IN THE SUPREME COURT OF FLORIDA

DAVID BOLAND, INCORPORATED
Appellant,

vs.

INTERCARGO INSURANCE COMPANY
Appellee.

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

REPLY BRIEF OF APPELLANT DAVID BOLAND, INC.

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Intercargo's Answer Brief raises two primary arguments, both of which are logically flawed.

Intercargo makes two primary arguments. Intercargo's first argument is that, while it agrees with Boland that Section 627.428 *entitles* Boland to attorneys' fees, the *amount* of fees recoverable under section 627.428 is limited by the bond itself, to the bond sum stated therein. That argument is flawed because the performance bond, like Section 627.428 which is a part of every performance bond, contains no limitation on the amount of fees recoverable from the surety for its breach of the bond obligation which resulted from the principal's default and its refusal to cure that default.

Intercargo's second primary argument is that performance bonds, as part of the law of suretyship, are not insurance contracts. That incorrect assertion leads Intercargo, and the Surety Association of America ("SAA") in its *Amicus Curiae* Brief, to this equally incorrect conclusion: the public policy goal of allowing recovery of attorneys' fees beyond the limits of coverage under an insurance contract does not apply to surety contracts in the form of performance bonds. See Answer Brief at 18-21; SAA's Brief at 11-13.

Intercargo's arguments are not only incorrect, but also internally inconsistent. The first argument, in acknowledging the applicability of Section 627.428 to performance bonds and in recognizing that Boland is entitled to attorneys' fees as an insured under

Section 627.428, destroys the second argument that surety bonds are fundamentally different from insurance contracts. In so doing, the premise for Intercargo's and the SAA's flawed public policy argument must logically evaporate. Since performance bonds are insurance contracts for which attorneys' fees are recoverable without limitation under the plain language of Section 627.428, the policy argument that fees under performance bonds should be limited because bonds are different from other insurance contracts makes no sense. Furthermore, if it had been the intent of the Florida Legislature to carve out this limited exception, it surely would have been expressed in the statute.

The amount of a bond has no bearing on the amount of attorneys' fees recoverable for a surety's breach of the bond.

This Court's decision in State Farm Fire & Cas. Co. v. Palma,[1] has already established that "*the terms of [§ 627.428] are an implicit part of every insurance policy issue in Florida*" and that "[w]hen 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." This Court has also already decided that a surety is an insurer subject to

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1 629 So.2d 830, 832 (Fla. 1993) (emphasis added).

liability for attorneys' fees under Section 627.428.[2] Accordingly, a surety performance bond is an insurance policy and the bond sum constitutes the policy proceeds. Thus, it is straightforward, under Palma, that when a bond obligee must sue its surety, the relief sought is both the policy proceeds up to the bond sum and, separately, attorneys' fees pursuant to Section 627.428.

As attorneys' fees beyond the bond sum became an express term of the performance bond through the operation of Section 627.428, Boland became entitled to attorneys' fees upon obtaining a judgment against Intercargo for its denial of benefits under the bond. Intercargo even concedes that unavoidable truth: "*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*." Answer Brief at 9 (emphasis added).

Intercargo's only argument against Boland's entitlement to all of the fees awarded

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[2] See Nichols v. Preferred Nat'l Ins. Co., 704 So.2d 1371, 1374 (Fla. 1997) ("We disapprove Dealers to the extent it holds that section 627.428 does not apply to sureties."); § 624.03, Fla. Stat. (2001) ("'Insurer' includes every … surety .. in the business of entering into contracts of insurance ….").

to it is that Palma, and the other decisions relied upon by Boland in its Initial Brief, deal only with entitlement to attorneys' fees and do not address the amount of fees that are recoverable. However, Intercargo has confused the issue on appeal because the bond sum is nothing more than the amount of policy proceeds available to the bond obligee and any recovery of attorneys' fees under Section 627.428 is in addition to the policy proceeds – an issue of entitlement, not amount. The issue here is simply whether or not there is any legal basis for limiting a surety bond obligee's entitlement to fees when other insureds are able to recover fees beyond the policy limits of their insurance contracts.[3]

Furthermore, Section 627.428 contains no limitation on the amount of fees that may be recovered. A limitation that does not exist cannot be read into the statute, and

