SUPREME COURT OF FLORIDA

CASE NO.: 83,254

TURNBERRY ASSOCIATES,

Petitioner,

vs.

SERVICE STATION AID, INC.,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

JOHN KIRK McDONALD, ESQ.
WILLIAM R. ROBBINS, ESQ.
The Law Center
370 Minorca Avenue
Coral Gables, Florida 33134

and

JEANNE HEYWARD, ESQ.
300 Courthouse Plaza
28 West Flagler Street
Miami, Florida 33130
Phone No. (305) 358-6750
Fla. Bar No. 035812

TOPICAL INDEX

TABLE OF CITATIONS

CASE AUTHORITIES

Statutory Authorities

STATEMENT OF THE CASE AND FACTS

Plaintiff/Petitioner, TURNBERRY ASSOCIATES, a Florida general partnership (TURNBERRY), seeks to have reviewed a decision of the District Court of Appeal, Third District, dated November 16, 1993 and Motion for Rehearing denied by order dated January 19, 1994.

TURNBERRY filed suit against AHRENS, the general contractor, and SERVICE STATION, a sub-contractor, alleging breach of contract, negligence and breach of warranty arising out of the construction and installation of an underground fuel tank, fuel delivery system and monitoring well in a project known as Champion Marine. All three counts sought damages and attorney's fees against AHRENS and SERVICE STATION jointly and severally. The trial court stayed the action and compelled arbitration in accordance with the contracts between the parties.

The arbitrator denied TURNBERRY'S claim against AHRENS and SERVICE STATION. The arbitrator's award stated that pursuant to stipulation of all the parties, he would hold a hearing to determine the amount of reasonable attorney's fees to be awarded to the prevailing parties. At a subsequent hearing, the arbitrator awarded attorney's fees to AHRENS and SERVICE STATION.

TURNBERRY moved to vacate or in the alternative modify or correct the arbitration award in the Circuit Court. The Circuit Court entered an Order affirming the arbitrator's findings that the parties had stipulated that he would determine attorney's fees but

vacated the award of attorney's fees to SERVICE STATION on the ground that the award was without foundation in law. The Court affirmed the arbitrator's award of attorney's fees to AHRENS.

SERVICE STATION appealed to the District Court of Appeal, Third District. TURNBERRY did not cross appeal the arbitrator's award of attorney's fees to Co-Defendant, AHRENS.

On appeal, the District Court of Appeal, Third District, in reversing the trial court's order vacating the arbitrator's award of attorney's fees to SERVICE STATION held inter alia:

> We reverse the trial court order vacating the arbitrator's award of attorney's fees based on a holding that (1) the trial court, in effect, found, based on substantial competent evidence, that the parties stipulated that the arbitrator should decide the issue of attorney's fees in the case; (2) the parties to an arbitration agreement may by stipulation confer jurisdiction on the arbitrator to decide entitlement to attorney's fees and to assess such fee, Pierce v. J. W. Charles-Bush Securities, Inc., 603 So.2d 625 (Fla. 4th DCA 1992) (en banc); and (3) a trial court has no authority to vacate such an attorney's fee award by an arbitrator, as was done in the instant case, on the ground that the award is legally incorrect [i.e., that there is no statute or contract between the parties authorizing such an award] because an arbitration award cannot be vacated because the arbitrator made an error of law. § 682.13, Fla. Stat. (1991); Schnurmacher Holding, Inc., v. Noriega, 542 So.2d 1327 (Fla. 1989).

SUMMARY OF ARGUMENT

The decision of the District Court correctly relied upon Pierce v. J. W. Charles-Bush Securities, 603 So.2d 625 (Fla. DCA 1992). The Pierce decision admitted it conflicted with Fridman v. Citicorp Real Estate, Inc., 596 So.2d 1128 (Fla. 2d DCA 1992) and certified the question. Therefore, the conflict in the present decision is obvious.

Respondent submits that Pierce is the better reasoned decision from the standpoint of logic, and judicial economy. It avoids unnecessary litigation by allowing parties to confer upon the arbitrator the right to determine entitlement and amount of attorney's fees.

However, Petitioner's Point II is based on an inaccurate assumption. The decision did not hold that an attorney's fee award does not have to be based on contract or statute. Rather, the decision correctly held that the basis of the arbitrator's award cannot be examined or reviewed because an arbitration award cannot be vacated because the arbitrator allegedly made an error of law.

POINT I

WHETHER THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH HIGLEY SOUTH, INC., V. QUALITY ENGINEERED INSTALLATION, INC., 19 FLA. LAW WEEKLY D99 (FLA. 2D DCA JANUARY 5, 1994) and FRIDMAN V. CITICORP REAL ESTATE, INC., 596 SO.2D 1128 (FLA. 2D DCA 1992) .

