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IN THE SUPREME COURT
OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

QUALITY ENGINEERED INSTALLATION, INC., a Florida corporation,

Petitioner/Cross-Respondent,

v.

HIGLEY SOUTH, INC., a Florida corporation, and RELIANCE CONSTRUCTION COMPANY, a Florida corporation, d/b/a HIGLEY-RELIANCE, a Joint Venture, and THE FEDERAL INSURANCE COMPANY, a foreign corporation,

Respondents/Cross-Petitioners.

CASE NO.: 83,468

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA
LAKELAND DIVISION

RESPONDENTS' ANSWER BRIEF AND CROSS-INITIAL BRIEF

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE AND FACTS 1

POINTS ON APPEAL 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 12

APPEAL

I.

THE SECOND DISTRICT'S DETERMINATION THAT PREJUDGMENT INTEREST IS UNAVAILABLE ON AN AWARD OF ATTORNEY FEES WHEN A PARTY IS NOT DEPRIVED OF HIS PROPERTY IS LEGALLY CORRECT 12

II.

THE SECOND DISTRICT CORRECTLY PROHIBITED THE ACCRUAL OF POST-JUDGMENT INTEREST ON PREJUDGMENT INTEREST 16

III.

THE SECOND DISTRICT CORRECTLY DETERMINED THAT THE USE OF A MULTIPLIER WAS LEGALLY ERRONEOUS BECAUSE THE ATTORNEYS MITIGATED THE RISK OF NON-PAYMENT 18

IV.

UNDER CLEAR PRECEDENT FROM THIS COURT, THE ATTORNEYS ARE UNENTITLED TO FEES INCURRED IN THIS APPEAL BECAUSE THEY ARE QUARRELING OVER THE AMOUNT OF THE FEE AND NOT ENTITLEMENT TO THE FEE 22

CROSS APPEAL

I.

THE SECOND DISTRICT ERRED WHEN IT RULED THAT THE TRIAL COURT WAS NOT REQUIRED TO FOLLOW THE MANDATES OF THE ARBITRATION AWARD LIMITING ATTORNEY FEES TO TIME SPENT PREPARING AND PRESENTING THE SUBCONTRACTOR'S CLAIM IN ARBITRATION 22

CONCLUSION 29

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

PAGE

Decisional Authority

Alvarado v. Rice
614 So. 2d 498 (Fla. 1993) 12-15

Argonaut Insurance Company v. May Plumbing Company
474 So. 2d 212 (Fla. 1985) 12-15

Askowitz v. Susan Feuer Interior Design, Inc.
563 So. 2d 752 (Fla. 3d DCA 1990)
rev. denied, 576 So. 2d 292 (Fla. 1991) 19

Bremshey v. Morrison
621 So. 2d 717 (Fla. 5th DCA 1993) 14

Carter v. State Farm Mutual Auto Insurance Co.
224 So. 2d 802 (Fla. 1st DCA 1969) 25

Central Constructors, Inc. and Seaboard Surety Co. v.
The Spectrum Contracting Co.
621 So. 2d 526 (Fla. 4th DCA 1993) 16, 18

Cigna Property & Casualty Co. f/k/a Insurance Company of
North America v. Ruden
621 So. 2d 714 (Fla. 3d DCA 1993) 13

Farmer v. Polen
423 So. 2d 1035 (Fla. 4th DCA 1982) 25

Fewox v. McCarthy
556 So. 2d 419 (Fla. 2d DCA 1990)
aff'd 579 So. 2d 77 (Fla. 1991) 5, 27

Florida Patient's Compensation Fund v. Rowe
472 So. 2d 1145 (Fla. 1985) 18, 19

Fridman v. Citicorp Real Estate, Inc.
596 So. 2d 1128 n.1 (Fla. 2d DCA 1992) 24

Ginsberg v. Keehn
550 So. 2d 1145 (Fla. 3d DCA 1989) 13

In re Amendments to Florida Small Claims Rules
601 So. 2d 1201 (Fla. 1992) 16

In re Estate of Platt
586 So. 2d 328 (Fla. 1991) 19

Inacio v. State Farm Fire & Casualty Co.
550 So. 2d 92 (Fla. 1st DCA 1992) 14

Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc.
619 So. 2d 6 (Fla. 5th DCA 1993) 18

LaFaye v. Presser
554 So. 2d 610 (Fla. 1st DCA 1989) 16

Lane v. Head
566 So. 2d 508 (Fla. 1990) 21

Mason v. Reiter
564 So. 2d 142 (Fla. 3d DCA 1989) 14

New Orleans Steamship S.S. Association v. General Longshore Workers
626 F.2d 455 (5th Cir. 1980)
aff'd 457 U.S. 702
73 L.E.2d 327
102 S.Ct. 2672 23

Oil, Chemical, and Atomic Workers International Union, Local 4-367 v. Rohm & Haas, Texas, Inc.
677 F.2d 492 (5th Cir. 1982) 23

Peavy v. Dyer
605 So. 2d 1330 (Fla. 5th DCA 1992) 18

Perez Sandoval v. Banco de Commercio, S.A., C.A.
582 So. 2d 179 (Fla. 3d DCA 1991) 18

Sachs v. Dean Witter Reynolds, Inc.
584 So. 2d 211 (Fla. 3d DCA 1991) 25

Standard Guarantee Insurance Company v. Quanstrom
555 So. 2d 828 (Fla. 1990) 18, 19

State Farm & Casualty Co. v. Palma
629 So. 2d 830 (Fla. 1993) 10, 22

Sun Bank of Ocala v. Ford
564 So. 2d 1078 (Fla. 1990) 19

Temple v. Temple
539 So. 2d 564 (Fla. 4th DCA 1989) 13, 14

The City of Tampa v. Janke Construction, Inc.
626 So. 2d 239 (Fla. 2d DCA 1993) 18

