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SID J WHITE

JUN 28 1994

SUPREME COURT OF FLORIDA

CASE NO. 83,254

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

TURNBERRY ASSOCIATES,

Petitioner,

vs.

SERVICE STATION AID INC.,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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

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PRELIMINARY STATEMENT

Petitioner TURNBERRY ASSOCIATES will be referred to as "TURNBERRY." Respondent SERVICE STATION AID, INC. will be referred to as "SERVICE STATION."

The following symbols will be used:

R. \_\_\_\_\_ - Index to the Record on Appeal

All emphasis is ours unless otherwise indicated.

### STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the District Court of Appeal, Third District, which reversed the trial court's order vacating an arbitrator's award of attorney's fees to SERVICE STATION and remanded with directions for the trial court to confirm the arbitration award in this case. The facts giving rise to these proceedings are as follows:

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. (R. 3) Ahrens had previously entered into a sub-contract with SERVICE STATION in furtherance of its obligations to TURNBERRY. Id.

After the construction work was completed, TURNBERRY discovered several defects in the construction and installation of the underground fuel tank and fuel delivery system. (R. 4) On February 13, 1991, TURNBERRY filed a suit against Ahrens and SERVICE STATION alleging breach of contract, breach of warranty and negligence. (R. 2-92) On SERVICE STATION'S motion, the trial court then stayed the action and compelled arbitration in accordance with the contracts between the parties. (R. 279, 280-281).

At arbitration, TURNBERRY'S claim against Ahrens and SERVICE STATION was denied. (R. 329-330). In the award, and pursuant to an alleged stipulation "of all the parties," the arbitrator retained jurisdiction to determine the amount of attorney's fees to be awarded to the prevailing parties. Id. TURNBERRY immediately

filed an application to modify or correct award of arbitrator directed at the potential liability of TURNBERRY to SERVICE STATION for attorney's fees. (R. 331-334). The arbitrator denied TURNBERRY'S application to modify or correct the award. (R. 342).

TURNBERRY then filed a motion to vacate or, in the alternative, to modify or correct arbitration award and an emergency motion to stay an upcoming hearing called by the arbitrator on the issue of attorney's fees. (R. 282-304). The trial court denied the emergency motion to stay at that time. (R. ).

At the subsequent fee hearing, the arbitrator awarded attorney's fees incurred during the arbitration in favor of SERVICE STATION and against TURNBERRY in the amount of \$25,000.00 plus costs. (R. 361). The arbitrator's claimed authority to enter such an award of fees was based on an alleged "stipulation" between and among SERVICE STATION and TURNBERRY that the arbitrator award attorney's fees. Id.

TURNBERRY disputed the existence of any such stipulation with SERVICE STATION and renewed its motion in the trial court to vacate or, in the alternative, to modify the arbitration award of attorney's fees in favor of SERVICE STATION.<sup>1</sup> (R. 319-345). After conducting a hearing at which it heard evidence and argument in the case, the trial court entered an order modifying the arbitration

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<sup>1</sup> 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 and TURNBERRY had already arrived at an agreement with Ahrens for the payment of these fees.

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. (R. 385-387). In its order, 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 in general. Id. However, the trial court determined 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.

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. (R. 419-420). As grounds, the Third District found that the trial court had, "in effect, found, based on competent substantial evidence, that the parties stipulated that the arbitrator should decide the issue of attorney's fees in the case." 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. (R. 421).

#### SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal erroneously departs from the strict language of the Florida Arbitration Code, in Section 682.11, which prohibits arbitrators from awarding counsel fees incurred during arbitration. While the case law interpreting the statute does not prohibit a prevailing party in an arbitration from obtaining an award of attorney's fees, the law clearly provides that fee awards are to be realized only in the trial court upon application by the prevailing party for confirmation of the arbitral award. Here, the Third District has allowed the parties, by way of an alleged stipulation, to confer subject matter jurisdiction upon an arbitrator to decide attorney's fees, where such jurisdiction has been expressly removed in the statute.

