IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID B. KESLER, individually and LAW OFFICES OF DAVID B. KESLER, P.A.,

Petitioner,

CASE NO.: SCOO-259

vs.

CHATFIELD DEAN & CO., INC.,

Respondent.

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL
CASE NO.: 98-048 19

AMENDED ANSWER BRIEF OF RESPONDENT, CHATFIELD DEAN & CO., INC.

John R. Ellis
Florida Bar No. 04 1970
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe Street, Suite 420
Tallahassee, Florida 3230 1
(850) 681-6788

Attorneys for Respondent,
CHATFIELD DEAN & CO., INC.

TABLE OF CONTENTS

AMENDED TABLE OF CITATIONS

Cases **Page**

Statutes

Rules

STATEMENT OF THE CASE

This case is before the Court on discretionary review from a decision of the Second District Court of Appeal reversing a judgment for attorney's fees in the amount of $74,920. The attorney's fees were awarded by the Circuit Court for the Sixth Judicial Circuit in and for Pinellas County ("the trial court") to an investor, petitioner David B. Kesler, individually and Law Offices of David B. Kesler, P.A. ("Kesler"), against a securities brokerage, respondent Chatfield Dean & Co., Inc. ("Chatfield Dean"), based on a March 5, 1996 National Association of Securities Dealers ("NASD") arbitration award in favor of Kesler in the amount of $3,836 plus costs. (R. 18-22, 56-69).

Kesler's "Motion to Confirm Arbitration Award and Petition for an Award of Attorney's Fees" was not filed in the trial court until March 3, 1997, one year after the arbitration award had been issued and eleven months after the arbitration award had been paid by Chatfield Dean. (R. 1-4). Chatfield Dean moved to dismiss the action for attorney's fees on the grounds that it was an untimely attempt to vacate or modify the express denial in the arbitration award of Kesler's request for attorney's fees, and that the arbitration award of $3,836 was only a fraction of the $137,000 Kesler sought in the arbitration. (R. 9-11).

The trial court held two hearings in the matter. At the first hearing on February 24, 1998, Chatfield Dean's motion to dismiss was argued and denied. (R. 34-35, 245-247). At the second hearing on August 24, 1998, the trial court determined the amount of the attorney's fees award. (R. 56-69, 247-252). The judgment confirming the arbitration award and awarding attorney's and experts' witness fees to Kesler was entered on October 26, 1998. (R. 56-69).

Chatfield Dean moved for rehearing in the trial court. (R. 72-224). The motion for rehearing reasserted the untimeliness of Kesler's filing of the action for attorney's fees and the inadequacy of the arbitration award as a basis for an award of attorney's fees, and argued that under Pharmacy Management Services: Inc. v. Perschon, 622 So.2d 75 (Fla. 2d DCA 1993), and Central Florida Investments, Inc. v. Fishkind, 660 So.2d 3 80 (Fla. 5th DCA 1995), the absence of any express finding in the arbitration award of specific liability against Chatfield Dean on any of the four alternative theories of liability asserted by Kesler in the arbitration precluded an award of attorney's fees. (R. 208-210). The motion for rehearing was denied. (R. 225).

The Court of Appeal reversed the judgment to the extent that it awarded attorney's and experts' witness fees to Kesler, finding that one of the issues raised by Chatfield Dean was dispositive and mandated reversal:

> The trial court did not have a basis upon which to grant attorney's fees because the arbitration award did not specify the theory upon which Kesler had prevailed. Barron Chase Securities, Inc. v. Moser, 745 So.2d 765 (Fla. 2d DCA 1999)

Chatfield Dean & Co., Inc. v. Kesler, 749 So.2d 542 (Fla. 2d DCA 2000). In a footnote to its decision, the Court of Appeal noted that Kesler's failure to timely seek relief to vacate or modify the arbitration award arguably foreclosed his petition for attorney's fees, but the Court declined to address the point based on its decision on the issue that it found to be dispositive. Kesler, supra, 543 at n. 1.

