IN THE SUPREME COURT OF FLORIDA

SC05-1935

LT NO. 2DO4-896

CONTINENTAL CASUALTY COMPANY
and LUMBERMANS MUTUAL CASUALTY COMPANY,

Petitioner,
v.

RYAN INCORPORATED EASTERN, and
HARTFORD FIRE INSURANCE COMPANY,

Respondents.

ANSWER BRIEF OF RESPONDENT HARTFORD FIRE INSURANCE COMPANY

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Hartford Fire Insurance Company ("Hartford"), generally does not dispute the "Statement of the Case and Facts" set forth in the Initial Brief on the Merits of Petitioner, Continental Casualty Company ("Continental").[1]

However, Continental fails to point out that the attorney's fee award by the Second District Court of Appeal ("Second District") also includes an award of fees to Ryan Incorporated Eastern ("Ryan"), the principal on Hartford's bond and the named insured under two Comprehensive General Liability ("CGL") policies issued by Continental and Lumbermens Mutual Casualty Company.[2] It is undisputed that Ryan, as named insured, is entitled to recover its attorney's fees

[1] Petitioner, Lumbermens Mutual Casualty Company ("Lumbermens"), a co-defendant/appellant of Continental, has also appealed. Continental's appeal, case number SC05-1935, is pending separately from Lumbermens' appeal, case number SC05-1816. The issues on appeal are identical as to both Petitioners, and on January 9, 2006, Continental filed a Motion to Consolidate its appeal with Lumbermens' appeal. As of the date of the service of this brief, the two cases have not been consolidated. Thus, Hartford has filed a separate Answer Brief in each case.

[2] The Second District's opinion is reported as *Ryan Incorporated Eastern v. Continental Casualty Company,* 910 So. 2d 298 (Fla. 2d DCA 2005).

from Continental pursuant to Section 627.428, Florida Statutes (2005). For this reason, Continental has not, and indeed could not, have appealed the award of fees to Ryan by the Second District.

Furthermore, Continental also fails to note that, as held by the Second District, under the terms of paragraph III the General Indemnity Agreement ("GIA") (A:36) entered into between Ryan and Hartford, Ryan must indemnify Hartford for any and all attorney's fees and costs Hartford incurs in this litigation, including all appellate attorney's fees. It is Ryan, the named insured under Continental's policy, that will ultimately be responsible for all attorney's fees incurred by either Ryan or Hartford in this action.

SUMMARY OF THE ARGUMENT

Continental appeals the Second District's holding that Hartford, a surety, may recover appellate attorney's fees from Continental, its principal's CGL insurer, under Section 627.428, Florida Statutes, if judgment is entered for Hartford on remand of this action to the trial court.[3] Continental does not dispute Hartford's entitlement to recovery of the attorney's fees it incurred in defending

[3] Section 627.428(1) states: "(1) 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."

the underlying claims brought by the project owner against its principal, Ryan, and against Hartford's bond. Therefore, the only issue is whether Hartford is entitled to recovery of its attorney's fees incurred in this indemnification action against Continental.

Contrary to Continental's suggestion in its Initial Brief, this case is not merely a battle between two insurance companies over which owes coverage. Hartford is not an "insurer" in this case. Rather, as the Second District correctly held, Hartford, a surety that has fully performed its bond obligations, is subrogated to any rights that its principal, Ryan, has against Continental. As such, Hartford stands in Ryan's shoes as a first party claimant under Continental's CGL policy and is entitled to fees under Section 627.428.

The purpose of Section 627.428 is to discourage insurance companies from contesting valid claims, and to reimburse insureds, their assignees, and beneficiaries for their attorney's fees incurred when they must enforce their contract with the insurance company, which is precisely what occurred in this case. Continental issued a CGL insurance policy to Ryan, but wrongfully refused to defend or indemnify Hartford or Ryan for a covered loss. Hartford and Ryan were forced to file this declaratory action to enforce Continental's obligations under the CGL policy. Pursuant to the statute, Continental must now reimburse Ryan, its

insured, and Hartford, as Ryan's subrogee and assignee, for their attorney's fees upon entry of a judgment against Continental on remand.

This Court has three alternate grounds upon which to affirm the Second District's decision. First, Hartford is subrogated as a matter of law to Ryan's rights against Continental and "stands in the shoes" of Ryan for purposes of recovery of attorney's fees against Continental. Second, pursuant to the GIA, Hartford is an assignee of Ryan's rights under the CGL policy. Under Florida law, an insured's assignee can recover its attorney's fees pursuant to Section 627.428. Third, Hartford is a third party claimant against Ryan by virtue of Ryan's obligations to indemnify Hartford contained in the GIA. Under the GIA, Hartford is entitled to recover from Ryan all the damages it has paid and all attorney's fees it has incurred. Ryan's liability to Hartford for these damages and attorney's fees is covered by Continental policy.

Continental does not dispute the Second District's holding that Ryan, its named insured, is entitled to attorney's fees under Section 627.428, conditioned upon the ultimate entry of judgment in favor of Ryan and Hartford. Continental also does not dispute that Hartford is entitled to recover all its attorney's fees from Ryan pursuant to the GIA. Since Ryan, the named insured, is liable to pay Hartford its attorney's fees in this action, it would be a total windfall for Continental not to have to either reimburse Ryan for those fees or to pay them

directly to Hartford. In short, as held by the Second District, to deny Hartford its attorney's fees in this case is to "exalt form over substance."

