IN THE SUPREME COURT

OF THE STATE OF FLORIDA

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NOV 10 1994
CLERK, SUPREME COURT
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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
REPLY BRIEF AND ANSWER BRIEF**

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STATEMENT OF THE CASE AND THE FACTS

Petitioner/Cross Respondent, Quality Engineered Installation, Inc. (hereinafter "Petitioner" or "Quality"), hereby incorporates by reference its statement of the case and facts set forth in its Initial Brief, and hereby calls attention to certain misstatements of fact set forth in the Statement of the Case and Facts submitted by Respondent/Cross Petitioner in their Answer Brief and Cross-Initial Brief.[1] 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. All references to Petitioner's Appendix will be referred to by "Appendix", followed by the appropriate pleading and page number from the Appendix.

1. In Page 2 of Respondent's Brief, it is stated that the entire $100,000.00 received by Quality was paid to Quality's previous attorney, Stolba. This is incorrect, as Stolba was paid an amount well below $100,000.00 (R. 2511).

2. On Page 3 of Respondents' Initial Brief, Respondents state, "Unbeknownst to the Subcontractor, its newly retained Attorneys had another client that was paying the Attorneys to defend the claim". First, Quality was well aware that its newly retained Attorneys were representing the interests of all of its bond guarantors (actually "indemnitors"), including Mr. Jurado and Mr. Aschi, to whom Quality obviously owed a duty of indemnity. Also, Quality was well aware that Attorney Leon A. Williamson, Jr.

[1]Respondent/Cross Petitioner will hereafter be referred to as "Respondent" or "Respondents".

was employed by Jaime Jurado's company, Electric Machinery Enterprises, Inc., as its General Counsel, and as such received a salary. In fact, Mr. Aschi sought out Mr. Williamson who he knew through his previous associations with Mr. Jurado. (R. 2514) Attorneys McLean and Schecht were advanced funds only for a portion of the hours worked in the arbitration at a reduced hourly rate. (Appendix 4 at 4) Also, it is not true that this arrangement was in place at the time Quality initially retained its attorneys. This arrangement was initiated subsequent to commencement of the arbitration. (R. 2544-2545) It is true that attorneys McLean and Schecht were guaranteed a payment of $26,000.00, regardless of the outcome of the arbitration. There is no evidence that attorney Williamson was guaranteed any payment whatsoever.

Also, there is no evidence in the record, and it is not true, that the payments to attorneys McLean and Schecht were specifically earmarked for defense of Respondents' claim against Quality.

3. On Page 5 of Respondents' Brief, it is stated that Subcontractor moved to confirm the arbitration award and requested the Trial Court award attorneys' fees "...for which entitlement was given by the arbitration award". This statement is true as far as it goes, however, Quality also requested in its motion to the Trial Court attorneys' fees pursuant to Florida Statutes, Section 627.428. (R. 1348-1349)

4. On Page 6 of Respondents' Initial Brief, Respondents state that the Trial Court award included "....any time spent by any attorney representing the Subcontractor." This statement is

incorrect, as the Trial Court did not award attorneys' fees for all hours requested by Quality, but in fact entered an award of attorneys' fees for a number of hours somewhat less than those presented by Quality at the attorneys' fee hearing. (Appendix 1 at 1)

5. Respondents state on Page 6 of their Brief that a multiplier of 2.2 was applied to the lodestar of the Attorneys. Actually, a multiplier of 2.0 was applied to the lodestar. (Appendix 1 at 4)

6. On Page 6, Respondents state that the Second District rejected the use of a multiplier because the attorneys had no risk of non-payment because they were paid $26,000.00 from a bond guarantor. (Emphasis added) This statement, again, is incorrect. The Trial Court actually held that the attorneys were able to mitigate their risk by approximately 90% (Appendix 4 at 10) While Quality asserts that this holding by the Second District is error, since the amount of mitigation should have been determined with reference to the reasonable fee instead of the percentage amount, Respondents' statement that the Second District held that there was "no risk" is false and misleading.

POINTS ON APPEAL

I. Whether the Second District's determination that prejudgment interest is unavailable on an award of attorneys' fees, because attorneys' fees are costs, 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 partially mitigated their risk of non-payment.

IV. Whether attorneys are entitled to fees incurred in this appeal, and for work done otherwise litigating amount of attorneys' fees.

CROSS APPEAL

I. Whether the Second District and the Trial Court erred in ruling that the Trial Court was not required to limit its award of attorneys' fees to time spent preparing and presenting Quality's claim in the arbitration. Whether or not this Court has previously ruled on this issue in this case.

