

IN THE SUPREME COURT OF FLORIDA

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DAVID BOLAND, INCORPORATED,  
Appellant,

vs.

INTERCARGO INSURANCE COMPANY,  
Appellee.  
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Case Number: SC02-2210

Question of Law Certified by the United States Court of Appeals for the  
Eleventh Circuit in Federal Case Number: 01-17246

**INITIAL BRIEF OF APPELLANT DAVID BOLAND, INC.**

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## STATEMENT OF THE CASE AND OF THE FACTS

### I. Nature of the Case.

Appellant, David Boland, Inc. (“Boland”), was a contractor awarded a prime contract to construct a Special Forces Training Facility at Fleming Key in Key West, Florida. The United States Navy was the procuring agency. The project specifications required the construction of various buildings at the project site. Boland delivered Miller Act payment and performance bonds written by The American Insurance Company. Boland subcontracted the roofing work to Trans Coastal Roofing Company, Inc. (“Trans Coastal”), which provided common law payment and performance bonds issued by Appellee, Intercargo Insurance Company (“Intercargo”). (V. 1, Dkt. #1).

Trans Coastal began performance of the roof installations in Spring 1993. It was nearing completion of the roofing work in late 1993 when a government inspection revealed that, at numerous locations throughout the roofs on the buildings, the roof insulation had failed to adhere to the concrete roof decks of the buildings as required by the express provisions of the contract specifications. Boland, pursuant to the subcontract agreement, directed Trans Coastal to proceed with remedial work that had been approved in late Spring 1994. Trans Coastal objected and claimed that it had performed the work in

accordance with the specifications. After repeated demands by Boland to perform, Trans Coastal refused to act and Boland defaulted Trans Coastal in July 1994. Boland made demand upon Intercargo, as Trans Coastal's performance-bond surety, that it perform and complete the work in accordance with its performance bond, which Intercargo refused to do. Thereafter, additional investigation was conducted and Boland determined that the roof systems as installed should be completely removed and replaced in accordance with the project specifications. (V. 1, Dkt. 1).

## II. Course of Proceedings.

In September 1994, Trans Coastal filed a Miller Act and breach of contract civil action against Boland and its surety, The American Insurance Company ("TAIC"), in the U.S. District Court for the Southern District of Florida ("the District Court"), seeking over \$300,000.00 in damages, plus attorneys' fees. (V. 1, Dkt. #1).<sup>1</sup> Boland and TAIC answered (V. 1, Dkt. #5), and Boland filed a compulsory counterclaim against Trans Coastal and a

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<sup>1</sup> The Record on Appeal, as prepared by the District Court for the Southern District of Florida for the U.S. Court of Appeals for the Eleventh Circuit, is organized according to volume and docket number. Accordingly, the references to the record in this appeal will be cited by volume and docket number as follows: (V. \_\_, Dkt. #\_\_).

third-party complaint against Intercargo (V. 1, Dkt. #5). Following a two-week trial in Key West, on April 19, 1996, the jury rendered a verdict of approximately \$23,451.00 in Boland's favor against Trans Coastal. (V.3, Dkt. #104). However, the jury did not find that Intercargo had defaulted on the performance bond under which Boland was the obligee and, accordingly, did not find Intercargo liable for damages. (V. 3, Dkt. #104).

Thereafter, Boland filed a Motion for a New Trial on damages and various other post-trial motions. (V. 3, Dkt. #107, 108). Judge James Lawrence King, of the District Court, entered an order granting the Motion for a New Trial and the case was again tried before Judge James C. Paine, also of the District Court. (V. 3, Dkt. #130). A verdict was rendered on October 27, 1998, in the amount of approximately \$31,000.00 against *both* Trans Coastal and Intercargo. (V. 4, Dkt. #187). Final judgment was entered for Boland against Intercargo and Trans Coastal on November 17, 1998. (V. 4, Dkt. #191). On December 17, 1998, Boland moved for attorneys' fees and to tax costs to Intercargo and Trans Coastal. (V. 4, Dkt. #196). Thereafter, Trans Coastal and Intercargo filed a Notice of Appeal primarily asserting that the District Court had committed error in granting the Motion for a New Trial. (V. 5, Dkt. #203, 206, 207). The



District Court motions, including Boland's motion for attorneys' fees and to tax costs, were stayed pending the outcome of the appeal. (V. 5, Dkt. #208). The U.S. Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit") subsequently *per curiam* affirmed the judgment against both defendants. (V. 5, Dkt. #224).

The result of this protracted litigation was that Boland prevailed on all claims at trial and on the first appeal to the Eleventh Circuit. Boland was the prevailing party on the two counts initially asserted against it by Trans Coastal under the Miller Act and for state law breach of contract. Boland was also the prevailing party on its two counterclaims for damages asserted against Trans Coastal and Intercargo. Boland achieved a judicial determination that both Trans Coastal and Intercargo had *breached* their contracts with Boland and that Boland was entitled to recover damages therefor. Trans Coastal did not prevail on any of its claims. Finally, Boland prevailed on the appeal of the District Court's decision brought in the Eleventh Circuit by Trans Coastal and Intercargo. (V. 5, Dkt. #224). After the appeal, the District Court recommenced its consideration of pending motions which had been stayed during the appeal, including Boland's motion for attorneys' fees and to tax costs (V. 5, Dkt. #227).

