David Boland, Inc. v. Trans Coastal Roofing Co.

THE NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS DAVID BOLAND INCORPORATED VERSUS TRANS COASTAL ROOFING COUNSEL CAN BE AT EASE FOR A MINUTE OR TWO WHILE PEOPLE LEAVE THE COURTROOM. I WANT TO BE SURE THAT WE CAN HEAR EVERY WORD. ALL RIGHT. THANK YOU FOR YOUR PATIENCE. GOOD MORNING.

GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS DENNIS DURKIN AND I REPRESENT DAVID BOLAND INCORPORATED. AS YOU ALL ARE AWARE THIS CASE IS HERE VIA THE STATE COURT OF APPEALS FOR A CERTIFIED QUESTION. I BELIEVE IT IS NECESSARY FOR ME TO STATE IT, JUST SO I CAN LEAD INTO MY ARGUMENT. THE QUESTION IS WHETHER FLORIDA STATUTE 627.428 OFFER RECOVERY OF ATTORNEY FEES IN EXCESS OF A PERFORMANCE BOND'S PHEASANT, WHEN THE FEE'S CLAIMANT HAS NOT SHOWN MISCONDUCT ON THE PART OF THE SURETY.

YOUR CLIENT WAS THE CONTRACTOR, CORRECT?

YES, YOUR HONOR.

WOULD YOU PLEASE, FIRST, ADDRESS THE FACT THAT 627.756 DOES NOT INCLUDE THE DOCTORORS.

IT CERTAINLY DOESN'T, YOUR HONOR.

NOW, THAT STATUTE IS VERY SPECIFIC AS TO THE APPLICATION OF 627.428, AS TO CONSTRUCTION OF SURETY BONDS, CORRECT?

YES, IT IS.

SO SHOULDN'T WE GIVE THAT WEIGHT, IN THE FACT THAT THE LEGISLATURE MADE THE DECISION NOT TO INCLUDE CONTRACTORS?

NO, YOUR HONOR. YOU SHOULDN'T. I WILL TELL YOU WHY 756 IS NOT APPLICABLE. IT ACTUALLY EXPANDS THE SCOPE OF CLAIMANTS WHO WOULD ENJOY THE BENEFIT OF 627.428. IT INCLUDES INDIVIDUALS SUCH AS MATERIALMEN, WHO WOULD NOT BE NAMED INSUREDS OR NAMED BENEFICIARIES UNDER A PARTICULAR BOND OR POLICY.

HERE IS MY PROBLEM. IN ORDER, THEN, TO GET A CONSTRUCTION SURETY UNDER 428, YOU HAVE GOT TO GO TO 624.04, CORRECT? YOU HAVE GOT TO GO ---624.03, CORRECT? YOU HAVE GOT TO GO TO --

YES, YOUR HONOR.

THAT SAYS THAT IT IS A SURETY THAT IS IN THE BUSINESS OF WRITING POLICIES OF INSURANCE, CORRECT?

THAT'S CORRECT.

NOW, ISN'T THERE A REAL DISTINCTION HERE, BETWEEN A CONSTRUCTION SURETY BOND AND A POLICY OF INSURANCE? LET ME POSE SEVERAL THINGS THAT BOTHER ME. ONE IS THAT AN

INSURANCE POLICY IS WRITTEN ON THE BASIS OF A PREMIUM FOR, ON AN ACTUARIAL BASIS, AS TO A NUMBER OF ACCIDENTS, LIABILITY INSURANCE, CONTRACT SURETY BOND IS WRITTEN ON THE BASIS OF FINANCIAL STRENGTH OF THE PRINCIPLE -- OF THE PRINCIPAL, AND HISTORICALLY, IT HAS BEEN CONSIDERED TO BE A FEE AS OPPOSED TO A PREMIUM. THERE IS NO DUTY TO DEFEND, ON THE PART OF A SURETY, AS OPPOSED TO A LIABILITY INSURANCE CARRIER, THAT THERE ARE NOT THE GENERAL CONDITIONS OF INSURANCE WITHIN THE SURETY BOND. I MEAN, AREN'T THOSE MATERIAL DIFFERENCES IN CONTRACT AND SURETY, CONSTRUCTION SURETY BONDS AS VERSUS INSURANCE POLICIES?

YOUR HONOR, I AGREE THAT THERE ARE SUBSTANTIAL DIFFERENCES BETWEEN WHAT A CLASSIC, AS COUNSEL WOULD REFER TO IT IN THEIR BRIEF, POLICY OF INSURANCE, AND A SURETY BOND, WHETHER IT BE A PAYMENT OR PERFORMANCE BOND. HOWEVER, THE LEGISLATURE HAS ELECTED, AS A MATTER OF POLICY, TO PLACE THEM ALL UNDER ONE STATUTORY SCHEME. AND I REPRESENTED SURETIES IN THE PAST, THAT SURETIES ALWAYS ATTEMPT TO DISTINGUISH THEMSELVES FROM POLICIES OF INSURANCE. HOWEVER, THIS COURT HAS DETERMINED THAT THESE BONDS FALL WITHIN THE AMBIT OF 628.748.

HAS THIS COURT EVER SAID THAT IN RESPECT TO A CONSTRUCTION SURETY BOND?

NO, YOUR HONOR, NOT WITH RESPECT TO A CONSTRUCTION SURETY BOND, BUT THE DIFFERENCE BETWEEN A CONSTRUCTION SURETY BOND AND A GUARDIANSHIP BOND, I FAIL TO SEE THE DIFFERENCE, BECAUSE HERE WE HAVE A NAMED BENEFICIARY, A NAMED INSURED, THE OBLIGEE, DAVID BOLAND, INC., AND IT PROVIDED A BOND TO TRANSCOASTAL -- AND IT PROVIDED A BOND TO INSURE, THAT THE PERFORMANCE OF TRANS COASTAL WAS OBTAINED.

TRANS COASTAL, IN THIS CASE, SAID, AND THIS WASN'T AN ISSUE WHERE THEY DIDN'T FINISH THE JOB, WHERE SOMEONE WALKED OFF THE JOB. THIS WAS AN ISSUE WHERE THERE WAS A DISPUTE AS TO WHETHER THEY HAD PERFORMED PROPERLY IN ACCORDANCE WITH THE SPECIFICATIONS. CORRECT?

YES, YOUR HONOR, THEY WERE TERMINATED.

NOW, IF, WHEN THE SURETY WAS PUT ON NOTICE OF THIS CLAIM, IT IS NOT A SITUATION WHERE, IF YOU HAD A HOMEOWNERS CLAIM AND THEY ARE SAYING THERE IS A, YOU KNOW, WATER DAMAGE, AND NOW THEY ARE GOING TO THEIR INSURANCE COMPANY AND SAYING YOU KNOW, THERE IS WATER DAMAGE. PAY. AND THE INSURANCE COMPANY SAYS NO. IS THE SURETY IN THIS SITUATION, ONCE THE NOTICE OF CLAIM IS THERE, NO MATTER WHETHER TRANSSAYS, TRANS COASTAL SAYS THEY ARE RESPONSIBLE OR NOT, ARE THEY ABLE TO JUST PAY ON THE CLAIM, WITHOUT TRANSCOASTAL -- TRANS COASTAL'S AGREEMENT?

