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 RESPONDENT

Joseph A. Lane, Esquire
Florida Bar No. 260819
Lowndes, Drosdick, Doster,
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802-2809
(407) 843-4600
Attorney for Respondent Acousti
Engineering Co. of Florida

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STATEMENT OF THE CASE

Respondent ACOUSTI ENGINEERING OF FLORIDA ("Acousti"), accepts Petitioner's statement of the case subject to the following clarifications or exceptions:

1. The November 11, 1986 Circuit Court action Acousti filed against Petitioner, Insurance Company of North America ("INA") was filed as a one count action against the INA surety payment bond; no demand for arbitration prior to that date had been filed or served by INA or its principal, G. H. Johnson Construction Company ("Johnson"). An arbitration clause was later determined by the trial court [P.App.6] to apply to the Acousti/INA circuit court payment bond action due to an incorporation of the subcontract documents by reference in the INA bond, including contract documents of others which in turn had been incorporated by reference by the subcontract. There was, therefore, no "disregard" by Acousti of any duty to arbitrate with INA as Petitioner suggests; there was at the time a good faith dispute as to whether the arbitration clause applied to INA. Once the trial court ruled there was such application, Acousti complied with the order and arbitrated against Johnson and INA.

2. Respondent INA itself filed a Motion to Compel Arbitration of Acousti's claim against the payment bond, which the trial Court granted in Paragraph 2 of its February 16, 1987 Order [P.App.6].

3. After the arbitration award was rendered in favor of Acousti, it, Acousti, agreed at the request made through the attorney for INA and Johnson to accept an installment payment

arrangement in lieu of immediate entry of a final judgment pursuant to Acousti's motion for confirmation of arbitration award [P.App.8]. Both Johnson and INA were jointly and severally parties to that written Agreement for Payment of Judgment. [R.App.1]. Petitioner's statement of the case wrongly implies that only Johnson reached such agreement with Acousti.

STATEMENT OF THE FACTS

Respondent Acousti accepts Petitioner's statement of facts subject to the following clarifications or exceptions:

1. The general conditions clause Petitioner references as requiring arbitration of "all claims" between the parties also contained a separate provision (which Petitioner does not cite, reference or quote in its statement of facts). This separate provision contractually reserved in arbitration any rights or remedies it, Acousti, had under the payment bond. In this regard, Article 13 of AIA Document A401 was titled "Arbitration" and contained the following clause in addition to the "all claims" arbitration clause Petitioner references.

> 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 law or under any applicable labor and material payment bonds unless such rights or remedies are expressly waived by him. (emphasis supplied)

2. Petitioner on Page 5 of its Brief briefly describes the nature of the underlying dispute which was resolved by the arbitration. While the merits of that dispute are now resolved with finality and admittedly not pertinent to this appeal, Acousti respectfully and forcefully disputes Petitioner's characterization that Acousti was directed by Johnson, INA's principal, to correct designated deficiencies or that it ever refused to correct any deficiencies for which it received directions from the architect.

3. Petitioner INA itself moved to compel arbitration and abate the Acousti Circuit Court action. The Court granted that

motion by its February 16, 1987 order [P.App.6]. Thereafter, and for that reason, Acousti arbitrated with INA with respect to the underlying claim.

4. Acousti's Response and Counterclaim [P.App.15] filed in the arbitration action against Johnson and INA did contain the "reservation of rights" INA references on Page 6 of its Brief. That reservation reserved Acousti rights to have the trial court determine in a scheduled hearing which had not taken place yet the rights and obligations of the parties to arbitrate. The reservation avoided the appearance of a waiver through what otherwise may have appeared to be a voluntary participation in arbitration. The trial court, on February 16, 1987 heard and denied Acousti's Motion to Stay Arbitration and granted INA's Motion to Abate the circuit court case and to compel arbitration [P.App.6].

5. Petitioner INA was a named party to the arbitration proceeding. [See counterclaim of Acousti, Page 2, P.App.5].

6. The arbitration award [P.App.7] did not expressly reference the Acousti "Counterclaim" but did resolve who was owed money and directed that Acousti be paid the principal amount in dispute plus interest. Acousti's claim to such sums could only be found in its counterclaim, which was the only procedural vehicle for Acousti to recover sums it claimed. The award referenced in its last sentence:

> This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

7. Thereafter, and before the hearing on Acousti's Motion for Confirmation of Arbitration award [P.App.8], both Johnson and

INA entered the Agreement for Payment of Judgment [R.App.1] under which the sum awarded Acousti was paid in agreed installments. (Acousti notes that it does not have a copy of the Agreement signed by INA, though the Agreement recites that INA is a party and Petitioner's counsel negotiated the Agreement for both Johnson and INA. There was an oversight by Petitioner in not returning a copy of the Agreement executed in its behalf. This was never an issue because the installment payments towards the Judgment sum were timely made and the Judgment sum satisfied).

