IN THE SUPREME COURT
STATE OF FLORIDA

SEARS AUTHORIZED TERMITE AND
PEST CONTROL, INC. f/k/a ALL AMERICA
TERMITE AND PEST CONTROL, INC.,

Petitioner,

vs. Supreme Court No: SC01-960

SHELLEY SULLIVAN, Fourth DCA No. 4D00-2276
L.T. No.: CL 99-10954 AI

Respondent.
_______________________________________/

On Review of a Decision by the
Fourth District Court of Appeal

INITIAL BRIEF
OF PETITIONER, SEARS TERMITE AND PEST CONTROL, INC., f/k/a ALL AMERICA TERMITE AND PEST CONTROL, INC.

ARNSTEIN & LEHR
John A. Turner
Florida Bar No.: 000922
Willa A. Fearrington
Florida Bar No.: 173252
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive
West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

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STATEMENT OF THE CASE

Sears Termite & Pest Control, Inc. ("Sears TPC") seeks review by this Court of the Fourth District's decision in Sullivan v. Sears Authorized Termite and Pest Control, Inc., 26 Fla. L. Weekly, D855 (Fla. 4th DCA, March 28, 2001)(App. - A), which reversed a Circuit Court Order Granting Sears TPC's Motion to Abate and Compel Arbitration (App. - B). The Fourth District certified that its decision was in conflict with the Fifth District's decision in Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA 1997). Jurisdiction of this Court to accept review is pursuant to Florida Appellate Rule 9.030(a)(2)(vi) and Article V, § 3(b)(4) of the Florida Constitution.

The parties shall be referenced in this brief by their names. This brief is accompanied by an appendix which shall be referenced in this brief as (App. - __).

SUMMARY OF FACTS

Sullivan and Sears TPC entered into a Pest Control Customer Agreement dated August 23, 1995. (App. - C) Under the Agreement, Sears TPC agreed to provide pest control services for various pests, including spiders. Sullivan later filed suit against Sears TPC, alleging that Sears TPC had failed to eradicate brown recluse spiders from her home, leading to a

spider bite which caused her injury and damages. Sullivan's Complaint alleged negligence, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, negligent misrepresentation, fraud in the inducement and fraud. (App. - D).

Sullivan's alleged spider bite injury occurred only because the pest control services performed by Sears TPC under the contract were purportedly ineffective. It is patently clear that her injury did not arise from any alleged poisoning or exposure to the pesticides that Sears TPC applied. (App. - D).

As noted above, the Customer Agreement between Sullivan and Sears TPC set forth the type of treatment to be provided by Sears TPC as follows:

> ANNUAL SERVICE for Ants, Roaches, Spiders, Crickets, Silverfish and Palmetto Bugs. (App. - C).

The Customer Agreement also defined the scope of Sears TPC's responsibility:

> Coverage: For a period of one year, beginning on the effective date shown above, [Sears TPC] agrees to provide necessary service and treatment for the control of the pests listed above . . . . (App. - C).

Finally, and of obvious significance here, the Customer Agreement mandated that arbitration would be the exclusive forum to resolve "any controversy or claim between [the parties] arising out of or relating to the interpretation,

performance or breach of any provision of this agreement." (App. - C).

STANDARD OF REVIEW

The issue in this case is whether Sullivan's claims for personal injuries caused when she was bitten by a spider, which Sears TPC allegedly failed to eradicate, are subject to the arbitration clause in her agreement with Sears TPC. Because arbitration provisions are contractual in nature, the construction of such provisions and the contracts in which they appear are matters of contract interpretation. Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Hence, the standard of review of the scope and application of the arbitration clause in this case is de novo. The decision of the trial court is presumed to be correct, although the reviewing court is free to decide the legal issue differently without paying deference to the trial judge's view of the law. Walter v. Walter, 464 So. 2d 538 (Fla. 1985).

