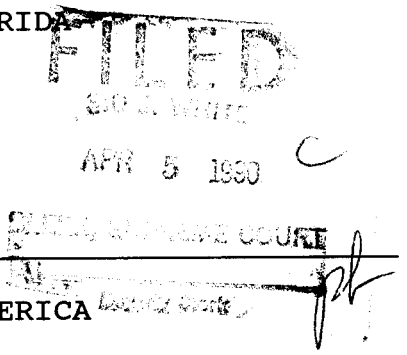
IN THE SUPREME COURT OF FLORIDA



CASE NO. 74,976

INSURANCE COMPANY OF NORTH AMERICA

PETITIONER,

v.

ACOUSTI ENGINEERING CO. OF FLORIDA

RESPONDENT.

PETITION FOR DISCRETIONARY JURISDICTION
OF OPINION FILED OCTOBER 5, 1989
BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

BRIEF OF PETITIONER

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REFERENCES

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STATEMENT OF THE CASE

This petition for certiorari arises from a final order rendered on August 17, 1988, by Circuit Court Judge W. Rogers Turner of the Ninth Judicial Circuit in and for Orange County, Florida [A.1] and from a decision affirming the trial court's order by the Fifth District Court of Appeal entered on October 5, 1989.[1] The order appealed from is an award of attorney's fees entered by the trial court in favor of Acousti for fees incurred during arbitration.

Acousti entered into a subcontract dated December 23, 1983, with G.H. Johnson Construction Company (hereinafter "Johnson"), which incorporated by reference a subcontract dated November 21, 1983, between Johnson, as a general trades subcontractor, and Mellon-Stuart Company (hereinafter "Mellon-Stuart"), as the general contractor.

By its subcontract with Mellon-Stuart, Johnson was obligated to provide a common law payment bond, which it obtained from Petitioner, Insurance Company of North America (hereinafter "INA"), as surety. Johnson's common law payment bond incorporated by reference the contract dated November 21, 1983, between Johnson and Mellon-Stuart [A.2]. By the terms of the incorporated contract, claimants under the payment bond were required to submit

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[1] Petitioner, Insurance Company of North America (hereinafter "INA") timely filed its Notice of Appeal on September 7, 1988, and its Petition for Certiorari to this Court on November 6, 1989.

"all claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof... " to arbitration.

On November 11, 1986, Respondent, Acousti, disregarding its contractual duty to arbitrate, filed its lawsuit against Petitioner, INA, [A.3]. Johnson filed its Demand for Arbitration with the American Arbitration Association on December 30, 1986 [A.4].[2] Acousti then filed its Counterclaim against Johnson and INA on January 26, 1987 [A.5].

On February 16, 1987, the trial court heard and denied [A.6] Acousti's Amended Motion for Stay of Arbitration and Motion for Leave to File First Amended Complaint; the trial court granted Petitioner's Motion to Abate the below cause of action filed by Respondent and Petitioner's Motion to Compel Arbitration [A.6].

After a full arbitration hearing on the issues in dispute, the Arbitrators found in favor of Respondent, Acousti, and against Johnson [A.7]. On May 10, 1988, Acousti filed its Motion for Confirmation of Arbitration Award [A.8], Motion for Award of Taxable Costs and Motion for Award of Prevailing Party's Attorney's Fees [A.9; A.10]. In response, Petitioner filed Defendant INA'S Reply to Plaintiff's Motion for Award of Prevailing Party Attorney's Fees and Defendant INA'S Reply to Plaintiff's Motion for Award of Taxable Costs [A.11; A.12]. Because Johnson agreed to pay the award, a subsequent proceeding

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[2] Case Number 32-110-0013-87-Q, entitled G. H. Johnson Construction Company vs. Acousti Engineering Company of Florida.

pursuant to Section 682.12, Florida Statutes, to confirm the arbitration decision was not set for hearing in the trial court [A.13, lines 4-6]. The trial court, at a hearing held on August 12, 1988, granted Acousti's Motion for Award of Prevailing Party's Attorneys' Fees [A.1] and awarded Acousti reasonable attorney's fees pursuant to Sections 627.756 and 627.428, Fla. Stat. (1987), as the prevailing party in the action below, to include services rendered by Plaintiff's attorneys in an Arbitration Case No. 32-110-0013-87-Q.

On September 7, 1988, INA filed its Notice of Appeal. After appellate briefs were submitted by the parties and oral argument was heard, the Fifth District Court of Appeal on October 5, 1989 affirmed the trial court's award to Acousti of attorney's fees incurred in arbitration. Because this decision conflicts with the rulings of other Florida District Courts of Appeal, INA petitioned the Florida Supreme Court on November 6, 1989, for discretionary jurisdiction pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv). The parties timely filed their briefs on jurisdiction and this discretionary review ensued.

STATEMENT OF THE FACTS

Petitioner, INA, is the surety under common law payment bond number K02006200 [A.2]. The bond was provided to Johnson to fulfill a condition of its subcontract with Mellon-Stuart, the general contractor for the construction of a project known as Orlando Regional Medical Center, Southwest Health Complex (hereinafter "Project") owned by Orlando Regional Medical Center, Inc. (hereinafter "Owner").

