IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1816

LT Number 2DO4-896

LUMBERMENS MUTUAL CASUALTY COMPANY, an Illinois Corporation,
Petitioner,
v.

RYAN INCORPORATED EASTERN,
a Florida Corporation, and
HARTFORD FIRE INSURANCE
COMPANY, a Connecticut Corporation,

Respondents.

PETITIONER LUMBERMENS MUTUAL CASUALTY COMPANY'S REPLY BRIEF ON THE MERITS

Respectfully submitted,

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A. RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE AND ADDITIONAL FACTS

In its Statement of the Facts, Hartford claims that LMC failed to mention the provision of the General Indemnity Agreement "GIA" that entitled Hartford to seek indemnification from Ryan for attorney's fees. LMC notes that it discussed and analyzed this issue on pages 23-26 of its Initial Brief.

B. REPLY TO RESPONDENT'S ARGUMENT

Throughout its brief, Hartford consistently confuses the concept of a contractual right of indemnification with a statutory right to collect attorney's fees under Florida Statute §627.428. The concepts are distinct. A contractual right of indemnification is not synonymous with a statutory right.

Hartford's confusion is demonstrated by Hartford's constant interjection of the unrelated issue of attorney's fees for the defense of the underlying matter into this appeal. The only issue before this Court is whether Hartford is entitled to seek attorney's fees under §627.428 for filing the instant declaratory judgment action. Whether Hartford is entitled to indemnification and/or subrogation for attorney's fees it may have incurred in defending Ryan in the underlying matter is simply not at issue.

Moreover, contrary to the position taken by Hartford, there is absolutely no correlation between Hartford's potential right of indemnification and/or

subrogation for paying defense costs that may have been owed by a CGL carrier (an issue that has not been decided) and Hartford's claim for attorney's fees under §627.428. The former is based on contract whereas the latter is based on statute. Thus, whether Continental had a contractual duty to defend Ryan in the underlying matter (an issue which remains in dispute) and whether Hartford is entitled to reimbursement for paying those purported defense costs, is independent from this litigation.[1] For this reason, Hartford's repeated statement that LMC, "does not dispute Hartford's entitlement to recovery of its attorney's fees it incurred in defending the underlying claims brought by the project owner against its principal, Ryan, and against the Hartford bond" (RB p.3) is neither correct nor relevant.

Despite the Surety's Protest, Florida Law Treats a Surety Performance Bond as a Form of Insurance.

Hartford goes to great length to distinguish a Surety Performance Bond from indemnity insurance.[2] LMC agrees that there are differences between a Surety Performance Bond and CGL insurance. Regardless, Hartford cannot credibly deny

[1] LMC, as the excess carrier, does not owe Ryan a defense obligation under Coverage A of the umbrella policy.

[2] The newly amended statute on bad faith provides that a Surety issuing a Payment or Performance Bond is not an insurer for purposes of bad faith. Facially, this codification of the "Dadeland issue" applies only to the construction or maintenance of "buildings" or "roadway projects." Because the construction of a golf course does not qualify as either, the door remains open whether §624.155 applies to the construction of a golf course.

that the Florida Legislature and the Florida Courts recognize a Surety Performance Bond as a type of insurance.

Florida Statute §624.03 defines "Insurer" to include: "Every person engaged as indemnitor, **surety** or contractor in the business of entering into contract of insurance or of annuity." Likewise §627.756 provides:

> Section 627.428 applies to suits brought by owners. . . 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 . . shall be deemed to be insureds or beneficiaries for the purpose of this section.

These statutes are consistent with the recognition by the Florida courts that a **surety is an insurer of the debt or obligation**. *A&T Motors, Inc. v. Roemelmeyer,* 158 So.2d 567 (Fla. 3rd DCA, 1963). *Plant City v. Scott*, 148 F.2d 953 (Fla. 5th DCA 1945). *Collins v. National Fire Insurance Company of Hartford,* 105 So.2d 190 (Fla. 2nd DCA 1958.)

Because the statute at issue in this appeal codifies a Surety as an "insurer," it is not "overly simplistic" for LMC to argue that for purposes of §627.428, Hartford is designated as an insurer. Consequently, the cases that LMC cited in its Initial Brief which prohibit an insurer from collecting fees under the statute are directly on point. Hartford has failed to distinguish them in a meaningful fashion.

Hartford has Failed to Identify any Means By which it is Entitled to Collect Fees Under the Statute

Hartford outlines three "positions" by which it claims it is entitled to "step into the shoes of Ryan" and seek fees under the statute: 1) as a third party claimant as Ryan's contractual and common law indemnitee; 2) as a first party claimant via equitable subrogation; and, 3) by assignment. As set forth below, none of the above will afford Hartford the relief it seeks.

