

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,976

INSURANCE COMPANY OF NORTH AMERICA

PETITIONER, *C*

NOV 16 1989

v

ACOUSTI ENGINEERING CO. OF FLORIDA

RESPONDENT.

CLERK, SUPREME COURT
By: *[Signature]*
Deputy Clerk

PETITION FOR REVIEW
DISCRETIONARY JURISDICTION
OF
OPINON FILED OCTOBER 5, 1989, BY DISTRICT COURT OF APPEAL
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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November 13, 1989

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STATEMENT OF THE CASE

This is Petition to invoke the discretionary jurisdiction of the Supreme Court to review the Opinion filed on October 5, 1989, in the District Court of Appeal of the State of Florida, Fifth District, wherein the Appeal Court affirmed the Trial Court's Final Order awarding attorney's fees pursuant to Section 627.756 and 627.428, Florida Statutes (1987), to the prevailing party for attorney's fees provided during an arbitration hearing conducted pursuant to Florida Arbitration Code, Section 682.01-682.22, Florida Statutes (1987) [Appendix Exhibit 1].

The Question presented by Petitioner to the Fifth District Court of Appeal was:

WHETHER A CLAIMANT UNDER A COMMON LAW PAYMENT BOND HAVING A CONTRACTUAL REQUIREMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND BREACHES CAN BE AWARDED ATTORNEYS FEES BY A TRIAL COURT FOR SERVICES RENDERED IN THE ARBITRATION PROCEEDING WHEN NEITHER THE CONTRACT, PAYMENT BOND NOR THE FLORIDA ARBITRATION CODE PROVIDES FOR ATTORNEYS' FEES TO THE PREVAILING PARTY.

STATEMENT OF THE FACTS

The issue underlying this petition stems from a construction contract containing an arbitration clause which required the contracting parties to arbitrate their disputes. During the construction, a dispute arose between the Respondent, Acousti Engineering Co. of Florida, and G. H. Johnson Construction Co., concerning the failure of and the replacement costs of a mechanically fastened exterior wall system.

Respondent, Acousti Engineering Company of Florida, recorded its Claim of Lien against the property of the Owner, Orlando Regional Medical Center, and then sued to collect its sub-subcontract balance from G. H. Johnson Construction Co.'s Surety, Petitioner, Insurance Company of North America, on a common law payment bond purchased by G. H. Johnson Construction Co. who was a general trades subcontractor to the general contractor, Mellon-Stuart Company.

G. H. Johnson Construction Company, pursuant to the terms of the contract and the Florida Arbitration Code, Sections 682.01 - 682.22, Florida Statutes (1987), demanded arbitration of its dispute with Respondent, Acousti Engineering Company of Florida. Acousti was the prevailing party at the arbitration hearing and an Award of the Arbitrators was rendered against G. H. Johnson Construction Company [Appendix Exhibit 2], who paid the full amount of the Award of the Arbitrators; thus, no cause of action was filed for confirmation of an award pursuant to Section 682.12, Florida Statutes. No judgment or decree was rendered by any court against an insurer and in favor of any named insured pursuant to

Section 627.428, Florida Statutes.

Subsequent to the arbitration hearing, Respondent, Acousti Engineering Company of Florida, filed its Motion to Dissolve Abatement of the Civil Action (the motion was moot because G. H. Johnson Construction Company's paid the Award of the Arbitrators; no hearing was held on the Motion) and its Motion for Award of Prevailing Party Attorney's Fees pursuant to Sections 627.756 and 627.428, Florida Statutes (1987). The mode or nature of recovery was the arbitration proceeding which was conducted pursuant to the Florida Arbitration Code, Sections 682.01 - 682.22, Florida Statutes. The Trial Court entered its Final Order wherein the Trial Court ordered Petitioner, Insurance Company of North America, to pay Respondent, Acousti Engineering Company of Florida, \$27,000.00 for the attorney's fees provided by Respondent's, Acousti's, attorneys in the arbitration case which G. H. Johnson Construction Co. had demanded pursuant to the arbitration provision of its contract with Respondent, Acousti [Appendix Exhibits 3 and 4].

