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/Appellee,

v. **Case No. 96,714**

BARRON CHASE SECURITIES, INC.,

Respondent/Appellant.
_____/

RESPONDENT'S ANSWER BRIEF

(On Appeal from the Second District Court of Appeal, Case No. 98-04009)

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STATEMENT OF THE CASE AND FACTS

Moser arbitrated her securities claims against broker Carl Allen, Jr. and his employer, Barron Chase, before an NASD arbitration panel. (R-6). Moser's claims were based on several common law legal theories of recovery that would not entitle the prevailing party to an award of fees from the circuit court. (R-6-7; T-23,125). Moser also raised a statutory claim under section 517.301, Fla. Stat. (1997) that could potentially support an attorney's fees award to the prevailing party. (R-6-7,104; T-23,125).

After presenting her case to the NASD Arbitration Panel, Moser asked the Arbitration Panel to award her economic damages in the sum of $103,000, plus $10,050 for unauthorized commissions, plus $21,643.66 for excessive commissions, plus punitive damages, fees and costs (R-7;T-57, 148). Moser also asked the arbitrators to identify the basis of any award to Moser. (T-151).

On December 9, 1997, Moser was awarded approximately $82,000 in damages by the Arbitration Panel. (T-71). The language of the Arbitration Award did not reveal whether the award was based on Moser's common law claims, her statutory claims, or both. (R-6-8; T-58). The Award also did not include any provision for an award of statutory interest under section 517.211, Fla. Stat.(R-6-8; T-58) or make any other reference to the statutory formula for economic damages under section 517.211. (R-6-8; T-128).

Moser sought confirmation of the Arbitration Award and an award of attorney's fees under section 517.211(6), Fla. Stat. from the circuit court. (R-1-6). Testimony on the attorney's fees issues was presented by both sides using lawyer witnesses with expertise and experience in securities arbitrations (T-9-62; 123-52). Barron Chase contested Moser's entitlement to a fees award based on the absence of any finding in the Arbitration Award that Moser had prevailed under her Chapter 517 claim. (T- 128-31).

The circuit court found that Moser was entitled to an award of attorney's fees under section 517.301 and 517.211(6), Fla. Stat. (1997). (R-104). The court awarded a total of $60,394.25 in fees to Moser's two attorneys, with interest accruing on the fees award retroactive to December 9, 1997, the date of the Arbitration Award. (R-110-11). After Barron Chase's motion for rehearing was denied (R-117), Barron Chase appealed the decision to the Second District Court of Appeal. (R-119).

The district court reversed the award of fees to Moser because the Arbitration Award did not disclose the basis for Moser's damages award. The district court noted that "arbitrators are certainly authorized to inform the parties whether the award is based upon a theory that will entitle the claimant to fees in a subsequent court proceedings." (A-1-2). The district court also reversed the trial court's

award of interest retroactive to entry of the Arbitration Award, relying on this Court's decision in *Turnberry Assoc. v. Service Station Aid, Inc.*, 651 So. 2d 1173 (Fla. 1995), in holding that "[a]bsent an agreement between the parties, the circuit court, and not the arbitration panel, has jurisdiction to determine entitlement to attorney's fees." (A-1-5). The Second District then applied this Court's holding in *Quality Engineered, Inc. v. Higley South, Inc*., 670 So. 2d 929 (Fla. 1996) that interest on a fees award begins to accrue from the date entitlement to the fee is determined to support reversal of the retroactive interest award. (A-1-5).

Moser's motions for rehearing and rehearing en banc were denied. (A-3). Moser's petition for review by this Court was accepted in the Court's March 22, 2000 Order Accepting Jurisdiction and Setting Oral Argument. (A-4).

In this Answer Brief, the record will be referenced as "R", the transcript of the fees entitlement hearing before the circuit court as "T", and the documents contained in the Appendix filed with Petitioner's Initial Brief as "A".

