IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SIXTH DISTRICT

FLOW WAY COMMUNITY DEVELOPMENT DISTRICT,

Appellant,

v.

CASE NO.: 6D23-0986

TAYLOR MORRISON OF FLORIDA, INC., ET AL.,

LT CASE NO.: 2020-CA-004147-000 I-XX

Appellees.

_____/

# APPELLANT'S INITIAL BRIEF

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## STATEMENT OF THE CASE & FACTS

This case involved an action against a developer and its employees for their pre-turnover transgressions, which cost a community development district and its residents hundreds of thousands of dollars to cure post-turnover. (R3794–3812). The appeal, however, is much narrower because all claims and counterclaims were resolved at nonbinding arbitration—including awarding $472,419.51 against the developer—and no one timely challenged that decision by requesting trial de novo under section 44.103(5), Florida Statutes (2020). (R7612–27, R9482, R9486 n. 2).

The appeal arises from the trial court's refusal to adopt the arbitration decision in full. (R9601–05). The court instead partially adopted it, but with two key exceptions. (*Id.*).

First, the court rejected the arbitrator's denial of the developer employees' counterclaim for statutory reimbursement of legal expenses. (R9603–04). The court reasoned that arbitrators lack authority to resolve attorney-fee issues absent the parties' written stipulation, which the court found no evidence of. (*Id.*).

Second, the court essentially modified the arbitrator's findings as to the two claims against the developer's employees, favoring instead a summary-judgment ruling made during the window between the arbitrator's award and the trial-de-novo deadline. (R9601–03, R9623–37).

This appeal thus challenges the trial court's failure to abide by section 44.103(5)'s plain language by simply carrying out the arbitrator's decision when it became final after no party challenged it by timely seeking trial de novo. Since the appellate issue is narrow, the facts below provide a brief background of what lead to the lawsuit, followed by the procedural features leading to this appeal.

***The Developer was required to establish an endowment fund to maintain certain preserves, which was not done.***

The general background in this section is mostly summarized from and cited to either admitted portions of the parties' pleadings or the arbitrator's decision, which portions were adopted without objection by the trial court. (R7612–27, R9601–05)

Appellant Flow Way Community Development District was created by local ordinance in 2002 for developing a residential community located in Collier County, Florida. (R7619–20). A

community development district is independent, special-purpose government entity authorized under chapter 190, Florida Statutes, to finance and manage basic infrastructure and services for properties within its boundaries. (R7613, § 190.002(1), Fla. Stat. (2020)). The residential community within Flow Way was developed by Appellee Taylor Morrison of Florida, Inc. through its subsidiary, Taylor Morrison Esplanade Naples, LLC. (R3795–96 & 4358 (¶¶ 4–5, 12)). These two appellees will be collectively referred to as "the Developer."

For almost 20 years, Flow Way was controlled by the Developer, which installed their employees to Flow Way's board of supervisors. (R7613, R7622, R3796–97 (¶¶ 16–20) & R4358 (¶¶ 16–20)). Appellees Stephen Reiter, Adam Painter, Andrew Miller, John Wollard, and Christopher Nirenberg were the Developer's employees who served on Flow Way's board of supervisors at all relevant times until control was turned over to supervisors elected by the community's residents in November 2020. (R7612–13, R3795 (¶¶ 6–10), R4358 ((¶¶ 6–10)). These appellees will be referred to as the "Employee Supervisors."

During development, the Developer obtained two relevant permits: one from the Army Corps of Engineers and another from

South Florida Water Management District. (R7613, R3797 (¶ 23), R4359 (¶ 23)). These permits obligated the Developer to manage and maintain about 1,000 acres of preserve land—known below as "the preserves"—located along Flow Way's northern and western boundary. (R7613, R3796 (¶ 14), R4358 (¶ 14)). The permits also obligated the Developers to establish a "non-wasting endowment fund sufficient to fund all management costs associated with maintaining the preserves." (R7613). The permits contemplated that sometime after establishing the fund, the preserves and fund would be transferred to and perpetually maintained by a wholly separate land-management entity with the Army Corps' approval. (R7613, R7615-16).

None of this happened, however. Instead, working through its Employee Supervisors, the Developer transferred the preserves to Flow Way. (R7613). Worst yet, the Developer never established the non-wasting endowment fund. (R7613). And the Employee Supervisors rubber stamped the transfer as Flow Way's developer-controlled board without conducting any due diligence and without inquiring about the endowment fund necessary to manage the

preserves. (R7615–17). As a result, Flow Way and its residents were substantially damaged. (R7616, R7622–24).

***After turnover, Flow Way sued the Developer and its Employee Supervisors, who countered for statutory reimbursement of defense expenses.***

Shortly after the insider transfer, the Developer turned over control of Flow Way to supervisors elected by the community's residents. (R7622,). The following month, Flow Way filed this lawsuit against the Developer and its Employee Supervisors. (*Compare* R7622, *with* R1).

The operative complaint alleged four total counts. (R3794–3810). Two were against the Developer, seeking to declare as ultra vires the preserves' transfer without establishing the endowment fund as required by the permits and seeking damages for unjust enrichment. (R3802–04, R3807–08). The other two counts were against the Employee Supervisors, similarly seeking to declare the transfer ultra vires and seeking damages for breaching their fiduciary duties to Flow Way and its residents due to their bad-faith and disloyal conduct. (R3804–07, R3808–10).

Notably, the Employee Supervisors filed several motions to dismiss and several answers and affirmative defenses to the various

versions of Flow Way's complaints, but none requested prevailing-party attorney's fees in their "wherefore" clauses as pleaders traditionally do when seeking such collateral relief. (R1150, R2079, R2121, R2855–62, R4361–69, R4666–74).

Instead, the Employee Supervisors raised a counterclaim for statutory reimbursement of their legal expenses in defending this lawsuit under section 111.07, Florida Statutes (2020). (R2865–67, R4373–74, R4680–83). That statute allows for state or local governments to provide attorneys to defend public officers or reimburse them for their legal expenses in civil actions for damages caused by their acts or omissions unless they have acted in bad faith, maliciously, or in willful and wanton disregard in carrying out their public duties. § 111.07, Fla. Stat. The Employee Supervisors alleged that they were public officers entitled to statutory reimbursement if they prevailed on the two counts against them. (R2866–66, R4373–74, R4680–83).

Later, the Developer and Employee Supervisors moved to amend their pleadings again to add a second counterclaim premised on breach of various agreements. (R4683–85). But the court never technically approved that additional counterclaim.

Flow Way denied the Employee Supervisors' statutory-reimbursement counterclaim generally and raised several fact-intensive affirmative defenses, including bad faith. (R2930–32, R4377–79).

***After arbitrating all claims and counterclaims, the arbitrator ruled against the Employee Supervisors on their counterclaim.***

The trial court on its own referred the parties to nonbinding arbitration under section 44.103, Florida Statutes. (R2870-72). Four provisions are relevant to the arguments below.

First, the court ordered "non-binding arbitration as to all triable issues…." (R2870 (¶ a)).

Second, the court said that the arbitrator could decide collateral issues related to attorney-fee entitlement and reasonableness if the parties agreed:

> While the issue of attorney's fees, if appropriate, is normally reserved for the trial court, the parties can waive this right and have the arbitrator(s) render a finding on entitlement and/or [sic] the reasonable amount of attorney's fees. Such a waiver should be in writing and signed by the respective parties or their attorneys. *See, generally*, Turnberry Associates v. Service Station Aid, Inc., 651 So.2d 1173 (Fla. 1995) [sic].

(R2871 (¶ 8)).

Third, the court required the arbitrator's written findings of fact and law to be kept sealed when filed with the clerk. (R2872 (¶ 9)).

Finally, the court said that the arbitrator's decision would be final and enforced if no party timely requested trial de novo:

> Any party may file a motion for trial de novo, pursuant to *Florida Statutes, Section 44.103(5)*. "An arbitration decision shall be final if a request for trial de novo is not filed within the time provided by the rules promulgated by the Supreme Court… If no request for trial de novo is made within the time provided, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision." *Florida Statutes, Section 44.104(5)*; *Florida Rules of Civil Procedure, Rule 1.820(h)*. [sic]

(R2872 (¶ 10) (emphasis original).

Per this order, the parties went to all-day arbitration on all pending claims and counterclaims on May 31, 2022. (R9892). The parties not only arbitrated the Employee Supervisors' counterclaim for statutory reimbursement of their legal defense, but they also arbitrated Flow Way's affirmative defenses to that counterclaim and their proposed, but never authorized by court order, second counterclaim for declaratory relief. (*See* R4657–85, R9484–85 at n.1).

