In the Supreme Court of Florida

CASE NO. SC05-1935

CONTINENTAL CASUALTY COMPANY
and LUMBERMENS MUTUAL CASUALTY COMPANY

Petitioners,

v.

RYAN INCORPORATED EASTERN and
HARTFORD FIRE INSURANCE
COMPANY

Respondents.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER CONTINENTAL'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Petitioner Continental hereby adopts the Statement of the Case and Statement of the Facts contained in the Initial Brief of Petitioner Lumbermens Mutual Casualty Company.

A conformed copy of the Second District's opinion[1] is included in the Appendix to this brief. (A 1-6). With regard to the issue before the Court, the Second District stated:

> The Contractor and the Surety seek appellate attorney's fees under section 627.428, Florida Statutes (2000). The Primary Insurer and the Excess Insurer object to an award of fees to the Surety, citing *Western World Insurance Co. v. Travelers Indemnity Co.*, 358 So.2d 602, 604 (Fla. 1st DCA 1978). They argue that the Surety is not entitled to an award of attorney's fees under the statute because it is neither a named insured nor a named beneficiary under the CGL policies. As the insurers see it, the declaratory judgment litigation involves a dispute between insurance carriers concerning who bears the responsibility for the repair and replacement of defective construction, not a first party action by an insured against an insurer.
>
> We disagree. Where, as in this case, a surety properly makes payment to correct defective construction or to complete a construction project

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[1]The Second District's opinion is reported as *Ryan Incorporated Eastern v. Continental Casualty Company,*

910 So. 2d 298 (Fla. 2d DCA 2005)Ryan Incorporated Eastern v. Continental Casualty Company, 910 So. 2d 298 (Fla. 2d DCA 2005).

> undertaken by its principal, the surety becomes subrogated to the rights and remedies of its principal. *See* Argonaut Ins. Co. v. Commercial Standard Ins. Co., 380 So. 2d 1066, 1068 (Fla. 2d DCA 1980); *U.S. Fid. & Guar. Co. v. N. Am. Steel Corp.*, 335 So. 2d 18, 20 (Fla. 2d DCA 1976). It follows that the Surety is subrogated to any rights which the Contractor may have against its CGL carriers. See Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F.Supp.2d 1248, 1260 (M.D Fla. 2002). For this reason, we conclude that the Surety stands in the shoes of the Contractor as a first party claimant under the CGL policies. *See id.* As a first party claimant standing in the shoes of the Contractor, the Surety is entitled to an award of fees under the statute. Moreover, the Contractor executed a general indemnity agreement in favor of the Surety, which required it to indemnify the Surety for its court costs and attorney's fees. Thus a denial of fees to the Surety would lead to the Contractor's responsibility to indemnify the Surety for payment of its fees without the possibility of reimbursement from the Primary Insurer and the Excess Insurer. Such a result would be contrary to the goals of section 627.428. *See* Ins. Co. of N. Am. v. Lexow, 602 So. 2d 528, 531 (Fla. 1992) ("[T]he purpose of section 627.428 ... is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts."). Besides, the opposing view exalts form over substance. The Surety could have achieved the same outcome by arranging for the Contractor's attorney to carry the ball in the litigation.

> For these reasons, we grant the motion for appellate attorney's fees, conditioned upon the ultimate entry of judgment in favor of the Contractor and the Surety on remand. The circuit court shall also determine the amount of appellate attorney's fees. We certify that our holding that the Surety is entitled to an award of appellate attorney's fees against the Primary Insurer and the Excess Insurer is in direct conflict with the portion of the First District's decision in §627.428,

Fla. Stat.

Petitioner Continental filed its Notice to Invoke Discretionary Jurisdiction on October 13, 2005. On November 18, 2005 this Court issued an order

postponing a decision on jurisdiction and directing the Petitioners to file their initial briefs on the merits.

SUMMARY OF THE ARGUMENT

The Second District's opinion, deeming the surety to be an "insured" as a result of equitable subrogation, fails to adhere to the legal requirement that the attorney's fee statute, §627.428, must be strictly construed.

