SUPREME COURT OF FLORIDA

CASE NO.: 83,254

TURNBERRY ASSOCIATES,

Petitioner,

vs.

SERVICE STATION AID, INC.,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is the brief on the merits of Respondent / Appellant / Co-defendant[1], SERVICE STATION AID, INC., (SERVICE STATION). The decision under review is from the District Court of Appeal, Third District, which reversed a trial court order vacating an arbitration award of attorney's fees in favor of SERVICE STATION for successfully defending an arbitration action brought by Petitioner TURNBERRY ASSOCIATES against SERVICE STATION and AHRENS. (R. 419-420).

THE PLEADINGS AND THE AWARD

On November 23, 1988, TURNBERRY, as owner, contracted with AHRENS, as prime contractor, for the construction and installation of an underground fuel tank, fuel delivery system and monitoring well in a project known as Champion Marine (R.9-59). In furtherance of its contractual obligations AHRENS previously entered into a subcontract with SERVICE STATION on August 25, 1988 (R.3,81-83,162-169). As admitted in its complaint, TURNBERRY was an intended "third party beneficiary of the contract" between AHRENS and SERVICE STATION (R.3).

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[1] The parties will be referred to as they stand before this Honorable Court and the symbol "R" signifies Record on Appeal.

After completion of the construction work a disagreement arose between TURNBERRY, AHRENS and SERVICE STATION. TURNBERRY alleged that the construction and installation of the underground fuel tank, fuel delivery system and monitoring well were defective as a result of which gasoline leaked causing severe contamination to the surrounding property (R.2-8).

TURNBERRY advised AHRENS of the problems and instructed AHRENS to put its liability insurer on notice regarding TURNBERRY'S claims and instructed it to advise SERVICE STATION to do likewise (R.84-86).

TURNBERRY filed suit against AHRENS and SERVICE STATION alleging breach of contract (Count I), negligence (Count II), and breach of warranty (Count III) (R.2-8). All three counts sought damages and attorney's fees against AHRENS and SERVICE STATION, jointly and severally, "pursuant to the applicable contracts and Florida law" (R.4-8). Under Count II TURNBERRY sought compensatory and punitive damages, interest, attorney's fees and costs against AHRENS and SERVICE STATION, jointly and severally, and cited the F.S. §57.105 as the basis for attorney's fees (R.7).

SERVICE STATION filed a Motion To Dismiss (R.93-95); AHRENS answered and cross claimed against SERVICE STATION (R.96-176); and TURNBERRY filed a Reply to AHRENS' Answer and Affirmative Defenses (R.177-178).

The Court stayed TURNBERRY'S claim against AHRENS and AHRENS' cross claim against SERVICE STATION until the issue had

been arbitrated in accordance with the contractual provisions between the parties (R.280,281).

The cause proceeded to arbitration which resulted in a denial of TURNBERRY'S claim against AHRENS and SERVICE STATION (R.290). The Arbitrator's Award also stated:

> "The Arbitrator pursuant to stipulation of all the Parties, will hold a hearing within thirty days from the date of this Award to determine the amount of reasonable attorney's fees to be awarded to the prevailing Parties." (R.290, 291)

TURNBERRY filed with the Arbitration Association an Application To Modify Or Correct Award Of Arbitrator directed solely toward the potential liability of TURNBERRY for attorney's fees (R.292-296,331-334).

SERVICE STATION filed an Objection which stated that during the arbitration hearing there was complete agreement by all three parties and the arbitrator that attorney's fees would be awarded to the prevailing parties and the amount would be set by the arbitrator (R.296-300,335-339). After TURNBERRY responded, the arbitrator denied TURNBERRY'S application to modify or correct the award (R.301-303,340-342).

TURNBERRY then filed a Motion to Vacate Or In The Alternative To Modify Or Correct Arbitration Award And Emergency Motion To Stay Hearing For Attorney's Fees in the Circuit Court (R.282-304). SERVICE STATION responded (R.305-309). The Circuit Court denied the Emergency Motion To Stay (R.321 paragraph 12).

The Arbitrator heard the evidence and entered an Amended Order awarding attorney's fees of $7,855.25 to AHRENS' counsel and $25,000.00 plus costs to SERVICE STATION'S counsel (R.343).

TURNBERRY renewed its motion to vacate or in the alternative to modify or correct the arbitration award in the Circuit Court (R.319-345). SERVICE STATION filed a Motion To Confirm Arbitration Awards And Response To Plaintiff's Renewed Motion To Vacate Or In The Alternative To Modify Or Correct Arbitration Award (R.346-361).

