

**IN THE SUPREME COURT OF THE  
STATE OF FLORIDA**

**KATHRYN B. MOSER, individually and as  
trustee of the Kathryn B. Moser  
Revocable Living Trust,**

**Petitioner,**

**CASE NO. 96,714**

**v.**

**BARRON CHASE SECURITIES, INC.,**

**Respondent.**

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**ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, SECOND DISTRICT  
CASE NO.: 98-04009**

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**PETITIONER'S INITIAL BRIEF**

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## **ISSUES PRESENTED FOR REVIEW**

### **I. Does the Statement in an Arbitration Award That “The Claimant’s Request for Attorneys’ Fees Is Referred to a Court of Competent Jurisdiction” Constitute a “Signal” That the Arbitrators Found Liability as to a Statutory Claim That Would Support an Award of Attorneys’ Fees to the Prevailing Party?**

The trial court in this case made an award of prevailing party attorneys’ fees to Moser. The Second District reversed the award of attorneys’ fees, on the grounds that the trial court did not have a basis upon which to award attorneys’ fees.

### **II. When a Court of Competent Jurisdiction Determines Entitlement to and the Amount of an Award of Prevailing Party Attorneys’ Fees in an Arbitration, Does Interest on the Award of Attorneys’ Fees Accrue from the Date of the Arbitration Award?**

The trial court in this case awarded interest on the attorneys’ fee award to Moser from the date of the arbitration award. The Second District held that the trial court erred in awarding interest retroactive to the date of the arbitration

award.

## **STATEMENT OF THE CASE AND FACTS**

This appeal arises out of a decision of the Second District Court of Appeal (Appendix, No.1), which reversed a trial court judgment that awarded attorneys' fees to Petitioner/Appellee Kathryn B. Moser ("Moser").

References herein to the "Appendix" refer to the Appendix to Petitioner's Initial Brief filed with this Court. References to "R" refer to the original record on appeal. References to "T" refer to the Transcript of the Hearing on Petitioner's Petition for Award of Attorneys' Fees, held before the Sixth Judicial Circuit Court for Pinellas County on July 2, 1998.

Moser had been the prevailing party in an arbitration proceeding against Respondent/Appellant Barron Chase Securities, Inc. ("Barron Chase") before the National Association of Securities Dealers, Inc. ("NASD"). (Appendix, No. 2)

In the arbitration proceeding, Moser had asserted both common law claims and a statutory claim under Florida Statutes Section 517.301. (R-6-7, 104; T-23, 125) Moser had also requested an award of attorney's fees, based on Florida Statutes Section 517.211. (R-6-7, 104; T-23, 125) Section 517.211

provides for an award of attorneys' fees to the party who prevails on a claim brought under Section 517.301.

The arbitration panel rendered an award in favor of Moser. (Appendix, No. 2) The language of the arbitration award did not specify the basis for liability, which is typical of NASD awards. (T- 38, 60, 77) As to the request for attorneys' fees, the arbitration award stated, "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction." (Appendix, No. 2)

Moser then petitioned the Sixth Circuit Court in Pinellas County, pursuant to the Florida Arbitration Code, Section 682.12, for confirmation of the award and an award of attorneys' fees under Section 517.211. (R-1-8) Expert testimony on the attorneys' fees issue was presented by both sides. (T- 9-62, 123-52) The Circuit Court awarded attorneys' fees to Moser (R-103-111), and Respondent Barron Chase Securities appealed to the Second District Court of Appeal. (R-119-120)

On appeal, Barron Chase argued that there was no basis for an award of fees and, alternatively, if there was such a basis, the trial court erred in awarding interest on such fees from the date of the arbitration award. Agreeing with Barron Chase, the Second District Court of Appeal reversed the award of

attorneys' fees. (Appendix, No. 1) The Second District also held that the trial court erred in awarding Moser interest on the award of attorneys' fees retroactive to the date of the arbitration award. (Appendix, No. 1)

Moser filed a motion for rehearing and rehearing en banc. Those motions were denied on September 9, 1999. (Appendix, No. 3)

Moser then invoked the discretionary jurisdiction of this Court. On March 22, 2000, this Court entered an Order Accepting Jurisdiction and Setting Oral Argument. (Appendix, No. 4)

## **SUMMARY OF ARGUMENT**

### **Issue I.**

The trial court in its discretion properly awarded attorneys' fees to Moser. NASD awards typically do not give a rationale for the decision. The arbitrators communicate their decision to NASD staff; NASD staff reduces the award to writing. The basis for liability is generally not stated in the award.