Hartford, the surety, is an "insurer"and is neither a "named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer," nor an assignee of the insured. As such, the surety does not come within the terms of the statute or Florida decisions applying the statute to assignees of the insured.

Florida law does not support the Second District's conclusion that the equitable subrogation doctrine can be employed to render the surety a "first party claimant" under the CGL policies and thus an "insured" for purposes of §627.428. Prior Florida decisions, including American Home Assurance, Co. v. City of Opa Locka, 368 So. 2d 416 (Fla. 3d DCA 1979) and *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*,

227 F.Supp. 2d 1248(M.D. Fla. 2002)Section 627.428 is not applicable in such actions between insurers.

Moreover, the Second District's determination that applying §627.428 according to its terms would "exalt form over substance" ignores both the legal requirement to strictly construe the attorney's fee statute and the ability of the surety and principal to structure their contractual relationships and business dealings as they deem appropriate.

Deeming subrogees such as the surety here to be "insureds" for purposes of §627.428 is within the province of the Legislature, not the courts. The First District's §627.428. Accordingly, this Court should reverse and disapprove of that portion of the *Ryan* decision awarding appellate attorney's fees to the surety, and should reaffirm the correctness of the holding in

At issue is a question of statutory interpretation, as to which the standard of review is *de novo*. Sullivan v. Fla. Dep't of Envtl. Prot., 890 So. 2d 417, 420 (Fla. 1st DCA 2004). Additionally, to the extent it is necessary to interpret the underlying contracts, the standard of review is also *de novo*. Whitley v. Royal Trails Property Owners' Ass'n, Inc., 910 So. 2d 381 (Fla. 5th DCA 2005).

ARGUMENT

A. The attorney's fee statute must be strictly construed.

Hartford's motion for appellate attorney's fees (A 14-21) was based upon §627.428(1), Fla. Stat., which provides:

> 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.

Under the "American Rule" attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-48 (Fla. 1985). It is well recognized that attorney's fees statutes must be strictly construed. *See, e.g.*, Dade County v. Pena, 664 So. 2d 959 (Fla. 1995); Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n, 539 So. 2d 1131, 1132 (Fla. 1989); *Roberts v. Carter,* 350 So. 2d 78 (Fla. 1977). Moreover, an award of fees to an insured is in the nature of a penalty against an insurer, and for that reason also, the authorizing statute, here *Equitable Life Assur. Soc. of U.S. v. Nichols,*

84 So. 2d 500 (Fla. 1956)*Nationwide Mutual Ins. Co. v. Nu-Best Diagnostic labs, Inc.*,

810 So. 2d 514, (Fla. 5th DCA 2002)

A surety is itself an "insurer," under well-settled Florida law. *See, e.g.*, Nichols v. Preferred National Ins. Co., 704 So. 2d 1371, 1373 (Fla. 1998)("[T]he term 'insurer' is clearly defined under the Florida Insurance Code to include a 'surety.' *See* §624.03."). Moreover, §627.756, Fla. Stat. makes it clear that attorney's fees are recoverable *from* a surety under*David Boland, Inc. v. Transcontinental Roofing Co.*,

851 So. 2d 724 (Fla. 2003)*Danis Industries Corp. v. Ground Improvement Techniques, Inc.*,

645 So. 2d 420 (Fla. 1994)

Hartford is plainly not a "named insured." (A 42, 61).

Nor is Hartford an "omnibus insured." An "ominbus insured" is an individual, for example a resident relative of a named insured, whose "rights are derived directly from his or her status under a clause of the insurance policy." State Farm Fire & Casualty Co. v. Kambara, 667 So. 2d 831, 833 (Fla. 4th DCA 1996). Hartford does not and cannot claim any rights derived directly from a clause of the CGL policies. Because Hartford is not a "named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer," Hartford is simply not covered by the terms of the statute.

