IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: SC05-1417
LOWER TRIBUNAL NO.: 5D05-651

O'KEEFE ARCHITECTS, INC.

Petitioner,

v.

CED CONSTRUCTION
PARTNERS, LTD., ET AL.

Respondents.

INITIAL BRIEF OF PETITIONER

On Certification of Conflict by the
Fifth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Because this is a discretionary proceeding pursuant to Rule 9.120, Fla.R.App.P., the record will be transmitted after Petitioner's initial brief on the merits is served. The facts referred to herein are not in dispute, and are supported by the documents and pleadings attached in the Appendix in accordance with Rules 9.120(f) and 9.220, Fla.R.App.P.

This case involves claims arising from two standard-form AIA agreements entered into between an architect, O'Keefe Architects, Inc. (hereinafter, "O'Keefe") and two owners, Vero Club Partners, Ltd., and Clearwater Phase I Partners, Ltd. On August 30, 1997, O'Keefe signed a contract with Vero Club Partners, Ltd. (hereinafter, "Vero Club") for the construction of a 184-unit senior housing project (hereinafter, "Vero Project"). A copy of the agreement between O'Keefe and Vero Club is attached as Exhibit "A" to Appendix 7. On January 7, 1999, O'Keefe entered into a virtually identical agreement with Clearwater Phase I Partners Ltd. (hereinafter, "Phase I") to construct a 240-unit senior housing project to be located in Clearwater, Florida (hereinafter, "Renaissance Project"). A copy of the agreement between O'Keefe and Phase I is attached as Exhibit B to Appendix 7.

A certificate of substantial completion was issued for the Vero Project on June 2, 2000. The Renaissance Project was substantially completed in February 2001.

Both contracts forbid consolidation of arbitrations and assignment of claims. The precise language in the contracts is set forth below:

> 7.3 No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute, or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.
>
> * * *
>
> 9.5 The Owner and Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither Owner nor Architect shall assign this Agreement without the written consent of the other.
>
> * * *
>
> 9.7 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

Despite the prohibition on assignment in both agreements, Vero Club and Phase I assigned their contract rights on both projects to the general contractor on both projects, CED Construction Partners, Ltd. (hereinafter, "CED") (Exhibit B to Appendix 8).[1] On the same date the assignments were made, CED, on its own behalf and as assignee of the owners, filed a demand for arbitration against O'Keefe and several subcontractors (Appendix 1) with the American Arbitration Association (hereinafter, "AAA") for damages purportedly arising from the negligent design and construction of both projects. Not only did the assignments violate the contracts, but the inclusion of subcontractors in the arbitration violated the non-consolidation clauses of both agreements. O'Keefe objected to arbitrating with CED, as assignee of the owners, in a single arbitration with other subcontractors.

On April 25, 2003, CED informed the AAA that it should assign a second, separate case number for the Vero Project (one case for each project) and that two panels should hear the cases because "the projects are very dissimilar with regard to types and quality of construction, subcontractors and suppliers used, as well as determination and allocation of damages." (Appendix 2) The AAA failed to act upon CED's request. After a telephonic hearing was conducted on January 12,

[1]CED is a closely related entity to Vero Club and Phase I (Appendix 7 at Para. 33).

2004, on O'Keefe's objection to a consolidated hearing with CED as assignee of the owners and before the arbitrators announced their ruling, on January 14, 2004, CED again requested separate cases with separate panels, informing the AAA that it had reassigned the claims back to the owners, Vero Club and Phase I (Appendix 3). However, neither owner filed a demand for arbitration or appeared in the single arbitration case filed by CED, which raises the issue whether CED had (or has) standing to litigate or arbitrate the owners' claims under the contracts.

As a result of the January 12, 2004 hearing, the arbitrators entered an order directing separate hearings for: (i) the claims between the owners and O'Keefe and (ii) the claims between the owners and various subcontractors. The same panel of arbitrators, however, was slated to hear the claims on both projects (Appendix 4).

Both standard-form agreements contain identical provisions directing the parties to Florida law (the situs of the construction) for resolution of all statutes of limitations issues. Specifically, the contracts read:

> 7.2 A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

The AAA scheduled a hearing on February 12, 2004, to consider the appropriate statute of limitations to apply to claims against O'Keefe. Over

O'Keefe's objections, the AAA ruled that the claims were governed by §95.11(3)(c), Florida's four-year statute of limitations for construction claims against it, despite the more appropriate two-year statute of limitations contained in §95.11(4)(a) (two-year statute of limitations for negligence claims against professionals, such as architects). Additionally, the AAA ruled that the owners' assignment of claims for damages to CED, as well as the right to enforce the arbitration provisions, was permissible despite the express contractual prohibition. Lastly, the AAA ruled that it would hold separate hearings on each project, but the same panel would render decisions in both. (Appendix 5).

