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 REPLY BRIEF

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SUMMARY OF ARGUMENT

Petitioner requested prevailing party attorneys' fees based on Respondent's violations of Florida securities law pursuant to F.S. § 517.301and 517.211(6), as alleged in Petitioner's amended arbitration claim. Arbitrators have no authority to award such fees. Entitlement to such fees, as well as the amount, must be determined by a court of competent jurisdiction.

The Petitioner had to file for confirmation as a condition precedent to the award of attorneys' fees. An arbitration award is not a judgment. It has no legal effect until a judgment is rendered upon it. A judgment must be rendered by a court before an arbitration award can be legally enforced.

Petitioner therefore filed his petition for confirmation and request for prevailing party attorneys' fees in the circuit court. The trial court properly made a determination as to the entitlement and the amount of such fees.

Petitioner filed his petition for confirmation under the Federal Arbitration Act, 9 U.S.C. § 9 ["FAA"] and under the Florida Arbitration Code, F.S. § 682.11 ["FAC"]. The FAA allowed the Petitioner one year to file to confirm his award while the FAC allowed the Petitioner up to four years within which to confirm his NASD award. In either case, the Petitioner's application was timely.

Respondent maintains that Petitioner's petition for confirmation and fees was untimely. Respondent mistakenly relies on cases concerning the timeliness of motions for attorneys' fees that emanated from court proceedings. Here, Petitioner's application for attorneys' fees involved matters that emanated from an arbitration. There could be no final judgment until post-arbitration award legal work was accomplished.

The authorities relied on by Respondent are distinguishable. Under the federal and state statutory provisions applicable to arbitration awards, Petitioner's application was timely.

ARGUMENT

I. The Trial Court Correctly Found That The Arbitration Claim Provided A Basis For The Award Of Attorneys' Fees To Kesler

In its Answer Brief, Chatfield Dean[1] argues for the first time that Kesler did not assert a claim against Chatfield Dean for violation of Section 517.301. Contrary to Chatfield Dean's assertions, Kesler's Amended Claim alleged violations of F.S. § 517.301. [*See* Appendix 1 to Reply Brief, attached]. Chatfield Dean did not answer or deny that Kesler had alleged statutory liability at any point up to the hearings held before the trial court. There are no pleadings, answers or rebuttals filed by Chatfield Dean in the record that deny the F.S. § 517.301 claims. Indeed, in its Initial Brief filed with the Second District, Chatfield Dean conceded that "Kesler pleaded entitlement to an award of attorney's fees under Section 517.211(6), Florida Statutes, contending that the arbitrators had found Chatfield Dean liable for a violation of Section 517.301." R. 1-253; Chatfield Dean Initial Appellate Brief at 17.

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[1] Chatfield Dean was represented by Christa Taylor, Esq., a Colorado attorney, at the arbitration, by R. Michael Underwood, Esq. before the trial court regarding Respondent's motion to dismiss and through the final hearing held on August 24, 1998, followed by John R. Ellis, Esq. who acted as counsel in Respondent's motion for a rehearing and as appellate counsel thereafter. In deference to Mr. Ellis, he may not have received a complete case file and documentation from former counsel prior to filing the answer brief to this proceeding.

In the arbitration proceeding, Kesler had asserted both common law claims and a statutory claim under F.S. § 517.301. Kesler had also requested an award of attorneys' fees, based on F.S. § 517.211(6). In fact, Kesler's counsel advised the arbitrators that they did not have the authority to either award or 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).

Respondent argues that at the final hearing held on August 24, 1999 that the Circuit Court incorrectly found entitlement to the attorneys' fees pursuant to F.S. §§ 517.301, 517.211(6) and incorrectly awarded attorneys' fees to Kesler. Contrary to Chatfield Dean's assertions, the trial court did not retry evidence presented at the arbitration. Rather, the trial court heard evidence about the difficulties faced by Kesler's attorney in confronting Chatfield Dean's frivolous collateral federal court action, his problems with having to force Chatfield Dean to produce documents and the improper use by Chatfield Dean of James W. Nearen, Esq. as an expert witness. R. 56-69, 245-252.

