SUPREME COURT OF FLORIDA

CASE NO. 83,254

DISTRICT COURT OF APPEAL, 3RD DISTRICT No. 93-568

TURNBERRY ASSOCIATES,

Petitioner,

vs.

SERVICE STATION AID INC.,

Respondent.



# PETITIONER'S REPLY BRIEF

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

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## REPLY STATEMENT OF THE CASE AND FACTS

With the Court's indulgence, TURNBERRY would like to reply to portions of SERVICE STATION's statement of the case and facts, as follows:

Contrary to SERVICE STATION's assertion, Frishman's testimony before the trial court at the January 13, 1993, hearing (on TURNBERRY's motion to modify or vacate the arbitration award) did not confirm the existence of the "stipulation" alleged in his prior affidavit. Indeed, Frishman's live testimony directly contradicted all of the statements contained in his affidavit. In particular, while Frishman had stated in his affidavit that it was Walter Stevens who stipulated on behalf of TURNBERRY to allow him to determine fees as to SERVICE STATION, Frishman later testified before the trial court that it was another attorney, Nicolas Manzini, who made the alleged stipulation in TURNBERRY's behalf. (R. Vol. III, Transcript of Hearing, January 13, 1993, p. 12)

Moreover, the affidavit of John Hamilton, attorney for Ahrens, highlights the implausibility of Frishman's recollection. While Frishman recalled that all of the attorneys had stipulated to let him decide the issue of attorneys' fees, Hamilton (who was present throughout the arbitration hearing and whose client received a favorable ruling from the arbitrator), stated that "he had no recollection of any agreement by TURNBERRY's counsel on behalf of his client that the arbitrator could decide the issue of entitlement and amount of attorneys' fees as between TURNBERRY and SERVICE STATION." (R. 417-418)

## REPLY ARGUMENT

### I.

### PIERCE IMPERMISSIBLY MISCONSTRUES THE PLAIN LANGUAGE OF FLORIDA STATUTE SECTION 682.11, WHICH PLACES ATTORNEYS' FEES BEYOND A SUBJECT MATTER JURISDICTION OF ARBITRATORS.

In its answer brief, SERVICE STATION essentially ignores the case law and arguments submitted by TURNBERRY why arbitrators lack subject matter jurisdiction to award attorney's fees. The only argument advanced by SERVICE STATION in support of its contention that attorney's fees fall within the arbitrator's subject matter jurisdiction rests on Pierce v. J.W. Charles-Bush Securities, Inc., 603 So. 2d 625 (Fla. 4th DCA 1992). However, SERVICE STATION's reliance on Pierce is tenuous at best. The Pierce court (which itself acknowledged the incongruity of its holding) misconstrued the plain language of Fla. Stat. § 682.11 to allow for the award of attorney's fees by arbitrators.

SERVICE STATION's reliance on Pierce, supra, ignores the steadfast pronouncements of this Court and of other appellate courts which correctly interpret the statute and unequivocally place attorney's fees beyond the subject matter jurisdiction of arbitrators. See Insurance Co. of North America v. Acousti Engineering Company of Florida, 579 So. 2d 77 (Fla. 1991)(adopting the "thorough and well reasoned" en banc opinion of the Second District in Fewox); See also Fewox v. McMerit Construction Co., 556 So. 2d 419 (Fla. 2d DCA 1989)("The Legislature apparently eliminated attorney's fees from the subject matter jurisdiction of

arbitrators . . . the intent of the statute is merely to prohibit arbitrators from awarding attorney's fees.")

Contrary to SERVICE STATION's contentions, TURNBERRY recognizes that arbitration is presently a favored means of dispute resolution. However, while courts may indulge reasonable presumptions to uphold the outcome of arbitration proceedings, the subject matter jurisdiction of arbitrators in Florida is not unfettered. Indeed, the Florida Arbitration Code limits the subject matter jurisdiction of arbitrators and requires that arbitration awards be vacated where, as here, the arbitrator exceeds the scope of his jurisdiction. Fla. Stat. § 682.13(1)(c). Accordingly, the applicability of Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989), which proscribes review of an arbitrator's mistake of law or fact, is limited here where the arbitrator was not empowered to decide attorney's fees between the parties in the first instance. Because Fla. Stat. § 682.11 explicitly eliminates attorney's fees from the realm of arbitrable issues, Schnurmacher, supra, does not apply.[1]

