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
REPLY BRIEF ON THE MERITS

Respectfully submitted,

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ARGUMENT

A. Under established Florida law, subrogation does not render the surety/insurer an "insured" under its principal's CGL policies for purposes of Florida Statute §627.428.

Conspicuously absent from Hartford's argument is any discussion, or even acknowledgment of, the bedrock principles that attorney's fees statutes must be strictly construed and that 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); Roberts v. Carter, 350 So. 2d 78 (Fla. 1977). To claim statutory entitlement to attorney's fees, Hartford ignores the authorities mandating the strict construction of §627.428, relies instead upon immaterial distinctions between "sureties" and "insurers" to argue that this matter does not involve a dispute between two insurers, and makes the new argument that it ought to now be deemed an "assignee" of the actual insured, and therefore entitled to fees under authorities applying §627.428 to assignees. All of Hartford's arguments are unavailing, and provide no support for the Second District's deviation from the established rule that sureties proceeding under a subrogation theory against their principal's insurer are not "insureds" entitled to fees under §627.428.

Tellingly, Hartford does not even *mention* American Home Assurance, Co. v. City of Opa Locka, 368 So. 2d 416 (Fla. 3d DCA 1979), a decision discussed extensively in Continental's Initial Brief. (Continental's Initial Brief, pp 4, 9, 10, 11, 12, 13, 18, 22). Hartford ignores *City of Opa Locka* despite, or perhaps because of, that decision's treatment of both of Hartford's core positions here: (1) as to the argument that "subrogee" status carries with it entitlement to §627.428 attorney's fees, the statute does not so provide ("Section 627.428 **does not apply...this case was not brought "under" American Home's policy with Opa Locka, but was rather based upon the city's and Travelers' indemnity and subrogated rights against American, as the insurer for LeMeur.**" 368 So. 2d at 420); (2) as to any argument that a claim for fees can be made as an "assignee," there must be an assignment ("**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.).[1]

By the same token, Western World Insurance Co. v. Travelers Indemnity Co., 358 So. 2d 602 (Fla. 1st DCA 1978) is not, as Hartford suggests, "inconsistent

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[1]The lack of any assignment here is addressed in the following section of this Reply Brief.

and illogical." (Answer Brief, p 31). *Western World* simply follows the statute. At the core of Hartford's position is the idea that, despite the requirement for strict construction, the statutory language really does not matter because Hartford believes the statue *ought* to cover a surety in Hartford's position. Of course, as previously argued, that type of statutory change is for the Legislature to determine, and may not be simply "read into" the statute by the courts.

Hartford's argument for entitlement to fees under *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*,

227 F. Supp. 2d 1248 (M.D. Fla. 2002) *Transamerica Insurance Co. v. Barnett Bank of Marion County, N.A.*,

540 So. 2d 113 (Fla. 1989) Transamerica Insurance Co. v. Barnett Bank of Marion County, N.A., 540 So. 2d 113 (Fla. 1989) for the proposition that, "At common law, a surety who performs or pays on behalf of an obligee steps into the shoes of the obligee to the extent of the performance or payment." 227 F.Supp. 2d at 1259.

In *Auto* §627.428. This unprecedented extension of the surety's status deviates from both the terms of the statute and established Florida law (including *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 the CGL carrier and surety created by the equitable subrogation doctrine under these circumstances. The "surety" functions undertaken by Hartford do not so transform the subrogation doctrine as applied here where the surety, in fulfilling its obligations under the bond, is performing as an "insurer." *See, e.g.,* §627.756, Fla. Stat.[2] The true essence of the action brought by Hartford remains one between two insurers as to which must bear the ultimate responsibility. And, as detailed next, the terms of Hartford's indemnity agreement with its principal also do not provide any basis for Hartford to claim "insured" status, and particularly not as an "assignee."

B. Hartford is not an "assignee"

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[2] Underscoring its own role as an "insurer," Hartford emphasizes that Continental "does not dispute" in this appeal Hartford's "entitlement" to recover fees Hartford expended in defending the *underlying* claims brought by the project owner against Ryan. Those underlying expenditure have no bearing upon, or logical connection to, the fees Hartford incurred on its own behalf in this declaratory action against the CGL carriers.

