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 BRIEF ON SUPREME COURT JURISDICTION

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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.

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").

In the arbitration proceeding, Kesler had asserted both common law claims and a statutory claim under Florida Statutes Section 5 17.301. Kesler had also requested an award of attorney's fees, based on Florida Statutes Section 5 17.211. Section 5 17.2 11 provides for an award of attorneys' fees to the party who prevails on a claim brought under Section 5 17.30 1.

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. 2)

Kesler then petitioned the Sixth Circuit Court in Pinellas County for an award of attorneys' fees under Section 5 17.211. The Circuit Court awarded attorneys' fees to Kesler, and Respondent Chatfield Dean appealed to the Second District

Court of Appeal. On appeal, Chatfield Dean argued that there was no basis for an award of fees.

On January 5, 2000 the Second District Court of Appeal reversed the award of attorneys' fees. On February 2, 2000 Kesler filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court.

II. SUMMARY OF ARGUMENT

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.*, 65 1 So.2d 1173 (Fla. 1995). *Turnberry* held that arbitrators have no authority to award fees, absent the parties' express waiver of the right to have the fee issue determined in court. In this case, the arbitrators complied with *Turnberry* by referring the issue of attorneys' fees to a court of competent jurisdiction. However, the Second District reversed the trial court's award of fees because the arbitrators had not specifically awarded such fees. The Second District's decision therefore expressly and directly conflicts with *Turnberry* because it requires arbitrators to specifically determine entitlement to fees.

This decision of the Second District Court of Appeal also expressly and directly conflicts with the decision of the Fourth District in *Charbonneau v. Morse*

Operations, Inc., 727 So.2d 1017 (Fla. 4th DCA 1999). The Fourth District held that an arbitrator exceeded his authority by expressly denying a claim for attorney's fees. 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 Kesler award did not specify the theory upon which the Kesler had prevailed. 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" pursuant to Florida Arbitration Code, F.S. §§ 682.10, 682.12., 682.13, 682.14, as had been requested by Kesler's counsel.

III. GROUNDS FOR INVOKING SUPREME COURT JURISDICTION

A. This Decision Expressly and Directly Conflicts With the Decision of This Court in *Turnberry Associates v. Service Station Aid, Inc.* Because It Requires Arbitrators to Specifically Determine Entitlement to Fees, in Violation of *Turnberry*

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 did not mention the language of the arbitration award which, in light of this Court's decision in *Turnberry* improperly stated that "Claimants request for attorneys' fees and punitive damages are hereby denied,"

In *Turnberry Associates v. Service Station Aid, Inc., 651* So.2d 1173, 1175 (Fla. 1995) (Appendix, No. 3), 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. Conversely, Kesler argues that the arbitrators have no right to deny attorneys' fees as well unless the panel also specifically finds that there was no violations of F.S. § 517.301, as alleged by Kesler.

In the present case, the arbitration award denied Kesler's (the prevailing party's) request for attorney's fees request for attorneys' fees without specifying the basis for which such fees were denied, *i.* e. without finding that F. S. § 5 17.30 1 was, or was not, violated. Under the rule articulated by the Florida Supreme Court in *Turnberry,* the arbitrators could do no more; they could not render an award of fees or even determine entitlement or non-entitlement to fees.

However, in the present case, the Second District required the arbitrators to do more. The Second District required the arbitrators to specifically state the theory upon which Kesler had prevailed. The Second District decision in this case thus

expressly and directly conflicts with ***Tumberry,*** which prohibits the arbitrators from awarding or even determining entitlement to fees.

B. This Decision Expressly and Directly Conflicts With the Decision of the Fourth District in *Charbonneau v. Morse Operations, Inc.* Because the Kesler Arbitrators Expressly Rejected Petitioner's Request For Attorney's Fees Contrary To the Holding in *Cltarbonneau* Which Found That An Arbitrator Exceeded His Authority By Denying the Claim for Attorney's 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. 4). The Fourth District has held that an arbitrator exceeds his authority by denying a claim for attorney's fees.

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, The Second District's conclusion ignored Kesler's express allegations in his arbitration claim which included alleged violations of F. S. § 5 17.30 1 and ignored the fact that the same allegations were again specifically stated in Kesler's petition for attorney's fees.