The reasoning adopted in Pierce favors, above all, the "faster and cheaper" method of alternative dispute resolution. According to SERVICE STATION, this ideal of expedited and efficient resolution is compromised by the requirement that attorney's fees incurred during arbitration be awarded by the trial court. SERVICE

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[1] The Court in Schnurmacher was largely concerned with the trial court's ability to revisit the arbitrator's misinterpretation of law or fact in matters properly within the jurisdiction of the arbitrator. The case at hand concerns the inability of an arbitrator to make an attorney's fee award in the first place.

STATION argues that bifurcating the attorney's fee issue would prolong the litigation at increased expense. This is not necessarily so, as an attorney's fee hearing is indispensable, whether before an arbitrator, or before the trial court as required.[2] In further support of its revisionist position, SERVICE STATION contends that the pool of arbitrators today are generally well-versed in attorney's fees and would competently make such an award when called for. Because the arbitrator in this case was also an attorney, SERVICE STATION maintains that he was properly allowed to make an attorney's fee award.

Interestingly, the Second District in Fridman v. Citicorp Real Estate, 596 So. 2d 1128 (Fla. 2d DCA 1992), faced a situation where the parties attempted to submit the question of attorney's fees to a panel of arbitrators for determination. Although each of the arbitrators on the panel were attorneys, the court in Fridman refused to carve out an exception to the limited subject matter jurisdiction of arbitrators. Id. at 1129. In doing so, the court recognized that in most instances arbitrators are chosen for their expertise in the field which is the subject of arbitration and are not necessarily well-versed in what is a reasonable attorney's fee. Id.

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[2] The trial court, in any event, must preside over the final stage of the arbitration proceeding as it is vested with the jurisdiction to confirm, vacate or modify the arbitration award. Fla. Stat. §§ 682.12 - 682.14.

Indeed, this remains the case today, as arbitrators continue to be selected for their technical expertise in the field which is the subject matter of the dispute. If, as SERVICE STATION would urge, arbitrators are allowed to venture into an area which is beyond their expertise, and trial courts are proscribed from reviewing their awards, the likely result would be a chilling effect on the popularity and utility of this form of alternate dispute resolution. It is precisely this re-interpretation of Fla. Stat. § 682.11 which would defeat the purpose and desirability of arbitration clauses in contracts. Further, if this is the outcome that was intended by the Florida Legislature, then it is the Legislature, and not the courts, which should undertake to revise the Florida Arbitration Code. As it stands, the Arbitration Code and the case law interpreting it place attorney's fees beyond the jurisdiction and purview of arbitrators and require that the award in the instant case be reversed.

II

**THE RECORD DOES NOT SUPPORT A FINDING, BASED ON SUBSTANTIAL COMPETENT EVIDENCE, THAT TURNBERRY AND SERVICE STATION STIPULATED TO AN AWARD OF ATTORNEYS' FEES.**

Assuming arguendo that subject matter jurisdiction can be conferred upon an arbitrator by the parties, TURNBERRY submits that, contrary to the opinion of the Third District, the record does not support a finding, based on competent substantial evidence, of the existence of a stipulation between TURNBERRY and SERVICE STATION as to attorney's fees. In fact, the record is replete with evidence which indicates that no such stipulation was

ever made.

Contrary to the conclusions drawn by the Third District, the trial court did not and could not find, based on substantial competent evidence, that a stipulation between TURNBERRY and SERVICE STATION had taken place. The alleged stipulation was never evidenced in writing nor did the stenographic transcript of the arbitration hearing reveal any such stipulation.[3] Similarly, counsel for Ahrens did not recall any stipulation between TURNBERRY and SERVICE STATION as to the issue of attorney's fees.[4] Instead, the record reveals that at the first indication that the arbitrator intended to decide the question or attorney's, TURNBERRY filed numerous emergency motions before the arbitrator and the trial court to prevent the arbitrator from making such an award in favor of SERVICE STATION. (R. 282-304, 319-345)