This Court first granted review of the Court of Appeal's decision in Barron Chase Securities, supra, and subsequently granted review in this action.[1] This Court's discretionary jurisdiction was invoked on Kesler's allegation that the Court of Appeal's decision expressly and directly conflicts with this Court's decision in Turnberry Associates v. Service Station Aid, Inc., 651 So.2d 1173 (Fla. 1995), because it requires arbitrators to specifically determine entitlement to attorney's fees. Kesler's brief on jurisdiction added the allegation that the Court of Appeal's decision expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Charbonneau v. Morse Operations, Inc. 727 So.2d 1017 (Fla. 4th DCA

[1] The petitioners in both cases are represented by the same attorney, Allan J. Fedor.

1999), because the Court of Appeal did not direct the trial court to remand the matter to the NASD with orders to reconstitute the panel of arbitrators for the purpose of clarifying the basis for the arbitration award, "as had been requested by Kesler's counsel."[2] (Kesler's Brief on Jurisdiction, at p. 3).

STATEMENT OF THE FACTS

Chatfield Dean provided services as a securities broker for Kesler pursuant to a written contract entered into in August, 199 1. (R. 53). The contract provided for binding arbitration of all disputes, but did not contain any provision regarding attorney's fees. (R. 53 at 5).

In December, 1993 Kesler filed a Statement of Claim with the NASD, alleging stock trading losses of over $109,000 incurred between August, 199 1 and July, 1992, and requesting arbitration of his claims against four parties: Chatfield Dean; a former account representative for Chatfield Dean, Samuel Crockett ("Crockett"); and Crockett's subsequent employer, Corporate Securities Group, Inc., and its affiliate, Corporate Management Group, Inc. (collectively "CSG"). (R. 80-82). Kesler's Statement of Claim alleged several alternative theories of liability, including common

---

[2]Kesler made no request to the trial court to remand the matter to the NASD for a specification of the basis for the arbitration award. The request was made to the Court of Appeal at oral argument, in light of the Court of Appeal's earlier decision in Barron Chase Securities.

law fraud and negligence, but did not allege a violation of Section 5 17.30 1, Florida Statutes, (R. 82). Kesler's Statement of Claim requested an award of punitive damages and an award of attorney's fees. (R. 90, 158-159).

Kesler's Statement of Claim included an exhibit entitled "Matched Trade Schedule," and Kesler submitted a revised Matched Trade Schedule at the arbitration hearing, which reflect the following facts concerning Kesler's stock trading losses: (1) Kesler purchased shares of six stocks between August, 1991 and March, 1992 while he was a client of Chatfield Dean; (2) Kesler transferred his stock holdings to Crockett's subsequent employer, CSG, in April, 1992 when Crockett terminated his employment with Chatfield Dean; and (3) Kesler liquidated his positions in the six stocks in July, 1992 with a net loss of $93,612.54. (R. 73-75, 92-93, 158-159).

Chatfield Dean's Statement of Answer filed with the NASD noted, among other matters, that if Kesler had liquidated his holdings in the six stocks when Crockett left Chatfield Dean and went to CSG in April, 1992, his net profit would have been approximately $15,000. (R. 75, 149).

The arbitration hearing was held on December 4 and 5, 1995 . (R. 19). Kesler settled his claims against Crockett and CSG for $2,500 and $4,000, respectively, before the arbitration hearing. (R. 76). Both Kesler's proposed arbitration award and the final arbitration award reflect that he asserted four theories of liability against

Chatfield Dean in the arbitration: common law fraud and misrepresentation, and/or negligent misrepresentation; negligence and/or gross negligence; breach of fiduciary duty; and violation of Rules 1, 2, 18, and 27 of the NASD Rules of Fair Practice. (R. 19, 162).

Kesler's proposed arbitration award reiterated his request for attorney's fees, but added the following statement: "The amount of any reasonable attorney's fees shall be determined by a court of competent jurisdiction." (R. 162, 164).