Accordingly, Kesler urged the Second District 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. , 682.13, 682.14 (Appendix, No. 5). However, despite Kesler's request the Second District elected to not 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. §§ 517.21 1(6) and 517.301.

Arbitration has increasingly become an important method of alternate dispute resolution. It is therefore important that this Court provide direction and guidance to the parties placed before arbitration tribunals. This court could articulate that whenever arbitration awards are unclear or are contrary to law, then the appellate courts should defer to the trial courts. Further, the trial courts should consistently remand to the arbitrators "for the purpose of clarifying the award" pursuant to Florida Arbitration Code, F.S. §§ 682.10, 682.12. , 682.13, 682.14.

By agreeing to grant jurisdiction in this matter, this Court could provide the guidance necessary to prevent confusion and inconsistent results at both the trial court level and the appellate court level.

CONCLUSION

Based on the foregoing, this Court should exercise its discretionary jurisdiction to review this case because of the express and direct conflicts with its decision in *Turnberry* and the Fourth District's decision in ***Charbonneau.*** Since arbitration has become a prominent and important method of alternate dispute resolution, this Court could then specifically articulate the requirements in arbitration awards as to the issue of denying or awarding attorney's fees to the prevailing party without violating *Turnberry 's* prohibition against arbitrators awarding such fees. Further this Court should provide that ambiguities in arbitration awards should necessarily 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, 682.13, 682.14 (Appendix No. 5).

Dated: February 9, 2000.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE RE: ADMINISTRATIVE ORDER DATED JULY 13, 1998

I hereby certify that the foregoing Petitioner's Amended Brief on Supreme Court Jurisdiction was 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 Notice to Invoke Discretionary Jurisdiction has been furnished to John R. Ellis, Esq., Rutledge, Encenia, Pumell & Hoffinan, P.O. Box 551, Tallahassee, FL 32302-0551 by U.S. Mail this 9th day of February, 2000.

Allan J. Fedor, Esq.

jurisbriefkeslerrevised.wpd

APPENDIX

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Appendix Part 1

MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FILED

JAN 5 2000

RECEIVED

CHATFIELD DEAN & CO., INC.,

Appellant,

v.

DAVID B. KESLER and THE OFFICES OF DAVID B. KESLER, P.A.

Appellees.

Case No. 98-04819

Opinion filed January 5, 2000.

Appeal from the Circuit Court for Pinellas County; James R. Case, Judge.

John R. Ellis, Tallahassee, for Appellant.

Richard R. Logsdon, Clearwater, and Allan J. Fedor, Largo, for Appellees.

SALCINES, Judge.

Chatfield Dean & Co., Inc. (Chatfield Dean), a brokerage firm, appeals the trial court's final judgment confirming an arbitration award and granting attorney's and experts' witness fees to David B. Kesler and the Law Offices of David B. Kesler, P.A.

(cumulatively referred to as Kesler). We reverse the final judgment to the extent that it granted attorney's and experts' witness fees to Kesler.

In 1991, Kesler became a Chatfield Dean customer, Disputes arose regarding certain stock trades which led the parties to arbitration. On March 5, 1996, Kesler obtained an arbitration award in the amount of $3,836, plus costs. Kesler had asserted both statutory and common law. grounds for recovery; however, the arbitration award failed to state the grounds upon which it was based. Further, the award rendered by the arbitration panel contained a provision expressly rejecting Kesler's request for attorney's fees.

Kesler did not seek a clarification of the award.[1] Instead, eleven months later, on March 3, 1997, Kesler filed a petition with the trial court seeking to confirm the arbitration award and to procure attorney's fees. After denying Chatfield Dean's motion to dismiss the Kesler petition, the trial court confirmed the award and granted $74,920[2] in fees.

Chatfield Dean has presented several points on appeal but one dispositive issue mandates 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. See Barron Chase Sec., Inc. v. Moser, 24 Fla. L. Weekly D1728 (Fla. 2d DCA July 21, 1999). For this reason, we reverse the portions of the

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[1] It is arguable that Kesler's failure to timely seek relief to either vacate or modify the arbitration award foreclosed the petition for attorney's fees in this case. See Sachs v. Dean Witter Revnolds. Inc., 584 So. 2d 211 (Fla. 3d DCA 1991). We decline to address that point in light of the dispositive issue on which this case turns.

