IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO. SC02-2210

DAVID BOLAND, INCORPORATED,

Appellant,

vs.

INTERCARGO INSURANCE COMPANY,

Appellee.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE INTERCARGO INSURANCE COMPANY

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STATEMENT OF THE CASE AND OF THE FACTS

Appellant, David Boland, Inc., was the primary contractor on the Special Forces Training Facility Project undertaken by the United States Navy at Fleming Key, Florida. (A4:Ex.B:p.1)[1] Boland entered into a subcontract with Trans Coastal Roofing Company, Inc., in which Trans Coastal agreed to install the roofs at the project. (A4:Ex.B:¶4) Boland agreed to pay Trans Coastal $167,800 for this work. (A4:Ex.B:¶5) The subcontract between Boland and Trans Coastal provided that the prevailing party in any litigation was entitled to recover its attorneys' fees. (A4:Ex.B:¶10A)

Under the subcontract, Trans Coastal was required to provide a performance bond at Trans Coastal's expense. (A4:Ex.B:¶24) A blank for the amount of the performance bond was filled in by the parties with "$167,800." (A4:Ex.B:¶24) The form of the bond was to be provided by Boland. (A4:Ex.B:¶24) Trans Coastal agreed that the bond would cover "damages or forfeitures" resulting from Trans Coastal's nonperformance of the contract. (A4:Ex.B:¶24) The parties' subcontract did not require the bond to cover attorneys' fees. (A4:Ex.B:¶24) Nonetheless, Trans Coastal provided a bond that covered Boland's attorneys' fees

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[1/] All references to the record below are contained in Appellant's Appendix.

and other damages up to the penal sum of the bond. (A3:¶2) As agreed, the bond was for $167,800, and was issued by Appellee, Intercargo Insurance Company. (A3)

A dispute arose when the Navy expressed dissatisfaction with the roofing work of Trans Coastal. (A5:Ex.D) As a result, Boland refused to tender payment under the subcontract. (A4:§11) Trans Coastal objected and claimed that it had performed the work in accordance with the specifications. (A4:§10)

Trans Coastal then sued Boland in the federal district court for the Southern District of Florida. (A4) Trans Coastal alleged both Miller Act and common law claims. (A4) Boland counterclaimed for breach of the subcontract agreement and also sued Appellee, Intercargo Insurance Company, on the performance bond Intercargo provided for Trans Coastal on the subcontract agreement. (A5)

The district court dismissed all of Trans Coastal's claims against Boland, but retained jurisdiction over Boland's common law counterclaims against Trans Coastal and Intercargo. (A2:Dkt.71) Boland's common law counterclaims against Trans Coastal and Intercargo were tried to a jury in 1996, resulting in a $23,451.38 verdict for Boland against Trans Coastal. (A6) The jury found no liability against Intercargo. (A6) Thereafter, the district court granted a motion for a new trial.

(A10) The case was tried before a jury a second time. (A11) The jury returned a $31,654.42 verdict for Boland and against Trans Coastal and Intercargo, jointly and severally. (A11)

Boland moved for attorneys' fees and costs against Trans Coastal and Intercargo. (A13) Boland argued that it was entitled to attorneys' fees against Transcoastal under Paragraph 10A of the subcontract. (A13:p.2) Boland also argued that it was entitled to attorneys' fees against Intercargo under the contractual terms of the performance bond and Section 627.428(1), Fla. Stat. (A13:p.2) Boland argued that although the performance bond limited it to attorneys' fees of the penal sum ($167,800), Section 627.428 permitted a fee award beyond the parties' contractual agreement to limit fees to the penal sum. (A13:p.4)