The arbitration award was issued on March 5, 1996. (R. 21). The arbitration award states: "Respondent Chatfield Dean & Co. is found liable and shall pay to the Claimant the amount of $3,836.00." (R. 20). However, the arbitration award does not specify whether Kesler prevailed on any of his four asserted theories of liability, or on equitable grounds, or on any other grounds. (R. 18-22). The arbitration award expressly rejects Kesler's request for attorney's fees: "Claimants request for attorney's fees and punitive damages are hereby denied." (R. 20). Chatfield Dean paid the arbitration award on April 4, 1996. (R. 4).

Kesler's Motion to Confirm Arbitration Award and Petition for an Award of Attorney's Fees ("motion for attorney's fees") was not filed in the trial court until March 3, 1997. (R. 1). The motion for attorney's fees alleged that Kesler had asserted a claim against Chatfield Dean in the arbitration for violation of Section

5 17.301, Florida Statutes, and that he was the prevailing party under the arbitration award and therefore was entitled to an award of attorney's fees under Section 5 17.211(6), Florida Statutes. (R. 2). As noted above, neither Kesler's Statement of Claim nor his proposed arbitration award reflect that he asserted a claim for violation of Section 5 17.301. (R. 82, 162), and the arbitration award reflects no such finding.[3] (R. 18-22).

Chatfield Dean filed a motion to dismiss the action for attorney's fees. (R. 9-11). The motion to dismiss alleged seven facts in support of Chatfield Dean's position that Kesler's action for attorney's fees should be dismissed: (1) the date the arbitration award was issued, March 5, 1996; (2) the date the arbitration award was paid, April 4, 1996; (3) the amount of the arbitration award, $3,836 plus costs; (4) that the amount of the arbitration award was only a fraction of the $137,000 Kesler sought in the arbitration; (5) that Kesler's request for attorney's fees had been expressly denied in the arbitration award; (6) that Kesler had not moved to vacate (or

---

[3]Kesler's motion for attorney's fees did not provide the trial court with a copy of the arbitration award. (R. 1-8). Chatfield Dean's motion to dismiss states that a copy of the arbitration award is attached as an exhibit, but the clerk's transcript of the record on appeal does not reflect that a copy of the arbitration award was attached as an exhibit to the motion to dismiss. (R. 9-11). A copy of the arbitration award is attached as an exhibit to Kesler's opposition to Chatfield Dean's motion to dismiss. (R. 18-22).

modify) the arbitrators' denial of his request for attorney's fees within the 90-day period provided under the Florida Arbitration Code;[4] and (7) that Kesler's motion sought review of the arbitrators' denial of his request for attorney's fees ". . , a full year after issuance of the award." (R. 9- 10). Chatfield Dean's motion to dismiss cited Sachs v. Dean Wxtter Reynolds, Inc., 584 So.2d 211 (Fla. 3d DCA 199 1) in support of its position that Kesler's failure to timely move to vacate the arbitrators' denial of attorney's fees precluded his claim for an award of attorney's fees by the trial court. (R. 10).

Kesler's opposition to the motion to dismiss argued that his motion for attorney's fees was timely filed because the Federal Arbitration Act provides a one-year period in which a party to an arbitration may apply to a court for an order confirming an award, and that his request for an award of attorney's fees by the arbitrators had been withdrawn by his submission of a proposed award with the following statement: "The amount of any reasonable attorney's fees shall be determined by a court of competent jurisdiction." (R. 14- 15, 164).

The motion to dismiss was heard and denied on February 24, 1998. (R. 34-35,

---

[4] Chapter 682, Florida Statutes. The sentence which begins at the bottom of the first page of the motion to dismiss, 'Under Sections 682.13 and . .." (R. 9), and which continues at the top of the second page, "... filed within 90 days after delivery of the award." (R. 10), presumably omitted a citation to Section 682.14, which provides a 90-day period for modification or correction of an award.