Further, in upholding the arbitrator's award of attorney's fees in this manner, the Third District has placed the legal sufficiency of the arbitrator's fee award beyond the purview of the trial court. Arbitrators are usually chosen for their expertise in a particular field as well as the expedited nature of their decision-making. As such, parties are said to be bound by an arbitrator's decision on the merits, and courts are powerless to correct an arbitrators misinterpretation of facts or law.

However, attorney's fees have traditionally been reserved for the trial court's determination and are awardable only when subtended by contract or statute. Because of their lack of expertise in determining what a reasonable attorney's fee should be, arbitrators have historically been left out of the loop when it comes to determining entitlement to fees, as well as determining what a reasonable attorney's fee should be. In this case, the Third District has not only placed the issue of attorney's fees squarely within an arbitrator's dominion, but has determined that these may be awarded even in the absence of an applicable contract or statute and without recourse in the trial court. Such a ruling is inconsistent with the treatment traditionally afforded attorney's fees and the strict requirement that these be authorized by contract or statute.

Lastly, in the event that this Honorable Court upholds the ability of parties to confer jurisdiction upon an arbitrator to determine attorney's fees, and finds that the trial court is powerless to review an arbitrator's fee award, this Court should remand this case for a threshold factual determination by the trial court as to the existence of a stipulation between the parties. Notwithstanding the Third District's acceptance of an implied finding by the trial court, the trial court did not make a factual finding, based on competent substantial evidence, that a stipulation among the parties had occurred. The trial court never found any record evidence of an agreement between the parties to allow the arbitrator to determine attorney's fees. Rather, the

trial court merely refused to take issue with the arbitrator's recollection of such an agreement and, instead, modified the award based on the manifest error of the arbitrator in making the award.

### ARGUMENT

#### I

#### **THE ARBITRATION CODE IN SECTION 682.11 PROHIBITS ARBITRATORS FROM AWARDING ATTORNEY'S FEES, AND PARTIES CANNOT BY STIPULATION CONFER SUBJECT MATTER JURISDICTION UPON ARBITRATORS TO AWARD SUCH FEES.**

The Florida Legislature has placed specific restrictions on an arbitrator's power and authority to determine claims for fees and expenses of arbitration after a determination on the merits. While arbitrators are empowered to award and determine their own fees and other expenses of arbitration, in Section 682.11 of the Florida Arbitration Code, the Legislature has specifically and unequivocally excluded attorney's fees from the range of an arbitrator's powers. Moreover, this explicit jurisdictional limitation necessarily supersedes and invalidates any and all agreements of the parties to voluntarily submit the issue of attorney's fees for an arbitrator's determination. Thus, while an arbitrator's discretion in deciding those issues of law or fact correctly placed before him is nearly limitless, he is powerless to determine the issue of entitlement or amount of attorney's fees incurred during arbitration.

A.

**FLORIDA STATUTE SECTION 682.11 EXPLICITLY REMOVES ATTORNEY'S FEES FROM THE SUBJECT MATTER JURISDICTION OF ARBITRATORS.**

It is well-settled that an arbitrator exceeds his or her power by going beyond the authority granted by statute, the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration. Applewhite v. Sheen Financial Resources, Inc., 608 So. 2d 80 (Fla. 4th DC 1992); Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989). Indeed, Florida Statute § 682.13 (1)(c) provides that an award shall be vacated when the arbitrator in the course of his jurisdiction exceeded his powers.