SUMMARY OF THE ARGUMENT

The Second District's decision that an award of interest on the entire amount of the fee was improper is error. Respondents' reliance on this Court's decision in Alvarado v. Rice, 614 So.2d 498 (Fla. 1993), ignores fundamental concepts with respect to attorneys' fees awarded pursuant to statutory provisions. Also, Respondents' argument fails to acknowledge the nature of interest awarded by the Trial Court herein. The Trial Court awarded

interest commencing on the date of the arbitration award, which is analogous to a judgment on the merits had this case been litigated in Court. In Alvarado, the Court addressed prejudgment interest on medical expenses which Plaintiff sought commencing from various dates well before a judgment in the main action, and even before commencement of the action. Also, this Court has held that the intent of Florida Statutes, Section 627.428 is to discourage the contesting of valid insurance claims. Again, the statutory purpose involved herein makes this case, and all cases involving attorneys' fees, fundamentally different from the situation addressed in Alvarado. This Court should affirm the Trial Court's proper award of interest.

In the event that this Court determines that the Trial Court's award of interest was proper, then this Court should decide whether or not post-judgment interest should accrue on the full merged amount of the judgment, including the portion thereof which constitutes interest. Respondents have argued that such a holding would be an improper award of "interest on interest". Quality acknowledges that the majority of the cases have held in Respondents' favor. However, Quality urges that this Court examine carefully the doctrine of merger with respect to final judgments, and adopt the reasoning of the courts which have held that once a judgment is entered, all elements of that judgment are "merged", and the full amount thereof should bear post-judgment interest at the statutory rate.

In applying an enhancement factor of 2.0, the Trial Court

properly construed and applied this Court's decision in Lane v. Head, 566 So.2d 508 (Fla. 1990). Respondents have attempted to mislead this Court with respect to the facts surrounding the attorneys' ability to mitigate their risk. The mitigation does not change or alter the fact that the Trial Court did have discretion to apply a multiplier in this action, so long as a multiplier was adjusted in accordance with this Court's decision in Lane. The Second District's ruling that the attorneys were able to mitigate their risk by 90%, and that such mitigation robbed the Trial Court of its discretion, was error. This Court should affirm the Trial Court's application of the multiplier.

With respect to the Second District's ruling that Quality was not entitled to an award of attorneys' fees for litigating amount of those fees, Quality points out that its attorneys work inured substantially to Quality's benefit, and therefore this Court should consider revisiting its previous decisions in this area.

Finally, Respondents' contention that the Trial Court was somehow limited in its power to award attorneys' fees due to the arbitration award is clearly erroneous. This Court has previously held, in this case, that the arbitration panel has no jurisdiction to determine entitlement to or amount of attorneys' fees. Any decision by the arbitration panel is void, not merely voidable, and of no legal force whatsoever.

ARGUMENT

APPEAL

I.

THE SECOND DISTRICT'S RULING THAT PREJUDGMENT INTEREST IS NOT AVAILABLE ON AN AWARD OF ATTORNEYS' FEES BECAUSE SUCH FEES ARE NOT "LIQUIDATED DAMAGES" WAS ERROR.

In this case, interest should properly accrue on all attorneys' fees awarded in this case from the date of the event which gave rise to Quality's right to those fees, as such fees were "incurred" prior to such date(s).

In their brief, Respondents argue that Quality is not entitled to interest on the attorneys' fee award, as granted by the Trial Court, under this Court's decision in Alvarado v. Rice, 614 So.2d 498 (Fla. 1993). Respondents also argue that a close reading of cases cited by Quality in its initial brief reveal that those cases support application of the Alvarado analysis to an attorney fee award. Respondents' arguments ignore the very nature of interest on attorneys' fees as awarded by the Trial Court and as approved by various District Courts of Appeal. Also, Respondents have misconstrued the meaning of cases cited by Quality in its initial brief in support of the Trial Court's award of interest, and specifically, Respondents have attempted to mislead this Court with regard to the true legal meaning of the word "incurred".

First, Quality disputes Respondents' construction of this Court's decision in Alvarado, and additionally Quality disputes that Alvarado is even applicable to interest relative to attorneys' fees as awarded by the Trial Court in this case and in the other

District Court cases cited below and in Quality's initial brief.

In any event, as admitted by Respondents in their brief, even if Respondents' construction of Alvarado is proper, Quality would be entitled to interest on approximately $29,000.00 of its award, which is the percentage amount which Quality is currently out of pocket. Also, Respondents failed to mention attorneys' fees paid by Quality to its previous attorneys, Louis Stolba and David Ross, for which Quality is out of pocket. Under Respondents' reasoning, Quality obviously would be entitled to interest on these amounts.

With that said, Quality disputes Respondents' construction of Alvarado, and asserts that it is entitled to the interest awarded by the Trial Court on the full amount of the reasonable fee determined by the Trial Court.