Under the Florida Arbitration Code, F.S. §682.11, attorneys' fees can only be awarded by a court of competent jurisdiction.

In this case the award stated, "The Claimant's Request for Attorneys' Fees is Referred to a Court of Competent Jurisdiction," thereby indicating that the arbitrators had found liability based on Moser's statutory claim under Florida Statutes Sections 517.211 and 517.301, which provide for prevailing party attorneys' fees.

If the arbitrators had not found liability based on Moser's statutory claim, there would have been no reason for them to refer the case to a court for determination of the attorneys' fee issue.

Because NASD awards typically do not state the basis for liability, Florida courts have looked to the language of the award for a "signal" that the

claimant prevailed on a statutory claim that would allow for an award of attorneys' fees.

In this case, the language of the award referring the attorneys' fee issue to a court of competent jurisdiction constitutes such a "signal," indicating that Moser prevailed on her statutory claim.

The Second District reversed the award of attorneys' fees to Moser without mentioning the "signal" in the award.

The decision of the Second District expressly and directly conflicts with the decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla. 1995). *Turnberry* held that arbitrators have no authority to award fees, absent the parties' express waiver of the right to have the fee issue determined in court. In this case, the arbitrators complied with *Turnberry* by referring the issue of attorneys' fees to a court of competent jurisdiction. However, the Second District reversed the trial court's award of fees because the arbitrators had not specifically awarded such fees. The Second District's decision therefore expressly and directly conflicts with *Turnberry* because it requires arbitrators to specifically determine entitlement to fees.

This decision of the Second District also expressly and directly conflicts

with the recent decisions of the Fifth District Court of Appeal in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487 (Fla. 5<sup>th</sup> DCA 1999) and *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5<sup>th</sup> DCA 1999). In *Kirchner*, the Fifth District held that the arbitrators may give an “indirect” indication that a party is entitled to fees. In *Josephthal*, the Fifth District upheld an award of fees by the trial court, but reiterated the rule of *Turnberry*, that the arbitrators had no authority to determine entitlement. In the present case, the Second District apparently concluded that the indirect indication that Moser was entitled to attorneys’ fees—i.e., the statement that the issue was referred to a court of competent jurisdiction—was insufficient and required the arbitrators to specifically determine entitlement.

The Florida Arbitration Code, Section 682.10, provides that the court can remand the case back to the arbitrators for the purpose of clarifying the award. If a specific finding of liability as to Moser’s statutory claim is required to authorize an award of attorneys’ fees, the trial court should be directed to remand the case back to the arbitrators so they can clarify whether there was a finding of liability as to Moser’s statutory claim.

## **Issue II.**

The trial court in its discretion also correctly determined that Moser was entitled to interest on the attorneys' fees award retroactive to the date of the arbitration award. Under Florida Statutes Section 517.211(6), the court must award attorneys' fees to the prevailing party, unless the award of such fees would be unjust. Thus, Moser became entitled to the attorneys' fees award on the date of the arbitration award, which contained the language indicating that she had prevailed on her statutory claim.

However, the Second District held that the trial court erred in awarding interest on the fee award retroactive to the date of the arbitration award. The Second District decision expressly and directly conflicts with the decision of this Court in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996). In *Higley South*, this Court held that interest accrues from the date the entitlement to attorney fees is fixed through agreement, *arbitration award*, or court determination, even though the amount of the award has not yet been determined.

## ARGUMENT

**I. The Statement in an Arbitration Award That “The Claimant’s Request for Attorneys’ Fees Is Referred to a Court of Competent Jurisdiction” Constitutes a “Signal” That the Arbitrators Found Liability as to a Statutory Claim That Would Support an Award of Attorneys’ Fees to the Prevailing Party.**

**A. The Language of the Award in this Case Is an Adequate “Signal” of a Basis for an Award of Attorneys’ Fees, in Light of the Fact That an NASD Award Typically Does Not Include a Finding as to the Basis for Liability.**

NASD arbitration awards typically do not specify the basis for liability. (T-38, 60, 77) After the arbitrators have reached a decision, that decision is communicated to NASD staff. The NASD Arbitrator’s Manual states:

“Once a decision is made, the staff member reduces the award to writing. Under present law, an arbitrator is not required to give a reason for the decision.”