8. The following sentence found at the bottom of Page 7 of Petitioner's statement of facts is seriously in error and seriously misstates Acousti's position before the Appellate Court and implies that the underlying action involved a mechanic's lien under Chapter 713, Florida Statutes or somehow involved the law applicable to such actions, which it did not:

> Acousti agreed that the award was proper because attorney's fees were not barred merely because a party was required to arbitrate a mechanic's lien or payment bond claim (emphasis supplied).

Acousti has not taken that position and does not now take the position that (a) foreclosure of a claim of lien under Chapter 713, Florida Statutes is subject to arbitration (which it is not due to exclusive jurisdiction of the circuit courts to decide lien foreclosure actions) or (b) that its, Acousti's, case involved a claim of lien under Chapter 713, Florida Statutes (which it did not). Petitioner's sentence is correct regarding arbitration of a common law payment bond action, which is what Acousti's action involved. The Appellate Court's decision affirmed the trial court's award to Acousti of attorney's fees

against a surety pursuant to Sections 627.756 and 627.428 (1987) and did not speak to or involve Chapter 713, Florida Statutes, which was not even at issue in the appeal.

QUESTION PRESENTED

Whether attorney's fees can be awarded pursuant to Sections 627.756 and 627.428, Florida Statutes and are not barred merely because the amount due the insured was established pursuant to arbitration rather than through a judicial determination.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Fifth District Court of Appeal upon the sound and deliberate reasoning it expressed in harmony with three other cases directly on point from the First and Second District Courts of Appeal.

The arbitration code does not exclude attorney's fees for arbitration where otherwise authorized by a separate statute or contract; the code merely disallows the arbitrators the authority to determine fees and confirms that the code itself does not afford an independent right to attorney's fees, apart from a separate statute or contract, which independently may authorize such fees. In this case, such separate authority is based on Sections 627.756 and 627.428, Florida Statutes. Petitioner here confessed judgment by the Agreement for Payment of Judgment and, independently was liable for the award by its notice of and participation in the arbitration.

Finally, by affirming the Fifth District here, consistent with the three other Florida appellate court decisions directly on point, this Court promotes and harmonizes existing public policy of allowing successful insureds recovery of reasonable attorney's fees and assures equality of treatment to insureds whose claims are arbitrated.

ARGUMENT

BOTH THE APPELLATE COURT AND THE TRIAL COURT CORRECTLY DETERMINED THAT ACOUSTI WAS ENTITLED TO ATTORNEY'S FEES UNDER SECTIONS 627.756 AND 627.428, FLORIDA STATUTES, WHICH WERE NOT BARRED MERELY BECAUSE THE AMOUNT DUE THE INSURED, ACOUSTI, WAS ESTABLISHED PURSUANT TO ARBITRATION RATHER THAN THROUGH JUDICIAL DETERMINATION.

The Fifth District Court of Appeal in its opinion filed October 5, 1989 affirmed the trial court's award of attorney's fees to Acousti where the sum due Acousti had been determined in an arbitration proceeding. In harmony with Zac Smith & Company, Inc. v. Moonspinner Condominium Association, Inc., 534 So.2d, 739 (Cla. 1st DCA 1988), Fitzgerald & Company, Inc. v. Roberts Electrical Contractors, Inc., 533 So.2d 789 (Fla. 1st DCA 1988), and now Fewox v. McMerit Construction Co., 14 F.L.W. 2827 (Fla. 2nd DCA December 15, 1989), the Fifth District held that attorney's fees separately authorized by Sections 627.756 and 627.428, Florida Statutes ("the statutes") are not barred merely because the amount due the insured was decided in arbitration rather than judicially. This result is sound and stands on the following foundation:

A. Section 682.11, Florida Statutes, does not prohibit attorney's fees for services rendered during arbitration proceedings.

