aetna Casualty & Surety Co. v. Hubbel,* 704 So. 2d 1141 (Fla. 5th DCA 1998); *Aetna Casualty & Surety Co. v. Herbert,* 706 So. 2d 417 (Fla. 5th DCA 1998). In essence, the Fifth District has nullified the statute.

Public policy, and the general principles of statutory and contract construction, require that this Court quash the Fifth District's decision, in favor of the First District decision in *Marshall v. W & L. Enterprises Corp.,* 360 So. 2d 1147 (Fla. 1st DCA 1978) and this Court's decision in *Nichols v. Preferred National Insurance Co.,* 704 So. 2d 1371 (Fla. 1997). Attorney fees must be covered by the bond in question to give meaning to the legislation involved.

ARGUMENT

I. THE LOSS COVERED BY A MOTOR VEHICLE DEALER'S BOND INCLUDES ATTORNEYS FEES PURSUANT TO F.S. §501.2105 (1995) AND F.S. CHAPTER 320 (1995).

Chapter 320.27(10), Florida Statutes was intended to protect the general public in the purchase of automobiles. *Interstate Securities Co. v. Hamrick's Auto Sales, Inc.*, 238 So. 2d 482 (Fla. 1st DCA 1970). This statute requires each motor vehicle dealer to provide a surety bond designed to cover any loss sustained by a customer due to a dealer's violation of Chapter 320.

Aetna Casualty & Surety Company issued a surety bond which covered the actions of the dealer involved in this case. That bond provided that Aetna agreed to cover " any loss or damage" which a customer of the dealer sustained:

> "as a result of any failure to comply with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicle or as a result of any violation of Chapter 319 or 320, Florida Statutes, in the conduct of the business of which he is licensed . . ."
> Appendix 4.

Neither the bond, nor the four corners of Chapters 319 and 320 expressly include attorneys fees. Therefore, the Fifth District held in *Hubbel* that the victim of the dealer's unfair practices was not entitled to attorneys fees. The First District in *Marshall v. W & L Enterprises Corp.*, 360 So. 2d 1147 (Fla. 1st DCA 1978) ruled to the contrary.

The *Marshall* court dealt with a bond which was issued pursuant to F.S. §320.77(11) (1975). At that time (10) of §77 prohibited a mobile home dealer from " violation of any provision of this section or of any law of this state having to do with dealing in mobile homes . . ." Chapter 501, Part II was a law of this state concerning mobile home dealers, and §501.201 (1975) provided for an award of attorney fees and costs to the prevailing party.

In holding that the loss covered by the bond included attorney fees by the incorporation of §501.201 in the bond, the First District reasoned that:

> . . . *The obvious purpose of the 'Little FTC Act' is to make consumers whole for losses caused by fraudulent consumer practices. Similarly, the purpose of the bonding and licensing requirements in Chapter 320 is protection of consumers who deal with mobile home dealers. These aims are not served if attorney's fees are not included in the protection.*
> 360 So. 2d at 1148.

A similar result should be reached in this case. The bond at issue here covers a motor vehicle dealer pursuant to F.S. §320.27(10) (1995). Section 27 does for motor vehicle dealers, consumers and sureties what section 77 does for mobile home dealers. Subsection 27(10) does not contain the precise language of former subsection 77(10), i.e. "violation of any provision of this section or of any law of this state having to do with dealing in mobile homes . . ." However, this omission does not change the application of *Marshall* to this case for a number of reasons.

First, it is a violation of Chapter 320 to willfully violate any law of the State. F.S. §327.9(a) (1995), and more specifically to make a false, deceptive, or misleading statement with regard to the sale of a motor vehicle. F.S. §327.9(f) (1995). Making a false, deceptive or misleading statement in trade or commerce is also prohibited by Chapter 501, Part II, Florida Statutes. As this Court recently stated in *McGhee v. Volusia County,* 679 So 2d 729, 730 at fn. 1(Fla. 1996):

> *The doctrine of pari materia requires the courts to construe related statutes together so that they illuminate each other and are harmonized.*

Violation of Chapter 501, Part II, is a violation of Chapter 320, and is covered by the terms of the bond. F.S. §501.2105(1995) clearly provides that attorneys fees are part of the loss sustained by a consumer who is victimized by a deceptive trade practice.

Secondly, as this Court found in *American Home Assurance Co. v. Larkin General Hospital, Ltd.,* 593 So. 2d 195, 197 (Fla. 1992) a bond is a contract, subject to contract law. It is well recognized that the law is a part of every contract. *Schekter v. Michael,* 184 So 2d. 641 (Fla. 1966); *Columbia County Sheriff's Office v. Florida Department of Law Enforcement,* 574 So. 2d 234 (Fla. 1st DCA 1991).