ARGUMENT

THE APPELLATE COURT CORRECTLY GRANTED HARTFORD AND RYAN'S MOTION FOR APPELLATE ATTORNEY'S FEES UNDER SECTION 627.428, FLORIDA STATUTES, BECAUSE RYAN IS THE NAMED INSURED IN THE CGL POLICIES ENTITLED TO RECOVERY OF ITS FEES UNDER SECTION 627.428, BECAUSE HARTFORD STANDS IN THE SHOES OF RYAN AS A FIRST PARTY CLAIMANT AND AN ASSIGNEE, AND BECAUSE HARTFORD IS ENTITLED TO RECOVERY OF ITS ATTORNEY'S FEES AS A THIRD PARTY CLAIMANT.

I. Standard of Review

Statutory construction is a question of law reviewable *de novo*. *Bruner v. GC-GW, Inc.*, 880 So. 2d 1244, 1246 (Fla. 1st DCA 2004). Likewise, a lower court's interpretation of a contract is subject to the *de novo* standard of review. *Beach Street Bikes, Inc. v. Bourgett's Bike Works, Inc.*, 900 So. 2d 697, 699 (Fla. 5th DCA 2005).

An appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the lower court, but rather, must affirm the judgment if it is legally sustainable on any grounds. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). A respondent, in arguing for an affirmance, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. *Id.*

II. Hartford is not an "Insurer" in this Action

As a threshold matter, it is important to clarify that Hartford is a surety, and is not an insurer. Continental argues that a surety is an insurer, and that there is no distinction between the two concepts. However, courts, both in and outside of Florida, have traditionally recognized the fundamental differences between a surety and an insurer. The United States Supreme Court has plainly stated, "suretyship is not insurance." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 n. 19 (1962). Performance and payment bonds are not insurance policies, and the principal on such bonds is not an "insured." *See e.g., Western World Insurance Company v. The Travelers Indemnity Company,* 358 So. 2d 602, 604 (Fla. 1st DCA 1978) ("The distinctions between a general liability insurance policy and a surety penal bond are obvious. 'The usual view, grounded in commercial practice, (is) that suretyship is not insurance.'") (quoting *Pearlman*, 371 U.S. 132, 140 n. 19); *Shannon R. Ginn Constr. Co. v. Reliance Ins. Co.*, 51 F. Supp. 2d 1347, 1350-53 (S. D. Fla. 1999) (holding that a principal on a performance bond is not an "insured," and stating that "suretyship and insurance have similar characteristics and sometimes are discussed as related concepts; nonetheless, they are distinct.").

It is true, as Continental notes, that for some purposes, a surety is loosely categorized under the general heading of "insurer" under the Florida Insurance Code (the "Insurance Code"). *See* § 624.03, Fla. Stat. ("'Insurer' includes every

person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity."); § 624.606, Fla. Stat. ("'Surety insurance" is defined as "[a]" contract bond…or a performance bond, which guarantees the execution of a contract."). Despite these general provisions of the Insurance Code, Florida state and federal courts consistently recognize the numerous differences between liability insurance and suretyship, and do not mechanically apply the Insurance Code's provisions in the surety context.[4]

In *Dadeland Station Associates, Limited. v. St. Paul Fire & Marine Insurance Company*, 16 Fla. L. Weekly Fed. D 497 (S.D. Fla. 2003), a performance bond obligee sued the surety for bad faith in refusing to settle claims against the bond issued to the obligee's contractor. *Id.* The issue was whether a

[4] *See e.g., David Boland Incorporated* v. *Trans Coastal Roofing Company,* 851 So. 2d 724, 727 (Fla. 2003) (Wells, J. concurring) ("It is my view that the role of such a contract surety is sufficiently distinct from the role of insurers that issue insurance policies so that the attorney fee liability of a construction contract surety needs to be covered by a separate statute."); *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 383 F.3d 1273 (11th Cir. 2004) (noting that neither the Florida courts nor the Florida legislature has specifically stated whether the surety bond obligee is considered an "insured" for purposes of bringing suit under Section 624.155(1)(b)(1), Florida Statutes, which provides civil penalties for bad faith refusal to pay claims, and certifying the question to this Court). Rather, courts determine on a case by case basis whether a Section of the Insurance Code applies in the surety context. *See e.g., Shannon R. Ginn Construction*, 51 F. Supp. 2d at 1351-52 (holding that, under Florida law, the principal in a surety agreement is not an "insured" within the meaning of Section 624.155(1)(b)(1), Florida Statutes); *DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland*, 597 So. 2d 248 (Fla. 1992) (holding that Section 627.428 did not apply against a surety issuing a transfer-of-lien bond).

performance bond surety's alleged refusal to perform its contractual duties could be characterized as a bad faith refusal to "settle claims" under the Insurance Code's civil remedy provision in Section 624.155(1)(b)(1).[5] *Id.* at 9. The plaintiff in *Dadeland* argued, as does Continental in this case, that the provisions of Section 627.155 applied to the surety since a "surety" was included as an "insurer" under the Insurance Code.

The United States District Court for the Southern District of Florida, after analyzing the distinctions between insurance and suretyship, rejected the attempt of plaintiff in *Dadeland* to interchangeably define "suretyship" as "insurance" for all purposes of the Insurance Code. The Southern District stated:

> There is nothing in the plain language of the bad-faith insurer statute, or the case law on the provision, that clearly indicates that a performance bond owner's contractual rights under a performance bond qualify as "claims" on a surety within the meaning of Section 624.155(1)(b)(1).

Id. at 8-10.[6] The court declined to decide the issue, but concluded that the obligee's bad faith claim failed on other grounds. *Id.* at 10; 15.

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[5] Section 624.155(1)(b)(1), Florida Statutes, states that an insurer can be held liable for "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests."

[6] The Southern District cited its previous holding, in *Shannon R. Ginn Construction*, 51 F. Supp. 2d at 1352-53, that a principal in a surety agreement was not an "insured" within the meaning of Section 624.155(1)(b)(1), Florida Statutes. *Dadeland*, 16 Fla. L. Weekly Fed. D 497 at 10.

