IN THE SUPREME COURT

OF THE STATE OF FLORIDA

QUALITY ENGINEERED
INSTALLATION, INC.,
a Florida corporation,

Petitioner/Cross Defendant

CASE NO.: 83,468

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,

Respondent/Cross Petitioner
_____/

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

PETITIONER/CROSS RESPONDENT'S INITIAL BRIEF

Leon A. Williamson, Jr. Esq.
P.O. Box 18192
Tampa, Florida 33679-8192
(813)251-2444
Florida Bar No.: 363537
Attorney for Petitioner/
Cross Respondent

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STATEMENT OF THE CASE AND THE FACTS [1]

This case involves construction of a condominium project known as the Promenade. (Appendix 4 at 2) (R.3) Hereafter, 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.

The Petitioner/Cross Respondent (hereafter "Petitioner"), Quality Engineered Installation, Inc. ("Quality"), was a window installation subcontractor on the project. Respondents were the Contractor and its Surety. (Appendix 4 at 2) (R.2, 3) During construction, the Owner terminated the Contractor's contract, and consequently Quality's subcontract was terminated. (R.1088)

Subsequent to its termination, Quality retained attorney Louis Stolba to represent it in collecting funds due it under its subcontract with Contractor. Contractor and Surety filed an action in the Circuit Court in and for the Twelfth Judicial Circuit of Florida in and for Sarasota County, Florida, seeking to consolidate all of the arbitrations concerning the Promenade project. (Appendix 4 at 2) (R 1-209)

[1]Petitioner has, basically, restated its Statement of the Case and Facts from its Jurisdictional Brief. Petitioner has made minor changes to remedy items which Respondent/Cross Petitioner ("Respondent") perceived in its Answer Jurisdictional Brief as incomplete. Petitioner, however, will not address factual assertions made in Item No. 3. of the Statement of Case and Facts previously submitted by Respondent, as the same are in no way relevant to any legal issues before this Court. That item relates only to reasonable hours expended by the attorneys for Quality at the arbitration, which issue was decided by the Trial Court based upon all evidence submitted to it, and which determination is not the subject of any appeal.

The Trial Court granted Quality's Motion to Dismiss this action. (R.393) The Contractor and Surety appealed this order of the Trial Court, and on October 6, 1986, the Second District Court of Appeal reversed the Trial Court's order dismissing the Respondent's complaint. (Appendix 4 at 2 and 3) (R.398-405) Thereafter, the Trial Court ordered that all arbitrations be consolidated. (Appendix 4 at 3) (R.597-599) During 1986, attorney Stolba terminated his relationship with Quality due to the fact that Quality could no longer pay his bills, and he refused to continue in his representation of Quality on a contingency basis because, in his professional opinion, the risk was too high. (Appendix 4 at 3) (R.2377)

Attorney David Ross also rejected representation of Quality due to the fact that Quality could not afford to pay his fees. He stated that he would not take the case on a contingency basis due to the fact that he was not optimistic about the chances of success. (Appendix 4 at 4) (R.2438) Quality then retained the services of attorneys McLean, Williamson and Schecht, who agreed, verbally, to handle the case on a contingency basis. (R.2514) The verbal agreement was later reduced to writing. (R.2540) The written attorneys' fee agreement provided, inter alia, that Quality would pay its attorneys the greater of 35% of the award or a court awarded fee. (Appendix 4 at 4)

Mr. Jaime Jurado, a guarantor on Quality's bond, agreed to advance, or pay, funds to attorneys McLean and Schecht based on hours worked to defend claims against the bond at a reduced hourly

rate. Mr. McLean received $80.00 an hour and Mr. Schecht received $50.00 an hour for only a portion of the total hours expended. The total received was $26,000.00. (Appendix 4 at 4) (R.2545) At the time of the arbitration, Quality had no knowledge of the arrangement between McLean and Schecht and Jurado. (Appendix 4 at 4)