On December 17, 1998, Boland moved for attorneys' fees and costs incurred by it to litigate both trials in the case. (V. 4, Dkt. #196). After Boland prevailed on the Eleventh Circuit appeal brought by Intercargo and Trans Coastal with respect to the final judgment against both of them (V. 5, Dkt. #224), on February 27, 2001, the District Court referred Boland's 1998 motion for attorneys' fees and costs to United States Magistrate Judge Linnea R. Johnson ("Magistrate Judge Johnson") (V. 5, Dkt. #233). On August 10, 2001, Magistrate Judge Johnson submitted a Report and Recommendation regarding Boland's Motion for Attorneys' Fees and Costs. (V. 5, Dkt. #252). On the basis of Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371 (Fla. 1997), Magistrate Judge Johnson recommended that Boland's motion be granted as follows: "that Boland be awarded \$207,790.66 in attorneys' fees and \$21,860.93 in costs, for a total fee and cost award of \$229,651.59; and that Intercargo's liability for such fees and costs be limited to the face amount of the bond." (V. 5, Dkt. #252). Boland timely filed an Objection to the Report and Recommendation. (V. 5, Dkt. #253).

### III. Disposition Below.

The District Court agreed with the Magistrate Judge Johnson's interpretation of Nichols and partly adopted the Report and Recommendation

on October 17, 2001, by awarding Boland \$276,950.33 in attorneys' fees and \$26,694.98 in costs and then limiting Intercargo's liability for said fees and costs to the face amount of its performance bond, \$167,800.00. (V. 5, Dkt. #260). A final judgment in accordance with the District Court's order of October 17, 2001, was entered on November 20, 2001 (V.5, Dkt. #262), and Boland proceeded to file a timely Notice of Appeal with the Eleventh Circuit on December 12, 2001 (V. 5, Dkt. #264). Prior to and during the pendency of Boland's appeal before the Eleventh Circuit, Intercargo partially satisfied the November 20, 2001, judgment by paying Boland the amount of \$39,115.03 in principal, plus interest (V. 5, Dkt. #230), and \$125,542.72 (V. 5, Dkt. # 265), respectively. The District Court, also during the pendency of Boland's Eleventh Circuit appeal, on January 18, 2002, entered an amended final judgment to reflect a minor downward adjustment in the amount of costs taxable to Intercargo and Trans Coastal, which amendment is not on appeal and will not be appealed by Boland. (V. 5, Dkt. #268)(reducing awarded costs from \$26,694.98 to \$22,194.98). The amended final judgment for Boland and against Intercargo and Trans Coastal neither altered the awarded attorneys' fees to Boland in the amount of \$276,950.00, nor the limitation of Intercargo's total liability to the face amount of the penal bond, \$167,800.00. (V. 5, Dkt. #268).

On October 10, 2002, the Eleventh Circuit certified the following question of Florida law to the Florida Supreme 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?” Certification Opinion from the U.S. Court of Appeals for the Eleventh Circuit (Oct. 10, 2002) at 6. Since there is no language in § 627.428 that would suggest that surety misconduct is in any way relevant to the scope and applicability of that statute, Boland believes that the following question more appropriately phrases the issue on appeal: Is the recovery of an award of statutory attorneys’ fees pursuant to § 627.428, Florida Statutes (2001), by an obligee under a surety performance bond limited to the penal sum of the bond? More precisely, is an award of statutory attorneys’ fees to an obligee limited to the difference between the penal sum of the surety bond and damages already awarded, such that *no* statutory fees may be recovered where the damages award equals or exceeds the penal sum of the bond? That issue, however phrased, is now before this Court pursuant to Florida Rule of Appellate Procedure 9.150, “Discretionary Proceedings to Review Certified Questions

from Federal Courts.”

## **SUMMARY OF THE ARGUMENT**

The District Court incorrectly held that Intercargo's liability, as a surety, for attorneys' fees under § 627.428 is limited to the penal sum of the performance bond under which Trans Coastal is the principal and Boland is the obligee. The plain, unambiguous language of § 627.428 supports Boland's recovery of statutory attorneys' fees in the full amount awarded by the District Court without limiting the fees award to the face amount of the bond. Section 627.428 mandates an award of attorneys' fees to insureds and named beneficiaries who prevail in litigation over an insurer and in no way suggests that attorneys' fees may be limited by the penal sum stated in a construction performance bond.

Florida case law, including this Court's decision in State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 832 (Fla. 1993), supports that conclusion. Together, § 627.428 and this Court's decision in Palma, provide the controlling law in this appeal. They do not support the District Court's decision to limit Boland's recovery of attorneys' fees and costs in addition to awarded compensatory damages, to the face amount of the performance bond. The penal amount of the bond only limits available compensatory damages, similar

to the policy limits of an insurance policy, but is irrelevant with respect to the extent of Boland's entitlement to statutory attorneys' fees under § 627.428.

Intercargo relies on completely inapposite cases that address limitations on the recovery of attorneys' fees under guardianship bonds and lien transfer bonds to support its position. With respect to guardianship bonds, this Court explained, in Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371, 1374 (Fla. 1997), that attorneys' fees recoverable under § 627.428 are limited by another statute which pertains only to sureties for guardians, § 744.357, Florida Statutes (stating: "[N]o surety for a guardian shall be charged beyond the property of the ward"). The statutory limitation on recovery of attorneys' fees for the breach of a guardianship bond does not apply to common law performance bonds.

