

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID BOLAND, INCORPORATED,

Appellant,

Case No. SC02-2210

Lower Tribunal No. 01-17246

vs.

INTERCARGO INSURANCE COMPANY,

Appellee.

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ON A QUESTION CERTIFIED BY THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

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AMICUS CURIAE BRIEF OF THE SURETY ASSOCIATION  
OF AMERICA IN SUPPORT OF APPELLEE,  
INTERCARGO INSURANCE COMPANY

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## **INTEREST OF THE SURETY ASSOCIATION OF AMERICA**

The Surety Association of America (“SAA”) is a voluntary, non-profit corporation with more than 550 member companies. Collectively, these companies write the overwhelming majority of performance and payment bonds furnished on construction projects in the United States and in Florida. SAA also collects statistics on premiums and losses on fidelity and surety insurance and files those statistics with the insurance departments of all 50 states. SAA is licensed by the Florida Department of Insurance as a rating, advisory and statistical organization.

SAA actively participates with Congress and the various state legislatures in the development of legislation related to fidelity and surety bonds. SAA and its members have an interest in ensuring that sureties are not exposed to risks they did not contemplate or accept when issuing bonds as sureties for construction contractors.

## **STATEMENT OF FACTS**

David Boland, Incorporated (“Boland”) was the prime contractor on a United States Navy construction project in Key West, Florida. Boland subcontracted a part of its work on the project to Trans Coastal Roofing Company, Inc. (“Trans Coastal”). Trans Coastal furnished a bond guarantying its performance of the subcontract. Intercargo Insurance Company (“Intercargo”) was the surety on the bond.

Disputes developed between Boland and Trans Coastal. Trans Coastal sued Boland, and Boland counterclaimed. In the first trial, Boland recovered \$23,451.38 against Trans Coastal but not Intercargo. Following a second trial, Boland recovered \$31,654.42 against Trans Coastal and Intercargo. Boland then applied for \$357,121.52 of attorney's fees. The trial court allowed \$276,950.33 of the fee application but held that the \$167,800 penal sum of the bond limited Intercargo's liability, including liability for the attorney's fee claim. Boland appealed that limitation to the United States Court of Appeals for the Eleventh Circuit. Recognizing that Boland's request to extend Intercargo's liability beyond the penal sum of the bond required an interpretation of a state statute, the Eleventh Circuit certified the following question to this Court for resolution:

Does Florida Statute § 627.428 authorize recovery of attorney's fees in excess of a performance bond's face amount from a subcontractor's surety, when the fees claimant has not shown independent misconduct on the part of the surety.

### **SUMMARY OF ARGUMENT**

Section 627.428, Fla. Stat., is generally applicable to insurers but is not applicable if a specific statute governs the obligation of that type of insurer for attorney's fees. Section 627.428 is not applicable to Boland's claim because another statute applies to attorney's fees claims against sureties on construction projects.

Specifically, section 627.756, which is titled “Bonds for construction contracts; attorney fees in case of suit,” governs the circumstances under which a construction contractor’s surety is liable for attorney’s fees. For certain specified types of claims, § 627.756 requires that § 627.428 apply. Since § 627.756 does not allow fees for Boland’s claim, however, Boland is not entitled to recover fees from Intercargo.

Even if § 627.428 applied, any fees are a part of Intercargo’s bond obligation and thus limited by the penal sum stated on the face of the bond. Intercargo’s maximum liability for Trans Coastal’s default is the \$167,800 bond penalty. The express language of the bond, which Boland drafted, limits the surety’s liability for all losses, costs and damages, including attorney’s fees, to the penal sum. Only if Intercargo were guilty of misconduct independent of Trans Coastal’s default could it be held liable in excess of the penal sum. Since the certified question is predicated on a lack of misconduct by Intercargo, it must be answered in the negative.

This result is consistent with the unique tripartite relationship of surety bonds and with the public interest in seeing that bonds are available at a reasonable cost, while also assuring that claims against bonds are handled promptly and fairly.

## ARGUMENT<sup>1</sup>

### I. SECTION 627.428 DOES NOT APPLY TO BOLAND'S CLAIM.

The American Rule requires that each litigant bear its own attorney's fees unless an exception applies. *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) states:

This Court has followed the "American Rule" that attorney's fees may be awarded by a court only when authorized by statute or by agreement of the parties.