Nor is Hartford an "assignee" of Ryan's claim, and, in seeking an award of appellate attorney's fees, it did not purport to be an assignee. (A 14-21). Recovery under *Roberts v. Carter*, 350 So. 2d 78, 79 (Fla. 1977); *All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So. 2d 131, 132 (Fla. 1972). However, the only assignment from Ryan to Hartford - which is set out in their indemnification agreement - was of Ryan's rights "in, arising from, or related to such Bonds [issued by Hartford], or any bonded or unbonded contracts..." (A 36).

There is no assignment by Ryan to Hartford of any claim or rights *under the CGL policies*, and thus no entitlement by Hartford to recover fees as an "assignee" of the insured. *See,* §627.428, the attorney's fees it expended in the action against American Home. The court noted that while *assignees* of insureds could recover under the statute, citing *Roberts, supra*, "**Travelers did not secure an assignment from the city or LeMeur of any rights either may have had against American Home.**" 368 So. 2d at 420 n. 6. Similarly here, there is no evidence of any assignment to Hartford of any rights Ryan may have had against the CGL carriers, and thus no ability to seek recovery of attorney's fees under

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[2]As detailed in the following section, in addition to the lack of "assignee" status *City of Opa Locka* also addressed the issue before the Court in this matter

The Second District deviated from established Florida law in holding that a performing surety acquires, via the equitable doctrine of subrogation, not only a stake in determining possible CGL coverage owed to its principal, but also the principal's status as an "insured" for purposes of the attorney's fee statute. Equitable subrogation does not confer "insured" status upon such a rival insurer, and the concept of "stepping into the shoes" of the principal is not so literally applied in the insurer versus insurer context as opposed to the more traditional subrogation context of the paying insurer stepping into the insured's shoes with regard to the principal's rights, remedies and obligations *as against the party who caused the loss.*

The inability to acquire "insured" status via subrogation was recognized in both *Western World Insurance Co. v. Travelers Indemnity Co.*, 358 So. 2d 602 (Fla. 1st DCA 1978). As detailed below, the Second District strayed from this precedent relying solely upon the federal case of *Auto Owners* simply dealt with the issue of standing, and did not award attorney's fees §627.428, as the discussion or even mention §627.428. There is, of course, a vast difference between having a

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and held that Travelers' status as a *subrogee* carried with it no entitlement to recover fees from American Home under §627.428.

stake in the determination of whether coverage is owed to the principal/indemnitor and being an "insured" for purposes of the attorney's fee statute, which statute is required to be strictly construed.

As noted above, the court in *City of Opa Locka* addressed the specific issue before this Court and, in addition to holding that Travelers had shown no right to recover as an "assignee," further held that to the extent Travelers became *subrogated* to the rights of its insured (the City) against American Home (the police officer LeMeur's insurer), such subrogation did not support a recovery of attorneys fees under *Western World Insurance Co. v. Travelers Indemnity Co.*, 358 So. 2d 602 (Fla. 1st DCA 1978), the decision as to which the Second District certified a direct conflict, stated that a surety who performs under its bond becomes subrogated to its principal's rights against the principal's CGL carrier. *Western World* reasoned that the principals "by paying a premium which resulted in the purchase of a liability insurance policy from Western World, in effect made themselves financially responsible to meet their obligations under the terms of the bond." 358 So. 2d at 604. The *Western World* court further opined that since "under the law of general suretyship...the surety, Travelers, may be indemnified from its principal...Travelers has the right to be subrogated to any rights which [the principals] have against their insurance carrier." *Id.*

Western World further recognized, despite the surety's "right to be subrogated" to its principals' rights against their insurer, that the surety is nevertheless not an "insured" entitled to an award of attorney's fees under *Western World*, the court applied the statute according to its terms and allowed attorney's

fees to the actual "insureds" - the surety's principals Clark and Moore - while simultaneously denying them to the subrogated surety, stating:

> Clark and Moore's petition for attorney's fees on appeal is granted and the cause remanded to the trial court for the assessment of an appropriate award. **Traveler's petition for fees is denied. We agree with the trial court that Travelers is neither an insured nor a named insured, as contemplated by Section 627.428, Florida Statutes (1975), entitling it to a fee**.

