

ORIGINAL

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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CLERK, SUPREME COURT
BY

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

Petitioner,

CASE NO. SC00-259

v s .

CHATFIELD DEAN & CO., INC.,

Respondent.

ANSWER BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 98-04819

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STATEMENT OF THE CASE AND FACTS

The appeal was taken from a judgment for attorney's and expert witness fees in the amount of \$74,920 awarded by the Circuit Court to an investor against a stockbroker, based on a March 5, 1996 National Association of Securities Dealers ("NASD") arbitration award in favor of the investor in the amount of \$3,836 plus costs. The stockbroker, respondent Chatfield Dean & Co., Inc. ("Chatfield Dean"), paid the arbitration award one month after it was rendered, but the Circuit Court action to confirm the arbitration award and for attorney's fees was not filed by the investor, petitioner David B. Kesler and the Law Offices of David B. Kesler ("Kesler"), until March 3, 1997, one year after the NASD award was issued.

Kesler's petition for attorney's fees alleged that the arbitrators had found Chatfield Dean liable to Kesler for securities transactions in violation of Section 517.301, Florida Statutes, making Kesler the prevailing party entitled to an award of attorney's fees under Section 517.211(6), Florida Statutes. Chatfield Dean moved to dismiss Kesler's petition for attorney's fees on the grounds that the NASD arbitration award had been rendered on March 5, 1996 and had been paid on April 4, 1996; that the award of \$3,836 was only a fraction of the \$137,000 Kesler had sought in the arbitration; and that the award expressly denied

Kesler's request for attorney's fees, and consequently that Kesler's petition for attorney's fees was an untimely attempt to obtain review of the NASD arbitration award under Section 682.13 and 682.14, Florida Statutes. The motion to dismiss was denied on and the Circuit Court subsequently entered the judgment on October 26, 1998.

Chatfield Dean moved for rehearing and argued, among other matters, that there was no basis on which the Circuit Court could award attorney's fees under Section 517.211(6), Florida Statutes, because the NASD arbitration award made no finding of liability on any of the four theories of liability advanced by Kesler and two of the four theories were common **law** claims not brought under Sections 517.211 or 517.301, Florida Statutes. The four theories of liability advanced by Kesler are listed in the award under the heading "Case Summary," and a copy of the award is Exhibit 2 to the Appendix of Petitioner's Brief on Supreme Court Jurisdiction. The Circuit Court denied the motion for rehearing, finding that the motion raised no new issues not previously argued by counsel.

The Court of Appeal reversed the portions of the judgment awarding attorney's and expert witness fees to Kesler, on the ground that the Circuit Court did not have a basis to award attorney's fees because the NASD arbitration award did not specify

the theory of liability upon which Kesler had prevailed.

SUMMARY OF ARGUMENT

The NASD arbitration award did not provide a basis for the Circuit Court to award attorney's and expert witness fees under Florida law, because the award made no finding of liability against Chatfield Dean on any of the four theories of liability advanced by Kesler at the arbitration, or on any other theory of liability. Pharmacy Management Services v. Perschon, 622 So.2d 75 (Fla. 2d DCA 1993); Central Florida Investments v. Fishkind, 660 So.2d 380 (Fla. 5th DCA 1995); Barron Chase Securities, Inc. v. Moser, 24 Fla. L. Weekly D1728 (Fla. 2nd DCA July 21, 1999).

There is no conflict between the Court of Appeal's decision in this case and the decisions in Turnbery Associates v. Service Station Aid, Inc., 651 So.2d 1173 (Fla. 1995), and Charbonneau v. Morse Operations, Inc., 727 So.2d 1017 (Fla. 4th DCA 1999), because the basis for the Court of Appeal's reversal of the judgment in this case was the absence of any specification in the NASD arbitration award of a finding of liability on a claim which would support an award of attorney's fees, rather than the express denial in the award of Kesler's claim for attorney's fees.