In its brief, Respondents fail to point out the fundamental difference of prejudgment interest sought by the Plaintiff (Appellant) in Alvarado and interest awarded by the Trial Court to Quality herein, as well as the various District Courts of Appeal cited below and in Quality's initial brief. In Alvarado, as pointed out by Respondents, the Plaintiff sought prejudgment interest on medical expenses, and asked that the Court accrue such interest from times beginning prior to a decision on the merits of that case. In this case, and in other cases involving the interest on attorneys' fees, courts have awarded interest starting only from a decision on the merits of the case forward until there is a judgment or order liquidating the amount of attorneys' fees due. In actuality, while the interest awarded by the Trial Court was

"pre", the attorneys' fee judgment, it was actually "post" the decision on the merits of the main action.

Quality did not ask the Trial Court to accrue interest from the respective dates that it actually paid attorneys' fees to its attorneys, but only from October 10, 1988, the date of the arbitration award in which Quality was the prevailing party. Likewise, with regard to the reasonable fee determined by the Trial Court for time spent by Quality's attorneys during the arbitration, Quality did not seek interest from the various dates which the attorneys actually performed work, but only from August 10, 1988, the date of the arbitration award in which Quality was the prevailing party. This date, for purposes of interest on those amounts, was the date on which the event occurred giving rise to Quality's right to an award of attorneys' fees from Respondents.

With regard to a reasonable fee as determined by the Trial Court for litigating entitlement to attorneys' fees, the Trial Court awarded interest on those fees incurred prior to the Second District's Order Granting Quality's Motion for Attorneys' Fees on January 12, 1990, from that date forward. (Appendix 1 at 2) For fees for time expended from that date until this Court's previous Order Granting Quality's Motion for Attorneys' Fees on June 11, 1991, the Trial Court awarded interest only from that date forward. (Appendix 1 at 2) The Trial Court by its award of interest from these various dates followed the rulings of the various District Courts of Appeal that interest on attorneys' fees should accrue from the date of the event giving rise to a party's right to

receive those fees on previously incurred fees.

Respondents seek to justify their application of the Alvarado analysis to attorneys' fees by stating that cases cited by Quality in support of its position actually support application of the Alvarado analysis. Frankly, nothing could be further from the truth. As stated by Respondents, Quality relied on Bremshey v. Morrison, 621 So.2d 717 (Fla. 5th DCA 1993), wherein the Fifth District stated that the date of determination of liability for attorneys' fees fixes the date for awarding prejudgment interest "on previously incurred attorneys' fees". Id. at 718 (emphasis added) Quality agrees with this statement. In Bremshey, no interest actually was awarded, since the judgment giving rise to the party's right to fees also set forth the amount of fees. Therefore, there was no time lag for interest to accrue on the previously incurred fees. The Court's opinion makes it clear, however, that had the judgment not set forth the amount of fees, interest would have accrued until a separate judgment or order was entered. The decision is devoid of any evidence that the client was actually out of pocket for fees which the Court awarded. Also, the decision is devoid of any language indicating that such previous actual payment was a requirement, in the Court's opinion, for an award of interest.

As stated by Respondents, the Bremshey Court relied on Inakio v. State Farm Fire & Casualty Co., 550 So.2d 92 (Fla. 1st DCA 1992) and Mason v. Reiter, 564 So.2d 142 (Fla. 3rd DCA 1989). Respondents state that the language in Inakio and Mason suggests

that the attorneys' fees must be "previously incurred" (i.e. paid). Respondents then state that the rules set forth in Inakio and Mason are consistent with this Court's analysis in Alvarado. To a point, Quality agrees with this analysis by Respondents. Specifically, Quality agrees that the First District's decision in Inakio and the Third District's decision in Mason correctly construe this Court's decisions relative to prejudgment interest. The fundamental problem with Respondents' analysis of these decisions is Respondent's assumption that, legally, "incurred" and "paid" are synonymous. Also, as discussed later, Respondents' construction of "a contingency fee agreement" is clearly erroneous and without support.

First, a reading of Inakio, Mason, and Visoly v. Security Pacific Corp., 625 So.2d 1276 (Fla. 3rd DCA 1993), as well as examination of the actual meaning of "incurred" reveals the flaw in Respondents' reasoning. Black's Law Dictionary defines "incurred" as follows:

> "To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to."

There is no reference in this definition to actual payment of a liability. To incur a debt means to be liable for it, not to have already paid it.

In Mason, attorneys' fees were awarded in a paternity action from the date of judgment of paternity, as that date gave rise to the party's right to attorney's fees. The decision is devoid of

any statements setting forth that the party's attorney had actually been paid for work performed prior to that date. The decision is likewise devoid of any statement by the Court in its opinion that such payment was a condition of the right to interest accruing subsequent to the judgment of paternity.

