015

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

QUALITY ENGINEERED
INSTALLATION, INC.,
a Florida corporation,

Defendant/Petitioner,

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,

Plaintiff/Respondent.
_____/

FILED
SID J. WHITE
APR 12 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND THE FACTS

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

The 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) During construction, the Owner terminated the Contractor's contract, and consequently Quality's subcontract was terminated.

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)

The Trial Court granted Quality's Motion to Dismiss this action. 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)

Thereafter, the Trial Court ordered that all arbitrations be consolidated. (Appendix 4 at 3) 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)

Attorney David Ross also rejected representation of Quality due to the fact that Quality could not afford to pay his fees, and 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) Quality then retained the services of attorneys McLean, Williamson and Schecht, who agreed, verbally, to handle the case on a contingency basis. This agreement was later reduced to writing. (Appendix 4 at 4)

Mr. Jaime Jurado, a guarantor on Quality's bond, agreed to advance funds to attorneys McLean & 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)

Ultimately, the arbitrators entered an award to Quality in the amount of $83,712.00. (Appendix 4 at 5) The Trial Court denied Quality's motion for attorney's fees, due to the then current state of the law in the Second District (Appendix 4 at 5) 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 Court of Appeal in a unanimous en banc decision, Fewox v. McMerit Construction Company, 556 So.2d 419 (Fla. 2d 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) Respondents appealed that decision to this Court, which upheld the

Second District's decision. (Appendix 4 at 6)

An attorney's fee hearing was then held. The Trial Court entered its order rendering an award of attorney's fees to Quality for fees incurred by it to Stolba, Ross, McLean, Williamson and Schecht, in the total amount of $319,000.00. (Appendix 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 prejudgment interest on the underlying amount of attorneys' fees (Appendix 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 has filed its Notice to Invoke the Supreme Court's Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE WHETHER OR NOT PREJUDGMENT INTEREST SHOULD ACCRUE ON AN AWARD OF ATTORNEYS' FEES, AND IF SO, FROM WHAT DATE PREJUDGMENT INTEREST SHOULD RUN.

The District Courts of Appeal vary on this issue. The Second District ruled that attorneys' fees are litigation costs and not damages, and that therefore the Trial Court's award of prejudgment interest was error. The First District Court of Appeal, Third District Court of Appeal, Fourth District Court of Appeal, and Fifth District Court of Appeal have all ruled that prejudgment interest does accrue on an award of attorneys' fees. This issue will arise in virtually every case involving attorneys' fees, and therefore the Supreme Court should decide this issue.

II. THE SUPREME COURT SHOULD ACCEPT JURISDICTION TO DECIDE THE ISSUE OF WHETHER OR NOT THE TRIAL COURT'S AWARD OF A MULTIPLIER IN THIS INSTANCE WAS PROPER.

The Second District ruled that the attorneys in this case were able to mitigate their risk of non-payment by approximately 90% ($26,000.00 divided by $29,000.00) and that therefore a multiplier was not appropriate. This decision directly conflicts with the Supreme Court's decision in Lane v. Head, 566 So.2d 511 (Fla. 1990). In that case, the Supreme Court held that Trial Courts have discretion to apply a multiplier in partial contingency fee situations, but that the multiplier should be reduced as set forth in the opinion. The Supreme Court should likewise resolve this conflict.

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 EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF FOUR OTHER DISTRICT COURTS OF APPEAL, AND THEREFORE THE SUPREME COURT SHOULD DECIDE THIS ISSUE.

The Trial Court in this action awarded prejudgment interest on the award of attorneys' fees. (Appendix 4 at 7)

The District Court of Appeal, Second District, reversed this award of the Trial Court, ruling that attorneys' fees were litigation costs and not liquidated damages, and that therefore prejudgment interest was not applicable. (Appendix 4 at 14)

As stated above, this position directly and expressly conflicts with decisions of four (4) other District Courts of Appeal.

The Fourth District Court of Appeal has previously taken a position similar to that taken by the Second District in this case. Temple v. Temple, 539 So.2d 564 (Fla. 4th DCA 1989). In that case, the court held "Prejudgment interest cannot be assessed since attorneys' fees do not constitute liquidated damages." Id. at 564. However, the Fourth District has subsequently held, in a case involving attorneys' fees awarded pursuant to Florida Statutes, Section 627.428 (as in this case) that a successful litigant was entitled to interest on the full fee award. Clay v. The Prudential Insurance Company of America, 617 So.2d 433 (Fla. 4th DCA 1993). The court stated as follows:

> While we recognize and accept the notion that ordinarily attorney's awards do not necessarily carry with them an entitlement to prejudgment interest on the award, the peculiar circumstances of this case, as well as the precise text of this fee authorizing statute implicate - at least to us - a right to interest on the full fee award from the date that fees were first fixed.
>
> Id. at 437
> (Emphasis added)

Therefore, it is obvious that with respect to fees awarded pursuant to Florida Statutes, Section 627.428, as in this case, the Fourth District's position directly and expressly conflicts with the position taken by the Second District Court of Appeal in this action.

The First District Court of Appeal has also ruled that it was error for the Trial Court to fail to award prejudgment interest on an award of attorney's fees from the time the claim was settled. Inakio v. State Farm Fire & Casualty Co., 550 So.2d 92 (Fla. 1st DCA 1989), at 97 and 98. This case also involved attorneys' fees awarded pursuant to Florida Statutes, Section 627.428. Again, this decision expressly and directly conflicts with the decision of the Second District Court of Appeal in this case.