The magistrate's report and recommendation limited Intercargo's liability for attorneys' fees and costs to the face amount of the bond. (A22) The magistrate found that while it may be appropriate to exceed the bond penalty in some instances, this case was not one of them. (A22:p.23) The magistrate relied upon Nichols v. Preferred National Insurance Company, 704 So.2d 1371, 1374 (Fla. 1997), in which this Court permitted recovery of attorneys' fees and costs against a surety in an amount greater than the penal sum of the bond where the attorneys' fees

and costs were incurred as a result of the surety's misconduct rather than that of the principal. In applying the reasoning employed in Nichols and American Surety Co. of New York v. Gedney, 185 So. 844 (Fla. 1939), the magistrate found no basis to expand the scope of the surety's liability in this case beyond the face amount of the bond; an independent review of the record did not disclose any misconduct by Intercargo. (A22:p.26) Nor did Boland allege any misconduct by Intercargo. (A5)

The district court adopted in part the report and recommendation; it limited Intercargo's liability for attorneys' fees and costs to the penal sum of its performance bond. (A24) The district court agreed with the magistrate that to expand the surety's liability, some misconduct must be alleged and proven on the part of the surety (Intercargo) separate and apart from the misconduct of the principal that the sum of the bond covers. (A24:p.6)

Boland appealed the judgment entered on the district court's attorney's fee order to the Eleventh Circuit Court of Appeals. (A26) In turn, the Eleventh Circuit certified the following question to this Court:

> DOES FLORIDA STATUTE § 627.428 AUTHORIZE RECOVERY OF ATTORNEYS' FEES IN EXCESS OF A PERFORMANCE BOND'S FACE AMOUNT FROM A SUBCONTRACTOR'S SURETY, WHEN THE FEES CLAIMANT HAS NOT SHOWN INDEPENDENT MISCONDUCT ON THE PART OF THE SURETY?

Trans Coastal Roofing Co. v. David Boland, Inc., 309 F.3d 758 (11th Cir. 2000). (A1:p.6)

STANDARD OF REVIEW

Intercargo accepts Boland's standard of review: because this appeal involves an issue of statutory interpretation based upon undisputed facts, this Court reviews this matter *de novo*. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000)("standard of review for a pure question of law is de novo").

SUMMARY OF THE ARGUMENT

Boland largely premises its argument on a legal principle Intercargo does not dispute. Boland maintains that attorneys' fees should be awarded to successful claimants against sureties on performance bonds. Intercargo does not dispute such ***entitlement.*** Through Section 627.756, the Florida Legislature applied Section 627.428 to require sureties to pay such attorneys' fees for a specified class of claimants.

But, as recognized by the Eleventh Circuit, Section 627.428 does not address the ***amount*** of those fees, other than to say they should be reasonable. Suretyship law does limit a claimant's damages to the penal sum of the bond. This Court has applied this same rule to limit attorneys' fees to the penal sum of other surety bonds, absent surety misconduct. Boland attacks the application of these legal principles to performance bonds, but cannot distinguish performance bonds from other types of surety bonds.

Boland's argument lacks primarily policy support. While Boland steadfastly urges attorneys' fees be awarded to level the playing field for insureds against insurance companies, the tripartite relationship between an obligee, principal and surety does not trigger that concern. Unlike an insured who bargained to be paid by an insurer upon the happening of a contingency,

the surety merely backs the credit of its principal.

Equally important, contractors and subcontractors sometimes negotiate performance bonds. Here, for instance, Boland required Trans Coastal to provide a bond on a form approved by Boland. Boland could have demanded a bond in an amount that fully protected Boland if litigation ensued. This oversight results ***not*** from inadequate bargaining powers, but from a poorly negotiated deal. Boland's public policy argument crumbles under the general realities of suretyship law and the specific facts of this case.

Boland's argument is also internally inconsistent. Boland argues that performance bonds are contracts, yet ignores the terms of the contract it negotiated. Indeed, the bond is on a form approved by Boland. The face of the bond provides a penalty of $167,800.00 and specifically includes, as part of the damages subject to that bond penalty, all litigation related costs and attorneys' fees which the contractor may suffer by reason of the principal's default.

Finally, Boland circumvents the question the Eleventh Circuit certified, except to assert without support that surety misconduct is unnecessary to award prevailing party attorneys' fees. Payment and performance bonds should be treated like other surety bonds: to expand the surety's liability, some

misconduct must be alleged and proven on the part of the surety separate and apart from the misconduct of its principal. Because no such separate misconduct is present here, Intercargo is not liable for fees beyond the penal sum of its bond.