In Visoly, the Third District approved an award of interest accruing subsequent to the date of an order striking pleadings, as such order gave rise to the party's right to attorney's fees under Florida Statutes, Section 57.105. Again, the opinion is devoid of any statement that the attorney was actually paid by the client, out of pocket, prior to the date of the order striking pleadings. Again, likewise, the decision is devoid of any statement that such payment was a condition of the award of interest. It is interesting that in Visoly, the Court states that this Court's decision in Argonaut Insurance Company v. May, 474 So.2d 212 (Fla. 1985) did not bar interest, since Argonaut addressed prejudgment interest on damages awards, and does not address an interest award commencing on the date of final judgment.

Finally, the First District's decision in Inakio by its language clearly indicates that attorneys' fees were not paid by the client prior to the date from which the Court approved accrual of interest on those attorneys' fees. Id. at 97. Inakio, as set forth in Quality's initial brief, involved an attorneys' fee award pursuant to Florida Statutes, Section 627.428, as does the attorneys' fee award in this case. Id. at 92 and 93. Also, Inakio involved an attorneys' fee contract which was virtually identical

to Quality's, and which provided for payment to the attorneys of a percentage amount or the amount of any fees awarded by the Court, whichever amount was greater. The contract further provided that if the Court awarded fee was greater than the percentage amount, that the client would be reimbursed the percentage amount. Id. at 94. Again, as in Bremshey, Visoly, and Mason, the decision is devoid of any statement indicating that fees were actually paid to the attorneys prior to the event which gave rise the client's right to the fee award. In fact, language in the decision indicates precisely the opposite. The First District stated in its opinion, as follows: "...under the terms of the fee agreement, Inakio became obligated to pay his attorneys a fee immediately upon recovery from State Farm when the claim was settled. The attorneys were entitled to withhold up to one-third of that amount as part of their fee". Id. at 97. The obvious implication of this language was that Inakio had not paid any fees prior to the date of the settlement. In any event, the Court held that the fees were "incurred" since the attorneys had actually performed services prior to that date.

Respondents in their brief further seek to justify their interpretation of Inakio, Mason, Bremshey, and Visoly by inventing a legal construction of contingency fee agreements. Respondents state that under contingency fee agreements, no fees are owed by a Plaintiff until the Trial Court renders an award of attorneys' fees. It is interesting that this legal conclusion by Respondents in their brief is not supported by any decisional authority. The

reason for such lack of authority is, obviously, that none exists. In fact, decisional authority for an entirely different construction of the contingency fee agreement between Quality and its attorneys is provided by Inakio. As stated above, the contingency fee agreement in Inakio is virtually identical to the one in this case. As also set forth above, the First District in Inakio construed the legal effect of that attorneys' fee agreement when it stated:

> "Under the terms of the fee agreement, Inakio became obligated to pay his attorneys a fee immediately upon recovery from State Farm when the claim was settled. The attorneys were entitled to withhold up to one-third of that amount as part of their fee. The attorneys' right to receive the fee was fixed at that time, although the ultimate amount of the fee due them remained for later determination by the Court."
>
> Id. at 97

The Third District expressly construed the legal effect of the contingency fee agreement, and the date upon which Inakio became obligated to pay his attorneys. That date was not the date that the Trial Court rendered an award of attorneys' fees, but the date of the settlement in the main action. Id. at 97. With regard to this issue, Inakio is clearly on all fours with the instant case, and under this analysis, Quality became obligated to pay its attorneys the full amount of the reasonable fee on October 10, 1988, the date of the arbitrator's award, or at a minimum, the date that the award was paid by Respondents shortly thereafter.

Based upon the true and logical meaning of the word

"incurred" and the construction implicitly given thereto by the courts in Inakio, Mason, Bremshey, and Visoly, as well as the First District's construction of the attorneys' fee contract in Inakio, it is clear that in the instant case, Quality's fees were "incurred" on October 10, 1988, the date of the arbitration award, or at a minimum, upon payment thereof shortly thereafter.

Respondents also state in their brief that an award of interest on the attorneys' fee award will result in a windfall to Quality if Quality was not actually out of pocket for the full amount of the reasonable fee. Respondents fail to recognize the fundamental difference between attorney fees awarded pursuant to statutory provisions, and the medical expenses which were involved in Alvarado. This Court has previously held that the intent of Florida Statutes, Section 627.428, 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. As set forth in the First District in Inakio, at 97 and 98, to deny interest to Quality would actually bestow upon Respondents (not Quality) a windfall by allowing them interest-free use of the attorneys' fee award during this extensive litigation. Also, such ruling will penalize Quality for Respondents' continuing litigation in this matter. Respondents' good faith or the merit of their defense is irrelevant. Argonaut, at 215.