On March 23, 2004, CED, on its own behalf and as assignee of the owner, subsequently served an amended demand for arbitration for the Vero Project, adding additional subcontractors as respondents (Appendix 6). CED did not amend its demand against O'Keefe concerning the Renaissance Project.

O'Keefe filed suit in the Ninth Circuit seeking to enjoin the arbitrations, as filed, and seeking specific performance of the arbitration agreements in the contracts (Appendix 7). Defendants CED, Vero Club, and Phase I moved to stay the litigation and sought to compel arbitration between O'Keefe and CED, or alternatively between O'Keefe and Vero Club and Phase I (Appendix 8), although neither has appeared or attempted to intervene in the arbitration case.

On August 30, 2004, the trial court conducted a non-evidentiary hearing on CED's Motion to Stay and Compel Arbitration. (A copy of the hearing transcript is attached as Appendix 9). When the parties were unable to agree as to the content of the order, the court scheduled an additional hearing for January 6, 2005.

> Prior to the second hearing, O'Keefe filed with the trial court December 16, 2004 correspondence from CED's counsel to AAA, in which CED reversed its prior position and consented to one arbitration panel deciding both arbitration cases, stating "the projects are strikingly similar" and "the similarities of the parties and the projects has always warranted the assignment of a single panel," and acknowledging that "[e]ffectively, the AAA has consolidated the two cases involving CED and O'Keefe." (Appendix 10)

At the second hearing on January 6, 2005, the trial court heard additional argument but did not conduct an evidentiary hearing. (A copy of the hearing transcript is attached as Appendix 11.). The trial court entered an order (Appendix 12) compelling arbitration and staying prosecution of O'Keefe's claims for contribution against CED, as the general contractor on the Vero Project and the Renaissance Project, despite the fact that these claims were not arbitrable in that no contract existed between O'Keefe and CED.

O'Keefe appealed the lower court's non-final order compelling arbitration and staying the case filed in circuit court to the Fifth District Court of Appeal. The Fifth District Court of Appeal affirmed the lower court's ruling in all respects in a per curiam opinion (Appendix 13).

SUMMARY OF ARGUMENT

There is no doubt as to what O'Keefe and the owners agreed to regarding the scope of arbitration. The contracts contain in their arbitration clauses specific prohibitions on consolidation and assignment, absent written consent of both parties, as well as a bar to arbitration of time-barred claims. The arbitration agreements expressly limited the scope of arbitrable claims to include only those which were not time-barred. The contracts do not expressly authorize the arbitrators to rule on the statute of limitations issues, nor do they authorize the arbitrators to determine the arbitrability of the dispute.

> The trial court erred in not staying arbitration proceedings that directly violated the arbitration agreements. In its ruling, the trial court failed to address United States and Florida Supreme Court precedent cited by O'Keefe. In affirming the trial court's ruling in all respects, the Fifth District Court of Appeal likewise erred by not enforcing the contracts and failing to consider the United States and Florida Supreme Court precedent holding that a party cannot be compelled to arbitrate in any manner inconsistent with its arbitration agreements.

The applicable standard of review as to all issues in this Appeal is *de novo* review. Avid Engineering, Inc. v. Orlando Marketplace, Ltd., 809 So.2d 1 (Fla. 5th DCA 2001); Tropical Ford, Inc. v. Major, 882 So.2d 476 (Fla. 5th DCA 2004). Furthermore, the determination of whether an issue is subject to arbitration is a matter of contract interpretation, and appellate review on that issue is also *de novo*.

ARGUMENT

I. THE TRIAL COURT ERRED BY COMPELLING O'KEEFE TO ARBITRATE MATTERS IT DID NOT AGREE TO ARBITRATE.

In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), the United States Supreme Court ruled that determination as to whether a claim was to be arbitrated (the issue of "arbitrability") would be made by a court unless the arbitration agreement expressly provided for an arbitral determination. "Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration." Id. at 943. This general principle was followed by the Fifth District in Seretta Construction, Inc. v. Great American Ins. Co., 869 So.2d 676 (Fla. 5th DCA 2004).

> Arbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which the arbitration will be conducted. (Citation omitted.)

Id. at 680.

Interestingly, in reversing the trial court's order granting consolidation of arbitrations, the Fifth District cited many U.S. Supreme Court cases concerning arbitration, but not First Options.

In Seifert v. U.S. Home Corporation, 750 So.2d 633 (Fla. 1999), the Florida Supreme Court ruled that both state and federal arbitration laws require courts to consider three factors when ruling on a motion to compel arbitration: "1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Id. at 636. Although not cited by the Fifth District in this case, the Seifert three-part test has been used by the Fifth District in ruling on motions to compel arbitration. See Presidential Leasing, Inc., v. Krout, 896 So.2d 938, 941-942 (Fla. 5th DCA 2005)(motion to compel arbitration denied because the purchase/sale agreement for a used car contained an unconscionable attorney fee provision which "frustrated" the statutory purposes of the Florida Deceptive Trade Practices Act."); Florida Power Corporation v. City of Casselberry, 793 So.2d 1174, 1178 (Fla. 5th DCA 2001)(motion to compel arbitration to determine valuation of a purchase price granted).

The trial court and the Fifth District failed to consider the implications of Seifert in ruling on CED's Motion to Compel. Neither the trial court's order granting CED's motion to compel nor the Fifth District's affirmance reflect any consideration of the Seifert three-part test. Had either court undertaken such an inquiry, it would have had to deny CED's motion to compel arbitration because: (i) the contracts expressly prohibit consolidation and assignment, and (ii) the

arbitration agreements do not expressly authorize the arbitrators to rule on statutes of limitation defenses. Because the arbitration agreements expressly reference statutes of limitations, it is clear that the parties did not intend to arbitrate time-barred claims.

Seifert was ignored by the trial court and the appellate court despite the fact that it establishes the standard for ruling on motions to compel arbitration. Since 1999, nearly every district court of appeal in Florida has ruled that courts are to determine arbitrability unless the arbitration clause authorizes arbitrators to do so. Curtis v. Olson, 837 So.2d 1155 (Fla. 1st DCA 2003) (following Seifert); Premier Medical Management, Ltd. v. Salas, 830 So.2d 959 (Fla. 1st DCA 2002) (following First Options); Romano v. Goodlette Office Park, Ltd., 700 So.2d 62 (Fla. 2d DCA 1997) (predating Seifert but following First Options); Rintin Corporation v. Domar, Ltd., 766 So.2d 407 (Fla. 2000) (citing First Options as basis for upholding arbitrators' authority to determine arbitrability because contract expressly cited to Florida International Arbitration Act (682.01-.35, Fla. Stat.), which contains a provision directing arbitrators to determine arbitrability); CitiGroup v. Amodio, 894 So.2d 296, 299 (Fla. 4th DCA 2005) (citing Seifert and First Options in sustaining trial court's denial of a motion to compel arbitration of Blue Sky law violation claims where arbitration clause was narrowly drawn to provide for arbitration only if the claim involved the "construction, performance or

breach of [the] account agreement"); Royal Professional Builders, Inc. v. Roggin, 853 So.2d 520 (Fla. 4th DCA 2003) (citing Seifert); K. W. Brown and Co. v. McCutchen, 819 So.2d 977 (Fla. 4th DCA 2002) (citing Seifert and First Options).

The determination of whether an agreement to arbitrate requires arbitration of a particular dispute rests upon the intent of the parties. Florida Power Corporation v. City of Casselberry, 793 So.2d 1174, 1178 (Fla. 5th DCA 2001). In determining the intent of the parties, a court should consider the language in the contract, the subject matter of the contract, and the object and purpose of the contract. Huntington on the Green Condominium v. Lemon Tree Condominium I, 874 So.2d 1, 4 (Fla. 5th DCA 2004). If there is any ambiguity in an arbitration provision, it should be construed against arbitration. Wood-Hopkins Contracting Company v. C.H. Barco Contracting Company, Inc., 301 So.2d 479, 480 (Fla. 1st DCA 1974).

Instead of relying on Seifert in this case, the Fifth District Court of Appeal cited three cases: CED Constr. v. Kaiser-Taulbee Associates, Inc., 816 So.2d 813 (5th DCA 2002); Pembroke Indust. Park P'ship v. Jazayri Constr., Inc., 682 So.2d 226 (Fla. 3d DCA 1996) and Alderman v. City of Jacksonville Fire & Rescue Division, 902 So.2d 885 (Fla. 1st DCA 2005). In CED v. Kaiser-Taulbee, the trial court had ruled that a court, not arbitrators, was to resolve a statute of limitations issue. The Fifth District reversed, without mentioning Seifert or First Options.