ARGUMENT

I. SECTION 627.428(1), FLA. STAT., DOES NOT REQUIRE A SURETY TO PAY ATTORNEYS' FEES IN EXCESS OF THE PENAL SUM OF ITS PERFORMANCE BOND.

A. While Sections 627.428 and 627.756 ***Entitle*** Successful Claimants to Attorneys' Fees Against Sureties Issuing Payment and Performance Bonds, Section 627.428 Does Not Address the ***Amount*** of Such Awards.

Boland argues that Section 627.428 authorizes a court to assess attorneys' fees to a prevailing party claimant against a surety issuing a payment and performance bond. Intercargo agrees. Section 627.756(1), entitled "Bonds for Construction Contracts; Attorney Fees in Case of Suit," states:

> 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.

Thus, the Legislature has provided a specific statute that applies Section 627.428 to award attorneys' fees to prevailing party claimants under payment and performance bonds.[2] See Danis

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[2] The Surety Association of American notes that Section 627.756 does not apply to prime contractors, and therefore cannot be the basis for assessing fees against Intercargo.

Industries Corp. v. Ground Improvement Tech. Co., 645 So. 2d 420 (Fla. 1994)(recognizing Section 627.428(1) applies *via* Section 627.756).

Neither Sections 627.428 nor 627.756, however, resolve the issue of the ***amount*** of that fee. This question arises because payment and performance bonds differ from insurance policies. The Florida Legislature recognized this distinction when it enacted Section 627.756. The only possible means to harmonize Section 627.428 with Section 627.756 is to conclude that while Section 627.428 applies to surety bonds, Section 627.756 specifically applies to payment and performance surety bonds in the construction context. As this Court noted in Unruh v. State, 669 So. 2d 242 (Fla. 1996):

> As a fundamental rule of statutory instruction, courts should avoid readings that would render part of statute meaningless, and whenever possible must give full effect to all statutory provisions and construe related statutory provisions in harmony with another.

See Id. at 245. It follows then that the Florida Legislature distinguished attorneys' fees for payment and performance bonds

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Intercargo did not raise this issue in the Eleventh Circuit because it has always contended that under either Section 627.428 or the contractual basis for attorneys' fees, fees were limited to the penal sum of the bond. Nonetheless, this Court might fashion a rule that applies the SAA's argument to future cases.

from those available under the more general provision of Section 627.428; otherwise, Section 627.756(1) would be rendered meaningless.

Julian E. Johnson & Sons, Inc. v. Balboa Ins. Co., 408 So. 2d 1044, 1047 (Fla. 1982), supports this conclusion. There, this Court cited with approval Snead Constr. Corp. v. Langerman, 369 So. 2d 591 (Fla. 1st DCA 1978), in which the First District held that Section 627.756 governs over Section 627.428 when the lawsuit involves a performance bond:

> We agree with appellants that Section 627.756(2) is applicable. Section 624.13 of the Insurance Code states that the code's provisions regarding types of insurance, insurers or as to "a particular matter" prevail over all other such provisions. Sections 627.428 and 627.756 are within the insurance code, ***and Section 627.756 deals specifically with suits on performance or payment bonds against surety insurers to construction contracts.*** By mandate of Section 624.13, then, attorney's fees in suits by sub-contractors like appellee against a surety on a performance or payment bond ***are governed by the specific provisions in 627.756.***

408 So. 2d at 1047 (emphasis added).

In sum, this Court has recognized the Legislature's distinction between sureties issuing payment and performance bonds and insurers issuing insurance policies. Contrary to Boland's assertion, because the issue certified by the Eleventh

Circuit involves performance bonds, it cannot be determined by solely the “face” of Section 627.428.

B. Prior Decisions from this Court Do Not Resolve Whether Attorneys' Fees Cannot Exceed the Penal Sum of the Performance Bond.