Ultimately, the arbitrators entered an award to Quality in the amount of $83,712.00. (Appendix 4 at 5) The arbitration award also awarded Quality attorney's fees as follows: "[r]eimbursement of reasonable legal fees for legal services necessary to prepare and present the Quality Engineered Installation, Inc.'s claim." (R.1339, 1340) Nowhere in the award was there, as alleged by Respondent/Cross Petitioner, any words of limitation or language purporting to limit the amount of any attorneys' fee award by any Court of competent jurisdiction for time spent during the arbitration. Additionally, there obviously was not, nor could there have been, language purporting to limit attorneys' fees which could or would be awarded by any Court of competent jurisdiction for time spent subsequent to the arbitration litigating the attorneys' fee claim. Shortly thereafter, Respondents paid the base amount of the arbitration award, but continued to contest and litigate Quality's right to attorneys' fees.

The Trial Court denied Quality's motion for attorneys' fees, due to the then current state of the law in the Second District (Appendix 4 at 5) (R.1714-1716) Quality appealed the Trial Court's decision to the Second District Court of Appeal. Prior to

the Oral Argument in that appeal, the Second District, in a unanimous en banc decision, Fewox v. McMerit Construction Company, 556 So.2d 419 (Fla. 2nd DCA 1989), affirmed 579 So.2d 77 (Fla. 1991), issued a decision reversing the Second District Court's previous position that prohibited attorney's fees for time spent in arbitration. (Appendix 4 at 6) On January 12, 1990, the Second District granted Quality's motion for attorneys' fees. (Appendix 5) Respondents appealed that decision to this Court, which upheld the Second District's decision, and on June 11, 1991 granted Quality's motion for attorneys' fees as well. (Appendix 4 at 6 and Appendix 6)

An attorney's fee hearing was then held. The Trial Court entered its order rendering an award of attorneys' fees to Quality for fees incurred by it to Stolba, Ross, McLean, Williamson and Schecht, in the total amount of $319,000.00. (Appendix 1 and 4 at 6) A multiplier of 2.0 was applied to the lodestar of McLean, Schecht and Williamson, excluding the $26,000.00 which was guaranteed to McLean and Schecht. (Appendix 4 at 7 and Appendix 1 at 4) The Trial Court also granted interest on the underlying amount of attorneys' fees (Appendix 1 and 4 at 7)

An appeal to the Second District Court of Appeal followed. The Second District Court of Appeal entered its order affirming in part and reversing in part the trial court's order awarding Petitioner attorneys' fees. (Appendix 2) On January 5, 1994, the Second District Court of Appeal granted Petitioner's Motion for Clarification (Appendix 3) and entered its substitute opinion. (Appendix 4)

Based on the substitute opinion, Petitioner filed its Notice to Invoke the Supreme Court's Discretionary Jurisdiction. On August 24, 1994, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, REVERSING TRIAL COURT'S DETERMINATION THAT PREJUDGMENT INTEREST SHOULD BE APPLIED TO AN AWARD OF ATTORNEYS' FEES IS ERROR AND THIS COURT SHOULD REVERSE AND REINSTATE THE TRIAL COURT'S AWARD.

The Second District Court of Appeal ruled that attorneys' fees are costs, and not liquidated damages, and therefore prejudgment interest is not appropriate. This reliance by the Second District on the "liquidated-nonliquidated" distinction is error, as this Court has previously rejected the "penalty theory" with regard to prejudgment interest, with which this distinction is closely aligned. Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985). In Argonaut, this Court adopted the "loss theory" with regard to prejudgment interest. In this action, the trial judge correctly recognized that the attorneys' fee judgment in December of 1991 had the effect of fixing Petitioner's loss with regard to attorneys' fees as of the prior date of October 10, 1988, the date of the arbitrator's award. That event gave right to Quality's right to attorneys' fees, and was the proper date of "the loss" as contemplated by this Court in Argonaut.

II. IN THE EVENT THIS COURT DETERMINES THAT PREJUDGMENT INTEREST IS APPROPRIATE, THEN THIS COURT SHOULD DECIDE WHETHER OR NOT POST JUDGMENT INTEREST SHOULD ACCRUE ON THE FULL MERGED AMOUNT OF THE JUDGMENT, INCLUDING PREJUDGMENT INTEREST.