[2] This amount included both the attorney's fees incurred in obtaining the arbitration award and the experts' fees incurred in obtaining the attorney's fee award.

final judgment awarding attorney's and experts' fees but affirm the portion confirming the arbitration award.

Reversed in part; affirmed in part.

WHATLEY, A.C.J., and NORTHCUTT, J., Concur.

Appendix Part 2

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

David B. Kesler Individually and
Law Offices of David B. Kesler, P.A.

93-05349

Name of Respondents

Chatfield Dean & Co.
Corporate Securities Group, Inc.
Samuel Crockett

REPRESENTATION

For Claimant, David B. Kesler Individually and Law Offices of David B. Kesler, P.A. ("Kesler"): Allan J. Fedor, Esq. and Franell Fedor, Esq. of Fedor & Fedor, Largo, FL.

For Respondent, Chatfield Dean & Co., ("Chatfield"): Christa D. Taylor, Esq., corporate counsel for Chatfield.

For Respondent, Corporate Securities Group, Inc., ("CSG"), Francis Curran, Esq. of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A. of Clearwater, FL.

For Respondent, Samuel Crockett, pro se.

CASE INFORMATION

Statement of Claim filed: December 28, 1993.

Claimant's Submission Agreement signed on: April 29, 1993.

Statement of Answer filed by Respondent, Chatfield, on: February 10, 1994.

Respondent's Chatfield Submission Agreement signed on: January 17, 1994.

Statement of Answer filed by Respondent, CSG, on: March 16, 1994.

Statement of Answer filed by Respondent, Samuel Crockett, on: May 12, 1994.

HEARING INFORMATION

On September 25, 1995, a pre-hearing conference was held with an arbitrator via-telephone,

On December 4 and 5, 1995, in Tampa, Florida, hearings lasting 4 sessions were conducted.

CASE SUMMARY

Claimants, alleged that despite Claimants' conservative investment objectives, Respondents recommended investments whose prices were manipulated and which were of substantial risk. Further, Respondents churned Claimants' accounts for their own benefit. Respondents' stock manipulation and excess markups involved, at the very least, a willful, wanton, callous and reckless disregard for Claimants' investment objectives.

Chatfield was a market maker in all of the securities it sold to the Claimant. Claimants alleged that Chatfield never disclosed the commissions on their trades. In particular, Claimants alleged that Respondent Chatfield manipulated the market in Royce Laboratories stock.

The Claimants alleged that Respondents' conduct: 1) constituted common law fraud and misrepresentation and/or negligent misrepresentation; 2) constituted negligence and/or gross negligence; 3) constituted a breach of fiduciary duty to Claimants; and 4) violated Rules 1, 2, 18, and 27 of the NASD Rules of Fair Practice.

Respondent Chatfield denies all of Claimant's allegations. Chatfield contends that Claimant was a sophisticated, suitable investor, whose investment objectives were growth with risk and speculation. Chatfield states that it acted as market maker for the stocks purchased by Claimant and disclosed all information the law required it to disclose regarding its market making activities. Chatfield neither manipulated the stock price of Royce Laboratories, Inc., nor churned Claimant's accounts, nor breached any fiduciary duties to Claimant in these non-discretionary accounts.

Respondent Chatfield alleged the affirmative defenses of statute of limitations, failure to mitigate, waiver, estoppel and laches.

Respondents Corporate Securities Group and Samuel Crockett each separately settled with the Claimants and were not, therefore, to be considered as parties to this award.

RELIEF REQUESTED

Claimants requests actual compensatory damages in excess of $137,000.00, plus costs, expenses, disbursements and reasonable attorneys' fees as well as the $950.00 filing and forum fee paid to the NASD. Claimants also requested punitive damages and such other relief as the panel

deems just and proper.

Respondent Chatfield requested dismissal of the claim and award of its costs of arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Claimants requested sanctions against Respondent Chatfield for discovery abuse, failure to produce documents pursuant to the arbitrator's order and for its deliberately dilatory defense motion related to the In Re: Royce Laboratories Securities Litigation. The panel denied the Claimants request for sanctions.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing the undersigned arbitrators have decided in full and fmal resolution of the issues submitted for determination as follows:

Respondent Chatfield Dean & Co. is found liable and shall pay to the Claimant the amount of $3,836.00.