This Court also explained that transfer-of-lien bonds are, like guardianship bonds, wholly distinct from performance bonds. See DiStefano Construction, Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992). This Court specifically stated that fees under § 627.428 are mandated in cases against sureties issuing performance bonds and that there is no corresponding authorization against a surety issuing a lien transfer bond. Id.

In short, the limitations imposed on guardianship bonds and lien transfer bonds do not apply to performance bonds. The plain language of § 627.428, this Court's holding in Palma, and the absence of any statutory limitation, support Boland's recovery of the full amount of the awarded attorneys' fees from Intercargo without regard to the penal sum of the performance bond.

## **ARGUMENT**

### I. Applicable Appellate Standard of Review.

The instant appeal is before this Court pursuant to a question certified by the U.S. Court of Appeals for the Eleventh Circuit (“the Eleventh Circuit”). That question asks this Court to interpret § 627.428, thereby raising a question of law. This Court's standard of review is *de novo*. See, e.g., Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000)(stating that “the standard of review for a pure question of law is *de novo*”); see also Savona v. Prudential Ins. Co. of Am., 648 So.2d 705, 707 (Fla. 1995)(reviewing a certified question from the Eleventh Circuit, which asked for the interpretation of a Florida Statute, by interpreting the statute according to its plain and ordinary meaning. This Court then returned the case to the Eleventh Circuit for disposition).

### II. Section 627.428, Florida Statutes (2001), and supporting Florida decisional law mandate that when a judgment is rendered against



an insurer, the court shall require that the insurer pay the obligee's attorneys' fees.

- A. Section 627.428 applies to all insurers, including sureties, and is implicit in all Florida insurance contracts, including surety bonds.

The only issue raised by the instant appeal is whether Boland is entitled to statutory attorneys' fees from Intercargo pursuant to § 627.428, even though Boland's recovery of attorneys' fees in addition to its costs and compensatory damages would constitute an amount in excess of the penal sum of the performance bond, \$167,800.00. Boland recognizes that recovery of *damages* based solely on the insurance contract, i.e., the performance bond, in which Intercargo is the surety, Trans Coastal the principal, and Boland the obligee, may not exceed the penal sum of the bond. See St. Paul Mercury Ins. Co. v. Department of State, 581 So.2d 976, 977 (Fla. 1st DCA 1991). However, Boland's entitlement to statutory *attorneys' fees* is not limited by the penal sum of the performance bond because § 627.428 mandates that any named insured or beneficiary under an insurance contract is entitled to statutory attorneys' fees upon the rendition of a judgment against the insurer. Specifically, § 627.428(1) provides as follows:

Upon the 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 insured or 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.

There is no question under Florida case law that the statute's use of "insurer" includes a surety such as Intercargo, so that the rendition of a judgment, as was obtained by Boland against Intercargo under its performance bond, required that Intercargo pay Boland's attorneys' fees. In other words, Intercargo, as the surety in the performance bond at issue, is an "insurer" under § 627.428. First, the Florida Insurance Code clearly defines "insurer" to include a "surety." See § 624.03, Fla. Stat. (2001)§§. Second, as Magistrate Judge Johnson correctly observed in her Report and Recommendation (Aug. 10, 2001), "the application of Section 627.428 to surety bonds is not and cannot be disputed. First Nat'l Bank of Miami v. Insurance Co. of North Am., 535 F.2d 2841, 286 (Fla. 5th DCA 1976)." Finally, this Court expressly stated that § 627.428 applies to sureties and surety bonds: "We disapprove Dealers to the extent it holds that section 627.428 does not apply to sureties." Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371, 1374 (Fla. 1997).

There also is no question that the statutory attorneys' fees prescribed by § 627.428 are recoverable by the named beneficiaries of *all* insurance contracts, including the subject performance bond. That is, the plain, unambiguous attorneys'

fee provision prescribed in § 627.428 is implicit in *all* Florida insurance contracts, so that an obligee may recover from its surety not only the full amount of the penal sum of the bond but also the attorneys' fees incurred to enforce liability under the bond. This Court expressly concluded that attorneys' fees under § 627.428 are implicit in all Florida insurance contracts. See State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 832 (Fla. 1993)(stating: "Because the statute applies in virtually all suits arising under insurance contracts, we agree ... that the terms of section 627.428 are an implicit part of every insurance policy issued in Florida.").

Thus, sureties are insurers and are subject to § 627.428, and surety bonds are insurance contracts such that § 627.428 is implicit in all of them. Any contrary argument is meritless.<sup>2</sup> The only legal issue for this Court's consideration, then, is whether a limitation upon recovery of attorneys' fees that is not found on the face of § 627.428 can be read into it solely for the benefit of Intercargo and other sureties who have required their respective obligees, or insureds, to sue for damages arising from the liability that the sureties share, jointly and severally, with their respective principals.

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<sup>2</sup> In its Answer Brief before the Eleventh Circuit, for instance, Intercargo represented that a surety is not an insurer under Florida law. While that position may be accurate in other jurisdictions, § 624.03, Florida Statutes, and Nichols make that representation frivolous.

As discussed below, Intercargo's position, in favor of imposing such a limitation, is not supported by Florida law.