245-247). The trial court found that it had exclusive jurisdiction to resolve the issue of Kesler's entitlement to attorney's fees under Section 5 17.2 11(6), Florida Statutes, because the parties had not stipulated to confer jurisdiction upon the arbitrators to determine that issue. (R. 35).

At the hearing on August 24, 1998, the trial court awarded attorney's fees in the amount of $70,420 to Resler based on his counsel's claimed hourly rate of $350 and 201.2 hours. (R. 65, 68, 25 1). The trial court also awarded $2,100 for the fees of an attorney who testified as an expert witness at the hearing on the motion for attorney's fees, and $2,400 for the fees of an attorney who represented Kesler at that hearing, for a total award of $74,920, plus costs, with interest awarded from the date of the arbitration award. (R. 69, 25 1). The final judgment was entered on October 26, 1998 (R. 56-69).[5]

SUMMARY OF ARGUMENT

The Court of Appeal correctly found that the arbitration award provided no basis for the trial court to award attorney's fees to Kesler. The arbitration award contained no express or implied finding of a violation of Section 5 17.301, Florida

---

[5] Chatfield Dean's motion for rehearing submitted affidavits of its trial counsel in the arbitration, Christa D. Taylor, and of its counsel in the action for attorney's fees, R. Michael Underwood, challenging the characterization of a number of issues in the final judgment. (R. 72-224).

Statutes. As Kesler concedes, because there was no contractual right to attorney's fees, a fading of a violation of Section 5 17.301 is the sole potential basis for an award of attorney's fees to him under Florida law.

The Court of Appeal also correctly noted that Kesler's failure to timely seek relief to vacate or modify the arbitration award arguably precluded his claim for attorney's fees in the trial court. The arbitration award contained an express denial of Kesler's request for attorney's fees, and the 90-day period allowed to Kesler to move to vacate or modify that denial had expired long before his motion for attorney's fees was filed. After the expiration of the 90-day period, the trial court was required to confirm the arbitration award according to its terms. Carpet Concepts of Concepts, Inc., Inc. v. Architectural ., 559 So.2d 303 (Fla. 2d DCA 1990).

Even if the arbitration award had included a finding of a violation of Section 5 17.301, and even if the denial in the arbitration award of Kesler's request for attorney's fees had been timely vacated or modified, the motion for attorney's fees still should have been denied as having been untimely filed. A motion for attorney's fees must be filed within a reasonable time after the final judgment. Stockman v. Downs, 573 So.2d 835, 838 (Fla. 1991). Months in the filing of a post-judgment motion for attorney's fees generally should result in the denial of the

motion on the grounds of unreasonable tardiness. McAskill Publications, Inc. v. Keno Brothers Jewelers, Inc., 647 So. 2d 1012, 1013 (Fla. 4th DCA 1994). Kesler's motion for attorney's fees was not filed until one year after the arbitration award was issued, and should have been denied as having been untimely filed regardless of its merits or lack of merits.

ARGUMENT

1. THE COURT OF APPEAL CORRECTLY FOUND THAT THE ARBITRATION AWARD PROVIDED NO BASIS FOR THE TRIAL COURT TO AWARD ATTORNEY'S FEES TO KESLER.

Kesler's motion for attorney's fees pleaded entitlement to an award of attorney's fees under Section 5 17.211(6), Florida Statutes, and alleged that the arbitrators had found Chatfield Dean liable for fraudulent securities transactions in violation of Section 5 17.301, Florida Statutes, as a predicate for the award. (R. 8, 12). As Kesler conceded in his answer brief before the Court of Appeal, only a violation of Section 5 17.301 could serve as a basis for an award of attorney's fees under Section 5 17.211 (6). (AB 15). However, the arbitration award reflects not only that the arbitrators made no finding of liability on any of the four theories advanced by Kesler in the arbitration, but also that Kesler did not assert a claim against Chatfield Dean for violation of Section 5 17.301. (R. 18-22). The four theories of liability asserted by Kesler in the arbitration were: common law fraud and

misrepresentation, and/or negligent misrepresentation; negligence and/or gross negligence; breach of fiduciary duty; and violation of Rules 1, 2, 18, and 27 of the NASD Rules of Fair Practice. (R. 19, 162).