The exception to the American Rule which Boland urges in this case is that § 627.428, Fla. Stat., allows Boland to recover its reasonable attorney's fees from the surety. Such a statute, being in derogation of the common law, should be strictly construed. *Insurance Company of North America v. Lexow*, 602 So. 2d 528, 530 (Fla. 1992) ("[S]ection 627.428(1) must be strictly construed because an award of attorney's fees is in derogation of common law.").

Prior to this Court's decision in *Nichols v. Preferred National Insurance Co.*, 704 So. 2d 1371 (Fla. 1997), § 627.428 and its predecessors had been held by Florida courts not to apply in actions against sureties. *Main v. Benjamin Foster Co.*, 192 So.

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<sup>1</sup> SAA agrees with Boland that the applicable standard of review in this appeal is the *de novo* standard. IB 10. (Citations to Boland's Brief are made by "IB" followed by the page number of the Initial Brief.)

602, 605 (Fla. 1939) (“So we must hold that the statute authorizing judgment for attorneys’ fees does not apply in suits on surety bonds.”); *United Bonding Ins. Co. v. Inter National Bank of Miami*, 221 So. 2d 20, 21 (Fla. 3d DCA 1969) (“[I]t appears to us that attorneys’ fees are not required to be paid by the surety company . . . .”); *Dealers Insurance Co. v. Centennial Casualty Co.*, 644 So. 2d 571, 573 (Fla. 5<sup>th</sup> DCA 1994), *review denied*, 658 So.2d 989 (Fla. 1995) (“There is no statutory basis for such an award against a surety. Section 627.428, Florida Statutes, does not apply . . . .”).

In *Nichols*, this Court noted that under the Florida Insurance Code, an “insurer” included a surety and held that § 627.428 can apply to sureties. 704 So. 2d at 1373. The Court explicitly disapproved the *Dealers Insurance Co.* decision to the contrary. *Id.* at 1374. The Court then stated at 704 So. 2d 1373-74:

Further, there is no provision governing an award of attorney’s fees under chapter 744 [the statutes dealing with guardianship bonds]. Given the absence of another statutory provision governing this issue, we agree with the district court and hold that section 627.428 allows for attorney’s fees and costs to be awarded in guardianship bond cases.

The *Nichols* decision cites *DiStefano Construction, Inc. v. Fidelity and Deposit Co. of Md.*, 597 So. 2d 248 (Fla. 1992), as an example of a case in which resort to § 627.428 was improper because another statute controlled the award of attorney’s fees. In *DiStefano*, § 713.29, Fla. Stat., provided for attorney’s fees to the

prevailing party in a mechanics lien enforcement action, and thus made § 627.428 inapplicable. Id. at 249-50.

In *DiStefano* the Court noted that § 627.756, Fla. Stat., governed the award of attorney's fees in suits against sureties issuing performance and payment bonds. Id. at 249. Section 627.756 states:

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.

§ 627.756, Fla. Stat. (2002).

Boland is a prime contractor, not an owner, subcontractor, laborer or materialman. It, therefore, does not fall within the ambit of § 627.756 and is not entitled to recover attorney's fees pursuant to the statute. The Legislature could have said that § 627.428 applied to suits under payment or performance bonds. Instead, it limited § 627.756 to suits by certain specified claimants and did not include prime contractors within the class of specified claimants entitled to the protection of § 627.428.

Section 627.756 is part of the Insurance Code. It is not, for example, part of the public procurement code and therefore limited to public works bonds provided by

prime contractors on state projects. The general statute, § 627.428, does not apply to Boland's claim because there is a specific statute, § 627.756, governing attorney's fees under performance and payment bonds. The Legislature, however, did not dictate that attorney's fees be awarded to all claimants on such bonds. It limited the classes of claimants entitled to fees, and prime contractors such as Boland are not among them.

It is a fundamental principle of Florida law and public policy that legislative intent is the polestar that guides a court in statutory interpretation. *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987); *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000). The primary source for determining legislative intent is the language chosen by the Legislature to express its intent. *Donato*, 767 So. 2d at 1150. This Court has specifically held that when the language of a statute "is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglas, Inc. v. McRaine*, 137 So. 157, 159 (Fla. 1939)). A court may not construe an unambiguous statute in a way that would "extend, modify, or limit its express terms or its reasonable and obvious implications." *Id.* To do so "would be an abrogation of legislative power." *Id.* (quoting *American Bankers Life*

*Assurance Co. v. Williams*, 212 So. 2d 777, 778 (Fla. 1<sup>st</sup> DCA 1968)).