- B. The liability of a performance-bond surety for attorneys' fees incurred by an obligee is not limited by the penal sum of the bond.

This Court, in State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 832 (Fla. 1993), explained that an insured is entitled to recover both statutory attorneys' fees and compensatory damages when the insured prevails in a legal dispute with its insurer. Magistrate Judge Johnson's Report and Recommendation, as partly adopted by the District Court in its final order, was incorrect, therefore, in concluding that the issue raised on appeal is one of first impression in Florida and that Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371, 1373 (Fla. 1997) is the "closest case to the matter at issue." (Report and Recommendation at 24). The issue of whether or not a surety, as an insurer, is liable for attorneys' fees beyond the contractual policy limits stated in its performance bond for its failure to discharge its duties to the obligee in accordance with the bond, where § 627.428 expressly and unambiguously *mandates* that the surety pay the obligee's attorneys' fees upon the rendition of a judgment against it, simply should not be considered a matter of first impression in Florida.

This Court's decision in Palma addressed that issue and resolved it in Boland's favor. Specifically, the Court held that an insured, which is forced to sue its insurer

for the latter's failure to pay under an insurance contract, may recover statutory attorneys' fees under § 627.428 for expenses incurred to litigate the issue of *entitlement* to attorneys' fees but not for expenses incurred to litigate the issue of the *amount* of recoverable attorneys' fees. Palma, 629 So.2d at 832. In reaching its holding, the Court discussed the scope and meaning of § 627.428, as each relates to the issue in the instant appeal.

The Court first explained that § 627.428 “*clearly* provides that attorneys' fees shall be decreed against the insurer when judgment is rendered in favor of an insured or when the insured prevails on appeal,” and added that “if the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorneys' fees.” State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 832 (Fla. 1993) (quoting Insurance Co. of North Am. v. Lexow, 602 So. 2d 528, 531 (Fla. 1992))(emphasis added). The Court then stated as follows:

When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is *both the policy proceeds and attorneys' fees* pursuant to section 627.428. The language of subsection (3), which provides that “compensation or fees of the attorney shall be included in the judgment or decree rendered in the case[,]” also supports this conclusion. § 627.428(3), Fla. Stat. (1983).

Palma, 629 So.2d at 833 (emphasis added).

In support of its conclusion, the Court in Palma relied on an earlier decision by

the Florida Fourth District Court of Appeal involving the issue of the recoverability of attorneys' fees where the insurer was sued for nonpayment of policy limits but paid the policy proceeds prior to the entry of a judgment against it, and where the insured nonetheless continued its suit to seek recovery of its attorneys' fees only. See Cincinnati Ins. Co. v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). The Palmer Court held that the named beneficiary of the fire insurance policy was entitled to attorneys' fees, under § 627.428, beyond the policy limits. Specifically, the court in Palmer stated:

Appellee contends, and we think correctly so, that upon the suit being filed, the relief sought was *both* the policy proceeds and attorneys' fees, and so long as the insurer failed to voluntarily pay any part of the relief sought, it continued to contest the policy, *Gulf Life Insurance Company v. Urquiaga*, Fla.App.1971, 251 So.2d 904, and thus even though the claim at that point is limited to the recovery of attorneys' fees, it is nonetheless a claim under the policy.

Cincinnati Ins. Co. v. Palmer, 297 So.2d 96, 99 (Fla. 4th DCA 1974)(emphasis in original).

In Blizzard v. Government Employees Ins. Co., 654 So.2d 565 (Fla. 1<sup>st</sup> DCA 1995), the First DCA reached the same conclusion as the Fourth DCA in Palmer. The pertinent facts of Blizzard are as follows. A woman's estate sued an auto insurer for unpaid benefits pursuant to a statute that required benefits to have been paid within thirty days of having provided reasonable proof of loss. After the thirty days had

expired and after the complaint had been filed, the defendant insurer paid the policy benefits that were overdue. Under those facts, the Court in Blizzard stated: “The language of [§ 627.428(1)] is plain on its face and requires that the estate receive an attorney’s fee for prevailing on count one of the instant suit.” Id. at 566. Although full payment was made up to the limits of the policy, it was made after the suit had commenced. Thus, the estate was “entitled to a fee on count one, according to the plain words of the statute [§ 627.428].” Id.

The opinions in Palma, Palmer, and Blizzard all support Intercargo’s liability to pay statutory attorneys’ fees, under the plain language of § 627.428, without limiting recovery of those fees to the face amount of the performance bond issued by Intercargo. Boland’s position is likewise strengthened by those cases, discussed below, that recognize the fundamental distinction between actual or compensatory damages, the recovery of which is limited by the policy limits of an insurance contract (or, the penal sum of a performance bond), and statutory attorneys’ fees whose recovery is not limited in any way.

C. Attorneys’ Fees and Actual or Compensatory Damages are Wholly Distinct, and Statutory Attorneys’ Fees are Recoverable Above and Beyond Damages.

The position advanced by Intercargo, that statutory attorneys’ fees are limited by the face amount of the performance bond, fails to account for the fundamental

distinction between attorneys' fees and actual or compensatory damages. This Court has explained that actual or compensatory damages "are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions." Bidon v. Department of Prof'l Regulation, Florida Real Estate Comm'n, 596 So.2d 450, 452 (Fla. 1992). Attorneys' fees, by contrast, are not recoverable in the absence of a statute or contract providing for their recovery. See id.