The Florida Arbitration Code, in §682.11<sup>2</sup>, outlines the scope of the arbitrator's power and jurisdiction to determine and make awards with respect to the fees and expenses of arbitration after a determination on the merits. According to Florida Statute §682.11, and unless otherwise agreed to by the parties, the arbitrator may make an award for payment of his own fees and other expenses incurred during arbitration. However, on its face, this

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<sup>2</sup> This section provides in its entirety, "Unless otherwise provided in the agreement or provision for arbitration, the arbitrator's 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. Fla. Stat. § 682.11. (emphasis added)

statute explicitly removes counsel fees incurred during arbitration from the range of arbitrable issues.<sup>3</sup>

The statutory reference to "counsel fees" is to remove it from the "other expenses" which may be awarded by the arbitrator. Thus, the purpose for including the phrase "not including counsel fees" is to modify and explain "expenses" and to make certain that attorney's fees remain outside the arbitrator's purview. See Tassinari v. Loyer, 189 So. 2d 651 (Fla. 2d DCA 1966). As such, the Florida Arbitration Code not only removes attorney's fee awards from the arbitrator's jurisdiction, but necessarily proscribes parties from unilaterally conferring said subject matter jurisdiction upon the arbitrator by agreement. Terex Trailer Corp. v. McIlwain, 579 So. 2d 237 (Fla. 1st DCA 1991)(subject matter jurisdiction cannot be conferred by agreement of parties.); State of Florida Department of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236 (Fla. 4th DCA 1990)(subject matter jurisdiction is conferred upon court by Constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties).

Thus, under Florida Statute §§ 682.11 and 682.13 (1)(2), an arbitral award of attorney's fees clearly is beyond the statutory

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<sup>3</sup> Given the broad latitude afforded arbitrators as to questions of law and fact involved in determining the merits of the issues before him, an arbitrator is instrumental only as to a determination of prevailing party which, in turn, is later considered in resolving the attorney's fee issue. However, determinations of entitlement under an operative statute or contract, and amount of attorney's fees, are beyond the range of arbitrable issues and must be determined by the trial court.

jurisdiction conferred upon an arbitrator by the Florida Legislature and must be vacated as a matter of law.

In the instant case, the trial court did not take issue with the arbitrator's contention that the parties had stipulated to allow the arbitrator to award attorney's fees, nor did the trial court take issue with the arbitrator's ability to assess and award such fees upon such an alleged stipulation. Instead, the trial court vacated that portion of the arbitration award which, contrary to the essential requirements of the law, awarded attorney's fees to SERVICE STATION where such fees had not been provided for by contract or statute.

The Third District Court of Appeal reversed the trial court's order vacating the arbitration award of attorney's fees. In pertinent part, that court found that "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 fees." Service Station Aid, Inc. v. Turnberry Associates, 629 So. 2d 204 (Fla. 3rd DCA 1993) (citing Pierce v. J.W. Charles-Bush Securities, Inc., 603 So. 2d 625 (Fla. 4th DCA 1992)(en banc)). In so ruling, the court departed from the strict language in the Arbitration Code which prohibits an arbitrator's assessment and award of attorney's fees and from a long line of well-reasoned cases which proscribe arbitrator's from making attorney's fee awards.

B.

DECISIONS OF THIS COURT AND OF THE SECOND DISTRICT PROSCRIBE AN ARBITRATOR'S AWARD OF ATTORNEY'S FEES, AS THESE ARE ONLY RECOVERABLE IN THE TRIAL COURT UPON CONFIRMATION OF THE ARBITRATION AWARD.

In the case at hand, the Third District Court of Appeal also departed from those cases which hold that attorney's fees incurred during arbitration are only recoverable in the trial court upon confirmation of the arbitration award. In construing the effect of the limiting language in §682.11 of the Florida Arbitration Code, several courts, including this Court, have proscribed attorney's fee awards by arbitrators, as these have been held to be beyond the arbitrator's subject matter jurisdiction. Fridman v. Citicorp Real Estate, Inc., 596 So. 2d 1128 (Fla. 2d DCA 1992); Higley South, Inc. v. Quality Engineered Installation, 19 Fla. L. Weekly D100 (Fla. 2d DCA January 5, 1994); Raymond James & Associates, Inc. v. Weineke, 556 So.2d 810 (Fla. 2d DCA 800); See also Lee v. Smith Barney, Harris Upham, 626 So. 2d 969 (Fla. 2d DCA 1993)("The Florida Legislature has expressly provided that attorney's fees for time spent in arbitration are recoverable but only in the trial court upon a motion for confirmation or enforcement of the award."); B & H Construction & Supply Co. v. Tallahassee Community College, 542 So. 2d 382 (Fla. 1st DCA 1989)(arbitration panel is authorized to award all fees and costs, except attorney's fees.)