Johnson entered into a subcontract dated December 23, 1983, with Respondent, Acousti, which obligated Acousti, inter alia, to furnish and install the Mechanically Fastened Exterior Wall System. Johnson's subcontract with Mellon-Stuart was in the form of AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, which incorporated by reference AIA Document A201, General Conditions of the Contract for Construction, both of which were incorporated by reference (see Article 4 - The Contract Documents into Johnson's subcontract with Acousti.

As a result of the several incorporations by reference, Johnson's subcontract with Acousti and the bond required the subcontracting parties and the claimants under the payment bond to arbitrate "all claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof...." pursuant to Article 13, Arbitration, of AIA Document A401 and Article 7, paragraph 7.9, Arbitration, of AIA Document

A201. The Johnson and Mellon-Stuart subcontract (dated November 21, 1983) was incorporated by reference into the bond [A.2].

During the construction of the Project, a dispute arose among Mellon-Stuart, Johnson and Acousti as to whether the Mechanically Fastened Exterior Wall System had been installed in accordance with the contract specifications. Mellon-Stuart directed Johnson, and Johnson directed Acousti, to correct certain deficiencies identified by the architect and to otherwise perform the installation of the Mechanically Fastened Exterior Wall System in accordance with the contract specifications. After Acousti refused to correct the deficiencies or replace the Wall System, Johnson hired a separate subcontractor to replace the system and withheld the cost of said replacement from Acousti's final subcontract payment.

On November 11, 1986, Acousti sued INA, as surety on the payment bond, for the amount of the subcontract balance [A.3]. On December 30, 1986, Johnson filed its Demand for Arbitration with the American Arbitration Association [A.4]. INA filed Defendant's Motion to Compel Arbitration and Alternative Motion to Abate in the case below [A.14]. On February 16, 1987, the trial court granted INA's Motion to Compel Arbitration and Motion to Abate. The trial court denied Acousti's Motion for Leave to File First Amended Complaint (to add Johnson as a Defendant) without prejudice to renew the motion, if required, to enforce the arbitration decision [A.6].

On January 26, 1987, Acousti filed its Reservation of Rights, Response and Counterclaim with the American Arbitration Association [A.15; A.5]. Acousti's Reservation of Rights, provided: [A.5].

> Acousti filed that lawsuit styled Acousti v. INA, Case No. 86-14573, prior to this arbitration demand being filed by Johnson. Acousti expressly reserves all its right to prosecute that lawsuit and to have the Court determine whether the claims between Acousti and Johnson and its surety are subject to this arbitration or may be prosecuted in the preexisting lawsuit. The answer and counterclaim filed herein are thus subject to this reservation.

An arbitration hearing was held on June 15-17, 1988, and the arbitrators found in favor of Acousti and against Johnson. The award of the arbitrators did not acknowledge the existence of Acousti's Counterclaim reference to Petitioner, INA [A.7].

On May 10, 1988, Acousti filed its Motion for Confirmation of Arbitration Award [A.8]. By mutual agreement between Acousti and Johnson, Johnson agreed to pay and has paid monthly installments in settlement of the award of the arbitrators; consequently, a subsequent proceeding pursuant to Section 682.12, Florida Statutes, to confirm the arbitration decision was not set for hearing in the trial court [A.13, lines 4-6]. Also on May 10, 1988, Acousti filed its Motion for Award of Taxable Costs and Motion for Award of Prevailing Party's Attorney's Fees [A.9; A.10]. In response, INA filed its Reply to Plaintiff's Motion for Award of Prevailing Party Attorney's Fees and its Reply to

Plaintiff's Motion for Award of Taxable Costs [A.11; A.12]. On August 17, 1988, a hearing was held and the trial court rendered its Order Granting Motion for Award of Prevailing Party Attorney's Fees, and said: [A.1]

> ORDERED AND ADJUDGED that Plaintiff's motion for award of prevailing party attorneys' fees is granted and Plaintiff is awarded reasonable attorneys' fees pursuant to Section 627.756 and 627.428, Florida Statutes (1987) as the prevailing party herein, to include services rendered by Plaintiff's attorneys in Arbitration Case No. 32-110-0013-87-Q. The Court reserves jurisdiction to determine the amount of such reasonable attorney's fees.
> [Emphasis supplied.]

On September 7, 1988, INA filed its Notice of Appeal based upon the trial court's error in awarding attorney's fees for the arbitration. INA alleged that such an award was improper when neither the contract nor the bond specifically allowed attorneys' fees for arbitration and when the arbitrators had not awarded them. INA argued that the trial court's award violated § 682.11, Fla. Stat. (1987). Acousti argued that the award was proper because attorneys' fees were not barred merely because a party was required to arbitrate a mechanic's lien or payment bond claim. The appellate court agreed with Acousti's position and affirmed the award of the trial court.

QUESTION PRESENTED

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.