The Award of the Arbitrators in American Arbitration Association Case number 32-110-0013-87-V required G. H. Johnson Construction Company to pay Respondent, Acousti Engineering Company of Florida. The Award of the Arbitrators did not contain any reference to Petitioner, Insurance Company of North America. The Award of the Arbitrators was not modified or corrected pursuant to Section 682.14, Florida Statutes [Appendix Exhibit 2]. G. H. Johnson Construction Company paid the full amount of the Award of the Arbitrators.

JURISDICTIONAL ARGUMENT

The Trial Court's Final Order awarding attorney's fees pursuant to Section 627.756 and 627.428, Florida Statutes (1987), to the prevailing party for professional services rendered during an arbitration hearing conducted pursuant to Florida Arbitration Code, Section 682.01-682.22, Florida Statutes (1987) [Appendix Exhibits 4 and 5], and the Affirming Opinion by Fifth District Court of Appeal [Appendix Exhibit 1] expressly and directly conflicts with decision of other district courts on the same point of law.

The rule of law, i.e. that attorney's fees awarded pursuant to section 627.756 are not barred merely because the amount due the insured was established pursuant to arbitration rather than through a judicial determination, announced by the First District Court of Appeal in Fitzgerald & Company, Inc., v. Roberts Electrical Contractors, Inc., 533 So.2d 789 (Fla. 1st DCA 1988), followed in Zac Smith & Company, Inc., v. Moonspinner Condominium Association, Inc., 534 So.2d 739 (Fla. 1st DCA 1988), and followed by the Fifth District Court of Appeal in the instant case conflicts with the language of Section 627.428(1), Florida Statutes, and other appellate expressions of law which hold:

1. that supplementary proceeding are separate and distinct from the main cause in which the judgment is procured, and sometimes said to be collateral to it.

Codomo v. Emanuel, 91 So.2d 653, 655 (Fla. 1956);

2. that the Florida Arbitration Code does not authorize attorney's fees. Therefore, fees incurred in

contractual arbitration proceedings can only be recovered pursuant to an agreement between the parties. McDaniel v. Berhalter, 405 So.2d 1027, 1030 (Fla. 4th DCA 1981);

3. that the Florida Arbitration Code excludes attorney's fees for the actual arbitration and only allows for the recovery of costs in subsequent proceedings to confirm or set aside an arbitration decision. Buena Vista Construction Company v. Carpenters Local Union 1756 of the United Brotherhood of Carpenters & Joiners of America, 472 So.2d 1356, 1358 (Fla. 5th DCA 1985);

The Opinion of the Fifth District Court of Appeal is in direct conflict with Beach Resorts International, Inc. v Clarmac Marine Construction Company, 339 So.2d 689 (Fla. 2d DCA 1976) and its dual rationale: (1) that where the "nature" of a recovery is in arbitration, rather than the litigation contemplated by the statute, it is error to award attorneys fees attributable to the arbitration previously conducted; and (2) that therefore a party who enters into an arbitration agreement which does not itself provide for fees, which are excluded by the governing Florida arbitration code, Sec. 682.11, Fla. Stat. (1981), may not become entitled to their recovery simply by filing a presumably unnecessary complaint in the circuit court.

Further, the application of the rule of law announced by the First District Court of Appeal as followed and applied by the Fifth District Court of Appeal in the instant case would produce a different result in Glen Johnson, Inc., vs L. M. Howdeshell, Inc.,

520 So.2d 297, 298 (Fla. 2d. DCA 1988) wherein the contractor and surety appealed a trial court judgment awarding subcontractor damages and attorney fees on a construction contract. The subcontractor, Howdeshell, filed a complaint, wherein it prayed for damages and attorney's fees, to recover amounts due under the subcontract with the general contractor and its surety. The general contractor and surety requested arbitration and the trial court ordered the parties to submit their claims to arbitration. The arbitrator held for the general contractor and surety. The arbitrator decided that payment was not due to the subcontractor from the general contractor until the general contractor was paid by the owner. Appellee filed a motion to modify or vacate the arbitration award in circuit court. The trial court found that all conditions precedent to payment had been satisfied, entered final judgment for appellee in the sum of \$11,045.10 and reserved jurisdiction to determine the amount of attorney's fees. The court after a hearing awarded appellee \$9,717.50 in attorney's fees. The Appeal Court held that the trial court improperly included attorney's fees for the arbitration proceeding in his award of fees against the general contractor and surety because attorney's fees for arbitration proceeding are expressly excluded by Section 682.11, Florida Statutes (1985).

