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**IN THE SUPREME COURT**
**OF THE STATE OF FLORIDA**

QUALITY ENGINEERED INSTALLATION, INC., a Florida corporation,

Defendant/Petitioner,

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,

Plaintiffs/Respondents.

CASE NO.: 83,468

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

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# RESPONDENTS' ANSWER JURISDICTIONAL BRIEF

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## STATEMENT OF THE CASE AND THE FACTS

Because the Statement of the Case and the Facts provided by the Petitioner, Quality Engineered Installation, Inc. ("Quality"), is incomplete, the Respondents, Higley South, Inc. and Reliance Construction Company, d/b/a Higley Reliance, and The Federal Insurance Company, submit these additional facts:

1. Leon Williamson, Neil Schecht, and Kevin McLean (the "Attorneys"), were retained by Quality around May 24, 1988. At that time, no written agreement concerning payment of fees was signed. There was a verbal agreement that the Attorneys would represent Quality on a contingency fee basis for 35% of any recovery received. This was reduced to writing on October 11, 1988. (Appendix 4 at 4)

2. The Petitioner claims that "Mr. Jamie Jurado, a guarantor on Quality's bond, agreed to advance funds to attorneys McLean and Schecht based on hours worked to defend claims against the bond at a reduced hourly rate." No reference is made to support this factual assertion. The reason for the absence of a citation to the Second District's opinion is because the Second District found otherwise. The Second District stated:

> Quality was bonded by Reliance Insurance Company; Mr. Jurado was a guarantor on the bond. Mr. Jurado agreed to pay McLean and Schecht on an hourly rate to defend the claims against Quality covered by the bond. Williamson was not paid on an hourly basis, apparently because he was in-house counsel for Mr. Jurado's company. McLean and Schecht received a combined total of approximately $26,000 from Mr. Jurado for the defense of these claims. The $26,000 represented only a portion of the total hours expended by McLean

> and Schecht in representing Quality in the arbitration at a reduced hourly rate of $80 per hour for McLean and $50 per hour for Schecht. There existed no written requirement that Quality's attorneys return this $26,000 payment to Jurado. <u>Quality had no knowledge of the arrangement between McLean and Schecht and Jurado</u>.
>
> . . .
>
> Quality's argument that the $26,000 was more in the nature of a loan is not supported by the record. There is no evidence to support the fact that had Quality been unsuccessful in the arbitration, that its attorney would have to repay the $26,000 to Jurado.

(Appendix 4 at 4, 10) (emphasis added)

3. 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 Quality's work was being discussed, and when necessary to present Quality's claim. Counsel for another contractor recalled McLean's presence at the arbitration approximately 10-15% of the time. McLean's daily calendar for the months of the arbitration revealed that he intended on his calendar to be present only 7 days out of the 4-month period of the arbitration. However, Quality's president, Mr. Aschi, attended the hearings and discussed the day's testimony and exhibits with Quality's attorneys everyday after the hearings. (Appendix 4 at 5)

4. The award rendered by the arbitrators included an award of attorney's fees to Quality, which was limited as follows:

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

(Appendix 4 at 5)

5. The Second District determined the Attorneys were not entitled to a multiplier. Absent from the Second District's opinion, however, is any mention that the Attorneys entered into a partial contingency fee arrangement with Quality. Nor does the opinion reflect that the Second District determined how and when a multiplier should be used in a partial contingency fee arrangement.

## POINTS ON APPEAL

I.

WHETHER THE SECOND DISTRICT'S DETERMINATION THAT PREJUDGMENT INTEREST IS NOT AVAILABLE ON AN AWARD OF ATTORNEY FEES CONFLICTS WITH OTHER DISTRICT COURT DECISIONS THAT INVOLVE INTRADISTRICT CONFLICT OR ARE OTHERWISE DISTINGUISHABLE.

II.

WHETHER THE SECOND DISTRICT'S REFUSAL TO APPLY A MULTIPLIER CONFLICTS WITH THIS COURT'S DETERMINATION THAT A MULTIPLIER MAY BE APPLIED TO A PARTIAL CONTINGENCY FEE AGREEMENT BECAUSE THE INSTANT CASE DID NOT INVOLVE A PARTIAL CONTINGENCY FEE AGREEMENT.

## SUMMARY OF THE ARGUMENT

To obtain conflict jurisdiction before this Court, the Petitioner must establish that there is an express and direct conflict between decisions of the Second District Court of Appeal and this Court or other district court of appeals. The Petitioner has failed to make such a showing. On the issue of whether prejudgment interest is available on an award of attorney fees, the Second District's decision does not provide a basis for jurisdiction because the cases relied upon by the Petitioner for conflict involve intradistrict conflict. This Court does not decide intradistrict conflict. Rather, such a resolution should be decided by the district court of appeals in which that intradistrict conflict is present. And, the decisions relied upon by Petitioner are distinguishable because those cases merely allow prejudgment interest on previously incurred attorney fees. Here, there were no previously incurred attorney fees.

With respect to the Second District's determination that a multiplier was inappropriate, no conflict exits with decisions from this Court. The Second District ruled that the Attorneys were unentitled to a multiplier under specific facts. The Second District was not confronted with nor did it decide whether a multiplier should be used in a partial contingency fee arrangement. Rather, the Attorneys obtained payment from another source which they concealed from their client. Decisions from this Court do not conflict with the Second District's conclusion that a multiplier was inappropriate under these facts.

## ARGUMENT

I.

THE SECOND DISTRICT'S DETERMINATION THAT PREJUDGMENT INTEREST IS NOT AVAILABLE ON AN AWARD OF ATTORNEY FEES DOES NOT CONFLICT WITH OTHER DISTRICT COURT DECISIONS THAT INVOLVE INTRADISTRICT CONFLICT OR ARE OTHERWISE DISTINGUISHABLE.

