

ORIGINAL

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,821

5 DCA CASE NO. 96-03182

PATRICIA SEIFERT, as Personal
Representative of the Estate of
Ernest Seifert, Deceased, for the
benefit of PATRICIA SEIFERT,
surviving spouse,

Petitioner,

v.

U.S. HOME CORPORATION and
WOODY TUCKER PLUMBING, INC.,

Respondents.

FILED

SID J. WHITE

NOV 13 1997

CLERK, SUPREME COURT
By: *[Signature]*
Chief Deputy Clerk

PETITIONER SEIFERT'S BRIEF ON JURISDICTION

POSES & HALPERN, P.A.
2626 Museum Tower
150 West Flagler Street
Miami, FL 33130
Telephone: (305) 577-0200

COOPER & WOLFE, P.A.
200 South Biscayne Boulevard
Suite 3580
Miami, FL 33131-2316
Telephone: (305) 371-1597

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INTRODUCTION

Plaintiff/Petitioner PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse, will be referred to as she stands before this Court, as she stood before the trial court and by name. Defendants/Respondents U.S. HOME CORPORATION and WOODY TUCKER PLUMBING, INC. will be referred to as they stand before this Court, as they stood before the trial court and as U.S. Home and Woody Tucker.

"A" refers to the appendix attached to this brief which contains the Fifth District's decision in this case, its decision in the case on which it relied and the Fourth District decision that is the basis for conflict jurisdiction. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Seifert requests this Court to take jurisdiction of the Fifth District's decision in this case because it conflicts with the decision of the Fourth District Court Appeal's decision in Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). (A. 5). The issue in these cases is whether a consumer who purchases a product or a service or even a home pursuant to a contract that includes an arbitration clause is required to arbitrate a personal injury or wrongful death claim caused by a defect in the product or service where no one claims that personal injury or wrongful death was ever contemplated when the consumer signed the contract. The Fourth District held in Michaels such a contract does not bar a personal injury claim. The Fifth District held in this case, and in the case of Terminix Int'l Co., L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997) (A. 9), that such a contract does bar a personal injury or wrongful death claim.

The Fifth District recited the relevant facts of this case in its opinion.

Appellees sued appellant alleging the creation of a dangerous condition, negligent manufacture and other claims regarding the placement and function of the air conditioning system. Appellees alleged that the decedent (husband of plaintiff) left his automobile running in the garage and the air conditioning system picked up the carbon monoxide emissions from the car, sent them through the house and thus killed the decedent.

(A. 2). The contract pursuant to which the Seifert's had purchased their home contained an arbitration clause which stated:

ARBITRATION. Any controversy or claim arising under or related to this Agreement or to the Property (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. Section 2301 et. seq., and the regulations promulgated under that Act) or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative, shall be settled and finally determined by mediation or by binding arbitration as provided by the Federal Arbitration Act (9 U.S.C., §§

1-14) and similar state statutes and not by a court of law.

(A. 1).^{1/}

The Fifth District summarily relied on the decision it had just issued in Ponzio. It held the parties had agreed to arbitrate such disputes and the trial court erred in refusing to require arbitration. It then concluded: "But see Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996)." (A. 3).

Judge Sharp concurred specially - she was bound by the prior decision in Ponzio, but would otherwise have followed the Fourth District's decision in Michaels.

However, I personally prefer the rule stated in [Michaels]. It is particularly appropriate in this case because the construction contract which provides for arbitration is a typical contract of "adhesion": the party being "bound" did not prepare the fine print and is in no position to bargain about it.

In such a context an agreement to arbitrate about contract disputes should not include issues beyond the subject matter of the contract, such as tort claims involving personal injuries, unless an interpretation of the contract is involved. In this case, the contract specified arbitration of issues concerning the "property." There is no indication here that the deceased/owner/signor of the contract intended to be bound to arbitrate wrongful death claims. Further, it is not clear to me that all the possible beneficiaries of the decedent's wrongful death claim should be bound by the decedent's contract.

(A. 4). Seifert asked the court to certify conflict. It denied the motion. Seifert sought review in this Court.