Boland argues that the magistrate and district court wrongly argued that the issue before this Court is one of first impression. According to Boland, this Court addressed the issue of whether a surety is liable for attorneys' fees beyond the penal sum of a performance bond in State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993). Boland's reliance upon Palma is puzzling. Palma addresses only entitlement, not amount, of attorneys' fees awards.

In Palma, plaintiff was injured in a car accident and sought no-fault benefits from her insurance company, State Farm. When plaintiff submitted the bill for a $600 thermographic examination, State Farm refused to pay. Plaintiff sued State Farm, which answered that it was not required to pay for the thermographic examination because this treatment did not constitute a necessary medical service. The trial judge agreed with State Farm and refused to order payment. After several appeals, the issue ultimately came before this Court on conflict certiorari. The issue in conflict was the ***entitlement*** of a party for attorneys' fees for litigating entitlement and amount of attorneys' fees. This Court described the issue before it:

> Thus, the issue presented in this case is when does a dispute relating to attorney's fees fall within the scope of section 627.428.

In answering this question, this Court held that

> if an insurer loses such a suit but contests the insured's entitlement to attorney's fees, this is still a claim under the policy and within the scope of section 627.428. Because such services are rendered in procuring full payment of the judgment, the insured does have an interest in the fee recovered. Accordingly, we hold that attorney's fees may properly be awarded under section 627.428 for litigating the issue of entitlement to attorney's fees.
>
> However, we do not agree with the district court below that attorney's fees may be awarded for litigating the amount of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment.

See Id. at 832-833. Palma did not address the amount of fees assessed against sureties issuing payment and performance bonds. Palma simply provides no guidance to the issue certified by the Eleventh Circuit.[3]

Boland argues that Palma states that “attorneys’ fees shall

[3/] Boland additionally cites Cincinnati Ins. Co. v. Palmer, 297 So. 2d 96 (Fla. 4th DCA 1974) and Blizzard v. Governmental Employees Ins. Co., 654 So. 2d 565 (Fla. 1st DCA 1995). (IBR, p. 15-16) Neither address the issue certified by the Eleventh Circuit. Both involved a claim for attorneys’ fees on a classic insurance liability contract.

be decreed against the insurer when judgment is rendered in favor of an insured or when the insured prevails on appeal" and that "if the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorneys' fees." (IBR, p. 14-15) Although the term "insurer" is defined under the Florida Insurance Code to include a "surety," *see* Nichols v. Preferred Nat'l Ins. Co., 704 So. 2d 1371, 1374 (Fla. 1997), the issue is not whether fees can be assessed against the surety (Sections 627.428 and 627.756 permit such an award), the issue is whether those fees can ***exceed*** the penal sum of the bond.

At the very least, Nichols supports the position that solely because a surety is an "insurer" under the Insurance Code does not expose the surety to unlimited attorneys' fees under a performance bond. In Nichols, this Court concluded that the surety on a guardianship bond was an insurer under Section 627.428. However, this Court recognized that the surety's exposure might be limited to the face amount of the bond. This Court then fashioned a rule that limited attorneys' fees it had previously held available under Section 627.428 to those resulting from the surety's misconduct:

> ***To ensure that sureties are protected from having to pay amounts over the face amount of the bond due to a principal's***

> ***misconduct but that the beneficiaries are not required to reduce the amount received under the bond when the surety itself is negligent or unreasonable in failing to timely pay a claim, we hold as follows***: When principals misappropriate guardianship funds or insufficiently discharge their duties, attorney's fees and costs for a claim based solely on this negligence are limited to the face amount of the bond pursuant to section 744.357; however, when the trial court specifically determines that attorney's fees and costs were incurred because a surety failed to act diligently and unreasonably delayed the payment of a claim, such attorney's fees and costs are not protected by section 744.357.

See Id. at 1374 (emphasis added) In short, this Court reconciled a claimant's right to attorneys' fees under Section 627.428 with the realities of suretyship law, and the specific statute limiting liability of sureties on guardianship bonds. Given the peculiar nature of payment and performance bonds, as well as a specific statute governing such bonds, this Court is confronted with an almost identical task.

C. The Penal Sum of a Performance Bond Is the Limit of Liability, Whether the Recovery Sought Is Attorneys' Fees And/or Compensatory Damages.