Respondent Chatfield Dean & Co. is also found liable and shall pay to the Claimant its costs in the amount of $2,432.99.

Claimants request for attorneys' fees and punitive damages are hereby denied,

Respondent's request for costs are hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of $3,300.00 (one pre-hearing conference x $300.00 and four hearing sessions x $750.00).

The Respondent, Chatfield Dean & Co., is hereby assessed $3,300.00 for which $750.00 shall payable directly to the Claimant and $2,550.00 of which shall be paid to the NASD.

Respondent shall reimburse the Claimant $200.00 for the non-refundable filing fee.

The NASD shall retain the session deposit of $750.00 paid by the Claimants.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures Name	Public/Industry
/s/ Robert M. Shavick, Esq.	Public
/s/ Gerald B. Conley	Industry
/s/ Ronald M. Gordon	Public

Date of Decision: March 5, 1996

Appendix Part 3

Florida Case Law

TURNBERRY ASSOCIATES v. SERVICE STATION, 651> <So.2d> <1173> (Fla. 1995)

TURNBERRY ASSOCIATES, A FLORIDA GENERAL PARTNERSHIP, PETITIONER, v. SERVICE STATION AID, INC., A FLORIDA CORPORATION, RESPONDENT.

No. 83254.

Supreme Court of Florida.

March 2, 1995.

Appeal from the Circuit Court, Dade County, Sidney B. Shapiro, J.
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Nicolas A. Manzini and Maidenly Sotuyo of Manzini & Stevens, P.A., Miami, for petitioner.

John Kirk McDonald and William R. Robbins, Coral Gables, and Jeanne Heyward, Miami, for respondent.

ANSTEAD, Justice.

We have *for review Service Station Aid, Inc. v. Turnberry Associates,* 629 So.2d 204 (Fla. 3d DCA 1993) because it conflicts with *Higley South,* Inc. v. *Quality Engineered Installation, Inc.,* 632 So.2d 615 (Fla. 2d DCA 1994), review *granted, 642* So.2d 1362 (Fla. 1994), and *Fridman v. Citicorp Real Estate, Inc.,* 596 So.2d 1128 (Fla. 2d DCA 1992). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve the decision below.

Facts

Turnberry Associates (Turnberry), as the owner of real property, contracted with Ahrens Construction Development, Inc. (Ahrens) for construction work on its property. In turn, Ahrens entered into a subcontract with Service Station Aid, Inc. (Service Station), to work on the Turnberry contract. After the construction work was completed, a disagreement arose among Turnberry, Ahrens, and Service Station. As a result, Turnberry filed suit against Ahrens and Service Station. The trial court ordered arbitration of the parties' dispute pursuant to a contractual provision for arbitration. At arbitration, Turnberry's claim against Ahrens and Service Station was denied. Subsequently, the arbitrator entered an award of attorney's fees in favor of Service Station and against Turnberry.

Turnberry asked the trial court to vacate the arbitrator's award of attorney's fees. After an evidentiary hearing, the trial court vacated the attorney's fees award because it found no contractual provision that would entitle Service Station to attorney's fees. On appeal, the Third District reversed and based its ruling, in part, on the authority of *Pierce* v. *J.W. Charles-Bush Securities, Inc., 603* So.2d 625 (Fla. 4th DCA 1992)

(en banc), which held that parties to an arbitration are free to confer jurisdiction by agreement on an arbitrator to award attorney's fees.

Discussion

We begin our analysis with the statutory provision which governs an arbitrator's powers and jurisdiction with respect to arbitration fees and expenses after a determination of the merits of the parties' dispute. In its entirety this section provides:

> Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, *not including counsel fees,* incurred in the conduct of the arbitration, shall be paid as provided in the award.

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§ 682.11, Fla. Stat. (1993) (emphasis added). The Second District in *Fewox v. McMerit Construction Co.,* 556 So.2d 419 (Fla. 2d DCA 1989), *approved sub nom. Insurance Co. of N. Am. v. Acousti Engineering Co.,* 579 So.2d 77 (Fla. 1991), interpreted the "not including counsel fees" clause in section 682.11 to mean that "an arbitrator may not include attorney's fees in his award of expenses and fees incurred during arbitration proceedings." *Id.* at 421. The district court concluded that the circuit court was the "`proper place to determine the entitlement to and amount of attorney's fees authorized by contract or statute , . . upon application for confirmation of the [arbitrator's] award."' *Id.* at 422 (quoting *Loxahatchee River Envtl. Control Dist. v. Guy Villa & Sons, Inc.,* 371 So.2d 111, 113 (Fla. 4th DCA 1978)).