In Insurance Co. of North America v. Acousti Engineering Company of Florida, 579 So. 2d 77 (Fla. 1991), this Court approved and adopted the "thorough and well-reasoned" en banc opinion of the Second District in Fewox v. McMerit Construction Co., 556 So. 2d

419 (Fla. 2d DCA 1989). In Fewox, the Second District Court of Appeal correctly construed the "not including counsel fees" clause in §682.11 of the Florida Statutes as prohibiting an arbitrator from including attorney's fees in his award of expenses and fees incurred during arbitration proceedings. That court stated:

" The Legislature apparently eliminated attorney's fees from the subject matter jurisdiction of arbitration because arbitrators are generally businessmen chosen for their expertise in the particular subject matter of the suit and have no expertise in determining what is a reasonable attorney's fees ... Thus, the intent of the statute is merely to prohibit arbitrators from awarding attorney's fees." Fewox, 556 So. 2d at 422. (citations omitted.)

Similarly, in Higley South, Inc. v. Quality Engineered Installation, 19 Fla. L. Weekly D99 (Fla. 2d DCA January 5, 1994), the court held that it is the trial court, and not the arbitrator, who had the authority to determine both entitlement to and amount of attorney's fees. In Higley, the appellants maintained, in part, that on confirmation of the arbitration award, the trial court's attorney's fee award was restricted by the language in the arbitration award limiting attorney's fees to those "fees for legal services necessary to prepare and present [appellee's] claim." Id. at D100.

In rejecting the appellant's position, the Second District found that arbitrators have no authority to award attorney's fees. Id. "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.



Of perhaps the greatest application here is the rule enunciated in the case of Fridman v. Citicorp Real Estate, 596 So. 2d 1128 (Fla. 2d DCA 1992). There, after the defendant/appellee refused to pay attorney's fees as agreed, the parties voluntarily submitted the matter of attorney's fees to binding arbitration. Id. 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.

Thus, although the Second District agreed with the trial court that the arbitration panel exceeded its authority, it reversed on different grounds. <sup>4</sup> Id. at 1129-30.

The court in Fridman concluded that the language of Florida Statute §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. at 1129. This was so even where the parties had submitted the question of attorney's fees to the arbitrators for their determination. Id.

The Fridman court noted that one of the primary reasons for removing attorney's fees from the scope of an arbitrator's

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<sup>4</sup> 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.

jurisdiction was the limited expertise of arbitrators in determining what is a reasonable attorney's fee. Id. While recognizing that this rationale did not necessarily apply in that case, where the three arbitrators were attorneys with some expertise in this area, the Fridman refused to carve out an exception of the limited subject matter jurisdiction of arbitrators as announced in Fewox. Id. In the instant case, the Third District found that an alleged stipulation between counsel for TURNBERRY and SERVICE STATION to submit the question of their attorney's fees to the arbitrator conferred jurisdiction upon the arbitrator to decide this issue. In doing so, the court ignored both the explicit limiting language of the applicable statute as well as the well-reasoned rule of law espoused by the Second District and this Court in various opinions. Indeed, the Third District here effectively acknowledged the ability of parties to an arbitration to confer, by agreement, subject matter jurisdiction upon the arbitrator where none had existed before, and where said subject matter jurisdiction had been explicitly removed by the statute. Further, in so ruling, the Third District has empowered arbitrators to delve into an area which, in Florida, has traditionally been reserved for the trial court.

