IN THE SUPREME COURT
OF THE STATE OF FLORIDA

C. B. HERBERT and
ANNIE HERBERT,

Petitioners,

vs. CASE NO.: 92,848

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a AETNA CASUALTY
& SURETY COMPANY,

Respondent.
_____/

RESPONDENT, TRAVELERS CASUALTY AND SURETY COMPANY, f/k/a AETNA CASUALTY & SURETY COMPANY'S ANSWER BRIEF

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INTRODUCTORY STATEMENT

Reference to the Petitioners' Appendix shall be made by the abbreviation (A.) followed by the appropriate tab number. During the course of litigation Aetna Casualty & Surety Company changed its name to Travelers Casualty & Surety Company such that Travelers is the actual Respondent to this action.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts proposed by the Petitioners and adds the following additional facts for clarity. The Demand for Judgment made by Petitioners was for $400.00 and was accepted within the time frame authorized by section 768.79, Florida Statutes. (A#4,#5)

The surety bond provided by respondent Aetna specifically provides as follows:

> "NOW, THEREFORE, if the above named principal shall fully comply with the conditions of any written contract made by him as such dealer in connection with the sale or exchange of any motor vehicle, and shall pay or cause to be paid to any person in a retail or wholesale transaction any loss or damages which such person shall sustain 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 the provisions of Chapter 319 or 320, Florida Statutes, in the conduct of the business of which he is licensed, then this obligation shall be void, otherwise to remain in full force and effect."
>
> (A#3)

The trial court ruled that Petitioners were entitled to attorney's fees by virtue of Chapter 501, Florida's Unfair and Deceptive Trade Practices Act, which it further held was

incorporated by reference into Chapters 319 and 320. (A#6)

Petitioners did not request attorney's fees pursuant to section 627.428, Florida Statutes, in the pleadings filed in the trial court. (A#2)

SUMMARY OF ARGUMENT

Petitioners initiate their argument by stating that Chapters 319 and 320 will be undercut because claimants will be left without a remedy on fees. This overlooks their claim against the principal in this case and in every other case that a claimant would file. The issue before the Court here is whether the surety bond provides for a recovery of attorney's fees by the claimant in the absence of express language in the surety bond. The issue is not whether the claimant can ever recover her attorney's fees against the auto dealership which may have violated Chapter 501, Florida Statutes.

The Fifth District properly ruled that section 320.27(10), Florida Statutes, does not require a motor vehicle dealer to post a surety bond which includes recovery for attorney's fees, and that the bond at issue here did not otherwise provide for an award of fees. Section 320.27(10) only requires the posting of a surety bond "in favor of any person in a retail or wholesale transaction who shall suffer any loss as a result of any violation" of Chapters 319 and 320. Petitioners made reference to section 501.201, Florida Statutes, in their Statement of Claim because there is no provision for attorney's fees in either Chapters 319 or 320. Petitioners did

not cite any specific provision from the surety bond because it does not include recovery for attorney's fees.

As the Fifth District properly concluded, "public policy concerns" do not override the requirement that attorney's fees be specifically provided for by statute or by express language in the bond. Aetna Casualty & Surety Co. v. Hubbel, 704 So. 2d 1141 (Fla. 5th DCA 1998). Attorney's fees must be provided for by contract or statute, and any statutory basis for fees is to be strictly construed since the award of fees is in derogation of the common law.

If the Florida Legislature determines that public policy dictates the recovery for attorney's fees under Chapter 319 or 320, it is for the Legislature to enact such legislation and provide for same. Respondent was not required, nor did it post a bond under the auspices of section 501.201, or any other provision of the Unfair Trade Practices Act.

Respondents have cited to no provision of Chapter 319 or 320 which defines "loss" as inclusive of attorney's fees, nor can she. In fact, her remedy for attorney's fees is found only under Chapter 501 and is fully recoverable against the auto dealership. For these reasons, the Court should affirm the holding of the underlying Fifth

District opinion and reject the holding of the First District Court of Appeal in Marshall v. W & L Enterprises Corp.. 360 So. 2d 1147 (Fla. 1st DCA 1978).