UNDER TERMS OF THE BOND, THEY HAVE INDEPENDENT SEVERAL LIABILITY.

SO EVEN IF IT LOOKS LIKE THERE IS NO CHANCE THAT, OF PREVAILING. IN OTHER WORDS THAT THERE IS A QUESTION OF WHETHER THE SPECIFICATIONS WITH OR WEREN'T COMPLETED, AND, AGAIN, THERE IS, THAT THEY COULD GO AHEAD AND PAY THE ENTIRE AMOUNT OF THE BOND PREMIUM. I AM SORRY. THE PHEASANT OF THE BOND, AND THEN GO AND GET FULL INDEMNIFICATION FROM THERE, FROM TRANS COASTAL?

I BELIEVE SO.

IN THAT EVENT, WOULDN'T TRANS COASTAL HAVE THE DEFENSE THAT YOU DIDN'T NEED TO PAY IT SO YOU SHOULDN'T HAVE PAID IT AND THEREFORE WE ARE NOT LIABLE. WE ARE ONLY LIABLE IF YOU SHOULD HAVE PAID IT BECAUSE WE DEFAULTED.

THAT IS PROBABLY CORRECT. THEY COULD ASSERT A DEFENSE THAT THEIR IN DIM FIXES AND

DEFENSE -- THAT THEIR IN DIM FIX -- THAT THEIR INDEMNIFICATION WAS WITH THE APPROVAL OF TRANS COASTAL.

BUT AS TO JUSTICE WELLS SAYS, WITH RESPECT TO THIS CASE, I AM HAVING TROUBLE SEEING AS TO WHY 627.428 EVEN ENTITLES BOLAND TO SEIZE UP THROUGH THE AMOUNT OF THE BOND, WHICH I, AS OPPOSED TO THAT THE BOND, ITSELF, PROVIDED FOR ATTORNEYS FEES, AND SO THERE WOULD BE ENTITLEMENT UP TO THE PHEASANT OF THE BOND, BECAUSE THE BOND, ITSELF, THERE WAS A CONTRACTUAL AGREEMENT TO PAY ATTORNEYS FEES. I AM NOT SURE WHERE 627.428 AND THE POLICY THAT DRIVES IT, IS FULFILLED BY REQUIRING ATTORNEYS FEES TO BE PAID UNDER THIS STATUTE.

I THINK I CAN ADDRESS THAT ISSUE RATHER SIMPLY, AND THAT IS BECAUSE INTERCARGO HAS CONCEDED IN ITS BRIEFS AND I BELIEVE AT THE TRIAL COURT, THAT IT WAS LIABLE UNDER 627.428.

THAT DOESN'T, WE ARE SETTING POLICY FOR THE STATE OF FLORIDA. JUST BECAUSE THERE IS A CONCESSION IN THIS CASE, I MEAN, AND THE AMICUS DOESN'T CONCEDE IT.

I AGREE, YOUR HONOR, THAT YOUR ROLE IS A DIFFERENT ONE AT THIS LEVEL, BUT NUMEROUS COURTS, THE FINANCIAL INDEMNITY DECISION FROM THE THIRD DISTRICT DETERMINED THAT 627.428 APPLIES IN THIS CIRCSANS.

SO NO MATT -- CIRCUMSTANCE.

SO NO MATTER WHAT THE NATURE, IT COULD BE THAT THEY JUST STOPPED PERFORMING, THAT ANY TIME A CLAIM IS MADE UNDER A SURETY BOND, YOU ARE SAYING THAT THERE IS AUTOMATIC ATTORNEYS FEES, UNDER 627.428. AND WHAT YOU ARE SAYING, UP TO WHATEVER THE AMOUNT OF THE LITIGATION, YOU KNOW, COULD BE $1 MILLION IS NO LIMIT. IT IS JUST BECAUSE THERE IS LITIGATION UNDER A SURETY BOND.

WELL, I AM NOT SAYING THAT ANY TIME A CLAIM IS FILED, YOUR HONOR. THE STATUTE SAYS ANY TIME A FINAL JUDGMENT IS ENTERED AGAINST AN INSURER, AND AN INSURER IS CLEARLY DEFINED IN FLORIDA.

BUT THE ATTORNEY SEES RUNS FROM -- BUT THE ATTORNEY FEES RUN FROM THE TIME THE CLAIM IS ACTUALLY MADE.

I THINK THE ATTORNEYS FEES WOULD ARISE OUT OF THE LITIGATION, NOT NECESSARILY AT THE TIME THE CLAIM WAS MADE.

WHY THE DISTINCTION AS TO WHEN THE ATTORNEYS FEES SHOULD START RUNNING? IN OTHER WORDS CLAIMS MADE. THEY ARE RELIABLE.

WHAT IT SHOULD BE IS THIS, IS THAT THE ATTORNEYS FEES THAT MAY ARISE DURING THE COURSE OF FIGHTING WITH THE PRINCIPAL OVER THE UNDERLYING CLAIM, THOSE MAY WELL BE CHARACTERIZED AS DAMAGES UNDER THE PENAL SUM OF THE BOND, WHICH IS THE DISTINCTION THAT I THINK THIS COURT HAS MADE ON A NUMBER OF CASES, THAT THERE IS A DISTINCTION BETWEEN COMPENSATORY DAMAGES, AND THOSE MAY WELL BE THE NEGOTIATIONS OR WHATEVER WITH THAT SUBCONTRACTOR, OVER ITS DEFAULT, AND THOSE WOULD BE LUMPED UNDER THE PENAL SUM OF THE BOND, BUT THEN, IF THE ONLY GEE, IN THIS CASE -- THE OBLIGEE, IN THIS CASE BOLAND, WAS TO ACTUALLY BRING SUIT UNDER THE PERFORMANCE BOND AGAINST INTERCARGO, AND IT WAS RENDERED A JUDGMENT, THEN IT IS REQUIRED TO ATTORNEYS FEES UNDER THE STATUTE.

SEE, THERE IS A CASE THAT I HAVE BEEN, THAT, IT IS NOT CITED BY EITHER SIDE. IT IS CALLED

SOME MORE VERSUS ALLSTATE -- IT IS CALLED SMORE VERSUS ALLSTATE INSURANCE COMPANY, AND THE IDEA WAS JUST BECAUSE YOU SUE THE UNINSURED MOTORIST CARRIER, THE UNINSURED MOTORIST CARRIER DENIES THAT THERE IS NEGLIGENCE ON THE PART OF THE TORTFEASOR, YOU DON'T GET ATTORNEYS FEES JUST FOR LITIGATING YOUR UNINSURED MOTORIST CLAIM, JUST BECAUSE YOU ARE SUING AN INSURER, AND I DON'T KNOW WHY THE SAME POLICY DOESN'T APPLY IN THIS SITUATION, ABSENT A, WHERE THEY SAY EITHER WE ARE NOT LIABLE OR WE ARE NOT STEPPING IN OR SOMETHING WHERE THERE IS A CLEAR BREACH OF THE CONTRACT, SAYING THAT THERE IS NO RESPONSIBILITY. WHY THE ATTORNEYS FEES UNDER THAT STATUTE SHOULD, YOU KNOW, APPLY, AND ESPECIALLY AS TO A CONTRACTOR WHO COULD SPECIFY ATTORNEYS FEES IN THE BOND, UP TO WHATEVER AMOUNT THAT THEY WANT TO SET.