With regard to the accrual of post judgment interest pursuant to Florida Statutes, Section 55.03(1), the Second, Third, and

Fourth District Courts of Appeal have ruled that post judgment interest should not accrue on the full judgment amount, including prejudgment interest, since this would result in an improper compounding of interest. However, the Fifth District Court of Appeal has ruled to the contrary, holding that prejudgment interest is merely another element of pecuniary damages which merges into the final judgment and should thereafter bear interest at the statutory rate. Judge Altenbernd of the Second District has issued a specially concurring opinion in which he agrees with the result reached by the Fifth District.

Quality asserts that the reasoning of the Fifth District and Judge Altenbernd is appropriate, and to hold that the portion of a judgment which constitutes prejudgment interest does not earn interest at the post judgment statutory rate would overlook the doctrine of merger.

III. THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, HOLDING THAT THE TRIAL COURT DID NOT HAVE DISCRETION TO APPLY A MULTIPLIER IN THIS CASE DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT, AND IS ERROR. THIS COURT SHOULD REVERSE SAID DECISION AND REINSTATE THE MULTIPLIER AWARDED BY THE TRIAL COURT.

The Second District Court of Appeal ruled that the Trial Court's use of a multiplier of 2.0 was error since the attorneys herein were able to mitigate their risk of non-payment. This Court has held in Lane v. Head, 566 So.2d 508 (Fla. 1990), that where a contingency fee situation is only partially contingent, and therefore attorneys have been able to mitigate their risk, that a

multiplier is still within the Trial Court's discretion, provided the Trial Court reduces the enhancement factor as set forth in Lane. The situation between Quality and its attorneys in this case is precisely that which was contemplated by this Court in Lane. Also, the Second District's ruling that the trial judge did not consider the mitigation effect is error, since the trial judge obviously considered the mitigation, having excluded the guaranteed fee from operation of the multiplier, in the manner required by this Court in Lane. Finally, the Trial Court compared the mitigation effect to the percentage fee contained in the attorneys' fee contract, and not the reasonable fee provided for by the attorneys' fee contract, as required by this Court's decision in Lane.

IV. WORK DONE BY PETITIONER'S ATTORNEYS IN LITIGATING THE AMOUNT OF ATTORNEYS' FEES IN THIS CASE INURE AT LEAST PARTIALLY TO THEIR CLIENT'S BENEFIT, AND THEREFORE THOSE FEES SHOULD BE RECOVERABLE.

The Second District, in its opinion, as well as this Court, have ruled that attorneys' fees litigating the amount of attorneys' fees are not recoverable because that work inures solely to the attorney's benefit. In this case, Quality's attorneys, in litigating amount, performed a substantial amount of work relative to fees incurred by Quality to its previous attorneys, Louis Stolba and David Ross. In this case at least, the attorneys' work in litigating the amount of fees inure to the attorneys' client's benefit. Therefore, fees should be recoverable for that work.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, REVERSING TRIAL COURT'S DETERMINATION THAT PREJUDGMENT INTEREST SHOULD BE APPLIED TO AN AWARD OF ATTORNEYS' FEES IS ERROR AND THIS COURT SHOULD REVERSE AND REINSTATE THE TRIAL COURT'S AWARD.

The ruling of the District Court of Appeal, Second District, reversing the Trial Court's award of interest on the award of attorneys' fees from the date of the event which gave rise to Petitioner's right to those fees was error. That decision should be reversed by this Court.

First, it should be noted that "prejudgment" interest as discussed herein and in other cases on this issue accrues only from the end of the action, that is from the date of a decision or some other event which determines an action on its merits, therefore giving rise to a party's right to an award of attorneys' fees. The time for accrual of interest on the attorneys' fee award which was awarded to Quality by the Trial Court is only for that time during which the issue of attorneys' fees has been litigated. This is consistent with all other cases in Florida, discussed below, where interest on attorneys' fees has been awarded.