358 So. 2d 604.

The refusal of the *City of Opa Locka* and *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999). In *Dade County School Board* this Court set forth the requirements for equitable subrogation:

> Equitable subrogation is generally appropriate where: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) **subrogation would not work any injustice to the rights of a third party**.

731 So. 2d at 646. Moreover, "The right to subrogation is not absolute, but depends upon the equities and attending facts of each case." National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. KPMG Peat Marwick, 742 So. 2d 328, 332 (Fla. 3d DCA 1999) *citing* Dixie Nat'l Bank v. Employers Commercial Union Ins. Co., 463 So. 2d 1147 (Fla. 1985). It would indeed be

inequitable and unjust to reorder the contractual arrangements chosen and made by the parties themselves, particularly where the law already affords full protection to the surety through the ability to obtain indemnification agreements and assignments of rights from its principal, and allows for standing in a declaratory action against the CGL carrier, and protects the principal through the ability to obtain insurance, and to recover attorney's fees under *Casualty Indemnity Exchange v. Penrod Brothers, Inc.*,

632 So. 2d 1046 (Fla. 3d DCA 1994),

rev. denied 641 So. 2d 1344 (Fla. 1994)*Underwriters at Lloyds v. City of Lauderdale Lakes*,

382 So. 2d 702 (Fla.1980) *Fayad v. Clarendon National Insurance Company*,

899 So. 2d 1082, (Fla. 2005) *Acuity v. Planters Bank, Inc.*,

362 F.Supp.2d 885 (W.D. Ky 2005) *Argonaut Ins. Co. v. Commercial Standard Ins. Co.*, 380 So. 2d 1066, 1068 (Fla. 2d DCA 1980) and §627.428 or attorney's fees.

United States Fidelity and Guaranty Company, v. North American Steel Corp., 335 So. 2d 18 (Fla. 2d DCA 1976), merely stands for proposition that, to extent of any payment properly made by a performance bond surety to correct defects in piping supplied by a materialman for a construction

project, the surety was subrogated to rights and remedies of its principal, the buyer of piping, *as against the materialman,* the party who had caused the loss. Again there was no discussion of the principal's insurance carrier, or of §627.428 or attorney's fees.

The Second District opined that since the surety becomes subrogated to the rights of its principal, "It follows that the Surety is subrogated to any rights which the Contractor may have against its CGL carriers" and that:

> For this reason, we conclude that the Surety stands in the shoes of the Contractor as a first party claimant under the CGL policies. As a first party claimant standing in the shoes of the Contractor, the Surety is entitled to an award of fees under the statute.

(A 5). The sole authority cited to support the "first party claimant" conclusion is *Transamerica Insurance Co. v. Barnett Bank of Marion County, N.A.*,

540 So. 2d 113 (Fla. 1989) *Auto Owners* characterization of the surety as a "first party claimant" has no direct support, and *Auto Owners* is the sole support relied upon by the Second District in taking the "first party claimant" characterization substantially further to give the surety "insured" status under *Western World* , *City of Opa Locka*, and the legion of cases requiring that the attorney's fee statute must be strictly construed).

There is no insurer/insured relationship between CGL carrier and surety created by the equitable subrogation doctrine under these circumstances. The CGL carriers did not cause the loss and the Second District's contortion of the

subrogation doctrine to deem the surety an "insured" serves to emphasize the fact that the true nature of the dispute is one between two insurers as to which owes coverage. As discussed next, in the insurer versus insurer context there is no entitlement to attorney's fees under

The true nature of the dispute between the surety and the CGL carrier is one between adverse insurers over which one owes coverage, not a "subrogation" action in which the surety should be deemed an "insured" under the CGL policies. Such disputes between two insurers do not qualify for recovery of attorney's fees under §627.428. *See, e.g.,* Fireman's Fund Ins. Co. v. Tropical Shipping and Constriction Co., Ltd., 254 F.3d 987, 1011 (11th Cir. 2001)(where true nature of dipute is betwen insurers as to which must provide coverage §627.428 is inapplicable); Utica Mut. Ins. Co. v. Pa. Nat'l Mut. Cas. Ins. Co., 639 So. 2d 41, 43 (Fla. 5th DCA 1994)(insurer does not qualify as 'any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer' and "Since the true nature of this action was, or should have been, one for declaratory relief solely between two insurers rather than a subrogation action, there was no basis for the attorney's fee award.").

