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, REPLY BRIEF ON MERITS

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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).

Aetna's basic argument is that since Chapter 320 make no specific reference for attorneys fees under the statutory surety bond no fees are permitted. The statute under consideration in *Marshall v. W & L Enterprises Corp.*, 360 So. 2d 1147 (Fla. 1st DCA 1978) also made no specific reference to attorney fees. However, the statute did require bond protection from violation of any other law of this state. Although Chapter 320 does not have the exact language of the statute considered in *Marshall*, a similar provision exists which Aetna attempts to skirt.

Florida Statutes §320.27(9)(a) specifically refers to a "violation of any other law of this state". Aetna asks this Court to ignore this reference because this particular subsection concerns the suspension of a dealers license. However, Aetna's argument ignores the fact that the bond expressly protects the Herberts and others from "*any violation* of Chapter 320". The bond does not omit any part of Chapter 320 from its agreement, nor should this Court. Appendix 4. Therefore, the bond must be read to protect the Herberts and other members of the car-buying public from any violation by the dealer of any law of this state.

As the First District held in *Marshal* Florida Statutes §501.201(1975) is a law of this state concerning mobile home dealers, and provides for an award of attorney fees and costs to the

prevailing party. Florida Statutes §501.2105(1995), virtually identical to the statute under consideration in *Marshal,* is the current statute, and also provides for attorneys fees.

In addition, Florida Statutes §320.27(9)(f) expressly prohibits false, deceptive, or misleading statements with regard to the sale of a motor vehicle, i.e. it makes a violation of Chapter 501 a violation of Chapter 320. Aetna argues that even if these subsections are applicable to a bond claim, there was no claim or proof that such violations occurred with sufficient frequency. Again Aetna misses the point.

The frequency of violation is only relevant regarding the suspension or revocation of a dealer's license. Obviously, all such violations are prohibited or there would be no power to suspend or revoke a dealer's license for a pattern of such violations. Certainly the legislature did not intend this statute to be interpreted to excuse the car dealer from losses he caused by any such offense. Rather, to suspend or revoke his license, a pattern or frequency of violation must be established. Suspension or revocation of the dealer license is not the issue here.

The bond in question was intended to protect the car-buying public from unscrupulous and fly-by-night car dealers who commit any violations of Chapter 320. Failure to include attorneys fees within the loss suffered as a result of those violations will result in a total lack of enforcement. That certainly was not the intent of the legislature.

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

Aetna argues that Petitioners are not entitled to attorney fees because it was not timely notified of Petitioners' claim for fees pursuant to Florida Statutes §627.428 and because Petitioners do not qualify for such fees since they are not the named insured, named beneficiary, or an omnibus insured. Aetna is incorrect.

Petitioners pled the correct entitlement for fees at the inception of this action in their Statement of Claim. Appendix 3 at 12. An entitlement to fees was claimed based upon Aetna's bond and the surety relationship existing between the Herberts and Aetna. The omission of an express reference to Florida Statute §627.428 does not defeat this claim. This Court has long ago recognized that to state a public statutory claim it is not essential to make an express reference to a statute, rather all that is necessary is for the pleading to contain the facts necessary to bring it within the statute. *City of Lakeland v. Select Tenures, Inc.*, 176 So. 274 (Fla. 1937). See also: *Vance v. Indian Hammock Hunt & Riding Club, Inc.*, 403 So. 2d 1367 (Fla. 4th DCA 1981); *Barnett Bank of Jacksonville, N.A., v. Jacksonville Nat'l Bank*, 457 So. 2d 535, 541 (Fla. 1st DCA 1984); and *H & H Design Builders, Inc., v. Travelers Indemnity Co.*, 639 So. 2d 697 (Fla. 5th DCA 1994).

Aetna claims this line of cases predates *Stockman* and is no longer valid. Aetna is incorrect. The pleading under consideration in *Stockman* was the answer filed by the Downs. It contained no claim

for attorneys fees. Thus, the principle set forth in *City of Lakeland* was not and could not have been considered and rendered invalid in *Stockman*. In addition, this principle is affirmatively discussed in *H & H Design Builders, Inc. v. Travelers Indemnity Co.*, 639 So. 2d 697 (Fla. 5th DCA 1994), a case which comes after *Stockman*. The principle could not be applied in *H & H* due to a deficiency in pleading, but that deficiency is not present in the case at bar.