The arbitration award reflects that Kesler requested actual damages in excess of $137,000, plus costs, punitive damages, and attorney's fees; and that he was awarded only $3,836, plus costs, and that his requests for punitive damages and attorney's fees were expressly denied. (R. 18-22). The Court of Appeal correctly reversed the portions of the judgment entered by the trial court awarding Kesler $74,920 in attorney's and expert witness fees, because the arbitration award provided no basis for the trial court to award attorney's fees against Chatfield Dean pursuant to Section 517.21 1(6).

No single one nor any grouping of Kesler's claimed losses on stock trades totaled $3,836. (R. 75, 92-93, 158-159). A potential basis for the specific dollar amount of compensatory damages awarded by the arbitrators may have been evidence received at the arbitration hearing that Chatfield Dean negligently miscalculated its commissions and markups on stock trades! Alternatively, the amount may have been based in part on an equitable approximation of the two settlements paid by the

[6] Both Kesler's statement of claim and his proposed arbitration award asserted that Chatfield Dean had incorrectly charged markups and cornrnissions on stock trades. (R. 8 1, 161).

codefendants. In any case, nothing in the arbitration award supports the finding by the trial court of a violation of Section 5 17.30 1 by Chatfield Dean as a basis for an award of attorney's fees to Kesler.

A trial court is not authorized to retry evidence presented at an arbitration. Cassedv v. Merrill J ynch, Pierce, Fenner & Smith, 75 1 So.2d 143, 150 (Fla. 1st DCA 2000). There was no finding in the arbitration award of a violation of Section 5 17.30 1, and there was no basis in the arbitration award for the trial court to imply such a fmding. Nor is there any conflict between the Court of Appeal's decision in this case and this Court's holding in Tumberrv Associates that parties to an arbitration agreement may waive the right to have a trial court decide the issue of attorney's fees. In this case, Chatfield Dean contended that the arbitrators were not authorized to award attorney's fees based on the choice of laws provision in its contract with Kesler, and requested that the arbitrators deny Kesler's request for an award of attorney's fees accordingly. (R. 46-47, 156). On similar facts, the First District Court of Appeal found in Cassedy that the issue of attorney's fees had been submitted for decision by the arbitrators. If Kesler believed that the arbitrators had made an award on an issue not submitted to them, then his remedy was to move pursuant to Section 682.13-14, Florida Statutes, to vacate or modify the arbitration award.

Because awards of attorney's fees are in derogation of the common law, statutes awarding attorney's fees must be strictly construed. Dade County v. Pena, 664 So.2d 959, 960 (Fla. 1995); Heindel v. Southside Chrysler Plymouth, Inc, 476 So.2d 266,269 (Fla. 1st DCA 1985). Kesler's initial brief suggests that the absence of a finding of liability in the arbitration award on a claim which would support an award of attorney's fees is the result of the use of "form awards" by NASD arbitrators. (IB. 10-11) Not only is this suggestion irrelevant in view of the policy that statutes awarding attorney's fees must be strictly construed, it is also contradicted by the fact that the arbitration award in this case was based on a proposed award form prepared by Kesler; and by the fact that the arbitrators added an express denial of his request for attorney's fees. (R. 18-22, 160-165). The standard of review of a trial court's determination of an issue of law is de novo. Akileh v. Elchahal, 666 So.2d 246, 248 (Fla. 2d DCA 1996). The absence of a finding in the arbitration award which would support the trial court's award of attorney's fees to Kesler under Section 5 17.2 11 (6) is dispositive of his claim, as stated by the Court of Appeal.