With these guiding principals, it is clear that Boland, a prime contractor, cannot recover attorney's fees against Intercargo. To allow such an award would extend the reach of the statute to benefit prime contractors when the Legislature clearly excluded prime contractors from § 627.756.

In the instant case, the United States District Court held that Boland was entitled to fees, and Intercargo did not file a cross-appeal. This appeal is only about the amount of those fees<sup>2</sup>, but if § 627.428 does not apply to Boland's claim, the answer to the certified question is negative. That is, to answer the certified question, the Court first has to determine whether § 627.428 applies and, only if it does, to determine whether the penal sum limits the recovery. As set forth above, § 627.428 does not apply to Boland's claim.

SAA acknowledges that *Financial Indemnity Co. v. Steele & Sons, Inc.*, 403 So. 2d 600 (Fla. 4<sup>th</sup> DCA 1981), applied § 627.428 to a subcontract bond, but it did

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<sup>2</sup> Boland is, therefore, incorrect in arguing that it is entitled to fees in this appeal. Fees for litigating the amount of fees, as opposed to entitlement to fees, are not recoverable under § 627.428. *State Farm Fire & Casualty Co v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) (“Accordingly, we hold that attorney’s fees may properly be awarded under Section 627.428 for litigating the issue of entitlement to attorney’s fees. However, we do not agree with the district court below that attorney’s fees may be awarded for litigating the *amount* of attorney’s fees.”) (Emphasis in original).

so without mentioning § 627.756 or considering the limitation implicit in it; to wit: that prime contractors are not afforded protection.

## II. THE PENAL SUM OF THE BOND LIMITS BOLAND'S RECOVERY.

Even if § 627.428 applies to Boland's claim, the penal sum of the bond limits the amount of fees which can be awarded. The bond at issue provides, in pertinent part,

Now, therefore, the condition of this obligation is such that if Principal [Trans Coastal] . . . shall promptly pay contractor [Boland] all losses, costs and damages (including, without limitation, damages resulting from delay in the performance of the subcontract work and damages from failure to discharge warranty, guaranty and indemnity obligations), including all litigation related costs and attorneys' fees which Contractor may suffer by reason of Principal's default . . . then this obligation is null and void . . . . (Emphasis added).<sup>3</sup>

The bond, therefore, provides that Trans Coastal will pay Boland's attorney's fees resulting from Trans Coastal's default. As surety, Intercargo guaranteed that obligation up to the penal sum stated in the bond. Boland could have provided in its bond that the surety's liability for attorney's fees was not limited by the penal sum or

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<sup>3</sup> The bond is Boland's pre-printed form. The identity of the principal, surety, bond number, project, penal sum and contract date, are all typed into blanks. "David Boland, Inc." is not typed into a blank, but is part of the pre-printed form. Boland is the drafter of the bond and its suggestion that the bond must be strictly construed against the surety is misplaced and cannot apply here. See, IB 19. If anything, the bond must be construed against Boland, which drafted the bond and required its use.

that the surety was liable for attorney's fees in addition to those caused by Trans Coastal's default (attorney's fees to sue Intercargo on the bond, for example). It chose not to do so. Instead, Boland's bond form addresses attorney's fees but limits the obligation to fees "by reason of" Trans Coastal's default.

Even if a statutory obligation to pay fees were read into the bond, it would be limited by the penal sum. The bond provides for payment of "all losses, costs and damages" up to the penal sum of the bond. The word "all" is unlimited. There is no basis to exempt attorney's fees from this all-encompassing category of payments which Boland specified were limited by the penal sum. Boland should not be allowed to escape the terms of the bond it drafted.

Moreover, both *Nichols, supra.*, and *Old Republic Surety v. Reischmann*, 713 So. 2d 434 (Fla. 2d DCA 1998), which followed *Nichols*, held that the surety was liable for fees beyond the penal sums of the guardianship bonds at issue only because of the surety's own misconduct. In *Nichols*, the Court described the purpose of its holding as follows:

To ensure that sureties are protected from having to pay amounts over the face amount of the bond due to a principal's misconduct but that the beneficiaries are not required to reduce the amount received under the bond when the surety itself is negligent or unreasonable in failing to timely pay a claim . . . .