In this case, the Trial Court awarded interest, at the statutory rate established by Florida Statutes, Section 687.01, on the attorneys' fees incurred prior to the end of the arbitration from the date of the arbitration award on October 10, 1988, through the date of the attorneys' fee judgment on December 13, 1991. Those fees were awarded for time expended by attorneys McLean, Schecht, and Williamson during the arbitration, as well as for fees

incurred by Petitioner to its previous attorneys, Louis Stolba and David Ross, prior to the commencement of the arbitration proceeding. (Appendix 1, 2, and 3) For fees incurred litigating entitlement to attorneys' fees, and for which Quality is still entitled pursuant to the ruling below by the Second District Court of Appeal, the Trial Court awarded interest from January 12, 1990, the date of the Second District's Order granting Quality's Motion for Attorneys' Fee, for fees incurred prior to that date, and from June 11, 1991, the date of this Court's Order Granting Quality's Motion for Attorneys' Fees, for fees incurred prior to that date.

By its ruling below, the Second District Court of Appeal reversed the Trial Court's award of any prejudgment interest on attorneys' fees, reasoning that attorney's fees are not liquidated damages, but are litigation costs. (Appendix 4 at 14) Quality respectfully submits that this ruling by the Second District Court of Appeal was error.

In support of its ruling, the Second District Court of Appeal cited the Fourth District case of Temple v. Temple, 539 So.2d 564 (Fla. 4th DCA 1989). Temple involves attorneys' fees awarded in a divorce proceeding.

However, other District Courts of Appeal have consistently held, with respect to fees awarded pursuant to Florida Statutes, Section 627.428, and otherwise, that prejudgment interest is applicable with respect to an award of attorneys' fees.

In Bremshey v. Morrison, et al, 621 So.2d 717 (Fla. 5th DCA 1993), the Fifth District Court of Appeal held that the date of the

court order or determination which triggers a party's entitlement to attorneys' fees is the proper date after which such fees should accrue. Id. at 718. In Visoly v. Security Pacific Corp., 625 So.2d 1276 (Fla. 3rd DCA 1993), the Third District Court of Appeal affirmed the Trial Court's award of interest on the attorney fee award (pursuant to Florida Statutes, Section 57.105) from the date of the Trial Court's judgment striking Plaintiff's pleadings. The Court held that this date triggered the Defendant's entitlement to attorneys' fees, and thus fixed the date of loss for purposes of awarding interest. Id. at 1277.

In Mason v. Reiter, 564 So.2d 142 (Fla. 3rd DCA 1989), the Third District Court of Appeal, in a paternity proceeding, held that prejudgment interest should have been entered on an attorney fee award from the date of judgment of paternity, because that date fixed the date of loss for purposes of awarding interest on previously incurred attorneys' fees, even though the actual amount of the award was at the time not yet determined. Id. at 147.

Finally, in another case involving fees awarded pursuant to Florida Statutes, Section 627.428, and on attorneys' fee contract virtually identical to Quality's, the First District Court of Appeal held that it was error for the Trial Court to fail to award prejudgment interest on the award of attorneys' fees. Inakio v. State Farm Fire & Casualty Co., 550 So.2d 92 (Fla. 1st DCA 1989). In Inakio, the action was litigated, and eventually settled. Id. at 92 and 93. Subsequent to the settlement, the only matter left to be litigated was attorneys' fees. Id. at 92 and 93. The Court

held that the date of settlement was the event that fixed the date of "the loss" for purposes of assessing prejudgment interest even though the ultimate amount of the award remained for determination. Id. at 97. The Court relied upon this Court's landmark decision in Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985) in arriving at its decision.

It should be noted that in the instant case, for fees incurred during arbitration, as in Inakio, there was no court order which could be construed as triggering Quality's right to attorneys' fees. The event which triggered Quality's right to attorneys' fees was the arbitrator's award on October 10, 1988. This award, in which Quality was the prevailing party, triggered Quality's right to attorneys' fees under Florida Statutes, Section 627.428. This event fixed the date of "the loss" for purposes of assessing prejudgment interest even though the amount of the attorneys' fee award remained for determination. The Trial Court recognized this fact, and properly awarded Quality interest from that date on fees which it had incurred prior to that date to attorneys Stolba, Ross, McLean, Schecht, and Williamson. The reason there was no formal court ruling or order was that the damage award of the arbitrators was paid by Respondents, leaving thereafter only the issue of attorneys' fees to be determined. Subsequent to that date, Respondents continued to contest Quality's right to receive attorneys' fees.