Nichols v. Preferred National Insurance Co., 704 So. 2d 1371 (Fla. 1998) does not conflict with the previous holdings of the Court because Nichols involved a first party claim by a guardian against her own guardianship bond as a named insured, omnibus insured or named beneficiary as specifically identified in section 627.428, Florida Statutes. Petitioners are third party claimants to the surety bond of the motor vehicle dealer and therefore does not qualify for fees under section 627.428, or the holding of Nichols. Petitioners did not plead fees under section 627.428 and therefore may not recover them pursuant to Stockman v. Downs, 573 So. 2d 835 (Fla. 1991) where the Court held that a belated request for attorney's fees constituted unfair surprise and violated fundamental due process. Finally, to the extent that Nichols could be construed to invoke attorney's fees in favor of third parties, it constitutes a change in existing law which cannot relate back to existing contracts.

ARGUMENT

POINT I

ATTORNEY'S FEES WERE PROPERLY REVERSED BY THE FIFTH DISTRICT COURT OF APPEAL BECAUSE THE SURETY BOND DID NOT PROVIDE FOR THE PAYMENT OF ATTORNEY'S FEES, NEITHER CHAPTERS 319 NOR 320 CONTAIN AN ENTITLEMENT FOR ATTORNEY'S FEES, AND CHAPTERS 319 AND 320 DO NOT INCORPORATE CHAPTER 501 BY REFERENCE

The Fifth District Court of Appeal should be affirmed because the surety bond did not include a provision for recovery of attorney's fees, and the statutes, Chapters 319 and 320, under which the bond was issued do not provide for attorney's fee recovery to a claimant. The Court should reject the holding of Marshall v. W & L Enterprises Corp., 360 So. 2d 1147 (Fla. 1st DCA 1978) or alternatively find it distinguishable.

Statutes providing for the award of attorney's fees should be strictly construed. INA v. Lexow, 937 F.2d 569 (11th Cir. 1991) (in response to certified question posed to the Florida Supreme Court.) See Travelers Indemnity Co. v Askew, 280 So. 2d 469, 475 (Fla. 1st DCA 1973)(The obligations assumed under the bond filed

pursuant to the requirements of the existing statute may not be increased by judicial interpretation in accordance with what the court might deem to be desirable as a matter of public policy.) Statutory provisions entitling a prevailing party to attorney's fees are in derogation of the common law and must be strictly construed. Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982). Florida follows the "American Rule" that attorney's fees are awardable by a court only when authorized by statute or by agreement of the parties. State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993)

Petitioners filed suit against Respondent on the bond which was issued pursuant to section 320.27(10). It is argued in Petitioners' brief that the language of section 320.27(9)(a), Florida Statutes, in some way bootstraps the attorney's fee provision of Chapter 501. Section 320.27(9) deals with the denial, suspension or revocation of a license to a motor vehicle dealer. Subsection (a) provides that the Department of Highway Safety & Motor Vehicles may take such action for a "wilful violation of any other law of this state, including Chapter 319, this Chapter [320], or ss.559.901-559.9221, which has to do with dealing in or repairing motor vehicles or mobile homes or wilful failure to comply with any administrative

rule promulgated by the department." Also, Petitioners cite subsection (f) which provides for department action upon a showing of "misrepresentation or false, deceptive, or misleading statements with regard to the sale or financing of motor vehicles ..."

From these provisions of Chapter 320, Petitioners conclude that a violation of Chapter 501, Part II is a violation of Chapter 320. In United Pacific Insurance Co. v. Berryhill, 620 So. 2d 1077, 1079 (Fla. 5th DCA 1993), the Fifth District specifically rejected this argument and recognized that "Chapter 501 (the Deceptive and Unfair Trade Practices Act) is not referenced in Chapter 319 or 320 [the Auto Dealer's Act].." (emphasis added).

Petitioners suggest the Court adopt the holding in Marshall and reject the holding of the Fifth District. Marshall is distinguishable based on the language of the statutes involved. Marshall dealt with a mobile home dealer's bond under section 320.77 and did not deal with a motor vehicle dealers bond under section 320.27 as in the instant case. The language of the bonds is different. Furthermore, the language of the enabling statute at issue in Marshall is different than the enabling statute in the present case. The Marshall statute, section 320.77(15), has since been amended and is more similar to this present case, section

320.27(10). However, at the time Marshall was decided, section 320.77(10) contained significantly broader conditions for the bond by providing it covered any violation of that section "or any other law of the state of Florida." The current version of the statute at issue in this Petition, section 320.27, does not contain this same provision. Hence, the statute relied upon in Marshall is plainly distinguishable from the case at hand and Aetna v. Hubbel is not in conflict with Marshall for these reasons.

