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

REPLY BRIEF OF PETITIONER

Donald E. Karraker, Esquire
Florida Bar No: 320919
De Renzo and Karraker, P.A.
251 Maitland Ave., Suite 116
Altamonte Springs, Florida 32701
(407) 834-6035

Attorney for Petitioner INA

original

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Decisional Authority

Statutory Authority

Other Authority

ARGUMENT

In paragraph three (3) of Respondent's Statement of the Case, Respondent makes a false statement that Petitioner entered into an agreement with Respondent for installment payments.

The Contractor, G. H. Johnson Construction Company (JOHNSON), against whom the Arbitrators' award for breach of contract was rendered, requested that Respondent agree to accept monthly payments plus interest from JOHNSON in satisfaction of the award of the arbitrators. Respondent agreed to accept monthly payments plus interest from JOHNSON and their attorneys attempted to draft an agreement that would be satisfactory to JOHNSON, Respondent and Petitioner. Although the agreement attached to Respondent's Brief was not part of the evidence/record in the trial court or the appeal court below, it appears to have been attached to Respondent's Brief as a "bootstrap" effort in support of its argument that Petitioner "confessed a judgment" by entering into the agreement.

As attorneys often do, Respondent's attorney attempted to cover ever possible contingency in the agreement. As the attorney's drafted the agreement, JOHNSON made monthly payments to Respondent and Respondent accepted the payments. After numerous drafts and re-drafts of the agreement, JOHNSON executed the agreement and Petitioner's attorney sent the agreement to Petitioner for its review of, among other things, paragraphs 4 and 5 of the agreement. Petitioner reviewed the agreement and refused to execute it. While the attorneys were arguing about the form of

the agreement, JOHNSON tendered the monthly payments plus interest to Respondent and Respondent accepted said payments in satisfaction of the award of the arbitrators. The attorney's attempt to draft an agreement which was acceptable to all concerned became moot.

The reason Respondent did not attach a signed copy of the agreement is because neither the Petitioner nor the Respondent ever signed the agreement. If Respondent and Petitioner had signed the agreement, Respondent's attorney would have attached it to Respondent's Brief and emphasized the fact that the agreement had been signed.

The agreement states in paragraph four (4), that in the event JOHNSON fails for any reason whatsoever to make the payments Respondent would have the right at an Ex Parte hearing to apply to the court for a Final Judgment against the bond. The language of the agreement in paragraphs 4 and 5 is a clear indication that Respondent knew that Petitioner, pursuant to its common law construction payment bond, did not have an obligation to pay Respondent, either a claim against the payment bond or an award by the arbitrators, unless and until the Contractor and Principal on the payment bond had failed or refused to pay an obligation stemming from the contract agreement between the contractor (JOHNSON) and its subcontractor (Respondent).

A. Payment of an arbitration award is not equivalent to a confession of judgment.

Respondent at page 13 agues that the payment of a claim is a

functional equivalent of a confession of judgment. This Court's decision in Wollard v. Lloyd's and Company of Lloyds, 439 So.2d 217 (Fla. 1983), held that the payment of a claim is the functional equivalent of a confession of a judgment and an insurer cannot escape liability for attorney's fees simply by settling the the suit before a judgment was entered. See also, Fortune Insurance Company v. Brito, 522 So.2d 1028 (Fla. 3d DCA 1988); Zac Smith & Company, Inc. v. Moonspinner Condominium Association, Inc., 534 So.2d 739 (Fla. 1st DCA 1988); Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). A review of the facts involved in Wollard demonstrates why an application of the Wollard rule to the instant case is inappropriate.

In Wollard, the plaintiff suffered a loss and brought a claim against his insurer. The insurer denied coverage. The plaintiff retained an attorney and filed a lawsuit. On the eve of trial, the parties agreed to a settlement of the claim but "stipulated that the matter of any award of attorney's fees would be submitted to the trial court." The trial court awarded plaintiffs' attorney's fees and costs and the insurer appealed.

On appeal, the insurer argued that there was no judgment in favor of the insured and, therefore, attorney's fees were not permissible under §627.428(1), Fla. Stats. The Third District Court of Appeal agreed with the insurer and reversed the trial court's decision. This Court reversed that decision and held that the lack of a judgment did not preclude the plaintiff from obtaining attorney's fees.