Recognizing that it does not fall within the statutory language of §627.428, and that the decisional authorities do not support an attorney's fee award to an equitable subrogee such as Hartford**,** Hartford's Answer Brief now asserts for the first time that Hartford is also an "assignee" of Ryan's rights under the Continental policy. (Answer Brief, pp 4, 19, 20, 24-28).

Hartford is not Ryan's assignee. If there was a valid assignment, this case would not create any conflict with existing authority, since it is well established that valid assignees of insureds may recover attorney's fees pursuant to §627.428. *See, e.g.*, *Roberts v. Carter*, 350 So. 2d 78, 79 (Fla. 1977).

Under the Hartford/Ryan indemnification agreement the only assignment from Ryan to Hartford was of Ryan's rights "in, arising from, or related to such Bonds [issued by Hartford], or any bonded or unbonded contracts..." (A 36). Hartford's various theories as to why it should be deemed an "assignee" of the Continental policy all fail.

First, Hartford suggests that because the underlying construction contract (the **"bonded contract"**) required Ryan to maintain CGL insurance, Hartford as an assignee of Ryan's *rights* under the construction contract somehow also received assignment of *coverage* under Continental's policy. (Answer Brief, p 25).The

requirement to maintain insurance, however, was a *duty* Ryan had under the construction contract, not a right. It is a *non sequitur* to say that the assignment of Ryan's rights under its construction contract with the project owner somehow translates into coverage under the policy which Ryan had a duty to maintain, and Hartford cites no authority for this unusual argument. The basic rules of contract construction do not support such a strained interpretation. *See*, Ospina-Baraya v. Heiligers, 909 So. 2d 465, 472 (Fla. 4th DCA 2005)(unambiguous language is to be given a realistic interpretation based on the plain, everyday meaning conveyed by the words of the agreement; a court must construe a contract in a manner that accords with reason and probability, and avoid an absurd construction). *See also*, Acuity v. Planters Bank, Inc.,362 F.Supp. 2d 885, 889 (W.D. Ky. 2005) ("As a general proposition, therefore, the surety that performs a contract, acquires all the contractor's *rights* **under that construction contract**").

Hartford further argues, again without citation of any authority, that Ryan's insurance policy with Continental is one of the **"unbonded contracts"** referred to in the indemnification agreement, because it was "not excluded" from the "broad assignment" of rights arising from "unbonded contracts." (Answer Brief, p 25). Such an argument is at odds with Florida law, with the terms of the Continental policy and with Hartford's own allegations.

Section 627.422, Fla. Stat. expressly provides that the terms of an insurance policy determine whether or not the policy is assignable:

> Assignment of policies.– **A policy may be assignable, or not assignable as provided by its terms**.

Here, the terms of the Continental CGL policy, as permitted by §627.422, prohibit any assignment in the absence of the written consent of the insurer:

> **Your [Ryan's] rights and duties under this policy may not be transferred without our [Continental's] written consent** except in the case of death of an individual insured. (A 57).

Accepting for the moment Hartford's new argument that the language of the indemnity agreement was at least *intended* by Hartford and Ryan to be an assignment of the Continental policy or any rights thereunder (a contention belied by both the parties' dealings and their allegations herein, as detailed below), the absence of Continental's *written consent* to such an assignment is fatal to Hartford's "assignee" status. There is no allegation or evidence in the record of any consent by Continental to such an assignment.

This Court applied §627.422 to precisely the same "no assignment without written consent" provision contained in Continental's policy in Lexington Ins. Co. v. Simkins Industries, Inc., 704 So. 2d 1384 (Fla. 1998). In *Simkins*, in exchange for a loan from Simkins to purchase a hotel, WAK executed security agreements and

mortgages and agreed to keep the hotel insured and to assign all policies to Simkins. 704 So. 2d at 1385. After WAK's insurers refused to fully cover a fire loss, Simkins sought to sue the insurers as an "assignee" of the policies. Like Continental's policy here, the policy in §627.422, the nonassignment clauses were "dispositive" and the purported assignment was "ineffective":

> [B]ased on the unambiguous language of the statute and the policy, we hold that the policy's nonassignment clauses are dispositive and WAK's purported assignment of the policy was ineffective.