United Services Auto Association v. Smith
527 So. 2d 281 (Fla. 1st DCA 1988) 16

Statutory Authority

Section 682.14, Fla. Stats. 24

Other Authority

Form 1.988 of the Florida Rules of Civil Procedure 17

STATEMENT OF THE CASE AND FACTS

The Respondents/Cross-Petitioners, Higley South, Inc. and Reliance Construction Company, d/b/a Higley-Reliance, a Joint Venture, and the Federal Insurance Company, submit their statement of the case and facts because the statement of the case and the facts submitted by Petitioner/Cross-Respondent, Quality Engineered Installation, Inc., omits numerous facts necessary to support the defense of the issues raised in the appeal and the cross-appeal.[1/][2/]

The Joint Venture was the Contractor for the condominium project known as the Promenade. (R.2751) The owner of the project was Park Shore Development Company, Inc. (R.2721) One of the sub-contractors on the job was the Petitioner, Quality Engineered Installation. (R.2509) The Subcontractor was responsible for the installation of the windows at the Promenade. (R.2509) Ultimately, the owner terminated the Contractor, as well as the Subcontractor, from the project. (R.2509) The owner completed its project with another general contractor. (R.2721)

1/ The Respondents/Cross-Petitioners, Higley South, Inc., and Reliance Construction Co., d/b/a Higley-Reliance, a Joint Venture, will be referred to as the "Contractor." The Respondent/Cross-Petitioner, The Federal Insurance Co., will be referred to as the "Surety." The Petitioner/Cross-Respondent, Quality Engineered Installation, Inc., will be referred to as the "Subcontractor" or the "client."

2/ All references to the Record on Appeal will be referred to by the symbol "R." followed by the appropriate page number from the Record on Appeal. All references to the Petitioner's Appendix will be referred to by the symbol "A." followed by the appropriate pleading and page number from the Appendix.

At the time the Subcontractor was terminated from the project, it was owed approximately $170,000 for the work completed under its agreement with the Contractor. (R.2519-2521) The Subcontractor retained the services of an attorney, Louis Stolba, to sue the Contractor for this amount. (R.1358) A lawsuit was filed by the Subcontractor against the Contractor and the Contractor's Surety, Federal Insurance Company. (R.5, 1358) Shortly thereafter, the Contractor and Subcontractor, including their respective sureties, entered into a Cooperation Agreement. (R.3752) Pursuant to this Agreement, the Contractor and Surety advanced to the Subcontractor the sum of $100,000 "to be applied in partial satisfaction of the claims raised by the" Subcontractor against the Contractor. (R.2523-2524, 3753) When the Subcontractor received this $100,000 payment, it was paid to Stolba for outstanding legal services owed by the Subcontractor to Stolba's firm. (R.2381-2384) After receiving the payment, Stolba withdrew from further representation of the Subcontractor in the claim set for arbitration. (R.1316, 2369)

The Subcontractor then began a search for a new attorney to represent it in the arbitration. (R.2512) Initially, the Subcontractor retained an attorney, David Ross, to review the file to determine whether he would represent the Subcontractor. (R.2512-2513) Ross rejected representation of the Subcontractor in the arbitration and the Subcontractor continued its search. (R.2512-2513) Around the first day of the arbitration, the Subcontractor retained new counsel to represent it; Leon Williamson, Neil

Schecht, and Kevin McLean.[3] (R.2514) The Attorneys were retained by the Subcontractor around May 24, 1988. (R.3752A-3753A) At that time, no written agreement concerning payment of attorney fees was signed. (R.3212)

Unbeknownst to the Subcontractor, its newly retained Attorneys had another client that was paying the Attorneys to defend the claim. (R.2521) The Subcontractor was bonded by Reliance Insurance Company. (R.2521) Jaimie Juardo was a guarantor on this bond for the Subcontractor. (R.2521) To ensure that a defense to the bonded claim was made, Jaimie Juardo agreed to pay Kevin McLean and Neil Schecht on an hourly rate. (R.2544-2545) Leon Williamson, the other counsel for the Subcontractor, was not paid on an hourly basis, apparently because he was in-house counsel for Jaimie Juardo's company. (R.2587-2588) Thus, the Attorneys were representing two different clients throughout the arbitration. On the one hand, the Attorneys were representing the Subcontractor on its claim to recover the remaining $60,000-$70,000. (R.2519, 2521) And on the other hand, the Attorneys represented the interests of the bond guarantor, Jaimie Juardo, for which they were paid an hourly rate. (R.2521-2522)

Kevin McLean and Neil Schecht received a combined total of approximately $26,000 from Jaimie Juardo for their defense of the defective window claim. (R.2544-2545) There existed no written requirement that the Attorneys return this $26,000 payment to Mr.

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[3] Leon Williamson, Neil Schecht, and Kevin McLean will be referred to as the "Attorneys" throughout this brief.