Thus, as the Court explained, "in general, actual or compensatory damages are not defined as including attorneys' fees." Id. (explaining that there are exceptions where fees may be recovered as damages, as in cases where a defendant's wrongful act caused the plaintiff to become involved in litigation with third parties, a situation completely inapposite to the instant case). The Court observed that, instead, numerous statutes providing for the recovery of attorneys' fees expressly do so as an *addition* to the recovery of actual or compensatory damages. See id. at 453 n.7. The Court stated: "These provisions [for statutory attorneys' fees] would be pointless if the legislature had truly intended its definition of actual or compensatory damages [, in a statute allowing victims to recover only actual or compensatory damages from the statutory Florida Real Estate Recovery Fund,] to include the recovery of attorney's fees." Id. The Court then provided examples of the provisions to which it was



referring:

E.g., § 40.271, Fla. Stat. (1991)(“individual shall be entitled to collect not only compensatory damages, but, in addition thereto, punitive damages and reasonable attorney fees for violation of this act”); § 92.57, Fla. Stat. (1991)(“court may award attorney’s fees and punitive damages ... in addition to actual damages”); § 440.37(2)(c), Fla. Stat. (1991)(“shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation expenses, including attorney’s fees”).

Id.

This Court’s opinion in Bidon clarifies the important distinction between actual damages and attorneys’ fees and, in particular, that statutory attorneys’ fees constitute a form of recovery *in addition to* actual or compensatory damages. Id. That distinction is central to the resolution of the issue raised by the instant appeal, as follows. The Intercargo construction performance bond is nothing more than a contract by which the surety (Intercargo) guarantees, to the obligee (Boland), the performance of the principal (Trans Coastal) up to the dollar amount stated in the contract by promising to remedy any default by the principal which, in the case of nonperformance or partial performance by the principal, entails completion of the performance or paying a third party to complete the performance. See American Home Assurance Co. v. Larkin General Hosp., 593 So.2d 195, 197 (Fla. 1992) (stating: “A bond is a contract, and, therefore, a bond is subject to the general law of contracts.”); see also id. at 198 (explaining: “The surety agrees to complete the construction or to

pay the obligee the reasonable costs of completion if the contractor defaults.”); (V. 1, Dkt. #5)(Defendant, David Boland, Inc.’s Answer, Affirmative Defenses and Counterclaim at Exhibit “B”)(consisting of a copy of the performance bond at issue in this appeal). The only difference between a performance bond and a contract generally is that a performance bond is to be construed strictly against the surety in favor of the obligee by granting it the broadest possible coverage. See, e.g., National Fire Ins. Co. of Hartford v. L.J. Clark Const. Co., 579 So.2d 743, 745 (Fla. 4<sup>th</sup> DCA 1991); Travelers Indem. Co. v. Housing Auth. of Miami, 256 So. 2d 230, 234 (Fla. 3d DCA 1972)(stating: “Florida has viewed construction bonds as contracts of insurance, and therefore in constructing the terms of these contracts, they must be read and interpreted strictly against the bonding company which prepared them”).

When a surety such as Intercargo fails to remedy a default or otherwise to ensure completion of performance that was promised by a defaulting or nonperforming principal such as Trans Coastal, the surety has breached the performance bond, a simple contract. The actual damages recoverable by an obligee such as Boland and owed by a surety such as Intercargo are measured by the expenses that are incurred by the obligee to complete the principal’s promised performance which, in turn, the surety guaranteed. Those actual damages are limited by the face amount stated in the performance bond, but are otherwise identical to the actual damages available under

any other simple contract. See, e.g., Larkin General Hosp., 593 So.2d at 198 (Fla. 1992)(recognizing the Florida precedent that a surety's liability for *damages* is limited to the face amount of the penal sum provided in the bond). While compensatory damages are clearly limited to the face amount of the performance bond, a point which Boland has steadfastly conceded, they are completely distinct from attorneys' fees, which are separately mandated by statute and implicit in all surety contracts. See § 627.428, Fla. Stat. (2001)§§.

The logic of Bidon ineluctably leads to the conclusion that the statutory attorneys' fees mandated by § 627.428§§ are wholly distinct from actual damages for which a surety's liability is limited to the face amount of the penal sum stated in the performance bond. While Bidon did not specifically address § 627.428§§ and insurance contracts (which include surety bonds), there is precedence in that specific context which leads to the same conclusion, see supra part I.B. (discussing Palma, Palmer, and Blizzard). Thus, Boland's compensatory damages are limited by the face amount of the performance bond while its statutory attorneys' fees under § 627.428, which are wholly distinct from compensatory damages, are not limited by that amount.

- III. The purpose of § 627.428 would be completely undermined if attorneys' fees incurred in an action to enforce a surety's obligation under a performance bond were limited to the face amount of the bond.

This Court's recently explained, in citing § 627.428, that "Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorneys' fees shall be awarded to the insured. See § § 627.736(8), 627.428(1)." Ivey v. Allstate Ins. Co., 774 So.2d 679, 684 (Fla. 2000)(involving an insurer's denial of entitlement to reimbursement for medical payments under a no-fault policy). The Court, in Ivey, discussed the purpose of § 627.428 and clarified its far-reaching scope:

If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorneys' fees. It is the incorrect denial of benefits, not the presence of some sinister concept of "wrongfulness," that generates the basic entitlement to the fees if such denial is incorrect. *It is clear to us that the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts.*

Id. (emphasis added).