Lastly, the only semblance of evidence that may have supported the trial court's "finding" of a stipulation was the arbitrator's own testimony. At the hearing before the trial court, the arbitrator testified that the circumstances giving rise to the "stipulation" between the parties were as follows:

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[3] The court reporter present during the arbitration hearings submitted her own affidavit in which she attested to having reviewed the entire transcript of the proceeding which did not reveal any stipulation between the parties as to attorney's fees. (R. 365-366)

[4] In his affidavit, John Hamilton, attorney for Ahrens, stated, ". . . [A]lthough I have a specific recollection of the issue of attorney's fees being raised . . . I have no recollection of any agreement by TURNBERRY'S counsel on behalf of his client that the Arbitrator could decide the issue of entitlement and amount of attorney's fees as between TURNBERRY and SERVICE STATION, INC." (R. 417-418)

A. (Mr. Frishman) When we walked out of the room - and it was Mr. Manzini not you - Mr. Manzini, if I recall, who was standing by the coffee pot as we were walking out. And when he answered - and the question was, "Do you want me to hear the question of attorney's fees?" Period.

Q. (Mr. Stevens) But was there any discussion that we would be willing to be bound to attorney's fees to Service Station Aid or just the question of attorney's fees in general?

A. In general. I don't even remember you standing there.

Q. . . . Isn't it true at the time of arbitration that I objected to you having authority to enter an entitlement in the amount of attorney's fees in the matter?

A. That's true. . . .

Q. There was never any argument about us - I never made the claim or the claim was never advanced by Turnberry Associates that they were entitled to attorney's fees against Service Station; is that correct?

A. I think you claimed right along that you weren't - you didn't have to pay them at all, any payment of attorney's fees would be to Ahrens. (R. Vol.III, Transcript of Hearing, January 13, 1993, pp. 12-13.)

Thus, even the arbitrator acknowledged that while TURNBERRY admitted its responsibility for payment of attorney's fees to Ahrens (with whom it enjoyed privity of contract), it steadfastly denied any such liability to SERVICE STATION (with whom it did not). Notwithstanding this acknowledgement, the arbitrator concluded that TURNBERRY had "stipulated" that he could decide the issue of attorney's fees as between it and SERVICE STATION.

The inconsistencies in the arbitrator's testimony and the

absence of any "finding" by the trial court[5] is highlighted by the arbitrator's affidavit. (R. 367-369) There, the arbitrator directly contradicts his testimony before the trial court, in which he states that it was attorney Nicolas Manzini (not Walter Stevens) who stipulated on behalf of TURNBERRY.

The absence of any stipulation in the record, the affidavits of the court reporter and counsel for Ahrens, and the testimony of the arbitrator himself belie the existence of a "stipulation" that would be binding upon TURNBERRY. Accordingly, the record does not support a finding, based on competent substantial evidence, that a stipulation with respect to the issue of attorney's fees was made by TURNBERRY and SERVICE STATION. If this Court should rule that notwithstanding the explicit statutory limitation proscribing arbitrators from awarding attorney's fees, such jurisdiction can be conferred by stipulation, then TURNBERRY prays that this Court remand this matter to the trial court for a determination whether such a stipulation was made by the parties.

## III

## THERE IS NO STATUTORY OR CONTRACTUAL BASIS FOR AN AWARD OF ATTORNEYS' FEES BETWEEN TURNBERRY AND SERVICE STATION.

Lastly, SERVICE STATION devotes a substantial portion of its answer brief to its contention that it is entitled to attorney's fees based upon a subcontract to which TURNBERRY was never a party

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[5] Indeed, TURNBERRY maintains that no finding of a stipulation was ever made by the trial court. Instead, the trial court, in its order vacating the arbitrator's fee award, simply did not "take issue" with the testimony of the arbitrator as to the existence of a stipulation. (R. 385-387)

and upon the then nonexistent reciprocity provision of Fla. Stat. § 57.105(2). Notwithstanding SERVICE STATION's efforts to convince this Court of its entitlement to fees against TURNBERRY (an argument which the trial court flatly rejected and the Third District did not address) neither of the two contracts in question (the main contract and the subcontract) can be interpreted to reach SERVICE STATION's desired result. Indeed, several links in SERVICE STATION's chain of liability are missing when viewed in the light of well-settled rules of contract construction and the plain language and meaning of the subject contracts and the statute at hand.