Although the Employee Supervisors' dispute the latter fact, it is illustrated by their arbitration summary, which argued both

counterclaims without reservation. (R9753–54). In fact, the Employee Supervisors concluded their arbitration summary with the following:

> Taylor Morrison and the [Employee] Supervisors have brought a Counterclaim for attorneys' fees and costs for this frivolous action brought against the [Employee] Supervisors.

(R9765). Flow Way's arbitration summary also thoroughly addressed that counterclaim and its related affirmative defenses. (R9775, R9777–78, R9790–94).

The arbitrator then issued his opinion with detailed findings of law and fact resolving all parties' claims, counterclaims, and affirmative defenses. (R7612–27). For example, the arbitrator denied the ultra vires claims. (R7619–21). But he found that the Developer and its Employee Supervisors' actions unjustly enriched the Developer and ruled Flow Way was entitled to $472,419.51 in damages from the Developer. (R7621–23, R7627).

As for the fiduciary-duty claim against the Employee Supervisors, the arbitrator ruled that their conduct was deplorable, in bad faith, and violated their duty of loyalty to Flow Way. (R7615–17). But the arbitrator denied the fiduciary-duty claim against them because (1) their conduct did not legally rise to the exceedingly high

benchmark for breach of public trust under the Florida Constitution and chapter 112 and (2) because the Employee Supervisors were protected by sovereign immunity. (R7617–19).

Finally, the arbitrator rejected the two counterclaims. (R7624–27). As to the Employee Supervisors' counterclaim for statutory reimbursement, the arbitrator found that Flow Way's presented sufficient evidence to show that the Employee Supervisors' actions were in bad faith, which precludes relief under section 111.07. (R7624). The arbitrator further reasoned that "[t]o award attorney's fees to the [Employee] Supervisors under such circumstances would encourage bad faith conduct and is contrary to the public policy underpinning section 111.07, Fla. Stat." (*Id.*). As a result, paragraph 8 of the arbitrator's decision said:

> 8. With respect to the claim for attorney's fees by the [Employee] Supervisors against [Flow Way] under the provisions of § 111.07, Fla. Stat., I find in favor of the Plaintiff and determine that the [Employee] Supervisors are not entitled to recover their attorney's fees….

(R7627)

This arbitration decision was filed under seal with the court and served on the parties on June 10, 2022. (R7612). The parties had

until Thursday, June 30, 2022 to challenge the arbitrator's decision by seeking trial de novo. (R2872 (¶ 10)).

Five days after that deadline, when no party sought trial de novo, the court—on its own motion—ordered the arbitration decision unsealed, stating:

> Upon review of the court file it does not appear that any part requested trial de novo on a timely basis, therefore, the Court "shall" enter judgment in accordance with the arbitration decision. Therefore, it is hereby **ORDERED AND ADJUDGED** that:
>
> The Clerk of the Court is directed to unseal the arbitration award filed on June 10, 2022 and to provide a courtesy copy to the Court.

(R9482).

Before explaining what happened next, the Court should note the procedural anomaly that happened in the 25 days between the arbitrator's decision and its court-ordered unsealing.

***After the arbitrator's award, the court orally granted the Employee Supervisors' summary-judgment motion, but which was not rendered before the trial-de-novo deadline expired.***

Eleven days after the arbitration decision and with still nine days left before the trial-de-novo deadline expired, the trial court held a hearing on a summary-judgment motion that the Employee Supervisors had previously filed. (R9662 & R4432–59). The trial

judge did not know the results of the arbitrator's decision at the hearing, and no one advised her about it. (R9662–9707). After all, the court had previously ordered it sealed until after the trial-de-novo period expired. (R2871–72 (¶¶ 9 & 10)).

The Employee Supervisors' motion was directed at just Flow Way's two counts against them for declaratory relief (count II) and breach of fiduciary duties (count III), advacating for their dismissal based on sovereign immunity. (*Compare* R4432–59, *with* R4371 (fourth & fifth)). These were also the only issues argued at the summary-judgment hearing. (R9662–9707).

Notably, the Employee Supervisors' motion neither sought summary judgment on their counterclaim for statutory reimbursement of litigation expenses nor generally requested any finding that they were entitled to attorney's fees and costs as a collateral matter. (R4432–59). The issue was also not argued or raised at the hearing. (R9662–9707).

After hearing the parties' arguments, the trial judge orally granted the Employee Supervisors' motion, but she did not state on the record the reasons for her ruling. (R9706–07). Instead, she ordered Employee Supervisors to prepare a final judgment satisfying

rule 1.510's requirements and "reserved jurisdiction to amend it based upon your submissions….." (R9706). She then ended the hearing by saying:

> The Court: Okay. And then I will wait to see what happens next week. And then I'll see you all on July 6th for the other motion. Thank you very much.

(R9707).

Again, the following week is when the trial-de-novo period was set to expire. (*Compare* R7612 (arbitrator's decision issued June 10, 2022), *with* R9662 (orally ruling on Tuesday, June 21, 2022), *and* R2872 (¶ 10) (making trial-de-novo deadline 20 days from June 10, 2022, which is Thursday June 30, 2022)). The reference to "see[ing] you all on July 6th for the other motion" was a reference to the Developer's separate summary-judgment motion, which was scheduled for hearing on July 6, 2022. (R9718–19).

But again, the day before that July 6th hearing, the court ordered the arbitration unsealed as noted above. (R9482–93 (ordering award unsealed on July 5, 2022).

***Despite no party timely seeking trial de novo, the court refused to confirm the arbitrator's award as written.***

After the arbitration award's unsealing, Flow Way moved to confirm the arbitration award and objected to the court reducing her

prior oral ruling on the Employee Supervisors' summary judgment to writing. (R9484–91). The Employee Supervisors opposed this motion—at least insofar as the award had denied their reimbursement counterclaim. (R9513 n.1, R9708-37).

In its motion and at the hearing, Flow Way raised essentially two broad arguments for confirming the arbitrator's decision. First, the trial court's oral summary-judgment ruling did not relieve the Employee Supervisors of their obligation to timely request trial de novo if they were unhappy with parts of the arbitrator's decision. Since they failed to make that request, the arbitrator's decision had become final, was binding on the parties and the court, and the court was powerless to do anything other than enter judgment consistent with it. (R9485-90, R9713–15, R9720–22,).

Second, even if the court could reduce its oral summary-judgment ruling to writing despite the unchallenged arbitration decision, it still must accept the arbitrator's denial of the Employee Supervisors' reimbursement counterclaim. That counterclaim was expressly arbitrated by the parties' consent and resolved against the Employee Supervisors. They did not seek partial trial de novo of that decision. And it was in no way part of their summary-judgment

motion or the court's oral ruling. Therefore, the court was required to enforce the arbitrator's award at least as to that counterclaim. (R9485–88, R9490–91, R9716–20, R9731–32, R9735).

The Employee Supervisors responded that the oral summary judgment trumped the arbitrator's decision as to counts II and IV even if not reduced to writing and no one filed a request for trial de novo. (R9515, R9518–21).

Alternatively, the Employee Supervisors argued that the court should strike the arbitrator's denial of their reimbursement counterclaim because it was beyond the scope of the arbitrator's authority. They argued that the court's referral order reserved to itself the resolution of attorney-fee issues unless the parties agreed to submit it to the arbitrator, which, according to the Employee Supervisors' interpretation of that order, had to be in writing. Since there was allegedly no writing, the Employee Supervisors argued that it was improper for the arbitrator to decide their counterclaim and the court should strike paragraph 8 of that award where that counterclaim was rejected. (R9514–17, R9722–35).

In reply to the latter contention, Flow Way argued at the hearing that the court's referral order said that the agreement "should" be in

writing, not that it "shall" be in writing. (R9730). Flow Way also argued that the parties had arbitrated the issue by consent when they had exhaustively presented on all claims and counterclaims at arbitration until well into the night. (R9730–31).

The court nevertheless agreed with the Employee Supervisors on both issues. (R9601–05). At the beginning of the hearing, the judge quickly dispensed with the first issue, stating that since the oral pronouncement of summary judgment had already occurred, she had authority to reduce it to writing regardless of the award or whether anyone moved for trial de novo. (R9712, R9602–03). She also agreed with the Employee Supervisors that the arbitrator exceeded the scope of his authority by resolving the reimbursement counterclaim without the parties' written consent, which she said there was "no evidence suggesting the parties stipulated in writing to the Arbitrator making such a determination." (R9602–03).