Section 682.11, Florida Statutes, does not substantively prohibit arbitration attorney's fees; instead, it merely excises attorney's fees from the subject matter jurisdiction of arbitration, presumedly because arbitrators are generally businessmen versed in a particular field and typically are not trained or

versed in awarding attorney's fees. The entitlement and amount of attorney's fees authorized by statute or contract are issues properly decided by the trial court upon motion to confirm the arbitration award. This foregoing principle is clearly established by Zac Smith, supra, Fewox, supra and Loxahatchee River Environmental Control District v. Guy Villa & Sons, Inc., 371 So.2d 111 (Fla. 4th DCA 1978).

The Court in Fewox, which represents the most deliberate analysis of this issue, acknowledged the mistaken interpretation by some that the effect of Section 682.11, Florida Statutes, is to wholly exclude or prohibit any award of attorney's fees resulting from an arbitration. As the Fewox Court allows, this incorrect interpretation of the statute by some has resulted from a misinterpretation of the Fewox Court's earlier decision in Beach Resorts International v. Clarmac Marine Construction, 339 So.2d 689 (Fla. 2d DCA 1976). This misinterpretation is also found in Petitioner's appeal brief which cites Beach Resorts as immaculate authority that attorney's fees resulting from arbitrations are wholly excluded or prohibited by Section 682.11, Florida Statutes. This assertion is flatly wrong. Rather, Beach Resorts holds that Section 682.11, Florida Statutes, prohibits an arbitrator from awarding attorney's fees associated with arbitration; such attorney's fees are awardable by the trial court if attorney's fees were allowed by contract or statute. See Fewox, and authorities therein cited, supra, p. 2828, Zac Smith, supra; and Fitzgerald, supra. As stated with respect to

this exact issue by the Zac Smith Court, supra, p. 742:

> We accept appellee's interpretation of section 682.11 as the more logical and as consistent with our opinion in Fitzgerald. The statute does not proscribe attorney fees in arbitration proceedings, but merely states that the arbitration panel is authorized to award all fees and costs except attorney fees. The Legislature apparently eliminated attorney fees from the subject matter jurisdiction of arbitration because the arbitrators are generally businessmen chosen for their expertise in the particular subject matter of the suit and have no expertise in determining what is a reasonable attorney fee. Loxahatchee River Environmental Control District v. Guy Villa & Sons, Inc., 371 So.2d 111 (Fla. 4th DCA 1978), cert den., 378 So.2d 346 (Fla. 1979).

In summary, Section 682.11, Florida Statutes, does not prohibit or exclude attorney's fees from being awarded as a result of an arbitration; it merely excises from the jurisdiction of the arbitrator the award of such fees, where otherwise authorized by statute or contract.

> B. Sections 627.428 and 627.756, Florida Statutes, authorize an award of prevailing party attorney's fees for services rendered in a successful arbitration.

There is considerable authority and merit for the statutes to authorize attorney's fees in favor of insureds where the amounts awarded are determined in arbitration. The Fitzgerald Court held that such arbitration fees were awardable as within the scope of the statute, even where the surety paid the claim previously decided in arbitration and thus as a matter of law confessed judgment before the circuit court enforced the award.

> When read together, sections 627.756 and 627.428 specifically provide for attorney's fees in construction bond actions. Furthermore, subcontractors, as well as owners, laborers, and materialmen are deemed to be insureds for purposes of the insurance attorney's fee provisions. Shores

Supply Co. v. Aetna Casualty & Surety Co., 524 So.2d at 724. Accord Snead Construction Corp. v. Langerman, 369 So.2d 591, 594 (Fla. 1st DCA 1978). Moreover since 'the payment of a claim is ... the functional equivalent of a confession of judgment,' Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217, 218 (Fla. 1983), an insurer cannot escape liability for attorney's fees 'simply by settling the suit before a judgment was entered.' Fortune Insurance Co. v Brito, 522 So.2d 1028 (Fla. 3d DCA 1988). See also Cincinnati Insurance Co. v. Palmer, 297 So.2d 96, 99 (Fla. 4th DCA 1974), in which the court observed-

> We think the statute must be construed to authorize the award of an attorney's fee to an insured or beneficiary under a policy or contract of insurance who brings suit against the insurer after the loss is payable even though technically no judgment for the loss claimed is thereafter entered favorable to the insured or beneficiary due to the insurer voluntarily paying the loss before such judgment be rendered.