Four affidavits were filed in the Circuit Court:

The affidavit of Jessica Berman, Court Reporter, stated that she had reviewed the notes of Susan Jayer, Court Reporter at May 27, 1992 hearing, and was unable to find any discussion pertaining to attorney's fees (R.362-364). The affidavit of Deborah Saylers, Court Reporter for the May 22, 1992 hearing, stated that her notes did not contain any discussion or stipulation between SERVICE STATION and TURNBERRY relating to attorney's fees (R.365,366).

The affidavit of John C. Hamilton, attorney for AHRENS, stated that he attended the arbitration hearings and:

A. He specifically recalled counsel for TURNBERRY stating that he was not stipulating to the fact that the arbitrator could decide the issue of entitlement of attorney's fees between AHRENS and TURNBERRY;

B. Subsequent to the arbitration hearing he had several conversations with counsel for TURNBERRY in which he specifically questioned the entitlement to attorney's fees by AHRENS and specifically mentioned that he felt that there was no entitlement to attorney's fees by SERVICE STATION;

C. He had no recollection of any agreement by TURNBERRY'S counsel on behalf his client that the arbitrator could decide the issue of entitlement and amount of attorney's fees as between TURNBERRY and SERVICE STATION (R.417-418).

The affidavit of the Arbitrator, Leonard Frishman, an attorney, stated that at the conclusion of the final hearing on May 27, 1992 and after the court reporter had stopped recording the proceedings, he inquired of the attorneys and all parties to the arbitration as to whether they desired him to determine the issues of entitlement to attorney's fees and the amount of fees. Frishman stated that Walter Stephens, attorney for TURNBERRY, John C. Hamilton, attorney for AHRENS, and John Kirk McDonald and William Robbins, attorneys for SERVICE STATION, stipulated that the issue of attorney's fees would be decided by the arbitrator. Pursuant thereto, the arbitrator entered the Award dated June 19, 1992 (R.367-369). Frishman's subsequent testimony at the hearing reaffirmed the parties' stipulation. He said his award was based on memoranda submitted by the parties and the statute (P.8-11, hearing January 13, 1993).

After hearing evidence and argument the trial court entered an Order Modifying Arbitration Award [Vols. III, IV, R. 385, 416]. The Order affirmed the arbitrator's finding 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 (R.385-387). The trial court held that Fla.Stat. §57.105(2) was inapplicable because there was no contract between TURNBERRY and SERVICE STATION which would call for fees in favor of TURNBERRY against SERVICE STATION. The balance of the arbitrator's award to AHRENS was affirmed (R.385-387). TURNBERRY did not appeal the award of attorney's fees to AHRENS.

SERVICE STATION's appeal to the District Court of Appeal, Third District, resulted in a reversal of the order vacating the arbitration award of attorney's fees. The decision held 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;

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 citing Pierce v. J. W. Charles-Bush Securities, Inc., 603 So.2d 625 (Fla. 4th DCA 1992)(en banc);

3. A trial court has no authority to vacate an arbitrator's award of attorney's fees on the ground that the award

is legally incorrect [i.e., that there is no statute or contract between the parties authorizing such award] because an arbitration award cannot be vacated on the ground that an arbitrator made an error of law. § 682.13 Fla. Stat. (1991) and Schnurmacher Holding, Inc., v. Noriega, 542 So.2d 1327 (Fla. 1989)(R. 419-420).

SUMMARY OF ARGUMENT

SERVICE STATION submits that the parties may stipulate to allow the arbitrator to decide entitlement to attorney's fees and assess the amount of the fee in accordance with Pierce v. J. W. Charles-Bush Securities, 603 So.2d 625 (Fla. 4th DCA 1992). The conflicting decisions do not promote the aim of faster resolution of litigation with less expense and, therefore, should be rejected.

SERVICE STATION also submits that the arbitrator's award of attorney's fees cannot be set aside on the ground of mistake of law in accordance with Schnurmacher Holding, Inc., v. Noriega, 542 So.2d 1327 (Fla. 1989).

Assuming a review of the evidence were allowed, it would establish that the award of attorney's fees was based on the sub-contract and the incorporated prime contract and § 57.105(2).