Subsequently, in *Insurance Co. of North America v. Acousti Engineering Co.,* 579 So.2d 77, 79 (Fla. 1991), this Court, in a decision which embraced three consolidated cases and involved a dispute as to the entitlement to fees incurred in arbitration, adopted the en banc opinion of the second District in *Fewox.* In that decision, we were asked whether "section 682.11, Florida Statutes (1987), prohibit[s] an award of attorney's fees incurred during arbitration proceedings, or does it merely prohibit the arbitrator from making such an award?" *Id.* at 79. We agreed with the *Fewox* Court that section 682.11 "does not proscribe the award of attorney's fees incurred during arbitration but rather merely prohibits arbitrators from awarding such fees." *Id.* at 80. However, in that decision, we did not decide the issue squarely confronting us today: Whether parties by stipulation may waive the statutory bar and confer jurisdiction upon arbitrators to award attorney's fees.

In recent years, we have consistently taken the view that "arbitration is a favored means of dispute resolution and courts [should] indulge every reasonable presumption to uphold proceedings resulting in an award." *Roe v. Amica Mut. Ins. Co.,* 533 So.2d 279, 281 (Fla. 1988). We now agree with the construction given to section 682.11 by the Fourth District Court in *Pierce,* and hold that the parties by agreement may waive their entitlement to have the circuit court decide the issue of attorney's fees and by doing so may confer subject matter jurisdiction upon an arbitrator to award attorney's fees. As the Fourth District points out, "Under the current policy of broad construction in favor of arbitration, such a narrow and

restrictive reading [of section 682.11] is certainly questionable." *Pierce,* 603 So.2d at 629. Arbitration itself, of course, is a voluntary alternative method for the resolution of disputes. Absent a clear directive from the legislature, we see no reason why the parties may not also voluntarily agree to allow the collateral issue of attorney's fees to be decided in the same forum as the main dispute. We do not read section 682.11 as such a clear directive.[fn1]

Notwithstanding our ruling today, we will continue to permit trial courts, in the event a dispute arises, to enjoy exclusive jurisdiction to resolve the factual issue of whether the parties have **waived** their statutory right to have the court decide the fee issue. Under section 682.11, as previously construed by this Court, the parties continue to have the right to have the issue of attorney's fees decided in court if they wish. The arbitrator has no authority to award fees absent an express waiver of this statutory right.

Turnberry argues that in this case there was neither an oral nor written stipulation by the parties to permit the arbitrator to enter an award of attorney's fees. However, as the Third District Court noted, and we agree, the trial court made a factual finding that the parties had agreed to permit the **arbitrator to** decide the **issue** of attorney's fees.

Accordingly, we approve the Third District decision and recede from our opinion in *Acousti Engineering* to the extent of conflict. We disapprove of the holdings in *Higley South, Xnc. v. Quality Engineesed Installation Inc.,* 632 So.2d 615 (Fla. 2d DCA 1994),
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and *Fridman* v. Citicorp *Real Estate, Inc.,* 596 So.2d 1128 (Fla. 2d DCA 1992), to the extent that they are inconsistent with this opinion.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.

[fn1] **We** agree that it would be helpful if the legislature would review this section and provide clearer guidance on this issue.0

Appendix

Florida Case Law

CHARBONNEAU v. MORSE OPERATIONS, 727> <So.2d> <1017> (Fla.App. 4 Dist. 1999)

BETH CHARBONNEAU, Appellant, v. MORSE OPERATIONS, INC., d/b/a ED MORSE CADILLAC, Appellee.

No. 98-0758

District Court of Appeal of Florida, Fourth District

Opinion filed February 17, 1999

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James T. Carlisle, Judge; L.T. Case No. CL-96-14 AE.

Raymond G. Ingalsbe of Raymond G. Ingalsbe, P.A., Palm Beach Gardens, for appellant.

Mark Atlas and Les Stracher of Stracher & Harmon, P.A., Fort Lauderdale, for appellee.