With respect to attorneys' fees incurred by Quality subsequent to the arbitration award of October 10, 1998, in litigating

entitlement to attorneys' fees, the dates of the Orders of the Second District and this Court, granting Quality's motions for attorneys' fees, are the events which triggered Quality's right to those fees, and therefore fixed the date of Quality's "loss" for purpose of awarding interest.

Quality urges that this Court adopt the reasoning of the courts in Inakio, Mason, Visoly, and Bremshey. Specifically, Quality asserts that the discussion by the First District Court of Appeal in Inakio regarding this issue is well-reasoned, logical, and properly construes this Court's decision in Argonaut. Clearly, with respect to attorneys Stolba and Ross, Quality had expended its funds in payment for fees or was obligated to pay fees, well prior to the arbitrator's award on October 10, 1988. Quality's right to receive those fees from Respondents was triggered by the award, and had not Respondents engaged in this extended litigation since October of 1988, Quality would have had been paid those funds at that time. Also, with respect to fees for work expended during the arbitration, Quality became obligated to pay its attorneys upon rendition of the arbitrator's award, or at a minimum, upon payment by Respondents of the award shortly thereafter, even though the ultimate amount remained for determination. See Inakio, supra at 97. The Trial Court's award of attorneys' fees by its order of December 13, 1991, had the effect of fixing Quality's loss as of the prior date of October 10, 1988. As stated by this Court in Argonaut, supra at 215, the calculation of interest by the trial judge was then purely a ministerial duty.

Also, as set forth in Inakio, supra at 97 and 98, any ruling denying interest on the award of attorneys' fees herein would have the effect of penalizing Quality for Respondents' delay in paying attorneys' fees due Quality, and it would likewise reward Respondents for continuing to contest Quality's reimbursement of attorneys' fees by allowing Respondents interest-free use of the attorneys' fee award for, as of this date, almost six (6) years. This result, obviously, would be inconsistent with the intent and purpose of Florida Statutes, Section 627.428, which this Court has held is to discourage the contesting of valid claims against insurance companies. Insurance Company of North America v. Lexow, et al, 602 So.2d 528 (Fla. 1992) at 531. Also, as this Court has held, Respondents' good faith or the merit of their defense is irrelevant. Id. at 531 and Argonaut, supra at 215.

Finally, Quality asserts that the Second District Court of Appeal's ruling that with respect to Florida Statutes, Section 627.428, that attorneys' fees are litigation costs and not liquidated damages, is error. Recently, as set forth above, this Court decided State Farm Fire & Casualty Co. v. Palma, 629 So.2d 830 (Fla. 1993). In that same case, the Fourth District Court of Appeal stated that upon any suit being filed under this statute, the relief sought was both the policy proceeds and attorneys' fees, and that the claim for attorneys' fees is in fact a claim under the policy. State Farm Fire & Casualty Co. v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991), at 332. On appeal, this Court approved, in stating "...the terms of Section 627.428 are an implicit part of

every insurance policy issued in Florida." State Farm & Casualty Co. v. Palma, supra at 832. The clear effect of these rulings is that attorneys' fees are in fact policy damages, and not mere "costs" attendant to litigation involving insurance contracts. Therefore, it is respectfully suggested that the Second District Court of Appeal's ruling to the contrary is error. Also, the Second District's implied requirement that damages be "liquidated" in order to be susceptible to prejudgment interest is error, as this Court has rejected the "penalty theory" of prejudgment interest, with which the liquidated-unliquidated distinction is closely linked. Argonaut, supra at 215.

Based on the above, Quality urges that this Court reverse the Second District's ruling, and affirm the Trial Court's proper and correct decision that interest on the award of attorneys' fees should properly accrue from the date of the arbitration award, and the two orders granting attorneys' fees, through the date of the judgment setting forth the amount of the award.