The essence of SERVICE STATION's argument is that by virtue of the allegedly "interlocking" nature of the main contract (between TURNBERRY and Ahrens) and the subcontract (between Ahrens and SERVICE STATION), SERVICE STATION is entitled to attorney's fees against TURNBERRY. In this manner, SERVICE STATION seeks to establish a contractual relationship, and hence attorney's fees, between SERVICE STATION and TURNBERRY, where neither is supported by either of the contracts at issue.

At best, the SERVICE STATION's subcontract with Ahrens creates rights and imposes duties <u>in favor of</u> TURNBERRY as an intended third party beneficiary of that agreement. It is well-settled that third party beneficiary status alone, however, although creating a duty on the part of SERVICE STATION in favor of TURNBERRY, does not create a reciprocal duty on TURNBERRY's part. Indeed, a third party beneficiary is not a party to the contract and is not

obligated to pay the promisor's attorney's fees in an action for a contractual breach. See Crabtree v. Aetna Casualty and Surety Company, 438 So. 2d 102 (Fla. 1st DCA 1983)(it is the undertaking of promisor as consideration to promisee to benefit third person that gives rise to cause of action by beneficiary against promisor).

In its quest for attorney's fees, SERVICE STATION relies on that portion of the subcontract which incorporates as part of the contract documents "all contracts between [TURNBERRY] and [Ahrens] regarding the work." (R. 162) In its subcontract, SERVICE STATION also assumes "all obligations placed upon [Ahrens] in the general contract." (R. 162) According to SERVICE STATION, the unilateral "incorporation and assumption by SERVICE STATION of AHRENS' rights and duties under the prime contract to TURNBERRY provides the privity between them" which would subject TURNBERRY to liability for SERVICE STATION's attorney's fees. (Respondent's Answer Brief, p. 18) While a careful reading of the subcontract reveals that SERVICE STATION voluntarily and of its own accord undertook the **obligations** placed upon the Contractor (Ahrens) in the general contract, SERVICE STATION now urges that this subcontract provision be interpreted to confer upon it all the **rights** Ahrens would have against TURNBERRY, including attorney's fees, pursuant to the main contract. This argument, and SERVICE STATION's entire plea for attorney's fees, must fail under common law contractual principles.

It is well settled that to create a valid contract there must be reciprocal assent to a certain and definite proposition. In re

Estate of Donner, 364 So. 2d 742 (Fla. 3d DCA 1978); CH2M Hill Southeast, Inc. v. Pinellas County, 598 So. 2d 85, 89 (Fla. 2d DCA 1992).

In CH2M Hill Southeast, Inc. v. Pinellas County, supra, Pinellas County, the owner, sought to apply the doctrine of contract merger to impose liability for the faulty manufacture of pipeline segments upon the project's design engineer. 598 So. 2d at 89. In that case, Pinellas County had contracted with a design engineering firm for the design of a water distribution pipeline system. Id. at 86. In a separate agreement, the County entered into a manufacturing agreement for the manufacture of the pipeline segments. Id. at 87 The engineering firm was not a party to the manufacturing agreement. Id.

While the court recognized that the doctrine of merger allows two contracts which are related and in close proximity to be read together, the court refused to impose contract obligations under the second contract on a party to the first contract who was not a party or a signatory to the second contract. Id. The court stated:

> "It remains the rule in Florida that ordinarily a contract cannot bind one who is not a party thereto or has not in some fashion agreed to accept its terms. To create a valid contract there must be reciprocal assent to a certain and definite proposition." Id. (emphasis added)

TURNBERRY was not a party to the subcontract between SERVICE STATION and Ahrens, nor did TURNBERRY agree to accept its terms. Accordingly, SERVICE STATION's unilateral acceptance of the obligations of the main contract did not, in turn, bind TURNBERRY to the subcontract. Far from creating a right or entitlement to

attorney's fees in favor of SERVICE STATION and against TURNBERRY, the subcontract provisions merely assured that the work to be performed by SERVICE STATION was consistent with the construction standards and specifications that were imposed against Ahrens by TURNBERRY.