As a result, the judge reduced her earlier summary-judgment ruling on counts II and IV to a written judgment. (R9623–36). And on the same day, she confirmed and adopted the arbitrator's decision into a final judgment, but struck its paragraph 8, which had denied the counterclaim for statutory reimbursement of attorney's fees.

(R9603–05). In that final judgment, she further ruled that the Employee Supervisors were the prevailing party given her summary judgment ruling and thus entitled to attorney's fees and costs under section 111.07, but reserved on amount. (R9604–05).

Flow Way timely filed separate rehearing motions to the summary-judgment order and the final judgment confirming the arbitration award without paragraph 8. (R9638–61, R9738–51). The latter motion reaffirmed and elaborated on their earlier arguments. For example, Flow Way's pointed out that the court had authorized the arbitrator to resolve "all triable issues," which naturally included all claims and counterclaims in the case, such as the Employee Supervisors' reimbursement counterclaim. (R9746–47). And insofar as written consent to arbitrate that counterclaim was required, Flow Way argued that written consent was given when each party thoroughly argued that counterclaim and its defenses in their written arbitration summaries, which were attached to the rehearing motion. (R9747–48, R9753–64, R9765–95).

The trial court, however, summarily denied the rehearing motions. (R9802–05).

## SUMMARY OF THE ARGUMENT

Despite the brief's thoroughness, this appeal is really quite straightforward: The arbitration award resolved all issues in the case, including denying the Employee Supervisors' counterclaim for statutory reimbursement of attorney's fees. They then failed to timely seek trial de novo. As a result, section 44.103(5)'s plain language and interpretative caselaw mandates that the award became final and binding on the parties and the court, which was powerless to do anything further in the case except reduce the award to judgment and enforce it as written.

The rest of the brief merely corrects the trial court's and Employee Supervisors' attempt to carve out exceptions that simply do not exist in section 44.103 or its interpretative caselaw.

For example, the counterclaim's denial was struck on the rationale that arbitrator's are prohibited from resolving attorney-fee issues absent written stipulation, which none ostensibly existed here. This conclusion and rationale are deeply flawed.

For starters, section 44.103 has never contained such a prohibition. Instead, the prohibition traces back to former section 682.11 and its interpretative caselaw. But the caselaw is clear that

chapter 682's provisions do not apply when a case is referred to nonbinding arbitration under section 44.103. What's more, section 682.11 was rewritten in 2013 to expressly remove the prohibition. So nothing in section 44.103 or Florida law prohibits arbitrators from deciding the entire lawsuit, including attorney's fees.

But even if the prohibition existed, it would not apply here. The referral order authorized the arbitrator to decide "all triable issues…." A natural reading of that phrase would include the Employee Supervisors' counterclaim for statutory reimbursement of legal expenses, which claim has fact-intensive elements and defenses. In other words, "all triable issues" would include claims where attorney's fees are an element of damages, not a collateral issue.

Further, the parties' waived the outmoded prohibition through their conduct. Although the court's conclusion that waiver requires written stipulations is supported by one district's precedent, it is not supported by the Florida Supreme Court's or the First District's precedent, which recognize that waiver can occur orally or through the parties' conduct. The evidence shows that happened here.

Insofar as a writing was required, the parties' written submissions make it very clear that they intended the arbitrator to

decide the reimbursement counterclaim. So, the trial court's decision to strike the arbitrator's denial of the reimbursement counterclaim is neither consistent with Florida law nor the abrogated principles underpinning the striking.

But even if properly struck, the court erred in finding the Employee Supervisors entitled to attorney's fees and costs. No party requested that relief in any pending motion. The Employee Supervisors also presented no proof satisfying section 111.07's elements. And the judgment confirms the arbitrator's bad-faith factual finding, which is an absolute defense under that statute.

Finally, summary judgment does not change the result. Its entry violated section 44.103, which, as one court already held, procedurally bars trial courts from entering summary judgment after the trial-de-novo deadline expires. Plus, the Employee Supervisors' summary-judgment motion never concerned their reimbursement counterclaim or Flow Way's defenses to it.

Therefore, the Court should reverse and remand with instructions to enter a judgment confirming the arbitration award in full.

## ARGUMENT & AUTHORITIES

### I. This Court has jurisdiction, and its standard of review is de novo.

On October 24, 2022, the trial court entered its summary-judgment order and a final judgment confirming the arbitration award in part and rejecting it in part. (R9601, R9623). Flow Way timely sought rehearing of both orders 15 days later, which tolled rendition until rehearing was denied. (R9638–61, R9738–51, R9802–05); Fla. R. Civ. P. 1.530(b); Fla. R. App. P. 9.020(h). The notice of appeal was timely filed five days later. (*Compare* R9802–05, *with* R9806). This Court thus has jurisdiction. Art. V, § 4(b)(1), Fla. Const.; Fla. R. App. P. 9.030(b)(1)(A) & 9.110(a)(1).

This Court reviews de novo both the trial court's decision to reject an arbitrator's award and its interpretation of statutes and rules. *See, e.g.*, *Connell v. City of Plantation*, 901 So. 2d 317, 319 (Fla. 4th DCA 2005); *Bacon Family Partners, L.P. v. Apollo Condo. Ass'n*, Inc., 852 So. 2d 882, 887 (Fla. 2d DCA 2003).

### II. The trial court erred in refusing to enforce the arbitration award in full when no one timely moved for trial de novo.

Although not historically the case, arbitration is now highly favored under Florida law. *See generally Pierce v. J.W. Charles-Bush*

*Sec., Inc.*, 603 So. 2d 625, 627–28 (Fla. 4th DCA 1992). In fact, arbitration is the "preferred method of dispute resolution…." *United Auto. Ins. Co. v. Ortiz*, 931 So. 2d 1025, 1026 (Fla. 4th DCA 2006) (cites & quotes omitted). As a result, courts "must avoid a 'judicialization' of the arbitration process" and instead "resolve all doubts in favor of arbitration rather than against it." *Chandra v. Bradstreet*, 727 So. 2d 372, 374 (Fla. 5th DCA 1999) (first quote); *Pierce*, 603 So. 2d at 628 (second quote).

Arbitration is so favored that the Florida Legislature and Florida Supreme Court created a process of nonbinding arbitration for all civil actions in section 44.103, Florida Statute (2020) and Florida Rule of Civil Procedure 1.820. The statute prescribes the process's substance, while the rule prescribes its procedure. *Dungarani v. Benoit*, 312 So. 3d 126, 129 (Fla. 5th DCA 2020). Together, they "require parties to use this non-judicial mechanism to resolve their multifaceted, multi-party dispute before trial and, if they failed to act seasonably after utilizing this mechanism, to be bound by it." *Johnson v. Levine*, 736 So. 2d 1235, 1240 (Fla. 4th DCA 1999).

And like any arbitration, a party's ability to challenge the arbitration award is strictly controlled by the statute and rule.

*Friendly Homes of the S. Inc. v. Fontice*, 932 So. 2d 634, 637 (Fla. 2d DCA 2006). For example, section 44.103(5) makes it very easy to contest any aspect of the arbitrator's decision through the simple expedient of a motion for trial de novo:

> The arbitration decision shall be presented to the parties in writing. An arbitration decision shall be final if a request for a trial de novo is not filed within the time provided by rules promulgated by the Supreme Court. The decision shall not be made known to the judge who may preside over the case unless no request for trial de novo is made as herein provided or unless otherwise provided by law. If no request for trial de novo is made within the time provided, the decision shall be referred to the presiding judge in the case who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court, and for which judgments execution shall issue on request of a party.

And rule 1.820(h) prescribes a bright-line deadline for filing this trial-de-novo motion and repeats the statute's rigid consequence for missing that deadline:

> If a motion for trial is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes.

Notably, the statute and rule do not use precatory or permissive language. *Johnson*, 736 So. 2d at 1238. Each uses the mandatory

"shall"—9 times, in fact. *Id.* The most notable of these are when someone fails to request trial de novo within 20 days of the decision, then the "arbitration decision *shall be final*.…" and "*shall be* referred to the presiding judge…who *shall enter* such orders and judgments as are required to carry [it] out…which orders *shall be* enforceable…." through contempt and execution. § 44.103(5), Fla. Stat. & Fla. R. Civ. P. 1.820(h) (emphasis supplied).

