

**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. SC00-259

v.

CHATFIELD DEAN & CO.,

Respondent.

_____ /

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, SECOND DISTRICT
CASE NO.: 98-04819**

PETITIONER'S INITIAL BRIEF

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ISSUES PRESENTED FOR REVIEW

- I. Does the Statement in an Arbitration Award That The Claimant's Request for Attorneys' Fees Is Denied Violate the Prohibition of *Turnberry* and F.S. § 682.11 That An Arbitrator Does Not Have The Authority To Either Award Or To Deny Attorneys' Fees Unless Such Authority Has Been Expressly Conferred on the Arbitrator?**

- II. Does Florida's "Two Issue Rule" Apply to Securities Arbitrations Where Two Or More Legal Theories of Recovery Have Been Alleged, Including A Statutory Theory Under F.S. § 517.301?**

- III. Is It Appropriate Where Necessary For The Trial Court to Remand an Arbitration Award Back to the Arbitrators For Clarification Under F.S. § 682.10 Where There Is An Application Pending To Confirm the Award Under F.S. § 682.12?**

I. STATEMENT OF THE CASE AND FACTS

This appeal arises out of a decision of the Second District Court of Appeal (attached hereto in Appendix, No. 1) which reversed a trial court judgment that awarded attorneys' fees and expert' witness fees to Petitioner/Appellee Kesler.

References herein to the "Appendix" refer to the Appendix to Petitioner's Initial Brief filed with this Court. References to "R" refer to the original record on appeal. There is no transcript of the hearings. However, the Final Judgment Confirming NASD Binding Arbitration Award And Awarding Attorney's Fees To The Prevailing Party [herein the "Final Judgment" (Appendix, No. 2)] recites the facts, evidence and testimony related to the final hearing on August 24, 1999. (R. 56-69). Chatfield Dean also filed a Statement of Evidence ("Statement of Evidence") which summarized some of the evidence presented at the hearing. (R. 245-253).

Kesler had been the prevailing party in an arbitration proceeding against Respondent/Appellant Chatfield Dean & Co., Inc. ("Chatfield Dean") before the National Association of Securities Dealers, Inc. ("NASD"). (NASD Award, Appendix, No. 3) (R. 1-8, ¶¶ 9, 10, 15, 17) (R. 56-69, ¶¶ 2, 10).

In the arbitration proceeding, Kesler had asserted both common law claims and a statutory claim under Florida Statutes Section 517.301. Kesler had

also requested an award of attorneys' fees, based on Florida Statutes Section 517.211(6). Section 517.211(6) provides for an award of attorneys' fees to the party who prevails on a claim brought under Section 517.301. The parties did not agree that the NASD arbitrators could determine the issues of attorneys' fees. Counsel advised the arbitrators that they did not have the authority to either award or to deny attorneys' fees. (Appendix, No. 2) Final Judgment dated October 26, 1998, ¶¶ 2-8, 13, 19; (R. 1-8, ¶¶ 6, 8-12, 17); (R. 56-69, ¶¶ 2-8, 13, 19); Statement of Evidence (R. 245-252).

The arbitration panel rendered an award in favor of Kesler. As to the request for attorneys' fees, the arbitration award stated, "Claimants request for attorneys' fees and punitive damages are hereby denied." (Appendix, No. 3, p. 3). Kesler then petitioned the Sixth Circuit Court in Pinellas County for an award of attorneys' fees under Section 517.211(6). The Circuit Court denied Chatfield Dean's motion to dismiss at a hearing held on February 24, 1999. (R. 1-35). At the final hearing held on August 24, 1999, the Circuit Court found entitlement to the attorneys' fees pursuant to F.S. §§ 517.301, 517.211(6) as alleged in Petitioner's arbitration claim and awarded attorneys' fees to Kesler. (Appendix, No. 2) Final Judgment, ¶¶ 1-30; (R. 38-44, 56-69) (R. 245-252).

At the final hearing, Chatfield Dean did not rebut most of Petitioner's

evidence. (Appendix, No. 3) Final Judgment, ¶¶ 9, 21; (R. 56-69, ¶ 9, 21).