In conclusion, the Trial Court's award of interest from the date of the decision in the main action was clearly proper, and followed the decisions of the respective District Courts in Inakio,

Mason, Bremshey, and Visoly. The Alvarado analysis is not applicable since Quality is not seeking "prejudgment" interest in the traditional sense, which accrues from dates which damages are incurred prior to a decision in the main action (and in many cases, prior to even filing or commencement of the main action). Quality respectfully requests that this Court quash the Second District's decision which reversed the Trial Court's award of interest on the full amount of the reasonable fee, as well as fees paid to Quality's previous attorneys.

II.

THE SECOND DISTRICT ERRED IN DETERMINING THAT POST JUDGMENT INTEREST DOES NOT ACCRUE ON THE ENTIRE MERGED AMOUNT OF A FINAL JUDGEMENT.

With respect to this issue, Respondents are correct in stating that a majority of cases have held that post-judgement interest should not accrue on the portion of a final judgement which constitutes pre-judgement interest. However, it is Quality's contention that the reasoning of the Fifth District Court of Appeals 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), as well as Judge Altenbernd's reasoning in his specially concurring opinion in Sciandra & Sciandra v. First Union National Bank of Florida, 638 So.2d 1009 (Fla. 2nd DCA 1994) is more compelling. As pointed out by Judge Altenbernd in Sciandra, to fail to award post-judgement interest on the entire amount of the judgement (including pre-

judgement interest) ignores the doctrine of "Merger".

Respondents are also correct in pointing out that this Court has amended form 1.988 of the Florida Rules of Civil Procedure to prevent "interest on interest". However, as pointed out by Judge Altenbernd in Sciandra, the standard form Final Judgement of Foreclosure, Form 1.996 of the Florida Rules of Civil Procedure has not been so amended, and continues to provide for post-judgment interest on the entire judgment amount (including interest).

In conclusion, Quality urges that this Court adopt the reasoning of the Fifth District in Peavy and Indian River, as well as that of Judge Altenbernd in Sciandra, and rule that post-judgement does properly accrue on the full merged amount of a final judgement, including pre-judgement interest.

III.

THE SECOND DISTRICT ERRED IN HOLDING THAT THE ATTORNEYS' MITIGATION OF THEIR RISK ROBBED THE TRIAL COURT OF DISCRETION TO APPLY A MULTIPLIER.

First, Quality agrees with Respondents that the Trial Court was required to follow the principles set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) as modified by Standard Guarantee Insurance Company v. Quanstrum, 555 So.2d 828 (Fla. 1990). However, Quality also points out that in this case, since Quality's attorneys were able partially mitigate the risk of non-payment, the Trial Court also properly considered and applied this Court's decision in Lane v. Head, 566 So.2d 508 (Fla. 1990).

Initially, Respondent's argue that a Trial Court does not have discretion to apply a multiplier unless the attorneys are unable to mitigate, to any extent, their risk. That is, in order for a multiplier to be appropriate, according to Respondents, the attorneys must receive no payment unless they are successful in the action.

This argument by Respondents ignores clear precedent from this Court, as set forth in Lane. As pointed out in Quality's initial brief, in Lane, the attorney was guaranteed $100.00 per hour regardless of whether or not his client prevailed. Id. at 509. This Court held that nonetheless, under a partial contingency fee arrangement as in Lane, a multiplier was within the Trial Court's discretion so long as the contingency factor was modified as provided for in the opinion. Id. at 511. Also, in Lane, this Court defined what it considered to be a "partial contingency-fee arrangement" as follows:

> We use the term "Partial Contingency-Fee Arrangement" to mean those instances in which an attorney is guaranteed a fee that is less than his or her customary reasonable fee if the client loses, but the opportunity for an enhanced fee if the client prevails."
>
> Id. at 509, note 1.

Clearly then, Respondents' assertion with regard to the meaning of this Court's decisions in Rowe and Quanstrum is erroneous.

Next, Respondents argue that the Trial Court had no discretion to apply a multiplier in this case because Quality's

attorneys were able to mitigate their risk of non-payment due to payments received from a client other than Quality. Again, the reasoning is erroneous. Quality has not argued that it had a "partial contingency fee contract" with Quality alone. Obviously, the attorneys were able to partially mitigate their risk of non-payment because of payments received from another client (who Quality was well aware they were representing as well). Again, there is no indication in this Court's decision in Lane that receipt of mitigation payments from a different client robs the Trial Court of discretion to apply a multiplier. Also, there is no indication that this is what the Second District ruled. As stated previously, the Second District's sole expressed reason for overruling the Trial Court's application of a multiplier was its perception that the attorneys had mitigated their risk by 90%. (Appendix 4 at 10).

