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IN THE SUPREME COURT
STATE OF FLORIDA

91,821

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

Petitioner,

vs.

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

Respondent.
_____/

Fifth DCA Case No.: 96-03182

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RESPONDENT, U.S. HOME CORPORATION'S AMENDED ANSWER BRIEF ON JURISDICTION

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INTRODUCTION

Respondent, U. S. HOME CORPORATION will be referred to, throughout this brief, as U. S. HOME CORPORATION, U. S. HOME, or Respondent. 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 PATRICIA A. SEIFERT, SEIFERT, Petitioner, or Plaintiff. Woody Tucker Plumbing, Inc., although a Defendant in this case, is not a party to this appeal, nor was Woody Tucker a party to the appeal in the Fifth District Court of Appeals. Woody Tucker is identified on the title page, solely because the Petitioner identified Woody Tucker Plumbing, Inc. in its original caption. Woody Tucker shall be referred to solely, in lower case, as Woody Tucker.

Pursuant to Rule 9.220, an appendix has been attached to provide the court with copies of such portions of the record in the trial and appellate court which, U. S. HOME believes, is necessary to an understanding of the issues presented.

STATEMENT OF THE CASE AND FACTS

On July 21, 1994, ERNEST R. and PATRICIA A. SEIFERT entered into a Sales Agreement with U.S. HOME CORPORATION for the construction of a new home at 2135 Terrace View Lane, Timber Pines Subdivision, Spring Hill, Hernando County, Florida. Among other provisions, the Agreement contained an arbitration clause which is recited in Statement of Facts in Seifert's Jurisdictional brief. The bizarre circumstances giving rise to the Plaintiff's claim are set forth in the Fifth District's decision, which is also recited in Respondent's brief. The primary fact omitted from that recitation, however, is that Mr. Seifert closed the garage door while leaving his car running, which obviously caused the garage to fill with carbon monoxide.

Relying upon the Sales Agreement's arbitration clause which clearly requires arbitration for "any controversy or claim arising under or related to this Agreement or to the Property," U.S. HOME brought a Motion to Stay and Compel Arbitration. Following the hearing before the Circuit Court for the Fifth Judicial Circuit in and for Hernando County, on October 7, 1996, the trial court denied U.S. HOME's Motion to Stay and Compel Arbitration. U.S. HOME then filed a timely appeal of the trial court's non-final order pursuant Rule 9.103, Florida Rules of Appellate Procedure.

On September 19, 1997, in U.S. Home Corporation v. Seifert, 699 So.2d 787 (Fla. 5th DCA 1997), the Fifth District Court of Appeals found that, since the issues raised by SEIFERT arose under or were related to the Sales Agreement "or to the property," the Arbitration Clause in this particular case encompassed the issues raised by the lawsuit. Accordingly, the Court ruled that the trial court erred in refusing to require arbitration, and remanded the cause for an order compelling the same. On September 25, 1997, the Petitioner moved the Fifth District Court of Appeals to certify that a conflict existed between the Court's decision in the instant case and the Fourth District Court of Appeals' decision in Terminix International Company, L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). On October 3, 1997, the Fifth District Court of Appeals denied the Petitioner's request for such a certification.

SUMMARY OF ARGUMENT

Unlike the Plaintiff's definition of the issue to be addressed by the court at this time, the consideration before the court is narrow, and is limited only to whether or not the Florida Fifth District Court of Appeals' decision in the case below "expressly and directly conflict[s] with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." Rule 9.030(a)(2)(A)(iv), Fla.R.App.Proc. A review of the lower court's decision in U. S. Home Corporation v. Seifert, 699 So.2d 787 (Fla. 5th DCA 1997) demonstrates no express conflict with the Fourth District Court of Appeals' decision in Terminix International Co. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996), as asserted by the Plaintiff, in that the District Court expressly *declined* to certify a conflict with the Fourth District Court of Appeals, upon SEIFERT'S request.

Moreover, the Fifth District Court of Appeals' decision in this case does not directly conflict with the decision of the Fourth District Court of Appeals in Michaels, in that the decisions are concretely distinguishable in at least three significant matters. First, the scope of the arbitration clause in Michaels, the determining factor in any analysis of the arbitrability of a claim, is much narrower than the arbitration clause addressed in the case at hand. Secondly, the relationship and legal duties created by that relationship differed markedly in Michaels and this case. Finally, the arbitration clause in this case has clearly invoked the Federal Arbitration Act, another factor glaringly absent in Michaels. Thus, the facts of Michaels clearly are distinguishable from those at bar, and the Fifth District's opinion neither expressly nor directly conflicts with the Fourth District in Michaels.