Chatfield Dean's motion for a rehearing was denied on November 17, 1999. (R. 225). Chatfield Dean appealed to the Second District Court of Appeal. (R. 226). On appeal, Chatfield Dean argued that there was no basis for an award of fees stated in the arbitration award. Petitioner moved to strike pages 72-224 of the record on appeal consisting of the supplemental affidavits submitted by Chatfield Dean along with its motion for rehearing. The Second District denied Petitioner's motion to strike. (R. 72-225).

On January 5, 2000 the Second District Court of Appeal reversed the award of attorneys' fees on the grounds that the trial court did not have a basis upon which to grant attorneys' fees because the arbitration award did not specify the theory upon which Kesler has prevailed. (Appendix, No. 1). On February 2, 2000 Kesler filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court and the parties submitted briefs. On September 1, 2000, counsel for Petitioner argued *Moser v. Barron Chase Securities, Inc.*, Case No. 96,714 before this Court. On September 14, 2000 the Florida Supreme Court entered an Order Accepting Jurisdiction and Dispensing With Oral Argument. (Appendix, No. 4).

SUMMARY OF ARGUMENT

Issue I.

This decision of the Second District Court of Appeal expressly and directly conflicts with the decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.* *Turnberry* held that arbitrators have no authority to award fees under F.S. § 682.11, absent the parties' express waiver of the right to have the fee issue determined in court. The arbitrators violated *Turnberry* by expressly ruling that the Petitioner's request for attorneys' fees was denied. In denying fees the arbitrators improperly dealt with the issue of Petitioner's entitlement to attorneys' fees which they had no right to do. The trial court properly heard evidence, determined entitlement and awarded fees. However, the Second District reversed the trial court's award of fees because the arbitrators had not specified the theory upon which Kesler had prevailed. The Second District's decision therefore expressly and directly conflicts with *Turnberry* because it allows arbitrators to specifically determine entitlement, or lack of entitlement, to fees.

This decision of the Second District also expressly and directly conflicts with the decision of the Fourth District in *Charbonneau v. Morse Operations, Inc.* The Fourth District held that an arbitrator exceeded his authority by

expressly denying a claim for attorneys' fees.

Relying upon its decision in *Barron Chase Securities, Inc. v. Moser*, 745 So.2d 965 (Fla. 2nd DCA July 21, 1999), argued before the Supreme Court September 1, 2000, the Second District concluded that the trial court did not have a basis upon which to grant attorneys' fees because the Kesler award did not specify the theory upon which Kesler had prevailed.

Issue II.

Kesler's claims involved multiple theories of recovery for the same wrongdoing, mismanagement of his investment account, including allegations of violation of F.S. § 517.301 and other common law allegations. Counsel urged the Second District to consider application of the "two issue rule." However, the Second District declined to consider application of the "two issue rule."

Issue III.

Counsel for Kesler also argued to the Second District that in light of its then recent decision in *Moser, supra*, the matter should be remanded to arbitrators for clarification under F.S. §§ 682.10, 682.12. The Second District did not order that the trial court remand the matter to the arbitration forum with orders that the arbitration panel be reconstituted "for the purpose of clarifying the award" as had been requested by Kesler's counsel.

ARGUMENT

I. The NASD Arbitration Award Improperly Included a Statement Denying Claimants' Request For Attorneys' Fees; The Trial Court Properly Heard Evidence, Determined Entitlement and Awarded Prevailing Party Attorneys' Fees

NASD arbitration awards typically do not specify the basis for liability. After the arbitrators have reached a decision, that decision is communicated to NASD staff. The NASD Arbitrator's Manual states:

“Once a decision is made, the staff member reduces the award to writing.

Under present law, an arbitrator is not required to give a reason for the decision.”

The Arbitrator's Manual, p. 31 (Appendix, No. 5).

Similarly, the NASD Code of Arbitration Procedure provides:

“The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.”

NASD Code of Arb. Proc., §10330(e). (Appendix, No. 5)

No statement regarding the basis for imposing liability is required.

Here, the NASD arbitration award improperly included a statement denying Petitioner's request for attorneys' fees. (Appendix, No. 3, page 3). Moreover, the trial court in its discretion properly heard evidence, determined entitlement and awarded prevailing party attorneys' fees. (Appendix, No. 2).