It should be remembered that Quality, and its President and sole shareholder Mr. Aschi, were both well aware that their attorneys were also representing all bond guarantors (indemnitors). In fact, Mr. Aschi, President of Quality, a corporation, was a co-bond guarantor with Mr. Jurado. All of these parties' interests, obviously, were not adverse. Also, as stated previously, Respondents' statement that the arrangement with Mr. Jurado was already, or previously, in place at the time Quality retained attorneys Williamson, McLean and Schecht, is false. (R. 2544-2545) In fact, approximately three to five weeks into the arbitration, Mr. McLean realized how much time he was going to have to devote to

the arbitration. He approached Mr. Williamson, who in turn approached Mr. Jurado. There was no agreement going into the arbitration, and Mr. Jurado did not pay all bills of attorneys McLean and Schecht. Attorneys McLean and Schecht didn't feel he was responsible for paying all of the bills. (R. 2994-2995)

Again, nothing about this arrangement prevents application of a multiplier, so long as the multiplier is applied in accordance with this Court's opinion in Lane.

Finally, Respondents in their one passing mention of this Court's decision in Lane, attempt to argue that the Trial Court did not follow the mandates of Lane which reduces the enhanced award to correspond to the risk the attorney's actually took. This statement is blatantly false, and ignores the facts of this case. The Trial Court properly recognized that Quality's attorneys' risk should be measured by comparing the guaranteed fee to the reasonable fee. The Trial Court properly excluded the guaranteed payment (or the percentage which the guaranteed payment bore to the reasonable fee) from application of the multiplier. (Appendix 1 at 4) Therefore, the Trial Court's action complied with Lane precisely, and should not have been overruled by the Second District. Quality urges that this Court quash the Second District's decision overruling the Trial Court's application of the multiplier.

IV.

THIS COURT SHOULD REVISIT ITS DECISION RELATIVE TO ATTORNEYS' FEES FOR LITIGATING AMOUNT OF THOSE FEES WHERE THE ATTORNEYS' WORK INURES TO HIS OR HER CLIENT'S BENEFIT.

With regard to this issue, Quality is well aware of this Court's recent ruling in State Farm Fire & Casualty, Co. v. Palma. 629 So.2d (Fla. 1993). This Court's majority stated as their express reason for their ruling as follows:

> However, we do not agree with the district court below that attorney's fees may be awarded for litigating the amount of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgement.

Id. at 833 (emphasis added)

Quality merely points out the obvious fact that the work of its attorneys in litigating amount did not inure solely to its attorneys' benefit. Quality's attorneys did a substantial amount of work proving up a reasonable amount of fees for Quality's previous attorneys Louis Stolba and David Ross. Quality's attorneys were able to procure for Quality's benefit a substantial recovery for fees paid to Stolba, despite the complete absence of itemized time records kept by Attorney Stolba. (R. 3084) Also, in the appeal below and in this appeal, Quality's attorneys have sought to procure for Quality's benefit and award of interest, for a period now in excess of six years, on funds Quality has previously paid to attorneys Stolba and Ross.

Clearly then, work performed by Quality's attorney's on its

behalf have been and are being rendered in procuring full payment of Quality's award against Respondents. Quality respectfully urges that this Court revisit its opinion in Palma, and supplement that opinion to deal with a situation, as here, where an attorney's work in litigating the amount of fees inures to his or her client's benefit.

CROSS APPEAL

I.

THE SECOND DISTRICT PROPERLY RULED THAT THE TRIAL COURT WAS NOT REQUIRED TO CONSIDER THE ARBITRATION AWARD RELATIVE TO ATTORNEYS' FEES.

First, it should be pointed out that this Court has ruled on this issue, in this case. Insurance Company of North America v. Acosti Engineering Company of Florida, Federal Insurance Company v. Parkshore Development Company, Inc., et al., McMerick Construction Company v. Fewox, 579 So.2d 77 (Fla. 1991). (hereinafter "Park Shore 1"). In Park Shore 1, this Court consolidated three cases, including this case, and decided the legal affect of Florida Statutes section 682.11. Previously, the Second District had ruled in Fewox v. Merit Construction Co., 566 So. 2d 419 (Fla. 2d DCA 1990), en banc, that Florida Statutes, Section 682.11 did not prohibit an award of attorney's fees incurred during an arbitration, but merely prohibited the arbitrators from making such an award. This Court affirmed the Second District's decisions in both that case and this case which was decided shortly thereafter, Park Shore Development Co., Inc. et al v. Higley South, Inc. et al, 556 So.2d 439 (Fla. 2nd DCA 1990), and adopted the Second

District's en banc decision as its own. Park Shore 1, at 79 and 80.