WELL, YOUR HONOR, THE ANSWER TO THAT IS THAT, IF YOU GO TO FLORIDA STATUTE 627.428, AND YOU GO TO THE DECISIONS OF THIS COURT, THE PALMA DECISION SAYS THAT THAT PROVISION IS INCORPORATED INTO EVERY CONTRACT OF INSURANCE. THIS IS A CONTRACT OF INSURANCE, AT LEAST AS DEFINED BY THE LEGISLATURE. IF THIS COURT WANTS TO --

WHERE DOES THE LEGISLATURE DEFINE A CONSTRUCTION SURETY BOND AS A 308 POLICY OF INSURANCE?

-- AS A POLICY OF INSURANCE?

WELL, YOUR HONOR, IT DEFINES A SURETY AS ASSURER.

IN THE BUSINESS OF WRITING POLICIES OF INSURANCE. THAT IS SORT OF CIRCULAR, ISN'T IT?

YES, YOUR HONOR, IT IS, BUT THERE IS NO QUESTION THAT MANY DECISION, ALL OF WHICH ARE CITED IN OUR BRIEFS, HAVE RECOGNIZED THAT THESE ARE POLICIES WHICH FALL WITHIN THE A.M. BRITT OF 627 -- WITHIN THE AMBIT OF 627.428.

IT STRIKES ME THAT THE REAL PROBLEM THAT I AM HAVING WITH THIS IS THAT, ONE DOES LOOK LIKE THE LEGISLATURE CARVED OUT SPECIFIC INDIVIDUALS THAT WERE GOING, OR SPECIFICENTIES IN 756 -- OR SPECIFIC ENTITIES IN 756 THAT WERE TO COME UNDER 428, BUT THE CONCEPT HERE THAT YOU CAN SUE THE PRINCIPAL BECAUSE A GENERAL CAN GET INTO A BATTLE WITH A SUB, SUE THE SUB, THERE IS NO RIGHT TO ATTORNEYS FEES IN THE SUBCONTRACT, AND THEN SIMPLY BY ADDING THE SURETY, GET ATTORNEYS FEES, FOR WHICH THE SURETY, THEN, IS IN, GETS INDEMNITY FROM THE SUB, AND IT DOESN'T COMPUTE WITH IT.

THE ISSUE OF ATTORNEYS FEES WITH TRANS COASTAL IS RESOLVED IN THE SUBCONTRACT PROVISION. -- SUBCONTRACT AGREEMENT. THERE WAS A PROVISION FOR ATTORNEYS FEES.

THAT SEEMS A REASON TO LIMIT IT TO THE PENAL SUM OF THE BOND, IF WE ARE GOING TO GO OUT ON THE BOND.

IS IT YOUR POSITION THAT, IF THE SURETY HAS TO PAY ATTORNEYS FEES UNDER 627.428, THAT THE SURETY CAN, THEN, SEEK INDEMNIFICATION FOR THAT, ALSO, FROM THE SUBCONTRACTOR?

ABSOLUTELY.

SO THEN YOU ARE SUBJECTING A NONINSURER TO THE PROVISIONS OF 627.428, WHICH ARE DESIGNED TO RECOVER ATTORNEYS FEES AGAINST INSURANCE COMPANIES, BECAUSE OF THE DISCREPANCY IN POWER AND RESOURCES BETWEEN AN INSURANCE COMPANY AND AN INSURER.

WELL, THAT IS A FUNCTION OF THE GENERAL AGREEMENT OF INDEMNITY, WHICH ALLOWS FOR THAT. I WOULD ASSUME. I DON'T KNOW THAT THAT IS A MATTER OF THE RECORD HERE.

AND WHERE, IN THE CONTRACT, WHERE, IN THE SURETY BOND DOES IT INFORM THE SUBCONTRACTOR OR THE PRINCIPAL THAT THEY ARE GOING TO BE SUBJECT NOT ONLY TO INDEMNIFICATION FOR UP TO THE A THE BOND BUT ANY AMOUNT OF ATTORNEYS FEES, WHATSOEVER, AND HOW DOES THAT REFLECT IN THE PREMIUM AMOUNT THAT THE SUBCONTRACTOR HAS TO PAY?

YOUR HONOR, I DON'T BELIEVE THAT THAT IS STATED ANYWHERE WITHIN THE BOND. THE BOND IS A FORM THAT IS GENERALLY PREPARED, EITHER BY THE BONDING COMPANY OR BY THE CONTRACTOR AS IN THIS CASE. I THINK THAT THE PARTIES OF EQUAL BARGAINING POWER, WHICH I THINK ALL OF THESE ARE, ARE ABLE TO EVALUATE WHAT EXISTING LAW IS IN THE STATE OF FLORIDA. THEY KNOW WHAT THEIR RISKS ARE GOING TO BE.

ASSUMING THAT WE CONTINUE TO ADHERE TO THE LOWER COURT'S DECISION THAT THE ATTORNEYS FEES ARE LIMITED BY THE PENAL AMOUNT OF THE BOND, WE KNOW THAT THAT DOESN'T COVER THE ENTIRE ATTORNEYS FEES THAT WERE ISSUED IN, THAT WERE ORDERED IN THIS PARTICULAR CASE, CORRECT?

THAT'S CORRECT.

IS INTRACOASTAL, THEN, LIABLE FOR THE BALANCE OF THE ATTORNEYS FEES?

YES, THEY WOULD BE.

AND SO YOU REALLY AREN'T OUT YOUR ATTORNEYS FEES. YOU ARE ARGUING THAT, BASICALLY WHO IS GOING TO PAY IT.

ACTUALLY THE FACT OF THE MATTER, YOUR HONOR, THAT INTERCARGO IS NO LONGER IN BUSINESS AND HAS NEVER PAID A PENNY OF THIS JUDGMENT, AND THAT IS WHY WE ARE PURSUING THE BONDING COMPANY, AND THAT IS EXACTLY WHY THERE IS A PERFORMANCE BOND BEHIND A CONSTRUCTION PROJECT OF THIS NATURE, TO PROTECT AGAINST THAT OCCURRENCE, WHERE THE PRINCIPAL GOES OUT OF BUSINESS AND FAILS TO DISCHARGE ITS CONTRACTUAL OBLIGATIONS.