II. IN THE EVENT THIS COURT DETERMINES THAT PREJUDGMENT INTEREST IS APPROPRIATE, THEN THIS COURT SHOULD DECIDE WHETHER OR NOT POST JUDGMENT INTEREST SHOULD ACCRUE ON THE FULL MERGED AMOUNT OF THE JUDGMENT, INCLUDING PREJUDGMENT INTEREST.

The Trial Court in this action awarded post judgment interest at the statutory rate of 12% per annum on the entire merged judgment, including the portion thereof which constituted prejudgment interest, pursuant to Florida Statutes, Section 55.03(1). The Second District Court of Appeal stated that it is

error to award interest upon sums that are interest, citing United Services Automobile Assoc. v. Smith, 527 So.2d 281 (Fla. 1st DCA 1988). (Appendix 4 at 14) However, the Second District did not make a formal ruling or decision on this issue, holding that since they had held that prejudgment interest on attorneys' fees is improper, the erroneous award of compound interest was moot. In the event that this Court holds that prejudgment interest on the attorneys' fee award is proper, then this Court should rule on this issue also in order to fully determine this case.

The Second District, since the ruling below, has reaffirmed its position on this issue. S & E Contractors, Inc. v. City of Tampa, 629 So.2d 883 (Fla. 2nd DCA 1993) and Sciandra and Sciandra v. First Union National Bank of Florida, 638 So.2d 1009 (Fla. 2nd DCA 1994). Also, the Third District and Fourth District Courts of Appeal have adopted the same position. Sandoval v. Banco de Commercial, S.A., 582 So.2d 179 (Fla. 3rd DCA 1991) and Central Constructors, Inc. v. Spectrum Contracting Co., 621 So.2d 526 (Fla. 4th DCA 1993).

However, the Fifth District has recently ruled to the contrary, holding that post judgment interest could be awarded on the total amount of a final judgment awarding a real estate commission, including prejudgment interest and costs. Peavy v. Dyer, 605 So.2d 1330 (Fla. 5th DCA 1992). See also Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc., 619 So.2d 6 (Fla. 5th DCA 1993). In Peavy, the Fifth District cited this Court's decision in Argonaut wherein this Court determined

that prejudgment interest is simply an element of pecuniary damages. Peavy, supra at 1332. The Court stated as follows, "Under this loss theory of damages, the failure of the Defendant to surrender monies it owed to the plaintiff was itself a wrongful deprivation of plaintiff's property which the judgment restores to the plaintiff. Once this element of damages is awarded in the final judgment, prejudgment interest, like all other elements of damage, becomes part of a single total sum adjudged to be due and owing." Id. at 1332.

Also, in Sciandra, supra, Judge Altenbernd issued a specially concurring opinion in which he concurred in the result, since the Second District had already expressly conflicted with Peavy, but stated that such result overlooked the doctrine of "merger". Id. at 1010. Judge Altenbernd stated that were it not for the fact that the Second District had previously declared its conflict with Peavy, that he would have found, as the Fifth District in Peavy, that prejudgment interest is merely a component of damages to which a plaintiff is entitled, and is "merged" with all other damages when a final judgment is entered, the entirety of which should bear post judgment interest at the statutory rate. Id. at 1010.

Quality respectfully submits that the discussion by the Fifth District in Peavy and by Judge Altenbernd in Sciandra is well reasoned and urges that this Court adopt the same.

III. THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, HOLDING THAT THE TRIAL COURT DID NOT HAVE DISCRETION TO APPLY A MULTIPLIER IN THIS CASE DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT, AND IS ERROR. THIS COURT SHOULD REVERSE THAT DECISION OF THE SECOND DISTRICT AND REINSTATE THE MULTIPLIER AWARDED BY THE TRIAL COURT.