Chatfield Dean also claims that the Second District reversed the trial court's award of fees to Kesler because it was merely following its earlier decision in *Pharmacy Management Services, Inc. v. Perschon*, 622 So.2d 75

(Fla. 2nd DCA 1993). In *Pharmacy Management, Inc.,* the Second District reversed an attorneys' fee award where the arbitration award did not specify whether the amounts awarded were based on a theory which allowed an award of fees or an alternative legal theory which did not. However, *Pharmacy Management, Inc.* is distinguishable from the case at bar in that this case does not involve separate and distinct claims arising from different acts resulting in different injuries. In *Pharmacy Management, Inc.* there were two claims, one for breach of contract and the other one for fraudulent inducement. If the arbitrator had found for the plaintiff on the fraudulent inducement claim, no contract would have ever resulted. As such, the prevailing party attorneys' fee provision in the contract would have never materialized in that there was no contract in the first place. The distinguishing feature of this case from *Pharmacy Management, Inc.* is that the legal theories in *Pharmacy Management, Inc.* were separate and distinct as opposed to being alternative theories of liability for the same wrong.

Moreover, as argued in his Initial Brief, Kesler asserts that the "two issue" rule applies to arbitrations such as this one. Since the arbitration claim involved alternate theories of liability for the same wrong, the trial court was required to assume that the Petitioner prevailed on all claims according the "two issue rule."

II. Petitioner's Application To Confirm The Award And For Attorneys' Fees Was Timely

A. Contrary To Respondent's Argument, Kesler Had One Year Under The Federal Arbitration Act, 9 U.S.C. §9 To First Confirm The Award In Order To Subsequently Be Awarded A Judgment For Attorneys' Fees

Petitioner had to file for confirmation as a condition precedent to the award of attorneys' fees. An arbitration award is not a judgment. It has no legal effect until a judgment is rendered upon it. A judgment must be rendered by a court before an arbitration award can be legally enforced.

Petitioner filed his petition under the Federal Arbitration Act, 9 U.S.C. § 9 ["FAA"] and under the Florida Arbitration Code, F.S. §§ 682.11 ["FAC"].

This matter was timely filed. Since the petition to confirm the award was filed under the FAA, Petitioner had one year in which to file to confirm the award under 9 U.S.C. §9. Petitioner filed to confirm his Award on March 3, 1997. Since the Award is dated March 5, 1996, the one year time period to confirm the award under the FAA would not have expired until March 4, 1997.[2]

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[2] Since the Florida Arbitration Code itself is silent as to any required time period within which to apply to confirm an award, then the four year period under F.S. § 95.11(3)(p) also applies. Under the facts of this case, Kesler's motion to confirm was timely because he can assert that either the requirement of the FAA [one year] was met or the requirement of the FAC [four year] was likewise met.

Both the FAA and the FAC contemplate that a petition to confirm the award must be filed before a judgment can issue. For example, 9 U.S.C. § 13 specifically states that a "judgment shall be docketed as if it were rendered in an action." *Accord* F.S. § 682.15 ["Upon the granting of an order confirming . . . an award, judgment or decree shall be entered . . . "]

Citing *Sachs v. Dean Witter Reynolds, Inc.*, 584 So. 2d 211 (Fla. 3rd DCA 1991) Chatfield Dean incorrectly argues that since the Petitioner did not move to vacate in part, or to modify, the arbitrators' award within 90 days of the award that the Petitioner's request for fees was untimely. However, *Sachs* is clearly distinguishable. Here, Kesler filed his petition under F.S. § 682.11 and 9 U.S.C. §9 to confirm the arbitration award. *Sachs* involved a proceeding to vacate, modify or correct an award under F.S. §§ 682.13 and 682.14. The time limits for proceeding to vacate, modify or correct awards do not apply to proceedings for confirmation of awards.