BUT I STILL, I THINK JUSTICE CANTERO HAS ASKED YOU, SO THE ATTORNEYS FEES COULD HAVE BEEN $500,000, AND THIS SURETY COMPANY WOULD HAVE HAD TO PAY, IT EVEN THOUGH THEY LIMITED THEIR LIABILITY TO THE $167,000.

I AGREE THEY WOULD BE OBLIGATED TO PAY IT UNDER THE STATUTORY SCHEME THAT SAYS THAT THEY ARE LIABLE FOR ATTORNEYS FEES, IF A JUDGMENT IS ENTERED AGAINST THEM. BUT NOT BECAUSE IT IS IN THE BOND.

AGAIN, SO WE UNDERSTAND, WE ARE LEER CLEAR ABOUT THIS, BUT -- SO WE ARE CLEAR ABOUT THIS, BECAUSE, AND THIS GOES BACK TO WHY IT DOESN'T SEEM TO ME THAT 627.428 WAS MEANT TO APPLY, IF YOU CAN THEN GO AHEAD AND GET TOTAL INDEMNIFICATION AGAINST THE PRINCIPAL, THEN THE PURPOSE OF 627.428 IS NOT ONLY NOT SERVED BUT IT IS FRUSTRATED.

BUT THAT IS INDEMNIFICATION FROM THE ASSURANCE COMPANY -- FROM THE INSURANCE COMPANY TO THE PRINCIPLE PAL. IT HAS -- TO THE PRINCIPAL. IT HAS NO INDEMNIFICATION WHATSOEVER TO DAVID BOWL LAND, INC..4H KYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKYKY-K BOLAND, INC..

CHIEF JUSTICE: THIS MIGHT BE A TIME TO PAUSE AND REGROUP.

GOOD MORNING.

CHIEF JUSTICE: GOOD MORNING.

MY NAME IS HALA SANDRIDGE WITH BYRD AND MURPHY, AND WE REPRESENT TRANS COASTAL -- AND WE REPRESENT THE INSURANCE COMPANY.

IT IS NOT OPPOSED THAT THE INSURANCE COMPANY IS NOT COVERED BY 428.

I THINK THE REALITY THAT THE DIFFERENCE BETWEEN THE PARTIES CAUSED US STRATEGICALLY NOT TO RAISE T WE ALL UNDERSTOOD THAT, URND THE -- UNDER THE CONTRACT, ATTORNEYS FEES WERE NOT TO BE AWARD AND THERE WAS AN ATTORNEYS FEES PROVISION IN THE SUBCONTRACT, AND IT IS OUR PROVISION THAT THOSE AMOUNTS WERE LIMITED BY THE A THE BOND, SO AS I UNDERSTAND WHAT OCCURRED IN THE TRIAL COURT, OUR STRATEGY WAS ALWAYS JUST TO LIMIT THE AMOUNT OF THE ATTORNEYS FEES TO THE BOND.

I AM HAVING A HARD TIME WITH THAT, BECAUSE IF THE, IF THE ACTION FOR ATTORNEYS FEES IS BASED UPON THE CONTRACT, THEN THERE IS NO ISSUE AS TO THE FACT THAT THE PENAL SUM OF THE BOND COVERS IT, BUT HOWEVER, IF THERE, IF IT, ON THE BASIS OF 4278, THEN THAT HAS -- OF 428, THEN THAT HAS NOTHING TO DO WITH THE PRINCIPAL'S CONTRACT. IT HAS TO DO WITH THE STATUTORY ENTITLEMENT OF ATTORNEYS FEES.

I CAN IT HAS TO DO WITH BOTH AND LET ME, ALSO, EXPLAIN THE UNDERLYING MOTOR VEHICLES. IN THE UNDERLYING MOTION SOUGHT BY BOLAND, THEY SOUGHT ATTORNEYS FEES COVERED BY BOTH THE CONTRACT AND THE STATUTE, SO WE ALWAYS KNEW THAT WE WERE GOING TO PAY ATTORNEYS FEES UNDER THE CONTRACT, AND OUR ARGUMENT WAS THAT THE ATTORNEYS FEES WE HAD TO PAY CONTRACTUALLY, WERE LIMITED BY THE PENAL SUM OF THE BOND.

LET ME ASK YOU THIS, NOW, IN NICKELS, THIS -- IN NICHOLS, THIS COURT MADE A FAIRLY BROAD STATEMENT, WHICH SAID THAT SURETIES ARE COVERED BY 428. IT DIDN'T LIMIT IT TO ANY PARTICULAR TYPE OF SURETY, AND IN FACT, THE LEGISLATURE JUSTICE PARIENTE, BROUGHT UP THE UNINSURED MOTORIST STATUTE, AND IN THE UNINSURED MOTORIST STATUTE, THE LEGISLATURE SPECIFICALLY SAID THAT 627.428 DOES NOT APPLY, AND AND UNINSURED MOTORIST, UNLESS THERE IS A DISPUTE ON WHETHER THE POLICY PROVIDES COVERAGE. NOW, THE LEGISLATURE INTENDED FOR SURETIES NOT TO BE COVERED BY 627.428. THEY KNEW HOW TO DO IT, DIDN'T THEY?

WELL, I THINK THAT THEY DID ENACT A SPECIFIC STATUTE THAT GOVERNS CONSTRUCTION SURETY BONDS. THAT IS WHAT WE ARE DEALING WITH HERE, IS A CONSTRUCTION SURETY BOND, AND THAT 627.756. THERE MUST BE A REASON FOR THAT STATUTE.

DOES THAT, DOES THAT STATUTE MAKE SENSE, WHEN IT LEAVES OUT THE VERY PARTIES THAT WE HAVE HERE? I MEAN, THEY WOULD NOT BE COVERED UNDER 756, WOULD IT? WHY WOULDN'T YOU JUST HAVE OWNERS AND MATERIALMEN AND THE OTHERS THAT ARE LISTED? THIS BENEFICIARY OF THIS POLICY WOULD NOT, IN FACT, BE A PERSON UNDER 756, WOULD THEY?

IT IS UNCLEAR TO ME, WHY IT WAS DRAFTED THAT WAY. I CANNOT TELL, FROM ANYTHING THAT I HAVE RESEARCHED, WHETHER IT WAS INTENTIONAL OR WHETHER IT WAS AN OVERSIGHT.

BUT DOESN'T THAT, IN FACT, SUPPORT THE APPELLANT'S ARGUMENT THAT, REALLY, THIS IS AN ADDITION TO 428, AS OPPOSED TO SUPPLANTING 428, BECAUSE YOU ARE SADING PEOPLE WHO -- YOU ARE ADDING PEOPLE WHO COULD POSSIBLY FULL UNDER 428, AS OPPOSED TO TAKING AWAY THE PEOPLE WHO ARE ALREADY INCLUDED UNDER 428.