The Court concluded that "[t]he decision also impacts the insurance statutory scheme and nearly thirty years of Florida jurisprudence. Accordingly, we quash the decision below, and hold that Ms. Ivey is entitled to recover the attorneys' fees she incurred in the prosecution of the legal action." Id.; see also Insurance Co. of North America v. Lexow, 602 So.2d 528, 531 (Fla. 1992)(recognizing that the purpose of § 627.428 "is to discourage the contesting of valid claims against insurance companies

and to reimburse successful insureds for their attorneys' fees when they are compelled to defend or sue to enforce their insurance contracts").

Boland's situation is precisely that contemplated by Lexow. Boland established, after two trials, that it had a valid contractual claim against Intercargo under its bond. Specifically, the second jury found that Intercargo had breached its surety contract with Boland and caused it damage. It took two trials to establish Intercargo's liability, and the trial court awarded Boland its fees and costs in the amount of \$276,950.33 and \$22,194.98, respectively.

Intercargo, as an insurer under § 627.428, should not be relieved from its statutory responsibility to make Boland whole for its successful effort in obtaining judgment against Intercargo. See, e.g., Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1149 (Fla. 1985)(stating that a medical malpractice statute which authorized the prevailing party to recovery attorneys' fees was not penal in nature and further observing that in certain cases, attorneys' fees historically have been considered part of litigation costs intended to make the prevailing party whole). Should Intercargo be rewarded for contesting Boland's valid claim through a judicially-imposed limitation on its liability for the attorneys' fees that it required Boland to expend-- or should it bear the consequences of such conduct as mandated by § 627.428? A judicially-imposed limitation of the surety's liability for attorneys'

fees would undermine the very policy behind § 627.428 by encouraging a surety such as Intercargo to avoid settlement of claims and thereby require an obligee such as Boland to sue, at its own expense and without the ability to fully recover its attorneys' fees, in order to recover its underlying damages -- the precise situation that occurred in the trial court.

Intercargo's refusal to honor its surety bond obligations to Boland is analogous to the refusal of a business owner's casualty insurance carrier to honor the business owner's claim for property damage. If the business owner is required to sue the insurer to recover on its claim, and damages are awarded, the insurer has no argument that its liability for attorneys' fees is somehow limited by the policy limits of the insurance contract. There is nothing in § 627.428 to support such a limitation. Here, Intercargo had express contractual obligations to Boland that were breached, requiring Boland to bring suit and obtain judgment. Full effect should be given to the statute and Boland should be made whole by Intercargo for the full amount of attorneys' fees and costs awarded by the District Court, and for the attorneys' fees incurred in this appeal. Otherwise, the purpose of § 627.428 will be undermined.

- IV. The District Court erred in holding that misconduct, in addition to a breach of the performance bond, must be demonstrated in order to justify an expansion of the scope of a surety's liability beyond the penal sum of the bond.

The District Court's conclusion, that there must be misconduct beyond the act of breaching a performance bond in order to justify an award of statutory attorneys' fees in excess of the face amount of the bond, eviscerates § 627.428 and undermines its purpose, see supra part II., while also ignoring controlling Florida law as discussed above, see supra part I. and cases cited therein. The District Court's conclusion, as originally suggested by Intercargo, states as follows:

This court, relying on the logic set forth in [Nichols v. Preferred National Ins. Co., 704 So.2d 1371 (Fla. 1997)] and its progeny, finds that breach of the performance bond alone is an inadequate justification for extending the scope of liability. That is, because a [surety's] liability is coextensive with its principal [sic], misconduct in addition to breach of the performance bond (such as unreasonable delay in payment) must be demonstrated in order to justify an expansion of the scope of the surety's liability.

(V. 5, Dkt. #260)(consisting of Order Adopting In Part Magistrate's Report and Recommendation, at 6) (Oct. 17, 2001). In light of (1) this Court's holding in Palma, the Fourth DCA's holding in Palmer, and the First DCA's holding in Blizzard, (2) the unambiguous language of § 627.428 upon which the Palma decision is based, and (3) this Court's holding in Ivey (as discussed further below), the District Court's interpretation of Nichols and application of the holding therein to the instant performance bond are entirely misplaced and contrary to the purpose of § 627.428.

In Nichols, this Court held that recovery by the obligee on a guardianship bond was limited to the penal sum of the bond and could not also include attorneys' fees, but only because § 744.357, Florida Statutes, provides that "no surety for a guardian shall be charged beyond the property of the ward." Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371, 1374 (Fla. 1997). The Court added that even with the limitation imposed by § 744.357, an obligee may recover attorneys' fees beyond the bond sum if the insurer has engaged in misconduct, including unreasonably delaying payment under its policy. Id.