Courts have consistently interpreted these phrases as:

- Forfeiting all right to a trial on the merits, *Alexander v. Quail Pointe II Condo.*, 170 So. 3d 817, 820 (Fla. 5th DCA 2015);
- Turning a nonbinding arbitration award into a final decision that is binding on the parties and the court, *id.*; *Dungarani*, 312 So. 3d at 129;
- Creating a right in the prevailing party's favor to a judgment confirming and enforcing the award as written, *Johnson*, 736 So. 2d at 1238;
- Creating a mandatory and ministerial duty in the trial court to reduce the arbitration award to a judgment and enforce it as written, *Id.*; *Connell*, 901 So. 2d 317, 320 (Fla. 4th DCA 2005).
- And prohibiting courts from acting inconsistent with the award, such as granting summary judgment for

> the party who lost at arbitration. *Quaregna v. Strategic Performance Fund II, Inc.*, 943 So. 2d 265, 267 (Fla. 4th DCA 2006).

The purpose behind this bright-line deadline and rigid consequence is to hasten the litigation's end by forcing " 'the parties [to] evaluate the award, and either accept it or complete the litigation through trial.' " *Stowe v. Universal Prop. & Cas. Ins. Co.*, 937 So. 2d 156, 158 (Fla. 4th DCA 2006) (citations omitted).

And consistent with the policy favoring arbitration, Florida courts have strictly enforced the statute and rule, even when some may find the result harsh. For example, the Second District granted mandamus relief to compel confirmation of an arbitration award after a court declined because trial de novo was requested a day late due to a paralegal's scheduling error. *Gambrel v. Sampson*, 330 So. 3d 114, 117–18 & n.2 (Fla. 2d DCA 2021). The Fourth District affirmed an award's confirmation despite a trial-de-novo motion because it was filed prematurely *before* the arbitrator had issued the award, explaining that the rule's 20-day deadline is a " 'window'… that… opens when an arbitrator serves a decision on the parties and closes 20 days later." *Stowe*, 937 So. 2d at 158.

Even when more substantive errors exist, courts refuse to rescue parties from their failure to timely seek trial de novo. For example, the Fifth District affirmed an award's confirmation that was against only one of three defendants despite their attorney moving for trial de novo because that motion was filed on behalf of a defendant not mentioned in the award instead of the defendant the award was actually against. *Am. Platinum Prop. & Cas. Ins. Co. v. Swank*, 357 So. 3d 174, 175 (Fla. 5th DCA 2022) (Traver, J., concurring), reh'g denied (Sept. 8, 2022). Similarly, the Fourth District found that nothing in section 44.103 "restricts the issues the arbitrator may determine during arbitration," thereby rejecting an insurer's argument that it did not need to seek trial de novo of the arbitrator's coverage decision because ostensibly that was exclusively a judicial question. *Ortiz*, 931 So. 2d at 1026–27.

Given the statute and rule's plain language, their interpretative caselaw, and the general policy about resolving all doubts in favor of arbitration, it should have been a perfunctory, ministerial act by the court to simply confirm the arbitration award—including its denial of the Employee Supervisors' reimbursement counterclaim. After all, it's undisputed that no one timely requested trial de novo. (R9482,

R9513–15, R9602, R9718–19, R9486 n.2). The Employee Supervisors did not even request a partial one on just their counterclaim.[1] Nor did they seek to modify the award or vacate it based on the procedures in section 682.13 or 682.14, Florida Statutes (2020) (insofar as the Revised Florida Arbitration Act applies to arbitration under section 44.103, *see infra* pp. 33–34). The trial court thus had no discretion to do anything other than reduce the arbitration award to a judgment and enforce it as written.

Instead, the court struck the arbitrator's denial of the Employee Supervisors' reimbursement counterclaim, reasoning the arbitrator lacked authority under Florida law to resolve attorney's fees absent a written agreement of the parties, which the court said did not exist. (R9601, 9603).

As a preliminary matter, none of this should have mattered. As shown above, even assuming that the court's reasoning was correct,

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[1] Although there is a conflict on whether one can seek partial trial de novo on specific claims or issues, that conflict is irrelevant since the Employee Supervisors failed to request even that. *Compare Dungarani*, 312 So. 3d at 128–29 (prohibiting partial), *with Johnson*, 736 So. 2d at 1239–40 (authorizing partial); *Bacon*, 852 So. 2d at 888 (same).

the Employee Supervisors' failure to timely seek trial de novo under section 44.103 was itself a waiver of any flaw in the arbitrator's authority over the reimbursement counterclaim. *Cf. Ortiz*, 931 So. 2d at 1026 (ruling if insurer believed arbitrator lacked authority over coverage issue, it should have timely moved for trial de novo).

Courts have reached the same conclusion in the section-682.13 and-682.14 context (which may not directly apply, *see infra* pp. 33–34, but is analogous here). *See, e.g.*, *Broward Cty. Paraprofessional Ass'n v. Sch. Bd. of Broward Cty.*, 406 So. 2d 1252, 1253 (Fla. 4th DCA 1981) (holding that even if arbitrators legally erred or exceeded their authority, courts must still confirm awards if no modification or vacatur is timely requested); *Avatar Props., Inc. v. N.C.J. Inv. Co.*, 848 So. 2d 1259, 1262–63 (Fla. 5th DCA 2003) (holding arbitrator's "jurisdiction" over matters must be timely challenged under section 682.13 or 682.14 or waived).

In fact, this waiver principle has been specifically applied in the chapter-682 context when arbitrators exceed their power by denying attorney's fees, but no one timely seeks modification, correction, or vacatur. *See, e.g.*, *A-1 Duran Roofing, Inc. v. Select Contracting, Inc.*, 865 So. 2d 601, 605 (Fla. 4th DCA 2004); *Chatfield Dean & Co., Inc.*

*v. Kesler*, 818 So. 2d 572, 573 (Fla. 2d DCA 2002); *Sachs v. Dean Witter Reynolds, Inc.*, 584 So. 2d 211, 212 (Fla. 3d DCA 1991).

So, even if the trial court was correct about the award exceeding the arbitrator's limited authority, it was irrelevant here because the Employee Supervisors never timely challenged that award.

But the trial court's conclusion and rationale is also erroneous for four independent reasons:

1. Nothing in chapter 44 or Florida law prohibits arbitrators from deciding the entire action, including any claims or requests for attorney fees.

2. The referral order itself could not and does not limit the arbitrator's authority to resolve the Employee Supervisors' reimbursement counterclaim.

3. Insofar as either Florida law or the referral order conditioned the arbitrator's authority over that counterclaim on the parties' consent, nothing required that consent to be in writing.

4. But even if written waiver was needed, the record shows it existed.

Each is sequentially addressed in the section's below, and each independently supports reversing the judgment and remanding for one fully consistent with the arbitration award.

### A. Nothing in chapter 44 or Florida law prohibits arbitrators from deciding the entire action, including claims or requests for attorney fees.

At this point, a curious reader may be wondering what is so special about attorney's fees that they would be excluded from the arbitrator's authority—especially when arbitration is the "preferred method of dispute resolution...." *Ortiz*, 931 So. 2d at 1026. Why would the legislature and supreme court create a "non-judicial mechanism" like section 44.103 and rule 1.820 for "eliminat[ing] some, even if not all, claims otherwise requiring a trial," but then carve attorney-fee issues out of that non-judicial mechanism? *Johnson*, 736 So. 2d at 1241 (the quotes).

The short answer: They didn't. Nothing in section 44.103 or rule 1.820 limits the arbitrator's authority or otherwise excludes attorney-fee issues. In fact, section 44.103(2) speaks to "refer[ing] any contested civil action filed in a circuit or county court to nonbinding arbitration." The context and term "civil action" means the entire civil proceeding to enforce and redress all disputed rights pleaded between the parties, not just bits and pieces of their pleadings. *See Civil Action*, BLACK'S LAW DICTIONARY (5th ed. 1979) & (6th ed. 1991) ("*Action* brought to enforce, redress, or protect a private rights.");

*Action*, BLACK'S LAW DICTIONARY (5th ed. 1979) & (6th ed. 1991) ("Term in its usual legal sense means a *lawsuit* brought in a court; a formal complaint.... It includes *all the formal proceedings*...upon the demand of a right made by one person of another in such court....") (emphasis added). *cf. Dungarani*, 312 So. 3d at 129 (interpreting section 44.103(5)'s reference to "trial de novo" as similarly referring to the "*entire* case in the circuit court," rather than just individual claims or issues) (Sasso, Cohen, Grosshans, JJ.). So, section 44.103(2)'s plain language as originally enacted in 1987 and maintained today allows the arbitrator to resolve the entire lawsuit—including any attorney-fee issue. Ch. 87-173, § 3, Laws of Fla.

When one traces the prohibition against arbitrators deciding attorney fees back to "first principles,"[2] it originates from the following version of section 682.11, Florida Statutes, which existed between 1957 and 2013:

> Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and

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[2] *CED Capital Holdings 2000 EB, LLC v. CTCW-Berkshire Club, LLC*, No. 6D23-1136, 2023 WL 1487713, at *3 (Fla. App. 6th Dist. Feb. 3, 2023) (holding that absent a Florida Supreme Court decision on point, the Sixth District intends to return to "first principles" when analyzing issues).

> fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award.

*Compare* Ch. 57-402, § 10, Laws of Fla. (enacting § 57.20, Fla. Stat.) (emphasis supplied), *with* Ch. 67-254, § 12, Laws of Fla. (renumbering § 57.20 to § 682.11), *and* Ch. 2013-232, § 22, Laws of Fla. (rewriting § 682.11).

The Second District was the first to interpret the emphasized phrase as prohibiting arbitrators from deciding attorney-fee issues, speculating:

> The legislature apparently eliminated attorney's fees from the subject matter jurisdiction of arbitration because arbitrators are generally businessmen chosen for their expertise in the particular subject matter of the suit and have no expertise in determining what is a reasonable attorney's fee.

*Fewox v. McMerit Const. Co.*, 556 So. 2d 419, 421–22 (Fla. 2d DCA 1989) (en banc). Two years later, the Florida Supreme Court "adopt[ed] the thorough and well-reasoned…." *Fewox* decision as its own. *Ins. Co. of N. Am. v. Acousti Eng'g Co. of Fla.*, 579 So. 2d 77, 80 (Fla. 1991).

The next year, the Fourth District resolved the open question about whether parties could consent to arbitrators resolving

attorney's fees despite the statutory prohibition. *Pierce v. J.W. Charles-Bush Sec., Inc.*, 603 So. 2d 625, 626 (Fla. 4th DCA 1992) (en banc). The Fourth District discussed the change in the judiciary's historical hostility towards arbitration, questioned the continued legitimacy of *Fewox*'s speculation about why section 682.11 originally excluded attorney's fees, and ultimately concluded that parties may agree to confer attorney-fee authority on arbitrators. *Id.* at 627–31. A few years later, the Supreme Court resolved an interdistrict conflict by approving *Pierce*'s reading and finding that parties may agree to submit fee requests to arbitrators or otherwise "waive[ ] their statutory right to have the court decide the fee issue." *Turnberry Assocs. v. Serv. Station Aid, Inc.*, 651 So. 2d 1173, 1175 (Fla. 1995).

In other words, the principle underpinning the judgment here (and its order of referral) rests on a statutory right given by section 682.11 that the parties could enforce or waive at their pleasure. *Compare id.*, *with* R2871, R9603. But two flaws exist in continuing to rely on this principle—both in this case and in any case generally.

First, this case does not involve voluntary binding arbitration under chapter 682, but rather court-ordered nonbinding arbitration under chapter 44. Section 682.013(1), Florida Statutes (2020), makes

clear that chapter 682 only "governs an agreement to arbitrate made on or after July 1, 2013." *See also* § 682.21, Fla. Stat. (2012) (containing similar language limiting chapter 682's scope before 2013's revisions). Nothing in either statute connects the two statutes.

Most cases have also concluded that chapter 682's provisions do not apply to civil actions referred to arbitration under section 44.103 and rule 1.820. *LP Graceville, LLC v. Odum Estate of Norton*, 335 So. 3d 764, 766 (Fla. 1st DCA 2022); *Johnson*, 736 So. 2d at 1237; *Preferred Mut. Ins. Co. v. Davis*, 629 So. 2d 259, 260 (Fla. 4th DCA 1993). The limited exception is *Wedgewood Holdings, Inc. v. Wilpon*, 972 So. 2d 1044, 1046 (Fla. 4th DCA 2008), which said—with no analysis or reference to the intra-conflicting *Preferred*—that those unhappy with court-ordered arbitration awards must seek to timely modify or clarify it under sections 682.12 or 682.14. But as borne out by chapters 682 and 44's plain language and recently explained by the First District, the two statutory processes are "mutually exclusive…." and do not "overlap." *LP Graceville,* 335 So. 3d at 766. Therefore, the trial court's reliance on a principle rooted in section 682.11's prior language is erroneous, especially when the legislature failed to include such a limitation in section 44.103.

Second, even if former section 682.11's principle had any relevance to section 44.103 at one time, it no longer has any life whatsoever because the legislature repealed the principle in 2013 when it rewrote section 682.11 to say, in relevant part:

> (2) An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

Ch. 2013-232, § 4, Laws of Fla. In other words, "an arbitrator may now award fees, so long as the fee claim is authorized by contract or statute." *Baron v. L.P. Evans Motors WPB, Inc.*, 333 So. 3d 1152, 1156 (Fla. 3d DCA 2022), *reh'g denied* (Mar. 23, 2022). So, section 682.11's original principle limiting the arbitrator's authority over attorney-fee issues and its interpreative caselaw are no longer valid. *Id.*; (identifying Supreme Court's *Turnberry* specifically); *Phillips v. Lyons Heritage Tampa, LLC*, 341 So. 3d 1171, 1175 (Fla. 2d DCA 2022), *review denied sub nom. Phillips v. Lyons Heritage of Tampa, LLC*, No. SC22-918, 2022 WL 4939287 (Fla. Oct. 4, 2022).

Therefore, the trial court's decision and reasoning for striking the arbitrator's denial of the Employee Supervisor's counterclaim for statutory reimbursement of their attorney's fees has no basis under

current Florida law. Nothing in section 44.103—or any other authority—limits the arbitrator's authority to decide the entire civil action once it is referred, including any claim for attorney's fees, regardless of how it's pleaded.

### B. The referral order itself could not and does not limit the arbitrator's authority to resolve the Employee Supervisors' reimbursement counterclaim.

The referral order itself does not support the judgment's modification of the arbitration award or otherwise save the Employee Supervisors from their failure to timely seek trial de novo for three independent reasons.

First, the referral order is simply the standard form-order required by local rule, i.e., Twentieth Judicial Circuit Administrative Order 1.15. (*Compare* R2870–72). Both the order and rule are premised on former section 682.11's pre-2013 statutory right. This is illustrated when paragraph 8 says that attorney-fee issues are "normally reserved for the trial court," but that "the parties can waive this *right* and have the arbitrator(s) render a finding on [their] entitlement and…amount….", citing the Supreme Court's *Turnberry*. *Id.* (emphasis added).

But as explained above, that is not currently Florida law—if it ever even was in the section-44.108 context. *See supra* pp. 31–35. Section 44.108 and rule 1.820 neither limit the arbitrator's authority nor give litigants any "right" to reserve attorney-fee issues for the court. Current section 682.11(2) doesn't either.[3] Administrative orders cannot grant rights that do not already exist. *Rodriguez v. State*, 919 So. 2d 1252, 1278 (Fla. 2005). Nor can they amend statutes or rules by adding terms and conditions. *Dougan v. Bradshaw*, 198 So. 3d 878, 882 (Fla. 4th DCA 2016). Insofar as the referral order and Administrative Order 1.15 conflict with Florida law, they were void and could not be used to avoid confirming the arbitrator's denial of the Employee Supervisors' counterclaim. *Skelly v. Skelly*, 257 So. 3d 150, 152 (Fla. 5th DCA 2018).

In any event, the second reason the referral order does not support the judgment is because it expressly authorized the arbitrator to decide "all triable issues…." (R2870). While "triable

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[3] For what it's worth, section 682.11(2)'s substantial rewrite and caselaw abrogation became effective two weeks after the local rule became effective. *Compare* Twentieth Jud. Cir. Admin. Order 1.15 (June 12, 2013), *with* Ch. 2013-232, § 22 (July 1, 2013).

issues" is undefined, each element in the parties' claims, counterclaims, and affirmative defenses would seem to satisfy the individual meaning of those terms. *See Triable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Subject or liable to judicial examination and trial."); *Issue*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A point in dispute between two or more parties.").

Here, the Employee Supervisors pleaded a counterclaim for reimbursement of defense expenses under section 111.07. (R4373–74; R4680–83). That statute works in tandem with the common law to allow local governments to reimburse public officers for legal expenses incurred in civil actions that concern their acts or omissions. § 111.07, Fla. Stat.; *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918–19 (Fla. 1990). Although the Employee Supervisors pleaded this cause of action as a counterclaim in the same lawsuit where the alleged defense expenses were incurred, normally this claim is pleaded *after* the lawsuit incurring the fees ends and *after* first affording the local government a chance to evaluate the expenses' reasonableness and whether the statute's prerequisites are met. *See, e.g.*, *id.* at 919; *Nuzum v. Valdes*, 407 So.

2d 277, 278–79 (Fla. 3d DCA 1981); *Pizzi v. Town of Miami Lakes*, 286 So. 3d 814, 815–16 & 818 (Fla. 3d DCA 2019).