I DON'T THINK IT IS IN ADDITION TO. I THINK IT IS A SEPARATE PROVISION THAT IS INTENDED TO APPLY TO THIS INDUSTRY, AND I THINK THERE IS A REASON FOR THAT. I REALLY THINK THAT WE NEED TO LOOK AT THE FACTUAL DIFFERENCES INVOLVED IN THIS TYPE OF A SURETY

RELATIONSHIP, AND I BELIEVE MANY MEMBERS OF THE COURT HAVE ALREADY TOUCHED ON THIS. THEN YOUR CLASSIC INSURANCE CASE. I AM CONVINCED THAT THE REASON THAT THE LEGISLATURE HAS THE SEPARATE STATUTE IS BECAUSE IT RECOGNIZED THE REALITIES OF THESE DIFFERING RELATIONSHIP. IN FACT, WHEN I LOOKED AT THE LANGUAGE IN 627.756, THE COURT, I AM SORRY, THE LEGISLATURE SPECIFICALLY APPLIED IT AGAINST THE SURETY INSUROR, UNDER PAYMENT AND PERFORMANCE BONDS WRITTEN BY THE INSURER, UNDER THE LOSS OF THE STATE TO INDEMNIFY PECUNIARY LOSS, TO INDEMNIFY AGAINST LOSS OR BREACH OF A CONSTRUCTION CONTRACT, SO I THINK THE LEGISLATURE HAS RECOGNIZED THAT THIS RELATIONSHIP IS JUST DIFFERENT THAN THE CLASSIC RELATIONSHIP THAT FALLS UNDER 627.428, AND THE REASON FOR ALL OF THIS, THE REASON I HAVE FOCUSED ON THIS DIFFERING RELATIONSHIP, IS BECAUSE THE PUBLIC POLICY, AND I KNOW JUSTICE PARIENTE, YOU FOCUSED ON THIS EARLIER, THE PUBLIC POLICY BEHIND 627.428 IS NOT SERVED IN THIS INSTANCE. THIS IS A TRIPARTITE RELATIONSHIP, WHERE THE SURETY IS SIMPLY SAYING TO THE OBLIGEE, IF THE PRINCIPAL DOES NOT PAY, WE STAND BEHIND THE PRINCIPAL TO PAY THAT DEBT. THAT IS WHEN THE OBLIGATION ARISES TO PAY. IF, IN FACT, THEY BREACH THE AGREEMENT, THEN IT IS VERY CLEAR THEY HAVE DONE SOMETHING WRONG AT THAT POINT IN TIME. BUT THEIR LIABILITY DOES NOT ARISE, UNTIL SOME POINT IN TIME WHEN A DETERMINATION HAS BEEN MADE, WHAT IT IS THE PRINCIPAL OWES AND THEN THE PRINCIPAL DOESN'T PAY. WE, THEN, HAVE THE OBLIGATION TO PAY. THIS IS ALL NEGOTIATED IN THESE CONSTRUCTION CONTRACTS. IN FACT, THIS RECORD SHOWS THAT BOLAND IN CYSTTED ON WHAT THE TERMS OF THIS BOND -- INSISTED ON WHAT THE TERMS OF THIS BOND WOULD BE AND COULD HAVE ASKED FOR A HIGHER BOND AMOUNT AND COULD HAVE INCLUDED TERMS IN THERE THAT WOULD HAVE ALLOWED THEM TO GET MORE ATTORNEYS FEES, IN THE CASE OF LITIGATION.

I AM VERY TROUBLED ABOUT HOW WE GET TO THAT ISSUE IN THIS CASE, BECAUSE THIS IS CERTIFICATION FROM THE ELEVENTH CIRCUIT.

YES, SIR.

WE ARE NOT DECIDING THEIR CASE FOR THEM. THAT WE ARE ASKING A SPECIFIC QUESTION IN WHICH THEY ARE ASSUMING, AS I TAKE IT, EVERYONE HAS AND YOUR BRIEF ASSUMES, THAT 428 APPLIES, AND IT DOES 428 AUTHORIZE RECOVERY OF ATTORNEYS FEES IN EXCESS OF PERFORMANCE BOND'S PHEASANT FROM A SUBCONTRACTOR SURETY, WHEN THE FEES CLAIMANT HAS NOT SHOWN INDEPENDENT MISCONDUCT?

RIGHT.

THAT IS SORT OF A DIFFERENT WRINKLE THAN WHETHER 756 APPLIES OR NOT.

WELL, 756, I THINK, APPLIES. I DON'T BELIEVE THAT ANYBODY DISAGREES THAT 756 APPLIES. THERE MAY BE A QUESTION WHETHER IT APPLIES BECAUSE CONTRACTORS ARE NOT INCLUDED IN THERE, BECAUSE I AM JUST ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THAT IS A OVERSIGHT ON THE LEGISLATURE'S PART, IN THAT A CONTRACTOR SUCH AS BOLAND, WOULD FALL WITHIN THE PARAMETERS OF 627.756. 627.756 THEN REFERS TO 627.428 AND CASE THAT YOU ARE ENTITLED -- AND INDICATES THAT YOU ARE ENTITLED TO ATTORNEYS FEES UNDER 627.428, UNDER THE CIRCUMSTANCES DESCRIBED IN 627.756.

IN OTHER WORDS, LET'S JUST, SO THEN, YOU ARE, 627.428 APPLIES, THEN WHAT PROVISION OF THE FLORIDA STATUTES WOULD ALLOW A COURT TO CAP THE AMOUNT OF THOSE ATTORNEYS FEES?

KEEP IN MIND THAT THE STATUTE DOESN'T ADDRESS IT. ALL IT SAYS IS THAT YOU ARE ENTITLED TO A REASONABLE FEE. SO ISSUE OF AMOUNT IS JUST NOT AN ISSUE IN 627.428. ALL THAT THERE IS AN ISSUE OF ENTITLEMENT. AND THAT, I THINK, IS WHAT HAS STUMPED THE ELEVENTH CIRCUIT. HOW DO WE DEAL WITH THIS OTHER ISSUE, THIS OTHER WELL ESTABLISHED LEGAL PRINCIPLE, AND THAT IS WHAT WE ARE DEALING WITH, THAT A SURETY'S LIABILITY IS LIMITED BY THE

PENAL SUM OF THE BOND, SO WE HAVE THAT ISSUE OVER HERE, AND THEN WE HAVE, IN 627.428, THE COURT, ASSUMING IT APPLIES.

DON'T ALL POLICIES, LIKE, IF YOU HAD A HOMEOWNERS POLICY, TO PAY, AGAIN, FOR WATER DAMAGE, AND THERE WAS, IT WAS A $25,000 PROPERTY DAMAGE.

RIGHT.

AND THEY CONTEST IT.

UM-HUM.

THE LIBLTH FOR THE, FOR THE -- THE LIABILITY FOR THE DAMAGE IS LIMITED, BUT IF THEY CONTEST IT AND THEY GET AN AWARD UNDER 627.428, THERE IS NOTHING IN THE CASE LAW THAT SAYS THAT THEIR LIABILITY FOR ATTORNEYS FEES IS LIMITED, BECAUSE, AGAIN, THE PURPOSE OF 627.428 IS TO DISCOURAGE INSURERS FROM CONTESTING VALID CLAIMS.