Juardo. (R.2556-2557) The Attorneys were, therefore, ensured that they would be paid even if there were no recovery for the Subcontractor. However, the Subcontractor knew nothing about this arrangement and, sometime after the arbitration was completed, signed a contingency fee agreement with the Attorneys for 35% of any recovery received. (R.2521, 3212)

This matter eventually proceeded to arbitration. At the arbitration, the Attorneys accepted the opportunity presented by the arbitrators, and by agreement of all counsel, to only be present at the arbitration when issues concerning the Subcontractor's work were discussed and, when necessary, to present the Subcontractor's claim. (R.2533-2534) Counsel for another subcontractor, Peter Spanos, recalled Kevin McLean's presence at the arbitration approximately 10-15% of the time. (R.2461-2462) Kevin McLean's daily calendar for the months of the arbitration revealed that he intended to be present only seven days out of the four month period of the arbitration. (R.3680-3751) In fact, because of the absence of the Attorneys at the arbitration, the Subcontractor's president, Mr. Aschia, was required to conduct cross-examinations of witnesses. (R.2515, 2531-2532)

Ultimately, an award was rendered in the arbitration proceedings, which, among other things, awarded the Subcontractor approximately $83,000. (R.1339) This amount included prejudgment interest and essentially equalled the $60,000-$70,000 amount which the Subcontractor believed was owed on the contract and which the

Contractor and Surety never disputed. (R.2519-2526) The arbitrators also awarded the Subcontractor attorney fees as follows:

> Reimbursement of reasonable legal fees for legal services necessary to prepare and present the Quality Engineered Installation, Inc.'s claim. (emphasis added) (R.1339)

Thereafter, the Subcontractor moved to confirm the arbitration award and requested the trial court to award attorney fees "for which entitlement was given by the arbitration award." (R.1338) In further proceedings before the lower court, the court refused to award attorney fees to the Subcontractor because, at that time, the prevailing law in the Second District did not permit an award of attorney fees for time spent in arbitration. (R.1714-1715) The Subcontractor, as well as the other claimants in the arbitration, appealed the trial court's decision to this Court. (R.2253)

Prior to a rendition of an order in that appeal, the Second District, in Fewox v. McCarthy, 556 So. 2d 419 (Fla. 2d DCA 1990), aff'd 579 So. 2d 77 (Fla. 1991) issued its decision, reversing its previous position that prohibited attorney fees for time spent in arbitration. (R.2326-2327) In light of its change in position, the Second District also held in the Subcontractor's appeal that attorney fees were available for time spent in arbitration. (R.2327) The Second District did recognize that it was in conflict with other jurisdictions and certified this matter to this Court. (R.2327) This Court upheld the Second District's decision. Id. Both this Court and the Second District awarded the Subcontractor attorney fees for these two appeals.

The case then proceeded to the trial court for a determination as to the amount of fees to which the Attorneys were entitled. (R.2346) A hearing was held on August 1, 1991, and was continued on December 10, 1991. (R.2492, 4029) At the hearing, testimony was presented by all parties as to what would be a reasonable fee. After receiving this evidence, the lower court rendered an award of attorney fees to Stolba, Ross, McLean, Schecht, and Williamson in a total amount of $319,000. (R.2736) The lower court refused to limit the award to time spent preparing and presenting the arbitration claim. (R.2736) Instead, the award included any time spent by any attorney representing the Subcontractor. (R.2736) And, a multiplier of 2.2 was applied to the lodestar of the Attorneys. (R.2738-2739) The order even included an award for time spent litigating the amount of the fee claim. (R.2737) The lower court also awarded costs incurred litigating the fee claim and prejudgment interest on the underlying amount and the entire judgment amount. (R.2737-2739, 4153) The Contractor and Surety appealed this order. (R.4155, 4168)

On appeal to the Second District, the award of the lower court was affirmed in part and reversed in part. The Second District rejected the use of a multiplier because the Attorneys had no risk of non-payment because they were paid $26,000 from the bond guarantor. (A.4/10) The Second District also determined that it was erroneous for the lower court to award attorney fees for time spent litigating entitlement to fees, although it permitted an award of attorney fees for the time spent litigating the amount of

the fees. (A.4/13) Finally, the Second District determined that prejudgment interest was unavailable on this award of attorney fees and that post-judgment interest should not accrue on prejudgment interest. (A.4/14) This appeal followed.

POINTS ON APPEAL

APPEAL

I.

WHETHER THE SECOND DISTRICT'S DETERMINATION THAT PREJUDGMENT INTEREST IS UNAVAILABLE ON AN AWARD OF ATTORNEY FEES WHEN A PARTY IS NOT DEPRIVED OF HIS PROPERTY IS LEGALLY CORRECT.

II.

WHETHER THE SECOND DISTRICT CORRECTLY PROHIBITED THE ACCRUAL OF POST-JUDGMENT INTEREST ON PREJUDGMENT INTEREST.

III.

WHETHER THE SECOND DISTRICT CORRECTLY DETERMINED THAT THE USE OF A MULTIPLIER WAS LEGALLY ERRONEOUS BECAUSE THE ATTORNEYS MITIGATED THE RISK OF NON-PAYMENT.

IV.

WHETHER UNDER CLEAR PRECEDENT FROM THIS COURT, THE ATTORNEYS ARE UNENTITLED TO FEES INCURRED IN THIS APPEAL BECAUSE THEY ARE QUARRELING OVER THE AMOUNT OF THE FEE AND NOT ENTITLEMENT TO THE FEE.

CROSS APPEAL

I.

WHETHER THE SECOND DISTRICT ERRED WHEN IT RULED THAT THE TRIAL COURT WAS NOT REQUIRED TO FOLLOW THE MANDATES OF THE ARBITRATION AWARD LIMITING ATTORNEY FEES TO TIME SPENT PREPARING AND PRESENTING THE SUBCONTRACTOR'S CLAIM IN ARBITRATION.

SUMMARY OF THE ARGUMENT

The Second District's decision that prejudgment interest is unavailable on an award of contingency attorney fees is based upon both logic and important policy considerations. The purpose of prejudgment interest is to compensate a plaintiff who has lost use of money and who should be made whole by an award of interest on that amount of money. Unless the plaintiff has actually paid attorney fees, prejudgment interest should not accrue on an award of attorney fees because the plaintiff has not lost use of money and there is no need to award prejudgment interest to make the plaintiff "whole." Indeed, awarding prejudgment interest on attorney fees that have not previously been paid would be a windfall to the plaintiff. Thus, in a case such as this, where there were no previously incurred attorney fees, the Second District correctly concluded it was improper to award prejudgment interest on attorney fees.