Similarly, the provision in the main contract between TURNBERRY and Ahrens, which required that any work to be performed by a subcontractor be pursuant to a written contract approved in writing by TURNBERRY, did not evidence TURNBERRY's assent to be bound by the subcontract nor to become a party thereunder. As is customary in the industry, TURNBERRY's approval of the subcontract was required to assure that the work to be performed by SERVICE STATION pursuant to its subcontract with Ahrens met the technical specifications envisioned for the project.

In further support of TURNBERRY's position is Pan American Surety Company v. Board of Public Instruction of Dade County, 99 So. 2d 890 (Fla. 3d DCA 1958). In that case, a subcontractor sought attorney's fees against the surety on a performance bond for the prime contractor's breach. Id. at 891. Neither the subcontract nor the performance bond included a provision for attorney's fees. Id. at 892. However, the main contract between the owner and the prime contractor authorized the assessment of this fee. Id. Based on the performance bond's incorporation of the prime contract, which did contain an attorney's fee provision, the subcontractor sought attorney's fees against the surety. Id.

The court rejected the subcontractor's argument and reversed

the award of attorney's fees. Id. The court stated:

> "Since attorney's fees can be allowed only by statute, or in the enforcement of a contract between parties stipulating for their payment, that portion of the judgment must be reversed. . . The stipulation in [the main contract] is not intended for the benefit of the [subcontractor], but rather for the protection of the [owner] in the event they are required to secure an attorney on account of a breach." Id. (brackets supplied)(emphasis added).

Thus, SERVICE STATION's argument that the unilateral incorporation of the main contract in its subcontract creates an entitlement to attorney's fees as against TURNBERRY is groundless and must fail. The lack of a contractual predicate for an award of attorney's fees was acknowledged by the trial court in its order and even by the arbitrator himself during his testimony before the trial court.[6] Similarly, a close reading of the plain language of the contracts by this Court compels this Court to reach the same conclusion, i.e., SERVICE STATION cannot unilaterally create an entitlement to attorney's fees against TURNBERRY.

Moreover, as mentioned in TURNBERRY's initial brief, SERVICE STATION's attorney's fee claim is likewise precluded by the plain language of the main contract between TURNBERRY and Ahrens, the only agreement to which TURNBERRY was a party. In Section 17.4.2, the main contract explicitly proscribed such claims or rights of action by third parties (such as SERVICE STATION) and against TURNBERRY:

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[6] During the January 13, 1993 hearing the arbitrator testified " . . . I believe there was no contract between Turnberry and Service Station. (R. Vol. III, Transcript of Hearing, January 13, 1993, p. 11)

> "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." (brackets added). (R. 51)

Lastly, because of the absence of any contractual provision for fees, and indeed, any contract, between TURNBERRY and SERVICE STATION, Florida Statute 57.105(2) does not kick into effect. On its face, this statute provides for mutuality of attorney's fees between parties to a contract that contains a fee provision in favor of one party but not the other. In addition, this statute would be inapplicable to the subcontract on which SERVICE STATION relies, as the subcontract predates the statute. Complete Interiors, Inc. v. Behan, 558 So. 2d 48 (Fla. 5th DCA 1990). As TURNBERRY and SERVICE STATION are not contracting parties, and the subcontract on which SERVICE STATION relies predated the effective date of § 57.105(2), SERVICE STATION cannot reap the benefits of its ameliorative provisions.

## CONCLUSION

For the above-stated reasons, TURNBERRY respectfully requests that this Honorable Court quash the opinion of the Third District Court of Appeal. Alternatively, TURNBERRY respectfully requests that this Honorable Court remand this case to the trial court to determine, based upon substantial competent evidence, whether the parties stipulated that the arbitrator could decide the issue of attorneys' fees as between TURNBERRY and SERVICE STATION.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was mailed to **John Kirk McDonald, Esq.**, The Law Center, 370 Minorca Avenue, Coral Gables, Florida 33134 and **Jeanne Heyward, Esq.**, 300 Courthouse Plaza, 28 West Flagler Street, Miami, FL 33130, Attorneys for Respondent, this 29th day of August, 1994.

By _____
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August 29, 1994