SUMMARY OF THE ARGUMENT

ISSUE I - The Second District correctly reversed the circuit court's award of attorneys' fees to Moser because the Arbitration Award did not reveal that Moser prevailed on a claim that entitled her to a fees award. To the extent that Moser argues the arbitrators "signaled" her entitlement to a fees award through certain language in the Arbitration Award, such a "signal" was outside the subject matter jurisdiction of the arbitrators as a matter of law and thus devoid of legal effect. Because Moser's arbitration claims included common law claims that did not support entitlement to a fees award, as well as a statutory claim that supported a prevailing party fees award, Moser had to show the circuit court that prevailing on any of her claims was tantamount to prevailing on her statutory claims. The record fails to support the trial court's finding of entitlement because the arbitration award was silent as to the basis for the damages award and the award did not comport with the statutory calculation of damages.

ISSUE II - Moser concedes throughout her brief that only the circuit court had the authority to determine her entitlement to a fees award, yet contrarily argues in Issue II that her entitlement to a fees award was somehow fixed by the Arbitration Award. This argument is illogical, inconsistent with the facts and Florida law, and should be rejected by this Court.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DETERMINED AS A MATTER OF LAW THAT THE ARBITRATION AWARD DID NOT SUPPORT THE CIRCUIT COURT'S AWARD OF ATTORNEY'S FEES TO MOSER UNDER THE FACTS OF THIS CASE

A. As A Matter Of Law, Arbitrators Have No Subject Matter Jurisdiction To Send "Signals" To The Circuit Court Regarding A Party's Entitlement To A Fees Award, Nor, Alternatively, Do The Facts Of This Case Support A Finding That The Instant Arbitration Award Sent Such A "Signal" To The Circuit Court

The instant arbitration panel lacked subject matter jurisdiction to consider the issue of Moser's entitlement to an award of attorney's fees. In *Insurance Co. of North America v. Acousti Engineering Co.*, 579 So. 2d 77, 79 (Fla. 1991), this Court found that section 682.11, Fla. Stat., is a statutory bar to the award of attorney's fees by arbitrators. In *Turnberry Associates v. Service Station Aid, Inc.*, 651 So. 2d 1173 (Fla. 1995), this Court held that the parties by agreement may waive their entitlement to have the circuit court determine the fees issues, thereby conferring subject matter jurisdiction upon an arbitrator to award fees. Id. at 1175. However, *Turnberry* unequivocally states that absent such an express waiver of this statutory right to have the circuit court determine fees entitlement, the arbitrator has no authority to award fees. Id.

It is undisputed that the attorney's fees issue in this case was never submitted by agreement to the arbitrators for determination. Accordingly, under *Turnberry*,

the instant arbitrators had no authority to even consider the Moser's entitlement to an attorney's fees award, much less to "signal" the circuit court either directly or indirectly, regarding such entitlement. To the extent that *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So. 2d 487, 488-89 (Fla. 5th DCA 1999) holds to the contrary, that decision should be disapproved by this Court as an improper circumvention of the plain language of section 682.11, Fla. Stat. and the *Turnberry* decision.

Should, for the sake of argument, this Court be inclined to recede from its decision in *Turnberry* and find that arbitrators have subject matter jurisdiction to "signal" circuit courts regarding a party's entitlement to fees, Barron Chase factually distinguishes this case from *Josephthal*. The *Josephthal* arbitration panel, unlike the instant panel, expressly directed the losing party to pay attorney's fees to the prevailing party:

> The Respondents . . . shall pay to the Claimant her attorneys' fees as determined by a court of competent jurisdiction.

Josephthal, 734 So. 2d at 488. However, the instant arbitration panel correctly followed the dictates of section 682.11 and *Turnberry* by referring the fees entitlement issue to the circuit court - - - an implicit acknowledgment of the arbitrators' lack of subject matter jurisdiction to either consider or determine the

fees issue.

Thus, before the circuit court, Moser had the burden to show that prevailing on any of her claims was legally tantamount to prevailing on her statutory claim --- the only claim that carried statutory entitlement to fees for the prevailing party. Her various claims before the arbitration panel included claims of common law fraud , negligent misrepresentation, negligent hiring, negligent supervision, as well as her statutory claims under section 517.301.