The Statement of Claim in this case clearly includes all facts necessary to bring this matter within Florida Statute §627.428: a demand for attorneys fees based upon the bond and the surety relationship. Nothing more is essential. Aetna's argument that Petitioner's claim for fees fails due to the absence of an express reference to Florida Statute §627.428 is without merit. The notice requirement of *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991) is satisfied.

Secondly, Aetna claims that the Petitioner is not within the class of persons entitled to claim fees based on Florida Statute §627.428. This contention is inconsistent with this Court's decision in *Nichols v. Preferred National Insurance Co.*, 704 So. 2d 1371 (Fla. 1997), and it is incorrect.

In *Dealers Insurance Company v. Centennial Casualty Company*, 644 So. 2d 571 (Fla. 5th DCA 1994) which considered a motor vehicle dealers bond the Fifth District stated as follows:

> . . . *we conclude the award of attorney's fees to Centennial was error. There is no statutory basis for such an award against a surety. Section 627.428, Florida Statutes does not apply* . . .
> 644 So. 2d at 573.

This Court in *Nichols* expressly stated that:

> *[w]e disapprove Dealers to the extent it holds that section 627.428 does not apply to sureties.*
> 704 So. 2d at 1374.

Aetna claims that *Nichols* does not control here because it was a first party claim brought by the guardian on her own bond. This construction of *Nichols* is wrong. The principal of the bond involved in *Nichols* was the former guardian, Everett Boss. The new guardian, Cynthia Nichols, instituted the action in Nichols against the surety of the Boss bond on behalf of the minors who were the persons to be protected from the wrongful acts of the original guardian, i.e. Boss. Similarly, the Petitioner Herberts are among the persons to be protected from the wrongful acts of the motor vehicle dealer who was the principal of the Aetna bond. Hubbel stands in the same relationship to the bond involved here as the minors did in *Nichols*.

Aetna also contends that the statement of this Court in *Nichols* regarding *Dealers* only referred to a so-called "first party" claim by the principal. Again, this construction cannot be correct, *Dealers* did not involve a suit by the dealer, but rather was a suit by the insurer of a company who suffered a loss as a result of the wrongful acts of the dealer. There would have been no need for this Court to have made any statement regarding *Dealers* if Aetna were correct in its interpretation as the principal on the bond in *Dealers* did not institute that action.

In *Royal Indemnity Co. v. Knott,* 101 Fla. 1495, 136 So. 474, 479 (Fla. 1931) this Court stated as follows:

> *The essential distinction between an indemnity contract and a contract of guaranty or suretyship is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligation to the promisee.*

The promisee in the liability insurance situation is the insured, i.e. the person the insurance policy was designed to protect. The promisee in the surety bond situation of the case at bar are the Petitioners, the people the bond was designed to protect.

Black's Law Dictionary defines the term "insure" as to make secure. "Insured" is the person who obtains or is otherwise covered by insurance. "Omnibus" means "for all". Black's Law Dictionary at pp. 726, 980 (5th ed. 1979). In other words, an "omnibus insured" is all who are made secure by an insurance policy or bond, but not the person who obtained the policy or bond. Although the Petitioners did not obtain the bond in question, they must be a named insured, named beneficiary, or one of the "omnibus insured", because the Petitioners are among the persons the bond was designed to protect.

In short, the Petitioners are members of the class to which Florida Statute §627.428 applies. Aetna was placed on notice from the inception of this action of all facts regarding the applicability of this statute and a demand for attorneys fees was made on that basis. Petitioner is entitled to attorney fees. The Fifth District Court of Appeal erred in finding to the contrary.

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 28th day of July, 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 28th day of July, 1998 to: JAMES W. SEARS, ESQUIRE, 511 N. Ferncreek Ave., Orlando, FL 32803 and KIMBERLY A. ASHBY, ESQUIRE, Post Office Box 633, Orlando, Florida 32802-0633.

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