Once denied by the local government, then the public official sues for statutory reimbursement. *See, e.g.*, *id.*; *Chavez v. City of Tampa*, 560 So. 2d 1214, 1216 (Fla. 2d DCA 1990). Like all causes of action, this one also has elements that public officials must plead and prove. *See, e.g.*, *Chavez*, 560 So. 2d at 1217–18; *Maloy v. Bd. of Cnty. Com'rs of Leon Cnty.*, 946 So. 2d 1260, 1264–65 (Fla. 1st DCA 2007). Local governments also have affirmative defenses under section 111.07, like bad faith, which Flow Way pleaded here. (R2930–32, R4377–79). And resolving the claim's elements and defenses are fact-weighing inquiries that require pretrial discovery and evidence. *Pizzi*, 286 So. 3d at 817–19.

In other words, the Employee Supervisors' counterclaim is not a traditional prevailing-party-fee request that is collateral to the main dispute, such as when a person sues for breach of a contract that also permits recovering attorney's fees for contractual disputes. Those types of "fee requests" do not have triable elements and defenses; the inquiry is simply who won on the significant issues. *See generally Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992).

Rather, the Employee Supervisors' counterclaim is an element of proof in the main dispute. It is quintessentially a statutory indemnity claim. *See Indemnity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty."). And like indemnity actions, the attorney-fee request is not merely collateral to the main claim, it is an element of the main claim's damages that must be proven like any other element of damages. *See, e.g.*, *Caribbean Fire & Associates, Inc. v. Coastal Const. Group of S. Fla.*, 985 So. 2d 1197, 1199 (Fla. 3d DCA 2008); *Proformance Plastering of Pensacola, Inc. v. Windmere Owners' Ass'n, Inc.*, 122 So. 3d 508 (Fla. 1st DCA 2013).

So, when the trial court ordered the parties to arbitration on "all triable issue," the most natural reading of that phrase included the fact-intensive elements of the Employee Supervisors' statutory counterclaim and Flow Way's affirmative defenses. Indeed, had the Employee Supervisors done the norm by waiting until after this lawsuit to separately sue for statutory reimbursement, then there would be no genuine doubt about the arbitrator's authority to decide their claim for reimbursement of attorney's fees since that is their

damages under section 111.07. It should not be treated differently just because the Employee Supervisors pleaded it as a counterclaim in the same action the defense fees were incurred.

Florida courts appear to agree with this distinction when they interpreted former section 682.11's limitation of the arbitrator's authority as attorney's fees. For example, the Supreme Court's *Turnberry* decision held: "[W]e 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*." 651 So. 2d at 1176 (emphasis supplied); *see also Ulrich v. Eaton Vance Distributors, Inc.*, 764 So. 2d 731, 733 (Fla. 2d DCA 2000) ("[W]hen devising Florida's Arbitration Code the legislature, too, viewed attorney's fee issues as collateral to the main disputes.").

In other words, under the outmoded principle relied on below, arbitrators are only prohibited from deciding "the collateral issue of attorney's fees" absent stipulation. But arbitrators would not be prohibited from deciding attorney's fees when, like here, they are directly recoverable as an element of damages to the parties' main claims. *Cf. Powell v. Carey Intern., Inc.*, 558 F. Supp. 2d 1265, 1269 (S.D. Fla. 2008) (reaching a similar conclusion after drawing a similar

distinction when "the issue of attorney's fees and costs is necessarily included within the scope of a statutory claim"). The first situation covers the referral order's restriction at paragraph 8, the second situation covers the referral order's "all-triable-issues" mandate at paragraph 1. (R2870–71). The trial court thus erred in concluding otherwise.

Finally, even if reimbursement under section 111.07 would normally be a "collateral issue of attorney's fees" under *Turnberry*, it would not be here since the Employee Supervisors chose to plead it as a distinct counterclaim, which, as noted above, is by definition a "triable issue." In other words, any error by the arbitrator in treating the reimbursement issue as a "triable issue" was invited by the Employee Supervisors when they chose to plead it as a distinct counterclaim—rather than as a mere collateral issue in their answer and affirmative defense's "wherefore" clause. *Cf. Cent. Fla. Invs., Inc. v. Orange Cnty.*, 295 So. 3d 292, 294–95 (Fla. 5th DCA 2019) (finding party invited procedural error by requesting wrong relief in their pleading); *Brevard Cnty. v. Obloy*, 301 So. 3d 1114, 1118–17 (Fla. 5th DCA 2020) (same). The trial court could not belatedly rescue the

Employee Supervisors at confirmation from the error caused by their own pleading folly. *Cf. id.*

Accordingly, the Court should reverse because the referral order is not premised on a correct statement of law and because, even if correct, the order would not apply to the section-111.07 context generally or this case specifically.

### C. Insofar as either Florida law or the referral order limited the arbitrator's authority, nothing required waiver of that limitation to be in writing.

Ignoring the latter two errors for the moment, the trial court also erred in holding that the parties could only waive the arbitrator's limitation through a written stipulation. (R9601, 9603). That conclusion is neither supported by the referral order's plain language nor Florida law.

The referral order only says that "[s]uch waiver *should be* in writing and signed by the respective parties or their attorneys." (R2871). The order doesn't say waiver *must be* in writing or even that it *shall be* in writing. It says "should be," which is permissive language denoting that something is recommended and maybe even desirable, but not mandatory. *Qwest Corp. v. F.C.C.*, 258 F.3d 1191,

1200 (10th Cir. 2001); *U.S. v. Rogers*, 14 Fed. App'x 303, 305 (6th Cir. 2001); *Cybertech Group, Inc. v. U.S.*, 48 Fed. Cl. 638, 649 (2001).

This construction is bolstered by the fact that a word search of the referral order shows that the court knew how to use mandatory language since it used "shall" 28 times and "will" and "must" one time each. *Cf. Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 275 (Fla. 1987) (employing a similar analysis to differentiate between "shall" and "may" in a contract); *Rogers*, 14 Fed. App'x at 305 (similar analysis).

This reading is further bolstered by the referral order's cite to *Turnberry* to support the notion that the "waiver should be in writing...." (R2871). Nothing in *Turnberry* required written waiver or stipulation. 651 So. 2d at 1175. In fact, the Supreme Court suggested that the waiver or stipulation did not need to be in writing if the record evidenced it:

> 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.

*Id.* In other words, despite "neither an oral nor written stipulation," the Court still found waiver and consent based on the evidence.

The First District agrees that waiver or consent do not have to be in writing. For example, in *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 149 (Fla. 1st DCA 2000), the First District ruled that "no 'express agreement' devoted exclusively to the question of attorney's fees is necessary…." Instead, "the parties may, by their actions, filings, and submissions, expressly waive their right to insist that only a court decide the issue of attorney's fees." *Id.* The court then found waiver because (1) the parties' "agreed to submit to arbitration all the claims raised in the statement of claim, which included the claim for attorney's fees"; (2) respondent neither referenced nor reserved "the right to a judicial determination of the attorney's fee claim…."; and (3) respondent never insisted on its right at the arbitration, waiting instead until after arbitration to object. *Id.* at 149–50.

Notably, *Cassedy* disagreed with the Fourth District, which beginning with *D.H. Blair & Co., Inc. v. Johnson*, 697 So. 2d 912, 913–14 (Fla. 4th DCA 1997), read *Turnberry* as requiring separate written agreements explicitly waiving the right to have courts decide fees.

Although *Blair* found "persuasive" the contention that waiver occurred when fees were requested in their arbitration submissions, the Fourth District believed that the following statement from *Turnberry* precluded waiver absent a written stipulation: " 'The arbitrator has no authority to award fees absent an express waiver of this statutory right.' " *Id.* at 914 (quoting *Turnberry*, 651 So. 2d at 1175.

But as the First District criticized, this reasoning is erroneous because neither *Turnberry* nor section 682.11 limits waiver to only written agreements. *Cassedy*, 751 So. 2d at 148. The quote above that *Blair* relied on ignores the next sentence in *Turnberry* where the Supreme Court agreed that the record showed "neither an *oral* nor written stipulation...." *Turnberry*, 651 So. 2d at 1175 (emphasis supplied). This significantly undercuts *Blair*'s reading of *Turnberry*.