ABSOLUTELY. ABSOLUTELY. I AGREE WITH YOU ON THAT, AND THIS IS A DIFFERENT RELATIONSHIP, AND THAT IS WHY I AM CONVINCED THERE IS A DIFFERENT STATUTE, 627.756, THAT APPARENTLY RECOGNIZES THAT THIS IS NOT A CLASSIC INSURANCE CASE. SO, AGAIN, THERE IS TWO ISSUES. NUMBER ONE IS THE ISSUE OF ENTITLEMENT. I DON'T THINK THERE IS A DISPUTE ABOUT ENTITLEMENT. I THINK THE ISSUE IS AMOUNT NOW.

YOU SAY THERE IS NO DISPUTE OF ENTITLEMENT, UNDER 627.428, VERSUS ENTITLEMENT UNDER THE TERMS OF THE BOND. ONCE YOU GET, THAT YOU ARE SAYING, THROUGH ALL OTHER SURETIES THAT ARE EVER GOING TO BE WRITING SURETY BONDS IN FLORIDA, THAT THEY ARE OBLIGATED, WHETHER THE BOND SPECIFIES ATTORNEYS FEES OR NOT, FOR ATTORNEYS FEES, UNDER 627.428, UP TO THE PENAL SUM OF THE BOND. THAT IS WHAT YOU ARE SAYING.

WELL, IT DEPENDS WHAT TYPE OF POLICY YOU ARE TALKING ABOUT, UNDER A PERFORMANCE CONSTRUCTION BOND, IT FALLS UNDER 627.756, WHICH, THEN, PULLS IN 627.428. I AM NOT HERE ARGUING ABOUT OTHER SURETY BONDS. I WOULD REALLY LIKE TO FOCUS ON PAYMENT AND PERFORMANCE CONSTRUCTION BONDS, WHICH I THINK HAS A SEPARATE STATUTE, IN THAT AGAIN, I GO BACK TO THAT SEPARATE STATUTE MUST MEAN SOMETHING, AND I THINK WHAT IT IS, IS A RECOGNITION THAT THERE ARE DIFFERING PUBLIC POLICIES BEHIND THE SURETY'S RELATIONSHIP AND THE PLAYING FIELD THAT EVERYONE KEEPS REFERRING TO, THAN THERE ARE IN YOUR CLASSIC INSURANCE CASE. IF THE STATUTE IS CONSTRUED AS BOLAND REQUESTS THIS COURT TO DO, THEN NO SURETY IS GOING TO BE PUNISHED IN THESE CASES, BECAUSE THEY HAVE INDEMNIFICATION GREEMENTS WITH THEIR PRINCE -- INDEMNIFICATION AGREEMENTS WITH THEIR PRINCIPAL, WHERE ALL OF THESE FEES CHALED BE ASSESSED BY STATUTE -- THAT WOULD BE ASSESSED BY STATUTE, WOULD THEN GO BACK AND BE ASSESSED TO THE PRINCIPAL. I WANT TO CONCLUDE THAT, IF WE ARE TRYING TO COMPORT WITH PUBLIC POLICY IN 627.428, IT IS NOT GOING TO HAPPEN IN THIS CASE. THE OWE OTHER QUESTION THAT -- THE OTHER QUESTION THAT CAME UP IS WHY DOESN'T THE INSURED --

LET ME TEST. THAT THE REALITY IS THAT, IN MOST INSTANCES WHERE YOU, WHAT THIS SYSTEM, WHAT THIS WHOLE THING IS DESIGNED TO BE IS THAT, IN MOST INSTANCES, BEFORE THE SURETY REALLY DWETS GETS INVOLVED, THE -- REALLY GETS INVOLVED, THE SUBIS, IN THIS SITUATION, HAS -- THE SUBHAS, IN THIS SITUATION, GONE UNDER -- THE SUB, HAS, IN THIS SITUATION, GONE UNDER, SO THERE REALLY IS AN OBLIGATION BETWEEN THE SURETY UNDER THE BOND. I MEAN THAT, IS REALITY IN MOST INSTANCES, AND WHAT THE LEGISLATURE IS APPARENTLY TRYING TO DO IN 756 IS TO SAY, FOR THE PEOPLE THAT ARE LISTED THERE, THAT WE WANT YOU TO END THIS LITIGATION BY THE SURETY STEPPING UP TO THE PLATE AND TAKING THE, MAKING THE OWNERS HOLD OR THE -- THE OWNERS WHOLE OR THE MATERIALMEN WHOLE. EYE WANT TO ANSWER THAT QUESTION. I THINK IT IS VERY IMPORTANT. IT IS MISUNDERSTOOD. IT IS NOT TRUE THAT

TYPICALLY THE PRINCIPAL HAS GONE UNDER. THAT IS NOT TRUE. TYPICALLY I THINK THE PRINCIPAL IS THERE, IN SAYING I DID NOT BREACH THIS AGREEMENT. I DID NOT PROVIDE INSUFFICIENT PERFORMANCE, AND I WANT YOU TO, SURETY COMPANY, MAKE SURE THAT YOU DON'T DO ANYTHING TO UNDERMINE MY DEFENSE OF WHAT THE CONTRACTOR IS SAYING. WE CANNOT GO IN, AS THE SURETY COMPANY, AND LET'S SAY, IN THIS CASE, BOLAND ASKED FOR $180,000, AND YOU KNOW, LET'S ASSUME THAT THE RIGHT THING FOR US TO DO IS TO GO IN AND JUST PAY THAT $180,000 AS THE SURETY COMPANY. WE, THEN, BECOME A VOLUNTEER, AND THEN THAT IS THE DEFENSE THAT OUR PRINCIPAL IS GOING TO RAISE TO US WHEN WE COME BACK TO OUR PRINCIPAL AND SAY, OKAY, NOW WE HAVE BEEN A GOOD SURETY AND DONE WHAT WE HAD TO DO UNDER 627.428 TO AVOID PAYING ATTORNEYS FEES. WE WANT YOU TO REIMBURSE US THAT $180,000. OUR PRINCIPAL IS GOING TO TURN TO US AND SAY YOU ACTED AS VOLUNTEER. I DID NOT OWE THAT $180,000. YOU BREACHED YOUR OBLIGATION TO ME AS THE PRINCIPAL AND SHOULD NOT HAVE PAID THAT $180,000.

SO THAT PLACES THE LITIGATION, THEN, BETWEEN THE ALLEGED DEFAULTING PARTY AND THEIR SURETY, WHICH IS WHY WOULD THAT NOT SERVE THE PUBLIC POLICIES? THAT IS WHERE THE DISPUTE SHOULD BE, THAT THE INNOCENT PARTY, WHATEVER HAS HAPPENED, IS ASSURED YOU WILL EITHER MADE WHOLE OR YOU WON'T.