POINT I ON DISCRETIONARY REVIEW

THE DECISION OF THE DISTRICT COURT WHICH FOLLOWED PIERCE V. J.W. CHARLES-BUSH SECURITIES, INC., 603 SO.2D 625 (FLA. 4TH DCA 1992)(EN BANC) IS CORRECT, DOES NOT CONTRAVENE § 682.11, FLA. STAT. (1991) AND PROMOTES THE JUDICIAL POLICY OF THIS STATE FAVORING ARBITRATION AND STIPULATIONS WHICH SETTLE LITIGATION, REDUCE COSTS AND RESULT IN JUDICIAL ECONOMY TO THE COURT.

ARGUMENT

All of TURNBERRY's argument under Point I concerning alleged statutory prohibition against allowing an arbitrator to decide the issue of attorney's fees even when the parties stipulate that the arbitrator may do so has been effectively answered in Pierce v. J. W. Charles-Bush Securities, Inc., supra. TURNBERRY's argument also overlooks the basic premise that arbitration is a favored means of dispute resolution and Florida courts indulge every reasonable presumption to uphold arbitration proceedings resulting in an award. Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988).

TURNBERRY's argument that § 682.11 has placed specific restrictions on an arbitrator's power and authority to determine claims for fees was clearly refuted in Pierce. In the en banc decision the District Court traced the history of arbitration from the initial disfavor based on the premise that arbitration was an

attempt to oust courts of their lawful jurisdiction to the change of attitude towards arbitration by a series of United States Supreme Court decisions which allowed arbitration in antitrust and RICO claims, security fraud claims and civil rights claims. Florida courts also changed their policy towards arbitration by resolving all doubts in favor of arbitration rather than against it. After reviewing the history and treatment of arbitration, Pierce examined § 682.11 and held inter alia:

> ... FAC section 682.11 provides:
>
> > 682.11 Fees and expenses of arbitration. Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. [e.s.]
> >
> > We apparently then read that text as a legislative determination not to allow parties to agree to submit attorney's fees claims to arbitrators. To do so, we had to give an unusually restrictive reading to the words "unless otherwise provided in the agreement or provision for arbitration." We necessarily had to read those words as having no effect on the later words "not including counsel fees", so that even an agreement of the arbitrating parties could not forego a judicial forum for that single issue. Under the current policy of broad construction in favor of arbitration, such a narrow and restrictive reading is certainly questionable.

The Court pointed out that the restrictive reading of the statute is no longer valid. Lawyers serve as arbitrators[2]; even

[2] The arbitrator in the present case is an attorney.

businessmen are knowledgeable about attorney's fees and; an award of attorney's fees indemnifies the party who retained the attorney.

The District Court then went on to say:

***

> The essential reason for preferring arbitration over litigation in a court is that arbitration is faster and cheaper. Limiting the determination of attorney's fees for arbitration to a judicial forum, however, simply adds time and expense to the chosen remedy. If the parties have expressly decided for themselves to have arbitrators determine entitlement and the amount of such fees, they have thereby manifested an intention in the clearest way possible that they desire to avoid that very additional time and expense. To deny them that savings, especially because of some now discredited notion about the inviolability of judicial turf, is -- well, certainly not unambiguously required by anything in the arbitration law.
>
> ***
>
> If the legislature has allowed them to confer jurisdiction by their own agreement to enforce an arbitration award, there is no reason to suppose that the legislature did not also intend for the contracting parties to decide for themselves precisely what claims to submit to the arbitrators. To hold otherwise is, at least without clear textual support, to add by judicial construction a new provision to a statute that is at war with its general purpose and contravenes the words already used by the legislature. Hence, appropriately read, FAC section 682.11 precludes the arbitrators from awarding fees, <u>but not when the parties have specifically agreed to submit the fee issue to arbitration</u>.

The above quoted portion of <u>Pierce</u> effectively answers TURNBERRY's argument that section 682.11 prohibits an arbitrator

from awarding attorney's fees and prohibits parties from stipulating to allow an arbitrator to award such fees. Simply stated, the alleged "explicit jurisdictional limitation" argument has been refuted.

This Honorable Court in Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179 (Fla. 1994) recently held that the trial court had jurisdiction to decide an insurer's liability for bad faith handling of a claim prior to final determination of the underlying court action where the parties had stipulated that the bad faith action may be tried before the underlying negligence claim. In so holding this Honorable Court said:

> This Court has looked with favor upon stipulations designed to simplify, shorten, or settle litigation and save costs to parties. Such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation, or mistake, and not against public policy. See Gunn Plumbing, Inc. v. Dania Bank, 252 So.2d 1 (Fla. 1971); Steele v. A.D.H. Bldg. Contractors, Inc., 174 So.2d 16 (Fla. 1965); Welch v. Gray Moss Bondholders Corp, 128 Fla. 722, 175 So. 529 (1937); Esch v. Forster, 123 Fla. 905, 168 So.229 (1936); Smith v. Smith, 90 Fla. 824, 107 So.257 (1925). In an arrangement such as the one in the instant case, trying the bad-faith claim before the underlying negligence action would result in a full release of the insured if no bad faith were found, thereby avoiding a time consuming and expensive trial on negligence and damages. We see no reason why the stipulation should not have been recognized.