No error was committed by the Second District when it concluded that post-judgment interest should not accrue on prejudgment interest. The majority of courts in Florida, including this Court, do not permit an award of post-judgment interest on prejudgment interest because it results in the unlawful compounding of interest. Moreover, if post-judgment interest accrued on prejudgment interest, the result would be another windfall to a party. The purpose of prejudgment interest is to make a party whole by compensating him for the lost use of his money. Post-judgment interest serves the same goal. The the money of which a

party lost use is not the prejudgment interest itself but the underlying damage amount. The accrual of post-judgment interest on prejudgment interest, therefore, results in the unnecessary compounding of interest.

The Second District's conclusion that application of a multiplier was inappropriate was also legally correct. The undisputed evidence proved the Subcontractor's arbitration counsel were paid attorney fees by another interested party. After receiving in excess of $26,000 under this arrangement, the Attorneys obtained the Subcontractor's signature on a contingency fee agreement. This contingency fee agreement provided the Attorneys would receive 35% of the award obtained in arbitration. However, the client did not know that the Attorneys had previously been paid by another client to defend the Subcontractor in that same arbitration. The purpose of applying a contingency fee multiplier is to compensate an attorney for the risk of non-payment. Here, the Attorneys suffered no risk of non-payment at the time the contingency fee agreement was signed and, in fact, had already been paid for services rendered in the same proceeding for which they obtained the contingency fee agreement. The Second District's conclusion that these facts prohibited the use of a multiplier was clearly correct.

The final complaint raised by the Attorneys is equally defective. The Attorneys request fees for litigating the amount of fees in this appeal. This Court recently announced in State Farm & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993) that attorney

fees were not recoverable for the time spent litigating the amount of attorney fees. This decision expressly addresses the issue of whether these Attorneys may receive a fee award for this appeal. Each and every issue raised by the Attorneys in this appeal is premised on an attempt to increase the amount of their attorney fee award. Not one of the issues raised by either party attempts to argue that the Attorneys are not entitled to an award of fees. The Attorneys' request for further attorney fees incurred in this appeal is meritless.

Although the Second District did not err in its legal rulings on any of the issues raised by the Attorneys in this appeal, legal error was committed by the Second District when it failed to limit the attorney fee award to the time spent preparing and presenting the Subcontractor's claim in arbitration. This limitation was required because the arbitrators, in their arbitration award, expressly limited the attorney fee award in this manner. The Subcontractor never challenged this limitation by moving to vacate or modify the award. Indeed, the Subcontractor moved to confirm the arbitration award and to assess attorney fees pursuant to this award. Trial courts should be guided by the instructions of arbitrators in their award and the lower court erred when it granted attorney fees for time other than that spent preparing and presenting this Subcontractor's claim.

ARGUMENT

APPEAL

I.

THE SECOND DISTRICT'S DETERMINATION THAT PREJUDGMENT INTEREST IS UNAVAILABLE ON AN AWARD OF ATTORNEY FEES WHEN A PARTY IS NOT DEPRIVED OF HIS PROPERTY IS LEGALLY CORRECT.

There is no decision from this Court which determines whether prejudgment interest may be applied to an attorney fee award. There is a recent decision from this Court, however, which is instructive. In Alvarado v. Rice, 614 So. 2d 498 (Fla. 1993), this Court held that a claimant in a personal injury action is only entitled to prejudgment interest on past medical expenses when the trial court finds that the claimant has made actual, out-of-pocket payments on those medical bills at a date prior to entry of judgment. In Alvarado, the plaintiff contended she was entitled to prejudgment interest for the damages awarded to her for past medical expenses as these are actual damages which have a certain amount and were incurred at a specific date in the past. However, the plaintiff admitted that she did not pay her medical bills prior to the entry of final judgment and that she was not charged interest by her health care providers. Citing Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985), this Court reaffirmed that a plaintiff is entitled to prejudgment interest when it is determined that the plaintiff has suffered an actual, out-of-pocket loss at some date prior to the entry of judgment. This Court then held:

> Unlike the plaintiffs in Argonaut . . . [the plaintiff] has not suffered the loss of a vested property right. She was not forced to use her private funds to pay medical bills incurred as a result of [defendant's] negligence. Had [plaintiff] actually paid her medical bills when they became due, she would be suffering the loss of a vested property right because she would be denied the use of her money. However, in the absence of such payment by [plaintiff], she is not entitled to prejudgment interest.

Id at. 499-500. See also Cigna Property & Casualty Co. f/k/a Insurance Company of North America v. Ruden, 621 So. 2d 714 (Fla. 3d DCA 1993) (insured unentitled to award of prejudgment interest against insurer for items not yet actually paid by insured, citing Alvarado). Given the purpose of prejudgment interest and this Court's decision in Alvarado, the Second District's conclusion that prejudgment interest was unavailable on the attorney fee award was proper.

Although this Court recognizes that prejudgment interest should only accrue on damages paid by a plaintiff, other Florida appellate courts have neglected to apply this analysis to an attorney fees award that was never previously paid by the plaintiff to his attorneys. Nonetheless, several appellate decisions refuse to apply prejudgment interest to an attorney fee award. For instance, in Ginsberg v. Keehn, 550 So. 2d 1145 (Fla. 3d DCA 1989), the Third District, without presenting its reasoning, held that the trial court erred in awarding prejudgment interest on an attorney fee award. And, the Fourth District also rejected prejudgment interest on an award of attorney fees in Temple v. Temple, 539 So.