At the circuit court's fees entitlement hearing, Moser's witness, attorney Jonathan Alpert, testified that if Moser prevailed on her common law fraud claim, she likewise prevailed on her section 517.301 claims because section 517.301 contains parallel statutory bases for liability that require a showing of fraud. However, the attorney witness for Barron Chase noted that the Arbitration Award of damages to Moser was for an amount that was significantly less than her claimed statutory damages. Further, the Arbitration Award failed to award Moser any statutory interest on the damages award under section 517.211, Fla. Stat., or to otherwise suggest that Moser's damages award arose from her statutory claim rather than from common law claims. Thus, the Arbitration Award failed to support a finding that Moser prevailed on her statutory claim instead of, for example, her negligent hiring or negligent supervision claim, neither of which would support an

award of fees to Moser.

Under these facts, the Second District correctly reversed Moser's award of attorney's fees. The Second District agreed with Barron Chase that because the Arbitration Award did not specify whether Moser prevailed on the common law claims or on the statutory claims, the trial court had no basis upon which to award fees. The Court noted again, as it did in *Pharmacy Management Serv., Inc. v. Perschon*, 622 So. 2d 75 (Fla. 2d DCA 1993) and in the pre-*Turnberry* decision, *Raymond James & Assoc., Inc. v. Wieneke*, 591 So. 2d 956 (Fla. 2d DCA 1991) that arbitrators are free to inform the parties whether an arbitration damages award is based upon a claim which supports an award of fees from the circuit court. Id.

The Second District's decision thus underscores the simple fact that where a claimant brings one or more claim(s) which do not support a fees award, together with one or more claim(s) which do support a fees award to the prevailing party, the arbitration panel has the authority and discretion under Florida law to identify which claim(s) either party prevailed on in the arbitration award. In this manner, the circuit court can determine the fees entitlement issue by reviewing the arbitrators' findings or identified bases for the award without the need for improper speculation by the circuit court.

This is the same simple process that was approved by the Fifth District Court

of Appeal in *Kirchner v. Interfirst Capital Corporation*, 732 So. 2d 482 (Fla. 5th DCA 1999). The *Kirchner* arbitration award contained findings indicating that the claimant had prevailed on her statutory securities claim. The circuit court nonetheless denied a fees award to the prevailing party, holding that the arbitration award did not disclose a basis for the damages award, citing to the Second District's decision in *Pharmacy Management Services, Inc. v. Perschon*, 622 So. 2d 75 (Fla. 2d DCA 1993). The Fifth District reversed, finding that the particular arbitration award findings amply supported an award of fees to claimant as the prevailing party on her statutory claim. The *Kirchner* court reasoned that the arbitration award stated that:

> ... approval of a trading account which is unsuitable for the customer in view of the customer's financial situation is an actionable violation of [Florida securities laws]

and the arbitration award expressly found that:

> The evidence presented in this proceeding clearly establishes that this options trading account was unsuitable for Claimant in light of her personal and financial situation. Id. at 483.

Thus, it followed that the Defendant breached the terms of Florida statutory securities law, thereby entitling the prevailing party to statutory fees..

The well-reasoned *Kirchner* decision illustrates how arbitration awards can provide findings informing the circuit court as to the basis for an arbitration award

without violating either the letter or spirit of *Turnberry*. Unlike the *Josephthal* and pre-*Turnberry Weinke* arbitration awards that direct one party to pay fees to the other party, thereby "signaling" the arbitrators' improper fees entitlement determination to the circuit court, the *Kirchner* arbitration award simply provides findings sufficient to support a fees entitlement determination by the circuit court. The Second District outlined this same simple solution to the "two tiered fees system" problem in *Perschon* and reaffirmed its appropriateness in the instant case. This Court should adopt the same rule and allow arbitrators to continue to choose whether or not to include such findings on a case by case basis, while barring improper "signaling" that is outside the subject matter jurisdiction of the arbitrators.