TURNBERRY's argument based upon all the conflicting decisions of the Second District Court of Appeal does not refute the logic and judicial wisdom of Pierce or Cunningham. Neither its

argument nor the conflicting decisions promote judicial economy and reduction of litigation expenses -- matters which are of utmost importance. The conflicting decisions should be disapproved.

Furthermore, as discussed in Pierce this Honorable Court's decision in Insurance Company of North America v. Acoustic Engineering Company of Florida, 579 So.2d 77 (Fla. 1991) did not involve the issue of whether the parties may stipulate that the arbitrator may decide the issue of attorney's fees. (603 So.2d 625,631).

The present case may be labeled as a "call to reason". The aim to streamline the judicial system in order to provide speedier resolution of lawsuits, at less expense, which is at the core of arbitration and mediation procedures, will not be served by prohibiting parties from agreeing to arbitrate all issues in a lawsuit including attorney's fees.

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 is to unduly and unnecessarily prolong the litigation at increased expense.

POINT II ON DISCRETIONARY REVIEW

THE DECISION OF THE DISTRICT COURT WHICH FOLLOWED SCHNURMACHER HOLDING, INC., V. NORIEGA, 542 SO.2D 1327 IS CORRECT AND, FURTHERMORE, THE AWARD OF ATTORNEY'S FEES IS GROUNDED UPON THE CONTRACT AND SECTION 57.105(2).

ARGUMENT

SCHNURMACHER FOLLOWED

The trial court erroneously vacated the arbitrator's award of attorney's fees on the ground that the award was without foundation in law and §57.105(2) was inapplicable because there was no contract between TURNBERRY and SERVICE STATION which would call for fees in favor of TURNBERRY against SERVICE STATION. Obviously, the trial court based its decision upon its own view of the evidence and the law.

This is an erroneous basis. §682.13 clearly states that "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award". Merely because the trial court disagreed with the arbitrator's interpretation of the contracts and §57.105(2) is not a valid ground to vacate an arbitrator's award.

The District Court correctly reversed the order because a trial court has no authority to vacate an arbitrator's award on

the ground that the award was without foundation in law [i.e., no statute or contract between TURNBERRY and SERVICE STATION which would authorize such an award]. The District Court's decision is supported by § 682.13 and Schnurmacher Holding, Inc., v. Noriega, supra.

In Schnurmacher this Honorable Court held that an arbitration award could not be reversed on the ground that the arbitrator made an error of law. Thus, this Court was forced to confirm the arbitrator's award even though it 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 that the standard of judicial review of an arbitrator's award is very limited; a high degree of conclusiveness attaches to an arbitration award; and the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award §682.13(1) Fla.Stat. (1985); Apple-white v. Sheen Financial Resources, 608 So.2d 80 (Fla. 4th DCA 1992); Mount Dora v. Central Florida Police, 600 So.2d 520 (Fla. 5th DCA 1992). In order to preserve the integrity of the arbitration process, courts will not review the findings of facts contained in an award and will never undertake to substitute their

judgment for that of the arbitrators, Fraternal Order Of Police v. Miami, 598 So.2d 89 (Fla. 3d DCA 1992). A mistake of fact or law or a different interpretation of the evidence is not a valid basis for vacating an award, Merritt-Chapman & Scott Corp. v. State Road Dept., 98 So.2d 85 (Fla. 1957); Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973). A party is not allowed to label a factual controversy an excess of jurisdiction in order to litigate the merits of the controversy, Bankers & Shippers Insurance Company v. Gonzalez, 234 So.2d 693 (Fla. 3d DCA 1970).

Certainly, if a misinterpretation of a statute which is an error of law is not a valid ground for reversal of an arbitrator's award [Schnurmacher], then an arbitrator's interpretation of the contractual provisions and §57.105(2)[which incidentally is correct] also constitutes an award based on the facts and law which cannot be vacated merely because the trial court has a different interpretation of the contract provisions and the statute. To hold otherwise would be to ignore the long-standing principle of finality of arbitration and the fact that in order to preserve the integrity of the arbitration process the courts will not substitute their judgment for that of the arbitrators, Fraternal Order Of Police v. Miami, supra.