2d 564 (Fla. 4th DCA 1989). Notably in Temple, the Fourth District stated:

> Pre-judgment interest cannot be assessed since attorney's fees do not constitute liquidated damages. Argonaut Insurance Company v. May Plumbing Company, 474 So. 2d 212 (Fla. 1985). Interest is only assessable when a claim is for the plaintiff's out-of-pocket, pecuniary loss and there is a fixed date of that loss. The purpose in awarding such interest is to compensate a party for the deprivation of his property. Attorney's fees are not liquidated damages, they are litigation costs.

Id. (emphasis added) Although the Fourth District's decision applies the same authority as this Court did in Alvarado, the court in Temple admittedly failed to utilize the Alvarado analysis to determine why Argonaut prohibited the application of prejudgment interest to an attorney fee award.

To support their position that prejudgment interest is available on an award of attorney fees, the Attorneys rely upon decisions which, when closely reviewed, actually support application of the Alvarado analysis to an attorney fee award. In Bremshey v. Morrison, 621 So. 2d 717 (Fla. 5th DCA 1993), the Fifth District stated that the date of the determination of liability for attorney fees fixes the date for awarding prejudgment interest "on previously incurred attorneys' fees." Id. at 718 (emphasis added). To support this rule of law, the Fifth District relied upon the First District's decision in Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1992) and the Third District's decision in Mason v. Reiter, 564 So. 2d 142 (Fla. 3d DCA 1989). Indeed, the language in these decisions suggests that the attorney

fees must be "previously incurred" (i.e. paid) before they can accrue prejudgment interest. This rule is consistent with this Court's analysis in Alvarado and the underlying concept of a prejudgment interest award.

An award of interest should not be made without closely reviewing the actual amounts which form the basis of the prejudgment interest award. If this Court were to uphold the lower court's award of prejudgment interest on the entire lodestar amount ($163,797.00) then the rule in Argonaut is violated. Argonaut recognizes the purpose of the interest award is to compensate a party for the loss of use of the funds. As such, the sole inquiry should be whether that party was ever "out-of-pocket" those funds prior to an award for those funds. Here, there were no "previously incurred attorney fees." Under a contingency fee agreement, no fees are owed by a plaintiff until the trial court renders an award of attorney fees. Because prejudgment interest compensates a party for its out-of-pocket loss, an award of prejudgment interest should only be made to a party when there are "previously incurred attorney fees." For instance, if a client was required to pay his attorney monthly for legal services, and the legal bills were paid, then prejudgment interest should accrue on the attorney fees paid. But when, as here, the client never paid the attorney fees prior to the award, no prejudgment interest should be awarded because the client never suffered a loss of a vested property right.[4]

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[4] In the instant case, the Subcontractor suffered no loss of attorney fees, except to the extent that it paid its attorneys 35% of the award, or $29,000 under the contingency fee agreement. Thus,

II.

THE SECOND DISTRICT CORRECTLY PROHIBITED THE ACCRUAL OF POST-JUDGMENT INTEREST ON PREJUDGMENT INTEREST.

Under well established Florida law, post-judgment interest is unavailable on an award of prejudgment interest. Most recently, in Central Constructors, Inc. and Seaboard Surety Co. v. The Spectrum Contracting Co., 621 So. 2d 526 (Fla. 4th DCA 1993), the Fourth District rejected the application of post-judgment interest on an award of prejudgment interest. In doing so, the Fourth District noted that this Court, by implication, has rejected the application of post-judgment interest on prejudgment interest. See In re Amendments to Florida Small Claims Rules, 601 So. 2d 1201, 1202 (Fla. 1992).[5] The Fourth District specifically referred to this

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if prejudgment interest is available, the only amount that should have been awarded was the amount that the Subcontractor was "out-of-pocket," which is approximately $29,000.

[5] In this Court's Amendments to the Florida Small Claims Rules, 601 So. 2d 1201, 1202, this Court stated:

> The sole comment received in connection with these rules was filed by Judge Harvey Goldstein who points out that as currently drafted Form 7.340 provides for statutory post-judgment interest on a total sum that includes the prejudgment interest award. This results in interest on interest or compound interest. See LaFaye v. Presser, 554 So. 2d 610 (Fla. 1st DCA 1989); United Services Auto Association v. Smith, 527 So. 2d 281 (Fla. 1st DCA 1988).
>
> . . .
>
> After reviewing the report of the rules committee and the comments of Judge Goldstein, we approve the appended amendments to the

Court's approval of Form 1.988 of the Florida Rules of Civil Procedure.[6] Not only has this Court implicitly held that post-judgment interest does not accrue on prejudgment interest, the district appellate courts (except the Fifth District) have uniformly rejected the application of post-judgment interest to prejudgment interest. Although the Subcontractor relies upon the

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> Florida Small Claims Rules. . . We also have amended Form 7.340 to ensure that post-judgment statutory interest will not be awarded on the prejudgment interest award.

[6] This form reads as follows:

> (b) **Form With Interest and Fees.** This form is for judgment after default including prejudgment interest and attorneys' fees recovered:
>
> FINAL JUDGMENT
>
> This action was heard after entry of default against defendant and
>
> IT IS ADJUDGED that plaintiff, ______________, recover from defendant, ____________, the sum of $_________ on principal, $_______ for attorneys' fees with costs in the sum of $__________, making a subtotal of $__________, that shall bear interest at the rate of ________% a year and in addition the plaintiff shall recover prejudgment interest of $_______, for which let execution issue.
>
> ORDERED at ______________, Florida, on ___________, 19__.
>
> ____________________
> Judge

Fifth District's decisions in Peavy v. Dyer, 605 So. 2d 1330 (Fla. 5th DCA 1992) and Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc., 619 So. 2d 6 (Fla. 5th DCA 1993), these decisions stand alone. See LaFaye v. Presser, 554 So. 2d 610, 611 (Fla. 1st DCA 1989); Perez Sandoval v. Banco de Commercio, S.A., C.A., 582 So. 2d 179 (Fla. 3d DCA 1991); Central Constructors, Inc. and Seaboard Surety Co. v. The Spectrum Contracting Co., 621 So. 2d 526 (Fla. 4th DCA 1993); The City of Tampa v. Janke Construction, Inc., 626 So. 2d 239 (Fla. 2d DCA 1993). Based upon this Court's implicit ruling on the prohibition against applying post-judgment interest to prejudgment interest, as well as the majority of district courts' rejection of such an award, the Attorneys have provided no basis for this Court to find that the Second District erred in its decision.