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[3] According to Intercargo's argument, if Boland's damages against Trans Coastal as the bond principal had been the full contract price of $167,800.00, equal to the bond amount, then Boland's recoverable fees under Section 627.428 would be $0.00 and the statute would be rendered, impermissibly, a nullity. Cf. Bidon v. Department of Prof'l Regulation, Florida Real Estate Comm'n, 596 So.2d 450, 453 n.7 (Fla. 1992) (explaining that statutes allowing recovery of attorneys' fees would be pointless if the legislature had intended its definition of compensatory damages in a statute allowing recovery from the Florida Real Estate Recovery Fund to include the recovery of attorneys' fees).

certainly a limitation that would conceivably result in no recovery of any fees (where damages from the principal's breach of the subcontract equal the contract price covered by the bond sum) is without support.[4]

Intercargo and the SAA argue that Intercargo's obligation as surety to pay the bond amount of $167,800.00 is inclusive of attorneys' fees incurred by Boland in its suit against Intercargo because the performance bond itself expressly limits Intercargo's liability to that amount. See Answer Brief at 16; SAA's Brief at 9-10. Significantly, the performance bond contains no such limitation. Rather, the bond states that Intercargo's obligation as surety is null and void if the *principal* (Trans Coastal) promptly pays the contractor (Boland) all losses, costs and damages, including all litigation-related costs and attorneys' fees resulting from the *principal's* default. App., Tab 3.[5] The bond states further that whenever the principal shall be or declared by the obligee to be in default under the subcontract, the surety *shall*

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[4] See Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) (stating that a court may not construe an unambiguous state in a manner that would "extend, modify, or limit its express terms or its reasonable and obvious implications").

[5] All cites to the Appendix are referenced by Tab number as "App., Tab ___".

promptly cause the default to be remedied. Id. The performance bond does not, however, expressly state anything regarding the *surety's* independent statutory obligation for attorneys' fees upon the *surety's* failure to promptly pay for damages, costs and fees resulting from the principal's default. Instead, the surety's obligation for fees incurred by the obligee in its suit against the surety is implicit in the bond under Section 627.428 which, in turn, includes no limitation on the amount of recoverable fees. Accordingly, since Trans Coastal, as principal, did not promptly pay Boland for its losses, Intercargo became obligated under the performance bond. Intercargo's decision to deny coverage, and to require Boland to obtain a judgment before Intercargo would honor its bond obligation, entitled Boland to attorneys' fees to make it whole for that additional loss, pursuant to Section 627.428.

Intercargo and SAA's policy argument that suretyship is different from insurance, and thereby requires a limitation on fees, is untenable.

Intercargo refuses to recognize that, as a surety, it is an insurer under Florida law.[6]

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6 Intercargo argues that proof of the difference between insurance policies and performance bonds lies in the existence of Section 627.756, Florida Statutes, which observes that Section 627.428 applies to suits brought against surety insurers under payment or performance bonds. Answer Brief at 9. On the contrary, Section 627.756 merely strengthens Boland's position that suretyship is insurance under Florida law and that 627.428 applies to the performance bond.

Intercargo and the SAA therefore argue incorrectly that performance bonds should be treated differently from other insurance contracts by limiting recovery to policy limits (the bond sum). The Appellees' incorrect treatment of Florida suretyship law is reflected in their insistence that the tripartite relationship under a surety bond creates a legal distinction between surety bonds and other insurance contracts.[7] Sureties are not merely guarantors with secondary liability.[8] They are insurers whose liability is coextensive with that of bond principals, a matter well-settled under Florida law and yet one that Intercargo steadfastly refuses to acknowledge and, in fact, continues to disavow through reliance on obsolete cases or decisions outside of Florida. See Henderson Inv. Corp. v. International Fidelity Ins. Co., 575 So. 2d 770, 771 (Fla. 5th

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[7] Intercargo, for instance, incorrectly relies on a federal First Circuit case for the principle that "there is a difference between the liability of a classic insurer and that of surety/guarantor," Answer Brief at 19, and states wrongly that "[a] payment and performance bond is not an insurance contract," Answer Brief at 27. Similarly, the SAA states that "[t]he surety is only secondarily liable," SAA's Brief at 13, that "the insurer can avoid any attorney's fees by promptly and fairly handling the claim" while a surety has no such luxury because it is "caught between the bond principal and the claimant," id., and that "[a] surety bond is not an insurance policy," id. at 12.