Boland argues that all attorneys' fees incurred by a claimant seeking to recover on a performance bond should be recoverable because attorneys' fees are something other than compensatory damages. So, Boland explains, Intercargo's argument should be rejected because the penal sum limitations

apply only to compensatory damages, not attorneys' fees.

Boland's argument is defective on several levels. First, Boland argues that the performance bond is nothing more than a contract. (IBR, p. 18-19) Yet Boland fails to note that the specific performance bond executed and delivered by Intercargo states the bond penalty of $167,800.00, then specifically includes as part of the losses, costs, and damages subject to that bond penalty, "all litigation-related costs and attorneys' fees which [Boland] may suffer by reason of [Trans Coastal's] default" (A3, ¶2). Therefore, Boland – who argues that it has a contract with Intercargo – accepted the bond issued by Intercargo which provided for attorneys' fees. While Intercargo agreed to pay attorneys' fees, it limited such exposure to the penal sum of the bond.

American Home Assurance Company v. Larkin General Hospital, Ltd., 593 So.2d 195, 198 (Fla. 1992), bolsters this point. In Larkin General, this Court held that a surety on a performance bond is not liable for delay damages unless the bond provided for such damages.[4] In reaching this conclusion, this Court noted that a bond is a contract, and that the surety's liability for damages is limited to the terms of the bond. Importantly, this Court refused to extend the liability of the surety by

[4] The bond here provided for delay damages. (A3, ¶2)

implication.

Boland cites Bidon v. Department of Professional Regulation, Florida Real Estate Commission, 596 So. 2d 450(Fla. 1992), to argue that attorney's fees were not to be included in the term "actual or compensatory" damages. (IBR, p. 17-18, 20) Even though Intercargo agrees Bidon so holds, Bidon is otherwise inapplicable to the issue before this Court. The inherent defect in Boland's reliance on Bidon, as well its attorneys'-fees-are-not-compensatory-damages argument, is this line of reasoning addresses ***entitlement*** to fees, not any limitations on the ***amount*** of the fee. Intercargo does not dispute Boland's entitlement to attorneys' fees, it just can recover no more than the penal sum of the bond. Whether fees are characterized as compensatory does not answer the issue before this Court.

II. PUBLIC POLICY DOES NOT JUSTIFY AWARDING OPEN-ENDED ATTORNEYS' FEES UNDER SECTION 627.428 WHEN CONTRACTORS CAN NEGOTIATE THE TERMS AND AMOUNT OF THE BOND, AND FEW SURETIES WOULD PROVIDE BONDS OR THE COST WOULD BE PROHIBITIVE TO THE CONSUMING PUBLIC IF THE RULE WERE OTHERWISE.

Boland pitches a public policy argument to justify imposing open-ended liability for attorneys' fees under a performance bond. Boland's argument initially suffers from dependency upon cases imposing attorneys' fees against an insurer who argues that ***no*** fees should be imposed. Intercargo does not argue "no

liability" for attorneys' fees, it just contests the ***amount*** of those fees beyond the penal sum of the bond.

Moreover, Boland inappropriately describes the purpose behind Section 627.428 to support its argument. (IBR, p. 21) Citing Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684 (Fla. 2000), Boland claims Section 627.428 levels the playing field so that the economic power of insurance companies does not prevent people from the means to seek redress in the courts. Though this concern may apply to an insurer who denies coverage to its insured, it does not apply to a surety providing a performance bond on a construction project in an amount and with terms specified by the contractor.

When a subcontractor such as Trans Coastal enters into a contract with a contractor such as Boland, the contractor specifies the amount of the bond it desires. The bond can be more or less than the subcontract amount. If a contractor is concerned about attorneys' fees, he can seek a bond amount that would include anticipated attorneys' fees. The contractor has the right to reject the bond tendered by the subcontractor if it does not meet the contractor's requirements.