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

Similarly, the NASD Code of Arbitration Procedure provides:

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

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

No statement regarding the basis for imposing liability is required.

Under the Florida Arbitration Code, attorneys’ fees can only be awarded by a court of competent jurisdiction. F.S. §682.11. Arbitrators have no authority to determine entitlement to or award attorneys’ fees, unless the parties expressly confer that authority by stipulation. *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla. 1995). (Appendix, No. 6)

Thus, the prevailing party in an NASD arbitration is required to bring a post-arbitration proceeding in court to obtain an award of attorneys’ fees under

Florida Statutes Sections 517.211 and 517.301. The trial court must determine entitlement to attorneys' fees, even though the award typically does not specify whether or not the claimant prevailed on the statutory claim.

Because of this anomalous situation, Florida courts have looked to the language of the award for a "signal" indicating that the claimant prevailed on the statutory claim. *See Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487 (Fla. 5<sup>th</sup> DCA 1999); *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5<sup>th</sup> DCA 1999); *Raymond James & Assoc. v. Wieneke*, 591 So.2d 956 (Fla. 2d DCA 1991).

The award in favor of Moser stated that "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction." That statement constitutes a clear "signal" that the arbitrators considered Moser to have prevailed on her statutory claim. Had Moser not prevailed on her Section 517.301 claim, there would have been no reason for the arbitrators to refer the attorneys' fees issue to the trial court.

**B. The Trial Court In Its Discretion Correctly Determined That Moser Was Entitled to an Award of Prevailing Party Attorneys' Fees, Based on the Language of the Arbitration Award in Her Favor and Expert Testimony Presented at the Hearing.**

The trial court conducted a 4½ hour hearing on Moser's petition for attorneys' fees. The transcript of that hearing reveals that the court heard testimony from several witnesses as to the issue of whether the arbitration award indicated a finding of liability under Section 517.301, the statutory claim that would authorize an award of attorneys' fees. (T-39-40, 56-60, 77-79, 95-96, 128-131)

The trial court had the opportunity to hear and weigh such conflicting testimony. The trial court had the discretion to determine, in light of the conflicting testimony, that the language of the award did indeed authorize an award of attorneys' fees.

The fact that Moser asserted common law claims as well as the statutory claim does not affect the "signal" of liability on the statutory claim. Moser's claim involved alternative theories of liability for the same wrong: the

mismanagement of an investment account. According to the “two issue rule” in Florida, the trial court was required to assume that Moser prevailed on all of her claims, unless it could be shown that a particular claim was specifically rejected. *Treal Group, Inc. v. Custom Video Services, Inc.*, 682 So.2d 1230 (Fla. 4th DCA 1996); *Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla. 1978).

**C. The Decision of the Second District in this Case Expressly and Directly Conflicts with the Decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.*, Which Prohibits the Arbitrators from Determining Entitlement to Attorneys’ Fees.**

In *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173, 1175 (Fla. 1995) (Appendix, No. 5), this Court stated that arbitrators have no authority to award fees, absent the parties’ express waiver of the right to have the fee issue determined in court.

In the present case, the arbitration award referred Moser’s request for attorneys’ fees to a court of competent jurisdiction. Under the rule articulated

by the Florida Supreme Court in *Turnberry*, the arbitrators could do no more; they could not render an award of fees or even determine entitlement to fees.

In its opinion, the Second District noted that the language of an arbitration award is sufficient to authorize an award of attorneys' fees if the award states that "The Respondents...shall pay to the Claimant her attorneys' fees as determined by a court of competent jurisdiction," as in the recent case of *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487, 489 (Fla. 5<sup>th</sup> DCA 1999). Similarly, the Second District noted that a statement that the arbitrators "determined to make an award in favor of the claimants...for attorney's fees" was sufficient to authorize an award of fees in *Raymond James & Assoc. v. Wieneke*, 591 So.2d 956, 957 (Fla. 2d DCA 1991).

Thus, the Second District would have found the language of the arbitration award in the present case sufficient to authorize an award of fees only if the arbitrators violated the rule of *Turnberry* by specifically stating that Moser was entitled to an award of attorneys' fees, instead of referring the attorneys' fees issue to a court of competent jurisdiction. The Second District decision in this case thus expressly and directly conflicts with *Turnberry*, which prohibits the arbitrators from awarding or even determining entitlement to fees.



