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SUPREME COURT OF FLORIDA

CASE NO.

83,254

TURNBERRY ASSOCIATES,

Petitioner,

vs.

SERVICE STATION AID INC.,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review from the
Third District Court of Appeal of Florida

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STATEMENT OF THE CASE AND FACTS

This is a request by Plaintiff/Petitioner TURNBERRY ASSOCIATES ("TURNBERRY") for discretionary review of an opinion rendered January 19, 1994, by the Third District Court of Appeal of Florida which reversed the trial court's order vacating an arbitration award of attorney's fees in favor of Defendant/Respondent SERVICE STATION AID INC. ("SERVICE STATION"). The opinion conflicts with the decisions of another district court of appeal and of this Court on the same question of law, and jurisdiction is invoked pursuant to Art. V, §3(b)(3) of the Florida Constitution.

On November 23, 1988, TURNBERRY, as owner, contracted with Ahrens Construction Development Inc. ("Ahrens"), as prime contractor, for the construction and installation of an underground fuel tank, fuel delivery system and monitoring well. Ahrens had previously entered into a sub-contract with SERVICE STATION in furtherance of its obligations to TURNBERRY.

After the construction work was completed, TURNBERRY discovered several defects in the construction and installation of the underground fuel tank and fuel delivery system. On February 13, 1991, TURNBERRY filed a suit against Ahrens and SERVICE STATION alleging breach of contract, breach of warranty and negligence. The trial court, however, stayed the action and compelled arbitration in accordance with the contracts between the parties.

At arbitration, TURNBERRY's claim against Ahrens and SERVICE STATION was denied. At a subsequent hearing, the arbitrator awarded attorney's fees incurred during arbitration in favor of SERVICE STATION and Ahrens and against TURNBERRY.

TURNBERRY then moved in the trial court to vacate or, in the alternative, modify the arbitration award of attorney's fees in favor of SERVICE STATION.¹ After conducting a hearing at which it heard evidence and argument in the case, the trial court entered an order modifying the arbitration award, finding that there was no contractual relationship between TURNBERRY and SERVICE STATION which would entitle SERVICE STATION to an attorney's fee award from TURNBERRY. (A. 1-3) While the trial court did not take issue with the arbitrator's testimony that counsel for the parties had stipulated to let him decide the issue of attorney's fees, the trial court found that the arbitrator's award of attorney's fees to SERVICE STATION was without foundation in law. Id. Specifically, the trial court found that there was neither contract nor statute authorizing an award of attorney's fees to SERVICE STATION. Id. Accordingly, the trial court vacated the arbitrator's award of attorney's fees in favor of SERVICE STATION, and SERVICE STATION appealed to the Third District Court of Appeal of Florida. Id.

On appeal, the Third District reversed the trial court's order and remanded with directions that the trial court confirm the arbitration award of attorney's fees to SERVICE STATION. (A. 4-5)

¹ TURNBERRY did not take issue with the arbitration award of attorney's fees in favor of Ahrens, as TURNBERRY's contract with Ahrens expressly provided for attorney's fees.

As grounds, the Third District found that the alleged stipulation of the parties conferred jurisdiction upon the arbitrator to decide entitlement to attorney's fees, as well as the amount of the attorney's fees claimed by SERVICE STATION from TURNBERRY. Id. Furthermore, the Third District determined that the trial court had no authority to review the legal sufficiency of the arbitrator's award of attorney's fees to SERVICE STATION on the grounds that an arbitration award cannot be vacated based on the arbitrator's error of law. Id.

The Third District subsequently denied TURNBERRY's motion for rehearing and reconsideration of its decision and this appeal ensued.

SUMMARY OF THE ARGUMENT

The decision of the Third District conflicts with decisions of the Second District Court of Appeal of Florida which removed attorney's fee questions from the range of arbitrable issues under Florida Statute §682.11 (1991). Higley South, Inc. v. Quality Engineered Installation, Inc., 19 Fla. L. Weekly D99 (Fla. 2d DCA January 5, 1994); Fridman v. Citicorp Real Estate, Inc., 596 So. 2d 1128 (Fla. 2d DCA 1993). In the case at hand, the Third District upheld an arbitrator's authority to decide attorney's fees, thereby creating a conflict with the decisions of the Second District in Higley and Fridman.