According to the Petitioner, the Second District's determination that prejudgment interest is unavailable on an attorney fee award conflicts with other district court decisions. This assertion is used by the Petitioner to support its conclusion that jurisdiction should be accepted by this Court because of an interdistrict conflict. The Petitioner's conclusion is misplaced. The decisions upon which the Petitioner relies to support its argument that there is an interdistrict conflict are either distinguishable or involve intradistrict conflict. As such, this Court has no conflict jurisdiction.

Rule 9.030, Fla.R.App.P., sets forth the basis for this Court's jurisdiction. Subsection (a)(2)(A)(4)(i) provides:

> The discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on the same question of law.

The Committee Notes to the 1980 Amendment provide that this new article "also terminates Supreme Court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in Rule 9.331." In the instant case, several of the district court of appeals have an intradistrict conflict as to whether prejudgment

interest is available on award of attorney fees. Compare, e.g., Temple v. Temple, 539 So. 2d 564 (Fla. 4th DCA 1989) (unavailable) with Clay v. The Prudential Insurance Company of America, 617 So. 2d 433 (Fla. 4th DCA 1993) (available); compare Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1989) with Spaulding v. Albertson's, Inc., 610 So. 2d 721 (Fla. 1st DCA 1992) (unavailable); compare Mason v. Reiter, 564 So. 2d 142 (Fla. 3d DCA 1990) (available) with Ginsberg v. Keehn, 550 So. 2d 1145 (Fla. 3d DCA 1989) (unavailable). This Court should refrain from deciding such purely intradistrict conflict.

Moreover, the decisions relied upon by the Petitioner are distinguishable from the facts in this case. 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 and the Third District's decision in Mason. Although the Petitioner argues these decisions conflict with the Second District's decision, the rule in those cases is consistent with the result of this case. Here, the Petitioner had 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. If the purpose of prejudgment interest is to award a party for its out-of-pocket loss, then an award of prejudgment interest should only be made to

a party when there are "previously incurred attorney fees." Unless the Petitioner was out-of-pocket for attorney fees previously paid, no prejudgment interest should be awarded. Thus, under the rule announced in Bremshey, Inacio, and Mason, there is no conflict with the result reached in this case.[1]

II.

THE SECOND DISTRICT'S REFUSAL TO APPLY A MULTIPLIER DOES NOT CONFLICT WITH THIS COURT'S DETERMINATION THAT A MULTIPLIER MAY BE APPLIED TO A PARTIAL CONTINGENCY FEE AGREEMENT BECAUSE THE INSTANT CASE DID NOT INVOLVE A PARTIAL CONTINGENCY FEE AGREEMENT.

The Petitioner maintains that the Second District's decision expressly and directly conflict with this Court's opinion in Lane v. Head, 566 So. 2d 508 (Fla. 1990). In Lane, this Court held:

> We believe that a multiplier also is within the trial court's discretion in those instances in which the contingency-fee arrangement is only partial.
>
> . . .
>
> [W]e believe that when a fee arrangement is partially contingent, the court still has discretion to apply the appropriate multipliers mandated either by Rowe or Quanstrom whichever is applicable.

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1/ The only other decision relied upon by the Petitioner is Clay v. Prudential Insurance Company of America, 617 So. 2d 433 (Fla. 4th DCA 1993). Admittedly, Clay does not pronounce the same rule contained in Bremshey, Inacio, and Mason. Regardless, the court in Clay specifically noted "we recognize and accept the notion that ordinarily attorney's fees awards do not necessarily carry with them an entitlement to prejudgment interest. . ." Id. at 437. Under the facts of Clay, however, the court awarded interest. Facts similar to those present in Clay are not present here.

Id. at 510-511. Clearly, if this case involved a partial contingency fee arrangement with the client, the trial court had discretion to apply a multiplier. Nevertheless, the Second District was not confronted with a partial contingency fee agreement between the Attorneys and the Petitioner. The only agreement between the Attorneys and Quality was an agreement to pay 35% of any recovery. (Appendix 4 at 4) Unbeknownst to Quality, the Attorneys also 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 Petitioner covered by the bond. **Quality had no knowledge of the agreement between the Attorneys and the guarantor on the bond.** (Appendix 4 at 4) The nature of this surreptitious agreement between the Attorneys and the guarantor, which was not disclosed to the Petitioner, did not even remotely resemble a partial contingency fee agreement. Absent from the Second District's opinion is any indication that the Second District would not have allowed the use of a multiplier if a partial contingency fee agreement existed between the Attorneys and Quality. There is no express and direct conflict between the Second District's decision and this Court's decision in Lane. As such, no basis exists for this Court to accept jurisdiction of this matter.

## CONCLUSION

For all the foregoing reasons, this Court should reject the Petitioner's request to accept jurisdiction of this case. There is no express and direct conflict between the Second District's decision and any other district court's decision on the issue of whether prejudgment interest is available on an award of previously incurred attorney fees. Nor is there any conflict between the Second District and this Court's decision on the use of a multiplier in a partial contingency fee agreement. Consequently, the relief sought in the Petitioner's Jurisdictional Brief should be rejected.

Respectfully submitted,

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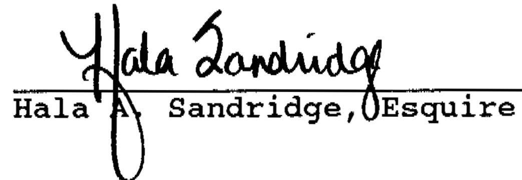
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: LEON WILLIAMSON, JR., Esquire, Post Office Box 18192, Tampa, Florida 33679-8192 on this the 16th day of May, 1994.



Hala A. Sandridge, Esquire