^{1/} Woody Tucker was the subcontractor who installed the air conditioning system. He was not a party to the agreement. He joined in Seifert's opposition to the motion to compel arbitration.

SUMMARY OF ARGUMENT

The Fifth District opinion in this case recognized that it conflicted with the Fourth District's decision in Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996), by citing it as "but see" and by relying on a recent Fifth District decision which also recognized such conflict. This Court should exercise its discretion and take jurisdiction of this case.

The question here is an important one. Should companies that sell products or services to consumers in this state be allowed to place arbitration clauses in commercial contracts which are later applied to require arbitration of claims for personal injury or wrongful death when the consumer obviously never contemplated such a result at the time he or she signed the contract. This is a narrow issue. It does not deal with torts generally, nor does it include commercial torts. The issue only concerns the alleged agreement to arbitrate personal injury or wrongful death claims.

Tort claims for bodily injuries relate to breach of a duty to use reasonable care, a duty imposed by law and owed to any person foreseeably injured by the breach, not just parties to the contract. Such claims arise from matters that the parties to the contract did not contemplate at the time of contracting. If a party to a contract could not sue for bodily injury damages under the contract, then neither could that party force arbitration of a claim for such damages.

No reasonable person could conclude that a new home purchaser contemplated potential bodily injury damages arising out of the sales contract or the property. Thus, no reasonable person could conclude that the home purchaser agreed in advance to arbitrate such a bodily injury claim. This Court should take jurisdiction and determine that adhesion contracts such as the one the Seiferts signed cannot be construed to require arbitration of this wrongful death claim.

ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S DECISION IN Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996).

The Fifth District held that Seifert had to arbitrate her claim for the wrongful death of her husband caused by a defective air conditioning unit in the house U.S. Home built for them because the purchase contract for the house contained an arbitration clause. It concluded its opinion with a "But see" citation to the Fourth District's decision in Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). A Uniform System of Citation (14th ed. 1986)[Blue Book] specifically defines the signal "but see" as

Cited authority directly contradicts the proposition. "But see" is used where "see" would be used for support.

Thus, the opinion recognizes the conflict on its face.^{2/}

Review of the opinion in this case, and the decision on which it relies, also demonstrates the conflict. The Fifth District wrote only a brief opinion here: it recited the basic facts of this case and stated its two sentence holding. It relied on a decision in another case that it had just issued in which it extensively analyzed the question of whether an arbitration provision in a sales or service contract could include a tort claim. Terminix Int'l Co., L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997). Ponzio also recognized that it conflicted with the Fourth District's decision in Michaels. The Fifth District's citation to Ponzio also supports this Court's exercise of jurisdiction. See Jollie v. State, 405 So.2d 418 (Fla.1981).

There are good reasons for this Court to exercise its discretion and take jurisdiction of this

^{2/} Seifert concedes that the Fifth District here denied her motion to certify conflict. Perhaps the court did so because the certification would have been redundant in light of this citation.

case, in addition to the obvious conflict. There appears to be only one other case in the country that rules on the applicability of a contractual arbitration clause to a claim for bodily injury. It, too, holds that the clause does not apply. Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz.Ct.App. 1990). This holding is consistent with the analysis in comparable cases from many jurisdictions. E.g., Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984)(despite extremely broad arbitration clause for "any" dispute arising during execution of charter party, claims for conversion and wrongful attachment not subject to arbitration); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Union, 359 F.2d 598, 601 (2d Cir. 1966)(to come within arbitration clause, dispute must at least raise some question that requires reference to contract); Greenwood v. Sherfield, 895 S.W.2d 169 (Mo.App.Ct. 1995)(for tort claim to arise out of or relate to particular contract, and so be subject to arbitration clause, claim must raise issue which requires reference to contract); Merrill Lynch Pierce Fenner & Smith, Inc. v. Wilson, 805 S.W.2d 38, 39 (Tex.App.Ct. 1991)(to determine whether tort claim arises from contract, test is whether the particular tort claim is so interwoven with contract that it could not stand alone); McMahon v. RMS Electronics, Inc., 618 F.Supp. 189 (S.D.N.Y. 1985)(where tort claim does not require interpretation of underlying contract, arbitration of claim not required).