III.

THE SECOND DISTRICT CORRECTLY DETERMINED THAT THE USE OF A MULTIPLIER WAS LEGALLY ERRONEOUS BECAUSE THE ATTORNEYS MITIGATED THE RISK OF NON-PAYMENT.

In this appeal, the Attorneys argue that the Second District erred when it rejected the trial court's discretionary use of a multiplier. However, the trial court had no discretion to use a multiplier. In determining the amount of reasonable fees to which the Attorneys were entitled, both the Second District and trial court were required to follow the principles enunciated in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) as more recently modified by Standard Guarantee Insurance Company v. Quanstrom, 555 So. 2d 828 (Fla. 1990). In Rowe and Quanstrom, this

Court established the criteria for determining a reasonable attorney fee. In Quanstrom, this Court stated:

> We find that the multiplier is still a useful tool which can assist trial courts in determining a reasonable fee in [tort and contract] cases when a risk of nonpayment is established.

Quanstrom at 834. Quanstrom clearly contemplates that multipliers are inapplicable when their is no risk of non-payment. In summarizing the requirements of Rowe and Quanstrom, this Court reaffirmed this analysis in In re Estate of Platt, 586 So. 2d 328 (Fla. 1991):

> The contingency risk factor, identified in many cases as a "multiplier," was explained in Rowe and modified in Quanstrom. This factor was created to compensate attorneys for those cases where there was a risk of nonpayment. In other words, this factor was added to the lodestar formula to compensate attorneys who receive no fees if they do not prevail.

Id. at 334. (emphasis is added)[7] Thus, the issue is whether the Attorneys received no fee if they lost the arbitration. If the Attorneys received no fee, then a multiplier could be used. Contrary to the Attorneys' assertion, a trial court has no discretion to utilize a multiplier when one cannot legally be

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[7] The Quanstrom court also approved those decisions holding that the application of a multiplier is not mandatory under Rowe when the prevailing party's counsel is employed on a contingency fee basis. Id. at 835. More recently, the Third District, in Askowitz v. Susan Feuer Interior Design, Inc., 563 So. 2d 752 (Fla. 3d DCA 1990), rev. denied, 576 So. 2d 292 (Fla. 1991) recognized that Quanstrom does not require the application of a multiplier when the prevailing party's counsel is employed on a contingency fee basis. In fact, in Sun Bank of Ocala v. Ford, 564 So. 2d 1078 (Fla. 1990), this Court completely rejected the use of a multiplier in a contract case.

applied. Once there is a legal basis to utilize a multiplier, then a trial court has discretion as to the amount of the multiplier.

Here, there was no legal basis to use a multiplier. The undisputed testimony was that the Attorneys were compensated $26,000 by Jaimie Juardo, a guarantor on the surety bond for the Subcontractor. (R.2545, 2555) This amount of money was paid so as to mitigate the risk of non-payment to the Attorneys. More importantly, this amount was billed and paid prior to the signing of the contingency fee agreement between the Subcontractor and its Attorneys. (R.2545, 3212) As such, if the Subcontractor recovered nothing in the underlying arbitration, the Attorneys nonetheless received compensation, even though they did not prevail for the Subcontractor. Because the point of the contingency risk factor is to compensate attorneys for those cases where there is a risk of non-payment, a contingency risk factor could not be applied. Given these facts and the decisions of this Court, the Second District was required to reverse the trial court's unauthorized use of a multiplier in this case.

Recognizing the legal insufficiency of their argument, the Attorneys attempt to recreate new facts to support their argument that the trial court had the discretion to apply a multiplier. Specifically, the Attorneys argue that "this case involves a contingency fee arrangement which is only partial." If this case had involved a partial contingency fee arrangement with the client, the trial court clearly had the discretion to apply a multiplier. Nevertheless, neither the trial court nor the Second District were

confronted with a partial contingency fee agreement between the Attorneys and the Subcontractor. The only agreement between the Attorneys and the Subcontractor was an agreement to pay 35% of any recovery. (Appendix 4 at 4) Unbeknownst to the client, prior to this written agreement, the Attorneys had entered into an agreement with the guarantor on the bond, whereby the guarantor agreed to pay the Attorneys on an hourly rate to defend the claims against the Subcontractor covered by the bond. **The Subcontractor had no knowledge of the agreement between the Attorneys and the guarantor on the bond.** (Appendix 4 at 4) It is disingenuous for the Attorneys to argue that they entered into a partial contingency fee agreement when the client never even knew about the $26,000 payment. The nature of this surreptitious agreement between the Attorneys and the guarantor, which was not disclosed to their client, does not even remotely resemble a partial contingency fee agreement.[8/] As such, error could not have been committed by the

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[8/] If the Attorneys had disclosed the existence of the funds they received from the bond guarantor to their client, the client may have refused to enter into a full contingency agreement. Typically, when clients enter into partial contingency fee agreements, the percentage of recovery is lower than if the agreement were for a full contingency. See, Lane v. Head , 566 So. 2d 508, 510-511 (Fla. 1990). Thus, the client did not even have the benefit of bargaining for a partial contingency fee agreement because the payments from the bond guarantor were never disclosed to the client. Moreover, if the client had signed a partial contingency fee agreement, the trial court was required to follow the mandates of Lane which reduces the enhanced award to correspond to the risk the attorneys actually took. Id. at 511. The trial court never undertook such action, obviously because it was not confronted with a partial contingency fee agreement.