[8] In fact, the performance bond states that Intercargo and Trans Coastal are bound to their obligation "jointly and severally." App., Tab 3.

DCA 1991) (correctly explaining the law in Florida as follows: "In addition, obligations of a surety under its bond agreement are coextensive with that of a contractor (principal**)**. *Thus, if the contractor owes the debt, so does the surety*.") (emphasis added).[9]

Similarly, the SAA has skirted the real issue here by asserting as follows: "Making the surety pay the claimant's fees for litigating with the principal will do nothing to encourage prompt and fair claim handling by sureties." SAA's Brief at 13. This appeal is not about the surety, Intercargo, paying Boland's fees for litigating with the principal, Trans Coastal. Rather, Boland seeks to recover fees incurred to enforce the surety bond itself, as an insurance contract, directly against the surety, Intercargo, for its own breach of the bond after the principal defaulted on the underlying subcontract.

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[9] See also § 624.03, Fla. Stat. (2001) ("'Insurer' includes every … surety .. in the business of entering into contracts of insurance …."); DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992) (explaining that Section 627.428 applies to sureties issuing payment or performance bonds); Nichols, 704 So.2d at 1373-74 (finding that sureties are subject to Section 627.428 because they are insurers and the plain language of section 627.428 states that reasonable attorney's fees and costs are to be awarded against an insurer upon rendition of a judgment against the insurer in favor of the insured or beneficiary).

See Ivey v. Allstate Ins. Co., 774 So.2d 679, 684 (Fla. 2000) ("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 'wrongfulness,' that generates the basic entitlement to the fees if such denial is incorrect."); O.A.G. Corp. v. Britamco Underwriters, 707 So.2d 785, 786 (Fla. 3rd DCA 1998) (explaining that an insurer's good faith in bringing suit is irrelevant. The insurer must pay attorney's fees if the controversy is within the scope of Section 627.428 and the insurer loses.) (citing the decision in Insurance Co. of North America v. Lexow, 602 So.2d 528, 531 (Fla. 1992), where this Court explained that the purpose of Section 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").[10]

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10 Intercargo and the SAA also argue that an additional element of unreasonable delay or other misconduct must be shown in order to recover attorneys' fees in construction bond cases. For support, they rely principally on Nichols. Answer Brief at 21-23; SAA's Brief at 10-11. However, as Boland's Initial Brief fully explains, Nichols is limited to the context of guardianship bonds because a statute other than Section 627.428 expressly prescribed a limitation on recovery in the amount of the bond sum. See Boland's Initial Brief at 24-29.

If Intercargo had settled within bond limits prior to Boland's action against it for failure to tender damages due under the bond, then Boland would not have been forced to sue Intercargo and would not have incurred attorneys' fees for which it must be made whole under section 627.428.[11] Intercargo, thereafter, could have sought indemnification from Trans Coastal, although that has no bearing on its status as an insurer under Section 627.428. Intercargo cannot logically or reasonably concede that Section 627.428 applies to it and in the same breath that its performance bond is not an insurance contract under which fees may be recovered beyond policy limits pursuant to Section 627.428. The bond sum is nothing more than a limitation on policy coverage and just as other insureds may recover separate, statutory fees for

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[11] See Fitzgerald & Co., Inc. v. Roberts Electrical Contractors, Inc., 533 So. 2d 789 (Fla. 1st DCA 1988) (holding that where a surety contested a claim in arbitration and proceeded to a decision by the arbitration panel finding that the principal owed money damages to the obligee, the surety could not avoid liability for attorneys' fees by paying the amount of the award – it was liable for attorneys' fees because it required the obligee to prosecute its claim before paying the damages owed by the principal); cf. Answer Brief at 20 (arguing that the undisputed facts do not bear out Boland's assertion that Intercargo refused to honor its surety bond obligation because Intercargo paid the bond amount).

suing to enforce policy coverage without regard for policy limits, so too is a bond obligee entitled to fees apart from the bond sum when it is compelled to sue to enforce the surety's bond obligation.