**D. The Decision of the Second District in this Case, Which Reversed the Award of Attorneys’ Fees, Expressly and Directly Conflicts with the Decisions of the Fifth District in *Josephthal Lyon & Ross, Inc. v. Durham* and *Kirchner v. Interfirst Capital Corp*, Which Allow Such a “Signal” That a Party Is Entitled to Attorneys’ Fees. . . . .**

The Second District reversed the trial court’s award of attorneys’ fees to Moser. The Second District agreed with Barron Chase that the trial court had no basis for awarding attorneys’ fees because the arbitration award did not specify whether Moser prevailed on her statutory claim. The Second District did not mention the language of the arbitration award which stated that “The Claimant’s request for attorneys’ fees is referred to a court of competent jurisdiction.”

By requiring a direct finding of liability on the statutory claim to be stated in the award, the decision of Second District conflicts with the recent decisions of the Fifth District in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487 (Fla. 5<sup>th</sup> DCA 1999) (Appendix, No. 7) and *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5<sup>th</sup> DCA 1999) (Appendix, No. 8), which held that

an indication in an arbitration award that a party is entitled to attorneys' fees may be "direct or indirect."

In *Josephthal*, the Fifth District upheld an award of fees where there was no specific indication of a finding of liability on the claimant's statutory claim. However, the award stated that "[t]he Respondents...shall pay to the Claimant her attorney's fees as determined by a court of competent jurisdiction." The Fifth District concluded that such language was sufficient to authorize a fee award under Section 517.211. *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487, 488-489 (Fla. 5<sup>th</sup> DCA 1999). (Appendix, No. 7) Although the Fifth District found the language of the award sufficient to "signal" liability on the statutory claim, the Fifth District also noted that the arbitrators were not authorized to award fees, as the arbitration award stated, under the rule of *Turnberry*. *Josephthal* at 489, fn.2.

Similarly, in *Kirchner*, the claim was based on several theories, including the violation of Section 517.301. The claimant received an award in her favor which stated that "the parties are referred to a court of competent jurisdiction for a determination [with regard of the entitlement to and amount, if any, of an award of counsel fees]." The Fifth District concluded that the language of the award indicated that the claimant had prevailed on her statutory cause of action.

The Fifth District stated that although the arbitrator must indicate that the one seeking attorneys' fees prevailed on a cause of action authorizing fees, this indication may be either direct or indirect. *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482, 483 (Fla. 5<sup>th</sup> DCA 1999). (Appendix, No. 8)

**E. If a Specific Finding of Liability on a Statutory Claim Is Required to Authorize an Award of Attorneys' Fees, the Trial Court Should Be Directed to Remand the Case to the Arbitrators for the Purpose of Clarifying the Award Pursuant to Florida Statutes Section 682.10.**

As discussed above, NASD awards typically do not state the rationale for the award or a specific finding as to the basis for liability. Because of such lack of specificity, Florida courts have looked for a "signal" that the award was based on a statutory claim that would authorize an award of attorneys' fees.

In the present case, the trial court found such authorization for the award of fees, based on the language of the award and the testimony presented at the hearing on the petition for attorneys' fees. The Second District disagreed and

reversed the decision of the trial court.

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

The Florida Arbitration Code provides, pertinent part:

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

F.S. §682.10.

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

The arbitrators’ statement that “The Claimant’s request for attorneys’ fees is referred to a court of competent jurisdiction” was obviously intended by the arbitrators to allow the claimant to seek an award of attorneys’ fees. If such language is not, in itself, sufficient to indicate that there is a basis for awarding such fees, clarification of the award by the arbitrators themselves is the only

means to determine their findings as to liability and to give effect to the statement in the arbitration award.