For example, in *Schekter,* this Court considered the following public interest question:

> *Whether a promissory note which is blank as to due date becomes, by application of Sec. 674.09(2), F.S., a demand note thereby barring the admission into evidence of a contemporaneous parol agreement which would vary the demand character of the instrument?*

This Court answered this question as follows:

> *The law is a part of every contract made in this State. Therefore, when this note was executed and delivered(April 19, 1960) the provisions of Section 674.09, Florida Statutes 1959, F.S.A., became as much a part of the note as if it had been written on the face of it. This was tantamount to stamping across the face of the note "No time for payment appearing hereon, this note is payable on demand.'*
> 184 So. 2d at 641-642.

Similarly, the attorney fee provision of Chapter 501 became part of the motor vehicle dealer bond just as if it was expressly included in the bond, stating that attorneys fees are part of the loss experienced by a victim of a deceptive trade practice by a motor vehicle dealer.

And in addition, if there is any ambiguity in this matter it must be resolved against the surety. Bonds are analogous to insurance contracts and must be strictly construed against the surety, "granting the broadest possible coverage to those intended to be benefited by protection of the bond." *National Fire Insurance Company of Hartford v. Clark Construction Co.*, 579 So. 2d 743, 744 (Fla. 1st DCA 1991); *Gulf Power Company v. Insurance Company of North America,* 445 So. 2d 1141 (Fla. 1st DCA 1984).

It should also be noted that the Fifth District relied upon *Dealer's Insurance Company v. Centennial Casualty Company,* 644 So. 2d 571 (Fla. 5th DCA 1994) in deciding the case at bar. However, this Court has recently disapproved *Dealers* to the extent it holds that F.S. §627.428, i.e. providing for attorneys fees to an insured, does not apply to sureties who issue motor vehicle dealer bonds. *Nichols v. Preferred National Insurance Co.*, 704 So. 2d 1371 (Fla. 1997).

On the other hand this Court cited the *Marshall* decision with approval by using it as an example of an attorneys fee relating to public policy enforcement. *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So. 2d 828, 833-834 (Fla. 1990). In short, the *Marshall* decision presents the better reasoned view of this matter and should be adopted by this Court.

II. THE JUDGMENT FOR FEES SHOULD HAVE BEEN AFFIRMED BASED UPON *Nichols v. Preferred National Insurance Co.*, 704 So. 2d 1371 (Fla. 1997).

The trial court in this action did not base the award of fees on F.S. §627.428 (1995). Appendix 7. However, this statute should have been considered by the Fifth District pursuant to the tipsy coachman rule, i.e. if there is any basis in the record for the decision, it must be affirmed regardless of the reasons advanced by the trial court. *Carraway v. Armour & Co.*, 156 So. 2d 494 (Fla. 1963); *Landis v. Allstate Insurance Co.*, 546 So. 2d 1051 (Fla. 1989).

In *Nichols v. Preferred National Insurance Co.*, 704 So. 2d 1371 (Fla. 1997) this Court clearly ruled that attorney fees are proper against motor vehicle dealer sureties based upon F.S. §627.428. Although the Petitioner's claim does not include a specific reference to that statute, it does include an express reference to the bond and to the relationship of insured and surety between Hubbel and Aetna. Appendix 3 at 12.

All statutes, relevant to the subject, are incorporated into a contract by operation of law. See *Schekter, supra.* F.S §627.428 is relevant to this motor vehicle dealer bond. Therefore, F.S §627.428, is a part of the bond in question, just as if it were explicitly set forth in the bond. By pleading an entitlement to attorneys fees pursuant to the bond and the insured/surety relationship, the petitioner implicitly claimed fees based upon F.S. §627.428. The notice requirement of *Stockman v. Downs,* 573 So. 2d 835 (Fla. 1991) is satisfied. Therefore, the trial court judgment for attorney fees should be reinstated.

CONCLUSION

For the reasons contained herein Petitioners, C.B. and Annie Herbert, respectfully requests this Honorable Court to reverse the Fifth District Court of Appeal decision, and reinstate the trial court judgment for attorney fees.

RESPECTFULLY SUBMITTED this 15th day of June, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 15th day of June, 1998 to: JAMES W. SEARS, ESQUIRE, 511 N. Ferncreek Ave., Orlando, FL 32803.

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