I DO NOT THINK THERE IS A RESPONSIBILITY BETWEEN THE INSURED AND THE PRINCIPAL. IN EVERY SITUATION THAT I SEE THEY ARE WORKING TOGETHER. THEY ARE NOT WORKING ADVERSE TO EACH OTHER. THE SURETY IS STANDING BEHIND ITS PRINCIPAL, WAITING TO SEE WHAT IS GOING TO HAPPEN AND THEN PAY --

WE ARE TALKING ABOUT PUBLIC POLICY, AND IF WE ARE SAYING THAT THE STATUTES WANT TO MAKE CERTAIN PEOPLE WHOLE, WE WANT TO MAKE SURE THAT THE OWNER, FOR EXAMPLE, WILL HAVE THE BUILDING AS CONSTRUCTED, AND IF NOT, THEN THE DISPUTE SHOULD BE BETWEEN THE CONTRACTOR WHO ALLEGEDLY DID NOT DO WHAT THEY ARE SUPPOSED TO DO AND THE SURETY, WHO WAS SUPPOSED TO STEP UP AND BE SURE THAT THE PROJECT WAS COMPLETED, SHIFTING THAT DISPUTE TO ANOTHER ARENA, RATHER THAN THE SHOULDERS OF AN INNOCENT PARTY WHO HAS ENTERED INTO A CONTRACT TO HAVE A BUILDING CONSTRUCTED.

JUSTICE LEWIS, I DON'T THINK THAT THAT IS THE PURPOSE OF THE STATUTE. I THINK THE PURPOSE OF THE STATUTE IS TO LEVEL THE PLAYING FIELD, BECAUSE INSURANCE COMPANIES TYPICALLY, AND WE REPRESENT A LOT OF THEM, HAVE A LOT OF POWER, WHEN, LET'S SAY, A LITTLE OLD LADY HAS, YOU KNOW, AN INSURANCE POLICY ON HER HUSBAND'S LIFE, AND HER HUSBAND DIES, AND COMES TO THE INSURANCE COMPANY. THE INSURANCE COMPANY SAYS I AM NOT GOING TO PAY, THAN LADY HAS LIMITED MEANS.

ARE YOU SUGGESTING THAT THE 627.428 APPLIES ONLY IF IT IS THE SMALL LITTLE INDIVIDUAL THAT IS HARMED BY AN INSURANCE COMPANY? CERTAINLY YOU RECOGNIZE THAT TAKE APPLIES TO A BISTHEY SAY THAT IS AN INSURER AS WELL AS AN INDIVIDUAL.

ABSOLUTELY, IN THE CLASSIC INSURANCE CONTEXT, BUT I THINK THAT IS THE STATED POLICY BEHIND 627.428. IS TO LEVEL THAT PLAYING FIELD. WE DO NOT HAVE THAT CONCERN HERE. THIS IS NOT FROM INCEPTION, AN UNEVEN PLAYING FIELD. THESE ARE ALL, AS MR. DURKIN STATED EARLIER, PARTIES WITH EQUAL BARGAINING POWER. AND THAT IS TYPICAL IN THIS CONTEXT. AND IRONICALLY, THE WEAKEST PARTY IN ALL OF THAT IS THE PRINCIPAL. JUSTICE WELLS, YOU ALSO ASKED ANOTHER QUESTION THAT I WANT TO MAKE SURE EVERYONE UNDERSTANDS. TYPICALLY, THE PRINCIPAL, LET'S SAY TRANS COASTAL, IS RUN BY MR. AND MRS. SMITH. THEY, TYPICALLY, SIGN GUARANTEES, AND SO IF BOLAND, I AM SORRY, IF TRANS COASTAL GOES OUT OF BUSINESS BELLY-UP, I GUARANTEE YOU WHAT IS GOING TO HAPPEN IS, IF THE SURETY IS FORCED TO PAY ATTORNEYS FEES, THEN THE SURETY IS GOING TO TURN TO THE GUARANTORS OF THE PRINCIPLE -- OF THE PRINCIPAL TO SEEK INDEMNIFICATION FOR THOSE ATTORNEYS FEES, SO,

AGAIN, I THINK THAT IF WE ARE TRYING TO RECONCILE PUBLIC POLICY HERE, AND OUR STATED PURPOSE IS TO MAKE SURE INSURANCE COMPANIES DO NOT TAKE ADVANTAGE OF THIS UNEVEN PLAYING FIELD, THE REALITY OF SURETY SHIP LAW JUST DON'T FIT WITHIN THAT FRAMEWORK.

WHAT IS YOUR POSITION REGARDING THE APPLICABILITY OF 428, REGARDLESS OF 756?

I DON'T THINK IT APPLIES. I DON'T THINK IT APPLIES.

AND --

WELL --

756 DOESN'T REFER TO CONTRACTORS, SO IF 428 ONLY APPLIES TO, IF 756 APPLIES, UNDER WHAT RULE OF STATUTORY CONSTRUCTION CAN WE ADD IN THE WORD "PRIME CONTRACTOR", IN ORDER TO APPLY 756?

WELL --

IN THIS CASE.

I BELIEVE THAT THE COURT HAS DONE IT BEFORE, AND IT DID IT BEFORE IN THE CASES INVOLVING, AND THEY WERE CITED BY MR. DURKIN, INVOLVING SUBSUBCONTRACTORS. AND WHAT THIS COURT DID, AND I APOLOGIZE. THE CASE NAME ESCAPES ME AT THIS POINT, IS IT DID HE SAY ESSENTIALLY WHAT MR. DURKIN DID WITH PRIME CONTRACTORS, AND IT LOOKED AT WHAT THE INTENT OF THE STATUTE WAS, AND WHAT THE STATUTE WAS TRYING TO DEAL WITH, AND IT HELD THAT EVEN THOUGH SUBSUBCONTRACTORS WERE NOT EXPRESSLY NAMED, THAT THE INTENT OF THE STATUTE WAS TO INCLUDE IN SUBSUBCONTRACTORS.

I WANT TO MAKE SURE I UNDERSTAND. YOUR POSITION IS DIRECTLY IN OPPOSITION TO YOUR AMICUS POSITION. IS THAT CORRECT?

NOT ON ALL ISSUES.

WELL, ON THE ISSUE OF WHETHER 756, BY NOT USING THE WORD "CONTRACTOR", YOUR POSITION IS DIRECTLY OPPOSED TO THE AMICUS.

I THINK IT COULD BE CONSTRUED THAT WAY.

ARE YOU, THEN, IMPLYING THAT 624.03, WHEN IT DEFINES INSURERS AS INCLUDING SURETIES, DOES NOT MEAN SURETY IN THIS CONTEXT?

NO. I THINK IT MEANS SURETY IN THE CONTEXT OF A SURETY. I MEAN, WE ARE A SURETY.

OKAY. WELL, IF 624.03 DEFINES INSURER AS INCLUDING A SURETY, WHY DOESN'T 627.428 APPLY TO A SURETY, EVEN ABSENT 756?

WELL, I THINK IN THIS, IN THE NICHOLS COURT, THE NICHOLS CASE, THIS COURT CONCLUDED THAT 627.428 DOES APPLY.