Respondent has also previously attempted to use section 320.27(9)(a) which refers to "willful violation of any other law of this state..." This subsection only applies to the grounds for suspension of dealer's license. It does not apply to claims on a motor vehicle dealer bond and more particularly, the claims in this case. The introductory paragraph of Subsection 9 is titled "Denial, Suspension, or Revocation." It further states the Department may deny, suspend, or revoke a license "upon proof that a licensee has failed to comply with any of the following provisions with sufficient frequency so as to establish a pattern of wrongdoing on the part of the licensee." Even if this section was somehow found to be applicable to a bond claim, there was no allegation in the Plaintiff's Statement of Claim that the motor vehicle dealer

violated any provisions with sufficient frequency so as to establish a pattern of wrongdoing on its part.

If the First DCA's holding in Marshall is deemed to based entirely upon an expansion of recovery due to public policy concerns, this is within the realm of the Florida legislature and Petitioners is in error asking this Court to expand for statutory or contractual remedies through court interpretation. See INA v. Lexow, 937 F. 2d 569 (11th Cir. 1991) (statutes awarding attorney's fees are to be strictly construed).

It is apparent that the Legislature does enact attorney's fees provisions, as covered by surety bonds when it is its intention to do so. For example, section 627.756, Florida Statutes, provides for the recovery of attorney's fees against sureties on performance and payment bonds. Section 255.05(2), Florida Statutes, also provides for the recovery of attorney's fees by third party subcontractors and materialmen against surety bonds issued for public works. Section 320.781(8), Florida Statutes, provides for attorney's fees in actions relating to mobile home or recreational vehicle dealers. The fact that no provision exists for attorney's fees regarding motor vehicle dealers shows the intent of the Legislature by its absence.

As the Fifth DCA pointed out in the opinion below, the attorney's fees are not considered part of a plaintiff's damages, and thus cannot be recovered pursuant to a bond unless the bond itself provides for such recovery. Hubbel, 704 So. 2d 1141. (citing Banker's Fire & Casualty Co. v. Newman, 330 So. 2d 760 (Fla. 4th DCA 1976); and United Bonding Insurance Co. v. International Nat'l Bank, 221 So. 2d 20 (Fla. 3d DCA 1969).

Petitioners erroneously rely on law applicable to other types of insurance contracts which are contracts of indemnity. See, e.g., National Fire Ins. Co. of Hartford v. Clark Construction Co., 579 So. 2d 743 (Fla. 1st DCA 1991). A surety bond is an instrument of secondary liability defined by its expressed terms. Dealers Ins. Co. v. Centennial Casualty Co., 644 So. 2d 571, 574 (Fla. 5th DCA 1994).

The Statement of Claim brought by Petitioners against Respondent was not for violations of Chapter 501, which by definition does not apply to the surety since it is not an indemnitor of the actions of its principal. Contrary to Petitioners' view that Marshall presents the better view, an adoption of that opinion requires the Court's reversal of the American Rule, expansion of surety liability beyond the limits of its contract with

the principal, and the intrusion of the Court into the legislative process. The Fifth District correctly ruled that as a contract of secondary liability, the bond here must be limited to its expressed terms and the statute under which it was issued must be strictly construed.

This case is consolidated with Hubbel v. Aetna Casualty & Surety Company, Case No. 92,532. In the reply brief submitted in that case, Petitioner argued that section 320. 27(9)(f) "makes a violation of 501 a violation of Chapter 320". (Petitioner Hubbel's Reply Brief at p. 2). This is not true. Section 320.27(9)(f) is entitled "Denial, Suspension or Revocation," and deals with those instances where the Department of Highway Safety and Motor Vehicles may deny, suspend or revoke any license issued under Chapter 320.77 or section 320.771 "upon proof that a licensee has failed to comply with any of the following provisions with sufficient frequency so as to establish a pattern of wrongdoing on the part of the licensee." No such finding of a pattern of frequency was made by the trial court, nor was one requested by Petitioner. As Petitioner Hubbel noted in her Reply Brief, suspension or revocation of the license is not the issue here.