The facts in Wollard are distinguishable from the facts in

the instant case. In Wollard, the action was not an arbitration which, by its very nature, would result in an "award" and not a "judgment." If the plaintiff in Wollard has proceeded to trial and won, she would have received a judgment. Here, Respondent proceeded to arbitration and received an award. The Award of the arbitrators does not satisfy the prerequisites for the receipt of fees under §627.428(1), Fla. Stats. Wollard's application must, therefore, be limited to judicial proceedings, not arbitrations.

Although not expressly stated, the facts of Wollard indicate that the action against the insurer was on a policy the insured held with the insurer. The insurer denied coverage, forcing the insured to proceed to trial. Thus, the concern expressed by this Court in Wollard is identical to the reasoning behind the legislature's enactment and judicial interpretation of §627.428(1), Fla. Stats. See Wilder v. Wright, 278 So.2d 1, 3 (Fla. 1973). That is, that there was some wrongful conduct by the insurer which gave the insured no choice but to file suit before the insurer would honor its policy obligations. There, this Court correctly held that the absence of a judgment would not preclude an attorney's fee award. That ruling sensibly precluded insurers from mistreating their insureds, forcing them into litigation to obtain benefits and then absolving themselves from the penalty of its wrongful conduct through pre-judgment settlement. However, this concern should not exist where a bonding company is acting as a guarantor of its principal's obligations and in conformity with its contract, pays the claim or, as in the instant case, the contractor pays the award of the arbitrators. The idea that a

bonding company "confessed judgment" by paying an arbitration award or as a result of the contractor/bond principal paying an arbitration award, when the bonding company's obligations to Respondent was not defined until the award was rendered against the contractor, is fanciful to say the least. Here, the bonding company does not need to be "penalized" or "punished" for refusing to pay an insured's claim and the rationale behind Wollard should not be applied. The issuance of an award in arbitration does not satisfy the prerequisites for receiving attorney's fees under Sections 627.428(1) and 627.756, Florida Statutes.

B. A judgment or decree must be rendered against a surety under §627.428(1), Florida Statutes.

It is error to determine that attorney's fees should be awarded to Respondent pursuant to §627.428(1), Fla. Stats. for the time it spent arbitrating its claims against JOHNSON and bonding company. Section 627.428(1), Fla. Stats. provides, in pertinent part:

> Upon the rendition of a judgment or decree . . . against an insurer and in favor of any named or omnibus insured . . . the trial court . . . shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney.

Certain principles should have guided the Fifth District in its determination as to whether attorney's fees were available under §627.428(1). First, an award of attorney's fees is a matter of

substantive law properly under the aegis of the legislature. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982). The legislature, by enacting §627.428(1), Fla. Stats. deemed it advisable, in derogation of the common law, to allow an insured an award of attorney's fees for having to sue an insurance company. Vermont Mutual Insurance Company v. Bolding, 381 So.2d 320 (Fla, 5th DCA 1980). Second, as this Court has previously held, statutes allowing for the award of such fees should be strictly construed. Roberts v Carter, 350 So.2d 78 (Fla. 1977). Discussing the purpose of §627.428(1), this Court recognized:

> The purpose of the statute is to discourage the contesting of valid claims of insureds against insurance companies . . . . and to reimburse successful insureds reasonably for their outlays for attorney's fees when they are compelled to defend or to sue to enforce their contracts . . . .

Wilder v. Wright, 278 So.2d 1, 3 (Fla. 1973). Because the statute has been considered a penalty, additional reason is given to require that this statute be strictly construed. Government Employees Insurance Co. v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987); Lumberman Mutual Insurance Co. v. American Arbitration Association, 398 So.2d 469 (Fla. 4th DCA 1981); Travelers Indemnity Co. v. Chisholm, 384 So.2d 1360 (Fla. 2d DCA 1980). These principles should have guided the Fifth District in its application §627.428(1), Fla. Stats., to the facts of the instant case. A thorough review of the language of §627.428(1), Fla. Stats., demonstrates the failure of the Fifth District to follow these rules.

Section 627.428(1), Fla. Stats. provides that attorney's fees are only to be awarded upon the "rendition of a judgment or decree" in prosecution of a "suit." Here, the owners did not receive a judgment or decree, they received an award. Section 627.428(1), Fla. Stats. does not provide that attorney's fees are available to an insured who recovers an "award." An "award" is a decision or determination rendered by arbitrator's or other private or extrajudicial deciders. See, Black Law Dictionary. Conversely, "judgments" and "decrees" are decisions received in judicial proceedings. See, Black's Law Dictionary. Since an "award" is not obtained in judicial proceedings, the legislature obviously intended attorney's fees only to be available for litigation by using the terms "judgment and decree." It is clear that the legislature did not intend attorney's fees to be awarded for arbitrations. Here, an "award" received in arbitration was rendered in favor of Respondent, not a "judgment or decree" rendered in a "suit."