In Park Shore 1, this Court held that Quality's attorneys were entitled to be paid for time expended during the arbitration, and this court held that Florida Statutes, Section 682.11 prohibited the arbitrators making any award relative to entitlement or amount of attorneys fees. By its award, the Trial Court was merely following the mandate issued by this Court. Respondents below asked the Trial Court and the Second District to adopt a legal position inconsistent with this Court's previous ruling in this case (Park Shore 1), and that is exactly what Respondents are asking this Court to do now.

It is not clear from Respondents' brief whether or not Respondents are arguing that the Trial Court was prohibited from awarding attorneys' fees for time spent litigating the entitlement to attorneys' fees. Fees were awarded by the Trial Court for time spent by Quality's attorneys before the Trial Court, after the arbitration, as well as before the Second District and this Court previously. Quality points out that the arbitrators could not possibly have intended to limit the Trial Court's power to award fees for time spent after the arbitration proceeding. Also, in awarding fees for time spent by Quality's attorneys before the Second District and this Court, the Trial Court was simply complying with the Second District's order previously granting Quality's Motion for Attorneys' Fees, as well as this Court's order granting Quality's Motion for Attorneys' Fees. (Appendix 5 and 6)

While Quality asserts, as stated herein, that this Court has already ruled on this issue, in this case, since Respondents are making this argument now, Quality will respond to the argument on the merits. In order for Respondents to prevail with regard to this issue, they must prove:

a. That the arbitrators' award actually purports to limit the Trial Courts discretion or power to award fees pursuant to independent statutory authorizations; and

b. The arbitrators' award has any legal significance whatsoever.

First, a reading of the award does not, in any way, indicate an intent by the arbitrators to limit attorneys' fees that the Trial Court was authorized to award pursuant to Florida Statutes, Section 627.428. This is especially true with respect to fees for time spent by attorneys before the Trial Court both before and after the arbitration proceeding, as well as for time before the Second District and this Court. The arbitrators could not possibly have been contemplating work that attorneys did outside of the arbitration proceeding.

Also, it is obvious that the arbitrator's purported award of attorneys' fees is of no legal significance whatsoever, as was ruled by this court in Park Shore 1. Subsequent to the arbitration, Quality moved for an award of attorneys fees pursuant to the arbitrators award, and pursuant to Florida Statute Section 627.428. At that point in time, the law in this area was unsettled, and Quality therefore plead alternative theories for recovery of attorneys fees. As it turned out, Quality's

application for fees under Florida Statute, 627.428 was affirmed by this Court in Park Shore 1. That ruling was final with respect to Quality's attorneys fees during the arbitration and precluded and closed out any argument relative to the arbitrators award. It should be noted that the Respondents did not make this argument relative to the arbitrators' award before this Court previously, in Park Shore 1, although both this Court and Respondents were obviously well aware of the contents of the award.

It is interesting that this issue has been discussed in a recent Florida Bar Journal article authored by counsel for Respondents. Volume LXVIII, No. 10, Florida Bar Journal 80, Recovering Attorney Fees Incurred In Arbitration: The Unworkable Two-Tiered System. It is stated therein as follows:

> The Florida Supreme Court's decision created a two-tied system for determining entitlement to and amount of arbitration attorneys fees. First, a party seeking fees must prevail in arbitration. The prevailing party then must file suit in circuit court to recover the attorney fees it incurred in the arbitration. A trial judge, not the arbitrator, then determines whether the prevailing parties entitled to legal fees and, if so, in what amount. The Florida Supreme Court's decision is based on questionable premises, and the procedure it created is wrought with problems.

Id. at 81. (emphasis added)

As set forth in this article, and above herein, this Court has ruled on this issue. That ruling is now the law of this case. The arbitrators are prohibited from awarding attorneys fees, and their award is null and void and of no legal effect.