More importantly, the amount of the bond effects the amount of the bond premium. If the contractor requires the subcontractor to provide a $500,000 bond, versus a $100,000

bond, the premium paid by the subcontractor will naturally be higher. In turn, the subcontractor's bid will be higher. If this higher bid is accepted, the costs to the contractor will be greater. The contractor therefore has an incentive to keep his costs down by keeping down the costs of the subcontractor. Consequently, it is imminently unfair for a contractor to complain that the penal sum of the bond is insufficient to cover his attorneys' fees when the contractor never demanded a higher penal sum, and initially benefitted from a lower sum. In suretyship law, both the economics and the bargaining power are inapposite to the classic insured/insurer relationship that has caused this Court to protect an insured from the "uneven playing field" typically present in classic insurance litigation.

Boland's "policy" argument also disregards that the surety will not always be the party paying prevailing party attorneys' fees. Suretyship involves a tripartite relationship between a surety, its principal and the bond obligee. Great American Insurance v. N. Austin Utility, 908 S.W.2d 415 (Tex. 1995). In other words, there is a difference between the liability of a classic insurer and that of surety/guarantor. Federal Deposit Insurance Corporation v. Insurance Company of North America, 105 F.3d 778 (1st Cir. 1997). An insurer, upon the occurrence of the contingency, must bear the ultimate loss, while a surety is

entitled to indemnity in case the surety is compelled to perform. Federal Deposit v. Ins. Co. of North America, 105 F.3d at 785-786. See also Federal Insurance Co. v. The Southwest Florida Retirement Center, Inc., 707 So. 2d 1119, 1121 (Fla. 1998)(the intent of the performance bond guarantee is to have the financial security of the surety standing behind the general contractor's obligations). As stated in Western World Ins. Co. v. Travelers Indemnity Co., 358 So. 2d 602, 604 (Fla. 1st DCA 1978):

> The surety on a bond is lending its credit to make certain, if the conditions of the bond are violated, that the aggrieved party will be protected in the event the principal is financially unable to comply with the conditions of the bond. If the principal can satisfy the obligation, the surety need not respond. The surety, unlike the liability insurer, however, is entitled to be indemnified by the one who should have performed the obligation.

Accordingly, if a surety must pay fees on its bond, it then turns to its principal for reimbursement. The policy behind Section 627.428 -- to level the playing field -- has no relevance in the context of this tripartite relationship.[5]

Boland argues that Intercargo has refused to honor its

[5/] The SAA explains in its amicus brief the public policy concern that bonds will become prohibitively costly if sureties are required to pay attorneys' fees beyond the penal sum of the bond. Intercargo adopts that argument.

surety bond obligations. (IBR, p. 23) The undisputed facts do not bear out this assertion. Intercargo agreed to pay attorneys' fees up to the penal sum of the bond, and has done so. (A27) It is Boland who refuses to honor this contractual agreement. Boland seeks to rewrite the bond to insert open-ended liability for attorneys' fees, despite the parties' agreement to limit the fees to the penal sum of the bond. See Joseph v. Houdaille-Duval-Wright Co., 213 So. 2d 3 (Fla. 3d DCA 1968)(parties free to agree on amount of fee under predecessor to Section 627.756). Given public policy and the differing relationship involved in suretyship, a rule of law that permits fees up to the penal sum of the bond is the most viable option to protect all parties to this contract.

III. BREACH OF THE PERFORMANCE BOND ALONE IS NOT ADEQUATE JUSTIFICATION TO EXTEND THE SCOPE OF LIABILITY BEYOND THE FACE AMOUNT OF THE BOND.

Boland complains that the federal courts applied the Nichols' misconduct rule to this performance bond case, despite Nichols' limitation to guardianship bond. (IBR, p. 24-26) Boland reads Nichols too narrowly.

This Court has applied the Nichols' rule in a variety of suretyship cases. Most importantly, Nichols relied upon American Surety Co. of New York v. Gedney, 185 So.844 (Fla. 1939), an action against a surety on a bond given to secure the

payment of support money to a child of the divorced parties, ***not*** a guardianship bond. The Gedney court stated that while the debt for which the surety can be held liable is limited by the penalty named in the bond, interest may be collected on such debt from the time when it became the surety's duty to pay it, even though the aggregate of principal and interest in more than the penal sum. The reason for the rule permitting a recovery beyond the penalty of a bond against the sureties thereon is that the penalty of the bond covers the misconduct of the principal, while the interest allowed on the penalty is for the misconduct of the sureties for the delay in payment. American Surety v. Gedney, 185 So. at 845.