By the same token, an attorney's fee award is not barred merely because the amount due a contractor was established pursuant to arbitration rather than through a judicial determination. See Carter v. State Farm Mutual Automobile Insurance Company, 224 So.2d 802 (Fla. 1st DCA 1969); Nigaglioni v. Century Insurance Co. of New York, 281 So.2d 570 (Fla. 3d DCA 1973).

In summary, in the instant case payment was made to the subcontractor Roberts at the eleventh hour, and only after Roberts incurred attorney's fees and costs in filing suit. Roberts received a favorable decision from the arbitration panel, and filed a motion to enforce the award and to assess attorney's fees and costs. The insurer, USF&G, joined the motion to require arbitration and may not now evade responsibility for an attorney's fee on the technical ground that a formal award was not rendered against it. Fitzgerald, supra, p. 790, 791.

Zac Smith, the other First District opinion on point, is in direct accord with Fitzgerald. Zac Smith also addresses the technical issue proudly waived by Petitioner that the statutes

only contemplate the award of attorney's fees upon the physical rendition of a judgment. Presumedly Petitioner's position would be that by mandatorily participating in arbitration and upon receiving an arbitration award (as opposed to a "judgment"), which was paid, Acousti, or any insured in arbitration, is excluded from the entitlement of prevailing party attorney's fees which it would have received in litigation.

The Zac Smith Court held, and Fewox Court agreed, that the scope of the insured's attorney's fees under the statutes would include arbitration services because "... the arbitration proceedings were necessary to rendition of the judgment which triggered its [the insured's] entitlement to attorney fees under these provisions." Zac Smith, supra, p. 742.

In summary, Zac Smith, Fitzgerald, the subject opinion of the Fifth District, and Fewox are in sound, deliberate and sensible harmony and accord that the subject statutes entitle a prevailing insured to his attorney's fees where arbitration is the forum to decide the amount due the insured.

C. Payment of the sum awarded the insured in arbitration is the functional equivalent of a "judgment or decree", thus satisfying the statutory condition to award of prevailing party attorney's fees.

It is axiomatic that payment of a claim is the functional equivalent of a confession of judgment. See Wollard v. Lloyd's and Companies or Lloyd's, 439 So.2d 217 (Fla. 1983). To this end, an insurer cannot escape liability for attorney's fees by the exercise of settling before judgment is entered. See Fortune Insurance Co. v. Brito, 522 So.2d 1028 (Fla. 3d DCA 1988) and Cincinnati Insurance Co. v. Palmer, 297 So.2d 96, 99 (Fla. 4th DCA

1974). The precise circumstance of the surety, here Petitioner, paying the arbitration award before enforcement by entry of final judgment by the circuit court, and thus scurrying to avoid the impending award of attorney's fees under the statutes, was directly considered and rejected for obvious reasons by the appellate courts in Zac Smith, Fitzgerald and Fewox. As directly held by Fewox, the surety's voluntary payment of the arbitration award is the equivalent of rendition of a judgment or decree under the statutes. See Fewox, supra, p. 2830. This furthers the policy of discouraging insurers from contesting coverage and reimburses successful insureds for reasonable attorney's fees in actions to enforce their policies. See Zac Smith, supra, p. 743 and Fewox, supra, p. 2829.

In the subject case, the Agreement for Payment of Judgment [R.App.1] was entered jointly by Petitioner and Johnson, its principal, before - and thus obviating the need for - entry of a final judgment. (It is, of course, revealing that INA now suggests that Acousti prejudiced its rights to attorney's fees by accepting installment payments of the sum awarded, rather than by then insisting upon a final judgment and payment by INA of the entire lump sum, which would have been detrimental to Johnson and INA). As a matter of law, there was on behalf of Petitioner a "confession of judgment" for purposes of an award of attorney's fees under the statutes. Beyond this, even if Johnson itself were singularly to have paid or agreed to pay the award, its surety would still be liable under the confession of judgment principle. Because Petitioner INA was on notice and a party to the

arbitration proceeding, Acousti would have been absolutely entitled to an order confirming the award by the circuit court. See Kidder Electric of Florida, Inc. v. USF&G, 530 So.2d 475 (Fla. 5th 1988) and Von Engineering Co. v. R.W. Roberts Construction Co., 457 So.2d 1080 (Fla. 5th DCA 1984). Thus, Petitioner INA was as a matter of law subject to a "final judgment" and its ramifications under the statutes by reason of Petitioner's entitlement to an order confirming the award.