704 So. 2d at 1374. *Nichols* and *Old Republic Surety v. Reischmann* involved

guardianship bonds, and the courts cited § 744.357, Fla. Stat., for the proposition that the surety could not be charged beyond the property of the ward. In the instant case, however, the penal sum of the bond limits the surety's liability for the principal's default. That is, the bond itself contains the limitation which the statute provided in the guardianship cases. The very case upon which Boland must rely to find that § 627.428 applies to sureties, therefore, answers the certified question. The surety can be held beyond the penal sum of its bond only as a result of its own misconduct.

In *State Farm v. Palma, supra.*, the Court stated, "the terms of section 627.428 are an implicit part of every insurance policy issued in Florida." 629 So. 2d at 833. If the right to fees is a part of the bond, however, it is subject to the penal sum. The bond at issue here limits Intercargo's obligation for Trans Coastal's defaults to \$167,800. Since there was no misconduct by Intercargo, the only recovery against it must be as guarantor of Trans Coastal's obligations, *i.e.*, as surety on the bond, and, therefore, limited by the penal sum.

To underwrite a bond, a surety company must know the maximum amount of risk it is asked to assume. For one thing, § 624.609, Fla. Stat., limits the risk an insurer can retain on any one subject to 10% of its policyholder surplus. If there is no limit on the surety's obligation on the bond, it cannot comply with the statute. It also cannot evaluate its risk or put aside adequate reserves of capital if the penal sum does

not limit its exposure.

The instant case is an excellent example of what could happen. Boland is claiming attorney's fees many times larger than its recovery and over twice the total cost of the roofing work itself. Intercargo was asked to write a bond for \$167,800 of roofing work, not a bond for \$167,800 plus an unlimited amount of attorney's fees. Even if the attorney's fee obligation is a part of the bond, it, like all the other bond obligations, is limited to the penal sum. Since there was no misconduct by Intercargo, as the Eleventh Circuit confirmed in articulating the certified question, there was nothing Intercargo could have done to protect itself from this fee claim in excess of the bond amount.

### III. PUBLIC POLICY SUPPORTS LIMITING THE SURETY'S LIABILITY.

A surety bond is not an insurance policy, and there are distinctions between suretyship and other types of insurance. As stated in *Western World Ins. Co. v. Travelers Indemnity Co.*, 358 So. 2d 602, 604 (Fla. 1<sup>st</sup> DCA 1978),

The surety on a bond is lending its credit to make certain, if the conditions of the bond are violated, that the aggrieved party will be protected in the event the principal is financially unable to comply with the conditions of the bond. If the principal can satisfy the obligation, the surety need not respond. The surety, unlike the liability insurer, however, is entitled to be indemnified by the one who should have performed the obligation.

An insurance policy is a two party contract under which the insured pays a

premium and in return shifts the primary risk of loss to the insurer. 30 Fla. Jur. 2d. Insurance § 1, p. 149. A surety bond, on the other hand, is a three party contract under which the surety promises the obligee that the principal will perform. The principal remains primarily liable to perform the obligation. The surety is only secondarily liable and is entitled to indemnity from the principal if the surety has to perform. See 28 Fla. Jur. 2d, Guaranty and Suretyship, § 1, p. 231 and § 61, p. 290.

On an insurance policy, therefore, the dispute is between the insurer and the claimant, and the insurer can avoid any attorney's fees by promptly and fairly handling the claim. Indeed, encouragement of such promptness is one of the reasons behind § 627.428. A surety insurer on a bond, on the other hand, is caught between the bond principal and the claimant. The primary dispute, as here, is between the principal and the obligee. If the surety pays the obligee, the principal is obligated to indemnify the surety. Making the surety pay the claimant's fees for litigating with the principal will do nothing to encourage prompt and fair claim handling by sureties. On the contrary, by coercing the surety to pay a legitimately disputed claim, it would prejudice bond principals and lead to further litigation between the surety and its principal over the propriety of the surety's payment of the disputed claim.

Section 627.428 is supposed to compensate the insured for the cost of obtaining the insurance protection it purchased. *Insurance Company of North*

*America v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992), states:

Florida courts have consistently held that the purpose of section 627.428 and its predecessor 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.