Without waiving any argument that the trial court's reversal of the attorney's fees award is prohibited by § 682.13 and Schnurmacher and, therefore, the District Court correctly reversed, SERVICE STATION submits that the arbitrator's award of

attorney's fees is correct on the merits and is supported by the contracts, pleadings and the statute:

CONTRACTS AND STATUTE SUPPORT AWARD OF ATTORNEY'S FEES TO SERVICE STATION

I. SERVICE STATION was bound to AHRENS under the subcontract and to TURNBERRY under the prime contract. The contracts were interlocking.

SERVICE STATION'S subcontract with AHRENS provided:

> 1. Contract Documents.
>
> 1.1 The contract documents consist of this Agreement and any exhibits attached hereto, all contracts between the owner and Contractor regarding the work and all Addenda and modifications thereof; Instructions to Bidders, Drawings, Specifications, and all modifications and written change orders received prior and subsequent to the execution of this Agreement. These form the Subcontract and are incorporated herein and made a part hereof (R.162).
>
> * * *
>
> 1.4 Subcontractor assumes for the portion of the work covered by this contract, all obligations placed upon Contractor in the general contract, plans, specifications, and general conditions mentioned in the general contract, which documents are made a part hereof ... (R.162).
>
> * * *
>
> 12.2.4 General Notes Regarding Liability:
>
> * * *
>
> (d) The Owner shall be included as an insured party (R.166).

* * *

20. Indemnification

> Subcontractor hereby indemnifies and holds harmless the ... owner ... from any and all claims, losses, damage ... arising out of the performance of this Agreement by the Subcontractor ... (R.168).

* * *

26. Attorney's Fees, In the event of any litigation arising hereunder, the prevailing party shall be entitled to recover reasonable attorney's fees and costs (R.169).

* * *

Therefore, the contract documents governing SERVICE STATION include the subcontract between AHRENS and SERVICE STATION and the prime contract between TURNBERRY and AHRENS. The interlocking provisions of the prime contract and subcontract provide a sound basis for the award of attorney's fees to SERVICE STATION as the prevailing party. This is based on the following:

SERVICE STATION assumed, for its portion of the work, the obligations set forth in its subcontract with AHRENS' and AHRENS' obligations to TURNBERRY set forth in the prime contract. The incorporation and assumption by SERVICE STATION of AHRENS' rights and duties under the prime contract to TURNBERRY provides the privity between them. SERVICE STATION was obligated to pay TURNBERRY attorney's fees [§1.1 and §26] which TURNBERRY may incur to enforce its rights under the prime contract and TURNBERRY was likewise obligated to pay attorney's fees to SERVICE STATION as prevailing party. This was undoubtedly the basis of TURNBERRY'S

complaint against SERVICE STATION which included a demand for attorney's fees.

TURNBERRY recognized the existence of these interlocking contracts and mutual duties which flowed from and between the prime contract and subcontract. TURNBERRY alleged in its complaint that it was an intended third-party beneficiary of the subcontract between AHRENS and SERVICE STATION, and it alleged that both AHRENS and SERVICE STATION, jointly and severally, breached their contracts (Count I), were negligent (Count II) and breached their warranty (Count III), and demanded attorney's fees, jointly and severally, from both defendants.

Having alleged that SERVICE STATION breached its contractual obligations to TURNBERRY, and that SERVICE STATION was liable to it for attorney's fees, it is inconsistent for TURNBERRY to now contend that there were no contractual obligations between TURNBERRY and SERVICE STATION and that it is not obligated to pay attorney's fees to SERVICE STATION as the prevailing party in accordance with its contract.

II. The obligation to pay attorney's fees to SERVICE STATION is also set forth in the prime contract which bound SERVICE STATION as well as AHRENS and TURNBERRY.

The prime contract between TURNBERRY and AHRENS provided:

Subcontractual Relations

9.2 Any part of the Work performed for Contractor by a Subcontractor shall be pursuant to a written Subcontract between Contractor and the subcontractor, approved in writing by Owner prior to its execution and delivery...(R.34).

11.3 Owner's Right to Carry Out The Work and Contractor's Other Obligations.

If Contractor fails to carry out the Work in accordance with the Contract or otherwise defaults in the performance of any provision of the Contract, Owner may, after five (5) days written notice to Contractor and without prejudice to any other remedy Owner may have, make good such deficiencies. In such case there shall be deducted from the Contract Sum then due Contractor, the cost of correcting such deficiencies made necessary by such default, neglect or failure (including but not limited to any and all attorneys fees and court costs incurred in connection therewith)... (R.38).