Indeed, the "signaling" issue raised by Petitioner before this Court was not even briefed by the parties below. Both *Josephthal* and *Kirchner* were provided to the Second District as supplemental authority after the briefing was completed by the instant parties. Further, the Second District's discussion of "signaling" in this case is purely dicta that has no bearing on the merits of this case. Even if, for the sake of argument, this Court determined that the dicta addressing "signaling" conflicts with *Turnberry's* holding that arbitrators generally lack subject matter jurisdiction to determine entitlement to fees awards, this Court may disapprove of the dicta discussion without disturbing the holding on the merits.

The merits decision by the Second District should not be disturbed. Under the facts of this case, the trial court unquestionably erred as a matter of law in finding Moser's entitlement to a fees award without any such basis for the award being identified in the Arbitration Award. Where, as in this case, a prevailing party can not establish that they have prevailed on claims permitting fees awards under either contract or statute, nothing could be more unfair or improper under Florida law than to award fees anyway. The Second District's reversal on the merits of the trial court's award of fees should be affirmed .

B. The Circuit Court's Award of Attorney's Fees Was Legal Error Reviewable Under A *De Novo* Standard of Review By The Second District

The witness testimony before the circuit court was given by lawyers with expertise in securities arbitration matters. Their testimony went to the legal heart of the entitlement issue, not to factual issues. Simply stated, the two lawyer witnesses disagreed as to whether or not the arbitration award was legally sufficient to support an award of attorney's fees to Moser as the prevailing party. The circuit court's adoption of the legal views of one lawyer witness over the competing legal views of the other lawyer witness was correctly reviewed *de novo* by the district court. See e.g. *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. 2d DCA 1996) (lower court's determination of a legal issue can be reviewed *de novo* by the appellate court).

Nor did the circuit court hear any testimony that Moser's recovery under any of her common law theories was tantamount to recovery under her statutory theory, thereby supporting a prevailing party fees award. As a matter of law, if the Arbitration Award was based on Moser's common law claims of negligent hiring and/or negligent supervision of the Barron Chase broker who serviced Moser's account**,** there is no parallel statutory basis for liability under section 517.301 that would support the fees award to Moser.

As to Moser's current attempt to convince the Court that the two issue rule is applicable to this arbitration case, Respondent notes that this issue was not preserved for review before this Court because it was not raised below. See e.g. *Way v. State*, 2000 WL 422869, *10 (Fla. April 20, 2000) (issue not preserved for review by Supreme Court where issue not raised below). If, for the sake of argument, the Court find no waiver of the issue, the Court should nonetheless reject this argument because there is no legal support for application of the two issue rule to arbitration awards. The two issue rule is an appellate tool premised upon a party's duty to request a special verdict form to reveal the jury's decision making process. See *Barth v. Khubani*, 748 So. 2d 260, 261 (Fla. 1999). Arbitration panels do not use verdict forms, and are not required to reveal their decision making process in any manner. Significantly, appellant cites to no legal authority applying

the two issue rule to an arbitration award.

Importantly, however, arbitrators may choose to reveal the basis for their award to ensure that the circuit court either has (or does not have) a legally sufficient basis for awarding attorney's fees to the prevailing party. This is the course of action approved by *Perschon, Kirchner*, and the instant Opinion that meshes flawlessly with *Turnberry* constraints on arbitrators' authority to determine fees entitlement issues.

Further, if, as in the instant case, the arbitration panel chooses to remain silent as to the basis for its award, the prevailing party is no more prejudiced than any other prevailing party in a lawsuit that does not support a fees award. Indeed, common law tort recoveries for grievous personal injuries are awarded without attendant fees awards on a daily basis by Florida courts. There is certainly no policy reason to create some special exception for Moser and other arbitration prevailing parties where their arbitrators have chosen to remain silent as to the basis for an award of damages. Florida law is crystal clear on the fees entitlement issue — either a prevailing party proves their right to fees under a contract or statute, or they pay their own fees out of their damages recovery. This Court must affirm the Second District's reversal of the fees award below.