This Court and others have indicated expressly and indirectly that Nichols applies outside guardianship bonds. For instance, the dissent in Hubbel v. Aetna Casualty & Surety Co., 758 So.2d 94, 97 (Fla. 2000), noted that this Court has applied the Nichols' rule to surety cases other than guardianship cases.[6] And in Mycon Constr. Corp. v. Board of Regents, 755 So. 2d 154 (Fla. 4th DCA 2000), the Fourth District addressed the ability of a contractor to obtain delay damages under a performance bond. In answering this question, the court resorted to the Nichols'

[6/] The Hubbel majority and dissent apparently did not disagree on the application of the Nichols' rule to cases involving all types of surety bonds.

rule and stated:

> The performance bond made the sureties liable, if the contractor defaulted, for "the cost of completion less the balance of the contract sum." Because the performance bond contains no provision for damages for delay, the surety cannot be held liable for such damages. American Home Assur. Co. v. Larkin Gen. Hosp. Ltd., 593 So. 2d 195 (Fla. 1992). The Board of Regents points out that our supreme court limited its holding in Larkin to cases in which the delay damages are due to the contractors default. Id. n.2. In the present case, however, the $ 750,000 award for delay was based on evidence that students would have to be relocated in order for the contractor's defective work to be repaired. ***It was not related to any breach of duty by the sureties. Any delay in payment by the sureties is covered by interest. Nichols v. Preferred Nat'l Ins. Co., 704 So. 2d 1371, 1374 (Fla. 1997)(recognizing "a distinction between the misconduct of the principal, which the sum of the bond covers, and the neglect of the surety for delay in payment, which is covered by interest on the amount of the bond").***

See Id. at 155. Thus, in Mycon Construction, the Fourth District applied the Nichols' misconduct rule to a performance bond, albeit for delay damages, not attorneys' fees.

Significantly, Boland fails to present authority which supports the argument that attorneys' fees may be collected beyond the penal sum of a performance bond, much less any type of surety bond. This Court permits recovery beyond the penal sum of a surety bond only where misconduct has been pled and

proven on the part of the surety. But, here, Boland never pled any misconduct by Intercargo. Notwithstanding the failure of Boland to plead misconduct, the magistrate, after an independent review of the record, found there was no misconduct on the part of Intercargo in this case. (A22:p.26) Both the facts and the law justify this Court applying the Nichols' rule to payment and performance bonds.'

IV. THIS COURT AND INTERMEDIATE APPELLATE COURTS HAVE CONSISTENTLY HELD THAT THE LIABILITY OF A SURETY IS NOT TO BE EXTENDED BEYOND THE FACE AMOUNT OR PENAL SUM OF ITS BOND.

Boland argues that Intercargo inappropriately relied upon transfer-of-lien cases in the Eleventh Circuit to argue that Florida courts have consistently held that the liability of a surety is not to be extended beyond the face amount or penal sum of its bond. (IBR, p. 31) According to Boland, it agrees that damages are limited to the face amount of the bond. Boland argues that Section 627.428 does not award compensatory damages, but attorneys' fees, and thus can exceed the amount of the bond. Intercargo recognizes that the transfer-of-lien cases do not resolve the specific question certified to this Court. Intercrago merely cited the transfer-of-lien cases to show that Florida courts consistently limit the liability of a surety to the penal sum of its bond.