**II. When a Court of Competent Jurisdiction Determines  
Entitlement to and the Amount of an Award of Prevailing Party  
Attorneys' Fees in an Arbitration, Interest on the Award of  
Attorneys' Fees Accrues from the Date of the Arbitration Award.**

**A. The Trial Court In Its Discretion Correctly Determined That  
Moser Was Entitled to Interest on the Award of Attorneys'  
Fees from the Date of the Arbitration Award in Her Favor.**

The trial court's award of interest on the attorneys' fees award was consistent with this Court's decision in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996). (Appendix, No. 9)

In *Higley South*, this Court held that interest accrues from the date the entitlement to attorney fees is fixed through agreement, *arbitration award*, or

court determination, even though the amount of the award has not yet been determined. *Higley South* at 931(*emphasis added*). Thus, the petitioner in *Higley South* was entitled to interest on attorneys' fees from October 10, 1988, the date of the arbitration award in its favor, even though the amount of fees was not determined until entry of final judgment in the trial court on December 10, 1991. *Higley South* at 932.

Florida Statutes Section 517.211(6) provides:

“In any action brought under this section, including an appeal, the court *shall* award reasonable attorneys' fees to the prevailing party unless the court finds that the award of such fees would be unjust.” (*emphasis added*)

In the present case, pursuant to Section 517.211(6), once Moser prevailed on her claim under Section 517.301, a court of competent jurisdiction was required to grant her an award of fees (“the court shall award”). Thus, Moser became entitled to fees on the date she received the arbitration award which “signaled” that she had prevailed on her statutory claim by stating that “The Claimant’s request for attorneys’ fees is referred to a court of competent jurisdiction.”

Under the rule articulated by this Court in *Higley South*, the trial court

correctly held that Moser was entitled to interest on the award of attorneys' fees retroactive to the date of the award.

**B. The Decision of the Second District in this Case, Which Reversed the Decision of the Trial Court, Expressly and Directly Conflicts with the Decision of this Court in *Quality Engineered Installation, Inc. V. Higley South, Inc.***

After the Second District held that there was no basis for awarding attorneys' fees to Moser, Barron Chase's alternative argument, that the trial court had improperly awarded interest on the fee award retroactive to the date of the arbitration award, became moot.

Nevertheless, the Second District also agreed with Barron Chase on that issue, holding that the trial court erred in awarding interest on the fee award retroactive to the date of the arbitration award.

The Second District's holding expressly and directly conflicts with this Court's decision in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996).

## CONCLUSION

The trial court in its discretion properly awarded attorneys' fees to Moser based on the language of the award, in light of the fact that NASD awards typically do not state a basis for liability and the decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla. 1995), which prohibits the arbitrators from awarding such fees. The trial court in its discretion also properly awarded interest on the attorneys' fees award retroactive to the date of the arbitration award.

Accordingly, Moser requests that this Court hold that the language in an arbitration award referring the issue of prevailing party attorneys' fees to a court of competent jurisdiction is an adequate "signal" that the arbitrators have found liability as to a statutory claim that would allow an award of attorneys' fees. Moser requests that this Court reverse the decision of the Second District in this case because it requires the arbitrators to "signal" liability on a statutory claim by specifically awarding attorneys' fees, in violation of the rule articulated in *Turnberry*. Moser requests that this Court approve the recent decisions of the Fifth District in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487 (Fla.

5<sup>th</sup> DCA 1999), and *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5<sup>th</sup> DCA 1999), which allow for an indirect indication of liability on a statutory claim.

If this Court concludes that a specific finding of liability on a statutory claim is required in an arbitration award to authorize an award of attorneys' fees, Moser requests that this Court reverse the decision of the Second District, with directions to the trial court to remand the case back to the arbitrators, pursuant to Florida Statutes Section 682.10, for clarification of the award. The trial court can thus request the arbitrators to specify whether Moser prevailed on her statutory claim under Florida Statutes Sections 517.211 and 517.301, which would authorize the award of attorneys' fees.

Moser also requests that this Court hold that when an arbitration award refers the issue of prevailing party attorneys' fees to a court of competent jurisdiction, interest should be awarded on the award attorneys' fees retroactive to the date of the arbitration award. Moser requests that this Court reverse the decision of the Second District in this case, which reversed the award of interest

retroactive to the date of the arbitration award, because it conflicts with this Court's decision in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996).

Dated: \_\_\_\_\_.

Respectfully submitted,

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

I hereby certify that the foregoing Petitioner's Initial Brief was produced in 14 point proportionately spaced Times New Roman type.

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Allan J. Fedor

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Karol K. Williams, Esq., 1315 S. Howard Ave., Suite 101, Tampa, FL 33606 by U.S. Mail this \_\_\_\_\_ day of April, 2000.

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Allan J. Fedor