ARGUMENT

Although, in its brief on jurisdiction, SEIFERT attempts to reach far beyond the issue of jurisdiction, and improperly argues the merits of her cause, this Court need *only* be concerned, at this time, with the narrow question of whether or not SEIFERT has adequately demonstrated a jurisdictional basis for the Court to review the Fifth District Court's decision. See, generally, Griffin v. State, 367 So.2d 736 (Fla. 4th DCA 1979). In order to confer such "conflict certiorari" jurisdiction on this Court, the Florida Rules of Appellate Procedure require SEIFERT to establish that the decision of the District Court "expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law." Rule 9.030(a)(2)(A)(iv), Fla.R.App.Proc. Although SEIFERT'S Brief is permeated with policy arguments in effort to persuade this court that the District Court of Appeals should have reached a different conclusion, she has completely avoided any analysis of the jurisdictional requirements set forth under the Florida Rules of Appellate Procedure. The simple explanation for SEIFERT'S omission, in this regard, is that no credible argument can be advanced to support the existence of an *express* and *direct* conflict.

In the face of an express denial of SEIFERT'S request that the Fifth District Court of Appeals certify a conflict with the Fourth District's decision in Michaels, SEIFERT relies, as full support for her conclusion that "the opinion recognizes the conflict on its face," upon a signal from the Fourteenth Edition of the Uniform System of Citation, commonly known as the "Bluebook." Setting aside the flaws in the Plaintiff's "Bluebook" argument[1], a simply, cursory review of the Court of Appeals' decision demonstrates that the Fifth District Court of Appeals

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[1] The first flaw in Plaintiff's argument is that the Fourteenth Edition of the Bluebook, cited by the Plaintiff, has been superseded by the Fifteenth Edition which defines the "but see" signal as only alerting the reader that another case supports a contrary "proposition," lessening the effect of this signal. Moreover, to the extent that SEIFERT'S "Bluebook" argument has any significance, whatsoever, the Bluebook identifies a more pronounced "signal that indicates contradiction" than "but see": the signal "*contra.*" Finally, and most significantly, use of Bluebook direction signals as sole support for a party's primary position is misplaced and unprecedented.

properly refused SEIFERT'S request to "express" a conflict through its certification. Indeed, even in the Fifth District Court of Appeals decision upon which the SEIFERT case was based, Terminix International Co. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997), a case obviously with facts more akin to Michaels, neither expressly nor directly conflicted with the Fourth District Court of Appeals' decision in Michaels. Rather, in Ponzio, another case in which Terminix invoked its arbitration clause, this time successfully, in connection with its pest control service contract, the Fifth District Court of Appeals distinguished Michaels in two respects, and identified a third distinguishing characteristic, absent in that case, which clearly exists in the case at bar. As will be discussed below, these factors which distinguished Michaels from Ponzio are considerably more profound in the case at bar, thereby precluding any analysis which could culminate in a conclusion that the Fifth District Court of Appeal's decision in this case either expressly or directly conflicts with that of the Fourth District Court of Appeals in Michaels.

A. *The scope of the arbitration clause in Michaels is much narrower than the contract at issue in the case at bar.*

As this court has clearly pronounced, arbitration is a favored means of dispute resolution, and the court should "indulge every reasonable presumption to uphold proceedings resulting in an award." Roe v. Amica Mutual Insurance Co., 533 So.2d 279, 280 (Fla. 1988). With this principle in mind, this Court, as did the Fifth District Court of Appeals in Ponzio, should begin its analysis by comparing the respective arbitration clauses to determine if a true "express and direct conflict" exists between the lower Court's decision in this case and the Fourth District Court of Appeals' decision in Michaels. In that case, the defendant corporation disseminated pesticide chemicals in the home of the plaintiff. When the plaintiff attempted to sue Terminix for injuries suffered from the chemicals, the corporation invoked an arbitration clause which set forth as follows:

> The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to *the interpretation,*

> *performance, or breach of any provision* of this agreement shall be settled exclusively by arbitration.

Michaels, 668 So.2d at 1014 (emphasis supplied). In that case, the court found, specifically, that the "personal injury claim did not relate to interpretation, performance or breach of any *provision* of the agreement." Id. at 1015 (emphasis in original). Accordingly, the court found that the facts alleged as the basis of Michaels' claim did not pertain to the specific language of the agreement, and, therefore, should be excluded.

In Ponzio, the Fifth District Court of Appeals distinguished Michaels, first, on the basis that the arbitration provision in Terminix's contract with a different customer was narrower than the provision recited in Michaels. In Ponzio, the court examined an arbitration clause which provided in part as follows:

> The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to *this agreement* shall be settled exclusively by arbitration.