Certain principles surrounding statutory construction further support the argument that the legislature never intended attorney's fees to be awarded under §627.428(1), Fla. Stats., for time spent in arbitration. Section 627.428(1), Fla. Stats., was enacted in 1959 pursuant to Ch. 59-205 §477, Laws of Fla. At that time, the Florida Arbitration Code was in existence. See, Chapter 57, Fla. Stats. (1957). Thus, it cannot be argued that a subsequent happening gave §627.428(1) prospective application to the Florida Arbitration Code. State v. Miami, 101 Fla. 292, 134 So. 608 (1931) By specifically referencing "judgments and

decrees" in §627.428(1), and by its failure to include the term "award" in §627.428(1), the legislature is presumed to have excluded awards from the scope of §627.428(1): expressio unius est exclusio alterius. University of Florida v. Karch, 393 So.2d 621 (Fla. 1st DCA 1981); Wanda Marine Corp. v. State, Department of Revenue, 305 So.2d 65 (Fla. 1st DCA 1974). The Second District was prohibited from supplying relief to the owners by amending the legislation where the legislature provided no such relief. Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984).

There is a rational policy reason to support this legislative intent. Section 627.428(1), Fla. Stats. is directed at preventing insurance companies from taking advantage of insureds by refusing to pay valid claims and forcing insureds into lengthy and expensive litigation. Battaglia at 358; Vermont Mutual Insurance Company v. Bolding, 381 So.2d 320 (Fla. 5th DCA 1980). By providing a penalty for insurance companies who use this method of operation, the legislature aided insureds with valid claims by penalizing the insurer if the insured is not promptly paid. However, arbitration is arguably immune from abuse by insurance companies. Arbitration is quick, inexpensive, and not subject to the extensive discovery available in litigation. Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916); Arnold's Restaurant, Inc. v. Larson, 149 So.2d 380 (Fla. 3d DCA 1963); Sections 682.06-.08, Fla. Stats. Appeal for a losing party in an arbitration is extremely limited. Section 682.20, Fla. Stats. Moreover, as in this case, the insurance companies are often not parties to the

arbitration agreement. Thus, it is likely that the legislature realized that insureds did not need the same protection from insurers in arbitration as they did in litigation.

Another important factor distinguishes the instant case from a typical insurance action that follows within the scope of §627.428(1), Fla. Stats.; here, Petitioner was guaranteeing performance of its principal. Only if its principal was unable to pay the amounts owed under the contract did Petitioner become obligated to pay the Respondent. This act of pure guarantee is different from those insurance actions in which the insurer assumes the risk of compensation to the insured or the insured's beneficiary upon the happening of a certain event or peril. There, the insured is not responsible for payment and the insurer is not assuming the role of guarantor. This distinction is relevant because the protection afforded an insured pursuant to §627.428(1), Fla. Stats. and §627.756, Fla. Stats. becomes less important when it is actually the principal who is refusing to pay the amounts owed on the contract, rather than the insurer.

The idea that a penalty should be imposed against insurers was only guarantee their principal's performance has less persuasiveness in this context. The absurdity of imposing a penalty against a surety, in this context, is exemplified by the fact that an indemnification agreement between the surety and the contractor normally exists. A contractor is then responsible for paying all necessary expenses incurred in defending itself against liability on the bond. These expenses usually include attorney's fees. See Appleman, Insurance Law and Practice §6677. Thus, a

contractor, such as JOHNSON, who is not liable to Respondent for attorney's fees by statute or by contract may ultimately pay them because the insurer, under its indemnification agreement with the contractor, may collect the attorney's fees assessed against the surety. Obviously, the intent of §627.428(1), Fla. Stats., is not served when the contractor, not the surety, pays the attorney's fees to the owner. Moreover, an interpretation of the statue which allows for such a result effectively re-writes the contract between the Contractor and its Subcontractor. Where those parties never agreed to the imposition of fees to a prevailing party, the Fifth District's interpretation of the statute now results in the insertion of such a judicially created provision into every construction contract which contains an arbitration provision and the contractor has secured a performance bond. Florida courts have traditionally rejected modification of contracts through judicial draftsmanship. See, e.g. Hurt v. Leatherby Insurance Company, 380 So.2d (Fla. 1980). There certainly is no overwhelming policy reason that Respondent has identified which supports the abandonment of this longstanding sensible rule of law.