I THOUGHT YOU WERE SAYING BEFORE THAT IT DOESN'T APPLY, IF 756 DOES APPLY.

I AM SORRY. WHAT I MEANT TO SAY IS THAT 627.756, ITS EXISTENCE TAKES US OUT OF 627.428. IF THERE WAS NO 627.756, THEN I THINK THAT WE MIGHT FALL UNDER 627.428. I AM SORRY. SO IF YOU ARE SAYING THERE IS NO 627.756, WE ARE A SURETY, AND WE WILL PROBABLY FALL UNDER 627.428, BUT BECAUSE OF 627.756, IT MUST MEAN SOMETHING. IT MUST HAVE SOME PURPOSE, AND WE CLEARLY FALL WITHIN THE SCOPE OF 627.756, SO I THINK THAT IF YOU RECOGNIZE THE

LEGISLATURE'S RECOGNITION OF THIS DIFFERENCE AND YOU TRY AND COMPORT IT WITH THE PUBLIC POLICY BEHIND 627.428, I THINK WHAT THE LEGISLATURE WAS ATTEMPTING TO DO IS TO DEAL WITH THE REALITY OF SURETY SHIP LAW, IN A DIFFERENT ATTORNEYS FEE STATUTE.

THE LEGISLATURE --

YOU GO AHEAD WITH THAT QUESTION, BUT THEN WE WILL END AFTER YOU ANSWER.

THE LEGISLATURE, IN 756, WHEN IT SAID, WELL, 627.428 IS GOING TO APPLY IN THESE CIRCUMSTANCES, IT COULD HAVE SAID, BUT ONLY TO THE EXTENT OF THE BOND, BECAUSE IT WAS SPECIFICALLY TALKING ABOUT SURETY BONDS IN THAT CASE, BUT IT DIDN'T SAY THAT.

WELL, BUT IT DID USE THE LANGUAGE OF INDEMNIFICATION, SO I THINK IT IS REFERENCED TO INDEMNIFICATION, IF THE LIMITATION, THE LIMITING LANGUAGE, THAT, AGAIN, COMPORTS WITH THE GENERAL SURETY SHIP LAW, WHICH IS A SURETY IS NOT LIABLE BEYOND THE AMOUNT THAT HE HAS AGREED TO INDEMNIFY.

CHIEF JUSTICE: THANK YOU VERY MUCH.

THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME ON REBUTTAL?

FOUR THANK YOU. IF I COULD JUST ADDRESS A COUPLE OF POINTS. THE FIRST POINT IS THAT THIS IS HERE ON THE CERTIFIED QUESTION, AND I THINK THAT THE DISTRICT COURT SIMPLY MISPLACED ITS RELIANCE ON THE NICHOLS DECISION, BUT THE NICHOLS DECISION, I THINK, IS INSTRUCTIVE. THERE THIS COURT WAS DEALING WITH A SPECIFIC STATUTORY LIMITATION ON THE LIABILITY OF SURETIES. IT WAS SECTION 744 .357, SAID THAT NO SURETY ON A GUARDIANSHIP POINT SHOULD BE CHARGED ON THE PROPERTY OF THE AWARD. THE INSURANCE INDUSTRY IS NOT WITHOUT INFLUENCE IN THE LEGISLATURE. IF IT BELIEVES THAT IT WAS ENTITLED TO A RESTRICTION, I BELIEVE THAT IS WHERE WE WOULD FIND THE RESTRICTION.

IT SEEMS TO ME THAT IS SOMEWHAT OF AN INCONSISTENT ARGUMENT, MR. DURKIN, FROM THE STANDPOINT REGARDLESS OF THE CONCESSION OF YOUR SPECIFIC OPPONENT IN THIS CASE. IF THE LEGISLATURE HAD DESIRED TO INCLUDE PRIME CONTRACTORS IN 756, IT COULD HAVE DONE SO JUST AS IT WOULD HAVE ACTED IN PLACING THE LIMITATION ON THE BOND IN THE GUARDIANSHIP SITUATIONS.

I AGREE, YOUR HONOR, BUT WHAT I AM DRIVING AT IS THE ISSUE OF WHY THE ATTORNEYS FEE ENTITLEMENT IS NOT LIMITED TO THE PENAL SUM OF THE BOND, IS BECAUSE THE STATUTE SIMPLY DOESN'T CONTAIN ONE. AND IF IT WAS THE INTENTION OF THE LEGISLATURE TO DO THAT, IT WOULD HAVE CLEARLY EXPRESSED THAT. AS IT DID WITH GRARDIAN SHIP BONDS. THIS ISSUE, YOUR HONOR, THAT WE DEBATED OVER THE ABSENCE OF THE WORD "CONTRACTOR" HAS BEEN ADDRESSED IN THE FINANCIAL INDEMNITY CASE WHERE IT DETERMINED THAT THE GENERAL CONTRACTOR WAS ENTITLED TO RECOVER, SIMPLY BASED ON THE FACT THAT THE SURETY WAS AN INSURER UNDER THE STATUTE.

EXCUSE ME. IF YOU COME ACROSS ANY LEGISLATIVE HISTORY, ANY COMMITTEE ARGUMENT?

NO, YOUR HONOR.

DEBATE ABOUT THAT?

I AM SURE WE LOOKED FOR IT. NOTHING, REALLY, THAT IS INSTRUCTIVE.

COULD YOU GIVE US A POLICY OR A REASON, WHY 756 WAS SPECIFICALLY REFERRED BY OWNER OR SUBCONTRACTORS, LABOR AND MATERIALMEN. WOULD THAT SPECIFICALLY BE INDIVIDUALS NOT NAMED IN THE SURETY BOND?

ABSOLUTELY.

SO THAT, ABSENT THAT, THEY WOULD NOT HAVE AN ABILITY TO SUE UNDER 627.428.

PRECISELY. MATERIALMEN ARE NEVER NAMED. THE OWNER MAY HAVE A LIEN FILED BEGINS ITS PROPERTY, WHICH IT HAS TO DISCHARGE, BUT THEN IT SEEKS TO RECOVER AGAINST THE PERFORMANCE BOND OF THE, OF A CONTRACTOR. THERE ARE A WEALTH OF CIRCUMSTANCES. THAT IS WHY I SEE THAT. WELL, I WILL AGREE WITH COUNSEL'S CONCESSION, I SEE THAT AS A STATUTE WHICH INCLUDES PARTIES WHO WOULD NOT OTHERWISE GET THE BENEFIT OF 428. I REALLY HAVE NOTHING FURTHER. THANK YOU ALL VERY MUCH.

CHIEF JUSTICE: ALL RIGHT. THANK YOU ALL FOR A VERY INTERESTING DISCUSSION. THE COURT IS GOING TO TAKE ITS REGULAR MORNING RECESS. WE WILL BE IN RECESS UNTIL ELEVEN O'CLOCK.

MARSHAL: PLEASE RISE.