## II

**ATTORNEY'S FEES INCURRED DURING ARBITRATION, RECOVERABLE ONLY UPON CONFIRMATION OF THE ARBITRATION AWARD, MUST ALWAYS BE GROUNDED IN CONTRACT OR STATUTE.**

The Third District Court of Appeal erred when it reversed the

trial court's order vacating the arbitrator's award of attorney's fees based, in part, on its holding that the trial court had no authority to vacate an arbitrator's attorney's fee award where such an award was not authorized by statute or contract. The Third District refused to recognize the trial court's ability to review the legal sufficiency of the award. In doing so, the court erred, first, in finding that an arbitrator was vested with the jurisdiction to make such an award<sup>5</sup>, and second, when it upheld the award where none had been provided for by statute or contract. The record in this case clearly evidences a lack of contractual or statutory predicate for an attorney's fee award as between TURNBERRY and SERVICE STATION.

It is well-settled that attorney's fees for legal services incurred during litigation are only recoverable when provided for by an operative statute or by specific agreement of the parties. Main v. Benjamin Foster Co., 192 So. 602 (Fla. 1939); Brite v. Orange Belt Securities Co., 182 So. 892 (Fla. 1938). In the context of an arbitration, the Florida Arbitration Code does not preclude recovery of attorney's fees related to arbitration proceeding. However, these attorney's fees are recoverable in the trial court only upon confirmation of an arbitration award, and only where authorized by a statute or contract. Fewox v. McMerit Construction Company, 556 So. 2d 419 (Fla. 2d DCA 1989) ("The proper place to determine the entitlement to and amount of attorney's fees

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<sup>5</sup> See Argument I, supra.

authorized by contract or statute is in the circuit court upon application for confirmation of the award."); Freedman v. Collier Commercial Builders, Inc., 596 So. 2d 115 (Fla. 2d DCA 1992); Par Four, Inc. v. Gottlieb, 602 So.2d 689 (Fla. 4th DCA 1992); B & H Construction & Supply Co., Inc. v. Tallahassee Community College, 542 So. 2d 382 (Fla. 1st DCA 1989).

Thus, in Par Four, Inc. v. Gottlieb, supra, the trial court's award of attorney's fees incurred during arbitration was affirmed where the specific agreement between the parties provided that in the event of "any litigation," the prevailing party would be entitled to recover attorney's fees. 602 So. 2d at 690. There, the court found that the provision for attorney's fees in "any litigation" encompassed arbitration proceedings. Id.

However, in Freedman v. Collier Commercial Builders, supra, the Second District Court of Appeal reversed the trial court's award of attorney's fees arising from an arbitration proceeding. 596 So. 2d at 116. There, after prevailing at arbitration, a contractor moved the trial court to confirm the arbitration award and successfully sought attorney's fees pursuant to Fla. Stat. § 713.29. Id. at 116.

On appeal, the Second District found that the statute in effect at the time the contractor commenced the action did not contemplate the award of legal fees arising from matters resolved through arbitration and reversed the award. Id. That court held, "There is neither a statute or a contractual predicate in the instant matter supporting the trial court's fee award." Id.

In so holding, the court rejected the contractor's contention that the parties had stipulated during the arbitration proceeding to an award of fees. Such a stipulation for an arbitral fee award, the court held, was rendered ineffectual in light of Fewox, which placed attorney's fees beyond the scope of an arbitrator's jurisdiction. Id.

Of perhaps greater application to the instant case is Raymond James & Associates, Inc. v. Wieneke, 556 So. 2d 800 (Fla. 2d DCA 1990), where the court reversed an award of attorney's fees by an arbitration panel. There, in reversing the trial court's confirmation of the arbitration award, the Second District specifically noted the arbitrator's lack of subject matter jurisdiction to determine attorney's fees. Id. at 801. Further, the court held that it was incumbent upon the trial court, and not the arbitrator, to award fees if there exists a contract or statute which authorizes such fees. Id. "If there is no contract or statute allowing an award of fees, then the parties are not entitled to an award." Id.

In the instant case, neither the arbitrator nor the trial court could form a legal basis, through statute or contract, on which to make an award of attorney's fees. Thus, the absence of a contract or statute entitling SERVICE STATION to recover attorney's fees from TURNBERRY, coupled with the lack of subject matter jurisdiction for the arbitrator to make such an award, required that the arbitrator's \$25,000.00 attorney's fee award be vacated. Further, the holding in Raymond James, supra, not only

allowed the trial court to re-visit the legal basis for such an award, but required that the trial court itself make such an award only after having made a favorable determination of legal entitlement.