ARGUMENT

1. THERE IS NO CONFLICT WITH ~~TURNBERRY ASSOCIATES~~
V. STATION AID, INC.

In Turnberry, this Court approved the Court of Appeal's decision giving effect to an arbitration award of attorney's fees in favor of a defendant in an arbitration involving a breach of contract claim, despite the absence of a contractual or statutory basis for the award, based on a finding by the Circuit Court that the parties to the arbitration had agreed to permit the arbitrator to decide the issue of attorney's fees. That finding was determined to be sufficient to control over the limitation of jurisdiction of arbitrators expressed in Section 682.11, Florida Statutes, that arbitrators are authorized to award expenses and fees "not including counsel fees." The opinion in Turnberry noted that in recent years, this Court has consistently taken the position that "arbitration is a favored means of dispute resolution and courts [should] indulge every reasonable presumption to uphold proceedings resulting in an award." Turnberry, supra at 1175, citing Roe v. Amica Mut. Ins. Co., 533 So.2d 279, 281 (Fla. 1988).

In the present case, there was no finding by the Circuit Court or by the Court of Appeal that the parties had agreed to confer jurisdiction on the arbitrators to award attorney's fees. If there

had been such a finding, then the express denial in the NASD arbitration award of Kesler's claim for attorney's fees would be dispositive.

Instead, the Court of Appeal's opinion succinctly states the basis for reversal of the Circuit Court's judgment as follows:

Kesler had asserted both statutory and common law grounds for recovery; however, the arbitration award failed to state the ground upon which it was based....

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. (citation omitted). For this reason, we reverse the portions of the final judgment awarding attorney's fees and experts' fees....

The Court of Appeal's decision is consistent in this regard with its prior decision in Pharmacy Management Services, Inc. v. Perschon, 622 So.2d 75 (Fla. 2d DCA 1993), and with its recent decision in Barron Chase Securities, Inc. v. Moser, 24 Fla. L. Weekly D1728 (Fla. 2nd DCA July 21, 1999), as well as with the decision of the Fifth District Court of Appeal in Central Florida Investments v. Fishkind, 660 So.2d 380 (Fla. 5th DCA 1995). Kesler's claim of inconsistency finds no support in the terms of Turnberry or in the terms of the Court of Appeal's decision in the case below.

2. THERE IS NO CONFLICT WITH CHARBONNEAU V. MORSE OPERATIONS, INC.

In Charbonneau v. Morse Operations, Inc. 272 So.2d 1017 (Fla. 4th DCA 1999), the Court of Appeals reversed the trial court's denial of a motion for attorney's fees made pursuant to the Florida Deceptive and Unfair Trade Practices Act and the Motor Vehicle Sales Finance Act, made by a consumer who had prevailed in an arbitration against a motor vehicle dealership. The arbitrator had awarded compensatory damages to the consumer but had denied her claim for attorney's fees, and she had promptly moved to modify the award as to the denial of attorney's fees. The trial court denied the motion to modify the award but made no finding that the parties had agreed to submit the attorney's fees claim to the arbitrator. The Court of Appeal reversed on the ground that under ~~Turnberry~~, a waiver of the limitation of Section 682.11, Florida Statutes, on the jurisdiction of arbitrators to award attorney's fees must be express and cannot be inferred from a party's actions, such as the submission by one party of a claim for attorney's fees to the arbitrators.

Again, there is no conflict with the Court of Appeal's decision in this case because the basis for the decision in this case was the absence of any specification in the NASD arbitration

award of a finding of liability on a claim or theory which would authorize the Circuit Court to award attorney's fees; not on the express denial in the award of **Kesler's** claim for attorney's fees.

CONCLUSION

For the foregoing reasons, this Court should decline to exercise its discretionary jurisdiction to review the decision of the Court of Appeal in this case.

Dated: March 6, 2000

Respectfully submitted,



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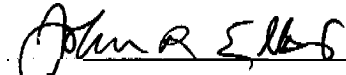
Attorneys for Respondent,
CHATFIELD DEAN & CO., INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 6th day of March, 2000:

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