The plaintiff appealed the Southern District's dismissal of its bad faith claim against the surety to the United States Court of Appeals for the Eleventh Circuit. *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 383 F.3d 1273, 1276 (11th Cir. 2004). Similar to Continental in this case, the plaintiff argued that the plain language of Section 624.155(1)(b)(1) indicates that a surety is subject to a bad faith suit because it applies to acts of an insurer, and the Florida legislature has defined "insurer" to include sureties. *Id.* (citing § 624.03, Fla. Stat.). The sureties argued that Section 624.155(1)(b)(1) only applied to "insureds" under Florida law, and that neither the Florida courts nor the Florida legislature had specifically stated whether the obligee of a surety bond is considered an "insured" for purposes of bringing suit under that section. *Id.* The court agreed with the sureties, and certified the question to this Court of whether an obligee is an "insured" under Section 624.155(1)(b)(1), such that the obligee has a right pursuant to that section to sue the surety for bad faith refusal to settle claims. *Id.*

On June 14, 2005, the Florida legislature solved the *Dadeland* question by amending Section 624.155(1)(b)(1), to include the following subsection: "(9) A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (1)."

§ 624.155(9), Fla. Stat. (2005).[7] Therefore, sureties are now expressly omitted from the scope of Section 624.155(1)(b)(1).

Like the foregoing courts and the Florida legislature, this Court should also consider the law of suretyship, the clear differences between "suretyship" and "insurance," case law construing the rights and duties of sureties, the purposes of Section 627.428, and the particular facts of this case, and affirm the ruling of the Second District that Hartford is entitled to its attorney's fees. This Court should reject Continental's overly simplistic and unsupported argument that because a "surety" is included in the Insurance Code's definition of "insurer," Hartford is not entitled to its attorney's fees.

A. The Unique Contractual Relationships of a Surety

Suretyship is a contractual tripartite relationship in which one party (the surety) guarantees to another party (the obligee) that a third party (the principal) will perform a contract in accordance with its terms and conditions. FLORIDA CONSTRUCTION LAW AND PRACTICE §8.2 (Fla. Bar, 4th ed., 2003) (citing *Shannon*

[7] The amendment to Section 624.155 was part of Senate Bill 652. The Senate's Judiciary Committee drafted a Senate Staff Analysis and Economic Impact Statement for Senate Bill 652, in which it did not specifically address Section 624.155(9), but did discuss the distinctions between a "customary insurance agreement" and "surety insurance." Fla. Staff Analysis, S.B. 652 (April 25, 2005). The Judiciary Committee wrote, "Although surety is oft times referred to in law as 'surety insurance,' legal commentators have explained that this is somewhat of a misnomer, as it does not insure the purchaser of the surety, i.e., the general contractor, against claims such as poor workmanship; rather, the surety insurance protects the obligee against the general contractor's default." *Id.* at 2, n.4.

R. Ginn Construction, 51 F. Supp. 2d at 1350). The surety contracts to answer for the debt, default, or miscarriage of the principal. *Shannon R. Ginn Construction*, 51 F. Supp. 2d at 1350 (citing *Meyer v. Building & Realty Serv. Co.*, 196 N.E. 250, 253-54 (Ind. 1935)). In effect, suretyship is a form of credit enhancement. 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 12.9 (2005). The surety lends its financial strength and credit to the principal on the condition that, if the surety has to satisfy the principal's debt or default, the principal will indemnify the surety for its losses and expenses. FLORIDA CONSTRUCTION LAW AND PRACTICE § 8.2 (Fla. Bar, 4th ed., 2003); *Western World*, 358 So. 2d at 604. The core purpose of the suretyship agreement is to insulate the obligee from the risk of a default by the principal. *Shannon R. Ginn Construction*, 51 F. Supp. 2d at 1350 (citing *Transamerica Premier Ins. Co. v. Brighton School Dist. 27J*, 940 P.2d 348, 353 (Colo. 1997)). To secure its indemnification rights, a surety normally requires the principal to execute a general indemnity agreement as a condition precedent to issuing the bonds.

Unlike suretyship, insurance is a two-party contract in which the insurer agrees to indemnify the insured against loss, damage, or liability arising from an unknown or contingent event that arises as a result of the insured's negligence. For losses covered under the policy, the insurer has promised to defend and indemnify the insured from the loss for which the insured will be liable to a third party. *See*

Shannon R. Ginn Construction, 51 F. Supp. 2d at 1350; *Western World*, 358 So. 2d at 604; FLORIDA CONSTRUCTION LAW AND PRACTICE § 8.2 (Fla. Bar, 4th ed., 2003).

B. The Rights and Remedies of a Surety

A surety that satisfies the debt or default of its principal has a variety of remedies, including the following: (1) common law indemnification from the principal for all damages it suffers as a result of the principal's default; *Pearlman*, 371 U.S. at 235; *Western World*, 358 So. 2d at 604; *Finkelstein v. Keith Fabrics, Inc.*, 278 F.2d 635 (5th Cir. 1960); (2) contractual indemnification from the principal based upon the general indemnity agreement, including indemnity for all of the surety's payments and attorney's fees incurred as a result of issuing the bond or enforcing the indemnity agreement; *Revenue Markets, Inc. v. Amwest Sur. Ins. Co.*, 35 F. Supp. 2d 899 (S.D. Fla. 1998); *Thurston v. International Fidelity Insurance Co.*, 528 So. 2d 128 (Fla. 3d DCA 1988); (3) assignment in the general indemnity agreement of the principal's rights and claims arising from any contracts, *Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A.*, 540 So. 2d 113, 115 (Fla. 1989); (4) equitable subrogation to all the obligee's rights; *Pearlman*, 371 U.S. at 235; and (5) equitable subrogation to any of the principal's rights against its liability insurance carriers. *Western World*, 358 So. 2d at 604; *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1260 (M.D. Fla. 2002).