SUMMARY OF THE ARGUMENT

It is a fundamental principle of Florida law that a party cannot bypass the unavailability of fees in arbitration by filing an unwarranted action in court for the sole purpose of claiming attorney's fees after arbitration. Buena Vista Construction Company v. Carpenters Local Union 1765 of the United Brotherhood of Carpenters & Joiners of America, 472 So.2d 1356 (Fla. 5th DCA 1985); Cuevas v. Potamkin Dodge, Inc., 455 So.2d 398 (Fla. 3d DCA 1984). In other words, where one has no substantive right to recover attorney's fees, one should not be able to fabricate a basis for fees by improperly filing in court a claim that is contractually required to be arbitrated. The Florida Arbitration Code, § 682.01, et seq., Fla. Stat. (1987), does not expressly allow such a fee. This position is consistent with a party's right to recover fees incurred for the confirmation and enforcement of the arbitrators' decision. An arbitration award cannot be enforced without confirmation by the court, and a party should be awarded fees against the losing party who fails to promptly pay an arbitration award. It is, however, contradictory to Florida case law and the Florida Arbitration Code for the trial court to enter an award for attorneys' fees expended in arbitration when neither the parties' contract nor the payment bond authorizes an award of fees.

Respondent, Acousti, was obligated by the terms and conditions of the common law payment bond, including the

subcontract incorporated therein, to arbitrate its dispute with Johnson, as principal, and Petitioner, INA, as surety. The trial court below ordered Acousti to arbitrate its dispute and Acousti participated in the arbitration. The Arbitrators entered their award of the arbitrators in favor of Acousti and Acousti accepted the benefits of said award. The mode and substance of Acousti's recovery was pursuant to the arbitration proceeding. Because neither the Florida Arbitration Code, the subcontract nor the payment bond provide for the payment of attorney's fees to the prevailing party for the professional services provided during the arbitration proceeding, an award by the trial court for arbitration attorneys' fees when such was not included in the arbitration award was wholly improper.

The mere institution of an action to make a claim under the payment bond does not alter the parties rights under the arbitration provisions of their contract. Petitioner, INA, is entitled to have its payment bond, including the incorporated subcontract, enforced pursuant to its terms and conditions. Courts may not rewrite contracts, nor can they rewrite payment bonds. St. Petersberg Bank & Trust Co. v. Boutin, 445 F.2d 1028 (5th Cir. 1971).

The rule of law announced by the First District Court of Appeal in Zac Smith & Co., Inc. v. Moonspinner Condominium Ass'n, Inc., 534 So.2d 734 (Fla. 1st DCA 1988) and followed by the Fifth District Court of Appeal in the instant case and by the Second

District Court of Appeal in Fewox v. McMerit Construction Co., 14 FLW 2827 (Fla. 2d DCA December 15, 1989) 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 result, general contractors will either discontinue the use of contracts containing arbitration provisions or include in their form contracts a provision providing for payment of attorney's fees to the prevailing party in either arbitration or court actions. This will greatly increase the cost of construction, as general contractors will pass on the additional cost to developers. Moreover, it is unfair to increase the cost of the bond to general contractors while conferring a benefit upon subcontractors, materialmen and owners, the mere donee beneficiaries of the bond.

Petitioner, INA, prays this Court will apply its holding in Buena Vista Construction Company, and Beach Resorts, supra, to the question presented in this Petition and reverse the Trial Court's and Appellate Court's decisions awarding Respondent, Acousti, attorneys' fees pursuant to §§ 672.756 and 627.428, Fla. Stat., (1987), for attorney's services rendered by Acousti's attorneys in the arbitration proceedings. These cases uphold the intent of § 682.11, Fla. Stat. (1987), to exclude awards of attorney's fees incurred during arbitration unless provided for in a specific agreement between the parties.

ARGUMENT

THE APPELLATE COURT ERRED BY AFFIRMING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO ACOUSTI FOR THE ARBITRATION PROCEEDINGS UNDER THE COMMON LAW PAYMENT BOND BECAUSE IT WAS NOT AUTHORIZED BY THE CONTRACT, PAYMENT BOND NOR THE FLORIDA ARBITRATION CODE.

In an opinion filed on October 5, 1989, the Fifth District Court of Appeal affirmed the trial Court's decision awarding fees to Respondent, Acousti, as the prevailing party in an arbitration proceeding. [R.2-3; A.16]. The apparent predicate upon which the trial court, and subsequently the appellate court, based its decision was the right of an insured receiving a favorable judgment to recover attorney's fees from its insurer pursuant to § 627.756, Fla. Stat. The reasoning of the appellate court in affirming the decision was that attorney's fees awards were not barred merely because the amount due the insured was established pursuant to arbitration rather than through a judicial determination [R.2-3; A.16].

A. A party cannot obtain attorney's fees incurred in arbitration which were not provided for in its contract by first suing in court pursuant to a statute which authorizes fees to the prevailing party.

The attorney's fees entered by the courts below were erroneous because a party is not entitled to fees incurred in arbitration unless the contract between the parties or the payment bond provides for attorney's fees incurred during arbitration

proceedings. The Florida Arbitration Code does not authorize such an award. In fact, § 682.11, Fla. Stat. (1987), specifically precludes such an award, stating "[u]nless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpires' expenses, not including counsel's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." [Emphasis added].