The discussion above applies with equal cogency to the SAA's unsupported policy argument that Boland's position would expose sureties to risks they did not contemplate or accept when issuing bonds for construction contracts. Simply stated, statutory attorneys' fees are prescribed by Section 627.428 and, unless the parties to a bond agreement expressly waive that statute, which they are free to do, it applies to their bonds as it does to all insurance contracts not governed by other statutes. An insurer, including a surety, assumes the risk of attorneys' fees *as a matter of statutory law*, when it decides to dishonor its bond obligation upon the default of the bond principal. The decision to deny coverage is a calculated one, based on the surety's evaluation of the merits of the underlying claim that the bond obligee has against the bond principal under their separate construction contract. That calculus is the same for all insurers and when they make a mistake in denying coverage and force their insureds to sue them, regardless of the reasons, they are liable for the additional fees incurred by the insured under the plain language of Section 627.428. See Lexow, 602

So.2d at 531. Contrary to Intercargo and the SAA's argument, the fact that a surety has the right to be indemnified by the bond principal actually lowers its risk relative to other insurers who have no such right.[12]

Limitations on mechanic's lien and lien transfer bonds under Chapter 713, Florida Statutes, have no relevance here.

Intercargo and the SAA further attempt to distinguish performance bonds from other insurance contracts by observing that Florida courts have limited or precluded recovery of attorneys' fees in transfer-of-lien and mechanic's lien bond cases. Boland's Initial Brief explains that those cases, including Gene B. Glick Co., Inc. v. Fischer-McGann, Inc., 667 So.2d 865 (Fla. 4th DCA 1996) and Aetna Casualty & Surety Co. v. Buck, 594 So.2d 280, 283 (Fla. 1992), are completely distinguishable because, whether mechanic's lien or transfer-of-lien bond cases, a different statutory scheme for awarding attorneys' fees exists under Chapter 713, Florida Statutes. While Glick is a mechanic's lien case, it is no different from a transfer-of-lien case because

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12 The Florida Legislature has already assigned the litigation risk of liability for attorneys' fees to the surety through enactment of Section 627.428, and this is not the forum in which to challenge or lobby against the Legislature's decree. The SAA is essentially asking this Court to ignore the constitutional doctrine of separation of powers by asking it to overturn a public policy decision that has already been made by the Florida Legislature.

Section 713.234(4), Florida Statutes,[13] expressly makes the transfer of lien statute, Section 713.24(3), regarding extra security for attorneys' fees, applicable to mechanic's lien payment bonds.

This Court clearly explained in Buck that Section 713.24(3) does not permit the trial courts to increase surety liability beyond the bond sum. Buck, 594 So.2d at 283. In DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992), this Court also explained that Section 627.428 applies to sureties issuing payment or performance bonds but not transfer-of-lien bonds. In agreement with Buck and Glick, this Court added 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. Intercargo and the SAA's reliance on transfer-of-lien and mechanic's lien bond cases is curious in light of those holdings and because such bonds are not issued to a named beneficiary.

Section 627.428, Florida Statutes, does not require obligees to state their entitlement to fees or the amount of fees.

The SAA argues that Boland could only recover attorneys' fees if the performance bond had stated the amount of fees to which Boland would be entitled. That is,

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13 Section 713.234 prescribes standards regarding contractor payment bonds.

according to the SAA's argument, Boland was required to guess the amount of fees to which it would be entitled in the event that Intercargo both denied coverage under the bond and then required Boland to sue to enforce Intercargo's bond obligation. Boland, the SAA would argue, was further required to include that guess in the bond, thereby limiting its fee recovery to that amount. To argue that Boland could have stated the *amount* of attorneys' fees as a performance bond contract term and by not doing so it waived its entitlement to statutory fees under Section 627.428 is untenable. The SAA implicitly recognizes that conclusion by claiming that the inherently unknown amount of attorneys' fees would require it to assume risk not subject to measurement and evaluation.[14]

This illogical argument belies the plain language of Section 627.428 for two reasons. First, Section 627.428 is implicit in all insurance contracts, including performance bonds, and contains no requirement that an insured must reference the statute in the insurance contract in order to protect its entitlement to fees thereunder.