The statute is not designed to provide a windfall to the insured. In *Travelers Indemnity Co. v. Causey*, 381 So. 2d 1200, 1201 (Fla. 2d DCA 1980), *affirmed*, 401 So. 2d 1334 (Fla. 1981), the court held that an uninsured motorist carrier was not liable for the insured's fees to sue the tortfeasor. The court stated:

Had the tortfeasor had insurance coverage in the sum of \$45,000, and had appellees recovered \$45,000 in suing the tortfeasor, they would not have recovered their attorney fees, in addition thereto, from the tortfeasor. They have no greater right under their uninsured motorist coverage.

In the instant case, Boland and Trans Coastal had a dispute under the subcontract. The attorney's fees were incurred to resolve that dispute. They were not incurred to force Intercargo to pay what it owed under the bond. If § 627.428 requires a surety to pay such litigation expenses, without regard for the terms of the bond or the underlying subcontract, the claimant will receive a windfall in the form of its litigation expenses with the principal.

That windfall will come at the expense of the principal, which remains primarily liable for any bond obligation and will have to indemnify the surety. Under Boland's

theory of this case, by providing a surety bond, a subcontractor exposes itself to payment of attorney's fees substantially in excess of the value of the subcontract work. From the subcontractor's point of view, such a holding will make any subcontractor reluctant to provide a bond. If one is provided, the substantial increase in risk will have to be charged for in the form of higher subcontract prices and thus increased costs of construction.

From the surety's point of view, Boland's theory exposes the surety to increased risk which the surety can neither quantify nor avoid. In the underwriting process, the surety knows that the limit of its liability is the penal sum of the bond, and that limit is a primary factor in accepting or declining the risk. If that limit is inapplicable, then the surety cannot properly price its product. In a two party insurance policy, the insurer can at least try to avoid the risk of attorney's fees by prompt, fair claims handling. As the instant case demonstrates, that option is not available to the surety. The surety's principal disputed Boland's claim. There was no misconduct by the surety, yet Boland asserts Intercargo should pay substantially in excess of its bond penalty for Boland's fees incurred in litigating with Trans Coastal.

If the surety is guilty of no misconduct, the penal sum of the bond should be the limit of its liability. A holding to the contrary will do nothing to encourage prompt, fair handling of surety claims. If a surety which engages in misconduct loses the

protection of the bond penalty while a responsible surety does not, sureties have a significant financial incentive to act responsibly. On the other hand, if responsible sureties also lose the protection of the bond penalty, there is no incentive to act responsibly.

Such a holding would also increase the cost of bonded construction projects, including public construction on which bonds are required by law, by forcing the surety to pay a claimant's attorney's fees in excess of the bond penalty when it could do nothing to avoid such fees. This increase will ultimately be borne by the taxpayers for public projects and by the owners of private projects.

Florida courts have avoided expanding the liability of a surety beyond the amount of its undertaking. *See, e.g., Fidelity and Deposit Co. of Maryland v. La Centre Trucking, Inc.*, 559 So. 2d 1242, 1243 (Fla. 4<sup>th</sup> DCA 1990) and *Ohio Casualty Ins. Co. v. Oakhurst Homes, Inc.*, 512 So. 2d 1156, 1157 (Fla. 2d DCA 1987), holding that the trial court could not increase the liability of the surety on a lien transfer bond beyond the face amount of the bond. An award of attorney's fees in excess of the penal sum of Intercargo's bond would be inconsistent with these precedents and needlessly increase the cost of construction in Florida without any counterbalancing benefit. Sureties would not be rewarded for prompt, fair claims handling nor penalized for misconduct. On the contrary, they would be penalized in the absence of

misconduct.

### **CONCLUSION**

The question certified by the Eleventh Circuit Court of Appeals should be answered in the negative. Section 627.428 should not apply to this subcontract performance bond since § 627.756 controls the allowance of attorney's fees on performance and payment bonds and does not include claims by prime contractors. Even if § 627.428 is applicable, however, the award of attorney's fees should be limited by the penal sum of the bond.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished on this \_\_\_\_ day of December by U.S. Mail to:

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**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT**

I CERTIFY that this Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is printed in Times New Roman 14-point font.

\_\_\_\_\_  
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