A. The Decision of the Second District, Which Reversed the Trial Court's Judgment Awarding Attorneys' Fees, Expressly and Directly Conflicts with This Court's Decision in *Turnberry Associates v. Service Station Aid, Inc.* Which Prohibits the Arbitrators from Determining Entitlement to Attorneys' Fees

Under the Florida Arbitration Code, attorneys' fees can only be awarded by a court of competent jurisdiction. F.S. §682.11. (Appendix, No. 6).

Arbitrators have no authority to determine entitlement to or award attorneys' fees, unless the parties expressly confer that authority by stipulation. *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla. 1995). (Appendix, No. 7).

Thus, the prevailing party in an NASD arbitration is required to bring a post-arbitration proceeding in court to obtain an award of attorneys' fees under Florida Statutes Sections 517.211(6) and 517.301. (Appendix, No. 6). The trial court must determine entitlement to attorneys' fees, even though the NASD

award typically does not specify whether or not the claimant prevailed on the statutory claim.

The trial court properly heard evidence, found entitlement and awarded fees. However, the Second District Court of Appeal agreed with appellant Chatfield Dean that the trial court had no basis for awarding attorneys' fees because the arbitration award did not specify the theory upon which Kesler had prevailed. The Second District therefore reversed the trial court's award of attorneys' fees to Kesler. The opinion of the Second District Court never addressed this Court's holding in *Turnberry*.

In *Turnberry*, this Court stated that arbitrators have no authority to award fees, absent the parties' express waiver of the right to have the fee issue determined in court. *Turnberry*, 651 So.2d at 1175 (Appendix, No. 7). Conversely, Kesler argues that the arbitrators have no right to deny entitlement to attorneys' fees unless the panel also specifically finds that there was no violations of F.S. § 517.301.

In the present case, the arbitration award denied Kesler's (the prevailing party's) request for attorneys' fees without specifying the basis for which such fees were denied, *i.e.* without finding that F.S. § 517.301 was, or was not, violated. Under the rule articulated by the Florida Supreme Court in *Turnberry*,

the arbitrators could not render an award of fees or determine entitlement or non-entitlement to fees.

However, the Second District allowed the arbitrators to summarily determine entitlement, or more specifically, non-entitlement to fees. The Second District decision in this case thus expressly and directly conflicts with *Turnberry*, which prohibits the arbitrators from awarding or even determining entitlement to fees.

Petitioner maintains that the problem of poorly drafted awards lies with the NASD. Further, the Petitioner should not be penalized due to NASD shortcomings in the securities arbitration process. Petitioner would ask that this Court not to set the bar so high in terms of the perfection in drafting arbitration awards so as to preclude him from justifiably receiving his prevailing party attorneys' fees under F.S. § 517.211(6).

Chatfield Dean is demanding a level of particularity and perfection in the arbitration award that simply does not exist in the NASD arbitration system. The awards are drafted by NASD staff from information provided by the panel of arbitrators on a form given to them by the NASD. These panel members are not all lawyers. Specific findings regarding statutory liability under F.S. § 517.301 are neither required nor encouraged. The award form is created by New Yorkers

for New Yorkers. The NASD staff provides the same form to panels throughout the country. Moreover, the NASD staff makes no attempt to have the award conform to the statutes or case law of a particular state, including Florida. (See NASD Manual and Code, Appendix, No. 5).

Chatfield Dean has seized on the shortcomings of the NASD system to preclude Petitioner from recovering the attorneys' fees he is entitled to as a prevailing party under the Florida Securities and Investor Protection Act.

As Petitioner's Counsel recently argued to this Court in *Moser v. Barron Chase Securities, Inc.*, *supra*, he has for many years attempted to get the NASD to correct the problem. There are significant problems created by the NASD's refusal to accept or favor proposed awards. The NASD's arbitration system was created by New Yorkers unfamiliar with Florida law. The NASD form used to create its awards is inadequate.