ARGUMENT

Florida law has long held arbitration clauses valid and enforceable. Roe v. Amica Mutual Ins. Co., 533 So. 2d 279 (Fla. 1988). Today, arbitration provisions are common and their use generally favored by the courts. Seifert v. U.S. Home Corp., 750 So. 2d at 636. Further, Florida courts have not hesitated to enforce arbitration provisions where tort claims are involved.

See, e.g., Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA 1997); Bachus & Stratton, Inc. v. Mann, 639 So. 2d 35 (Fla. 4th DCA 1994); Value Car Sales, Inc. v. Bouton, 608 So. 2d 860 (Fla. 5th DCA 1992); Larry Kent Homes v. Empire of America, FSA, 474 So. 2d 868 (Fla. 5th DCA 1985). Indeed, the Florida Arbitration Code expressly provides that arbitration clauses are valid and enforceable without regard to the justiciable character of the controversy. Fla. Stat., § 682.02 (1967).[1]

This Court has observed that the application of an arbitration clause to a tort claim depends upon the language contained in the clause. "The phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between contracting parties, including related tort claims." Seifert v. U.S. Home Corp., 750 So. 2d at 637 (emphasis supplied)(citations omitted). That is precisely the language contained in the arbitration provision in the Customer Agreement Sullivan entered into with Sears TPC.

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[1]Compare the arbitration codes of other states which expressly exclude the application of arbitration provisions to tort or personal injury claims. Ark Code Ann. § 16-108-201(b) (Michie Supp. 1993); Ga. Code Ann. § 9-9-2(c)(10)(Supp. 1995); Kan. Stat. Ann. § 5-401(c)(3); Mont. Code Ann. § 27-5-114(2)(a) (1995); Neb. Rev. Stat. § 25-2602 (1989); S.C. Code Ann. § 15-48-10(b)(4) (Law Co-op Supp. 1994); Tex. Code Ann. § 171.002(a)(3).

The courts consider three elements when ruling on motions to compel arbitration: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived. Seifert v. U.S. Home Corp., 750 So. 2d at 635 (citing Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA 1997)). There is no dispute here as to the existence or validity of the written agreement between the parties, and no argument that Sears TPC waived its right to arbitration. Thus, the determinative issue in this case, as in Seifert, is whether the dispute between the parties is subject to arbitration.

This Court's opinion in Seifert sets forth the test for determining whether Sullivan's claim is subject to arbitration. Seifert involved a homeowner's exposure to carbon monoxide caused by a home builder's negligent placement of an air conditioning intake vent in the garage. Seifert v. U.S. Home Corp., 750 So. 2d at 635. This Court held that the test of whether a particular claim must be submitted to arbitration necessarily depends upon the existence of some nexus between the dispute and the contract containing the arbitration clause. Seifert v. U.S. Home Corp., 750 So. 2d at 638. For a tort claim to be considered "arising out of or relating to" a contract, the claim must, at a minimum, raise some issue which requires reference to or construction

of some portion of the contract itself for resolution of the claim. Id. The claim in Seifert did not so require. Rather, it was a negligence claim that arose irrespective of and outside the contract terms.

In this case, however, the Customer Agreement provided that Sears TPC would provide the service and treatment necessary for the "control" of spiders. (App. - C). In her Complaint, Sullivan refers repeatedly to a (necessarily contractually based) duty of Sears TPC to "eradicate" spiders. (App. - D). In its decision here, the Fourth District went even further, holding that "the negligence claim for personal injuries is based on Sears' breach of its duty to exercise reasonable care in applying the exterminating chemicals so as to ensure brown recluse spiders were eradicated from the infested areas." Sullivan v. Sears Authorized Termite and Pest Control, Inc., supra (emphasis supplied).