Here, the Third District acted improperly not only in reversing the trial court's order vacating the arbitrator's award of attorney's fees, but also in remanding the case with instructions that the fee award to SERVICE STATION be confirmed where the trial court had already determined that none had been provided by contract or statute. Thus, in one fell swoop, the Third District has not only empowered parties to confer subject matter jurisdiction upon arbitrators to determine attorney's fees where none had existed before, but also eliminated the trial court's ability to review the legal sufficiency of an arbitral fee award which is rightfully within its exclusive purview.

**A.**

**TURNBERRY DID NOT CONTRACT WITH SERVICE STATION.**

The trial court correctly determined that the two operative contracts in this litigation, the first between Ahrens and SERVICE STATION (subcontract), and the second between Ahrens and TURNBERRY (prime contract), did not provide a basis for the award of attorney's fees to SERVICE STATION by TURNBERRY. Neither of the two contracts in question authorized an award of attorney's fees to SERVICE STATION from TURNBERRY because (a) neither contract was between SERVICE STATION and TURNBERRY, (b) the arbitration clauses

in the two contracts did not include attorney's fees, and (c) the two contracts were not interlocking, as SERVICE STATION would urge.

It is well-settled that before attorney's fees may be awarded in any case, such an award must be predicated upon a "prevailing party" contract or statute. The operative contracts in this case did not provide for attorney's fees. As evidenced by the trial court's order under review and by the arbitrator's own testimony before the trial court acknowledging that no contract existed between SERVICE STATION and TURNBERRY, the two contracts in question actually precluded the arbitrator's award of attorney's fees to SERVICE STATION from TURNBERRY.

Throughout the proceedings below, SERVICE STATION'S argument that it was entitled to attorney's fees from TURNBERRY has been twofold. First, SERVICE STATION claims that its contract with Ahrens (the subcontract) incorporated by reference the contract between TURNBERRY and Ahrens (the prime contract), including its provision for attorney's fees. However, since TURNBERRY was not a party or even a signatory to the SERVICE STATION/Ahrens contract, this argument must fail on its face. SERVICE STATION then argues that the TURNBERRY/Ahrens and Ahrens/SERVICE STATION contracts were interlocking and, therefore, give rise to a claim for reciprocal attorney's fees by operation of Florida Statute §57.105(2). The trial court properly rejected both of these arguments in vacating the arbitrator's award of attorney's fees to SERVICE STATION.

Because there was no contractual relationship between SERVICE STATION and TURNBERRY, SERVICE STATION'S claim for attorney's fees

against TURNBERRY arose, if at all, out of the SERVICE STATION/Ahrens contract. That contract incorporated by reference the TURNBERRY/Ahrens contract regarding the work to be done by SERVICE STATION. In the SERVICE STATION/Ahrens contract, SERVICE STATION assumed all obligations placed upon Ahrens in the TURNBERRY/Ahrens contract for SERVICE STATION'S portion of the work. However, the TURNBERRY/Ahrens contract was not in existence when the Ahrens/SERVICE STATION contract was executed. Moreover, at no time did TURNBERRY assume any obligations vis-a-vis SERVICE STATION.

SERVICE STATION'S request for an arbitral award of attorney's fees against TURNBERRY was further precluded by the unequivocal language of the TURNBERRY/Ahrens contract. The clause that prompted arbitration in this case was contained in the TURNBERRY/Ahrens contract and did not contemplate that the question of attorney's fees would be submitted to the arbitrator for his determination.