Moreover, Gene B. Glick Company, Inc. v. Fischer-McGann, Inc., 667 So.2d 865 (Fla. 4th DCA 1996), is not, as Boland claims, a transfer-of-lien case. (IBR, p.31) The action was brought to foreclose a mechanic's lien; nothing in the opinion remotely suggests the action was on a transfer-of-lien bond. Like here, the subcontractor sued the general contractor. The court affirmed all issues raised except to the extent that the primary judgment plus interest and attorneys' fees may exceed

the amount payable under the surety's bond. Citing Aetna Casualty & Surety Co. v. Buck, 594 So.2d 280, 283 (Fla. 1992), the court restricted the trial court on remand to ordering the surety to pay the amount of its bonded obligation.

Boland claims that one of the transfer-of-lien cases, DiStefano Constr., Inc. v. Fidelity & Deposit Co., 597 So. 2d 248 (Fla. 1992), actually supports its argument that attorneys' fees are available against a surety issuing a performance bond under Section 627.428. DiStefano concisely states that Section 627.428 applies to payment and performance bonds ***via*** Section 627.756. In other words, it determines that a claimant recovering on a performance bond is ***entitled*** to attorneys' fees, an issue Intercargo does not dispute.

DiStefano is otherwise consistent with a long line of cases from this Court indicating that a surety is not bound beyond the contractual terms of its bond.[7] True, DiStefano does not

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[7] See Gato v. Warrington, 19 So. 883, 884 (Fla. 1896)("The rule is well settled that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; and to the extent, in the manner, and under the circumstances pointed out in his undertaking he is bound and no further."); Standard Accident Insurance Co. v. Bear, 184 So. 97, 102 (Fla. 1938)(same); American Surety Co. of New York v. Gedney, 185 So. 844, 845 (Fla. 1939)(debt for which the surety can be held liable is limited by the penalty named in the bond, but permitted recovery only where misconduct occurred on the part of the surety); Fidelity and Deposit Co. of Maryland v. Sholtz, 168 So. 25, 31 (Fla. 1935)("The surety's maximum

specifically address whether the penal sum of the bond limits attorneys' fees under Sections 627.428 and 627.756. DiStefano does hold that attorney's fees under Section 713.29 (private construction contracts) are limited to the penal sum of the bond. Because the:

(1) public policy concerns;

(2) tripartite relationship; and

(3) determinations made by sureties issuing construction bonds

are virtually identical under Sections 713.29 and 627.756, there is no reason to limit attorneys' fees to the penal sum of the bond under one, but not the other.

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liability is measured by the penalty named in the bond.")

CONCLUSION

Boland's action against Trans Coastal and Intercargo, its surety, was for breach of contract. Boland's attorneys' fee claim is provided through Section 627.756, which applies Section 627.428 to suits against a surety insurer issuing payment or performance bonds. Neither statute addresses or authorizes the recovery of attorneys' fees in excess of the face amount of the surety performance bond.

The parties' agreement to limit the sureties' liability to the penal sum of the bond should be honored. A payment and performance surety bond is not an insurance contract; different public policy concerns apply that do not justify exposing sureties to unlimited attorneys' fees. Because of the differing nature between surety bonds and classic insurance coverage, the only justification to expose the surety to unlimited fees is if the surety has engaged in misconduct.

It is respectfully submitted that the question certified by the Eleventh Circuit:

> "DOES FLORIDA STATUTE § 627.428 AUTHORIZE RECOVERY OF ATTORNEYS' FEES IN EXCESS OF A PERFORMANCE BOND'S FACE AMOUNT FROM A SUBCONTRACTOR'S SURETY, WHEN THE FEES CLAIMANT HAS NOT SHOWN INDEPENDENT MISCONDUCT ON THE PART OF THE SURETY?"

should be answered in the negative and returned to the Eleventh

Circuit for final disposition.

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 U.S. Mail to DENIS L. DURKIN, ESQ., Baker & Hostetler, Attorneys of Record for Appellant David Boland, Inc., P.O. Box 112, Orlando, Florida 32802; and ROBERT E. FERENCIK JR., ESQ., Ferencik Libanoff Brandt and Bustamante, P.A., Attorneys of Record for Appellee Trans Coastal Roofing Company, Inc., 150 South Pine Island Road, Suite 400, Fort Lauderdale, Florida 33324; on December 20, 2002.

_____
Hala Sandridge

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210: this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

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Hala Sandridge