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 REVIEW DISCRETIONARY JURISDICTION OF OPINION FILED OCTOBER 5, 1989, BY DISTRICT COURT OF APPEAL FIFTH DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Petitioner's characterization of the issue determined by the Fifth District Court of Appeal is not accurate. The actual issue expressly determined by the Fifth District Court of Appeal was as follows:

> Attorneys' fees awarded pursuant to Section 627.756, Florida Statutes are not barred merely because the amount due the insured was established pursuant to arbitration rather than through a judicial determination.

STATEMENT OF THE FACTS

Respondent Acousti Engineering Co. of Florida ("Respondent" or "Acousti") specifically does not agree with or accept the following aspects of Petitioner's Statement of the Facts.

1. The underlying construction contract did contain an article requiring arbitration, as noted by Petitioner. However, Petitioner fails to acknowledge that the same article contained a specific provision reserving in arbitration to the subcontractor, Acousti, its rights and remedies under the applicable payment bond. The two provisions are quoted in pertinent part below:

> ARTICLE 13 - ARBITRATION
> 13.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, shall be decided by arbitration...
>
> 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.

2. The arbitration proceeding was not demanded only by G. H. Johnson Construction Company. Petitioner itself demanded and participated in the arbitration by filing, and having the trial

court grant, its motion to abate and compel arbitration. Thereafter Petitioner was joined as a party in Acousti's counterclaim in the arbitration.

3. Subsequent to the arbitration hearing and issuance of the arbitration award in favor of Acousti, both G. H. Johnson Construction Company and Petitioner Insurance Company of North America ("INA") paid the amount of the award by entering a Settlement Agreement with Acousti (which provided for certain installment payments for which Johnson and INA were jointly responsible).

JURISDICTIONAL ARGUMENT

The trial court's final order and the affirming opinion of the Fifth District Court of Appeal awarded attorney's fees to Acousti pursuant to Section 627.756 and 627.428, Florida Statutes (1987) ("the Insurance Code") as a result of a controversy which resulted in Acousti filing its civil action in which the amount due Acousti, the insured, was established pursuant to arbitration. This result is specifically consistent and harmonious with two other opinions on the same precise point from the First District Court of Appeal and does not expressly and directly conflict with any other opinion from a district court of appeal.

I. The cases which specifically and clearly hold that attorneys' fees under Section 627.756 and 627.428 are not barred merely because the amount due the insured was determined in arbitration rather than through a judicial determination.

The First District Court of Appeal in Fitzgerald v. Roberts Electrical Contractors, Inc., 533 So.2d 789 (Fla. 1st DCA 1988) reached precisely this same result and affirmed an award of attorneys' fees against a surety based on Sections 627.428 and 627.756, Florida Statutes. The Court's interpretation was concisely stated as follows:

> When read together, Sections 627.756 and 627.428 specifically provide for attorneys' fees in construction bond actions. Furthermore, subcontractors, as well as owners, laborers, and materialmen are deemed to be insureds for purposes of the insurance attorneys' fee provisions. Shores, 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 attorneys' 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 subcontractor 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). (Id. at p. 790-891)

The identical result based on an interpretation of Sections 627.428 and 627.756, Florida Statutes was reached in Zac Smith & Company, Inc. v. Moonspiner Condominium Association, Inc., 534 So.2d 739 (Fla. 1st DCA 1988). Additionally, the Zac Smith Court discussed the contrast between the mechanics lien law and the Insurance Code and acknowledged that the two statutes are "different animals." Id., p.742. The Court did this to acknowledge why a different result is reached when a claimant, who otherwise has mechanic's lien rights, arbitrates a related dispute and nonetheless is not entitled upon prevailing to an award of attorney's fees. This is the case because the separate and distinct statutory authority for fee awards in mechanic's lien cases is found in Section 713.29, Florida Statutes, and not in the Insurance Code, and because to recover attorney's fees

under Section 713.29 the claimant must have prevailed in an action to foreclose a mechanic's lien. As recognized specifically by the Court, a party who arbitrates his claims has not prevailed in an action to foreclose a mechanic's lien (which as a statutory remedy is confined jurisdictionally to the Circuit Court) and for that reason is not entitled to recovery of arbitration fees.