C. Suretyship and Insurance Distinguished

Unlike a surety, a liability insurer has neither a common law nor contractual right to indemnification from the insured. *See Shannon R. Ginn Construction*, 51 F. Supp. 2d at 1350; *Western World*, 358 So. 2d at 604; *Dadeland Station Associates, Ltd. v. St. Paul Fire & Marine Ins. Co.*, 16 Fla. L. Weekly Fed. D 497, 8 (S.D. Fla. 2003). A liability insurer owes a fiduciary and contractual duty to defend and cover its insured. Unlike a liability insurer, a surety has no duty to defend its principal. *Id.* at 1352. In fact, the general indemnity agreement requires the principal to defend and hold harmless the surety from any bond claims. Thus, an insured looks to its insurer for protection, whereas a surety looks to the principal for protection and indemnification. *Western World*, 358 So. 2d at 604; *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1260 (M.D. Fla. 2002); 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 12.9, n.3 (2005).

The equitable subrogation rights of sureties and insurers also differ. Equitable subrogation is not created by contract, rather it arises as an operation of law and substitutes one person in the place of another with respect to the other's lawful claim or right. *See* RESTATEMENT OF THE LAW (THIRD) OF SURETYSHIP & GUARANTY § 28 (ALI 1996). A surety's equitable subrogation rights arise once it makes payment on a performance or payment bond. *Transamerica*, 540 So. 2d at 115. In enforcing its equitable right to reimbursement, the surety stands in three

sets of shoes. *Id.* First, the surety stands in the shoes of the bond obligee to the extent of performance or payment. Second, the surety stands in the shoes of the principal as to all receivables due to the principal. Third, the surety stands in the shoes of the laborers and materialmen who the surety has paid. *Id.* at 115-16.[8]

Most significant to this case, the surety's equitable subrogation right to receivables due to the principal is not limited to any certain creditor under Florida law. Thus, a surety can stand in the principal's shoes to pursue *any* of the principal's receivables for reimbursement. In this case, the Continental policy proceeds are a receivable due Ryan for its claim arising from a covered loss, assuming certain facts are established on remand to the trial court. Hartford stands in Ryan's shoes in pursuing reimbursement from the Continental policy.

In contrast, an insurer's equitable subrogation rights are much more limited under Florida law. An insurer is only equitably subrogated to "any right of action that the insured may have against the third person whose negligence or wrongful

[8]Additionally, The surety's equitable subrogation rights to receivables or withheld contract funds have priority, even over a creditor bank with a prior perfected security interest, bankruptcy trustees, and government tax liens. *See* FLORIDA CONSTRUCTION LAW AND PRACTICE § 8.79 (citing *Transamerica*, 540 So. 2d at 117 (bank); *Fidelity & Deposit Co. of Maryland v. New York City Housing Authority*, 241 F.2d 142 (2nd Cir. 1957) (tax lien); *Pearlman*, 371 U.S. at 235 (bankruptcy trustee)). As this Court explained in *Transamerica*, "The interests of all concerned parties, whether they be contractors in default, nonsurety assignees, owners, or other obligees, are best served by prompt performance by the surety." *Transamerica*, 540 So. 2d at 117.

act caused the loss." *National Union Fire Ins. Co. of Pittsburgh, PA v. KMPG Peat Marwick*, 742 So. 2d 328, 332 (Fla. 3d DCA 1999). The very limited equitable subrogation rights of an insurer are far different in scope and nature than the broad rights of a surety set forth above. Sureties, both in Florida and elsewhere, regularly exercise their far more expansive equitable subrogation rights.

III. The Policies Behind Section 627.428 Will Not Be Served by Denying Hartford its Attorney's Fees in this Case

Continental argues, overly simplistically, that because Section 624.03 of the Insurance Code includes "surety" within the definition of "insurer," Hartford is therefore an "insurer" for the purposes of Section 627.428, and not entitled to recover its attorney's fees from its fellow "insurer," Continental. Not only is this argument flawed because it ignores the fundamental differences between insurance and suretyship discussed in Section II, above, but also because it totally contradicts the purposes behind the enactment of Section 627.428.

Under Florida case law, Section 627.428 is a "one-way street," allowing insureds, their assignees, and beneficiaries to recover attorney's fees when they prevail against an insurer, but prohibiting recovery by the insurer if it prevails. *See, e.g., McCarthy Brothers Company v. Tilbury Construction, Inc.*, 849 So. 2d 7, 11 (Fla. 1st DCA 2003); *Smith v. Conlon*, 355 So. 2d 859, 860 (Fla. 3d DCA 1978). According to Florida state and federal courts, the legislative purpose of Section 627.428 is to discourage insurance companies from contesting valid

claims, and to reimburse insureds for their attorney's fees incurred when they are compelled to defend or sue to enforce their insurance policies. *Danis Industries Corp. v. Ground Improvement Techniques*, 645 So. 2d 420, 421 (Fla. 1994); *Insurance Company of North America* v. *Lexow*, 602 So. 2d 528, 531 (Fla. 1992); *Fireman's Fund Insurance Co. v. Tropical Shipping and Construction Co. Ltd.*, 254 F.3d 987, 1010 (11th Cir. 2001). The statute penalizes litigious insurers for the wrongful refusal to pay policy proceeds to their insureds. *Equitable Life Assur. Soc. of U.S. v. Nichols*, 84 So. 2d 500, 502 (Fla. 1956); *Nationwide Mutual Ins. Co. v. Nu-Best Diagnostic labs, Inc.*, 810 So. 2d 514, 516 (Fla. 5th DCA 2002). As set forth below, these statutory purposes would be wholly frustrated by denying Hartford (and for all practical purposes, Ryan) its attorney's fees in this case.