More importantly, the attorney's fee clause in the TURNBERRY/Ahrens contract provided for an award of reasonable attorney's fees to the "prevailing party" as between TURNBERRY and Ahrens only. In point of fact, an award of attorney's fees to SERVICE STATION from TURNBERRY was expressly precluded by another clause in the TURNBERRY/Ahrens contract:

"17.4.2 No provisions contained in this contract shall create or give to third parties any claim or right of action against owner [TURNBERRY] or contractor beyond such as may legally exist in the absence of such provision" (bracketed language added). (R. 51)



Far from creating a fee entitlement in SERVICE STATION, the TURNBERRY/Ahrens contract actually barred SERVICE STATION'S claim for attorney's fees against TURNBERRY.

After careful consideration of the two contracts in question, the trial court properly vacated the arbitrator's award of attorney's fees to SERVICE STATION. The trial court found that there was no contractual relationship between SERVICE STATION and TURNBERRY which would call for an award of attorney's fees as between those parties.

Moreover, during the hearing before the trial court on TURNBERRY'S motion to vacate the arbitrator's fee award to SERVICE STATION, the arbitrator (who testified at the request of SERVICE STATION) was uncertain and could not articulate the grounds for his award of attorney's fees to SERVICE STATION. Under questioning by the trial court, the arbitrator could not specify the source of his assumed authority to award attorney's fees to SERVICE STATION:

[BY THE COURT]

Q. . . . (W)as it the legal basis contract between the owner and the contractor? Was it some statute that you relied on? Not what you went through your process to come up with the dollar amounts, but under what legal theory you said yes.

[BY THE ARBITRATOR]

A. Sir, I don't have my notes here, but if I can recall, I believe there was no contract between Turnberry and Service Station. Their contract, I believe, was with the other contractor. And based on the memorandum of the two parties I felt that Service Station was entitled to it. And I believe it was statutory, but I don't really -

[BY THE COURT]

Q. You believe it was on the basis of a statutory award?

[BY THE ARBITRATOR]

A. It was statutory and something else. I forget exactly what it was. (R. Transcript of Hearing, Jan. 13, 1993, p. 11)

Since there was no privity of contract between SERVICE STATION and TURNBERRY and, therefore, no "prevailing party" provision to support an award of attorney's fees, the arbitrator's award of attorney's fees to SERVICE STATION was improper and was properly vacated by the trial court. Further, given the holdings of Raymond James and Freedman, the Third District's reversal of the trial court's order vacating said award on the grounds that the trial court lacked the authority to review the legal entitlement to such an award was improper. This is especially so in light of those cases which place the legal sufficiency for an attorney's fee award squarely within the exclusive purview of the trial court, and required the trial court to vacate the arbitration award in this case.

B.

**FLORIDA STATUTE SECTION 57.105(2) DID NOT EXIST WHEN SERVICE STATION ENTERED ITS CONTRACT WITH AHRENS AND COULD NOT HAVE PROVIDED A BASIS FOR AN ATTORNEY'S FEE AWARD.**

Likewise, the trial court correctly found that the arbitrator was without legal authority to award attorney's fees to SERVICE STATION on statutory grounds. In any case where attorney's fees are awarded, they must be based on a contract or statute. As there was

no contractual basis for the disputed award, the only possible source of authority for the arbitrator to award attorney's fees to SERVICE STATION was Florida Statute §57.105(2). Yet, the trial court found that, absent a direct contractual relationship between SERVICE STATION and TURNBERRY, Florida Statute §57.105(2) was inapplicable. Moreover, Florida Statute §57.105(2) was not in effect when SERVICE STATION contracted with Ahrens, and the Florida Legislature did not intend for that statutory provision to apply retroactively.

Florida Statute §57.105(2)<sup>6</sup> affects only the relationship between contracting parties. Thus, the threshold requirement for the application of this section is the existence of a contract between the party seeking to invoke the statute and the party who is being charged. Moreover, this section is not applicable in disputes involving contracts which were executed before the statute's effective date. Complete Interiors Inc. v. Behan, 558 So.2d 48, 53 (Fla. 5th DCA 1990), rev denied, 570 So.2d 1303 (Fla. 1990).