The holding in Nichols is clearly limited to guardianship bonds. The opinion began with a statement that the case on appeal concerned the amount of attorneys' fees and costs to be paid by a surety *on a guardianship bond*. Id. at 1372. The question certified to the Court also demonstrated that the matter was limited to guardianship bonds: "WHETHER AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO SECTION 627.428, FLORIDA STATUTES, IS AUTHORIZED AGAINST A SURETY ON A GUARDIANSHIP BOND UNDER CHAPTER 744, FLORIDA STATUTES." Id. (emphasis added). The Court expressed its holding similarly: "[W]hen a surety unreasonably delays in investigating a claim *against a guardianship bond*, an award of attorneys' fees and costs may exceed the face amount of the bond." Id. Later in its opinion, the Court stated: "The



application of section 627.428 to *guardianship bonds* is an issue of first impression for this Court.” Id. at 1373. Then, the Court queried:

“Having determined that attorneys’ fees may be awarded under section 627.428, we must next address *whether such attorneys’ fees are limited by section 744.357* to the amount of the bond. In this regard, we disagree with the District Court’s conclusion that section 744.357 limits the damages to the face amount of the bond in all cases.”

Id. at 1374. The Court’s final holding was as follows:

When principals misappropriate guardianship funds or insufficiently discharge their duties, attorneys’ 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 attorneys’ fees and costs were incurred because a surety failed to act diligently and unreasonably delayed the payment of a claim, *such attorneys’ fees and costs are not protected by section 744.357*.

Id. (emphasis added).

The Court in Nichols could not have been more clear that its holding pertained only to guardianship bonds and that it was based on the specific limitation expressed in § 744.357, Florida Statutes. In an obvious attempt to grant a window of relief to future obligees *under guardianship bonds*, the Court in Nichols held that even with the limitation on recovery for guardianship bonds which is imposed by § 744.357§§, an obligee may recovery attorneys’ fees beyond the face amount of a guardianship bond where the surety has engaged in misconduct. See Nichols, 704 So.2d at 1374.

Thus, the Court in Nichols did not create a judicial *limitation* on recovery of attorneys' fees under guardianship bonds. On the contrary, it created an exceptional basis (misconduct) for *additional* recovery in the specific context of guardianship bonds where an express statutory limitation, § 744.357§§, otherwise precludes recovery in excess of the bond's face amount.

The District Court's opinion in the instant case effectively engrafted the statutory limitation on recovery that is provided in § 744.357, for guardianship bonds only, onto all common law performance bonds. The District Court thereby undermined § 627.428, as it applies to all sureties and their obligees under performance bonds, in derogation of controlling Florida case law, even though Florida courts are powerless to modify or limit the express terms and reasonable and obvious implications of a statute. See Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)(stating that Florida courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications").

Nichols creates an exceptional basis for recovery beyond the bond sum solely in cases involving guardianship bonds. The Court created that exception for guardianship bonds because a specific, limiting statute, § 744.357, otherwise limits recovery of statutory attorneys' fees under § 627.428. There is no statutory equivalent

to § 744.357 that would limit the applicability of § 627.428 to performance bonds or other insurance contracts. Accordingly, the imposition of a judicial, extra-statutory limitation on Boland's entitlement to recovery of attorneys' fees under § 627.428 would contravene the separation of powers doctrine implicit in this Court's discussion in Holly, as well as the underlying purpose of § 627.428. In short, recovery of attorneys' fees beyond the face amount of the performance bond executed by Intercargo and Boland is not limited by a statute such as § 744.357, and misconduct need not be demonstrated in order for Boland to recover statutory attorneys' fees beyond the penal sum of the bond.

The court in Palmer, as approved by this Court in Palma, prefaced its holding with the following observation: "The fact that the insurer's refusal to pay the amount owed by it under the terms of the policy was in good faith and on reasonable grounds does not relieve the insurer from liability for payment of attorneys' fees where it is subsequently found liable on the policy." Palmer, 297 So.2d at 98. Accordingly, the motivation behind Intercargo's breach of its performance bond obligations to Boland is irrelevant to its liability for statutory attorneys' fees when Boland was forced to bring suit and obtain judgment for damages. Intercargo owed a separate and distinct contractual obligation as an "insurer" to Boland beyond its co-extensive liability with its principal. The District Court's conclusion that the liability of a surety is

coextensive with its principal's such that misconduct in addition to breach of a performance bond must be demonstrated to justify "expansion of the scope of the surety's liability" is simply wrong and certainly without supporting precedent in Florida. (V. 5, Dkt. #262).

As this Court explained in Ivey v. Allstate Ins. Co., 774 So.2d 679, 684 (Fla. 2000), a case involving an insurer's denial of entitlement to reimbursement for medical payments under a no-fault policy: "To the contrary, Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorneys' fees shall be awarded to the insured. See § § 627.736(8), 627.428(1)." The Court added that "*[i]t is the incorrect denial of benefits, not the presence of some sinister concept of "wrongfulness," that generates the basic entitlement to the fees if such denial is incorrect.*" Id. (emphasis added).

In Ivey, the obligee (Ivey) continued its action against the insurer (Allstate) after it offered policy coverage "under the theory that the insurer's failure to pay the original bill in full constituted a wrongful withholding of benefits requiring her to seek the services of an attorney." The Court agreed with the obligee's theory stating:

It is therefore obvious that Allstate voluntarily paid Ivey's claim only after the lawsuit was filed and without any type of settlement agreement which would preclude her from recovering her attorneys' fees. Thus, we conclude that the district court erred in failing to find that Allstate's payment of the remainder of the claim constituted a confession of

judgment, entitling Ms. Ivey to recovery of her attorneys' fees. The decision below would incorrectly deny application of statutory attorneys' fees when insurers come to the realization during litigation that a denial of benefits has been incorrect.