Sachs also preceded this Court's decision in *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla. 1995), by almost four years. In *Turnberry*, this Court found that pursuant to F.S. § 682.11, the arbitrator had no authority to award fees absent an express waiver of the statutory right. Kesler argues that the arbitrators cannot either award or deny attorneys' fees under

Turnberry and F.S. § 682.11.

B. Petitioner Moved For Confirmation And Attorneys' Fees In A Reasonable And Timely Manner As A Matter of Law

As noted above, the Petitioner had to file for confirmation as a condition precedent to the award of attorneys' fees. The FAA imposes a one-year time limit on confirmations.

By contrast, the Florida Arbitration Code is *silent* as to any required time period within which to apply to confirm an award. Accordingly the four year limit under F.S. §95.11(3)(p) also applies. Under F.S. §95.11(3)(p) "any action not specifically provided for in these statutes" carries with it a limitation period of four years.

The Florida Arbitration Code, F.S. §682.12, provides for confirmation of arbitration awards as follows:

> "682.12 Confirmation of an award.- Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14."

Since the Petitioner is entitled to have his award confirmed under the Florida Arbitration Act, F.S.§682.12, he had four years to confirm his award. The Petitioner was easily within the four year period in his petition. Since the

Award is dated March 5, 1996, the four year time period to confirm the award would not have expired until March 4, 2000.

Here, it was the Petitioner who moved to confirm his award, not the Respondent. The Respondent did not move to vacate, modify or correct the award pursuant to the "90 day" or "three month" time limits under either the Florida Arbitration Code or the Federal Arbitration Act, respectively. The trial court does not have discretion and must confirm an arbitrator's award, unless one of the parties seeks to vacate, modify, or correct the award within 90 days of delivery of the award. *Moya v. Board of Regents, State University System of Florida*, 629 So.2d 282 (Fla. 5th DCA 1993); *Carpet Concepts of St. Petersburg, Inc. v. Architectural Concepts, Inc.*, 559 So.2d 303 (Fla. 2nd DCA 1990).

The award must be confirmed before the court can award reasonable attorneys' fees. 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. *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).

The distinction between actions conducted completely in court from beginning to end and those filed as arbitrations with subsequent post-award court

actions is important. An action handled by a court from beginning to end portends that the application for post-judgment attorneys' fees be filed within a reasonable time after the entry of judgment. By contrast an arbitration claimant must first win the arbitration, be issued an award showing the he or she won the arbitration, and then file to confirm the award to get a judgment that can be enforced.

Respondent wrongly argues in its answer brief that *McKaskill Publications, Arceneaux and Finklestein*[3] should apply here. They plainly do not apply. *McKaskill Publications, Arceneaux and Finklestein* are clearly distinguishable, because in each case the application for attorneys' fees was made only after the plaintiffs had won their cases in a court of law, rather than having won an arbitration award before a panel of arbitrators instead of a judge or jury. The *McKaskill Publications, Arceneaux and Finklestein* plaintiffs did not have to confirm an arbitration award as did the Petitioner herein. Under both the FAA, 9 U.S.C. §§ 9, 13 and the FAC, F.S. §§ 682.12, 682.15, Petitioner had

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[3] *McKaskill Publications, Inc. v. Keno Brothers Jewelers, Inc.*, 647 So.2d 1012, 1013 (Fla. 4th DCA 1994); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 767 F.2d 1498 (11th Cir. 1985); *Finklestein v. North Broward Hospital District*, 484 So.2d 1241 (Fla. 1986).

to first confirm his NASD award before he could get a an enforceable judgment.