B. This Decision of the Second District Also Expressly and Directly Conflicts With the Decision of the Fourth District in *Charbonneau v. Morse Operations, Inc.*, Which Found That An Arbitrator Exceeded His Authority By Denying a Claim for Attorneys' Fees

The decision of the Second District also expressly and directly conflicts

with the recent decision of the Fourth District in *Charbonneau v. Morse Operations, Inc.*, 727 So.2d 1017 (Fla. 4th DCA 1999) (Appendix, No. 8). The Fourth District has held that an arbitrator exceeds his authority by denying a claim for attorneys' fees.

Under F.S. §682.11 and F.S. §517.211(6) attorneys' fees can only be awarded by a court of competent jurisdiction. Arbitrators have no authority to award attorneys' fees absent an express waiver of the statutory right to have attorneys' fees decided by a court of competent jurisdiction. *Turnberry Associates v. Service Station Aid, Inc.*, *supra*; *Dean Witter Reynolds, Inc. v. Wood*, 676 So. 2d 464 (Fla. 5th DCA 1996); *D.H. Blair and Company v. Johnson*, 697 So. 2d 912 (Fla. 4th DCA 1997).

Attorneys' fees for time spent in arbitration are recoverable but only in the trial court upon a motion for confirmation or enforcement of the award. The award must be confirmed before the court can award reasonable attorneys' fees. *Lee v. Smith Barney Harris Upham & Co., Inc.*, 626 So. 2d 969 (Fla. 2nd DCA 1993); *Raymond James & Associates, Inc. v. Smith*, 632 So. 2d 715 (Fla. 2nd DCA 1994). Therefore, it is clear that the arbitrators did not have the authority to either award or to deny attorneys' fees unless that authority was conferred upon them by the parties.

Here, no authority was conferred on the arbitrators for them to either grant or to deny attorneys' fees. (Final Judgment, Appendix, No. 2, ¶ 4). Their denial of fees was, in effect, a nullity, because they simply did not have such authority.

In the present case, the Second District concluded that the trial court did not have a basis upon which to grant attorney's fees because the award did not specify the theory upon which Kesler had prevailed. However, the Second District's conclusion ignored Kesler's express allegations in his arbitration claim which included alleged violations of F.S. § 517.301 and ignored the fact that the same allegations were again specifically stated in Kesler's petition for attorney's fees. (Final Judgment, Appendix, No. 2).

Furthermore, the trial court heard substantial evidence about the Petitioner prevailing under F.S. § 517.301. (Final Judgment, Appendix, No. 2). Thus the trial court properly confirmed the NASD award and properly awarded prevailing party attorneys' fees. *Id.*

Accordingly, Kesler urged the Second District to affirm the final judgment, or alternately, to order that the trial court remand the matter to the arbitration forum with orders that the arbitration panel be reconstituted "for the purpose of clarifying the award" pursuant to Florida Arbitration Code, F.S. §§

682.10, 682.12, (Appendix, No. 6)¹. However, despite Kesler's request the Second District elected not to order that the trial court remand the matter to the arbitration forum even though the arbitrators would have been in the best position to determine whether or not their award in Kesler's favor was based upon his having been the prevailing party under F.S. §§ 517.211(6) and 517.301.

Petitioner argues that arbitration has increasingly become an important method of alternative dispute resolution. It is therefore important that this Court provide direction and guidance to the parties placed before arbitration tribunals by specifically stating that when an arbitration award does not specify the basis for liability the "two issue rule" applies in order to avoid an unjust result as to prevailing party attorneys' fees.

II. The Florida "Two Issue Rule" Applies To Arbitrations As Well As to Civil Actions Where The Arbitrators Fail to State Which Theories Of Recovery Upon Which They Made An Award

The trial court conducted two hearings on Petitioner's petition for

¹ See e.g. Order, NASD Case No. 95-2976 dated November 19, 1999; Order Clarifying, Modifying and Correcting Award, NASD Case No. 98-02437 dated May 5, 2000 [both decided after the Second District's decision in *Barron Chase Securities, Inc. v. Moser, supra* and both specifically finding violation of F.S. § 517.301 after the claimants had alleged multiple theories of recovery and had prevailed.] (Appendix, No. 9).

confirmation and for attorneys' fees. The trial court had the opportunity to hear and weigh conflicting arguments and testimony.