704 so. 2d at 1386. Of course in *Simkins*, the parties' "ineffective" effort to accomplish an assignment was explicit but unapproved. Here, Hartford relies upon its own ambiguous (not explicit) language to argue that an assignment was intended, and similarly fails to establish any valid, consented-to, assignment.

In *Simkins,* this Court expressly approved Classic Concepts, Inc. v. Poland, 570 So. 2d 311, 313 (Fla. 4th DCA 1990), which also held that §627. 422 prohibits the assignment of an insurance policy without the insurer's consent where the policy includes an unambiguous "no assignment" clause. In *Maryland Casualty Co. v. Murphy,*
342 So. 2d 1051 (Fla. 3d DCA)
cert. denied, 352 So. 2d 173 (Fla. 1977)§627.428.

Moreover, it is settled that an assignment transfers *all the rights of the assignor* in the thing assigned. Peyton v. Horner, 2006 WL 305434 (Fla. 2d DCA

2006); Lawyers Title Ins. Co., Inc. v. Novastar Mortgage, Inc., 862 So. 2d 793, 798 (Fla. 4th DCA 2004); Rose v. Teitler, 736 So. 2d 122 (Fla. 4th DCA 1999). Because an assignment vests in the assignee the right to enforce the contract, an assignor retains no rights to enforce the contract after it has been assigned. Price v. RLI Ins. Co., 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005); Lauren Kyle Holdings, Inc. v. Heath-Peterson Construction Corp., 864 So. 2d 55, 56 (Fla. 5th DCA 2004). Thus, if there were truly an assignment of Ryan's rights in the Continental policy to Hartford, then there would be no rights left in Ryan, and no basis for Ryan to be party to this action as an "insured," or for Hartford's alleged status to be limited to "subrogee" and "indemnitee."

Axiomatically, this Court cannot rewrite Hartford and Ryan's contract for them. *See, e.g.,* Barakat v. Broward County Housing Authority, 771 So. 2d 1193 (Fla. 4th DCA 2000)(it is not the role of the court to rewrite the parties' contract); *RX Solutions, Inc. v. Express Pharmacy Services, Inc.*, 746 So. 2d 475, 477 (Fla. 2d DCA 1999)(courts are powerless to rewrite contracts to make them more advantageous for one of the contracting parties). There is nothing in the terms of the indemnification agreement that reveals any intent by Ryan to assign its rights under the Continental policy. *Garcia v. Tarmac American, Inc.,* 880 So. 2d 807, 809 (Fla. 5th DCA 2004)(intent of the parties to an unambiguous contract must be

determined from only the four corners of the document);*All Ways Reliable Building Maintenance, Inc. v. Moore*,

261 So. 2d 131 (Fla. 1972) §627.422. In *All Ways Reliable* there was an assignment "found by implication of the related circumstances." 261 So. 2d at 132. Where, as here, insurer and insured have contracted that there can be no assignment without consent, there cannot be an assignment by implication, and under §627.422 and *Simkins*, any purported assignment is ineffective. There is no basis for Hartford to now deem itself an "assignee" and no grounds for recovery under §627.428 on this basis.

C. The argument 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.

Hartford and Ryan entered into their contractual relationship with presumptive knowledge of all of the Florida law discussed above, and in the Initial Brief, which prohibits Hartford's recovery under *Barnett v. Pan American Surety Co.*,

139 So. 2d 192 (Fla. 3d DCA 1962)*Western World* and *City of Opa Locka* were decided, and has not seen fit to act to add subrogees to the scope of §627.428. Under the "American Rule" there is no contractual or statutory basis supporting the award of attorney's fees to Hartford as Ryan's surety/insurer, and subrogee.

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 §627.428. The First District's *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.*

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief on the Merits was sent by U.S. mail this 21st day February, 2006 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.