A party should not be able to bypass the unavailability of fees in arbitration by filing an unwarranted action in court for the sole purpose of claiming attorney's fees after arbitration. In other words, where one has no substantive right to recover attorney's fees, one should not be able to fabricate a basis for fees by improperly filing in court a claim that is contractually required to be arbitrated.

This position is consistent with a party's right to recover fees incurred for the confirmation and enforcement of the arbitrators' decision. An arbitration award cannot be enforced without confirmation by the court, and a party should be awarded fees against the losing party who fails to promptly pay an arbitration award. It is, however, contradictory to Florida case law and the Florida Arbitration Code for the trial court to enter an award for attorneys' fees expended in arbitration when neither the parties' contract nor the payment bond authorizes an award of fees.

INA's position is wholly supported by the holdings in Buena Vista Construction Company v. Carpenters Local Union 1765 of the United Brotherhood of Carpenters & Joiners of America, 472 So.2d 1356 (Fla. 5th DCA 1985) and Cuevas v. Potamkin Dodge, Inc., 455 So.2d 398 (Fla. 3d DCA 1984).

In Buena Vista Construction Company v. Carpenters Local Union 1765 of the United Brotherhood of Carpenters & Joiners of America, supra, Buena Vista Construction Company appealed from a judgment confirming an arbitration award and the trial court entry of a judgment for damages, attorney's fees and costs. In reversing the award of attorney's fees, the court stated:

> On the question of attorney's fees, we find merit to Buena Vista's position. The general rule in Florida is that attorney's fees cannot be taxed as costs in any cause, including arbitration proceedings, unless authorized by contract or legislative authority. Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956); Beach Resorts International, Inc. v. Clarmac Marine Construction Co., 339 So.2d 689 (Fla. 2d DCA 1976).
>
> Carpenters Local 1756 filed a motion for attorney's fees pursuant to section 448.08, Florida Statutes, which provides that the court may award fees to the prevailing party in an action for unpaid wages. The instant case was not an action for unpaid wages, since, even though the damages were measured by the amount of lost wages, the basis of the recovery was pursuant to the arbitration clause, as governed by Chapter 682, Florida Statutes, and not the general labor regulations of Chapter 448, Florida Statutes. Florida cases have distinguished attorney's fees for arbitration proceedings from suits to enforce arbitration cases based on the foreclosure of a mechanic's lien. See McDaniel v. Berhalter, 405 So.2d 1027 (Fla. 4th DCA 1981); Beach Resorts International.

> The mechanic's lien statute expressly authorizes such fees. S.713.29, Fla. Stat. (Supp.1984). In the case sub judice, the project agreement did not expressly provide for attorney's fees in arbitration proceedings. Additionally, 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. SS.682.11, 682.15, Fla. Stat. (Supp.1984). Thus the appellees were entitled to the $95 for costs associated with the confirmation proceedings, but not $10,000 for attorney's fees.
>
> We affirm the judgment as to damages and costs, but reverse the award as to attorney's fees.

472 So.2d at 1358.

In Cuevas v. Potamkin Dodge, Inc., supra, Cuevas appealed the Circuit Court's denial of an application for attorney fees after the Circuit Court had referred the matter to arbitration and the arbitrators had awarded damages and reasonable attorney's fees and costs; the Cuevas court affirmed the denial of fees, stating:

> Notwithstanding that one of the underlying bases for the plaintiff's recovery was a claim under a statute which explicitly provides for a fee award to the victorious side, we agree that no fees are available in the present circumstances, essentially because Ms. Cuevas' success was achieved, not as the statute says, "after judgment in the trial court," but through the arbitration process to which, it must be taken on this record, she had voluntarily agreed. The conclusion is required, as the trial judge ruled, by what we regard, as the controlling case of Beach Resorts International, Inc. v. Clarmac Marine Construction Co., 339 So.2d 689 (Fla. 2d DCA 1976). There, the court denied fees in a mechanics' lien foreclosure proceeding, although the applicable statute of course

> provides for them, on the ground that the claimant had, as here, won its case in arbitration. Both this court, and the first and fourth districts [n.5] have followed the holding of Beach Resorts and its dual rationale that the "nature" of such a recovery is in arbitration, rather than the litigation contemplated by the statute; and that therefore a party who enters into 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. Heyman v. Vonelli, 413 So.2d 1254 (Fla. 3d DCA 1982); McDaniel v. Berhalter, 405 So.2d 1027 (Fla. 4th DCA 1981); Oakdale Park Ltd. v. Byrd, 346 So.2d 648 (Fla. 1st DCA 1977). As to the issues involved on this appeal - the entitlement to statutory fees when recovery is effected in arbitration - we are unable meaningfully to distinguish these cases from the present one.
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> * * *
>
> [n.5:]
> We note also that Beach Resorts has become a leading case throughout the country on the issue. [Citations omitted.] [Emphasis supplied.]

