SUPREME COURT OF FLORIDA

DANIS INDUSTRIES CORPORATION,
ET AL.,

Petitioner,

vs. Case No. 83,016

GROUND IMPROVEMENT TECHNIQUES,
INC., ET AL.,
Respondents.

_____/

On Petition for
Review of a Decision of
the District Court of Appeal, Fifth District
Case No. 92-3127

REPLY BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

The parties are referred to as in the initial brief.

ARGUMENT

May a party who did not prevail in the trial or arbitration of a breach of contract action nonetheless recover attorneys' fees because the party obtained a net recovery? Stated differently, is the losing party in a trial or arbitration entitled to recover fees under section 627.428 and 627.756 of the Florida Statutes? The questions should be rhetorical at best, yet, under GIT's theory the answer would be yes, a losing party should be awarded fees.

In Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992), this Court held that, in breach of contract actions, a party is entitled to fees only if it prevails on the significant issues in the case. In Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993), the Court held that a different standard would not apply to construction contract actions in which fees are authorized by statute. Now GIT argues that a party who did not prevail according to the Moritz test still should be entitled to fees.

Interestingly, throughout the proceedings in the trial court and the District Court, GIT recognized that its entitlement to fees depended on a determination that it prevailed in the arbitration. The trial court found, contrary to this Court's holding in Moritz, that GIT prevailed because it obtained a net recovery. The District Court found, also contrary to Moritz, that GIT prevailed because it obtained a net recovery and no offer of settlement ever had been made. Although it attempts to obfuscate its tenuous position, the essence of GIT's argument remains unchanged. GIT contends that because it obtained a net flow of money in the

arbitration which was reduced to a judgment, everything this court said in Moritz and Prosperi should be ignored. Yet, this Court unequivocally has rejected the net recovery theory as a basis for determining entitlement to attorneys' fees. GIT's position therefore is untenable.

This Court's holding in Insurance Co. of N. Am. v. Acousti Eng., 579 So. 2d 77 (Fla. 1991) supports Danis and Seaboard, not GIT. The issue there was "whether a subcontractor or owner who prevails in arbitration proceedings" is entitled to recover fees from the Surety under sections 627.428 and 627.756. Id. at 78 [emphasis supplied]. The Court's adoption of the Second District's opinion in Fewox v. Merrit Const. Co., 556 So. 2d 419 (Fla. 2nd DCA 1989) further supports Danis and Seaboard, not GIT. Fewox held that the surety is bound by the outcome of the arbitration. If the claimant prevails in the arbitration the claimant may recover fees against the surety even if the surety did not participate in the arbitration. GIT quotes a portion of the Fewox decision which supports Danis' and Seaboard's interpretation:

> [t]he policy underlying section 627.428 is to discourage the contesting of coverage by insurers and to reimburse successful policy holders when they are compelled to sue to enforce their policies.

Fewox 556 So. 2d at 423 [emphasis supplied]. Obviously, under the Moritz standard, a policyholder must "prevail" to be "successful." By the same token, if the claimant does not prevail in the arbitration, attorneys' fees are not awardable.

Under Moritz, Danis prevailed in the arbitration. Under Acousti and Fewox, the rights of the claimant against the surety

are established by the outcome of the arbitration. That outcome is determinative of GIT's entitlement to fees in this case. Seaboard had no statutory obligation to pay GIT's costs and attorneys' fees if GIT was not the prevailing party. Because GIT did not prevail in the arbitration, it is not entitled to fees.

Apparently realizing the tenuous nature of its position, GIT argues for the first time that because the applicable statute employs the words "judgment in favor of" rather than "prevailing party" Moritz and Prosperi are not controlling. However, that arcane distinction was long ago disavowed. In Folta v. Bolton, 493 So. 2d 440 (Fla. 1986) this Court made it clear that there is no basis for distinguishing between "prevailing party" and other similar phrases such as "judgment in favor of" and "recovering judgment." Id. at 442. Further, Acousti, the Fifth District's opinion in this case, and every court that has considered the applicability of section 627.428, has recognized that fees are allowed only if the claimant prevails.