This is not a case in which Hartford is defending a claim for wrongful refusal to pay or perform pursuant to a bond. If Hartford prevailed in that scenario, it would not be entitled to attorney's fees under Section 627.428, because the statute flows only in favor of a prevailing claimant against the bond. *Danis Industries*, 645 So. 2d at 421 (Fla. 1994) (holding that a surety is not entitled to attorney's fees under Section 627.428 when it prevails against a bond claimant).[9]

[9] Certain bond claimants are entitled to attorney's fees against sureties under Section 627.428. Part XII of the Code is entitled the "Surety Insurance Contract." Part XII includes Section 627.756, which expressly made Section 627.428 applicable to suits *against* sureties by specified bond claimants, as follows:

Hartford is not an "insurer" that is denying coverage under its bonds. On the contrary, Hartford has fully performed and paid its bond obligations.

In this case, Hartford is the claimant against Continental's policy. The issue at trial was whether Continental wrongfully refused to defend and provide coverage to Ryan. The Second District has already ruled that there is coverage under the Continental policy for the damages incurred by Hartford and Ryan, assuming certain facts are established at trial. Once those facts are established, and judgment is entered against Continental, Continental should be liable to Hartford and Ryan for their attorney's fees in this litigation.

The purposes of Section 627.428 are achieved by allowing Hartford, not just Ryan, to recover its attorney's fees as a penalty to Continental for wrongfully withholding the proceeds of its policy. Otherwise, Continental will largely escape the statutory penalty, and receive a completely undeserved windfall merely because Hartford has "carried the ball" in this litigation for Ryan.

> (1) 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.

Section 627.756 is further indication that the Florida legislature recognizes the distinctions between sureties and insurers in the Insurance Code.

IV. Continental's Cases Regarding Actions Between Insurers Are Inapplicable

Continental notes that Section 627.489 is inapplicable to disputes between two insurers over which owes coverage for a loss claimed by a claimant against their respective policies. (IB:19-21). Continental argues that this case is really a dispute between two insurers, Continental and Hartford; and thus, Florida law bars Hartford from recovering its attorney's fees under Section 627.428. In support, Continental cites the following cases: *Fireman's Fund Insurance Co. v. Tropical Shipping and Construction Co. Ltd.,* 254 F.3d 987 (11th Cir. 2001)*; Utica Mutual Insurance Company v. Pennsylvania National Mutual Casualty Insurance Company*, 639 So. 2d 41 (Fla. 5th DCA 1994)*; Smith v. Conlon*, 355 So. 2d 859 (Fla. 3d DCA 1978); *Central Mutual Ins. Co. v. Michigan Mutual Liability Co.*, 285 So. 2d 684 (Fla. 3d DCA 1983). These cases are inapposite to this case.

None of the above cases cited by Continental involves a dispute between a surety and an insurer. As discussed above, this case involves a claim by a named insured (Ryan) and its surety (Hartford) against a liability insurer (Continental). The above cases might be applicable to deciding a dispute between Continental (Ryan's excess insurer) and Continental (Ryan's primary insurer), but have no application at all to this case.

For example, *Utica Mutual* was a dispute between a primary insurer and an excess insurer as to their respective liabilities in a suit brought against their mutual

insured. 639 So. 2d at 42. At trial, a jury returned a verdict in favor of the excess insurer. *Id.* The court awarded the excess insurer its attorney's fees pursuant to Section 627.428. *Id.* The Fifth District Court of Appeal of Florida found that the trial court erred in awarding attorney's fees to the excess insurer because the excess insurer did not qualify as "any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer." *Id.* The Fifth District explained that the case was not a subrogation action; rather, the insurers were "simply seeking a declaratory judgment of their respective obligations under the insurance policies." *Id.*

Unlike Hartford, the excess insurer in *Utica Mutual* did not have any assigned or subrogated rights against the primary insurer. Thus, the excess insurer had no standing under Section 627.428 to recover its attorneys fees, even though it received a judgment against the primary insurer. *See also, Fireman's Fund,* 254 F.3d at 1011 (dispute between two insurers over which owed coverage for their insured's loss, where neither insurer held any assigned or subrogated rights against the other's policy); *Smith,* 355 So. 2d at 859 (same).

Unlike the insurers in the above cases, Hartford is not arguing that its bonds do not "cover" Ryan or the obligee, and that the Continental policy does. Hartford's bonds are not insurance policies. Indeed, Hartford has already paid out under its bonds on behalf of Ryan and is now seeking to enforce Ryan's rights to

coverage under Continental's policy. As set forth in the next section, Hartford's position in this case is totally different from the positions of the insurers in the cases cited by Continental.

V. Hartford is Entitled to Recovery of its Attorney's Fees in this Action Because of its Unique Standing as a Surety

Continental does not dispute, as it cannot in light of the holdings of the Florida cases on which it relies, that it is liable for Hartford's attorney's fees incurred in defending against the underlying claims brought by the project owner against Ryan and against Hartford on its bonds. However, Continental argues that it is not liable for Hartford's attorney's fees incurred in establishing its right to indemnification from Continental in this action, relying primarily on cases applicable only to insurers. In this case, Hartford occupies three unique positions, which insurers do not occupy: (1) first party claimant against Continental's policy standing in the shoes of Ryan through equitable subrogation; (2) first party claimant against Continental's policy as an assignee of Ryan's claims against Continental's policies; and (3) third party claimant against the Continental's policy as Ryan's contractual and common law indemnitee.

A. Hartford's Status as Ryan's Equitable Subrogee Entitles it to Recovery of its Attorney's Fees in this Action

The GIA obligates Ryan to pay Hartford's fees in pursuing this claim. Paragraph III of the GIA states:

> The Indemnitors will indemnify and hold the Surety harmless from all loss, liability, damages and expenses including, but not limited to, court costs, interest and attorney's fees, which the Surety incurs or sustains (1) because of having furnished any Bond, or (2) because of the failure of an Indemnitor to discharge any obligations under this Agreement, or (3) in enforcing any of the provisions of this Agreement.