The decisions in Pembroke Indust. Park P'ship and Alderman are inapposite, because they concern questions of timeliness rather than imposition of a statute of limitations. Determining the timeliness of a claim (a waiver, estoppel, or laches issue) is not the same as determining whether a claim is time-barred under a statute of limitations, despite what the Fifth District has stated in this case. Compare First Options with Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (same justices who decided First Options held in Howsam that arbitrators determine timely compliance with an arbitration rule of procedure).

Pembroke Indus. Park P'ship did not involve a statute of limitations issue. The arbitration agreement in that case did not, as the arbitration clause in the present case does, specifically refer to statutes of limitation or preclude time-barred claims from arbitration. Instead, the arbitration agreement merely provided that demand be "made within a reasonable time after the dispute had arisen." Thus, the contract authorized an arbitrator to determine whether the claims were filed within a reasonable period of time, without regard to any statutes of limitation.

The First District's opinion in Alderman similarly concerned the timeliness of a claim rather than a statute of limitations, and therefore provides no support to the Fifth District's reasoning in this case.

The Fifth District's opinion in this case only addresses O'Keefe's claim that the court (and not arbitrators) were to rule on the statute of limitations issue. The more general topic of the appeal—the scope of arbitrability—was left unaddressed.

A. The arbitration clause provided for arbitration solely between O'Keefe and the respective property owners.

The court should not have compelled arbitration between O'Keefe and CED, as assignee, because the arbitration agreements prohibited assignment. The court failed to adequately consider whether, as a matter of law, CED, as assignee, could pursue arbitration. In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), the Supreme Court ruled that a court must decide whether a successor in interest was obligated to arbitrate a dispute. In American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), the Second Circuit extended this ruling to an assignee of a party to an agreement that permitted assignment only with the consent of the other party. The American Safety court noted the appellant's secondary argument (that even if the assignment was valid, it only transferred the right to receive royalties, not the right to demand arbitration) and directed the trial court on remand to address this issue. The Eighth Circuit has similarly held in I. S. Joseph Company, Inc. v. Michigan Sugar Company, 803 F.2d 396 (8th Cir. 1986) that when a party challenges the appropriateness of arbitrating with an assignee, it brings into question whether there is an agreement

between the parties at all, and a court must determine if the assigned claims are to be arbitrated before an arbitrator can decide the merits.

Florida courts have acknowledged that a third party's ability to proceed to arbitration is limited by the underlying contract. In Morgan Stanley DW Inc. v. Halliday, 873 So.2d 400 (Fla. 4th DCA 2004), the trustees of a lifetime trust opened an account with a brokerage firm to manage the assets of a trust. The account agreement between the trustee and the brokerage firm contained an arbitration clause. The trust beneficiary sued the trustees and the brokerage firm for mismanagement. In denying the brokerage firm's motion to compel arbitration, the court emphasized that the lifetime beneficiary of the trust was not a third-party beneficiary of the account agreement between the trustees and the brokerage firm. A third party (such as the beneficiary) cannot sue the parties to the contract unless she was a third-party beneficiary of the contract. Id. at 403. "[B]inding a non-signatory to arbitrate under the theory of third party beneficiary is fraught with miscalculation and unfairness." Id. at 404. Relying on Seifert and First Options, the court ruled that the trust beneficiary could not be forced to arbitrate her claims against the brokerage or the trustees and that it should not be assumed that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable evidence" to that effect. Id. at 404-405. See also Technical Aid Corporation v. Tomaso, 814 So.2d 1259 (Fla. 5th DCA 2002) (former employer required to

arbitrate its claims against its former employee, but not required to arbitrate its claims against its former employee's newly formed company, because it did not sign the agreement nor was it an intended third-party beneficiary of the contract.)

In two cases involving non-consolidation, non-assignment clauses similar to paragraph 7.3 of the contracts in this case, the Fourth District held that third-party beneficiaries were not required to arbitrate based upon exclusionary language in the contract. In Raffa Associates, Inc. v. Boca Raton Resort & Club, 616 So.2d 1096, 1097 (Fla. 4th DCA 1993), the non-consolidation, non-assignment provision read as follows.

> No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined.

Because there was no signed written consent, the sought-after arbitration was not authorized by the contract and the court declined to require arbitration.