ARGUMENT

The decision of the District Court of Appeal, Third District, held that parties to an arbitration agreement may stipulate to confer jurisdiction on the arbitrator to decide entitlement to attorney's fees and to assess such fee. This is supported by Pierce v. J. W. Charles-Bush Securities, Inc., supra. The District Court in Pierce acknowledged and certified that its decision was in conflict with Fridman v. Citicorp Real Estate, Inc., supra.

Pierce traced the history of arbitration from the initial view that such agreements to arbitrate constitute an attempt to oust courts of their lawful jurisdiction to the present view of Federal and State courts to resolve all doubts about the scope of an arbitration agreement as well as any questions about waiver thereof, in favor of arbitration. Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988); Ronbeck Const. Co., v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992).

Pierce contains a logical discussion of the reasons for rejecting or overruling the older rule prohibiting an arbitrator

from awarding attorney's fees when the parties so stipulate. Pierce pointed out that the essential reason for preferring arbitration over litigation was that arbitration is "faster and cheaper". Parenthetically speaking, this is undoubtedly the basis for the favored method of mediation and the alternative dispute resolution.

It is thus obvious that the District Court in the present case correctly relied upon Pierce to support its decision that parties to an arbitration agreement may stipulate to confer jurisdiction on the arbitrator to decide entitlement to attorney's fees and to assess such fee. Any decision to the contrary defeats the purpose of arbitration and results in an incongruous situation by allowing only part of the issues to be decided by an arbitrator and the balance of the issues to be decided by a trial court who, for the most part, may not be in any better position to decide entitlement and amount of attorney's fees based on expert testimony than an arbitrator who also has the benefit of such expert testimony. The only thing to be accomplished by bifurcating the issues would be to unduly and unnecessarily prolong the litigation.

In summary, since the District Court relied upon Pierce to support its decision and since Pierce concededly conflicts with Fridman v. Citicorp Real Estate, Inc., supra, there is a conflict between these two decisions. Nonetheless, the Pierce decision represents the more logical answer to the problem. Furthermore, when parties agree to submit the issue of entitlement to attorney's fees and amount thereof to an arbitrator, the latter's decision

should be final and the parties should be precluded from contesting the award on any basis not allowed by § 682.13 Fla. Stat. (1991). As this Honorable Court stated in Schnurmacher Holding, Inc., v. Noriega, 542 So.2d 1327 (Fla. 1989), quoting from Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916) "To permit the dissatisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would be to render it merely a step in the settlement of the controversy, instead of a final determination of it".

POINT II

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

Contrary to Petitioner's argument, the District Court did not hold that an award of attorney's fees need not be grounded in statute or contract. Rather, the decision merely held that the trial court was without authority to vacate the arbitrator's award of attorney's fees on the alleged basis that the award was not grounded in statute or contract. This is because the arbitrator's award cannot be set aside for a mere error of judgment either as to the law or as to the facts since this is not one of the enumerated grounds for vacating an arbitrator's award set forth in § 682.13 Fla. Stat. (1991). This portion of the decision is also correct and does not conflict with any other decision.

It follows the pronouncement of this Honorable Court in Schnurmacher Holding, Inc., v. Noriega, supra, which held that an award of an arbitrator in statutory arbitration proceedings cannot be set aside for mere errors of judgment either as to the law or as to the facts. Thus, this Court confirmed the arbitrator's award even though the Court disagreed with the basis of the award which had erroneously placed a sales tax burden on the lessor rather than the lessee. This Court held that the standard of judicial review of statutory arbitration awards is extremely limited and an arbitrator's error of law is not a valid basis for reversal. This follows the principle of law set forth in Cassara v. Wofford, 55 So.2d 102 (Fla. 1951) that an award of an arbitrator in statutory arbitration cannot be set aside for mere errors of judgment either as to the law or as to the facts.

Therefore, this part of the decision of the District Court of Appeal does not conflict with any other decision. On the contrary, the decision correctly held that the trial court had no authority to vacate an arbitrator's award of attorney's fee on the alleged ground that there was no statute or contract between the parties authorizing an award. Schnurmacher and § 682.13 Fla. Stat. (1991).

CONCLUSION

The decision of the District Court which follows Pierce obviously conflicts with Fridman. It is respectfully submitted that Pierce should be approved. It is also respectfully submitted

that Petitioner's remaining argument should be rejected because the decision follows Schnurmacher and § 682.13.

Respectfully submitted,

JOHN KIRK McDONALD, ESQ.
WILLIAM R. ROBBINS, ESQ.
The Law Center
370 Minorca Avenue
Coral Gables, Florida 33134

and

JEANNE HEYWARD, ESQ.
300 Courthouse Plaza
28 West Flagler Street
Miami, Florida 33130
Phone No. (305) 358-6750

Jeanne Heyward
JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 18th day of March, 1994, to: WALTER E. STEVENS, ESQ., Manzini & Associates, P.A., Attorneys for Appellee, 2050 Courthouse Tower, 44 W. Flagler Street, Miami, FL 33130.

Jeanne Heyward
JEANNE HEYWARD