SHAHOOD, J.

Appellant, Beth Charbonneau, appeals from an Order denying her Motion to Modify/Correct Award and Motion for Confirmation of Award and from the granting of appellee's Motion for Confirmation of Award of the Arbitrator as Entered with Final Judgment. Because the arbitrator exceeded his authority in denying appellant's claim for attorney's fees, we reverse and remand with directions in accordance with this opinion.

In October 1994, appellant visited the appellee's dealership to look for a used Cadillac. Appellee's salesman recommended a 1991 Cadillac Seville which he allegedly represented was in excellent condition and had never been in an accident. Based on such representations, appellant entered into a purchase agreement for the purchase of the used Cadillac. Approximately one year later, appellant learned that the Cadillac had been in a prior accident. According to appellant, when appellee was apprised of the vehicle's condition, they would not agree to rescind their agreement.

Appellant filed a two-count complaint against appellee alleging in count I, fraud and deceit, and in count II, Deceptive and Unfair Trade Practices. Appellee moved to stay the action and compel arbitration in accordance with the terms and conditions of the Purchase Agreement. As a result of said provision, the trial court stayed the action and compelled the arbitration of this dispute.

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Appellant's arbitration claim alleged three counts: fraud and deceit (count I); Deceptive and Unfair Trade Practices (count II); and violation of the Motor Vehicles Sales Finance Act (count III). Count II sought damages and attorney's fees under section

501.2105, Florida Statutes and Count III sought statutory damages and attorney's fees under section 520.12, Florida Statutes.

Appellee initially filed a Motion to Strike Claimant's Claim for Attorney's Fees claiming that appellant was barred from seeking statutory attorney's fees under section 501.2105, since her recovery, if any, would be achieved through arbitration rather than after judgment in a trial court following litigation as contemplated by the language in statute. Prior to appellee filing his amended motion, appellant's counsel, in a letter to the arbitrator dated September 8, 1997, responded to the attorney's fee issue and stated the following:

> . . My file note adequately addresses the issue and a reading of those two cases clearly indicates that attorney's fees are available and awardable as a result of arbitration, the only question remaining is whether the arbitrator or a circuit court judge actually awards the fees. The case law seems to indicate that the arbitrator in his arbitration award should indicate that plaintiff is entitled to attorney's fees but leave the decision as to the amount of attorney's [fees] to a circuit court judgment upon confirmation of the entire arbitration award. . . . Of course the arbitrator can decide the issue if both parties agree. In that regard, the plaintiff has no objection to that arrangement.

In its Amended Motion to Strike Claimant's Claim for Attorney's Fees, appellee claimed that attorney's fees associated with arbitration proceedings were recoverable only by statute or by specific agreement. Appellee argued that since the parties did not specifically agree either orally or by written stipulation to an attorney's fee provision in the purchase agreement, appellant would only be entitled to recover attorney's fees pursuant to statute and that such recovery was barred by statute.

On October 15, 1997, the Arbitrator entered an award of compensatory damages in favor of appellant in the amount of $9,500, denied appellee's Amended Motion to Strike Claimant's Claim for Attorney's Fees, and denied appellant's demand for attorney's fees. The Arbitrator further held that appellee shall be responsible for administrative fees of the American Arbitration Association previously advanced by appellant in the amount of $2,213.75.

Appellant filed a Motion to Modify/Correct Award and Motion for Confirmation of Award arguing that the Arbitrator was without authority to deny her claim for attorney's fees available pursuant to statutes 501.2105 and 520.12. In response, appellee claimed that during the hearing on its Motion to Strike Claimant's Claim for Attorney's Fees, appellant did not reserve her right to seek the trial court's determination as to entitlement of attorney's fees. specifically, appellee argued that the parties submitted the issue of entitlement of attorney's fees to the Arbitrator by virtue of the evidence submitted before the Arbitrator at the hearing on the motion to strike and appellant's counsel correspondence to the Arbitrator.

The trial court subsequently denied appellant's Motion to Modify/Correct Award and Motion for Confirmation of Award dated October 29, 1997. Instead, the trial court granted appellee's Motion for Confirmation of the Award of the Arbitrator as entered.