Respondents do agree that the issue is the legislative intent

regarding the inclusion or exclusion of attorney's fees as a remedy to a civil litigant against the bond which is issued pursuant to section 320.27(10). That statute requires that the bond cover the dealers's compliance with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicle and shall not violate the provisions of chapter 319 and 320 in the conduct of the business of the business for which the dealer is licensed. "Wilful violation of any other law of this state.... which has to do with dealing in or repairing motor vehicles or motor homes failure to comply with any administrative rule promulgated by the department [of Highway Safety and Motor Vehicles]" may give rise to that Department's right to revoke the license, but does not constitute a violation of chapter 320 as described in 320.27(10) which is covered by the bond.

POINT II

NICHOLS V. PREFERRED NATIONAL INSURANCE CO., 704 SO. 2D 1371 (FLA. 1997) DOES NOT APPLY BECAUSE PETITIONERS DID NOT PLEAD ENTITLEMENT TO ATTORNEY'S FEES PURSUANT TO SECTION 627.428 AND AS REQUIRED BY THIS COURT IN STOCKMAN V. DOWNS, AND BECAUSE SECTION 627.428 APPLIES ONLY TO NAMED OR OMNIBUS INSUREDS OR NAMED BENEFICIARIES AND PETITIONERS FITS NONE OF THESE CATEGORIES

In the instant case, Petitioners have no right to attorney's fees under section 627.428 anyway because that statute only applies to named insureds, named beneficiaries, or omnibus insureds, and she is neither.

Section 627.428(1) provides:

> (1) Upon 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 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 added by the Court in Nichols v. Preferred National Insurance Co., 704 So. 2d 1371, 1373 (Fla. 1998))

The Court has previously held "It is clear to us that § 627.428, Florida Statutes, F.S.A. was intended to govern the relationship between the contracting parties to the insurance policy." Wilder v. Wright, 278 So. 2d 1,3 (Fla. 1973). Thus, the definition of "named or omnibus insured or the named beneficiary" has already previously excluded non-privity claimants and third party beneficiaries such as Petitioners. In Wilder, the Court denied attorney's fees to a party injured in a motor vehicle accident who made a claim against the other driver and the other driver's insurance carrier for the for the negligence of the "named insured". These are similar facts to the present case since Petitioners seek fees from the motor vehicle dealer and its surety for the wrongful acts of the "named insured", the dealer. As in Wilder, Petitioners are not the persons who

contracted for the insurance policy or surety bond, nor is she in privity with the carrier. She is instead a third party beneficiary. The Court held, "While the injured party may become a third party beneficiary under the policy, as stated in Shingleton v. Bussey, supra, that third party may not automatically invoke all the provisions of the contract or statutes governing the rights and responsibilities flowing between insurer and insured." 278 So. 2d at 3. Thus, Petitioners stand in the same shoes as the third party claimant in Wilder, and therefore her fee claim cannot be sustained under section 627.428. To hold otherwise is to allow attorney's fees by statute to every third party claimant under every insurance policy in the state, which Florida courts have consistently rejected.

More recently, the Fifth District addressed this same issue and reversed the award of attorney's fees under section 627.428. Assurance Co. of America v. Merical, 464 So. 2d 174 (Fla. 5th DCA 1985). In Merical, the court specifically held that "third party claimants who are not omnibus insureds under the policy are not within the class of persons entitled to recover attorney's fees under §627.428(1)... Plaintiffs were, at best, third party beneficiaries of the contracts between Sears and the insurance

carriers." 464 So. 2d at 176. In the same year, the Fourth District agreed that third party beneficiaries of the bond were not entitled to recovery of attorney's fees under section 627.428. Powell v. Allstate Insurance Co., 479 So. 2d 149 (Fla. 4th DCA 1985). Petitioners are not omnibus insureds. An omnibus insured is one who did not directly contract with the insurer but who is an insured under the policy because of some relationship with the named insured. U.S. Fidelity & Guaranty Co. v. State Farm Mutual Auto Insurance Co., 369 So. 2d 410 (Fla. 3d DCA 1979). Petitioners had no direct privity relationship with Respondent surety here. They are not a first party on the bond. In an instance where a borrower failed to obtain property insurance, and the lender instead purchased its own collateral protection insurance policy, the borrower was not a "named insured", "omnibus insured," or a named beneficiary" within the meaning of that insurance policy. Romero v. Progressive Southeast Insurance Co., 629 So. 2d 286 (Fla. 3d DCA 1993). Therefore, the borrower was not entitled to recover attorney's fees under section 627.428.