The rule of law, i.e. that attorney's fees awarded pursuant to section 627.756 are not barred merely because the amount due the insured was established pursuant to arbitration rather than through a judicial determination, conflicts with the language of Section 627.428(1), Florida Statutes, which provides that "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 insured" a reasonable sum as attorney' fees shall be adjudged. In the instant case the trial court did not render a "judgment or decree" to confirm the Award of the Arbitrators because one of the contracting parties, i.e. G. H. Johnson Construction Company, who was not a party in the trial court case, paid the full amount of the Award of the Arbitrators to the other contracting party, i.e. Respondent, Acousti Engineering Company of Florida. The payment of the arbitration award and acceptance of the same constituted settlement of the real controversy between the contracting parties; therefore, the mode and substance of Respondent's recovery was defined by the the Florida Arbitration Code and not Section 627.428(1), Florida Statutes.

The Supreme Court should exercise its discretion and entertain the case on the merits if it find it does have jurisdiction, because the rule of law announced by the First District Court of Appeal and followed by the Fifth District Court of Appeal does substantial harm to the continued use of arbitration as a means of dispute resolution on construction projects that require either a statutory or common law payment bond. As a counterbalance to this new rule of law the construction industry general contractors will either discontinue the use of contracts containing arbitration provisions or include in their form of construction contracts a provision providing for payment of attorney's fees to the prevailing party in either

arbitration or court actions. This new rule of law establishes an intolerable inequality between the general contractors and their subcontractors for construction projects having either a statutory or common law payment bond and a construction contract containing an arbitration provision. Since the Attorney's fee Sections 627.756 and 627.428, Florida Statutes, applies only to suits brought by owners, subcontractors, laborers, and materialmen against a surety, the application of this new rule of law becomes a "one way street" for the payment of attorney's fees provided to an owner, subcontractor, laborer or materialman during a contractually agreed arbitration proceeding. Unless general contractors add a contract provision providing for the payment of attorney's fees to the prevailing party in arbitration, the owner, subcontractor, laborer or materialman will have a unilateral right to collect its attorney's fees if they prevail in contractually required arbitration proceedings but the general contractors will not have a reciprocal right. The addition of a contract provision wherein the prevailing party in arbitration is paid its attorney's fees, will result in increased consumer cost for construction.

SUMMARY OF ARGUMENT

The Opinion of the Fifth District Court of Appeal follows a new rule of law announced by the First District Court of Appeal which conflicts with the rule previously announced by other appellate expressions of law and where the Opinion is applied, it will produce a different result in a case which involves substantially the same controlling facts as a prior case. The Opinion of the Fifth District Court of Appeal is in direct conflict with Beach Resorts International, Inc. v Clarmac Marine Construction Company, 339 So.2d 689 (Fla. 2d DCA 1976) and its dual rationale: (1) that where the "nature" of a recovery is in arbitration, rather than the litigation contemplated by the statute, it is error to award attorneys fees attributable to the arbitration previously conducted; and (2) that therefore a party who enters into an arbitration agreement which does not itself provide for fees, which are excluded by the governing Florida arbitration code, Sec. 682.11, Fla. Stat. (1981), may not become entitled to their recovery simply by filing a presumably unnecessary complaint in the circuit court.

The Opinion of the Fifth District Court of Appeal is in direct conflict with the Opinion of the Second District Court of Appeal in Glen Johnson, Inc., vs L. M. Howdeshell, Inc., 520 So.2d 297 (Fla. 2d. DCA 1988) which involves substantially the same controlling facts as the facts involved in the instant case.


CERTIFICATION

I HEREBY CERTIFY that a true copy of the foregoing
JURISDICTIONAL BRIEF OF PETITIONER has been sent by U. S. Mail
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