Furthermore, the decision of the Third District conflicts with decisions of this Court and of the Second District requiring that attorney's fees associated with the confirmation or enforcement of an arbitral award must be grounded in statute or contract. Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989), approved, Insurance Co. of North America v. Acousti Engineering Co. of Florida, 579 So.2d 77 (Fla. 1991); Freedman v. Collier Commercial Builders, 596 So.2d 115 (Fla. 2d DCA 1992). The Third District refused to review the statutory or contractual basis for the arbitrator's attorney's fee award, finding that such an award could not be vacated based on the arbitrator's error of law. In effect, the decision of the Third District empowers arbitrators to award attorney's fees where no entitlement for such has been provided for in contract or statute, and places such awards beyond

the purview of a reviewing court. As such, the decision of the Third District also conflicts with decisions of this Court and of the Second District, and this case is ripe for discretionary review by this Court.

ARGUMENT

I

THE DECISION UPHOLDING THE ARBITRATOR'S AWARD OF ATTORNEY'S FEES EXPRESSLY AND DIRECTLY CONFLICTS WITH HIGLEY AND FRIDMAN WHICH REMOVED ATTORNEY'S FEES FROM THE SUBJECT MATTER JURISDICTION OF ARBITRATION.

The Third District's opinion upholding the arbitrator's attorney's fee award conflicts with decisions of the Second District removing attorney's fee determinations from the subject matter jurisdiction of arbitrators. Higley South, Inc. v. Quality Engineered Installation, Inc., 19 Fla. L. Weekly D99 (Fla. 2d DCA January 5, 1994); Fridman v. Citicorp Real Estate, Inc., 596 So. 2d 1128 (Fla. 2d DCA 1993). In those cases, the Second District construed the parameters of an arbitrator's jurisdiction under the Florida Arbitration Code, Florida Statute Section 682.11.² Each time, the Second District determined that it is the trial court, not the arbitrator, who must determine the attorney's fee award.

² Florida Statute §682.11 (1991) provides: "Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."

In Higley South, Inc. v. Quality Engineered Installation, Inc., 19 Fla. L. Weekly D99 (Fla. 2d DCA January 5, 1994), the appellants raised several issues concerning an award of attorney's fees to the appellee. In part, appellants maintained that, on confirmation of the arbitration award, the trial court's attorney's fee award was restricted by the language of the arbitration award limiting attorney's fees to those "fees for legal services necessary to prepare and present [appellee's] claim." Id. at D100.

The Second District rejected appellants' argument, finding that arbitrators have no authority to award attorney's fees. Id. The court stated:

"We reject appellants' argument that because the arbitrators were present during the arbitration proceedings their 'direction' or limiting language in fee awards should be binding on the trial courts which subsequently determine the amount of the fee award. We have held and continue to hold that it is the trial court which determines both entitlement to and amount of attorney's fees. Accordingly, the arbitration award did not limit the trial court's award of fees. Id. (emphasis added)

Thus, the Third District's threshold determination in this case that the arbitrator did have authority to make a determination of entitlement and enter an award of attorney's fees conflicts with the Second District's holdings in Higley and Fridman.

In the instant case, however, the Third District maintained that "parties to an arbitration agreement may by stipulation confer jurisdiction on the arbitrator to decide entitlement to attorney's fees and to assess such fees." (A. 4-5) Here, the Third District purported to uphold the trial court's "finding" that such a

stipulation had existed, and determined that the stipulation was dispositive and that it vested the arbitrator with authority to determine attorneys fees as between TURNBERRY and SERVICE STATION. Further, the Third District determined that, once submitted to an arbitrator, his decision to award attorney's fees could not be challenged or reviewed by the trial court, even where insufficient legal basis for the award was shown.