The cases cited by Respondents in their brief, when viewed

closely, do not support their argument. Respondents cite Fridman v. Citicorp Real Estate, 596 So.2d 1128 (Fla. 2nd DCA 1992). It is interesting that Respondents would cite a Second District case decided before the Second District's decision below. One would think that the Second District could properly construe their own decisions. It should be noted that in Fridman, the Second District held that an arbitration panel exceeded its authority in awarding attorneys' fees for work performed in preparation for and during arbitration proceedings, as only the Circuit Court had authority to award such fees. Id. at 1128 and 1129. Also, the Second District discussed its decision in Fewox, which decision was adopted by this Court as its own in Park Shore 1 and stated "...this Court's holding in Fewox regarding the limited subject matter jurisdiction of the arbitration...". Id. at 1129 (emphasis added). The Second District confirmed the ruling of Park Shore 1 that arbitration panels lack subject matter jurisdiction relative to attorney's fees. It is axiomatic that where a Court, or other panel or body, makes a ruling with regard to subjects over which they lack subject matter jurisdiction, that such ruling is void, not merely voidable. This distinction was recognized in another case cited by Respondent. Carter v. State Farm Mutual Automobile Insurance Company, 224 So.2d 802 (Fla. 1st DCA 1969). In Carter, the First District held that an arbitration panel's award relative to arbitrators' fees was within their jurisdiction and therefore presumably valid until modified, vacated, or amended in a proper proceeding. Id. at 805. The Court stated that if the arbitrators

committed an error of law that it was not "void ab initio, but merely voidable". Id. at 805. Clearly then, Carter is distinguishable from the instant case, wherein the arbitrators' award was "void ab initio" due to the arbitrators' lack of subject matter jurisdiction, as held by this Court in Park Shore 1. Farmer v. Polen, 423 So.2d 1035 (Fla. 4th DCA 1982), cited by Respondents, involved construction of an employment agreement, a matter obviously within the arbitration panel's subject matter jurisdiction.

Finally, in support of their argument, Respondents state, after arguing throughout this section of their brief that the arbitrators "award" or "decision" was binding on the Trial Court, that they are not arguing that arbitrators may determine issues of entitlement or amount, but that they merely provided "guidance". In order for Respondents' to prevail, this "guidance", must somehow be "binding", or have the same effect as a "decision". Frankly, Respondents cannot have it both ways. Either arbitrators have the power to bind the Trial Court, or they don't. Obviously, this Court has ruled on this issue, and the arbitrators have no subject matter jurisdiction to bind or "guide" the Trial Court relative to entitlement or amount of attorneys fees.

In conclusion, there is no evidence that the arbitrators intended to limit the Trial Court's power to award attorneys fees, as it saw fit, pursuant to Florida Statutes, Section 627.428. Additionally, there is no question that, in this case, this Court has ruled on this issue and has held that the Trial Judge is the

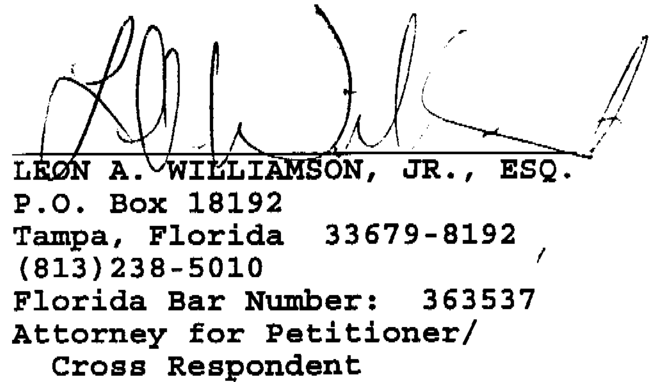
proper party determine a reasonable amount of attorneys fees. The Trial Court followed this Court's mandate in doing so. The Second District's decision on this issue was proper.

CONCLUSION

In conclusion, Quality respectfully requests that this Court quash the Second District's decision overruling the Trial Court's award of interest to Quality. Additionally, Quality respectfully requests that this Court decide the issue of whether or not post-judgment interest properly accrues on the full amount of a judgment, including the portion thereof which constitutes interest. Quality urges that this Court consider the doctrine of "merger" and hold that post-judgment interest accrues on the full amount of a judgment, including interest. Quality further requests that this Court quash the Second District's decision overruling the Trial Court's application of a multiplier, and to affirm the Trial Court's award thereof. Quality requests that this Court revisit its decision relative to the propriety of an award of attorneys' fees for litigating the amount of attorneys' fees, wherein attorney's work inures to his or her client's benefit. Quality requests that this Court quash the Second District's ruling that Quality was not entitled to an award of attorneys' fees for time spent litigating amount of attorneys' fees. Finally, Quality requests that this Court affirm the Second District's ruling that the Trial Court was not limited in any way by the arbitration award, as this Court has previously ruled on that issue in this

Case.

Respectfully submitted.



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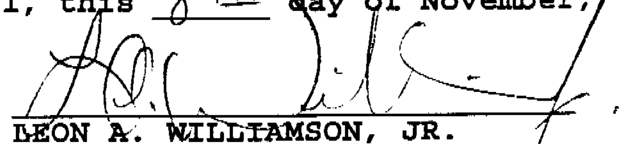
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hala A. Sandridge, Esq., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, Florida 33601, this 8th day of November, 1994.



LEON A. WILLIAMSON, JR.