* * *

13.2.3

If Contractor fails to correct any such defective or non-conforming Work, Owner may correct it in accordance with paragraph 11.3. ... Owner may upon five (5) additional days' written notice, sell such Work at auction or at private sale and shall account for the net proceed thereof, after deducting all costs that should have been borne by Contractor (including but not limited to any and all attorneys fees and court costs incurred therewith...(R.41).

Thus, TURNBERRY was obligated to approve in writing the subcontract prior to its execution and delivery (9.2). Although the subcontract was entered into on August 23, 1988, it must of necessity have been reaffirmed or confirmed by TURNBERRY after the

prime contract was signed on November 23, 1988. Therefore, the October 1, 1988 date in §57.105(2) has been satisfied.

If AHRENS, the contractor, failed to perform his work TURNBERRY could correct the deficiencies and charge AHRENS attorney's fees (11.3) and if AHRENS failed to correct defective or nonconforming work TURNBERRY could correct it and charge AHRENS with attorney's fees (13.2.3). SERVICE STATION assumed all of AHRENS' duties and obligations to TURNBERRY. Thus, SERVICE STATION stepped into the shoes of AHRENS and is now subrogated to AHRENS' rights. In the event of defective work performed by SERVICE STATION, it was obligated to pay TURNBERRY'S attorney's fees. Therefore, TURNBERRY is now obligated to pay attorney's fees to SERVICE STATION, as well as AHRENS, in accordance with the contracts and §57.105(2) which allows attorney's fees to a prevailing party even though the contract only provides attorney's fees to the other party.

TURNBERRY recognized that the prime contract and the subcontract were interlocking and bound all three parties to each other. Based on these contract provisions, TURNBERRY labeled itself as a third-party beneficiary of the subcontract and sought damages including attorney's fees for breach of contract, negligence and breach of warranty against SERVICE STATION. It also relied upon §57.105. It would be inconsistent for TURNBERRY to now contend it had no contractual relationship with SERVICE STATION and is not responsible for attorney's fees pursuant to the contract provisions above stated or §57.105(2). The rights, duties and

obligations are reciprocal -- a fact which TURNBERRY consistently travelled upon until it lost its claim in arbitration.

SERVICE STATION's argument concerning interlocking or incorporating contracts is supported by Lord & Son Const. v. Roberts Elec. Contr., 624 So.2d 376 (Fla. 1st DCA 1993). Lord & Son contracted with Gulf Coast to build a student service facility. Lord & Son then entered into a sub-contract with Roberts. The project was not completed because of various delays. The sub-contractor Roberts filed suit against the general contractor Lord & Son for money lost. Lord & Son answered and filed a motion to compel arbitration. The trial court denied the motion on the ground that only the sub-contract was governed by the arbitration provisions.

On appeal from a final judgment based on a jury verdict the District Court held that the trial court erred in denying the motion for arbitration because the sub-contract unambiguously incorporated certain provisions of the general contract among which was the provision requiring arbitration. The sub-contract provided that Roberts was to:

> Furnish and install the items listed above, complete for an acceptable job, according to the contract documents for Student Services Facility and Natatorium, Gulf Coast Community College ...[e.s.]

> The statement in the subcontract that the furnishing and installation of materials must be completed according to the contract documents including "Non-Technical Specifications A through J" acts as an incorporation of that document or those terms into the subcontract...In short, since the

> documents including "Non-Technical Specifications A through J" acts as an incorporation of that document or those terms into the subcontract...In short, since the subcontract must be completed according to Non-Technical Specification I, which in turn incorporates the "General Conditions of the Contract for Construction, AIA Document A201, 1987 Edition," which contains the arbitration provisions, the arbitration provisions of that document are incorporated into the subcontract.

By the same token SERVICE STATION's sub-contract with AHRENS, which incorporated all of the contract between the owner TURNBERRY and the contractor AHRENS, had the effect of incorporating all the provisions of the prime contract into the sub-contract including TURNBERRY's obligation to pay SERVICE STATIONS's attorney's fees.

In summary, the prime contract and the subcontract were interlocking and the duties and obligations were binding on all parties. The obligations to perform under the prime contract between TURNBERRY and AHRENS were made a part of the subcontract so that SERVICE STATION was obligated to TURNBERRY in the same manner for performance of the work and attorney's fees that AHRENS was obligated to TURNBERRY under the prime contract. TURNBERRY treated it as a tri-party contractual relationship. Its complaint alleged breach of contract, negligence and breach of warranty and demanded attorney's fees against AHRENS and SERVICE STATION.