455 So.2d at 399-400.

The Second District Court of Appeal in Beach Resorts International, Inc. v. Clarmac Marine Construction Company, 339 So.2d 689, 691 (Fla. 2d DCA 1976) said:

> In the case sub judice there was no award of attorneys fees by the arbitrator nor was there any special agreement between the parties for payment of the same. Therefore, the remaining question is whether some other statute can be invoked to warrant the awarding of attorney fees attributable to the arbitration herein.
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> * * *
>
> Resolution of any conflict between the Arbitration Code, which prohibits attorney fees, and the Mechanic's Lien law, which specifically allows such costs, is determined

by the nature of the recovery. Emery v. International Class & Mfg., Inc., 249 So.2d 496 (Fla 2d DCA 1971). In Emery, involving the construction of Section 713.29, we stated,

> . . . [A] claimant is not entitled to attorneys, fees under the section before us, notwithstanding that he ultimately prevails in the case, unless the mode and substance of his recovery is as expressly provided for within the lien law itself." 249 So.2d at 500.
>
> * * *

A third and more critical reason for conclusion that Clarmac's recovery was governed by the Arbitration Code, and not the Mechanic's Lien Law, is the interpretation given the relationship of these two statutes in Mills v Robert W. Gottfried, Inc., 272 So.2d 837 (Fla. 4th DCA 1973). The Fourth District Court of Appeal stated,

> . . . The order for arbitration should stay the judicial proceedings pending a determination . . . Once the arbitration is completed, the trial court may on motion of either party dissolve the stay order and proceed to confirm, vacate, or modify the award in accordance with Sections 682.12-682.14, F.S. 1971, F.S.A., and to enter a judgment in accordance with Section 682.15, F.S. 1971, F.S.A. Contemporaneously therewith, the court may adjudicate the right of the plaintiff to a mechanic's lien for the purpose of enforcing such judgment as plaintiff may obtain." 272 So.2d at 838-839.

The plain meaning of this language is that the mechanic's lien statute, in cases initiated as lien foreclosures but submitted to mandatory arbitration, is not operative unless the judgment entered confirming, vacating or modifying the arbitration award must be enforced in favor of the plaintiff. This view is strengthened by the statement in Mills that, ". . . [T]he plaintiff still retains the amount ultimately determined to be due by means of a mechanic's lien, if plaintiff is

> other wise entitled to such a lien." (emphasis supplied).
>
> * * *
>
> In the absence of a refusal to abide by the trial court's judgment, it was error to impose a mechanic's lien and award of attorneys fees attributable to the arbitration previously conducted.

339 So.2d at 691-2.

The Fourth District Court of Appeal in McDaniel v. Berhalter, 405 So.2d 1027 (Fla. 4th DCA 1981) resolved the question of whether a party can shift the burden of attorney's fees in arbitration by instituting a mechanic's lien foreclosure action and said:

> McDaniel claims that institution of a mechanic's lien action should operate to entitle the prevailing party to attorney's fees, including those incurred during arbitration. * * *
> However, the general rule in Florida is that attorney's fees associated with arbitration proceedings are recoverable only by statute or by a specific agreement between the parties. Beach Resorts International, Inc. v. Clarmac Marine Construction Co., 339 So.2d 689, 690 (Fla. 2d DCA 1976). The Florida Arbitration Code does not authorize attorney's fees. Id. at 691. Therefore fees incurred in contractual arbitration proceedings can only be recovered pursuant to an agreement between the parties....There is no claim in this case that any such agreement exists.
>
> In Oakdale Park Ltd. v. Byrd, 346 So.2d 648 (Fla. 1st DCA 1977), and Beach Resorts International, Inc. v. Clarmac Marine Construction Co., 339 So.2d 689 (Fla. 2d DCA 1976), our sister courts addressed the question whether attorney's fees incurred in the course of arbitration were recoverable because the party claiming entitlement to the fees had previously filed a suit to foreclose a mechanic's lien and then prevailed in arbitration. Both courts held that the mere

> institution of an action to enforce a mechanic's lien does not alter the parties rights under the arbitration provision in their contract. Accordingly, we hold that McDaniel had no right to recover attorney's fees for services rendered in the course of arbitration.

In the instant case, Respondent, Acousti, without mention of the arbitration provisions of its subcontract with Johnson or the arbitration provisions of the payment bond, attempted to disregard its contractual obligation to arbitrate by filing its claim in the Circuit Court against INA. INA thereupon invoked its right to arbitrate,[3] and the case was referred to arbitration.

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[3] INA's right to arbitration flowed from the interlocking provisions of the various contract documents:

The payment bond [A.2], a common law bond and therefore binding upon the claimants provides:

> WHEREAS, the above bounden Principal has entered into a certain written contract with the above named Obligee [MELLON-STUART COMPANY], dated the 21st day of November, 1983, for Bid Group 3, Bid Package 3, General Trades Work, which contract is hereby referred to and made a part hereof as fully and to the same extend as if copied at length herein.