Similarly, a landlord was not entitled to recover attorney's fees from a tenant's insurer since the landlord was not a named insured or an omnibus insured under a basic liability policy. AIU

Insurance Co. v. Coker, 515 So. 2d 317 (Fla. 2d DCA 1987) Also, a plaintiff in a personal injury action who had no connection with the named insured except that his automobile struck their vehicle was not entitled to attorney's fees for the same reason in Fernandez v. Alonso, 375 So. 2d 8 (Fla. 3d DCA 1979) cert. denied 383 So. 2d 1193. See also United General Life Insurance Co. v. Koske, 519 So. 2d 71 (Fla. 5th DCA 1988)(no fees recovery under section 627.428 where no policy was issued or executed by insurer covering claimant husband as insured).

Nichols v. Preferred National Insurance Co., 704 So. 2d 1371 (Fla. 1998) does not reverse the Court's prior holding in Wilder, and does not apply to the facts in the present case, and therefore cannot be the basis for an award of attorney's fees. In Nichols, the Court was asked if attorney's fees were authorized under 627.428 against a surety on a guardianship bond under Chapter 744, Florida Statutes. The claim brought in Nichols was by a guardian against her own bond. The father of two minors was appointed guardian and ordered to provide a guardianship bond to cover the amount the minors would receive as a result of settlement of claims arising from the mother's death. The trial court sua sponte removed the father as guardian and appointed Nichols as guardian, which had the

effect of substituting her for the father under the guardianship bond. The claim made by Nichols was therefore a first party claim of the guardian for a claim under her guardianship bond. Id. at 1372.

Rejecting the application of section 627.428 here is not inconsistent with the holding in Nichols. The Court held only that Dealers Insurance Co. v. Centennial Casualty Co., 644 So. 2d 571 (Fla. 5th DCA 1994), rev. denied 658 So. 2d 989 (Fla. 1995) was disapproved "to the extent it holds that section 627.428 does not apply to sureties." Consistent with Nichols, attorney's fees may be awarded against sureties on first party claims by principals on those bonds.

Petitioners did not plead section 627.428, Florida Statutes, as a basis for attorney's fees in her pleadings in the trial court, or at any point prior to this petition. According to the Court's ruling in Stockman v. Downs, 573 So. 2d 835 (Fla. 1991) a belated request for entitlement under this new statute should be denied. As the Court concluded before, a claim for attorney's fees must be pled and notice of the claim alleged to prevent unfair surprise in order to comport with fundamental due process. The Fifth District subsequently held that a party seeking fees must plead the correct

entitlement. United Pacific Insurance Co. v. Berryhill, 620 So. 2d 1077 (Fla. 5th DCA 1993). Because Petitioners did not plead entitlement to fees under section 627.428, they cannot recover them now.

Petitioner Hubbel cited to cases in her reply brief which she contended negated the requirement of Stockman v. Downs that attorney's fees be specifically pled with the basis for same. See City of Lakeland v. Select Tenures, Inc., 176 So. 274 (Fla. 1937); 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 (Fal. 1st DCA 1984); H & H Design Builders, Inc. v. Travelers Indemnity Co., 639 So. 2d 697 (Fla. 5th DCA 1994). All of these cases, except H & H predate Stockman v. Downs.

The 5th DCA held in H & H that a complaint was "wholly inadequate" in pleading a statutory right to triple an estimated premium pursuant to section 440.381(8), Florida Statutes. 639 So. 2d at 701. Similarly, Petitioners made no reference to section 627.428, which could have easily been done if they intended to rely on that statute. Neither did the Statement of Claim establish a factual basis for Petitioners as "insureds" who would be entitled to

fees, nor could they for the reasons established above.

CONCLUSION

For the reasons stated herein, the opinion of the Fifth District Court of Appeal in Aetna v. Herbert, 706 So. 2d 417 (Fla. 5th DCA 1998) should be approved, and to the extent that it may be in conflict with Herbert, the opinion of the First District Court of Appeal in Marshall v. W & L Enterprises Corp., 360 So. 2d 1147 (Fla. 1st DCA 1978) should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Marcia K. Lippincott, P.A., Post Office Box 940490, Maitland, FL 32794-0490 and to J. Gordon Blau, Esq., J. Gordon Blau, P.A., Post Office Box 3346, Orlando, FL 32802 this 10th day of July, 1998.

/s/ Kimberly A. Ashby

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