As stated previously, this case involves a contingency fee contract which provides that the attorneys would be paid the greater of 35% of the award or the court awarded fee. (Appendix 4 at 11) As also stated previously, attorneys McLean and Schecht were paid by a Mr. Jurado, a guarantor on Quality's bond, for a portion of the hours worked at a greatly reduced hourly rate of $80.00 per hour for McLean and $50.00 per hour for Schecht. The total amount paid was $26,000.00. Quality had no knowledge of this arrangement. (Appendix 4 at 4)

The Trial Court applied a multiplier of 2.0 to the attorney fee award of Williamson, McLean, and Schecht, excluding the $26,000.00 which was guaranteed to McLean and Schecht. (Appendix 1 at 4)

In reversing the Trial Court's application of a multiplier, the Second District held as follows:

> The attorneys' fees pursuant to the contingency fee agreement were approximately $29,000.00. Attorneys McLean, Schecht, and Williamson's risk of non-payment was in an amount of approximately $29,000.00; $26,000.00 of which they were able to mitigate...
>
> ...Although the Trial Court found that success was unlikely at the outset of the case, the Judge did not take into consideration the extent to which the attorneys were able to mitigate their risk of non-payment. Taking into account that McLean, Schecht, and Williamson were able to mitigate their risk of

> non-payment by approximately 90%, we hold that the use of a multiplier was not proper in this case. (Appendix 4 at 10)

In its Answer Jurisdictional Brief, Respondents argue that there is no indication that the Second District found that this was an instance in which the contingency-fee arrangement was only partial, as was the situation in Lane v. Head, 566 So.2d 508 (Fla. 1990). Respondents seek to imply some other reasoning for the Second District's reversal of the Trial Court's application of the multiplier. This position is simply not supported by any reading, however strained, of the Second District's opinion. There is no reason expressed or even remotely implied by the Second District for its decision other than the attorneys' ability to mitigate their risk, and the Second District's perception that the Trial Court did not take this mitigation into consideration.

Clearly, this case involves a contingency fee arrangement which is only partial. The attorneys had a pure contingency fee contract with Quality. The situation was rendered only partially contingent due to attorneys McLean and Schecht's ability to partially mitigate their risk of non-payment of the reasonable fee by the payments from Jurado. This is a situation which was, without question, addressed by this Court in Lane.

With regard to the Second District's ruling, there are several errors. First, in Lane, this Court held that where the contingency fee arrangement is only partial, the Court still has discretion to apply the appropriate multipliers mandated either by

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) or Standard Guarantee Insurance Co. v. Quanstrum, 555 So.2d 828 (Fla. 1990), whichever is applicable. Id. at 511. Also, the Second District misconstrued Quality's contingency fee contract. In its opinion, at Page 10, the Second District held that the attorneys' fees pursuant to the contingency fee agreement were approximately $29,000.00. This was error, since Quality's attorneys were clearly entitled to receive a reasonable fee, if that reasonable fee was greater than a percentage amount of $29,000.00. The Second District even recognized this fact in its opinion, when it stated "It was clear that a Court awarded reasonable attorney's fee would exceed the $29,000.00 Quality was obligated to pay under its fee agreement". (Appendix 4 at 13) The Trial Court, in fact, awarded fees greatly in excess of $29,000.00 (Appendix 1) Clearly then, Quality's attorneys were not able to mitigate their risk of non-payment by 90%, but by a much smaller amount. In any event, regardless of the amount of mitigation, under this Court's decision in Lane, the Trial Court had discretion to apply a multiplier so long as a multiplier was reduced in accordance with Lane.

Additionally, the Second District erred in holding that the Trial Court did not take into consideration the extent to which the attorneys were able to mitigate their risk of non-payment. Obviously, the Trial Court considered the mitigation effect of the $26,000.00 guaranteed payment, because the Trial Court excluded these fees from operation of the multiplier as required by Lane.

(Appendix 1 at 4) In fact, the Trial Court followed the procedures set forth in Lane in arriving at the amount of additional compensation, because the Trial Court reduced the amount of the enhancement by the percentage of the reasonable fee that was guaranteed.

Finally, the Second District ignored the well-settled principle, recently restated by this Court in State Farm v. Palma, supra, that the application of a contingency fee multiplier is discretionary with the Trial Court. Id. at 833. See also Quanstrum, supra at 831. All of the elements required by Quanstrum and Rowe are present in this case, as was determined by the Trial Court. Both of Quality's prior attorneys, Louis Stolba and David Ross, testified that they would not have taken this case on a contingency basis because the risk was too high. (Appendix 4 at 3 and 9) Attorney Ross testified that he would not take the case on a contingency basis due to the fact that he was not optimistic as to the chance of success. (Appendix 4 at 3) The Trial Court acted within its discretion in applying the multiplier in this action. The Trial Court properly considered the attorneys' mitigation in accordance with this Court's mandate in Lane.