Specifically, the Fifth District here noted that under sections 627.428 and 627.756, "a subcontractor who prevails in arbitration proceedings" is entitled to recover fees. Indeed, the cases cited by the Fifth District in support of its ultimate holding established that an insured who does not prevail is not entitled to fees. Westinghouse Electric Corp. v. Shafer & Miller, Inc., 515 So. 2d 248 (Fla. 3d DCA 1987); Greenough v. Aetna Cas. & Sur. Co., 449 So. 2d 1001 (Fla. 4th DCA 1984). According to those cases, a claimant who does not prevail does not receive a judgment

in his favor under section 627.428. GIT would have been better served to have left the non-distinctions between the statutory language buried beneath the weight of precedent.

In spite of the precedent, GIT makes unsubstantiated assertions that the difference in the statutory language between sections 627.428 and 713.29 (the mechanics lien law) are such that conflicting rules of law should exist. Yet, the purpose behind the mechanics lien act and the purpose underlying legislatively mandated construction bonds (section 255.05) is the same -- protection of laborers, subcontractors and suppliers who are not in privity with the owner. Miller v. Knob Const. Co., 368 So. 2d 891 (Fla. 2d DCA 1979). The Fifth District recognized in its original opinion the analogous relationship between the two statutes but omitted those authorities without explanation in its substituted opinion. Certainly, GIT has suggested no great distinction warranting the result it advocates: one standard for determining entitlement to fees when the claimant is a worker on a job subject to section 713.29 and a wholly conflicting standard when the claimant is a worker on a job subject to section 255.05.

GIT also fails to grasp the point of Danis' argument regarding the applicability of cases which concern fee awards to insureds under section 627.428 but do not concern section 627.756. The Fifth District relied on cases which did not involve affirmative claims brought against the insured. According to the Fifth District, those cases establish that any time an insured or claimant obtains money and no offer has been made, the insured or

claimant is entitled to fees. However, in typical coverage disputes between an insured and an insurer, the insurer makes no affirmative claim against the insured, so there is never any call for determining who prevailed on the significant issues in a case. The rationale underlying those typical cases may well remain viable after Moritz. But that rationale is not applicable to cases such as the present one in which the key question is who prevailed on the underlying breach of contract action where there were multiple issues and claims on both sides.

Finally, GIT's newly created, convoluted portrayal of the arbitration proceedings in a way to suggest that GIT might have been the prevailing party under the Moritz standard would be entertaining were it not so grossly disingenuous. GIT ignores but cannot dispute the following which conclusively demonstrate that Danis prevailed:

- GIT claimed Danis breached the contract by failing to pay for $800,000.00 worth of alleged additional work. GIT recovered nothing under that claim. Danis prevailed.

- Of the approximately $430,000.00 retained by Danis as backcharge, Danis was required to pay only $214.575.00 and was entitled to retain $215,588.00. Danis prevailed.[1]

- The arbitrators expressly found that Danis properly withheld the $68,000.00 retainage and was not required to make that payment until Danis was paid by the owner. That was Danis'

[1]Contrary to the suggestion in footnote 2 of GIT's brief, the arbitrators did not find that Danis owed GIT more than the contract balance. The base amount the arbitrators found owed ($498,456.00) included the backcharge ($430,000.00) and the retainage ($68,000.00). Accordingly, there was no finding that GIT was entitled to additional monies.

> position throughout. Danis therefore prevailed on this issue also.[2]

In sum, GIT's suggestion notwithstanding, the record indisputably establishes that under the Moritz analysis, Danis prevailed in the arbitration. A claimant under sections 627.428 and 627.756 must prevail in the arbitration in order to be entitled to fees. GIT did not prevail and therefore the award to it of fees was erroneous.

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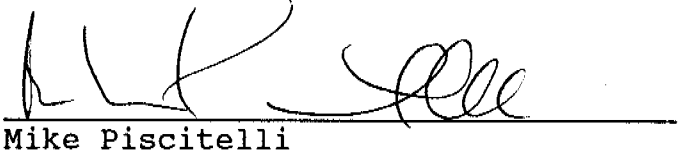
[2] Id.

CONCLUSION

Based on the foregoing and for the reasons asserted in the initial brief, Danis respectfully requests that the decision of the Fifth District Court of Appeal and the trial court be reversed.

Respectfully submitted,



Mike Piscitelli

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Steven R. Schooley**, Holland & Knight, 200 S. Orange Avenue, Suite 2600, Post Office Box 1526, Orlando, Florida 32802 this 21 day of March, 1994.

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