The Court of Appeal's decision follows its earlier decision in Pharmacy Management Services. In that case, the plaintiffs had arbitrated claims against a former employer on the alternative legal theories of breach of an employment contract and fraudulent inducement to enter the contract. Following an arbitration award in

their favor the plaintiffs filed an action for attorney's fees based on the award. However, only the contractual claims provided a basis for an award of attorney's fees, and the arbitration award did not specify whether the amounts awarded were based on the contractual claims or the fraudulent inducement claims, Pharmacy Management, supra at 75-76. The Court of Appeal reversed a judgrnent awarding attorney's fees to the plaintiff employees, finding that:

> In this case, where the arbitrator had before him two groups of claims, one of which would support an award of attorney's fees and one of which would not, the arbitrator failed to inform the parties whether his award was based upon claims which would support the later award of attorney's fees by the trial court. Accordingly, the trial court erred in awarding attorney's fees based on the arbitration award.

Pharmacy Management, supra at 76; see also, Central Florida Investments, Inc. v, Fishkind, 660 So.2d 380 (Fla. 5th DCA 1995).

Kesler's initial brief attempts to avoid the dispositive effect of the inadequacy of the arbitration award by asserting that the "two issue rule" applies to this case. However, the "two issue rule" applies by its terms only to the submission of a general verdict form to a jury:

> [W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced.

Whitman v. Castlewood Int'l Corp., 383 So.2d 618, 619 (Fla. 1980).

Barth v. Khubani, 748 So.2d 260, 261 (Fla. 1999). The "two issue rule" has no application to the facts of this case.

Kesler's alternative attempt to avoid the dispositive effect of the inadequacy of the arbitration award is to propose that this matter be remanded to the trial court, with directions to remand the matter to the NASD with a request to reconstitute the 1995 panel of arbitrators for the purpose of specifying the basis of the $3,836 award. See, Central Florida Investments, Inc., supra at 382. Kesler's remedy under the Florida Arbitration Code was to timely move for correction of the award, which he failed to do.

2. KESLER'S FAILURE TO TIMELY MOVE TO VACATE OR MODIFY THE ARBITRATION AWARD PRECLUDED HIS CLAIM FOR ATTORNEY'S FEES.

Kesler's motion for attorney's fees was filed on March 3, 1997, one year after the arbitration award was issued on March 5, 1996. (R. 1,8). Chatfield Dean promptly moved to dismiss the action on the grounds that it was an untimely attempt to obtain review of the denial in the arbitration award of Kesler's request for attorney's fees. (R. 9-11). The trial court's denial of Chatfield Dean's motion to dismiss was reversible error.

Chatfield Dean's motion to dismiss cited Sachs v. Dean Witter Reynolds, Inc., 584 So.2d 2 11 (Fla. 3d DCA 1991). Sachs is based on facts identical to those in Kesler's motion for attorney's fees: (1) an investor obtained a favorable arbitration award against a securities brokerage; (2) the arbitration award denied the investor's request for attorney's fees; and (3) the investor filed a petition for attorney's fees in the circuit court more than 90 days after delivery of the arbitration award. Sachs, supra at 211-212. Sachs affirmed the trial court's denial of the investor's petition for attorney's fees, fmding that the petition was untimely because it was filed beyond the 90-day period provided under Sections 682.13 and 682.14, Florida Statutes, and finding that the investor had made no allegations upon which an extension of the 90-day requirement could be based. Sachs, supra at 211-212. Sachs cited Carpet Concepts of St. Petersburg, Inc. v. Architectural Concepts, Inc., 559 So.2d 303 (Fla. 2d DCA 1990), holding that a trial court must confirm an arbitration award according to its terms unless a timely and sufficient application to vacate, modify, or correct the award is made under Sections 682.12-682.14, Florida Statutes. Carpet Concepts, supra at 305; see also, Broward County Paraprofessional Ass'n v. School Rd. of Broward County, 406 So.2d 1252 (Fla. 4th DCA 1981).