(A:3). In this matter, the Second District held that Hartford, both at common law and by virtue of the GIA, stands in the shoes of Ryan as a first party claimant under the Continental's policy, and thus, is entitled to an award of fees under Section 627.428. *Ryan Incorporated*, 910 So. 2d at 301. The Second District explained that where, as in this case, a surety properly makes payment to correct defective construction or complete a construction project undertaken by its principal, the surety becomes subrogated to the rights and remedies of its principal. *Id.* at 300 (citing *Argonaut Ins. Co. v. Commercial Standard Ins. Co.*, 380 So. 2d 1066, 1068 (Fla. 2d DCA 1980); *U.S. Fidelity & Sur. Guar. Co. v. N. Am. Steel Corp.*, 335 So. 2d 18, 20 (Fla. 2d DCA 1976)). The court concluded, "It follows that the Surety is subrogated to <u>any</u> rights which the Contractor may have against its CGL carriers." *Id.* (citing *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1260 (M.D. Fla. 2002)) (emphasis added). The Second District's well-written opinion, and the cases upon which it relies, are consistent with established jurisprudence on suretyship. Even *Western World* holds that a

surety is subrogated to "any rights" that the principal has against its insurance carrier. *Western World*, 358 So. 2d at 604.

Continental argues that the Second District in this matter and the *Auto Owner's* court were incorrect in holding that Hartford is subrogated to "any rights" of Ryan, and that Hartford's right to subrogation is limited to "the extent of the performance or payment." (IB:18). However, Hartford's "performance or payment" *included* Hartford's payment of attorney's fees in this action. Ryan agreed in the GIA to indemnify Hartford for costs and attorney's fees Hartford sustains (1) because of having furnished the bonds; (2) because of the failure of Ryan to discharge any obligations under the GIA; or (3) in enforcing any of the provisions of the GIA. Hartford incurred attorney's fees in this litigation clearly because of having furnished the bonds, because of Ryan's failure to indemnify and hold Hartford harmless, and in enforcing its indemnification rights under the GIA. Hartford is entitled to reimbursement pursuant to the GIA for any payments Hartford made in a good faith belief that it was required to pay, including attorney's fees. *See Thurston v. Int'l Fidelity Ins. Co.*, 528 So. 2d 128, 129 (Fla. 3d DCA 1988).

Continental argues that the Second District's conclusion that the Hartford became a "first party claimant" against Continental as a result of subrogation departs from the traditional rule that an insurer who pays on behalf of a contractor

"becomes subrogated to the right of the contractor against the parties responsible for causing the loss." (IB:15) (citing *Casualty Indemnity Exchange v. Penrod Brothers, Inc.*, 632 So. 2d 1046 (Fla. 3d DCA 1994); *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005)). However, both *Penrod* and *Fayad*, which Continental cites in support of this argument, involve insurers whose equitable subrogation rights are much more limited than those of sureties. *See, e.g., Transamerica*, 540 So. 2d at 115 (stating that a surety stands in the shoes of the principal as to all receivables due to the principal). *Cf. KMPG Peat Marwick*, 742 So. 2d at 332 (stating that an insurer is equitably subrogated to "any right of action that the insured may have against the third person whose negligence or wrongful act caused the loss").

Continental also asserts that the Second District's characterization of Hartford as a "first party claimant" against Continental's policy was unprecedented. (IB:16). *Ryan Incorporated*, 910 So. 2d at 300 (citing *Auto Owners*, 227 F. Supp. 2d at 1248 (holding that "[a]s an assignee or subrogee [the surety] stands in [the principal's] shoes as a first party claimant" against the CGL policy)). However, this argument places undue emphasis on nomenclature. It is undisputed that Hartford "stands the shoes" of Ryan in this matter. Ryan is a first party claimant on the policy. It is self-explanatory that a party standing in Ryan's

shoes would assume the same status as Ryan as a first party claimant when asserting Ryan's claim against the policy.

B. Hartford's Status as Ryan's Assignee Entitles it to Recovery of its Attorney's Fees in this Action

Continental argues that Ryan did not assign or otherwise grant Hartford any contractual rights or interests under Continental's policy, and therefore, did not grant any corresponding rights to seek attorney's fees under Section 627.428. (IB:8).

It is undisputed that an assignee of an insurance claim stands in the shoes of the insured and is entitled to recover attorney's fees under Section 627.428 if the assignee prevails in an action against the insurer to enforce the policy. (IB:8); *All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So. 2d 131, 132 (Fla. 1972). *See also, Roberts v. Carter*, 350 So. 2d 78, 79 (Fla. 1977) ("Award of attorney's fees from insurer is available only to contracting insured, insured's estate, specifically named policy beneficiaries, and third parties who claim policy coverage by assignment from insured."). In *All Ways Reliable*, this Court held:

> Under the broad interpretations which this Court has given Section 627.0127 [now Section 627.428], it would appear to follow that an assignee of an insurance claim stands to all intents and purposes in the shoes of the insured and logically should be entitled to an attorney's fee when the assignee sues and recovers on the claim.

Id. (Emphasis added).

Ryan unequivocally assigned to Hartford all its rights arising from any contracts, bonded or unbonded. Paragraph VII of the GIA states, in pertinent part:

> With respect to any Bond issued on behalf of and Indemnitor, all Indemnitors assign, transfer and convey to the Surety:
>
> A. All rights of the Indemnitors in, arising from, or related to such Bonds or any bonded or unbonded contracts or any extensions, modifications, alterations or additions thereto;

(A:36) (emphasis added).