In Florida, "[t]he standard of judicial review applicable to challenges of an arbitration award is very limited, with a high degree of conclusiveness attaching to an arbitration award." *See Applewhite v. Sheen Fin. Resources, Inc.,* 608 So.2d 80, 83 (Fla. 4th DCA 1992). Under this limited review, the courts must avoid a "judicialization" of the arbitration process. Arbitration is an alternative to the court system and limited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative. See *Chandra, M.D. v. Bradstreet,* 23 Fla. L. Weekly D2658 (Fla. 5th DCA Dec. 4, 1998). In order to preserve the integrity of the arbitration process, "courts will not review the finding of facts contained in an
Page 1020
award, and will never undertake to substitute their judgment for that of the arbitrators." *See Schnurmacher Holding, Inc. v. Noriega,* 542 So.2d 1327 (Fla. 1989).

An arbitration award may not be set aside for mere errors of judgment either as to the law or as to the facts. See *id.* If the award is within the scope of the submission, and the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment. See *Verzura Constr., Inc. v. Surfside Ocean, Inc.,* 708 So.2d 994, 995 (Fla. 3d DCA 1998). An arbitrator exceeds his or her power by going beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration. See *Applewhite, 608 So.* 2d at 83.

In finding that the arbitrator in this case exceeded his authority by denying appellant's claim for attorney's fees, we note that it is well settled that an arbitrator has no authority to award attorney's fees absent an express waiver of the limitation contained in section 682.11, Florida Statutes. *See D.H. Blair & Co. v. Johnson,* 697 So.2d 912, 913 (Fla. 4th *DCA* 1997), *review dismissed as improvidently granted,* No. 91,539 (Fla. Nov. 16, 1998). "Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." See § 682.11, Fla. Stat. (1997).

In *Turnberry Associates v. Service Station Aid, Inc.,* 651 So.2d 1173, 1175 (Fla. 1995), the Florida Supreme Court held that "the parties by agreement may waive their entitlement to have the circuit court decide the issue of attorney's fees and by doing so may confer subject matter jurisdiction upon an arbitrator to award attorney's fees." Absent a clear directive from the legislature, there is no reason why parties may not voluntarily agree to allow the collateral issue of attorney's fees to be decided in the same forum as the main dispute. See *id.*

The *Turnberry* court went on to hold that:

Notwithstanding our ruling today, we will continue to permit

> trial courts, in the event a dispute arises, to enjoy exclusive jurisdiction to resolve the factual issue of whether the parties have waived their statutory right to have the court decide the fee issue. Under section 682.11, as previously construed by this Court, the parties continue to have the right to have the issue of attorney's fees decided in court if they wish. The arbitrator has no authority to award fees absent an express waiver of his statutory right.

651 So.2d at 1175.

In *GCA, Inc. v. 90 S.W. 8th St. Enterprises, Inc.*, 696 So.2d 1230, 1232 (Fla. 3d DCA 1997), the Third District, in following *Turnberry,* held that in order for an express waiver to be found, there must either be a stipulation during the course of arbitration or a specific finding based on substantial, competent evidence that the parties agreed to submit the attorney's fees issue to the arbitrator.

In *D.H. Blair,* an NASD (National Association of Securities Dealers) arbitrator ruled in favor of appellees and awarded them attorney's fees to be determined by a court of competent jurisdiction. Appellees filed an action to confirm the arbitration award and set the amount of attorney's fees. Appellant moved to vacate the arbitration award claiming that the arbitrator exceeded his power in determining entitlement to fees. The trial court affirmed the arbitration award and awarded appellees' attorney's fees.

On appeal, this court held that the arbitrator did not have the authority to award fees. This court rejected appellees' argument that the parties agreed to submit the issue of attorney's fees to the arbitrators by their actions. 697 So.2d at 914. Appellees claimed that both parties sought attorney's fees in their claims and by the execution of an NASD agreement in which they agreed that all controversies or disputes of any kind shall be settled by arbitration. See *id.* Based on *Turnberry,* the court held that the parties' actions did not constitute an express waiver of their right to have the court decide the issue of fees. See *id.; see also Solomon v. Sirkus,* 682 So.2d 676 (Fla. 4th DCA 1996)(in the absence of a stipulation to confer jurisdiction upon the arbitrator to decide the attorney's fee issue, the arbitrator exceeded

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his scope of authority under section 682.11, Florida Statutes).

