

ORIGINAL

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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CLERK, SUPREME COURT
By *[Signature]*

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.

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

PETITIONER'S AMENDED BRIEF ON SUPREME COURT
JURISDICTION

ALLAN J. FEDOR, [✓]ESQ.

FBN: 845574

FRANELL FEDOR, [✓]ESQ.

FBN: 845582

Fedor & Fedor

10225 Ulmerton Rd., Suite 8A

Largo, FL 33771

(727) 581-6100

FAX (727) 585-2232

RICHARD R. LOGSDON, [✓]ESQ.

FBN: 163441

1423 S. Ft. Harrison Ave.

Clearwater, FL 33756

(727) 446-8249

Attorneys for Petitioner
KATHRYN B. MOSER

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I. STATEMENT OF THE CASE AND FACTS

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

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").

In the arbitration proceeding, Moser had asserted both common law claims and a statutory claim under Florida Statutes Section 517.301. Moser had also requested an award of attorney's fees, based on Florida Statutes Section 517.211. 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. 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 for an award of attorneys' fees under Section 517.211. The Circuit Court awarded attorneys' fees to Moser, and Respondent Barron Chase Securities appealed to the Second

District Court of Appeal. 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.

The Second District Court of Appeal reversed the award of attorneys' fees. Moser filed a motion for rehearing and rehearing en banc. Those motions were denied on September 9, 1999. (Appendix, No.3)

II. SUMMARY OF ARGUMENT

This decision of the Second District Court of Appeal expressly and directly conflicts with the decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.*, 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. 5th DCA 1999) and *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5th 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 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 Second District decision in this case also 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. In the present case, the Second District held that the trial court had erred by awarding Moser interest on the attorneys’ fees award from the date of the arbitration award. The decision of the Second District therefore expressly and directly conflicts with *Higley South*.

III. GROUNDS FOR INVOKING SUPREME COURT JURISDICTION

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

The Second District Court of Appeal agreed with appellant 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 therefore reversed the trial court's award of attorneys' fees to Moser. The opinion of the Second District Court 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."

However, the Second District noted that the Fifth District recently upheld an award of fees where the arbitration panel stated that "[t]he Respondents...shall pay to the Claimant her attorney's fees as determined by a court of competent jurisdiction." *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487, 488-489 (Fla. 5th DCA 1999). (Appendix, No. 4)

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 (the prevailing party'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.

However, in the present case, the Second District required the arbitrators to do more than refer the attorneys' fees issue to a court of competent jurisdiction. The Second District required the arbitrators to specifically state that the prevailing party is entitled to fees. 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.

B. This Decision Expressly and Directly Conflicts With the Decisions of the Fifth District in *Josephthal Lyon & Ross, Inc. v. Durham* and *Kirchner v. Interfirst Capital Corp.* Because it Does Not Allow an “Indirect” Indication That a Party Is Entitled to Attorneys’ Fees

This decision of Second District also conflicts with the recent decisions of the Fifth District in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So.2d 487 (Fla. 5th DCA 1999) (Appendix, No. 4) and *Kirchner v. Interfirst Capital Corp.*, 732 So.2d 482 (Fla. 5th DCA 1999) (Appendix, No. 6). The Fifth District has held that an indication in an arbitration award that a party is entitled to attorneys’ fees may be “direct or indirect” (*Kirchner* at 483), but arbitrators lack authority to award such fees (*Josephthal* at 489, fn.2).

In the present case, the Second District ignored the “indirect” indication in the arbitration award that Moser is entitled to attorneys’ fees, that is, the language of the award stating that “The Claimant’s request for attorneys’ fees is referred to a court of competent jurisdiction.” The Second District decision here thus conflicts with the Fifth District decision in *Kirchner*.

The decision in the present case also conflicts with the Fifth District opinion in *Josephthal*. In *Josephthal* the Fifth District acknowledged the rule that

arbitrators lack authority to award fees. *Josephthal* at 489, fn.2. Here, the Second District required such an award to indicate the arbitrators' opinion that Moser was entitled to fees.

C. This Decision Expressly and Directly Conflicts With the Decision of This Court in *Quality Engineered Installation, Inc. v. Higley South, Inc.*

Which Held That Interest on an Attorneys' Fee Award Accrues from the Date of the Arbitration Award Even Though the Amount of the Award Has Not Yet Been Determined

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.

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). (Appendix, No. 7)

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. *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929, 931 (Fla. 1996) (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.

The decision of the Second District in the present case, which held that the trial court erred in awarding Moser interest on attorneys' fees from the date of the arbitration award in her favor, therefore expressly and directly conflicts with this Court's decision in *Higley South*.

CONCLUSION

Based on the foregoing, this Court should exercise its discretionary jurisdiction to review this case because of the express and direct conflicts with its decisions in *Turnberry* and *Higley South* and with the Fifth District decisions in

Kirchner and Josephthal. This Court could then articulate what is required for arbitrators to indicate their opinion that a prevailing party should be entitled to attorneys' fees without violating *Turnberry's* prohibition against arbitrators awarding such fees. Further this Court could provide that ambiguities in arbitration awards should be remanded to the arbitration forum by the trial courts with orders that the arbitration panels be reconstituted "for the purpose of clarifying the award" pursuant to the Florida Arbitration Code, F.S. §§ 682.10, 682.12, 682.13, 682.14.

Dated: October 15, 1999.

Respectfully submitted,



ALLAN J. FEDOR, ESQ.

FBN: 845374

Fedor & Fedor

10225 Ulmerton Rd., Suite 8A

Largo, FL 33771

(727) 581-6100


One of the

Attorneys for Petitioner

KATHRYN B. MOSER

CERTIFICATE RE: ADMINISTRATIVE ORDER DATED JULY 13, 1998


I hereby certify that the foregoing Petitioner's Amended Brief on Supreme Court Jurisdiction was produced in 14 point proportionately spaced Times New Roman type.



Allan J. Feder

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 15th day of October, 1999.



Allan J. Feder

APPENDIX

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