Since rendering its opinion in this matter and in *Barron Chase Securities, Inc. v. Moser*, 745 So.2d 965 (Fla. 2nd DCA July 21, 1999), Supreme Court Case No. 96,715 argued September 1, 2000, the Second District appears to have retreated from its position on timeliness in the filing of post-judgment motions. The Second District recently held that it was not authorized to create a rule of civil procedure stating that motions will be unreasonable or untimely as a matter of law if filed more than a certain number of days after the entry of a judgment. *Shipley v. Belleair Group, Inc.*, 25 Fla. Law W. D 747, ___ So.2d ____ (Fla. 2nd DCA March 4, 2000); *See* Art. V, § 2, Fla. Const. Thus, the Second District has declined to create a bright-line rule for post-judgment motions for fees and costs because it correctly recognized that a final judgment does not necessarily end all legal work. *Shipley, supra*.[4]

Here, there could be no final judgment until post-arbitration award legal work was accomplished. Petitioner needed to confirm the Award before he was

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[4] The Second District acknowledged that the Supreme Court has requested the Civil Procedure Rules Committee of the Florida Bar to draft an adequate proposal governing motions to tax fees and costs. *Shipley, fn. 1, supra*.

entitled to a judgment from which he could collect his prevailing party attorneys' fees. Petitioner had four years under F.S. § 95.11(3)(p) and at least one year under 9 U.S.C. § 9 within which to file his post-award petition.[5]

Where arbitration is involved and either a four-year or a one-year statutory period is allowed, the Petitioner would ask that this Court defer to the wisdom of the Florida legislature and to Congress in having set the time periods until such time as these elected bodies change such periods. *See, e.g. Miele v. Prudential Securities, Inc.*, 656 So.2d 470 at 473 (Fla. 1995) [where this Court declared that it was up to the legislature, not the courts, to change the punitive damages limitations statute to apply to arbitrations as well as civil actions].

Last, the Respondent incorrectly cites *Stockman v. Downs*, 573 So.2d 835

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[5] When presented with arguably conflicting federal and state statutes, the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. The FAC, which excluded resolution of arbitrators authority, with such fees recoverable only in court upon a motion for confirmation or enforcement of the award, is not preempted by the FAA, which is silent on the issue of attorneys' fees. The two schemes do not conflict. *Lee v. Smith Barney Harris Upham & Co., Inc.,* 626 So. 2d 969, 970 (Fla. 2nd DCA 1993). Arguably, the differences between the FAC and the FAA as to the time to file for an award confirmation likewise do not conflict in this case where the Petitioner timely filed his confirmation action within the time limits of <u>both</u> the FAC and the FAA.

(Fla. 1991), for the proposition that a motion for confirmation of an arbitration award must be filed within a certain amount of time. In *Stockman, supra at 837,* this Court found that the fundamental concern was one of notice. This Court held that "[A] claim for attorney's fees, whether based on statute or contract, must be pled." *Id.* Here, Petitioner's properly pled for attorneys' fees in the NASD claim and in the post-award proceedings. *See* Appendix 1 to Petitioner's Reply Brief, R. 1-8, 12-28, 56-69. Moreover, as with *McKaskill Publications, Arceneaux and Finklestein*, the matter related to a court-only proceeding. By contrast, Petitioner's complaint began with the filing of an arbitration claim followed by an award and then an application in court to confirm that award.

For all the above reasons, the Petitioner maintains that he filed a timely motion to confirm his award in order to get an enforceable judgment and the award of prevailing party attorneys' fees to which he was entitled.

CONCLUSION

Based on the foregoing, this Court should reverse the decision of the Second District because Petitioner's post-award motion was timely filed under either the Federal Arbitration Act or the Florida Arbitration Code, and because the decision of the Second District expressly and directly conflicts with the

Court's decision in *Turnberry* and the Fourth District's decision in *Charbonneau*. Petitioner again 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 attorneys' fees to the prevailing party without violating *Turnberry's* prohibition against arbitrators awarding such fees. This Court should rule that post-award applications for attorneys' fees are timely if filed under the FAA or the FAC, as applicable.

Dated: November 22, 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 November, 2000.

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Allan J. Fedor, Esq.

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