Although neither Sullivan in her Complaint nor the Fourth District in its decision explain what gave rise to a duty of Sears TPC to eradicate pests, the Customer Agreement is the obvious answer. With respect its interpretation, it can hardly be disputed that neither the word "ensure" nor the word

"eradicate" are used in the Customer Agreement.[2] Instead, the parties here agreed that Sears TPC would "control" pests such as spiders in Sullivan's home. The plain meaning of "eradicate," which Sullivan apparently contends is the standard by which to measure Sears TPC's performance, is "to erase; eliminate." See Webster's Seventh New Collegiate Dictionary (1969). On the other hand, the relevant meaning attributed to the word "control," which is the language actually used in the contract, is "to exercise restraining or directing influence over." Id. Although Sears TPC suggests that the phrase "pest control" in Florida does not mean the complete eradication or elimination of insects, that is nonetheless the touchstone of Sullivan's Complaint and there - unlike Seifert - lies the crux of the dispute between the parties.

The significance of the stark contrast between Sullivan's interpretation of Sears TPC's duty to perform to a certain level, and the duty which Sears TPC contends is actually set forth in the Customer Agreement, highlights the fact that a resolution of this dispute will necessarily require reference to and construction of the contract. Stated another way, the Customer Agreement is the sole and defining source of Sears TPC's obligation to perform pest

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[2]For that matter, the word "exterminate" also does not appear in the Pest Control Customer Agreement.

control services in Sullivan's home. Sullivan's contention that she was bitten by a spider because Sears TPC allegedly failed to adequately perform its contractually based obligations is the very foundation of her claim. The issue, then, of whether Sears TPC satisfied its pest control obligations, even if some spiders survived the pesticide treatment or entered the Sullivan home afterward, is entirely dependent upon the meaning attributed to the terms of the contract between the parties. Thus, there is an inescapable and inseparable nexus between Sullivan's personal injury claim and the Customer Agreement. See Seifert v. U.S. Home, supra. That sort of nexus was clearly not present in Seifert or in Terminix Int'l. Co., L.P. v. Michaels, 668 So. 2d 1013 (Fla. 4th DCA 1996), upon which the Fourth District also relied here.

However, the Fifth District's decision in Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA, 1997), involved facts virtually indistinguishable from those in this case. In Ponzio, the Fifth District reversed the trial court and ordered arbitration of a spider bite claim brought by a Terminix customer. There, as here, the cause of action arose from allegedly ineffectual pest control services performed under a contract between Mr. Ponzio and Terminix. The Fifth District held that the claim clearly arose out of Terminix's contractual undertaking to provide pest control services and,

although the nature of the injuries differed from a typical breach of contract action, there was no language in the arbitration clause limiting arbitration to only those claims for economic losses. Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d at 107.[3]

Significantly, Ponzio was the basis for the Fifth District's decision in Seifert, 699 So. 2d 787 (Fla. 5th DCA 1997), which would have abated the Seiferts' claim pending arbitration. This Court, however, did not disapprove of Ponzio when it reversed the Fifth District and allowed the Seiferts' claim to proceed in court. While this Court's decision in Seifert approved the Fourth District's decision in Terminix Int'l. Co. L.P. v. Michaels, supra, it also cited Ponzio with approval. Seifert v. U.S. Home Corp., 750 So. 2d at 635. Accordingly, Ponzio is still good law.

As stated above, however, the Fourth District here reversed the trial court's order compelling arbitration, relying instead upon its own decision in Michaels and rejecting Ponzio. Sullivan v. Sears Authorized Termite and Pest Control, Inc., supra. But Michaels, which affirmed the denial of arbitration, was a toxic tort, chemical exposure case where the claimants were allegedly

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[3]The same situation obviously exists in this case and, accordingly, the Fourth District certified conflict between its decision in this case and Ponzio.

injured by exposure to the pesticide chemicals Terminix had applied. Terminix Int'l. Co. L.P. v. Michaels, 668 So. 2d at 1014. Thus, Michaels is much like Seifert - an alleged breach of a duty imposed by common law and not dependent upon an interpretation of a contract.