The holding in Sachs applies equally to preclude Kesler's action for attorney's fees. The arbitration award in this case expressly denied Kesler's request for

attorney's fees. (R. 20). Kesler's contention that the issue of attorney's fees was withdrawn and was not submitted to the arbitrators does not excuse his failure to timely proceed pursuant to Section 682.14(b), Florida Statutes, providing a 90-day period for modification of an award where:

> The arbitrators.. . have awarded upon a matter not submitted to them... and the award may be corrected without affecting the merits of the decision upon the issues submitted.

§ 682.14 (b), Fla. Stat. (1998).

In this case, the 90-day period in which Kesler could have requested modification of the award had expired nine months before Kesler's motion for attorney's fees was filed. Chatfield Dean had paid the arbitration award in full eleven months before Kesler's motion was filed. There was nothing in the arbitration award to "confirm" which would support Kesler's action for an award of attorney's fees, and the award contained an express denial of his request for attorney's fees which became binding and final upon the expiration of the 90-day period in which Kesler could have moved to vacate or modify that denial. Consequently, Kesler's motion for attorney's fees was precluded on this ground alone, as argued in Chatfield Dean's motion to dismiss and as noted by the Court of Appeal.

3. THE FILING OF THE MOTION FOR ATTORNEY'S FEES ONE YEAR AFTER THE ARBITRATION AWARD WAS UNTIMELY AS A MATTER OF LAW.

In his response to Chatfield Dean's motion to dismiss, Kesler asserted that the one-year period of limitation of actions to confirm an arbitration award provided by the Federal Arbitration Act, 9 U.S.C. $9, applied to his motion for attorney's fees. (R. 14-15). Kesler's answer brief filed with the Court of Appeal retreated from that position and conceded that under Florida law, a motion for attorney's fees must be filed within a reasonable time after the decision on the merits of the underlying claim. (AB. 10-11). However, Kesler's answer brief asserted that the one-year period provided by 9 U.S.C. $9 for a motion to confirm an arbitration award is persuasive authority on the issue of what is a reasonable time, and that Chatfield Dean must "...show the unreasonableness of Kesler's filing the motion for confirmation and petition for award of attorney's fees almost one year after the arbitration award was entered." (AB. 12).

Neither Kesler's position in the trial court nor his position in the Court of Appeal has any support in Florida law, nor was any case cited in support of either position. Instead, Florida law provides that "... a trial court generally should not grant a post-judgment motion for attorney's fees filed almost three months after the judgment on the merits because of 'unreasonable tardiness.'" McAskill Publications, Inc. v. Keno Brothers Jewelers. Inc,, 647 So.2d 10 12, 1013 (Fla. 4th DCA 1994). Florida law thus presumes that a delay of three months is unreasonable, requiring the

moving party to make some showing of excuse for delay in the filing of a motion for attorney's fees. In this case, Kesler has made no showing of any excuse for his delay of one year from the date the arbitration award was rendered, and of eleven months from the date the arbitration award was paid in full by Chatfield Dean, before the filing of his motion for attorney's fees.

The earliest appellate decision considering the timeliness of a motion for attorney's fees under Section 5 17.21 1(6) is Arceneaux v. Merrill J ynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498 (1 1th Cir. 1985). In Arceneaux, an investor obtained a jury verdict against a stockbroker in the United States District Court for the Middle District of Florida. Final judgment on the jury verdict was entered on May 2, 1984, and the investor's motion for attorney's fees was filed seven weeks later, on June 19, 1984. Arceneaux, supra at 1503. The district court rejected the stockbroker's contention that because the motion for attorney's fees was not made within ten days of entry of the judgment, it was untimely under Fed.R.Civ.P. 59(e), and the Court of Appeals agreed:

> We agree with the district court that White v. New Hampshire Department of Employment Security, 455 U.S. 445,102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), is instructive. In White, the Supreme Court held that a motion for attorney's fees under 42 U.S.C. §1988 raised issues collateral to the main action, and therefore the time constraints of Rule 59(e) did not apply.