*Blair*'s reading also ignores that all rights—whether constitutional, statutory, or contractual—can be waived expressly, implicitly through conduct inconsistent with that right, or even by failing to "speak out in vindication of a claim when there is a duty to do so." *Arbogast v. Bryan*, 393 So. 2d 606, 608–09 (Fla. 4th DCA 1981). Courts have applied these general waiver principles to find

litigants arbitrated other issues by consent or waived their rights to have courts decide them. *See, e.g.*, *LeNeve v. Via S. Florida, L.L.C.*, 908 So. 2d 530, 534–36 (Fla. 4th DCA 2005) (applying general waiver principles to find litigant waived right to resolve claims in court despite never executing a formal document); *Bacon*, 852 So. 2d at 890 (finding parties arbitrated by consent dismissed counterclaim when it was presented to the arbitrator without objection). There is no reason to treat attorney-fee issues differently (especially today, *see supra* pp. 31–35).

Therefore, the trial court erred in finding its referral order and Florida law required written waiver. The Court should also find the following unrebutted evidence shows that the Employee Supervisors waived any right under the referral order or Florida law to have the attorney-fee issue resolved by the court:

- The Employee Supervisors pleaded it as one of two counterclaims (R2865–67, R4373–74, R4680–83);
- The parties' argued both those counterclaims (and defenses to them) in their arbitration summaries—even though the non-fee counterclaim had never been authorized by the court (R9753–54, R9764, R9775, R9777–78, R9790–94);

- Flow Way's attorney's statements (in lieu of an arbitration transcript) that both parties' made presentations at arbitration until well into the evening on all issues, including the reimbursement counterclaim (R9729–30)—which statements were not objected to, opposed, or rebutted;[4]

- The fact that the arbitrator's decision specifically said the Employee Supervisors "have asserted a counterclaim against [Flow Way] seeking the recovery of their attorney's fees…." and then fully addressed that counterclaim, including highlighting the evidence presented on it (R7615, R7624);

- And the fact that no evidence shows that the Employee Supervisors ever voiced any objection to the arbitrator's authority over their counterclaim until after losing and after the trial de novo deadline.

Accordingly, the Court should reverse the judgment and remand with instructions to enter judgment confirming the arbitration award in full because insofar as waiver was needed, the record reflects it occurred.

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[4] While attorney factual assertions are typically not competent, substantial evidence, they become evidence when not objected to. *Waste Mgmt., Inc. v. Florida Power & Light Co.*, 571 So. 2d 507, 509 (Fla. 2d DCA 1990); *Centennial Ins. Co. v. Fulton*, 532 So. 2d 1329, 1331 (Fla. 3d DCA 1988).

### D. But even if written waiver was necessary, the record shows it existed.

Insofar as written waiver or consent was required, the parties' written arbitration submissions satisfied that requirement. For example, the Employee Supervisors' arbitration summary begins by summarizing Flow Way's claim and then affirmatively saying:

> We are countering these claims seeking damages and attorney's fees based on the overwhelming evidence that the Preserves were always intended to be owned and maintained by the CDD.... Finally, the CDD is statutorily responsible for paying the Former Supervisors their fees in defending this suit...."

(R9753–54). A few lines later, the Employee Supervisors again say:

> The Defendants answered the Fourth Amended Complaint and raised seven affirmative defenses and a counterclaim seeking to enforce the CDD's common law and statutory obligation under Section 111.07, Florida Statutes, for payment of attorney's fees of the Former Supervisors. *See* Exhibit 2.

(R9754). The Employee Supervisors then conclude their submission by asserting:

> Taylor Morrison and the Former Supervisors have brought a Counterclaim for attorneys' fees and costs for this frivolous action brought against the Former Supervisors.

(R9764). This written submission was then signed by the Employee Supervisors' attorney. (*Id.*).

Flow Way's written submission also extensively addressed this counterclaim and their affirmative defenses to it in their written submission (R9775, R9777–78, R9790–94). And Flow Way's written submission was also signed by its attorney. (R9795).

Therefore, insofar as waiver had to "be in writing and signed by the respective parties or their attorneys," these written submissions were more than sufficient to satisfy these ostensive requirements. (R2871). Several writings may evidence an agreement when they reflect a complete meeting of the minds. *See Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004). The parties would not have bothered to discuss the Employee Supervisors' counterclaim if they did not intend for the arbitrator to resolve it or genuinely believe that the arbitrator had authority to do so. *Cf. Powell*, 558 F. Supp. 2d at 1269 (applying a similar rationale to find waiver). Accordingly, the judgment and rehearing denial were erroneous because the evidence reflects written stipulations signed by the parties' attorneys as ostensibly required.

## III. At a minimum, the trial court erred in finding that the Employee Supervisors were entitled to reimbursement under section 111.07.

After striking the award's paragraph 8—which denied the Employee Supervisors reimbursement counterclaim (R7627)—the court then sua sponte found the Employee Supervisors entitled to attorney's fees because all counts against them were found in their favor by the arbitrator and summary-judgment order. (R9603–05). This ruling was erroneous for three reasons.

First, as argued above, the Employee Supervisors never pleaded a collateral issue of prevailing-party attorney's fees. *See supra* pp. 39–42. What's more, neither their summary-judgment motion nor their response against confirmation asked the court to find them entitled to attorney's fees—whether under section 111.07 or some other theory. (R4432–58; R9513–21). The court thus could not grant relief that was neither pleaded nor moved for. *See, e.g.*, *McDonald v. McDonald*, 732 So. 2d 505, 506 (Fla. 4th DCA 1999); *Wallace v. Wallace*, 605 So. 2d 504, 505 (Fla. 4th DCA 1992).

Second, even if the arbitrator lacked authority to decide attorney's fees, he still had authority (and the duty) to "identify and resolve the legal and factual issues upon which the determination of

attorney's fees will be based…." *A-1 Duran*, 865 So. 2d at 603; *see also R.M. Stark & Co., Inc. v. Noddle*, 941 So. 2d 401, 403–04 (Fla. 4th DCA 2006). Here, the arbitrator factually concluded based on the evidence presented at arbitration that the Employee Supervisors had "acted in bad faith…." (R7624; *see also* R7615–17). This fact is presumed correct, and the trial court cannot substitute its judgment for the arbitrator's. *Merritt-Chapman & Scott Corp. v. State Rd. Dep't*, 98 So. 2d 85, 86 (Fla. 1957). This is especially true here when neither the Employee Supervisors nor the judgment addressed the bad-faith findings, much less challenged them in a timely trial de novo or motion to modify or vacate. (R9513–21, R9601–05). Given this factual finding, the court could not find entitlement under section 111.07 because bad faith is a complete defense under that statute.

Finally, the court could not find entitlement when the Employee Supervisors failed to prove—and cannot prove—that they satisfied section 111.07's two elements, which are that the lawsuit arose from "(1) the performance of the officer's *official duties* and (2) while serving a *public purpose*." *Chavez*, 560 So. 2d at 1218. Assuming they could prove the first, they could not prove that their conduct served a public purpose.

The caselaw equates "public purpose" with "public interest" and holds that the conduct must have truly served a public interest and "exclude[ ] any taint of 'private interest.' " *Id.*; *Pizzi*, 286 So. 3d at 819. For example, even if a councilperson votes on a land-use application that could serve some public interest, if the vote also advances a private pecuniary interest, then the statute is not met. *Chavez*, 560 So. 2d at 1218.

Here, as in *Chavez*, the Employee Supervisors did not—and at this point, cannot—prove that their vote to approve the preserves transfer without the endowment fund purely served the public interest without the "taint of 'private interest.' " Indeed, the arbitrator made the following factual findings, which at this point are conclusive as they were not challenged:

- The Employee Supervisors were the Developer's agents and employees when the preserves were transferred to Flow Way without an endowment fund. (R7613).
- Through "blind obedience," the Employee Supervisors "followed the lead of their corporate superior, Andrew Miller.... [who] made the decision to transfer the preserves to [Flow Way].... [and a]ll of

these individuals voted in favor of their corporate superior." (R7617).

- "By arranging for its agents to transfer the preserve lands to [Flow Way] prior to turnover, … [the Developer] sought to prematurely absolve itself of financial responsibility for preserve maintenance…. which, according to the evidence presented by the parties, amounted to $770,789.72." (R7622).

- "[T]he evidence has established that the former supervisors rubber stamped the actions that were suggested by their private employer, …. [which] led to the Flow Way Community Development District satisfying hundreds of thousands of dollars of maintenance obligations which should have been funded by the [Developer]…." (R7624).

Given these unchallenged findings, which the judgment adopted (R9605 (¶ 1)), the court could not find that the Employee Supervisors were entitled to attorney's fees since they have not and cannot prove section 111.07's public-interest element. Accordingly, the Court should reverse the trial court's finding that the Employee Supervisors were entitled to attorney's fees under that statute. (R9604 (¶¶ 7–8)).