Indeed, in explaining how the Michaels' toxic tort claim was not connected to their termite prevention contract with Terminix, the Fourth District held:

> The personal injury claim did not relate to interpretation, performance or breach of any provision of the agreement. Those matters relating to the performance of the contract would be reasonably construed as matters concerning the application of the pesticide to the home and the resulting condition of the property to which it was applied, namely the object of the contract being the eradication of termites in the home.

Id. at 1015 (emphasis supplied). The foregoing language from Michaels, describing those claims that should be subject to the contractual arbitration clause, is a virtual summary of the allegations in Sullivan's Complaint. The objective of the Customer Agreement between Sullivan and Sears TPC was clearly the "control" of spiders in Sullivan's home. Sullivan alleges that Sears TPC failed to satisfy this objective, thus allowing the presence of a spider in her home which bit her and caused her alleged injuries. Clearly then, even under Michaels, which the Fourth District relied upon in this case, Sullivan's

claim must be subject to arbitration.

Moreover, the Fourth District later limited its ruling in Michaels, subsequently explaining that the opinion should be narrowly read and applied. Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., 683 So. 2d 1133 n. 1 (Fla. 4th DCA 1996). Thus, in Advantage, the Fourth District reversed and compelled arbitration, holding that "all doubts as to the scope of an arbitration agreement are to be resolved in favor of arbitration rather than against it." Id. at 1134. The Advantage court further held that:

> [A]ny time a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., 683 So. 2d at 1134 (quoting The Regency Group Inc. v. McDaniels, 647 So. 2d 192, 194 (Fla. 1st DCA 1994)(quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).

The Fourth District's holding in Advantage thus appears contrary to Michaels, which it nonetheless relied on and even quoted in its decision in this case, that "a court should order arbitration 'when satisfied that there is no doubt that an agreement to arbitrate the subject dispute was made.'" Sullivan

v. Sears Authorized Termite and Pest Control, Inc., 26 Fla. L. Weekly, D855 (quoting Terminix Int'l. Co. L.P. v. Michaels, supra). There is no authority under Florida law, however, for a court to require that the proponent of arbitration prove "beyond a doubt" that a claim is included in an arbitration provision in order to compel arbitration of a dispute which arises from or relates to a contract containing such a provision. Indeed, such a "standard" would clearly constitute a reversal of longstanding Florida law - including the Fourth District's later decision in Advantage - that arbitration provisions must be broadly interpreted, so as to be inclusive of claims, and that all doubts as to the scope of an arbitration clause must be resolved in favor of arbitration. See Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., supra.

But this impermissible result is precisely the effect of the Fourth District's decision in this case. The Fourth District applied Seifert and Michaels to the facts of this case, which are virtually the same set of facts as those involved in Ponzio, but reached a conclusion contrary to the Fifth District in Ponzio. Therefore, the Fourth District's decision in this case could well lead to the plausible conclusion that Seifert was a de facto disapproval of Ponzio, when

it clearly was not.[4] At a minimum, the Fourth District's decision in this case patently underscores the unresolved and continuing conflict which has evolved since Seifert, and which will now surely lead to further uncertainty about how arbitration clauses should be construed, particularly when applied to tort claims. Sears TPC respectfully but strenuously suggests that such a result was not intended by this Court in deciding Seifert and should be rectified now.

The justiciable character of the dispute, whether it sounds in tort or contract, should have no bearing on the analysis of whether a claim is subject to arbitration. Nor should the nature of the alleged claim or damages alter the rules of how a court interprets an arbitration provision. For example, if this case involved termites biting wood and causing property damage even after pesticides were applied, the arbitration provision would clearly apply. In this case, a spider allegedly bit a person and caused personal injuries after pesticides were applied. There is absolutely no basis in logic or law for a different conclusion on the facts of this case.