Hartford is not a Third Party Claimant

In taking the position that it is a "third party claimant," Hartford completely ignores the body of Florida law which holds that third party beneficiaries of a liability policy are not entitled to attorney's fees under §627.428 where there is no assignment. *Pickett v. Woods,* 360 So.2d 45 (Fla. 4th DCA 1978). *Hartford Accident and Indemnity Company v. M-B Leasing,* 394 So.2d 561 (Fla. 3rd DCA 1981). *Safeco Insurance Company of America v. Albriza, 365 So. 804* (Fla. 4th DCA 1978).

Moreover, outside of the Second District's decision, Hartford fails to cite to any authority that would allow a third party claimant to "step into the shoes" of Ryan such that it is entitled to fees under the Statute. In support, Hartford raises its sword of "indemnification," however as explained by *Western World Insurance Company v. The Travelers Indemnity Company,* 358 So.2d 602 (Fla. 1st DCA

1978) and *American Home Assurance Company v. City of Opa Locka,* 368 So.2d 416 (Fla. 3rd DCA 1979), a contractual or implied right of indemnification does not confer a statutory right for attorney's fees.

Hartford commits the equivalent of legal contortionism, by arguing, *sans* authority, that the CGL policies provide coverage for Ryan's contractual liability, and, therefore, because Ryan entered into the GIA with Hartford and agreed to indemnify Hartford for attorney's fees, therefore, Hartford's attorney's fees qualify as a covered loss under the CGL policies. (RB 30-31). This argument is nonsensical and wholly unsupported. Hartford offers no authority that economic losses incurred for attorney's fees meets the definition of "property damage" under the policies. The fact that Ryan assumed a contractual obligation to indemnify Hartford for attorney's fees does not transform that obligation to a covered loss under a CGL policy as "property damage." This argument is without merit.

Equitable Subrogation

A contractual right of indemnification and/or subrogation does not transform Hartford into a first party claimant under Ryan's CGL policies. Although the Second District raises the potential for "first party claimant" status, as set forth in LMC's Initial Brief, a review of the authority cited by the Second District cannot stand up to scrutiny. In fact, a close review of *Argonaut Ins. Co v. Commercial Standard Ins. Co,* 380 So.2d 1066, (Fla 2nd DCA 1976) and *U.S. Fidelity & Surety*

Guar. Co v. N. Am. Steel Corp, 335 So.2d 18 (Fla. 2nd Dist. 1976) supports LMC's position on this issue.

Outside of the Second District's decision in *Ryan v. Continental,* 910 So.2d 298 (Fla. 2nd DCA 2005), which LMC distinguishes in its Initial Brief, the only additional authority that Hartford cites for the proposition that it qualifies as a "first party claimant" is *Thurston v. Int'l Fidelity Insurance,* 528 So.2d 128 (Fla. 3rd DCA 1988). This case stands for the proposition that the Surety is entitled to enforce its provision for attorneys against the contractor. The fact that Hartford has the right to seek indemnification from Ryan to recover its attorney's fees has no bearing on whether Hartford qualifies as a "first party claimant" under the CGL policies.

The lack of authority supporting Hartford's contention that it qualifies as a "first party claimant" under the CGL policies forces Hartford to argue that it is "self-explanatory" why a contractual right for indemnification and a contractual right for attorney's fees would translate the holder of that right into an insured or a first party complainant under a CGL policy. LMC disputes that such a finding is "self-explanatory." In order for an entity who is not a party to an insurance contract to seek "first party claimant" status under an insurance policy, that entity requires a legal mechanism to create that right.

The Only Avenue By Which Hartford Can Exercise Rights under §627.428 is by Assignment, However, Hartford did not have a Valid Assignment.

In its Response brief, for the first time, Hartford takes the position that it had an assignment of rights from Ryan.[3] LMC agrees that under the authority of *Roberts v. Carter*, 350 So.2d 78 (Fla. 1977), if Ryan had made a valid assignment of its post-loss rights under its insurance policies to Hartford, that Hartford could "step into the shoes" of Ryan and would be entitled to fees under the statute. However, as set forth in LMC's original motion, and as clarified by this Reply, Ryan did not make a valid assignment.

In support of its argument that it made a valid assignment, Hartford points to the language contained within the GIA. Significantly, the GIA does not reference insurance policies. Hartford argues that because Ryan's contract with 951 Holding included a requirement that Ryan carry insurance, that the aforementioned GIA can be read broadly to infer that Hartford assigned all rights it had in its insurance contracts to Hartford. It must be noted that Ryan's contractual obligation to procure insurance was a contractual duty not a right. Hartford cites to no case law that would allow a satisfaction of a contractual duty to qualify an assignment of right. More importantly, such a reading is inconsistent and contrary to Florida law.

[3] In its complaint for declaratory relief, Hartford identifies itself as only a "subrogee" and "indemnitee" of Ryan. (A7-13).