The Second District Court of Appeal's ruling that the Trial Court did not consider the mitigation is error. Further the Second District's ruling that the mitigation robbed the Trial Court of its discretion to apply a multiplier is likewise clearly error, and directly conflicts with this Court's decision in Lane. For the foregoing reasons, Quality urges that this Court quash the Second

District's decision and reinstate the multiplier as applied by the Trial Court.

IV. WORK DONE BY PETITIONER'S ATTORNEYS IN LITIGATING THE AMOUNT OF ATTORNEYS' FEES IN THIS CASE INURE AT LEAST PARTIALLY TO THEIR CLIENT'S BENEFIT, AND THEREFORE THOSE FEES SHOULD BE RECOVERABLE.

The Second District below, and this Court in Palma, supra, ruled that attorneys' fees were not recoverable for litigating the amount of attorney's fees, since that work inures solely to the attorneys' benefit and cannot be considered services rendered in procuring full payment of the judgment. Id. at 833 and Appendix 4 at 13.

However, in this case, in litigating the amount of attorneys' fees, Quality's attorneys expended substantial time and effort in proving up the proper or reasonable fee incurred by Quality to its previous attorneys, Louis Stolba and David Ross. This work by Quality's attorneys did not inure one bit to them, but solely to their client, Quality. Also, in the appeal below to the Second District, Quality's attorneys defended awards, as well as prejudgment interest on those awards, to Quality's previous attorneys, Mr. Stolba and Mr. Ross. By this appeal, Quality's undersigned attorney is seeking to have reinstated an award of prejudgment interest on fees incurred by Quality to its previous attorneys, Mr. Stolba and Mr. Ross, as well as on the percentage fee. This interest, at the rate of twelve percent (12%) per annum for a period of almost six (6) years, if granted by this Court,

will inure solely to the benefit of Quality, and not Quality's undersigned attorney. Therefore, Quality respectfully urges that this Court revisit the issue of entitlement to attorneys' fees for time spent litigating amount of attorneys' fees, and supplement its position set forth in Palma, supra, to allow for reimbursement for attorney's fees expended litigating amount of attorneys' fees where that work inures to the benefit of the attorney's client, and not solely to the attorney.

CONCLUSION

Based on the argument set forth above, Petitioner, Quality Engineered Installation, Inc., requests that this Court quash the ruling of the District Court of Appeal, Second District, that prejudgment interest does not accrue on an award of attorneys' fees, and reinstate the award of the Trial Court of prejudgment interest on the award of attorneys' fees to Quality. Also, Petitioner requests that this Court decide the issue of whether or not post judgment interest accrues on the entire amount of a judgment, including prejudgment interest, and urges that this Court rule that it does, and affirm the Trial Court's award thereof. Petitioner further requests that this Court quash the ruling of the District Court of Appeal, Second District, that the trial judge did not have discretion to apply a multiplier of 2.0 to the attorneys' fee award, and to reinstate the multiplier applied by the Trial Court. Finally, Petitioner requests that this Court revisit its opinion in Palma, supra, and supplement its position with regard to a party's right to an award of attorneys' fees for work litigating the amount of attorneys' fees, where such work inures to the benefit of the attorneys' client, as in this case. In this regard also, Petitioner requests that this Court quash the ruling of the District Court of Appeal, Second District, reversing the Trial Court's award of attorneys' fees and costs incurred litigating the amount of those fees, and reinstate the Trial Court's award.

Respectfully submitted.

LEON A. WILLIAMSON, JR., ESQ.
P.O. Box 18192
Tampa, Florida 33679-8192
(813)251-2444
Florida Bar Number: 363537
Attorney for Petitioner/
Cross Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hala A. Sandridge, Esq., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, Florida 33601, this 16th day of September, 1994.

LEON A. WILLIAMSON, JR.