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[14] The SAA's argument regarding the inability to evaluate litigation risk is further flawed because a surety may approximate its risk in a particular case by comparing fee awards in similar, previously decided cases that are in the public record.

Second, Section 627.428 certainly does not include a requirement that an insured contractually limit the amount of fees it may recover by stating such an amount in the insurance contract. The reason for the statute's silence is obvious: there is no limitation on the amount of fees recoverable under the statute and the amount is determined by the trial courts, after the entry of judgment, based upon existing and measurable legal standards.

Section 627.756, Florida Statutes, does not exclude contractors as insureds under Section 627.428, Florida Statutes.

SAA also claims that Section 627.428 does not even apply to construction performance bonds where the obligee is a prime contractor, rather than an owner, subcontractor, materialman or laborer. For support, the SAA cites Section 627.756, Florida Statutes (2001).[15] The last sentence of Section 627.756 makes clear that this section is intended to provide an expansion, rather than a limitation, of the classes of individuals that may constitute an insured under a performance or payment bond.

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15 (stating: "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.").

Boland is a *named beneficiary* under the Intercargo performance bond. Section 627.756 is clearly intended to benefit those who may have a claim under a payment or performance bond, but who are not expressly named as beneficiaries and are not in contractual privity with the surety. It cannot be logically read to limit the application of Section 627.428 to a party that is expressly named as a beneficiary of a payment or performance bond. Such a conclusion would surely turn the statute on its head. The SAA's suggestion that all classes of potential claimants under construction bonds, except for prime contractors who obtain bonds from their subcontactors and who are named beneficiaries, may recover attorneys' fees as insureds under Section 627.428, is absurd.[16]

Conclusion

Section 627.428, according to its plain language and supporting decisions of this

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16 See Duvall Asphalt Products, Inc. v. E. Vaughn Rivers, Inc., 620 So.2d 1043 (Fla. 1st DCA 1993) (holding that a sub-subcontractor, a class of obligee not listed in Section 627.756, was entitled to attorneys' fees under Sections 627.756 and 627.428); see also Financial Indemnity Co. v. Steel & Sons, Inc., 403 So.2d 600, 602 (Fla. 4th DCA 1981) (holding that the contractor's surety, standing in the contractor's place, had a valid claim for attorneys' fees against the subcontractor's surety under the subcontract bond because the subcontractor's surety was an insurer under Section 627.428).

Court, applies to all insurance contracts, including surety performance bonds. The same public policy behind Section 627.428 that applies to other insurers applies with equal force to sureties. This Court discussed that important policy goal in Ivey v. Allstate Ins. Co., 774 So.2d 679, 684 (Fla. 2000):

> 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 "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.*

Intercargo and the SAA attempt to avoid the applicability of Section 627.428 and its important policy goal by incorrectly distinguishing surety bonds from other insurance contracts. However, as set forth above and in the Initial Brief, sureties issuing performance bonds are insurers subject to attorneys' fees under Section 627.428, which contains no limitation on entitlement or amount. Furthermore, unlike guardianship, mechanic's lien, and lien transfer bonds which are expressly limited by other statutes, Boland's entitlement to fees under its performance bond is not similarly limited. Thus, the policy goal of Section 627.428, as described by this Court in Ivey, applies with equal force to Boland's surety bond and Boland's fee award should not

be diminished by the policy limits reflected in the bond sum.

Respectfully submitted this ____ day of January, 2003.

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I hereby certify that a copy of the foregoing Reply 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, and Hala A. Sandridge, Esquire, Fowler White Boggs Banker, P.A., P.O. Box 1700, Tampa, Florida 33602, Attorneys for Appellee Intercargo Insurance Company; Robert E. Ferencik, Jr., Esquire, Ferencik Libanoff Brandt & Bustamante, P.A., 150 S. Pine Island Road, Suite 400, Fort Lauderdale, Florida 33324, Attorneys for Trans Coastal Roofing Company, Inc.; and Brett D. Divers, Esquire, Mills Paskert Divers P.A., 100 N. Tampa Street, Suite 2010, Tampa, Florida 33602, Attorneys for Amicus Curiae, The Surety Association of America, by Federal Express this ____ day of January, 2003.

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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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