Ponzio, 693 So.2d at 105 (emphasis supplied). Thus, in examining an arbitration clause which no longer contained the limiting language: "the interpretation, performance, or breach of any provision" of the argument, the court believed that Terminix had sufficiently broadened the parameters of their arbitration clause to encompass Ponzio's claim.

By contrast, U. S. HOME'S arbitration clause, recited above, is far broader than even the clause set forth in Ponzio. Like the Ponzio arbitration clause, U. S. HOME'S arbitration provision applies not just to any controversy or claim "arising out of or relating to the interpretation, performance, or breach of any provision of this agreement," as was the case in Michaels, but also any claim arising out of or relating to "this Agreement." Furthermore, U. S. HOME'S arbitration provision expands the scope of the arbitration clause one giant step further by broadening its clause to also include *any* claim or controversy relating to the "property." Thus, even beyond Ponzio, the arbitration clause at issue makes abundantly clear that any claim

relating, in *any* manner, either to the agreement or to the *property*, whether based in contract, tort, or any other claim, is subject to arbitration.

B. *The relationship and legal duties created by the relationship differed markedly in the Michaels and Seifert cases.*

In Ponzio, the Fifth District Court of Appeals noted, as the second distinguishing factor from Michaels, the relationship between the parties and the legal duties created by that relationship. As addressed by Ponzio, "Michaels dealt with the common law duty to warn and not simply a duty imposed by the contract." Ponzio, supra, at 108. Thus, in Michaels, the plaintiffs sued Terminix based upon the failure to warn them of the dangerous and ultra-hazardous nature of the pesticide chemicals which it disseminated throughout the house. The court explained as follows:

> In the instant case, the appellees alleged that their injuries occurred because of the appellants' failure to warn them of the dangerous nature of the chemicals which it used. The appellees allege both negligence and strict liability *based upon the ultrahazardous nature of the chemicals.* Therefore, the duty owed was a general duty imposed on the producer and distributor of hazardous chemicals, not one imposed by contract.

Id. at 1015 (emphasis supplied).

By stark contrast, SEIFERT has brought her action based upon allegations that the home bought by the SEIFERTS, pursuant to the Sales Contract, contained an air conditioner that was defectively manufactured, defectively installed, or never should have been installed in the garage at all. Accordingly, any duty owed by U.S. HOME to the SEIFERTS was not based upon any duty "imposed by law in recognition of public policy and generally owed to others besides the contracting parties," id., but, instead, was based purely upon obligations growing from the contract between U.S. HOME and the SEIFERTS in which U.S. HOME built and supplied a house for the Plaintiff. Therefore, in light of the allegations of the Complaint, any duty owed by U.S. HOME to the SEIFERTS, even from the Plaintiff's perspective, clearly is not a duty implied by law, "controlled by common law tort principles of products liability." Id.

In contrast to the factual scenario in Michaels, this Court has already determined that the type of action under which SEIFERT brings her Complaint is one in which strict liability principles do not apply. Essentially, SEIFERT alleges no more than U.S. HOME has breached its obligation by providing real estate which was defective. This Court, however, has long recognized that strict and products liability principles simply do not apply to structural improvements to real estate. See Easterday v. Masiello, 518 So.2d 260 (Fla. 1988). As noted by SEIFERT in her Jurisdictional Brief, the lower court has already determined that this case comes under this well recognized law, and has dismissed the Plaintiff's count based upon strict liability.

The fact that the Michaels decision is distinguishable, rather than expressly and directly conflicting, from the Fifth District Court of Appeals' decision in this case is perhaps best demonstrated by the Fourth District Court of Appeals' own later explanation of Michaels. In a case decided ten (10) months after Michaels, Advantage Dental Health Plans Inc. v. Beneficial Administrators Inc., 683 So.2d 1133 (Fla. 4th DCA 1996), the trial court had refused to compel arbitration based upon the same grounds alleged by SEIFERT in this case: the contract's arbitration clause did not expressly exclude the plaintiff's claim from the scope of the provision. Citing this Court's decision in Roe v. Amica Mutual Insurance Co., supra, as well as federal law, the Fourth District recognized that the rule is exactly opposite from the conclusion reached by that court, in that "all doubts as to the scope of the arbitration agreement are to be resolved in favor of arbitration rather than against it." Id. at 1134. Based upon this rationale, the Fourth District reversed the trial court's refusal to compel arbitration.