A homeowner might anticipate disputes with her contractor for shoddy workmanship, building inspection failures and delays. Cf. Insignia Homes, Inc. v. Hinden, 675 So.2d 673, 674 (Fla. 4th DCA 1996)(homeowner would expect these types of controversies to "arise under" or "relate to" the property and so be subject to arbitration). But it is highly improbable that such a home purchaser would contemplate that in signing a sales agreement with an arbitration clause, she would be waiving her right to litigate future claims for bodily injury or death in a court of law.

Many commentators and courts are of the opinion that arbitration generally is not the best method to resolve serious personal injury claims. 1 *Alternative Dispute Resolution in Florida* § 3.7 (Fla. Bar. 2d ed. 1995). There are historical reasons for this view. Merchants began the practice of settling disputes through arbitration rather than litigation. Id. They found they were able to avoid the uncertainties of a legal system unfamiliar with their specialized business problems by empowering a fellow merchant with similar experience and training to resolve commercial disputes. In this manner arbitration could provide what the judicial system could not - experts in the subject matter, familiar with industry customs, who are therefore highly qualified to fashion appropriate remedies. For this reason, arbitration is well suited to fit the needs of parties involved in disputes of a commercial or technical nature. It provides certain advantages over a judicial system composed of trial judges and lay persons who lack the arbitrators' training and expertise. Id.

By contrast, the judicial system, with its discovery process, procedural safeguards and full appellate review, is the more appropriate forum if the dispute involves resolution of substantial legal questions, or deals with factual situations commonly resolved by jurors. Id. at § 3.9. See also Armada Coal Export, Inc., 726 F.2d at 1568 (tort claims are more appropriately resolved by judges skilled in such matters rather than arbitrators who are trained to resolve contract disputes.

Seifert's suit presents legal issues which should be determined by a judge and subject to full appellate review.^{3/} Her lawsuit involves factual situations and factual issues, such as the scope of

^{3/} A perfect example of the appropriateness of appellate review is the order in this case that dismissed the strict liability and implied warranty claims. The trial court dismissed the count for strict liability because no Florida case has yet adopted that theory as applied to the sale of a new home. The trial court ruled that only contract damages could be recovered on the implied warranty claim. There is a split in the district courts of appeal on this issue. Compare Elizabeth N. v.
(continued...)

wrongful death damages, which are commonly submitted to jurors. Although arbitration may be an appropriate method for resolving controversies over contract damages, a wrongful death claim is better suited to formal legal proceedings with full judicial processes and safeguards.

CONCLUSION

For the foregoing reasons, Appellee PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse, respectfully requests this Court to take jurisdiction in this case.

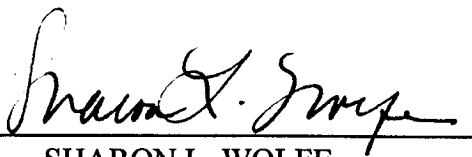
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 12th day of November, 1997, to: Fredric S. Zinober, Esq., Counsel for U.S. Home, 2655 McCormick Drive, Clearwater, FL 34619; and Joseph T. Patsko, Esq., Counsel for Woody Tucker, 300 South Hyde Park Avenue, Tampa, FL 33601.

Respectfully submitted,

POSES & HALPERN, P.A.
2626 Museum Tower
150 West Flagler Street
Miami, FL 33130
Telephone: (305) 577-0200

COOPER & WOLFE, P.A.
200 South Biscayne Boulevard, Suite 3580
Miami, FL 33131-2316
Telephone: (305) 371-1597

By: 
SHARON L. WOLFE
Fla. Bar No. 222291

^{3/} (...continued)

Riverside Group, Inc., 585 So.2d 376 (Fla. 1st DCA 1991)(citing cases from around the country which allow tort damages) with Lockrane Eng'g, Inc. v. Willingham Real Growth Investment Fund Ltd., 552 So.2d 228 (Fla. 5th DCA 1986)(limiting implied warranty claim to contract damages). Seifert is entitled to have a court, not a panel of merchants, decide such issues.