C. Moser Is Not Entitled To A Second Bite At the Arbitration Apple

The Court should reject outright Moser's request for remand to the arbitrators for clarification of the award as untimely and waived. Section 682.10, Fla. Stat. includes express time restraints for such resubmission to the arbitrators, i.e. 20 days from Moser's receipt of the arbitration award. Moser never requested the circuit court to remand the Arbitration Award for this purpose, thereby waiving this right, as well as failing to preserve this issue for appeal. See e.g. *Way v. State*, 2000 WL 422869, *10 (Fla. April 20, 2000) (issue not preserved for review by Supreme Court where issue not raised below).

Nor does the Arbitration Award require clarification. The award plainly awards damages in a specified amount to Moser, and, as required by *Turnberry*, refers the fees entitlement issue to a court of competent jurisdiction. Accordingly, there is no legal basis for seeking clarification or otherwise disturbing the Arbitration Award. Certainly a remand by this Court "would serve only to defeat the high degree of conclusiveness that accompanies review of an arbitration award." See e.g. *Applewhite v. Sheen Fin. Resources, Inc.*, 608 So. 2d 80 (Fla. 4th DCA 1992). Finally, Respondent reminds the Court that Moser asked the arbitrators to identify the basis for her award and the arbitrators declined to do so. This denial was well within their broad discretion as arbitrators, leaving this Court with no legal basis for ordering a re-opening of the arbitration proceedings for any purpose,

including Moser's requested clarification of the award. See *Charbonneau v. Morse Operations, Inc*., 727 So. 2d 1017, 1020 (Fla. 4th DCA 1999) (if arbitration award is within the scope of the submission and arbitrators are not guilty of misconduct set forth in the statute, the award operates as a final and conclusive judgment). The decision of the Second District should be affirmed.

II. AS A MATTER OF LAW, INTEREST ON MOSER'S AWARD OF ATTORNEY'S FEES ACCRUED FROM THE DATE THE CIRCUIT COURT DETERMINED HER ENTITLEMENT TO THE FEES AWARD BECAUSE THE ARBITRATORS LACKED SUBJECT MATTER JURISDICTION TO DETERMINE ENTITLEMENT TO FEES

Moser argues inconsistently and illogically on this issue. She acknowledges in her argument on Issue I that the arbitrators had no authority under *Turnberry* to determine her entitlement to a fees award. She concedes in statement of Issue II that the circuit court, not the arbitrators, determined the fees entitlement issue. Yet she nonsensically asserts that her entitlement to fees was somehow fixed by the Arbitration Award.

Moser was not entitled to an award of fees until a court of competent jurisdiction — the circuit court in this case ---- determined her entitlement. If, hypothetically, the parties had agreed to a *Turnberry* waiver of their statutory right to have the fees entitlement issue determined by the circuit court, the arbitrators would have had subject matter jurisdiction to determine the entitlement issue. Then,

assuming an arbitrators' award of fees to Moser, her entitlement to attorney's fees would have been "fixed through . . . arbitration award" under *Quality Engineered Installation, Inc. v. Higley South, Inc*., 670 So.2d 929 (Fla. 1996), and she would have been entitled to interest on the fees award retroactive to the date of the arbitration award.

However, the instant record is clear that Moser's entitlement to fees was "fixed through ... court determination" under *Quality Engineered*, thus eliminating her right to accrual of interest prior to the court's determination of entitlement. The Second District's ruling on this issue is completely consistent with *Quality Engineered* and should be affirmed.

CONCLUSION

For all the foregoing reasons, the Second District's reversal on: (1) the merits of the circuit court's fees entitlement determination and (2) the merits of the circuit court's award of interest on the fees award retroactive to the date of the arbitration

award should be affirmed by this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Respondent's Jurisdictional Answer Brief was produced in 14 point proportionately spaced Time New Roman font.

_____

Karol K. Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U.S. Mail to Richard R. Logsdon, Esq., 1423 S. Ft. Harrison Avenue, Clearwater, FL 33756 and Allan J. Fedor, Esq. And Franell Fedor, Esq., 10225 Ulmerton Road, Suite 8A, Largo, FL 33711 on this 1st day of May, 2000.

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