Johnson's subcontract with Acousti provides inter alia:

> ARTICLE 4 - THE CONTRACT DOCUMENTS
> 4.1 The contract documents consist of this agreement and any exhibits attached hereto: the agreement between the Owner [Mellon-Stuart] and the General Contractor [Johnson], . . . [Emphasis supplied]

Mellon-Stuart's subcontract with Johnson provides, inter alia:

> ARTICLE 13, ARBITRATION
> 13.1 All claims, disputes and other matters in question arising out of, or relating to, this

Continued on following page

In the arbitration, Acousti was successful in its claim against Johnson. The award directed the parties to share equally the fees and expenses of the American Arbitration Association and the arbitrators. Acousti then returned to the trial court and filed its Motion to Dissolve Abatement of Civil Action and Motion for Confirmation of Arbitration Award, neither of which were heard by the trial court below because Johnson entered into a written agreement to pay and is paying the award of the arbitrators. Respondent, Acousti, acknowledged to the trial court that: [R.5].

> The time to vacate the arbitration award has expired, and since we're working out a payment schedule, we will not be seeking a confirmation order and a judgment. That's why we've now filed our motion for an award of fees at this time.

Acousti, as prevailing party in the arbitration, based its entitlement to attorney's fees on §§ 627.756 and 627.428, Fla. Stat. (1987), successfully arguing to the trial court that Article 13 of the subcontract (providing for arbitration) tacitly allows for fees, or at least does not foreclose them:

> 13.6 This Article shall not be deemed a limitation of any rights or remedies which the Subcontractor may have under any Federal or State Mechanics' lien laws or under any applicable labor and material payment bonds unless such rights or remedies are expressly waived by him.

Continued from previous page

> Subcontract, or the breach thereof, shall be decided by arbitration. . .

Article 4 of the Johnson-Acousti subcontract, known as a "flow-down" provision, served to incorporate by reference, among other things, Article 13 of the Mellon-Stuart-Johnson subcontract.

But the effect of Acousti's argument is to read into the subcontract inchoate statutory rights which Acousti never had bargained for and was not entitled to enjoy. The subcontract itself did not provide for attorney's fees for arbitration, and no attorney's fees were awarded by the arbitration panel under any theory. To award Acousti attorney's fees after the fact was to allow Acousti to circumvent the outcome of the only procedural remedy it had bargained for -- an arbitration award devoid of attorney's fees.

An analogous situation arose in Mills v. Robert W. Gottfried, Inc., 272 So.2d 837 (Fla. 4th DCA 1973), which discussed the rights and remedies which a contractor may have under state Mechanics' lien laws when its contract contains an arbitration provision, and at page 839 said:

> The present contract contains, insofar as we can tell, no express waiver of the contractor's right to assert a mechanic's lien. And, in our opinion, the mere execution of the contract containing the above-quoted arbitration provision did not clearly imply an intent to relinquish the contractor's right to the judicial enforcement of a mechanic's lien for amounts found due under the contract. Thus it follows that although the plaintiff may be required to arbitrate the issue of its entitlement to final payment and the amount thereof because or the arbitration agreement, Plaintiff still retains the right to enforce the amount ultimately determined to be due by means of a mechanic's lien, if plaintiff is otherwise entitled to such a lien.
>
> [Emphasis Supplied.]

The Fourth District Court of Appeal explained its holding in Mills v. Robert W. Gottfried, Inc., supra., in McDaniel v. Berhalter, supra, at page 1029, and said:

> Mills, however, did not hold that the mere institution of a mechanics lien foreclosure action would operate to change a party's rights under the Arbitration Code.

The First District Court of Appeal in Oakdale Park, Ltd. v. Byrd, 346 So.2d 648, 649 (Fla. 1st DCA 1977) was faced with a similar issue as in the instant appeal. The Oakdale court, in reversing an award of attorney's fees where the claimant had improperly filed an action to foreclose a mechanic's lien, rather than seeking contractually- mandated arbitration, stated:

> Of particular import in the instant case is that the record does not demonstrate any necessity on the part of appellees, in order to protect their claim of lien, to resort to foreclosure proceedings. Had appellees promptly sought redress through their agreed upon arbitration forum and had their claim not been resolved prior to expiration of the jurisdictional time for mechanic's lien foreclosure, then, in such event, they would have possessed a right to file the action for foreclosure of mechanic's lien in order to protect same. A party, who has entered into a contract requiring arbitration, may not flagrantly disregard this contractual prerequisite, march down to the courthouse, file a complaint of foreclosure, and demand an attorney's fee by reason of ignoring at the outset his contractual duty to arbitrate.
> [Emphasis supplied]

Id. at 649.