> .., [T]his court has recently held 'that requests for attorneys' fees may be made by motion within a reasonable period of time after the final judgment in a case.' (citation omitted). Our research has not revealed any Florida cases which address this issue of timeliness of a motion for attorney's fees under §5 17.2 1 1(6). We therefore conclude that the motion in the instant case was made within a reasonable time....

Arceneaux, supra at 1503-04.

In Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), this Court adopted the United States Supreme Court's reasoning and holding in White that a trial court has continuing jurisdiction to entertain a post-judgment motion for attorney's fees filed "... within a reasonable time, notwithstanding that the litigation of the main claim may have been concluded with fmality." Finkelstein, supra at 1243. The motion for attorney's fees in Finkelstein had been filed three days after the expiration of the 30-day period in which the final judgment could have been appealed under Fla.R.App.P. 9.1 10(b). Finkelstein, supra at 1242.

In Stockman v. Downs, 573 So.2d 835 (Fla. 199 1), this Court held that a party seeking attorney's fees pursuant to statute or contract must plead his entitlement to attorney's fees, and may move for an award of his attorney's fees within a reasonable time after entry of final judgment. Stockman, supra at 838. The motion for attorney's fees in that case was filed one day after entry of the final judgment. Stockman, supra,

at 836.

In McAskill, a Circuit Court acting in its appellate capacity entered a judgment awarding attorney's fees to the prevailing party in a contract action, pursuant to a motion for attorney's fees filed in the Circuit Court on May 7, 1992 following entry of final judgment in the County Court in February, 1992. The Court of Appeals reversed the judgment for attorney's fees, stating ". . . a trial court generally should not grant a postjudgment motion for attorney's fees filed almost three months after the judgment on the merits because of 'unreasonable tardiness.'" McAskill, supra. at 10 13 (emphasis added).

The court in McAskill also noted that the motion for attorney's fees in White was filed four and one-half months after the final judgment; and that while the United States Supreme Court did not rule in White on the length of time which was permissible, leaving that decision to local rules approved by district courts, it noted that the Supreme Court had cited a decision which recommended a uniform rule with a maximum of twenty-one days. McAskill, supra at 10 13; White, supra, 45 5 U.S. at 451, 102 S.Ct. at 1168, 71 L.Ed.2d at 333.

In this case, Kesler has offered no explanation for the delay in the filing of his motion for attorney's fees until twelve months after the decision on the merits of the underlying case. The record in this case reflects no activity whatsoever in the eleven

months from the date of payment by Chatfield Dean of the full amount of the arbitration award, April 4, 1996, and the date of filing of Kesler's motion for attorney's fees, March 3, 1997. (R. 1, 4). The delay was presumptively unreasonable by a multiple of four under McAskill, and the motion for attorney's fees should have been denied as having been untimely filed regardless of the merits or lack of merits of the motion.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Respectfully submitted,

John R. Ellis
Florida Bar No. 041970
Rutledge, Ecenia, Pumell & Hoffman, P.A.
P. 0. Box 551
Tallahassee, Florida 323 02
(850) 681-6788 (Telephone)

Attorneys for Respondent,
CHATFIELD DEAN & CO., INC.

CERTIFICATE OF COMPLIANCE

In compliance with the Court's Administrative Order dated July 13,1998, the font size used in this Amended Answer Brief is Times New Roman, size 14.

John R. Ellis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent, Chatfield Dean's Amended Answer Brief was furnished by U. S. Mail to the following this 3rd day of November, 2000:

Allan J. Fedor, Esq.
Franell Fedor, Esq.
10225 Ulmerton Road, Suite 8A
Largo, Florida 33 77 1

Richard Logsdon, Esq.
1423 S. Ft. Harrison Avenue
Clearwater, FL 33756

John R. Ellis

F:\USERS\JELLIS\kesler.amenbrief.sup.wpd