Significantly, in a footnote, the Fourth District Court of Appeals explained the apparent inconsistency between its decision in Advantage and its rationale in Michaels, as follows:

> The decision in *Terminix International Co. v. Michaels*, 668 So.2d 1013 (Fla. 4th DCA), *rev. denied*, 679 So.2d 774 (1996), is distinguishable. It merely holds that there is contractual ambiguity in the arbitration provision and that the strict liability claim did not

> "arise out of or relate to the interpretation, performance, or breach of any provision" of the contract. *The opinion should be narrowly read and applied.*

Id. at 1134 n.1 (emphasis supplied). Thus, as the Fourth District Court of Appeals, *itself*, makes clear, Michaels "should be narrowly read and applied," to apply *only* to a claim based upon strict liability which is unambiguously excluded from the contract. Inasmuch as none of those attributes apply to the facts in this case, this court should have little difficulty determining that the narrow holding of Michaels clearly does not "expressly and directly conflict" with the Fifth District Court of Appeal's decision in SEIFERT.

C. *Unlike Michaels, The Federal Arbitration Act also requires arbitration in Seifert.*

In Ponzio, the Fifth District Court of Appeals also noted that a third factor, if the facts were present to support it, could also be used to distinguish Michaels. Terminix argued, in Ponzio, that an additional point of distinction from the Michaels case could be found in the Fourth District Court of Appeals' failure to reference any federal authority which, as set forth in the recently decided United States Supreme Court case of Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S.265 (1995), would require a referral to arbitration. The Fifth District Court of Appeals noted that, once the Federal Arbitration Act is invoked, a strong federal policy applies that favors the enforceability of arbitration provisions and interprets them broadly. Under federal law, in this regard, the court must resolve any doubts concerning the arbitrability of any dispute in favor of arbitration. Id. at 108 (citing Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., 683 So.2d 1133 (Fla. 4th DCA 1996)); see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S.1 (1983).

Although the Fifth District Court of Appeals, in Ponzio, eventually found Michaels distinguishable for the reasons set forth above, the court noted that Terminix's argument, in this regard, was unavailing for the simple reason that the parties, in Ponzio, failed to develop any record relative to the applicability of the Federal Arbitration Act. Id. at 1106. Certainly, a

cursory examination of the arbitration clauses in either Ponzio or Michaels reveals no reference, whatsoever, to the federal statute. By contrast, however, the case at bar even features this characteristic, which further distinguishes this case from Michaels. Not only does the U. S. HOME arbitration provision prominently reference the fact that its agreement is governed by the Federal Arbitration Act, but additionally, U. S. HOME'S motion to compel arbitration unambiguously references the federal statute in support of its position.

As noted in U. S. HOME'S brief to the Fifth District Court of Appeals, should this court follow the construction suggested by SEIFERT, in the case at hand, its decision would be in conflict, and therefore be preempted, under federal law, in that the United States Supreme Court has held that the Federal Arbitration Act specifically precludes any construction of state law which runs counter to the broad provisions of the Federal Arbitration Act. See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S.265 (1995); Southland Corporation v. Keating, 461 U.S.1 (1984). Clearly, however, this court has no need to render any decision which contravenes federal law, in that both forums consistently favor arbitration, resolve all doubts in favor of the same, and *only* exclude, from the parameters of a valid arbitration clause, those claims which are *expressly* excluded. See Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., supra; Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986). Despite the Plaintiff's protestations to the contrary, this general proposition applies to tort claims under both state and federal law, as well. See, generally, McGinnis v. E. F. Hutton and Company, Inc., 812 F.2d 1011 (6th Cir. 1987); Gregory v. Electromechanical Corporation, 83 F.3d 382 (11th Cir. 1996); Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, Ltd., 1 F.3d 639 (7th Cir. 1993); Bachus and Stratton, Inc. v. Mann, 639 So.2d 35 (Fla. 4th DCA 1994). Therefore, any construction of Michaels beyond its narrow limitation to the facts of that particular case, which involved: a) a strict liability claim; b) a contract with a narrow arbitration clause; and c) no invocation of the broad federal policy favoring arbitration, is clearly unwarranted.

CONCLUSION

For the foregoing reasons, Respondent, U. S. HOME CORPORATION, respectfully requests this Court deny jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jay Halpern, Esquire, Poses & Halpern, P.A., 150 West Flagler Street, Suite 2626, Miami, FL 33130; Joseph T. Patsko, Esquire, P. O. Box 2151, Tampa, FL 33601; Sharon Wolfe, Esquire, Cooper & Wolfe, P.A., 200 South Biscayne Blvd., Suite 3580, Miami, FL 33131-2316; Frank A. Lane, Esquire, Lane, Reese, Aulick, Summers & Field, P.A., Douglas Centre, Suite 304, 2600 Douglas Road, Coral Gables, FL 33134; this 10th day of December, 1997.

Respectfully submitted,

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