II. The lack of any express and direct conflict between the three District Court decisions recognizing the award of attorney's fees under the Insurance Code where the amount due an insured is determined by arbitration rather than judicially and any other District Court decisions on the same point of law.

Petitioner cites Beach Resorts International, Inc. v. Clarmac Marine Construction Company, 339 So.2d 689 (Fla. 2nd DCA 1976) where the Court reversed the trial court's award of attorney's fees after the Plaintiff's civil action under Chapter 713, Florida Statutes to foreclose a mechanic's lien was converted voluntarily to an arbitration of the contractual differences between the parties. This deals with the very same interpretation of the mechanic's lien statute (Section 713.29, Florida Statutes) already recognized and contrasted as "a different animal" from the Insurance Code by the First District in Zac Smith, supra, p.742, 743. The procedure peculiar to arbitration of issues ancillary to mechanic's liens was carefully explained by the Beach Resorts Court: the mechanic's lien issue itself is not jurisdictionally subject to arbitration and therefore the prevailing party attorney's fee statute is not triggered unless and until the lien action is pursued in the circuit court after the arbitration. As a result, the Beach

Resorts decision creates no conflict with the subject decision, Fitzgerald or Zac Smith. Actions to foreclose mechanic's liens cannot be arbitrated and therefore ancillary arbitrations do not and cannot trigger fee awards under Section 713.29, Florida Statutes.

Similarly, Buena Vista Construction Company v. Carpenters Local Union, 472 So.2d 1356 (Fla. 5th DCA 1985) creates no express and direct conflict with the point of law decided in the subject decision. In Buena Vista the Court reversed the trial court's award of attorney's fees based on Chapter 448, Florida Statutes (which in general deals with attorney's fees for actions for unpaid wages). Buena Vista simply stands for the unrelated proposition that fees will not be awarded under Chapter 488, Florida Statutes where the arbitration was not founded on an action for unpaid wages. In the subject decision as with Fitzgerald and Zac Smith, the Court awarded fees under the Insurance Code.

Just as no express and direct conflict is created by Beach Resorts and Buena Vista, there is no such conflict created by Glen Johnson, Inc. v. Howdeshell, 520 So.2d 297 (Fla. 2nd DCA 1988). The Second District in a procedurally different circumstance reversed in part the trial court's order which had awarded fees for both an arbitration and subsequent circuit court proceeding. The Court limited the claimant to its fees in the circuit court proceeding. The arbitration award was against the claimant without prejudice due to the failure at that time of all conditions precedent to have occurred to the payment it sought.

The trial court later determined that the conditions precedent were satisfied and awarded the claimant its damages and fees, without regard to whether those fees were occasioned in the unsuccessful arbitration or in the circuit court. Howdeshell does not create an express and direct conflict with the subject decision, or with Fitzgerald or Zac Smith, because it does not address the attorney's fees issue under Sections 627.428 and 627.756, Florida Statutes (apparently the basis of the attorney's fee claim was "pursuant to the surety agreement." Id. at p.298) and because of its procedurally different context, i.e., an unsuccessful arbitration followed by the trial court's subsequent ruling that conditions precedent had then occurred (the decision does not address whether the conditions precedent had matured by the time of the trial court's decision or whether the trial court disagreed with the arbitrator's decision). It is, of course, axiomatic that attorney's fees are awardable either by statute or contract. See Beach Resorts, supra, p.690.

Finally, Petitioner asserts that the subject decision and Fitzgerald and Zac Smith conflict with the language of Section 627.756, Florida Statutes, which provides for attorney's fees under the Insurance Code upon rendition of a judgment or decree by any of the courts against an insurer and in favor of an insured. This Court and the districts in fact uniformly hold and interpret Section 627.428, Florida Statutes such that an insured seeking attorney's fees under its authority must obtain either a judgment against his insurer or payment of the claim after suit is filed, which is uniformly regarded by the Florida Supreme