Florida Statute §627.422 "Assignment of Policies" provides that, "A policy may be assignable, or not assignable, as provided by its terms." Where an insurance policy contains a non-assignment clause, the clause is dispositive and a purported assignment of the policy is ineffective. *Lexington Insurance Company v. Simkins Industries Inc.*, 704 So.2d 1384 (Fla. 1998). Thus, §627.422 prohibits assignment of an insurance policy without the insurer's consent where the policy includes an unambiguous "no assignment" clause. *Classic Concepts, Inc.v. Poland*, 570 So.2d 311 (4th DCA 1990).

The LMC policy is a follow form policy to the underlying policy issued by Continental. The LMC policy provides that the insured, Ryan, must, "Comply with all the terms and conditions of any "underlying insurance." (R11: 104) The underlying policy issued by Continental includes an anti-assignment clause:

F. Transfer of Your Rights and Duties Under This Policy

> **Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured. (R11:17-102)**

Under the clear terms of the policy, Ryan, may not transfer its rights without the express, written consent of Continental and LMC. There is no evidence that Ryan secured written permission from either carrier before allegedly assigning its rights in the insurance contract to Hartford. Thus, at the time the GIA was executed, on or about August 1, 1994, even if this Court were to read the contract as broadly as

the Surety asks, any attempted assignment by Ryan of its rights in its insurance policies to the Surety was void as a matter of law.

The anti-assignment clause contained in the Continental policy is consistent with this Court's holding in *Roberts v. Carter,* 350 So.2d 78 (Fla. 1977). Although an insured cannot assign its rights under a contract where there is an anti-assignment clause, that clause does not bar an insured's assignment of an after loss claim. *Better Construction, Inc. v. National Union Fire Insurance Company of Pittsburgh,* 651 So.2d 141 (3rd DCA 1995). Once a valid assignment of an after loss claim is made, then the assignee may "step into the shoes" of the insured. However, the assignment cannot be made until after the loss has incurred, as explained by West's Florida Practice Series, Chapter 14. Assignment of Benefits:

> Where an insurance policy prohibits assignment it is essential to look at whether the assignment occurred after or before the loss. While an insurer may prohibit or limit assignment of policy rights or benefits which materially affect the risk, i.e., the insurer may prohibit the insured from assigning policy coverage to another insured who may be a higher risk of loss (see *Lexington, Inc. Co. v. Simkins Industries Inc.,* 704 So.2d 1384 (Fla 1998)), the insurer generally may not prohibit the assignment of claim rights to a loss **that has already occurred** – even if the policy contains a prohibition against assignment. *Id.* Since, as the Supreme Court has stated, "the purpose of a provision prohibiting assignment is simple – to protect an insurer from unbar gained for risk," *Id.* at 1386, a post-loss assignment would be permitted. **Once the loss has occurred the claimant may assign the claim for the insurance proceeds to a third party even without the consent of the insurer.** *Id.*

7 Fla. Practice. Motor Vehicle No-Fault Law (PIP) Sec. 14:2 (2006 Ed).

Ryan and the Surety executed the GIA on August 1, 1994. (App. 3) Ryan and 951 Holdings entered into the contract to build the golf course on November 29, 2000. The Surety places the alleged date of the "occurrence" in 2001. Thus, the document that the Surety purports to act as the assignment of rights, was executed six years before Ryan executed the contract to build the golf course and 7 years before the Surety alleges there was an "occurrence" under the policies.

The record is deafeningly silent on an after loss assignment from Ryan to Hartford. A third party lacking a valid assignment of policy coverage from the insured, is not entitled to attorney's fees under *Roberts v. Carter,* 350 So.2d 78 (Fla. 1977). *Safeco Insurance Company of America v. Albriza,* 365 So.2d 804 (4th DCA 1978). Where there is no assignment to the right to receive payment, there is no right to collect attorney's fees under §627.428. *USAA Casualty Insurance Company v. Romm,* 712 So.2d 405 (4th DCA 1998).

As further evidence that Ryan did not assign its after loss claim to Hartford, this Court may look to the point raised by Hartford in its Response brief: Ryan remains entitled to seek recovery for its attorney's fees in appealing this action under §627.428. (RB 2) As a general rule, an assignor retains no rights to enforce the contract after it has been assigned because an assignment vests in the assignee the right to enforce the contract. *Price v. RLI Insurance,* 914 So.2d 1010, 1013-1014 (Fla. 5th DCA 2005). The fact that Hartford takes the position that Ryan

remains entitled to collect fees under the statue supports a finding that Ryan did not assign any rights to Hartford.

As an alternate source of authority, Hartford cites to *All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So.2d 131 (Fla. 1972) for the proposition that the Surety is the implied assignee of Ryan, and, therefore, even though there is not a direct assignment, nevertheless, as a matter of equity, this Court should find that Hartford has an implied assignment.