This incorporation of the rights and duties between SERVICE STATION and TURNBERRY provides the privity between them and overcomes any objection that the subcontract was signed before the October 1, 1988 date in §57.105(2). SERVICE STATION'S obligation

to pay attorney's fees to TURNBERRY as the prevailing party carried with it TURNBERRY'S reciprocal obligation to pay attorney's fees to SERVICE STATION as the prevailing party in accordance with the contract documents and §57.105(2). The provision works both ways. It must be noted that a review of the merits of an arbitration award is prohibited by § 682.13. However, assuming arguendo, a review were allowed, it is obvious that the award of attorney's fees is supported by the contracts and § 57.105(2).

PETITIONER'S ADDITIONAL ARGUMENTS ANSWERED AND REFUTED

TURNBERRY argues that the District Court erred when it reversed the trial court's order vacating the arbitration award on the ground that the trial court had no authority to vacate the arbitration award. TURNBERRY argues that the trial court has the ability to review the legal sufficiency of the award (Page 14 of TURNBERRY's brief).

This argument was answered in Schnurmacher which held that § 682.13(1) sets forth the only grounds for vacating an arbitrator's award. The statute specifically provides that an arbitrator's award cannot be set aside for mere errors of judgment either as to law or the facts.

Schnurmacher then held:

> The reasons underlying the need for finality of arbitration awards were expressed in Johnson v. Wells, 72 Fla. 290, 297; 73 So. 188, 190-91 (1916):

> The reason for the high degree of conclusiveness which attaches to an award made by arbitrators is that the parties have by agreement substituted a tribunal of their own choosing for the one provided and established by law, to the end that the expense usually incurred by litigation may be avoided and the cause speedily and finally determined. 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.

> These reasons articulated by this Court over seventy years ago, remain relevant under today's arbitration legislation. As petitioner notes, the finality and enforceable nature of an arbitration award is a characteristic of arbitration that distinguishes it from other forms of alternative dispute resolution. To allow judicial review of the merits of an arbitration award for any reasons other than those stated in section 682.13(1) would undermine the purpose of settling disputes through arbitration. We find it incumbent to adhere to the long-standing principle of finality of arbitration awards in order to preserve the integrity of the arbitration process as a means of alternative dispute resolution.

TURNBERRY argues that the record "evidences a lack of contractual or statutory predicate for an attorney's fee award as between TURNBERRY and SERVICE STATION" (Pages 14-17). This has been effectively answered and refuted by SERVICE STATIONS's argument on Pages 16 to 23.

TURNBERRY'S reliance on the arbitrator's statement that there was no contract between SERVICE STATION and TURNBERRY (Page

18) overlooks the fact that the arbitrator was uncertain as to the basis of his award because he did not have his notes (Page 11 of January 13, 1993 hearing). However, all the contract documents establish that the SERVICE STATION-AHRENS subcontract incorporated the TURNBERRY-AHRENS prime contract; under the prime contract AHRENS was liable to TURNBERRY for attorneys' fees; and under the subcontract all the obligations placed upon AHRENS in the prime contract including the obligation to pay attorneys' fees were also assumed by SERVICE STATION. Thus, since AHRENS was liable for attorney's fees by virtue of the prime contract and TURNBERRY was liable for attorneys' fees, by virtue of the contracts and § 57.105(2), SERVICE STATION, who assumed AHRENS' duties and obligations, was also liable for attorneys' fees to TURNBERRY in the event it had been the prevailing party. Thus, when SERVICE STATION prevailed it was likewise entitled to an award of attorney's fees by virtue of the contracts and § 57.105(2). This was the basis for the award of attorney's fees to SERVICE STATION.

TURNBERRY's statement that 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 (Page 19) conveniently overlooks:

(a) The SERVICE STATION/AHRENS subcontract incorporated the TURNBERRY/AHRENS prime contract;

(b) SERVICE STATION was required to assume all the obligations of AHRENS in the prime contract;

(c) SERVICE STATION was required to include TURNBERRY as an insured under its liability policy;

(d) SERVICE STATION was required to indemnify and hold harmless the owner from all claims;

(e) In the event of any litigation hereunder, the prevailing party shall be entitled to recover attorney's fees. This included TURNBERRY/AHRENS/and SERVICE STATION;

(f) TURNBERRY labeled itself as an intended third party beneficiary of SERVICE STATION's subcontract with AHRENS and;

(g) TURNBERRY sought attorney's fees from SERVICE STATION pursuant to the contracts and § 57.105.