> D. The underlying arbitration clause reserved to Acousti in arbitration its rights or remedies to which it was otherwise entitled under Petitioner INA's payment bond and so, even if the subject statutes strictly by operation of law did not apply to the arbitration award, they were made to apply by operation of the specific agreement of the parties.

By virtue of incorporation by reference of various contract documents into the payment bond of Petitioner INA, Acousti's payment bond claim was submitted to arbitration (see the trial court's February 16, 1987 order; P.App.6). However, the very article which mandated arbitration reserved and protected inviolate to Acousti in arbitration all of its rights and remedies which it had under the payment bond. That article read as follows:

> 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. (emphasis supplied).

A very considerable and substantive right and remedy, of course, was Acousti's right to prevailing party attorney's fees under the subject statutes. Thus, in arbitrating its dispute with

Petitioner INA, Acousti proceeded without any limitation on its rights or remedy to receive, upon prevailing, its reasonable attorney's fees. It is axiomatic that parties - even under Petitioner INA's restrictive view of the applicable law - can contract for the award of attorney's fees in arbitration; by this provision, they did just that. At Page 21 of its Brief, Petitioner INA concludes on this very point:

> 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. (emphasis supplied).

This statement by Petitioner INA contradicts the common-sense words used in the subject reservation clause (which it had just quoted on the previous page 20 of its Brief). As a result, even if we grant Petitioner for the purpose of argument its best position, that strictly by operation of law the subject statutes did not apply to the arbitration result, then contractually Acousti reserved and made the statutes, and their substantive grant of attorney's fees, apply to the arbitration by operation of this specific agreement.

E. Erroneous points of fact and law submitted by Petitioner which create confusion.

1. The case cited by Petitioner of Buena Vista Construction Company v. Carpenters Local Union 1765 of United Brotherhood of Carpenters & Joiners of America, 472 So.2d 1356 (Fla. 5th DCA 1985) fails to support its position. The fee award in that action was reversed because there was a lack of statutory or contractual authority for any award of fees (it was decided by the appellate court that the arbitration did not deal with unpaid

wages; the statute there relied on for attorney's fees authorized fees only for unpaid wages; hence, no authority for the award).

2. The case cite heartily by Petitioner of Beach Resorts International, Inc. v. Clarmac Marine Construction Company, supra, fails to support its position. This case merely holds that Section 682.11, Florida Statutes, prohibits an arbitrator from awarding attorney's fees but that such fees are awardable by the trial court where there is separate statutory or contractual authority for an award of fees. As stated by the Second District itself in Fewox, the Beach Resorts case has been misinterpreted as authority for the proposition that attorney's fees are prohibited for arbitration services. The Fewox Court cited the Cuevas v. Potamkin Dodge, Inc., 455 So.2d 398 (Fla. 3rd DCA 1984) case, among others, as another example of the misconstruction of Section 682.11, Florida Statutes. Aside from this misconstruction, the Beach Resorts case and all other mechanic's lien cases cited by Petitioner are perfectly consistent with Fewox, Fitzgerald, Zac Smith, and the Acousti opinion by the Fifth District. Petitioner fails to understand or explain the perfectly clear jurisdictional basis for why Section 713.29, Florida Statutes (which allows prevailing party attorney's fees in mechanic's lien cases) is not authority for the award of fees in arbitrations where the award is paid before the lien is foreclosed. We start with the simple proposition that mechanic's liens, themselves a creature of Chapter 713, Florida Statutes, can only be foreclosed by a circuit court and attorney's fees are awardable by statute to the prevailing party on the foreclosure;

this foreclosure action jurisdictionally cannot be arbitrated. Therefore, where there is a mechanic's lien and a concurrent contractual dispute and where the latter is subject to arbitration, the circuit court sends the contractual dispute to arbitration and pending the result retains and holds the mechanic's lien action. If the contractual dispute is resolved and paid then, as Fewox explains, supra, p. 2829, there is no need to initiate the remedy of foreclosure of the claim of lien and, hence, the trigger for awarding fees (foreclosure of the lien) is not pulled. It is strongly noted, of course, that various technical requirements of Chapter 713, Florida Statutes (for example, the timely and proper recordation of a claim of lien), potentially present independent items to be litigated, regardless of outcome of the contractual arbitration. The mechanic's lien litigation easily could have a different result than the substantive result reached in arbitration of the contractual dispute; in fact, a losing owner in arbitration could well prevail in mechanic's lien litigation, and so the fee award certainly would not always follow an ancillary "rubber stamp" lien foreclosure consistent with the arbitration result. Consequently, an award of prevailing party attorney's fees directed to the prevailing party in arbitration; to this end, the degree and complexity of legal services in the lien foreclosure action may be vastly different than those for the previous arbitration. This illustrates why Beach Resorts, and the Fewox Court's observations on its misconstruction, is entirely consistent with the proposition now before this Court: the lien