The trial court found, and the arbitrator conceded, that there was no contract between SERVICE STATION and TURNBERRY. That fact alone prohibited the arbitrator from awarding attorney's fees

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<sup>6</sup> This section provides: "If a contract contains a provision allowing attorneys fees to a party when he is required to take any action to enforce the contract, the Court may also allow reasonable attorneys fees to the other party when that party prevails in any action, whether as Plaintiff or Defendant, with respect to the contract. This act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter". Fla. Stat. §57.105(2) (West's F.S.A. Supp. 1993)

to SERVICE STATION from TURNBERRY. Further, Florida Statute §57.105(2) limits application of the statute to contracts entered into on or after the effective date of the statute.<sup>7</sup>

After careful consideration, the trial court correctly determined that the absence of a contract between SERVICE STATION and TURNBERRY rendered Florida Statute §57.105(2) inapplicable, and the arbitrator powerless to make an attorney's fee award to SERVICE STATION from TURNBERRY. The trial court held, "The statute authorizes the award of attorney's fees to one party if a contract provides that the other party is entitled to same. This statutory provision is inapplicable in the instant case since there was no contract between TURNBERRY and SERVICE STATION which would call for fees in favor of TURNBERRY and against SERVICE STATION". (R. 386)

Thus, the trial court properly found that the arbitrator could not invoke Florida Statute §57.105(2) as the source of his authority, and that an alleged stipulation of the parties to submit the issue of attorney's fees in general to the arbitrator did not, in and of itself, vest upon one party (SERVICE STATION) a right or entitlement to attorney's fees from another party (TURNBERRY) where no such right or entitlement existed in the first place. Accordingly, the Third District should have accepted the trial court's authority to make this determination and affirmed the order vacating the fee award as a matter of law.

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<sup>7</sup> The effective date of Fla. Stat. §57.105(2) was October 1, 1988. The date of the SERVICE STATION/AHRENS contract was August 25, 1988.

### III

**THE TRIAL COURT DID NOT FIND, BASED ON COMPETENT SUBSTANTIAL EVIDENCE, THAT THE PARTIES HAD SUBMITTED THE ISSUE OF ATTORNEY'S FEES FOR THE ARBITRATOR'S DETERMINATION.**

If this Court determines that the parties may, by stipulation, confer subject matter jurisdiction upon an arbitrator to award attorney's fees, this case should be remanded to the trial court for a determination as to whether a stipulation among the parties, did, in fact, exist.

Contrary to the implication in the opinion of the Third District<sup>8</sup>, the trial court in this case did not make a finding which was based on competent substantial evidence that the parties had stipulated to the arbitrator's award of attorney's fees. The trial court merely refused to take issue with the arbitrator's testimony that the parties entered into a general agreement for his determination of fees. Instead, the trial court challenged the arbitrator's obvious misapplication of the law and reversed the arbitrator's award.

The trial court stated, "While the parties may have conferred jurisdiction on the arbitrator to listen and decide the issue of attorney's fees, the award he made to Service Station Aid is without foundation in law." (emphasis added) Thus, the language used by the trial court is not indicative of a specific and well-substantiated finding of fact which is beyond appellate review and

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<sup>8</sup> In its opinion, the Third District found that "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." (emphasis added)

reconsideration. Rather than take issue with the arbitrator's testimony, the trial court made its ruling based on the arbitrator's error of law in awarding SERVICE STATION its attorney's fees. As such, and in the event that this Court finds that arbitrators may, upon a stipulation by the parties, award attorney's fees, this case should be remanded to the trial court for a factual determination as to whether a stipulation among the parties did, in fact, exist.

#### CONCLUSION

For the above-stated reasons, Petitioner TURNBERRY ASSOCIATES respectfully requests that this Honorable Court quash the opinion of the Third District Court of Appeal. Alternatively, Petitioner TURNBERRY ASSOCIATES respectfully requests that this Honorable Court remand this case to the trial court to determine the existence of a stipulation between the parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to 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, FL 33130, Attorneys for Appellant, this 27<sup>th</sup> day of June, 1994.

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