Finally, it has long been recognized that the primary purpose behind the attorney fee statutes of this type is to prevent wrong doing. The primary purpose behind §627.428(1), Fla. Stats. is to prevent wrongful conduct by an insurance company and provides a penalty for refusing to pay valid claims. See, e.g. Wilder v. Wright, 278 So.2d 1 (Fla. 1973); Government Employees Insurance Company v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987). The

facts of these cases hardly point to the type of wrongful conduct contemplated by the statute and the cases which interpret it. In fact, the situation in these cases would suggest the exact opposite from the abuses the statute was designed to redress.

Here, the parties to the construction contract, as others in the construction industry do, recognized that disputes concerning performance of the parties at the project would predictably arise. In such a situation the parties agreed to rely upon an arbitrator(s) to resolve the dispute. Once the dispute was resolved, that is, once it was found that Petitioner's principal did not comply with all of the contract duties, the Contractor, JOHNSON, paid the appropriate amounts it was required to pay. It is unreasonable to believe that under the vast majority of construction contracts some dispute regarding "performance" will not arise. It hardly seems reasonable to penalize the surety with the imposition of attorney's fees where the contractor and the subcontractor have simply resorted to the remedy they chose between themselves to resolve those predictable disputes. It is even more unreasonable to interpret those parties election of a means of dispute resolution as "wrongful" conduct by the surety. This is far from the situation where the insurer forces the insured into litigation before the insurer will honor its contractual obligations. It should not be treated as if it were the same.

Respondent at page 23 in paragraph "2 Second" states that a principal's (contractor's) failure to contract for prevailing party attorney's fees placed him on the one-way street (only the

claimant against the bond can receive attorneys fees). In the instant case the contractor, JOHNSON, and its Subcontractor, Respondent, entered into a subcontract agreement that did not provide for attorney's fees either in arbitration or litigation. The same standard form of subcontract agreement would have been used regardless of whether: (1) the Owner's property had been subjected to liens pursuant to Section 713.08, Fla. Stats.; (2) a statutory bond pursuant to Section 713.23, Fla. Stats. had been required; (3) a statutory transfer bond pursuant to Section 713.24, Fla. Stats., had been required to transfer a Claim of Lien from the Owner's real property; or (4) as in the instant case, a common bond was required for the benefit of the Prime General Contractor (Mellon-Stuart). Pursuant to condition (1) the subcontractor would not be entitled to attorney's fees for the time spent in arbitration. Pursuant to condition (2) and (3) it would appear that if the court viewed an action to foreclose an award of the arbitrators as an action to foreclose a Claim of Lien against a Mechanic's Lien Bond under Chapter 713, Florida Statutes, the subcontractor would not be entitled to attorney's fees for the time spent in arbitration. However, pursuant to condition (4) the Fifth District has read an additional requirement into the subcontract providing for attorneys fees where otherwise a subcontract attorneys fees provision does not exist.

CONCLUSION

Section 682.11, Fla. Stats., clearly prohibits the award of attorney's fees for time spent in arbitration. Rational policy reasons support this construction. When a statute is clear, it only need to be applied. Section 627.428(1) and 627.756, Fla. Stats., require judgments or decrees to be rendered in suits in favor of the claimants against the bonding companies on the payment bonds. Here, in the absence of a judgment or decree received in a suit against the surety on the bond, the claimant is not entitled to a judgment for attorney's fees. The surety is not guilty of any wrongful conduct. Respondent was obligated by the terms and conditions of the subcontract to arbitrate its dispute with JOHNSON. Neither the Florida Arbitration Code or the subcontract provided for the payment of attorney's fees to the prevailing party for the professional services provided during the arbitration proceeding. Respondent'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 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 REPLY BRIEF OF PETITIONER has been sent by U.S. Mail to:

Joseph A. Lane, Esquire
LOWNDES, DROSDICK, DOSTER, KANTOR, & REED, P.A.
Post Office Box 2809
Orlando, Florida 32802
(305) 843-4600
Attorneys for Appellee Acousti

this 17th day of May, 1990.

Donald E. Karraker
Fla. Bar #320919
De Renzo and Karraker, P.A.
251 Maitland Ave., Suite 116
Altamonte Springs, Florida 32701

Attorney for Petitioner, INA