In International Bullion and Metal Brokers, Inc. v. West Pointe Land, LLC, 846 So.2d 1276, 1277 (Fla. 4th DCA 2003), the non-consolidation, non-assignment provision read as follows:

> No arbitration arising out of or relating to this Contract shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Contract except by written consent containing a specific reference to this Contract signed by the

> Purchaser, Architect, and any other person or entity sought to be joined.

Even if the appellee was an intended third-party beneficiary, it would nonetheless be precluded from arbitration due to the express language recited above.

B. The arbitration clause did not permit consolidation of actions.

In Seretta Construction, the Fifth District ruled that a trial court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate, absent the parties' consent. The Seretta court acknowledged that although a consolidated arbitration proceeding promotes judicial economy, a court is not permitted to interfere with private arbitration agreements by rewriting the contract to expand the scope of arbitration proceedings, even if it would result in inefficient, separate proceedings. The possibility of inconsistent determinations is also not a sufficient justification for consolidation. The sole question for a trial court to determine is whether the parties agreed, in writing, to consolidate arbitration of disputes. Id. at 680. The Seretta court found no such express provision and required separate proceedings. As the court stated in Gov't of the U.K. of Gr. Brit. & N. Ir. through U.K. Def. Procurement Office, Ministry of Def. v. Boeing Co., 998 F.2d 68 (2d Cir. 1993), "If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to

which they are a party." Id. at 74. In the present case, there is no provision for consolidated arbitration; instead, there is an express prohibition of consolidation.

In Lefkovitz v. Wagner, 395 F.3d 773 (7th Cir. 2005), the Seventh Circuit interpreted the prohibition on consolidation to foreclose hearings of different disputes by the same arbitrator. The court stated:

> Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process. The fact that a party has consented to arbitrate one dispute before Arbitrator Smith and an unrelated dispute, albeit with the same antagonist, before Arbitrator Jones doesn't mean that he's agreeable to having Jones arbitrate the first dispute or Smith the second. *Hence, the rule that consolidation of arbitrations is permissible only if the arbitration clauses authorize it.* (Citations omitted.) (Emphasis added.)

CED's letter of December 16, 2004 is an admission that the AAA's assignment of a single panel to hear both claims constitutes consolidation.

> Not only should the AAA not reverse its decision to assign the same arbitrators to resolve these disputes, this case should serve as a model for future arbitration assignments. When the parties and the issues in dispute in two cases are substantially related, *judicial economy and efficiency* are fostered by assigning the same arbitrators. Frankly, this is what the circuit courts already do. If there are multiple claims arising from a single project or if identical parties are involved in two or more similar projects, a single judge would typically be assigned. In fact, this is why the Florida Rules of Civil Procedure allow for the consolidation of cases. Effectively, *the AAA has consolidated the two cases involving CED and O'Keefe*.
>
> A consolidation in circuit court does not mean that there will be a single trial of two cases. Consolidated cases are often tried separately, though, by the same judge. *That is what is occurring here*, and it makes sense. (Emphasis added.)

In the present case, paragraph 7.3 in both contracts prohibits consolidation absent written consent by both parties. O'Keefe has not consented to consolidation. Allowing a single arbitration panel to hear both claims is no different than permitting the hypothetical Arbitrator Smith or Arbitrator Jones in Lefkovitz to hear both disputes, which the Lefkovitz court viewed as impermissible consolidation, absent the parties' consent. The trial court's order in the present case (requiring separate adjudicatory hearings but not requiring separate cases with separate panels) has effectively permitted consolidation of two arbitrations despite the contractual prohibitions against consolidation. This result violates the holding in Seretta Construction. On this basis alone, reversal is required.

C. The arbitration clause did not expressly authorize the arbitrators to resolve statute of limitations issues.

In both the AAA proceedings and before the lower court, O'Keefe has asserted that at least some of the owners' claims are time-barred. O'Keefe cannot be compelled to arbitrate time-barred claims, pursuant to section 7.2 of both contracts. In Reuter Recycling of Florida, Inc. v. City of Dania Beach, 859 So.2d 1271 (Fla. 4th DCA 2003), the arbitration clause at issue was virtually identical to paragraph 7.2 in the present case. The Fourth District reversed the lower court's refusal to enjoin arbitration, finding that the arbitration clause was not ambiguous

and that it expressly excluded time-barred claims from arbitration. Id. at 1273. Because section 7.2 of the contracts in the present case expressly excludes time-barred claims from arbitration, the trial court was required to conduct an evidentiary hearing to hear and determine all statute of limitations issues.