The Third District Court of Appeal, in a paternity proceeding, ruled that prejudgment interest should have been entered on the attorney fee award from the date of judgment of paternity, as such date fixed the date of loss for purposes of awarding prejudgment interest on previously incurred attorneys' fees, even though the actual amount of the award was at that time not yet determined. Mason v. Reiter, 564 So.2d 142 (Fla. 3rd DCA 1990), at 147. This decision, also, is in direct conflict with the decision of the

Second District Court of Appeal in this case.

The Third District also considered this issue in Visoly v. Security Pacific Credit Corp., 625 So.2d 1276 (Fla. 3rd DCA 1993). In that case attorney's fees were awarded under Florida Statutes, Section 57.105. The Court held that the date of final judgment striking pleadings, which judgment triggered Defendant's entitlement to attorney's fees, was the proper date from which to award prejudgment interest on the attorney's fee award. Id. at 1277. This decision, also, expressly and directly conflicts with the decision of the Second District Court of Appeal.

Finally, the Fifth District Court of Appeal has ruled on this issue. In Bremshey v. Morrison, et. al., 621 So.2d 717 (Fla. 5th DCA 1993), the court ruled that the date of the determination of liability for attorney's fees fixes the date for awarding prejudgment interest on previously incurred attorney's fees. Again, this decision expressly and directly conflicts with the Second District Court of Appeal's ruling in this case, which is that prejudgment interest is never available.

It is evident that on this issue the Second District Court of Appeal stands alone. At least four (4) other District Courts of Appeal have rendered decisions which directly and expressly conflict with the Second District Court of Appeal's decision. The Supreme Court, therefore, should resolve this conflict and decide this question. This issue will arise in virtually every action involving an award of attorney's fees to a prevailing party, as there will always be a period of time between either the date which

triggers a litigant's right to attorney's fees or the date on which a court enters an award setting forth a litigant's entitlement to attorney's fees, and the date of a final judgment setting the amount of those attorney's fees. A litigant's right to prejudgment interest on an award of attorney's fees (or any relief, for that matter) should not be decided solely upon the geographical judicial district in which that litigant's case is heard.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, REVERSING THE TRIAL COURT'S APPLICATION OF A MULTIPLIER EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT, AND THEREFORE THE SUPREME COURT SHOULD ACCEPT JURISDICTION OF THIS CASE AND REVERSE THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL.

This case involved a contingency fee contract which provided that the attorneys would be paid the greater of 35% of the award, or the court awarded fee. (Appendix 4 at 11) The fee based on the percentage (35% of the award) would have equaled $29,000.00. Id. However, the Trial Court found that the reasonable fee greatly exceeded the percentage amount, and therefore the fee based on the percentage became irrelevant. The Second District Court of Appeal 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) However, notwithstanding the fact that the percentage amount was irrelevant when discussing the proper fee, the Second District ruled that since the attorneys were guaranteed $26,000.00, which equaled approximately 90% of the percentage

amount, that the attorneys were able to mitigate their risk of non-payment by said 90%. Because of this, the Court held that use of a multiplier was not proper. (Appendix 4 at 10)

This decision by the Second District to ignore the reasonable fee expressly and directly conflicts with this Court's opinion in Lane v. Head, 566 So.2d 508 (Fla. 1990). In Lane, this Court quashed the District Court's ruling that the Trial Court did not have discretion to apply a multiplier in a partial contingency fee situation. Id. at 510. In Lane, the attorney was guaranteed $100.00 per hour for all hours expended. The Trial Court held that a reasonable fee was $150.00 per hour for all hours expended. Therefore, the attorney in Lane was able to mitigate his risk of non-payment by two-thirds. This Court ruled that notwithstanding this mitigation, a multiplier was within the Trial Court's discretion. Id. at 510 and 511. The Court did rule that the portion of the fee that was guaranteed should be compared to the reasonable fee, and then the amount of the multiplier should be reduced by that percentage. Id. at 511.

In this case, the Trial Court excluded the $26,000.00 (guaranteed fee) from application of the multiplier. In essence, while not following the mechanics set forth in Lane exactly, the result obtained was the same. The Trial Court excluded from operation of the multiplier the portion or percentage of the reasonable fee that was guaranteed.

In its decision, the Second District Court of Appeal ignored the reasonable fee. This expressly and directly conflicts with

this Court's decision in Lane. The decision of the Second District that the Trial Court did not have discretion to award any multiplier in a partial contingency fee situation likewise expressly and directly conflicts with this Court's decision in Lane. Due to this fact, this Court should accept jurisdiction of this case and overrule the Trial Court's decision.

CONCLUSION

As stated above, the decision of the District Court of Appeal, Second District, holding that in no instance is prejudgment interest appropriate on an award of attorney's fees expressly and directly conflicts with decisions of four (4) other District Courts of Appeal. Since this will be an issue in virtually every action involving attorney's fees, Petitioner requests that this Court accept jurisdiction and finally decide this issue. Also, the decision of the District Court of Appeal, Second District, that the Trial Court had no discretion to apply a multiplier, and its decision to ignore the reasonable fee, expressly and directly conflicts with this Court's decision in Lane. Therefore, Petitioner requests that this Court accept jurisdiction with regard to this issue also.

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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 11th day of April, 1994.

Leon A. Williamson, Jr.