In doing so, the Third District overlooked the rule enunciated by the Second District in Fridman v. Citicorp Real Estate, 596 So.2d 1128 (Fla. 2d DCA 1992), which expressly conflicts with the decision here. In Fridman, after the defendant/appellee refused to pay attorney's fees as agreed, the parties submitted the matter of attorney's fees to binding arbitration. Id. at 1129. The arbitration panel, which consisted of three attorneys, recommended that the plaintiff/appellant be awarded attorney's fees for services incurred both prior to and during arbitration. Id. On motion to confirm said award, the trial court determined that the arbitrators exceeded their authority in awarding fees for the arbitration and vacated the award. Id. Although the Second District agreed with the trial court, it reversed on different grounds.³ Id. at 1129-30.

The Fridman court applied this Court's rationale in Fewox, as follows,

³ The Second District determined that after correctly concluding that the arbitrators exceeded their authority in awarding fees for arbitration, the trial court should have directed a rehearing on the matter. Fridman at 1129.

Fewox held that a party may be awarded fees for arbitration proceedings if authorized by statute or contract; however, the circuit court and not the arbitrators must determine the fee. We, therefore, conclude that the arbitrators erred in awarding fees for work performed in preparation for and during arbitration proceedings. Id. at 1129.

Thus, the Fridman court concluded that the language of Florida Statute Section 682.11 and this Court's holding in Fewox limited the subject matter jurisdiction of arbitration to exclude attorney's fee determinations from the realm of arbitrable issues. Id. This was so even where the parties had submitted the question of attorney's fees to the arbitrators for their determination. Id.

In this case, the Third District's finding that an alleged stipulation between counsel to submit the question of attorney's fees to the arbitrator conferred jurisdiction upon the arbitrator to visit and decide this issue is in conflict with the holding in Fridman. The conflict is direct and explicit on the face of the Third District's opinion. As such, this Court should exercise its discretionary jurisdiction to settle this conflict among the appellate courts.

II

THE DECISION CONFLICTS WITH CASES
THAT HOLD THAT AN AWARD OF
ATTORNEY'S FEES INCURRED DURING
ARBITRATION MUST BE GROUNDED IN
STATUTE OR CONTRACT.

The Third District's opinion in this case also conflicts directly and explicitly with decisions of this Court and of the

Second District which have required that any award of attorney's fees incurred during arbitration must be provided for by contract or statute. Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989), approved, Insurance Co. of North America v. Acousti Engineering Co. of Florida, 579 So.2d 77 (Fla. 1991); Freedman v. Collier Commercial Builders, 596 So.2d 115 (Fla. 2d DCA 1992).

Generally, attorney's fees incurred during arbitration may be recovered in the trial court in an action associated with the confirmation or enforcement of an arbitral award, but such an award must be subtended by statute or contract. Freedman v. Collier Commercial Builders, 596 So.2d 115 (Fla. 2d DCA 1992); Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989), approved, Insurance Co. of North America v. Acousti Engineering Co. of Florida, 579 So.2d 77 (Fla. 1991)(while section 682.11 prohibits the arbitrator from awarding attorney's fees incurred during arbitration, the trial court may do so if authorized by contract or statute.)

The historical and philosophical underpinnings of that rule are generally that awards of attorney's fees are in derogation of the common law.

In the case at hand, the Third District refused to review the legal sufficiency of the arbitrator's determination of entitlement to attorney's fees, i.e., whether there was a statute or contract between the parties authorizing such an award. Instead, the Third District merely determined that the trial court had no authority to

vacate such an attorney's fee award on the stated ground that the arbitrator's award was legally incorrect. (A. 4-5)

The Third District's decision expressly contradicts the holdings in Fewox and Freedman. In those cases, attorney's fees incurred during arbitration proceedings could only be awarded by the trial court, and only when they had been provided for by contract or statute. Clearly, on the motion for confirmation of the arbitration award, the trial court's review of the legal sufficiency of the attorney's fee award in this case was not only appropriate, but required. As such, the Third District's finding that the trial court had no authority to vacate an arbitrator's award of attorney's fees is contrary to prevailing law and is ripe for discretionary review by this Court.

CONCLUSION

It is respectfully submitted that this Court should grant discretionary review of the decision of the Third District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to John Kirk McDonald, Esq., The Law Center, 370 Minorca Avenue, Coral Gables, Florida 33134 and Jeanne Heyward, Esq., 300 Courthouse Plaza, 28 West Flagler Street, Miami, FL 33130, Attorneys for Respondent, this 28th day of February, 1994.

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