foreclosure procedure is an independent, autonomous remedy which is not even jurisdictionally subject to arbitration and, therefore, the provision for prevailing party attorney's fees for mechanic's lien actions (for which exclusive jurisdiction is circuit court; see Article V of the 1972 Florida Constitution and Mills v. Robert Gottfried, Inc., 272 So.2d 837 (Fla. 4th DCA 1973)) cannot be triggered because the lien foreclosure action is never arbitrated.

3. Petitioner is factually and legally wrong where in its Brief beginning at Page 24 it submits that Acousti in the Fifth District and now " . . . relies on part of the 'Reservation of Rights, Response and Counterclaim'", which was contained in Acousti's responsive filing to the arbitration demand. The reservation, which Petitioner quotes at Page 24 of its Brief, was not relied upon below, is not referenced in the Fifth District Opinion, is not relied on now, and is irrelevant to the issue presented to this Court. The motions then before the trial court to determine if the Acousti/INA bond action would be arbitrated had not been heard when the Response and Counterclaim was filed; the reservation merely confirmed that the arbitration responsive pleading was made subject to the trial court's later determination of the arbitration issue and avoided the appearance of a waiver of that issue then before the trial court. Beyond this, Petitioner telegraphs the urgent notion that somehow Acousti dastardly manipulated and created its entitlement to attorney's fees by the act of filing suit before the arbitration.

The result of Acousti's attorney fee award was not and is not remotely affected by the order of precedence of the suit against Petitioner being filed either before or after the arbitration award. In this regard, Sections 682.18 and 682.12, Florida Statutes, specifically confer jurisdiction on the trial court to confirm the award upon application of a party after its entry. Acousti could have filed in that confirmation proceeding its motion for award of prevailing party attorney's fees, together with such other authorized matters for which relief was sought, and the disposition of that motion would have been no different than if it were instead filed in a civil action commenced before, but stayed pending, the arbitration. Petitioner's anguish over this point is difficult to understand and in any event it is without merit.

It is noted that in each other case dealing with this exact issue now before the Court (Fewox, Fitzgerald and Zac Smith), a suit was first filed and arbitration ordered after a motion to compel. Acousti further submits that it was entitled, if not obligated as a responsibility to itself, to commence the action against the Petitioner to toll whatever statute of limitation the surety would argue to be applicable to the bond action (it would have been either a one (1) year limitation period, if Johnson were construed a "contractor" as defined under Section 713.23, Florida Statutes, or a five (5) year period under Section 95.11(2)(b), Florida Statutes, if Johnson was determined to be a subcontractor). See Kidder Electric of Florida, Inc., supra, which is directly on point and holds that there is no waiver to arbitrate by filing suit to toll the statute of limitations.

Indeed, that there was a good faith dispute of Acousti's obligation to arbitrate is apparent from even a cursory review of the convoluted machinations (see Petitioner's Brief, footnote 3, beginning at Page 19) by which, as Petitioner itself asserts at Page 19, "INA's right to arbitration flowed from the interlocking provisions of the various contract documents." Acousti did nothing wrong by filing suit and by disputing in good faith Petitioner INA's demand (raised then for the first time; Acousti and INA had not previously exchanged points of view on the issue) for arbitration by virtue of multiple provisions from various other contracts between various other parties which had been incorporated by reference into the INA bond.

F. The Award of prevailing party attorney's fees under the subject statutes for arbitration promotes existing public policy and assures equality of treatment to insureds whose claims are arbitrated.

Petitioner INA bemoans long and loud the intolerable inequality and substantial harm which results by an insured recovering his attorney's fees when the disputed sum is determined in arbitration rather than in court. The unilateral right to such fees in favor of insureds against insurers is a creature of statute for sound public policy reasons. The subject decision, the First District's decisions in Fitzgerald and Zac Smith, and the Second District's decision in Fewox, fulfill, promote and assure equality of these public policy concerns by assuring that insureds whose claims, and their amounts, are decided in arbitration receive equal entitlement to prevailing party attorney's fees as do insureds who proceed in the judicial forum.