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[4]This erroneous conclusion - that the decision in Seifert constituted disapproval of Ponzio - was argued by Sullivan at the hearing on Sears TPC's motion to compel arbitration, but was correctly rejected by the trial court. (App. - E).

The propriety of the initial ruling by the trial court that Sullivan's claim is subject to arbitration is further demonstrated by reference to the same hypothetical facts that this Court considered in Seifert. This Court observed:

> [Seifert's] allegations rely on obligations that would extend to anyone, third parties as well as the Seiferts, who might be injured by U.S. Home's tortuous conduct. Indeed, it appears to be entirely fortuitous that it was Mr. Seifert, and not a guest or someone else in the house, who was injured as a result of the alleged neglect by U.S. Home. Obviously, such a guest or other person would not be subject to the arbitration provisions of the contract between U.S. Home and the Seiferts.

Seifert v. U.S. Home Corp., 750 So. 2d at 641.

At the risk of repetition, but in the hope of clarity, Sears TPC owed no duty under the common law to exterminate pests in Sullivan's home and, in the event Sears TPC did not exterminate all pests such as spiders, Sullivan's guests surely could not recover in tort against Sears TPC if they were bitten. Such an expansion of tort law would be all but absurd, especially when one considers that Sullivan's contract for pest control services, including its arbitration provision, would have virtually no connection to such third-party claims.

Sears TPC respectfully but strenuously urges this Court to expressly reject Sullivan's position, as adopted by the Fourth District. There can be no

question that the claim involved in this dispute is based upon an alleged failure of Sears TPC to perform duties expressly and solely arising from the Customer Agreement. This is not a case like either Seifert or Michaels, where the parties were merely introduced to each other as buyer and seller, with one party then performing its contractual obligations in a negligent manner, thus breaching a common law duty owed by it prior to and apart from any contract.

Rather, the premise of Sullivan's claims is that Sears TPC did not perform its contractual obligations, and her alleged damages flow from the alleged failure to satisfy the objective of the contract. Sears TPC's duties with respect to the control of spiders had one source and one source only: the Pest Control Customer Agreement, which has a mandatory arbitration provision. Neither Sullivan nor the Fourth District can or did point to an alternate source of legal duty owed by Sears TPC which Sullivan might claim was breached when a spider was found in her home. There is a clear and substantial - indeed overwhelming - nexus between the claims raised in this action and the contract between the parties. Accordingly, arbitration of Sullivan's claims is required and would be required even under Seifert and Michaels.

CONCLUSION

Sears TPC respectfully submits that it would be impossible for a court

or jury to find that Sears TPC was obligated to ensure that Sullivan's home was free of spiders without referencing and interpreting the Pest Control Customer Agreement. Obviously, therefore, Sullivan's claims for spider bite injuries necessarily arise from and relate to the interpretation, performance and alleged breach of the contract. There is no question that the contract contains a broad arbitration provision, and there is no language in the contract from which it may be said that Sullivan's claims are excluded from arbitration. Thus, Sullivan's claims must be subject to arbitration and this Court should reverse the Fourth District's erroneous ruling to the contrary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: William M. Julien, Esquire, Grossman & Goldman, P.A., 1098 N.W. Boca Raton Boulevard, Boca Raton, Florida, 33432 and Howard S. Grossman, Esquire, Grossman & Goldman, P.A., 1098 N.W. Boca Raton Boulevard, Boca Raton, Florida, 33432, via regular U.S. mail this _____ of June, 2001.

ARNSTEIN & LEHR
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive
West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

____
JOHN A. TURNER
Florida Bar No.: 000922
WILLA A. FEARRINGTON
Florida Bar No.: 173252

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the contents of this brief meet the font requirements set forth under Fla. R. App. P. 9.210(a). The size and style of type used in this brief is 14 point Arial.

ARNSTEIN & LEHR
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive
West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

____
JOHN A. TURNER
Florida Bar No.: 000922
WILLA A. FEARRINGTON
Florida Bar No.: 173252

109653