The Third District Court of Appeal in Heyman v. Vonelli, 413 So.2d 1254 (Fla. 3d DCA 1982), likewise dealing with a similar

situation as arises in the instant case, followed the holding in Oakdale Park, Ltd. v Byrd, supra. The Heyman court, at page 1255, stated:

> Since Vonelli could not recover his attorney's fees and costs under the Arbitration Statute, he sought them under the Mechanic's Lien Statute while simultaneously asking the court to affirm the arbitration finding in his favor. . . . A party who enters into a contract requiring arbitration may not file a complaint of foreclosure and demand an attorney's fee. Oakdale Park, Ltd. v. Byrd, 346 So.2d 648 (Fla. 2d DCA 1977). The order confirming the arbitration panel's award is affirmed, except as to that part of the award which grants attorney's fees and costs incurred in the Circuit Court litigation which is reversed, and the cause is remanded with instructions to assess and award only those court costs incurred pursuant to confirming the arbitration award. The court in State Farm Mutual Automobile Insurance Company v. Anderson, 332 So.2d 623, 625 (Fla. 4th DCA 1976), discussed the issue of awarding attorneys' fees in a 682.02, Fla. Stat., proceeding initiated to compel arbitration and the subsequently held arbitration:
> Although the proceeding in the circuit court was the rather summary one authorized by S. 682.03 F.S. 1973, we perceive no reason which precludes the application of S. 627.428(1), F.S. 1973 to that proceeding. The latter statute authorizes the award of attorney's fees to an insured "[u]pon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of an insured . . . under a policy or contract executed by the insurer, ..." A claim under S.627.428(1) is of course not to be confused with a claim for attorney.s fees by an insured for services rendered in the conduct of arbitration since such fees (absent an agreement to the contrary) are not recoverable. S.682.11, F.S. 1973....
> [Emphasis Supplied.]

Acousti relies on part on the "Reservation of Rights, Response and Counterclaim" which it filed with the American Arbitration Association after arbitration was begun. Acousti's Reservation of Rights, provided:

> Acousti filed that lawsuit styled Acousti v. INA, Case No. 86-14573, prior to this arbitration demand being filed by Johnson. Acousti expressly reserves all its right to prosecute that lawsuit and to have the Court determine whether the claims between Acousti and Johnson and its surety are subject to this arbitration or may be prosecuted in the preexisting lawsuit. The answer and counterclaim filed herein are thus subject to this reservation. [A.5]

Acousti's Reservation of Rights did not operate to change its rights and obligations under the subcontract or payment bond; nor did it operate to change its rights under the Florida Arbitration Code. Acousti was contractually required to arbitrate the issue of its entitlement to final payment and the amount thereof because of the arbitration agreement. Acousti reserved the right to enforce the amount ultimately determined to be due by means of an action under the terms and conditions of the payment bond in issue. The enforcement was not ultimately required, because Johnson, a party to the subcontract with Acousti and the principal on the payment bond, agreed in writing to pay the award of the arbitrators. If enforcement would have been required, an award of fees incurred for the confirmation and enforcement of the arbitrators' award would have been proper.

Acousti's successful award from the arbitrators was achieved as a result of the trial court's order directing the Petitioner, Respondent and Johnson to arbitrate their dispute. Respondent participated in this contractually-required arbitration process and has accepted the benefits set forth in the award of the arbitrators from Johnson.

Acousti entered into a subcontract containing an arbitration agreement which does not itself provide for attorneys' fees and which are excluded by the governing Florida Arbitration Code, and may not now become entitled to their recovery simply by its flagrant disregard of its contractual prerequisite to arbitrate its dispute with Johnson and Petitioner, INA, by filing a presumably unnecessary complaint in the circuit court. The award by the trial court and its affirmance by the Fifth District Court of Appeal was erroneous and must be reversed.

B. The Trial and Appellate Courts Erred in Awarding Attorney's Fees for the Arbitration Because Such an Award Violates the Policy Underlying Section 627.428(1) and Section 682.11, Florida Statutes.

The rule of law enunciated by the courts below that attorney's fees awarded pursuant to § 627.756, Fla. Stat., 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 § 627.428(1), Fla. Stat., which provides that "[u]pon 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 attorneys' 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, Johnson, 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, Acousti. 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 Acousti's recovery was defined by the the Florida Arbitration Code and not Section 627.428(1), Florida Statutes.

The rule of law announced by the First District Court of Appeal in Zac Smith & Co., Inc. v. Moonspinner Condominium Ass'n, Inc., 534 So.2d 734 (Fla. 1st DCA 1988) and followed by the Fifth District Court of Appeal in the instant case and by the Second

District Court of Appeal in Fewox v. McMerit Construction Co., 14 FLW 2827 (Fla. 2d DCA December 15, 1989) 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, if it is adopted by this Court as the law of Florida, general contractors will either discontinue the use of contracts containing arbitration provisions or include in their form contracts a provision providing for payment of attorney's fees to the prevailing party in either arbitration or court actions.

Moreover, this new precedent 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 provisions, §§ 627.756 and 627.428, Fla. Stat., apply 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. This unfair windfall will greatly elevate the cost of a surety bond to contractors. Thus, the addition of a contract provision awarding attorneys' fees to the prevailing party in arbitration will result in increased consumer cost for construction.

The subcontract between Johnson and Acousti required the subcontract parties to arbitrate their claims, disputes and other matters arising under the contract. The common law payment bond in issue was secured by Johnson for the benefit of Mellon-Stuart; protecting materialmen and subcontractors, such as Acousti, was not the main purpose of the payment bond. Acousti is, at best, merely a donee third-party beneficiary of the payment bond and there is no reason why Acousti should enjoy the benefits of the bond without bearing its burdens as well; in particular, the burden to arbitrate its disputes.