The facts in this litigation are markedly different than those in *All Ways.* Hartford and Ryan are sophisticated entities well versed in contract and insurance. In contrast to a business whose specialty lies in repair, Hartford is a business whose specialty lies in insurance. Moreover, Hartford is designated by the Florida Insurance Code as an insurer against whom the attorney's fee statute applies.

Additionally, in *All Ways*, the jury heard testimony that the insurer gave Ms. Moore authority to hire All Ways to repair the fire damage. The Supreme Court states as a basis for its opinion, "[an implied contract] is the essence of what the jury found in the trial court upon which judgment was entered in All Ways Reliable's favor, followed by the allowance of attorney's fees."

Here, there are no factors that would justify an "implied assignment." At the time that Hartford paid the claim, both Hartford and Ryan knew that the insurers had disclaimed coverage. If Hartford had desired to "step into the shoes" of Ryan,

Hartford could have asked Ryan to provide it with a post-loss assignment of the claim. By failing to exercise this right, this Court should not, after the fact, read into this case an implied right of assignment.

The Western World Decision is the Better Reasoned Decision

Hartford cites to *Western World* as authority. Hartford agrees that the Third District understood and acknowledged the "special status of a surety." Given Hartford's concession that the Third District "got it right" with respect to the Surety, this Court should use that acknowledgment as support for a finding that the Second District fully analyzed the relationship of a Surety and, nevertheless, held that the Surety was not entitled to recover attorney's fees under the statute. Considering that Hartford has no contractual right to recover attorney's fees from the CGL insurers (because there is no valid assignment) and considering that Hartford does not qualify under the clear terms of the statute (Hartford is neither a "named insured" or a "named beneficiary of the insured") and considering that the statute specifically identifies Hartford as an entity against whom the statute applies, the Third District's decision is sound.

Hartford's attempt to distinguish *Western World* on the basis that it, "does not appear that the principals (Clark and Moore) and the Surety (Travelers) had entered into a written General Indemnity Agreement" is curious. In *Western World* the court held that the contract exclusion contained within the liability insurer's

policy (Western World) was not applicable because Clark and Moore's liability arose as a matter of law to the surety, as opposed to liability under a written contract. If Clark and Moore and Travelers had been operating under a written GIA, then, logically, the court may have applied the exclusion to bar coverage.

The decision that demands close scrutiny and is subject to question is the Second District's decision in *Ryan v. Continental*, 910 So.2d 298 (Fla. 2nd DCA 2005). The Second District's decision is reactionary rather than substantive. The Second District is concerned with the possibility that in the end, because of the language in the GIA, that Ryan could end up paying to have Hartford "carry the ball" whereas if Ryan had prosecuted the declaratory judgment action, and if Ryan had prevailed, that Ryan could pass on those losses to the CGL carriers. However, that concern overlooks the fact that Ryan and Hartford could have exercised the right of assignment to allow Hartford the right to "step into the shoes" of Ryan. The fact that Ryan and Hartford failed to exercise that right does not justify creation of new law.

CONCLUSION

Based upon the foregoing facts and authorities, Petitioner, Lumbermens Mutual Casualty Company respectfully submits that the decision of the Second District Court of Appeal issued herein should be reversed with respect to the application of Florida Statute §627.428, such that this Court should find that

should Hartford prevail in its declaratory judgment action against the CGL carriers, that Hartford is not entitled to fees and costs under Florida Statute §627.428. LMC asks this Court to affirm the correctness of the holding in *Western World*.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and _____copies of the **PETITIONER LUMBERMENS MUTUAL CASUALTY COMPANY'S REPLY BRIEF ON THE MERITS** of the Petitioner have been furnished by Federal Express this _____Day of February, 2006 to **THE SUPREME COURT OF FLORIDA,** Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; and a copy each has been furnished by regular U.S. Mail to Stephen Schember and Robin L. Henderson, Esquire, Shumaker, Loop and Kendrick, LLP, 101 E. Kennedy Blvd. Suite 2800, Tampa, FL 33602-5151, Attorneys for Hartford Fire Insurance Company, to Paul M. Woodson, Esquire, Adorno & Yoss, 350 E. Las Olas Boulevard, Suite 1700, Ft. Lauderdale, Fl 33301, Attorney for Ryan Incorporated Eastern; Kathleen Shanley, Esquire, Peterson Bernard, Post Office Drawer 14126, Fort Lauderdale, Florida 33302-4126, attorneys for Continental Casualty, Robert L. Donald, Esquire, Law Office of Robert L. Donald, 1375 Jackson Street, Site 402, Ft. Myers, FL 33901-2841, Co-Counsel for Lumbermens Mutual Casualty Company and Jonathan L. Gaines, Esquire, Russo Appellate Firm, P.A. 6101 Southwest 76th Street, Miami, Florida 33143.

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