The fact that Petitioner asserted common law claims as well as the statutory claim does not affect the issue of liability on the statutory claim. Petitioner's claim involved alternative theories of liability for the same wrong: the mismanagement of his investment account. According to the "two issue rule" in Florida, the trial court was required to assume that Petitioner prevailed on all of his claims, unless it could be shown that a particular claim was specifically rejected. *Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla. 1978); *Treal Group, Inc. v. Custom Video Services, Inc.*, 682 So.2d 1230 (Fla. 4th DCA 1996). (Appendices, Nos. 10, 11). *See also, Barth v. Khubani*, 748 So.2d 260 (Fla. 1999); *Zimmer, Inc. v. Birnbaum* __ So.2d __ (Fla. 4th DCA March 29, 2000) [both applying the "two issue rule" to the facts and circumstances of those cases].

Therefore, the trial court had the discretion to determine, in light of the conflicting testimony, that the language of the award denying fees was contrary to *Turnberry. supra* and F.S. § 682.11 and that the "two issue rule" applied. Under this rationale alone, the decision of the Second District should be reversed and the final judgment of the trial court affirmed.

III. If a Specific Finding of Liability on a Statutory Claim Is Required to Authorize an Award of Attorneys' Fees, the "Two Issue Rule" Does Not Apply to Arbitrations and an Application has Been Made to Confirm An Arbitration Award under F.S. § 682.12, the Trial Court In It Discretion Should Remand the Case to the Arbitrators for the Purpose of Clarifying the Award Pursuant to F.S. § 682.10

As discussed above, NASD awards are not perfect and typically do not state the rationale for the award or a specific finding as to the basis for liability. Because of such lack of specificity, there is confusion as to what theory or theories of recovery apply.

In this case, the trial court properly awarded fees based upon the testimony and evidence presented at the hearings.

However, if a specific finding of the basis for liability is required, the trial court should have been directed by the Second District to remand the case back to the arbitrators for purposes of clarifying the award.

The Florida Arbitration Code provides, pertinent part:

“[I]f an application to the court is pending under s. 682.12...on submission to the arbitrators...by the court under such conditions as the court may order, the arbitrators...may modify or correct the award...for the purpose of clarifying the award.”

F.S. §682.10. (Appendix, No. 6)

The petition for attorneys' fees was filed with an application to confirm the arbitration award pursuant to Florida Statutes Section 682.12. Pursuant to Section 682.10, the trial court can remand the award back to the arbitrators for clarification.

If either the appellate court or trial court is unsure as to the theory on liability upon which an arbitration award was made or if the "two issue rule" is found to not apply to arbitrations, then clarification of the award by the arbitrators themselves is the only means to determine their findings as to liability.

CONCLUSION

Based on the foregoing, this Court should reverse the decision of the Second District because of the express and direct conflicts with its decision in *Turnberry* and the Fourth District's decision in *Charbonneau*. Arbitration has become a prominent and important method of alternative dispute resolution. Petitioner respectfully asks this Court to prospectively articulate the requirements in arbitration awards to specify the statutory and common law theories of recovery so as avoid the issue of denying or awarding attorney's fees to the prevailing party without violating *Turnberry's* prohibition against arbitrators awarding such fees. This Court should extend the "two issue rule" to include

arbitrations. However, if a specific finding of the basis of liability is required, this Court should provide that ambiguities in arbitration awards should be remanded to the arbitration forum by the trial courts with orders that the arbitration panels be reconstituted “for the purpose of clarifying the award” pursuant to the Florida Arbitration Code, F.S. §§ 682.10, 682.12.

Dated: October 6, 2000.

Respectfully submitted,

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**CERTIFICATE RE: ADMINISTRATIVE ORDER DATED JULY 13,
1998**

I hereby certify that the foregoing Petitioner's Initial Brief and the related Appendix to Petitioner's Initial Brief were produced in 14 point proportionately spaced Times New Roman type.

Allan J. Fedor, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief and Appendix to Petitioner's Initial Brief has been furnished to John R. Ellis, Esq., Rutledge, Encenia, Purnell & Hoffman, P.O. Box 551, Tallahassee, FL 32302-0551 by U.S. Mail this _____ day of October, 2000.

Allan J. Fedor, Esq.