The Reuter court concluded that even if the agreement to arbitrate had been ambiguous, it would still find that the parties had not agreed to have the arbitrators determine the issue of arbitrability. Quoting First Options, the court stated:

> The rule is that 'courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.' An ambiguity as to who should determine arbitrability means that the parties have not clearly and unmistakably manifested an intent to have arbitrators decide the issue as to what specific claims they have agreed to arbitrate. Thus, if the agreement is ambiguous, then it is for the court to say what claims should be arbitrated.

Id. at 1273.

Despite the holdings of First Options and Seifert, and Reuter Recycling, the trial court below ruled that the arbitrators were to determine if the claims were time-barred. The sole basis for its ruling was the CED Construction decision. As authority for its position, the CED Construction court cited two cases: Victor v. Dean Witter Reynolds, Inc., 606 So.2d 681 (Fla. 5th DCA 1992) (decided before First Options and Seifert) and Pembroke Indus. Park Partnership. However, as

pointed out previously, Pembroke Indus. Park did not involve a statute of limitations issue.

Had the contracts in the present case merely required that a demand for arbitration be made within a reasonable time after the dispute had arisen (a procedural issue), Appellees' position would be well founded. However, because the contract invoked statutes of limitation which, under Florida law, are substantive issues for determination, only a court can resolve these issues. Fulton County Administrator v. Sullivan, 753 So.2d 549 (Fla. 1999) (citing Merkle v. Robinson, 737 So.2d 540 (Fla. 1999) for the proposition that statutes of limitations are to be treated as substantive law). Because the statute of limitations issue is not a procedural issue and O'Keefe did not agree to arbitrate time-barred claims, O'Keefe cannot be compelled to submit time-barred claims to arbitration. Accordingly, this Court should overrule the holding in CED Construction and approve Reuter Recycling and hold that questions of timeliness are for arbitrators to consider, but that courts are required to rule on statute of limitations issues.

Applying the four-year statute of limitations found in §95.11(3)(c), Fla.Stat., it appears the statute of limitations has run on Vero Club's and Phase I's claims. Because they have never been parties to the arbitral proceeding, they cannot take advantage of the tolling provision contained in §95.051(1)(g), Fla.Stat.

Notwithstanding footnote 2 in Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983), Petitioner believes that the two-year statute of limitations is the applicable statute of limitations. Florida has been recognized as a jurisdiction that liberally construes statutes of limitation, meaning that Florida courts favor a restriction shortening the time within which suit may be brought. Sheils v. Jack Eckerd Corporation, 560 So.2d 361 (Fla. 2d DCA 1990). The Sheils court also discussed a second rule of statutory construction that a more specific statute of limitation will control over a more general one. That is apparently the basis upon which the Kelley court based its footnote. However, Petitioner submits that a closer analysis justifies the imposition of a two-year statute of limitations.

Section 95.11(3)(c) applies generally to all claims related to design, planning or construction of an improvement to real property, including claims against contractors who are not recognized as professionals and including third-party claims against professionals not based on professional malpractice (*e.g.*, Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So.2d 1301 (Fla. 1991)).

As this court recognized in Moransais v. Heathman, 744 So.2d 973 (Fla. 1999), engineers and architects fall within the definition of professionals. It seems incongruous to hold that an architect would be subject to a two-year statute of limitation for reviewing drawings prepared by another architect or for inspecting

property as part of a pre-purchase inspection and hold the drafting architect or one who proposes remodeling of the premises to be purchased to a four-year statute of limitations that may not actually run for fifteen years.

Petitioner submits that professional malpractice claims are a smaller universe than all claims related to design, planning, or construction of an improvement to real property, and that the more narrow statute is the professional malpractice statute.

CONCLUSION

Appellant requests this Court 1) reverse the Order compelling arbitration and direct the trial court to enjoin arbitration with CED because of the non-consolidation, non-assignment provisions in the contracts, 2) compel specific performance of Appellant's arbitration agreements with Vero Club and Phase I, and 3) direct the lower court to determine which claims of Vero Club and Phase I are time-barred, applying the appropriate statute of limitations.

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 United States Mail this 12th day of September 2005, to Kevin P. Kelly, Esquire, Gray Robinson, P. O. Box 3068, Orlando Florida 32802-3068.

LEE L. HAAS, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has a typeset of Times New Roman 14.

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