TURNBERRY's argument that the TURNBERRY/AHRENS contract was not in existence when the AHRENS/SERVICE STATION contract was executed is immaterial (Pages 21-23).

The sole purpose of the AHRENS-SERVICE STATION subcontract was to perform the TURNBERRY-AHRENS prime contract. This is the reason AHRENS required SERVICE STATION to incorporate the TURNBERRY-AHRENS prime contract into the subcontract and required SERVICE STATION to assume all the obligations and duties placed upon AHRENS to TURNBERRY in the prime contract.

Furthermore, the prime contract between TURNBERRY and AHRENS required that all subcontracts be approved in writing by TURNBERRY. Thus, in order for SERVICE STATION to commence work on TURNBERRY'S property, TURNBERRY had to approve the subcontract. This approval took place after TURNBERRY signed its contract with

AHRENS. This satisfies the time requirement of §57.105(2)(October 1, 1988).

TURNBERRY relies upon § 17.4.2 of the prime contract which provides that nothing in the prime contract shall create a claim or right of action against the owner. This provision is meaningless. It is inconsistent with the subcontract which TURNBERRY must have necessarily approved and is inconsistent with and disregarded by TURNBERRY in its complaint against SERVICE STATION which alleged breach of contract, negligence and breach of warranty and sought attorneys' fees. The rights and duties (as the tide) flow both way. Since SERVICE STATION was the prevailing party it is entitled to attorney's fees under the subcontract and prime contract and § 57.105(2).

TURNBERRY's argument that § 57.105(2) was not in existence when the AHRENS/SERVICE STATION subcontract was executed (Pages 21-23) overlooks:

(1) The subcontract had to be approved by TURNBERRY which approval occurred after the effective date of § 57.105(2);

(2) TURNBERRY and SERVICE STATION were contracting parties by virtue of the prime contract and the subcontract which incorporated the prime contract and further evidenced by TURNBERRY's complaint against SERVICE STATION which alleged breach of contract, negligence and breach of warranty and sought attorney's fees. Suffice to say, the prime contract was only half of the picture. Its work could not have been performed without the

subcontract and vice-versa. The contractual relationship between the parties was admitted by TURNBERRY in its complaint.

In summary, there was a contract between the parties. TURNBERRY requested attorney's fees against SERVICE STATION and since it lost, it is liable to SERVICE STATION as the prevailing party in accordance with § 57.105(2).

Lastly, TURNBERRY argues that if it is unsuccessful in all its argument, this case should be remanded to the trial court to determine whether a stipulation among the parties did, in fact, exist (Page 24-25).

The answer to this is simple i.e., the arbitrator testified that the parties stipulated to have him decide the issue of entitlement to and the amount of attorney's fees (R. 290, 367-368). The trial court approved the arbitrator's determination (R. 385-387). The trial court's statement that "This Court will not take issue with this testimony" concerning the existence of a stipulation does <u>not</u> mean the trial court did not make a finding based on competent substantial evidence. In fact, the trial court heard the testimony of the arbitrator (Transcript of hearing held on January 13, 1993) and examined the affidavits of the court reporters (R. 362-366) and the attorney for AHRENS (R. 417-418). The court's statement of "refusal to take issue" is another way of stating the court's approval or affirmance based on the evidence presented to him.

Thus, the District Court's affirmance on the ground that the trial court, in effect found based upon substantial competent evidence that the parties stipulated to allow the arbitrator to decide attorney's fees, is correct.

There is simply no necessity to have another review of the same evidence for another factual determination. Once is sufficient.

CONCLUSION

For all the reasons stated above, Respondent, SERVICE STATION AID, INC., respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal, Third District.

Respectfully submitted,

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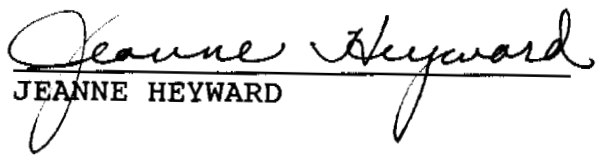

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 1st day of August, 1994, to NICHOLAS A. MANZINI and MAIDENLY SOTUYO, Attorneys for Petitioner, 2050 Courthouse Tower, 44 W. Flagler Street, Miami, FL 33130.

Jeanne Heyward

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