Petitioner's stance makes no sense. Its indignation cannot be founded on any unfair or different treatment it is receiving. As an insurer, it already is subject by the statutes to paying prevailing party attorney's fees in litigation; it offers not the first clue as to why there should not be equal treatment for this existing public policy where the sum due the insured is decided in arbitration. Obviously, the same reasons exist to apply this public policy in both forums. The insured in arbitration (often times a small subcontractor) should not be made less whole upon prevailing in arbitration than his counterpart in litigation, who upon prevailing is made whole by receiving whatever sum is as decided to be owed and reasonable attorney's fees. Petitioner advances that position that the general contractor should be able to contract for arbitration, and thereby shield his surety from reimbursing the insured his reasonable attorney's fees upon prevailing. Plainly there is not equality of justice under Petitioner's goal and it is inconsistent with public policy underlying the statutes.

Taken in perspective, the position urged by Petitioner cripples and restricts these public policy considerations by creating for insurers a "safe haven" in the arbitration forum from already existing exposure to paying their insured's attorney's fees for prosecution of successful claims.

Petitioner proclaims but thoroughly confuses the alleged perilous position of its principal, Johnson, and by analogy, that of any principal whose surety must or elects to arbitrate. The suggested peril is that the principal is thoroughly prejudiced

because in arbitration his surety is subject to paying prevailing party attorney's fees, although he, the principal, cannot recover such fees if he prevails; this is the infamous "one way street" of which Petitioner shrieks.

There are at least two major and independent reasons why this assertion is devoid of merit:

1. First, the principal's position in arbitration is no different than it would be in litigation, i.e., even in litigation the principal drives a "one way street"; his surety is still exposed to the insured for attorney's fees under the statutes and the principal even in litigation still cannot recover attorney fees if he prevailed (absent, of course, a contractual provision for prevailing party fees, which Petitioner's illustration assumes does not exist). Thus, the principal who has no contractual right to prevailing party fees drives the identical one way street, whether in litigation or arbitration. The principal drives that one way street because of his failure to have contracted for, or deliberate decision not to contract for, attorney's fees. This is certainly not a suitable reason (nor is this appeal the appropriate legislative forum) to repeal the subject statutes.

2. Second, the principal's failure to contract for prevailing party attorney's fees placed him on the one way street, whether the forum - as addressed above - is litigation or arbitration. The solution to the one way street is simple: the principal can contract for prevailing fees in

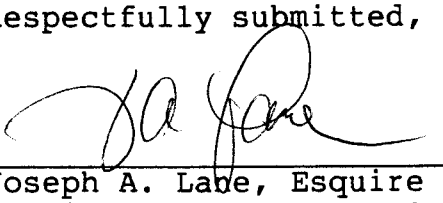
litigation or arbitration. This solves his problem without sacrificing the independently sound and long standing public policy considerations underlying the subject statutes.

In summary, the award of prevailing party attorney's fees under the subject statutes for arbitration plainly is a good thing: it promotes existing and considerable public policy underlying the statutes and assures equality of treatment under the statutes to insureds whose claims are decided in arbitration.

CONCLUSION

This Court should affirm the decision of the Fifth District Court of Appeal upon the sound and deliberate reasoning uniformly expressed by that decision and by Fewox, Fitzgerald and Zac Smith.

Respectfully submitted,



Joseph A. Lane, Esquire
Florida Bar No. 0260819
LOWNDES, DROSDICK, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION
215 North Eola Drive
P.O. Box 2809
Orlando, Florida 32802
(407) 843-4600
Attorneys for Respondent Acousti
Engineering Company of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been sent by United States Mail to:

Donald E. Karraker, Esquire
De Renzo and Karraker, P.A.
251 Maitland Avenue, Suite 116
Altamonte Springs, Florida 32701
Attorney for Petitioner, INA

this 23rd day of April 1990.

Joseph A. Lane, Esquire
Florida Bar No. 0260819
LOWNDES, DROSDICK, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION
215 North Eola Drive
P.O. Box 2809
Orlando, Florida 32802
(407) 843-4600
Attorneys for Respondent Acousti
Engineering Company of Florida