Second District because there was no legal basis for application of the multiplier.

IV.

UNDER CLEAR PRECEDENT FROM THIS COURT, THE ATTORNEYS ARE UNENTITLED TO FEES INCURRED IN THIS APPEAL BECAUSE THEY ARE QUARRELING OVER THE AMOUNT OF THE FEE AND NOT ENTITLEMENT TO THE FEE.

The Attorneys request this Court to award fees for litigating the amount of fees in this appeal. This request is contrary to the law of this Court and, therefore, meritless. This Court recently announced in State Farm & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993) that attorney fees were not recoverable for the time spent litigating the amount of attorney fees. This decision clearly decides the issue of whether the Attorneys should be entitled to a fee award. Each and every issue raised by the Attorneys in this appeal is premised on an attempt to increase the amount of their fee award. None of the issues raised by either party even remotely suggests that the Attorneys are entitled to an award of fees. The Attorneys' request for the attorney fees incurred in this appeal is without any legal support.

CROSS APPEAL

I.

THE SECOND DISTRICT ERRED WHEN IT RULED THAT THE TRIAL COURT WAS NOT REQUIRED TO FOLLOW THE MANDATES OF THE ARBITRATION AWARD LIMITING ATTORNEY FEES TO TIME SPENT PREPARING AND PRESENTING THE SUBCONTRACTOR'S CLAIM IN ARBITRATION.

When the arbitrators issued the award in the above-referenced matter, the award provided for a sum certain that the Contractor

and Surety were to pay the Subcontractor. The award additionally provided for:

> [r]eimbursement of reasonable legal fees for legal services necessary to prepare and present the Quality Engineered Installation, Inc.'s claim.

(R.1339) There is no ambiguity contained within this language. On the face of the award, the arbitrators limited the fees to which the Attorneys for the Subcontractor were entitled. Notably, the arbitrators did not broadly state "a reasonable fee" was to be awarded. As the trier-of-fact, the arbitrators presumably believed that the Attorneys should recover no more than the time it took to prepare and present the Subcontractor's claim. Thus, the trial court was confronted with an arbitration award which guided the trial court as to how attorney's fees should be calculated. The law is clear that an arbitrator's decision can only be enforced as written. Oil, Chemical, and Atomic Workers International Union, Local 4-367 v. Rohm & Haas, Texas, Inc., 677 F.2d 492 (5th Cir. 1982); New Orleans Steamship S.S. Association v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), aff'd 457 U.S. 702, 73 L.E.2d 327, 102 S.Ct. 2672.

The Attorneys argued to the Second District and in the trial court that the trial court was not required to follow the arbitrators' language and that it was up to the trial court to determine the attorney fees to which they were entitled. Specifically, Kevin McLean stated at trial:

> Question: And what did the arbitrators award in the arbitration agreement, do you recall?

Answer:	I do recall. I think that is completely irrelevant because I mean -- well, I can tell the court what they awarded. It was $83,000 some dollars plus reasonable attorney's fee for -- you got it in front of you.
Question:	It says for legal services necessary to prepare and present the [the Subcontractor's] claim.
Answer:	I would object to that as to relevancy. The Supreme Court has ruled that its the trial court that determines attorney's fees and the Supreme Court has ruled that attorney's fees are awardable even if the time expended is performed in arbitration. These men participated in the pre-arbitration proceedings and the litigation which sent it to the arbitration. What the arbitrator said -- that they're not entitled to any attorney's fees, that would have no legal significance and therefore its irrelevant.

(R.2574-2575)

The Attorneys' argument entirely misses the mark. Once the arbitrators rendered a decision awarding attorney fees, specifically delineating how these attorney fees should be awarded, the Attorneys were bound by this award. Indeed, the Subcontractor could have sought modification of the award. <u>See</u> §682.14, <u>Fla. Stats</u>. <u>See also</u> <u>Fridman v. Citicorp Real Estate, Inc.</u>, 596 So. 2d 1128 n.1 (Fla. 2d DCA 1992). The Subcontractor never undertook such action. In fact, the Subcontractor moved to confirm the award and to assess attorney fees pursuant to the award. (R.1338) By

failing to apply to the arbitrators or the trial court to modify or vacate the award, the Subcontractor waived any objection it had to the correctness and validity of the arbitrators' ability to limit the amount of the fee award. See e.g., Sachs v. Dean Witter Reynolds, Inc., 584 So. 2d 211 (Fla. 3d DCA 1991); Farmer v. Polen, 423 So. 2d 1035 (Fla. 4th DCA 1982); Carter v. State Farm Mutual Auto Insurance Co., 224 So. 2d 802 (Fla. 1st DCA 1969). Moreover, there was no ruling from any of the appellate courts that the arbitrators' decision to limit the attorney fee award to the time it took to prepare and present the claim of the Subcontractor was in error. As such, both the trial court and the Second District legally erred in rejecting the request that attorney fees be limited to the time spent by the Attorneys to prepare and present the claim in arbitration.