In this case, the bonded contract on the underlying construction project required Ryan to maintain the Continental policy, insuring both Ryan and the project owner. (R:II:153) Hartford, as assignee of all rights under that bonded contract, is entitled to coverage under the Continental policy.

Furthermore, it is "hornbook law" that an insurance policy is a contract. *See e.g.*, 30 FLA. JUR. 2D INSURANCE § 1 ("insurance is a contract"). Thus, the Continental's policy is a contract, and was not excluded from the broad assignment in the GIA of Ryan's rights arising from unbonded contracts. Ryan's claim against Continental's policy is a right arising from an unbonded contract, which Ryan assigned to Hartford.

Continental's brief did not cite to any case law or record support for its argument that Ryan did not assign its claim against the Continental policy in Paragraph VII of the GIA. Nor does Continental argue that its policy prohibits

Ryan from assigning its claims against the policy. Moreover, Continental has not cited to any case law that holding that a surety cannot recover under Section 627.428 as an assignee.

Even if this Court determines that Paragraph VII of the GIA is not a valid assignment of Ryan's claims against the Continental policy, it may nonetheless award Hartford its fees based upon an implied assignment of Ryan's claim against Continental. *All Ways Reliable*, 261 So. 2d at 132. In *All Ways Reliable*, this Court affirmed an award of attorney's fees under Section 627.428 to a house repair company against the homeowner's fire insurer. After fire damaged the insured's home, the insured agreed to have the fire damage repaired by the repair company, upon the insurer's approval. However, the insurer later denied the insured's claim for fire loss under the policy. The repair company sued the insured and insurer for its services and attorney's fees. The insured alleged that the insurer was liable for the work done, but the insurer denied liability on the ground that the insured failed to file a proper claim of loss. *Id.*

The repair company received a jury verdict against the insurer, and the trial court awarded it attorney's fees under Section 627.0127 (now Section 627.428). The district court reversed the award of fees, reasoning: (1) the repair company was not a named insured or beneficiary under the policy; and (2) the repair

company's suit was based upon an implied contract for the work done and not "on the insurance policy." *Id*.

This Court reversed the district court and reinstated the attorney's fee award. As this Court explained, it was established in the trial court that an implied contract existed in favor of the repair company "which logically included an assignment of [the insured's] fire claim loss against her insurance company" to the repair company. *Id.* This Court continued:

> Under such circumstances it is **highly technical and unrealistic** to take the view that F.S. Section 627.0127 [now Section 627.428], F.S.A., does not authorize an attorney's fee award for [the repair company]. [The repair company] was found by implication of the related circumstances to be the assignee of the insured Elsie Moore's loss claim against the insurance company; and having successfully sued the insurance company which denied the claim for the amount representing the fire loss, was entitled concomitantly to the attorney's fees.

Id. (Emphasis added). In reinstating the fee award to the repair company, this Court added that doing so was consistent with the purpose of Section 627.0127 (now Section 627.428), which is to discourage insurance companies from contesting the valid claims of insureds. *Id.*

Hartford is in the position of the repair company in *All Ways Reliable.* Hartford performed under its bonds on Ryan's behalf, and Ryan was obligated to reimburse and indemnify Hartford for its payments. Under the GIA and by implication under the circumstances, Hartford was an assignee of Ryan's loss

claim against Continental. It would be "highly technical and unrealistic" to take the view that Section 627.428 does not authorize fees for Hartford.

C. Hartford's Status as a Third Party Claimant Against the Policy Entitles it to Recovery of its Attorney's Fees in this Action

As Hartford set forth in its Motion for Attorney's fees, in addition to standing in the shoes of Ryan as a first party claimant against Continental's policy, Hartford also sued Continental as a third party claimant against the policy pursuant to its contractual and common law right to indemnification. (A:19-20).

Under the GIA, Ryan must indemnify Hartford for *all* its damages and attorney's fees incurred as a result of Hartford having issued its bonds. Continental's policy provides coverage for Ryan's agreement in the GIA to indemnify Hartford for its attorney's fees in this litigation. *See* (R:VI:999) (Hartford's Memorandum in Support of its Motion for Summary Judgment). Coverage A in Continental's policy is not limited to just physical property damages. The policy also covers damages "because of" a covered "property damage." Ryan's obligation to perform under the GIA, including indemnifying Hartford for its attorney's fees incurred in the underlying litigation and in this litigation, arose "because of" a covered "property damage," assuming certain facts are established on remand to the trial court. (A:45).

In the "contractual liability exclusion," Continental's policy excludes coverage for contractual liability "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." (A:45). However, exception (1) to this exclusion provides coverage for contractual liability that "the insured (Ryan) would have in the absence of the contract or agreement." (A:45).

Ryan is contractually liable to Hartford under the GIA for all damages, costs, and attorney's fees incurred by Hartford in this litigation. As discussed above, Ryan would also be liable to Hartford under the common law for these amounts. *See e.g.*, RESTATEMENT OF THE LAW, SURETYSHIP AND GUARANTY (THIRD), § 21 (1995); *Transamerica Premium Ins. Co. v. Calvary Constr. Inc.*, 552 So. 2d 225, 227 (Fla. 5th DCA 1989), *cert denied*, 563 So. 2d 635 (Fla. 1990); *Western World*, 358 So. 2d at 604. Accordingly, under the Continental policy, the fact that there is also contractual liability under the GIA does not preclude coverage because the liability exists even in absence of the GIA. Therefore, Continental's policy provides coverage for Ryan's contractual liability under the GIA for all of Hartford's attorney's fees in this litigation.