## IV. The court could not award any defendants costs when no one timely challenged the arbitrator's silence on that issue.

The judgment's last paragraph ruled that the Employee Supervisors and Taylor Morrison of Florida were the prevailing parties and thus entitled to an award of costs. (R9605 (¶ 10)). But the referral order expressly authorized the arbitrator to resolve these issues. (R2871 (¶ 8)). And as the judgment correctly noted, "the arbitrator made no recommendation regarding the assessment of costs." (R9603; *see* R7612–27). Since the award was silent on that issue and no one timely challenged that silence, the trial court was "procedurally barred" from finding the Employee Supervisors and Taylor Morrison of Florida entitled to costs. *Wedgewood*, 972 So. 2d at 1046 (reversing order reserving jurisdiction to award costs).

## V. The summary-judgment order was also improper and does not support affirmance.

Finally, the court also erred in entering a summary-judgment order in the Employee Supervisors' favor after no one moved for trial de novo. (R9623–36). According to the trial judge, since she had orally granted summary judgment at a hearing between the award's issuance and the trial-de-novo deadline, she had authority to reduce

it to writing, which "preempted" the arbitrator's award. (R9712, R9602–03).

As argued above, this conclusion and rationale contravenes Florida law—whether analyzed under section 44.103 or under sections 682.13 and 682.14. *See supra* pp. 21–30. In fact, the Fourth District reversed a post-arbitration summary judgment, calling it improper because when the defendant failed to timely seek trial de novo, "the arbitration order became binding and the plaintiff was entitled to judgment accordingly." *Quaregna, Inc.*, 943 So. 2d at 266.

The Employee Supervisors distinguished *Quaregna* below by arguing that unlike here, the summary-judgment motion in *Quaregna* was allegedly not filed, heard, or orally decided until *after* the trial-de-novo deadline expired. (R9517). Yet, these alleged distinguishing facts are nowhere in *Quaregna*'s opinion. 943 So. 2d at 966–68. Instead, the Employee Supervisors cited a computer printout purporting to be that case's trial docket. (R9517, 9524–99). Unsworn, unauthenticated printouts are inadmissible hearsay. *DiGiovanni v. Deutsche Bank Nat'l Tr. Co.*, 226 So. 3d 984, 989 (Fla. 2d DCA 2017). More fundamentally, appellate decisions cannot be distinguished using alleged facts that do not appear in the four-

corners of the opinion. *Adelman Steel Corp. v. Winter*, 610 So. 2d 494, 503 (Fla. 1st DCA 1992), *superseded by statute on other grounds as stated in Reed v. Reed*, 643 So. 2d 1180, 1182 n.4 (Fla. 1st DCA 1994). So, *Quaregna* was binding on the trial court. *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992).

What's more, the Employee Supervisors' alleged distinction is irrelevant under section 44.103(5)'s plain language and interpretative caselaw. *See supra* pp. 21–30. Once they failed to seek trial de novo, the Employee Supervisors forfeited any right to a judicial resolution of the case's merits. *Alexander*, 170 So. 3d at 819. The award became final and binding on the parties *and* the trial court by operation of law. *Id.* Flow Way had a statutory "right to enforce the arbitration award...." that the trial court had a "non-discretionary, mandatory duty...." to enforce. *Johnson*, 736 So. 2d at 1238.

The oral ruling does not "preempt" section 44.103(5) and rule 1.880(h)'s forfeiture consequence because oral rulings are not effective until rendered. *Barry v. Robson*, 65 So. 2d 739, 740 (Fla. 1953). Oral rulings are "only a statement of the court's present intention as to how it will rule." *Dalton v. Dalton*, 412 So. 2d 928, 929 (Fla. 1st DCA 1982). The trial judge could always change her mind

between pronouncement and rendition. *Carr v. Byers*, 578 So. 2d 347, 348 & n.3 (Fla. 1st DCA 1991); *see also Delco Oil, Inc. v. Pannu*, 856 So. 2d 1070, 1072 (Fla. 5th DCA 2003) (illustrating point). Until rendered—i.e., reduced to writing, signed by the judge, and delivered to the clerk—"the decision of a trial judge is not a judgment." *Hartney v. Piedmont Tech., Inc.*, 814 So. 2d 1217, 1218 (Fla. 1st DCA 2002); *see also* Fla. R. App. P. 9.020(h) (defining rendition). For example, oral rulings do not have res judicata effect. *See City of Panama City v. Fla. Pub. Employees Relations Comm'n*, 364 So. 2d 109, 112 (Fla. 1st DCA 1978). Rather, the court's oral ruling was as if "[i]n effect, no decision has been made in th[e] case." *Anders v. Anders*, 376 So. 2d 439, 440 (Fla. 1st DCA 1979).

To oppose this caselaw, the Employee Supervisors raised two arguments. First, they argued that more recent cases hold that "oral pronouncements are valid and binding even though a written order has not yet been entered." (R9520–21). The cases they cited though do not support this proposition. (R9520–21). Rather, those cases stand for the uncontroversial principle that oral pronouncements control over written judgments insofar as discrepancies exist. *See, e.g.*, *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 488–89 (Fla.

5th DCA 2004). Here no written judgment was rendered *before* the arbitration award became final by operation of section 44.103(5) and rule 1.880(h). So those cases don't apply and cannot "preempt" the legislature and supreme court's clear mandate.

Alternatively, the Employee Supervisors argued that reducing oral rulings to judgments are purely ministerial acts. (R9518–19, R9722). Their support was a case where a disqualified judge reduced an earlier oral rulings to writing despite an intervening disqualification motion. (R9519 (citing *Fernwoods Condo. Ass'n #2, Inc. v. Alonso*, 26 So. 3d 27, 29 (Fla. 3d DCA 2009)).

But *Fernwoods*' principle does not apply when, like here, a court orally grants a motion, but leaves it to the prevailing party to prepare a proposed written order that, as the court here said, would withstand scrutiny and be upheld on appeal. *Compare* R9706, *with Plaza v. Plaza*, 21 So. 3d 181, 183 (Fla. 3d DCA 2009) (refusing to find rendition was ministerial in that situation). Indeed, the oral ruling was devoid of the reasons and findings required by Florida Rule of Civil Procedure 1.510(a) and, in fact, "reserve[d] jurisdiction to amend it based upon [their] submissions." (R9706).

Thus, insofar as *Fernwoods*' ministerial-act principle could, in theory, "preempt" section 44.103(5)'s ministerial-duty mandate, it would not apply here because "the trial judge was required to exercise discretion in determining whether the proposed order comported with [her] ruling.... *Plaza*, 21 So. 3d at 183; *Berry v. Berry*, 765 So. 2d 855, 857 (Fla. 5th DCA 2000). But exercising this discretion became procedurally barred when the arbitration award became final and binding by operation of section 44.103(5).

Yet, even if the Employee Supervisors and trial court were correct about the oral summary judgment's "preemption," that would only apply to the arbitrator's rulings on counts II and IV because those were the only counts at issue in the summary-judgment motion and hearing. (R4432–58, R9662–07). The Employee Supervisors' reimbursement counterclaim and Flow Way's defenses—like bad faith—were not raised or heard. (*Id.*). So, the court could not reach factual findings inconsistent with the arbitrator's, such as finding that "no evidence was presented of bad faith or malicious purpose by any Former Supervisor in their vote let alone a majority of the Former Supervisors acting as the CDD's Board of Supervisors, its governing body." (R9601–22, R9633).

Accordingly, the Court should reverse the judgment and summary-judgment order and remand with instructions to reduce the arbitration award as written to a judgment or, alternatively, reverse the parts of the judgment and order that refused to adopt the arbitrator's resolution and findings on the reimbursement counterclaim.

## CONCLUSION

The trial court erred in failing to strictly adhere to section 44.103(5) and rule 1.880(h)'s plain language and interpretative caselaw. The Court should reverse the judgment and summary-judgment order and remand with instructions to enter a judgment fully consistent with the arbitration award, including denying the Employee Supervisors' counterclaim for reimbursement of their attorney's fees, costs, and other legal expenses.

At a minimum, the Court should reverse the judgment's finding that the Employee Supervisors were entitled to attorney's fees and costs because (1) they failed to prove section 111.07's elements and (2) the arbitrator found bad faith, which finding was confirmed by the judgment.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2023, appellant's initial brief was electronically transmitted to the Clerk of Court via the Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the following FCEP registrant(s) or pro se parties in the manner specified:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this initial brief was submitted in Bookman Old Style 14-point font as required by Florida Rule of Appellate Procedure 9.045(b) and satisfies Rule 9.210(a)'s word limitation by being less than 13,000 words.

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