In Smith v Conlon, 355 So. 2d 859 (Fla. 3d DCA 1978) a driver, Smith, and his insurance company, American Bankers, cross-claimed against the owner of the

car Smith was driving and the owner's insurance company, Allstate, to establish that Allstate owed the coverage for the lawsuit brought by the party injured by the car. 355 So. 2d at 860. It was determined that Allstate did indeed owe the coverage, and both Smith and American Bankers sought attorney's fees under *Central Mutual Insurance Company v. Michigan Mutual Liability Company,*

285 So.2d 684 (Fla.3d DCA 1973)§627.428 in action between two insurers as to which owes coverage).

F. The Second District's determination that applying §627.428 according to its terms would "exalt form over substance" ignores both the legal requirement to strictly construe the attorney's fee statute and the ability of the surety and principal to structure their contractual relationships and business dealings as they deem appropriate.

The Second District's reasoning that, because Ryan had agreed to indemnify Hartford, including for any fees, denying the applicability of §627.428 would "exalt form over substance" because "[t]he Surety could have achieved the same outcome by arranging for the Contractor's attorney to carry the ball in the litigation," (A 5) does not change the fact that subrogees are still not within the terms of the statute and it is up to the Legislature to place them there, not the courts, who are required to strictly construe the statute.

Moreover, the indemnification agreement between principal and surety was a voluntary business arrangement entered into by Ryan in order to facilitate its

ability to obtain its construction contract with the project owner, together with all of the benefits that go with such a contract. If the parties had intended to come within the attorney's fee statute, then they could, in fact, have had Ryan "carry the ball." Or, their general indemnity agreement, or the underlying settlement agreement with the project owner, could have contained a provision assigning Ryan's rights under its CGL policies to Hartford in the event Hartford was called upon to perform under its bond. Since these sophisticated business entities made no such arrangements - despite their presumptive knowledge of the law limiting the reach of *Western World* and *City of Opa Locka,* that subrogees such as the surety here are not "insureds" and not within the terms of §627.428.

CONCLUSION

On the basis of the foregoing, the Second District in *Ryan* incorrectly held that a surety in the posture of Hartford is entitled to recover attorney's fees from the CGL carriers under the provisions of *Western World* decision correctly applied the statute according to its terms and recognized that a subrogated surety is not an "insured" and has no right to fees under §627.428. Accordingly, this Court should reverse and disapprove of that portion of the *Ryan* decision awarding appellate attorney's fees to the surety, and should reaffirm the correctness of the holding in *Western World.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the forgoing Initial Brief on the Merits was sent by U.S. mail this 22nd day December, 2005 to: William M. Martin, Esquire, Peterson Bernard, Post Office Drawer 14126, Fort Lauderdale, Florida 33302; Paul M. Woodson, Esquire, Adorno & Yoss, 350 East Las Olas Boulevard, Suite 1700, Ft. Lauderdale, Florida 33301; Steven G. Schember, Esquire, Shumaker, Loop & Kendrick, LLP, 101 Kennedy Boulevard, Suite 2800, Tampa, Florida 33602; Janelle K. Christensen, Esquire, Tressler, Sodestrom, Maloney & Priess, 100 Village Green Drive, Suite 200, Lincolnshire, Illinois 60069; Robert L. Donald, Esquire, Law Office of Robert L. Donald, 1375 Jackson Street, Suite 402, Ft. Myers, Florida 33901.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.