VI. *Western World*, 358 So. 2d 602, 604 (Fla. 1st DCA 1978), the Case Certified as in Being in Conflict with the Second District's Decision in this Action, was Wrongly Decided

Western World is the only case Continental relies upon that applies to sureties, which is why the Second District in this matter acknowledged direct conflict with *Western World*, 358 So. 2d 602, 604 (Fla. 1st DCA 1978). Hartford respectfully submits that the court in *Western World*, without explanation or reason, reached the wrong conclusion regarding the surety's entitlement to attorney's fees pursuant to Section 627.428, and requests that this Court affirm the Second District's well-reasoned decision in this matter.

In *Western World*, the First District Court of Appeal explained in detail many of the important differences between suretyship and insurance. *Id.* The First District held that under the general law of suretyship, the surety was entitled to indemnification from its principal for amounts it paid to a third party under a performance bond. *Id.* The First District also held that the surety had the right to be subrogated to "any rights" that the principal had against its insurance carrier. *Id.*

The First District further held that the principal, which had apparently "carried the ball" in defending both it and the surety in the underlying litigation, could recover its attorneys fees incurred in defending the claims both against it and against the surety in that underlying litigation. *Western World* further found that

the principal was entitled to its fees in pursuing its coverage claims against its insurer pursuant to Section 627.428, but with no analysis and without citing any authority, denied fees to the surety, stating, "We agree with the trial court that [the surety] is neither an insured nor a named insured, as contemplated by Section 627.428, Florida Statutes (1975), entitling it to a fee." *Id.* With respect, it is submitted that because of this last ruling, *Western World* is internally contradictory and wrongfully decided. *Western World* properly documents the fundamental differences between sureties and insurers, properly recognizes the rights of sureties that do not exist in favor of insurers, properly establishes the surety's right to be subrogated to all the principal's rights against the principal's insurer, but, without explanation, then comes to the inconsistent and illogical conclusion that "all the principal's rights" apparently does not include the surety's right to be subrogated to the principal's rights pursuant to Section 627.428 against the insurer.

Importantly, *Western World* cited to no authority for its denial of the surety's fees pursuant to Section 627.428. In contrast, the Second District did rely on authority in reaching its holding, i.e., *Argonaut, U.S. Fidelity*, and *Auto Owners* and the cases cited therein. These cases apply the traditional principles of equitable subrogation—that a surety who pays or performs on its bonds stands in the shoes of its principal and is entitled to "all rights" of its principal in seeking reimbursement.

In addition, the facts of *Western World* are significantly different from the facts of this case. In *Western World*, it does not appear that the principal and the surety had entered into a written GIA. In this case, as the Second District noted, "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." *Ryan Incorporated*, 910 So. 2d at 301. Therefore, Ryan is contractually obligated under the GIA to indemnify Hartford for its attorney's fees, in addition to payments Hartford made under the bond.[10] Thus, in contrast to what Continental argues, Hartford's right to indemnification is not limited to the amounts it paid to complete the project. Hartford's right to indemnification *includes* the attorney's fees has incurred, in addition to other payments it made.

Additionally, this case is also appears to differ from *Western World* because in *Western World* it appears that the surety had not received an assignment from its principal of any rights. Ryan, on the other hand, executed the GIA, which assigned all its rights arising out of any contract to Hartford. Ryan's rights against Continental's policy were not excluded from this assignment. It is clear under Florida law that an insured's assignee is entitled to attorney's fees incurred in obtaining a judgment against the insured. *See e.g.*, *All Ways Reliable*, 261 So. 2d at 132.

[10] Moreover, the contractual liability of Ryan for Hartford's attorney's fees is covered under Continental's policy, as discussed in Section C, *infra*.

For all the foregoing reasons, Hartford respectfully submits that *Western World* was wrongly decided, and alternatively, is inapposite to this case, and requests that this Court affirm the Second District's holding that Hartford is entitled to its attorney's fees incurred in this litigation.

VII. The Florida Second District Court of Appeal Correctly Found that Continental's Arguments Exalt Form Over Substance

In this appeal, Continental seeks to avoid the penalty of Section 627.428 for insurers who wrongfully refuse payment of policy proceeds. As the Second District stated, the 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 must sue to enforce their insurance contracts. *Ryan Incorporated*, 910 So. 2d at 301. The Second District noted that Ryan executed the GIA in favor of Hartford, which requires Ryan to indemnify Hartford for all of its court costs and attorney's fees. The court explained that if Hartford is denied recovery of its fees from Continental, Ryan would be left with the responsibility of indemnifying Hartford for payment of the fees without the possibility of reimbursement from Continental. The Second District wisely reasoned that such a result is contrary to the purpose of Section 627.428, and that Continental's position "exalts form over substance" because Hartford could have achieved the same result by having Ryan's counsel "carry the ball" in this litigation.

Once again, the Second District's reasoning simply makes common sense. Continental is clearly liable to Ryan for Ryan's attorney's fees in this case. Ryan is clearly liable to Hartford for Hartford's attorney's fees incurred in pursuing the identical claims against Continental that Ryan is pursuing. If Hartford is denied its attorney's fees, Continental will escape the full penalty that the Florida legislature intended pursuant to Section 627.428, resulting in an undeserved and wholly unjustifiable windfall to Continental.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Second District's holding that Hartford is entitled to recover from Continental its attorney's fees incurred in this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to: Jonathan L. Gaines, Esquire, 6101 Southwest 76th Street, Miami, Florida 33143; Robert L. Donald, Esquire, Law Office of Robert L. Donald, 1375 Jackson Street, Suite 402, Fort Myers, Florida 33901-2841; Janelle K. Christensen, Esquire, Tressler, Sodestrom, Maloney & Priess, 100 Village Green Drive, Suite 200, Lincolnshire, Illinois 60069; William M. Martin, Esquire, Peterson Bernard, 707 Southeast 3rd Avenue, 5th Floor, P.O. Drawer 14126, Fort Lauderdale, Florida 33302-4126; and Paul M. Woodson, Adorno & Yoss, 350 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, Florida 33301on January 26, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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