Like appellees in *D.H. Blair,* appellee in this case argues that appellant, by her actions, agreed to submit the issue of entitlement to fees to the arbitrator. Here, appellant moved for attorney's fees in her arbitration claim pursuant to the Florida Deceptive and Unfair Trade Practices Act, section 501.2105(1)[fn1] and the Motor Vehicle Sales Finance Act, section 520.12(2)[fn2], claiming that under a prevailing party statute, she was entitled to an award of fees.

In opposing her claim for fees, appellee takes contradictory positions. Appellee acknowledges that appellant opposed its motion to strike, yet nevertheless maintains that appellant's counsel's September 8, 1997 correspondence to the arbitrator on appellee's motion to strike was evidence that she agreed to submit the issue of entitlement to the arbitrator. Then, in its

Amended Motion to Strike Claimant's Claim for Attorney's Fees, appellee argued that attorney's fees associated with arbitration proceedings were recoverable only by statute or by specific agreement. Appellee claimed that there was *no* written stipulation for attorney's fees and that recovery ***was*** barred by statute.

At the hearing before the trial court on her motion to correct or modify the arbitration award, appellant argued that there was no stipulation to allow the issue of entitlement to go the arbitrator, and that appellee, in its trial brief filed after the arbitration, admitted that there was no stipulation. Relying upon section 682.11 and *Turnberry,* appellant argued that entitlement to attorney's fees must be determined by the trial court and not by the arbitrator unless there is a specific stipulation to the contrary. The trial court disagreed and denied her motion to modify or correct the arbitration award. It is undisputed that the trial court made no specific factual finding based on substantial, competent evidence that the parties agreed to submit the attorney's fee issue to the arbitrator.

Based on the foregoing, we conclude that appellant's actions did not constitute an express waiver by either express stipulation or by a specific finding based on substantial competent evidence that the parties agreed to submit the attorney's fee issue to the arbitrator. See *D.H. Blair,* 697 So.2d at 913; *GCA, Inc., 696* So.2d at 1232. In accordance with *D.H. Blair* and *Turnberry,* there was no express waiver. Thus, the trial court's confirmation of the arbitrators's denial of fees was in error as the arbitrator exceeded his authority to decide the issue of fees.

We accordingly reverse and vacate the trial court's confirmation of the arbitrator's denial of fees and direct the trial court to conduct further proceedings to determine appellant's entitlement to attorney's fees.

REVERSED AND REMANDED.

GUNTHER, and TAYLOR, JJ., concur.

[fn1] Section 501.2105(1), Florida Statutes (1997) provides that "[i]n any civil litigation resulting from an act or practice involving a violation of this part, . . ., the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs ***from*** the nonprevailing party."

[fn2] Section 520.12, Florida Statutes (1997) provides that "[i]n the case of a willful violation of this part with respect to any retail installment sale, the buyer may recover from the person committing such violation, or may set off or counterclaim in any action against the buyer by such person, an amount equal to any finance charge and any fees charged to the buyer by reason of delinquency, plus attorney's fees and costs incurred by the buyer to assert rights under this part."

Appendix

682.10 **Change of award by arbitrators or umpire.** --On application of a party to the arbitration, or if an application to the court is pending under s. 682.12, s. 682.13 or s. 682.14, on submission to the arbitrators, or to the umpire in the case of an umpire's award, by the court under such conditions as the court may order, the arbitrators or umpire may modify or correct the award upon the grounds stated in s. 682.14(1)(a) and (c) or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the other party to the arbitration, stating that he or she must serve his or her objections thereto, if any, within 10 days from the notice. The award so modified or corrected is subject to the provisions of ss. 682.12-682.14.

History.--s. 9, ch. 57-402; s. 12, ch. 67-254; s. 728, ch. 97-102.

Note.--Former s. 57.19.

682.14 Modification or correction of award.--

(1) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:

(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.

(b) The arbitrators or umpire have awarded upon a matter not submitted to them or him or her and the award may be corrected without affecting the merits of the decision upon the issues submitted.

(c) The award is imperfect as a matter of form, not affecting the merits of the controversy.

(2) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

History.--s. 13, ch. 57-402; s. 12, ch. 67-254; s. 730, ch. 97-102.

Nob-Former s. 57.23.