Ivey v. Allstate Ins. Co., 774 So.2d 679, 684 (Fla. 2000).

The Court held that "Ms. Ivey is entitled to recover the attorneys' fees she incurred in the prosecution of the legal action." Id. In the instant case, Intercargo failed to discharge its contractual duties to its obligee (Boland) under the performance bond. The jury verdict found that Intercargo breached its contract with Boland. Ivey and Palmer, as relied on by this Court in Palma, unambiguously support Boland's entitlement to the full amount of attorneys' fees awarded in the instant case, including the additional fees incurred to lodge this appeal. Palma and Palmer demonstrate that Boland's recovery of attorneys' fees is not limited by bond sum. Most importantly, the unambiguous language in § 627.428 supports Intercargo's liability for the entire amount of attorneys' fees and costs awarded by the District Court.

V. Intercargo incorrectly relied on distinguishable cases involving statutory lien transfer bonds to support the argument that its liability for damages, attorneys' fees and costs is limited to the penal sum of its performance bond.

Intercargo, in its Answer Brief before the Eleventh Circuit, also relied upon three decisions involving lien transfer bonds in support of its claim that Florida courts have a long history of limiting a surety's liability to the face amount of its bond. See

Appellee Intercargo's Answer Brief at pp.12-13 (citing DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992); Gene B. Glick Co. v. Fischer-McGann, Inc., 667 So.2d 865 (Fla. 4<sup>th</sup> DCA 1996); and Aetna Casualty & Surety Co. v. Buck, 594 So.2d 280, 283 (Fla. 1992)). Again, Boland does not dispute that a surety's liability for damages is limited to the face amount of its bond. The issue is whether or not an obligee's entitlement to fees and costs, pursuant to § 627.428 and under a performance bond, may be limited by the face amount of the bond. The cases cited by Intercargo, which involve lien transfer bonds, are like Nichols in that they are completely inapposite to the issue on appeal. In fact, the Court in DiStefano makes a clear distinction between common law performance bonds and statutory lien transfer bonds and states that § 627.428 applies to performance bonds but not to lien transfer bonds. Most notably, lien transfer bonds do not have obligees as do performance bonds. The Court further explained:

The award of attorney's fees under section 627.428, the general attorney's fees provision of the Florida Insurance Code, is specifically mandated in a number of circumstances, including against sureties issuing payment bonds or performance bonds .... There is no corresponding authorization of section 627.428 attorney's fees against a surety issuing a transfer-of-lien bond. Instead, mechanic's lien proceedings are governed by Chapter 713 of the Florida Statutes. Section 713.29, Florida Statutes (1987), provides that a prevailing party in a mechanic's lien enforcement action is entitled to recover attorney's fees "which shall be taxed as part of [the prevailing party's] costs." Accordingly, we agree with the court below that "there is no need . . . to look to section 627.428

for authority to award attorney's fees in an action to foreclose on a mechanic's lien."

DiStefano, 597 So.2d at 249. The holding in DiStefano is actually supportive of Boland's position in expressly stating that section 627.428 applies to sureties issuing performance bonds.

### CONCLUSION

Boland is entitled to recover its attorneys' fees and costs from Intercargo in the amounts awarded in the District Court's final judgment, as later amended, without any limitation with respect to the amount of the bond, in addition to its fees and costs incurred on appeal, based on the plain language of § 627.428. This Court's holdings in Palma and Ivey, and the lower court decisions of Palmer and Blizzard further support Boland's position that the plain language of § 627.428 does not limit Boland's recovery to the penal sum of the bond at issue. This Court's holding in Bidon likewise supports Boland's position by distinguishing attorneys' fees from damages and clarifying that statutory attorneys' fees are recoverable *in addition to* damages. Those cases, together with the plain language of § 627.428, demonstrate that Nichols is completely inapposite to the instant case.

Accordingly, Boland is entitled to recover from Intercargo, in addition to fees and costs incurred on appeal, the fees already awarded in the amount of \$276,950.33

and costs in the amount of \$22,194.98, less the amounts that Intercargo has paid to date in partial satisfaction of the amended final judgment, \$39,115.03 and \$125,542.72. The face amount of the bond, \$167,800.00, does not limit Boland's entitlement to a full recovery of all attorneys' fees and costs awarded by the District Court. This Court should answer the certified question in the affirmative and return the matter to the Eleventh Circuit for final disposition.

Respectfully submitted this \_\_\_\_ day of October, 2002.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Initial Brief of Appellant David Boland, Inc., has been furnished to James O. Murphy, Jr., Esquire, Byrd and Murphy, 524 South Andrews Avenue, Suite 200N, Fort Lauderdale, Florida 33301, Attorneys of Record for Appellee INTERCARGO INSURANCE COMPANY, and Robert E. Ferencik, Jr., Esquire, Ferencik Libanoff Brandt & Bustamante, P.A., 150 S. Pine Island Road, Suite 400, Fort Lauderdale, Florida, 33324, Attorneys of Record for Appellee TRANS COASTAL ROOFING COMPANY, INC., by Federal Express this \_\_\_\_ day of October, 2002.

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Denis L. Durkin

**CERTIFICATE OF COMPLIANCE**

The undersigned attorney certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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