The Third District Court of Appeal was faced with the similar issue of whether a materialman may recover against a surety on a construction bond absent compliance with a contractual notice requirement to the surety in Travelers Indemnity Co. v. National Gypsum Co., 394 So.2d 481, 482 (Fla. 3d DCA 1981). Judge Nesbitt discussed the condition precedent requirements of common law bonds and stated:

> Parties enjoy the fundamental principle to make contracts and have them enforced without being re-written by the courts. Century Federal Savings and Loan Association v. Madorsky, 353 So.2d 868 (Fla. 1st DCA 1977), cert. denied, 359 So.29 1217 (Fla. 1978). It follows then, with greater force of reason,

> that parties in a purely common law bond are entitled to have such a plain and unambiguous notice provision enforced. Consequently, we align ourselves with Balboa Insurance Company v Alpha Electric Supply, Inc., 373 So.2d 391 (Fla. 1st DCA 1979) and our decision in W.F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District, supra.

Judge Schwartz, in his specially concurring opinion, at Page 485, stated:

> While I agree with the conclusion reached by Judge Nesbitt and with much of his opinion, I think it goes further than is necessary or appropriate to dispose of the issues presented. In my view, the holding that compliance with a notice provision is indispensable to recovery on a bond should be -- and, in this case need be -- confined only to would-be beneficiaries of bonds which secure the performance or payment of building and construction contracts. In this area, as is said in 17 Am.Jur. 2d Contractor's Bonds, S.30 at 212 (1964), "[a] provision to give notice of default is, of course, valid provided it is reasonable, and is a condition precedent to an action so based."
> . . .
> [I] see no reason why a subcontractor or materialman should be in a superior position concerning a bond which has been fortuitously posted and as to which it is merely a donee third-party beneficiary, than with respect to a bond which is specifically required by statute to be maintained for its benefit. If anything, the reverse should be true.

The Florida Supreme Court affirmed the appellate court's decision in National Gypsum Co. v Travelers Indemnity Co., 417 So.2d 254 (Fla. 1982), adopting the rule set forth by Judge Schwartz and holding:

> Courts are not authorized to rewrite contracts. Home Development Co. v. Bursani, 178 So.2d 113 (Fla. 1965). This, however, is what the trial court did. As Judge Schwartz

> pointed out, National Gypsum is, at best, merely a donee third-party beneficiary of the instant bond. We see no reason to allow National Gypsum to enjoy the benefits of the bond without bearing its burdens as well.

Id. at 256. In so holding, this Court reasoned that protecting materialmen was not the main purpose of the bond. Id.

Thus, as in National Gypsum, Acousti must also bear the burdens of INA's bond. The payment bond in issue [A.2] incorporated the contract dated November 21, 1983, between Johnson and Mellon-Stuart Company and by the terms of said incorporated contract, claimants under the payment bond were required to submit "all claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof. . . " to arbitration.

A surety is bound only to the express terms of its bond. St. Petersberg Bank & Trust Co. v. Boutin, 445 F.2d 1028 (5th Cir. 1971). Courts may not rewrite the terms of contracts or common law bonds. In effect, this is precisely what the trial court and appellate court below have done. Their decisions retroactively impose a new contractual term upon the general contractor and surety -- payment of attorney's fees incurred in arbitration to donee beneficiaries not foreseen when the payment bond was negotiated. Such a rule increases the monetary exposure of general contractors and sureties at least twofold. Clearly, INA would have increased the cost of its bond and Johnson would have passed this cost along to the owner in its construction bid, has

they known they would be paying the attorney's fees of all arbitrating claimants not a party to the bond. This rule will impede settlement if parties believe they will succeed in arbitration and collect their attorneys' fees. This increased cost of litigation and anti-settlement effect are some of the things arbitration was created to eliminate. The lower courts' holdings defeat the underlying policies and intent of § 682.11, Fla. Stat., and must be reversed.

CONCLUSION

Respondent, Acousti, was obligated by the terms and conditions of the common law payment bond, including the subcontract incorporated therein, to arbitrate its dispute with Johnson, as principal, and Petitioner, INA, as surety. Neither the Florida Arbitration Code, the subcontract nor the payment bond provide for the payment of attorney's fees to the prevailing party for the professional services provided during the arbitration proceeding.

Acousti's institution of an action to make a claim under the payment bond did not alter the parties' rights under the arbitration provisions of their contract. Petitioner, INA, prays this Court will apply Buena Vista Construction Company, and Beach Resorts, supra, to the question presented in this Petition and reverse the trial and appellate court's decisions awarding Respondent, Acousti, attorneys' fees pursuant to §§ 672.756 and 627.428, Fla. Stat., (1987), for services rendered by Acousti's attorneys in the arbitration proceedings. These cases uphold the intent of § 682.11, Fla. Stat. (1987), to exclude awards of attorney's fees incurred during arbitration unless provided for in a specific agreement between the parties.

CERTIFICATION

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

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