Even if there were a question as to whether there was any logical basis for the arbitrators' decision to limit the fee award, the answer is easily addressed. The Subcontractor was operating under two burdens. The first was to present its claim against the Contractor. The Subcontractor retained McLean, Schecht, and Williamson to do so. These Attorneys accepted the offer of the arbitrators not to be present during the entire arbitration. (R.2452-2453) The Subcontractor testified that its entire claim was presented in 1 1/2 day's time on August 29 and August 30, 1988. (R.2534) The Subcontractor was also defending against the allegations of the owner, not the Contractor and Surety. This defense was different in form and in substance from the claim being made by

the Subcontractor. Nothing in the arbitration award indicates that the Attorneys were to be awarded attorney fees for the time spent preparing and presenting a defense to the owner's allegations of defective workmanship. In any event, the Attorneys were compensated for this time by Jaimie Juardo, the guarantor on the bond. Thus, there is certainly no inequity in enforcing the arbitrators' award, as expressly stated.

In light of this clear arbitration mandate, the lower court erred when it ordered any attorney fees to be awarded to Stolba or Ross. Neither of these attorneys were involved in preparing or presenting the Subcontractor's claim in the arbitration. At trial, the following question was asked of counsel for the Subcontractor:

> Question: Let me ask the question to you a different way. Can you quantify the amount of time that Mr. Stolba or Mr. Ross participated in this arbitration?
>
> Answer: The actual hearing, zero.

(R.2577) If neither Stolba nor Ross participated in the arbitration, then obviously they could not have prepared and presented the Subcontractor's claim at the arbitration. There was a total absence of any time slips for either gentleman indicating that they prepared and presented the Subcontractor's arbitration claim. (R.2370) Yet, the lower court awarded Stolba a total of $51,282 and Ross $6,128. (R.2738) To the extent the lower court awarded any attorney fees to Stolba or Ross, it erred.

Secondly, the lower court erred when it refused to segregate the time spent by the Attorneys preparing and presenting the

Subcontractor's claim and defending against the owner's claim. Instead, the lower court rendered an attorney fee award to the Subcontractor for both of these amounts. (R.2736-2738) By refusing to limit the Attorneys' fees to the time spent "preparing and presenting the Subcontractor's claim," the lower court ignored the language of the arbitrators' decision as written. In the absence of an order granting a motion to vacate or modify the arbitration award, the lower court had absolutely no choice but to properly enforce the award. This Court should, therefore, reverse the lower court's award to the extent that it awards fees beyond that authorized by the arbitration award.

In rejecting this argument, the Second District believed the Contractor and Surety were arguing that the arbitrators had the authority to award attorney fees. Citing Fewox v. McCarthy Construction Co., 556 So. 2d 419 (Fla. 2d DCA 1989), aff'd, 579 So. 2d 77 (Fla. 1991), the Second District held that "the proper place to determine the entitlement to an amount of attorney fees authorized by contract or statute is in the circuit court upon application for confirmation of the arbitrators' award." (A.4/7) The Contractor and Surety are not arguing that arbitrators may determine issues of entitlement or amount. Instead, the arbitrators provided guidance to the trial court for determining a proper attorney fee award. These arbitrators, who sat through the many months of the arbitration, had the opportunity to observe the proceedings and understand the Attorneys' involvement in the arbitration. As previously noted, the Attorneys were not present

at much of the arbitration proceedings and their claim formed a small portion of the entire arbitration claim and award. The arbitrators apparently recognized this fact and attempted to prevent the Attorneys from capitalizing upon the argument that they participated in a lengthy arbitration. Moreover, the Attorneys were treated no differently than any of the other attorneys in the arbitration. The arbitration award similarly limited the attorney fee award for all the other parties. Consequently, the Attorneys are bound by the arbitration award language and cannot now argue that their fees were not limited to the time necessary to prepare and present their client's claim.

CONCLUSION

For all the foregoing reasons, the decision entered by the Second District should be affirmed as to all issues raised by the Attorneys. The Second District correctly concluded that prejudgment interest is unavailable on this attorney fee award. The purpose of awarding prejudgment interest is to make a party whole and compensate the party for the lost use of money. Only to the extent that the client suffered a loss of a vested right should prejudgment interest be available. The Subcontractor failed to suffer a loss of a vested right as to the entire lodestar amount. Further, post-judgment interest should not accrue on the prejudgment interest because it would constitute an invalid award of compound interest.

Given the fact that there was no risk of non-payment of attorney fees, the Second District correctly refused to apply a multiplier. Florida law only permits the use of a multiplier to compensate attorneys when there is a risk of non-payment. Here, the Attorneys were paid by another client for the time they spent in the arbitration.

This Court should also reject the Attorneys' request to award attorney fees for the time the Attorneys spent prosecuting this appeal. Under clear authority from this Court, attorney fees are unavailable for litigating the amount of an attorney fee award. This appeal does not involve a challenge to entitlement of attorney fees but rather a quarrel over the amount of attorney fees. As such, no fees are available for the time spent in this appeal.

Finally, this Court should reverse the Second District's conclusion that the lower court properly rejected a limitation on the attorney fee award to time spent preparing and presenting the Subcontractor's claim in arbitration. By failing to so limit the award, the lower court improperly awarded attorney fees to attorneys not involved in the preparation and presentation of the Subcontractor's claim and improperly awarded fees beyond the time spent preparing and presenting the Subcontractor's claim.

Based upon the above, this Court should affirm the Second District's opinion in all respects, except to require the lower court to limit the attorney fees to time spent preparing and presenting the Subcontractor's claim in arbitration.

Respectfully submitted,

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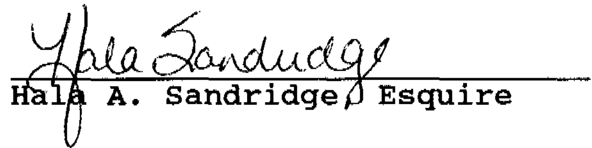
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has furnished by U.S. Mail to: LEON WILLIAMSON, Esquire, Post Office Box 18192, Tampa, Florida 33679-8192 on this the 13th day of October, 1994.



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