

**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.**

**BARRON CHASE SECURITIES, INC.,**

**Respondent/Appellant.**

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**FILED**  
DEBBIE CALUSSEAU

NOV 05 1999

CLERK, SUPREME COURT  
BY 

**Case No. 96,714**

**ORIGINAL**

**RESPONDENT'S JURISDICTIONAL  
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**

This appeal began with a circuit court award of Chapter 517 attorney's fees to Moser, the prevailing claimant in a securities arbitration. (Opinion at 1-2).

Moser's arbitration arose in part on several common law theories of recovery, and also on statutory claims under section 517.301, Fla. Stat. (1997). (Opinion at 2).

Moser expressly asked the arbitrators to identify the basis for any damages awarded, but the arbitrators did not do so. (Opinion at 2).

Moser then sought an award of attorney's fees from the circuit court, asserting entitlement to a fees award as a prevailing party on her section 517.301 claims. (Opinion at 2). Barron Chase contested Moser's entitlement to a fees award based on the absence of any finding or indication in the Arbitration Award that Moser had prevailed under her Chapter 517 claim --- the only claim that supported an award of fees to Moser. (Opinion at 2). Barron Chase also contested the trial court's decision to award interest on the fees award retroactive to the date the Arbitration Award was entered by the arbitration panel. (Opinion at 2).

The circuit court found that Moser was entitled to an attorney's fees award and awarded interest on the fees award to accrue retroactive to December 9, 1997, the date of entry of the NASD Arbitration Award. (Opinion at 2). Barron Chase

appealed.

The district court reversed, noting 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." (Opinion at 2). In finding error in the trial court's award of interest retroactive to entry of the Arbitration Award, the district court's Opinion relied on this Court's holding in *Turnberry Assoc. v. Service Station Aid, Inc.*, 651 So. 2d 1173 (Fla. 1995), in confirming 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." (App.-5). The Court reversed the award of interest retroactive to the arbitration award, expressly citing in support to 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. (Opinion at 5).

Moser's motions for rehearing and rehearing en banc were denied. This petition for review followed.

## SUMMARY OF THE ARGUMENT

Moser's brief contorts the Second District's Opinion's holding in a strained effort to show conflict where there is none. Contrary to the assertions of Moser, the Second District's Opinion is squarely in line with this Court's decisions in *Turnberry* and *Quality Engineered*, and demonstrates no express and direct conflict with the Fifth District decisions in *Josephthal*, *Lyons & Ross* and *Kirchner*. In fact, the Opinion expressly cites to each of these purportedly conflicting decisions in supporting and explaining its reversal of the circuit court's fees award.

Moser mistakenly argues that the Opinion imposes a requirement on arbitrators to determine entitlement to fees when the Opinion is plainly devoid of such a holding. Moser also incorrectly argues that the Arbitration Award language neutrally referring her claim for fees entitlement to the circuit court for determination somehow conflicts with the *Josephthal* holding, despite the vast contrast between the expressly directive language in *Josephthal* and the neutral "referral" language in the instant Arbitration Award.

Thus, none of Moser's conflict arguments have any support in the plain language of the Opinion or the cases cited by Moser. This Court should decline discretionary jurisdiction as Moser has failed to establish the Court's conflict

jurisdiction or any other jurisdictional basis supporting the Court's review of the Second District's Opinion.

## ARGUMENT

### **I. PETITIONER HAS FAILED TO ESTABLISH THIS COURT'S DISCRETIONARY JURISDICTION**

Petitioner's strained reading of the Second District's Opinion to establish this Court's discretionary jurisdiction is unsupported by the plain language of the Opinion. Contrary to Moser's misinterpretation of the Opinion, the Opinion creates no conflict that can support the exercise of this Court's discretionary jurisdiction over this case.

#### **A. There Is No Express And Direct Conflict Between The Opinion And *Turnberry Associates v. Service Station Aid, Inc.***

Moser mistakenly reads the Opinion entered by the Second District to require arbitrators to "specifically state that the prevailing party is entitled to fees". Petitioner's Brief at p. 5. To the contrary, the Opinion does not require arbitrators to make any particular findings. The Opinion merely recognizes that because some of Moser's arbitration claims supported an award of fees by the circuit court and some of her claims did not, the Arbitration Award's silence as to the basis for the Award was fatal to Moser's fees claim before the circuit court. At most, the Opinion reminds arbitrators that a prevailing party cannot establish entitlement to fees where the award fails to show the circuit court that the party



prevailed on a claim that supports entitlement to fees. Accordingly, there is no conflict whatsoever between the Opinion and this Court's decision in *Turnberry Associates v. Service Station Aid, Inc.*, 651 So. 2d 1173 (Fla. 1995).

**B. There Is No Express And Direct Conflict Between The Opinion And The Fifth District Decisions In *Josephthal Lyon & Ross, Inc. v. Durham* and *Kirchner v. Interfirst Capital Corp.***

Moser similarly strains to claim conflict between the Opinion and the Fifth District's decisions in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So. 2d 487, 488-89 (Fla. 5<sup>th</sup> DCA 1999) and *Kirchner v. Interfirst Capital Corp.*, 732 So. 2d 482 (Fla. 5<sup>th</sup> DCA 1999). Moser overlooks the fact that the Arbitration Award in this case contains neither a *Kirchner* direct or indirect indication that Moser is entitled to a fees award. Instead, the Arbitration Award merely recites in a neutral manner that "[t]he Claimant's request for attorneys' fees is referred to a court of competent jurisdiction", in compliance with this Court's holding in *Turnberry*. The neutrality of this language is in sharp contrast with the arbitrators' expressly directive language in *Josephthal Lyon & Ross, Inc. v. Durham*, 734 So. 2d at 488-89 (Fla. 5<sup>th</sup> DCA 1999), i.e. "[t]he Respondents ... shall pay to the Claimant her attorney's fees as determined by a court of competent jurisdiction." (emphasis added). Thus, Moser also fails to show conflict on these grounds.

**C. There Is No Express And Direct Conflict Between The Opinion And *Quality Engineered Installation, Inc. v. Higley South***

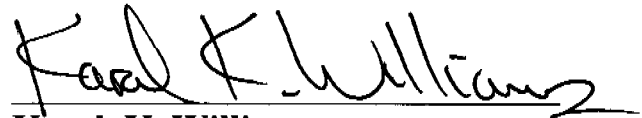
Moser's final attempt to show conflict supporting this Court's jurisdiction likewise fails. The Opinion strictly comports with this Court's ruling in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929 (Fla. 1996), in reversing the award of interest on the fees award retroactive to the date of the Arbitration Award. *Quality Engineered* holds that interest accrues on the fees award based on the date entitlement to a fees award is determined. In this case, entitlement was determined by the circuit court, not the arbitration panel. Indeed, Moser's jurisdictional brief acknowledges the arbitrators' lack of authority below to determine Moser's entitlement to fees under *Turnberry*. Yet in trying to show conflict with *Quality Engineered*, Moser inconsistently argues that Moser's entitlement to fees was somehow fixed by the arbitrators upon entry of the Arbitration Award. The Second District's ruling is in complete harmony with *Quality Engineered* on this issue.

## CONCLUSION

For all the foregoing reasons, this Court should find no conflict, much less express and direct conflict between the Second District Opinion in this case and the cases relied upon in Moser's jurisdictional brief. Further, this Court should decline Moser's invitation to encourage arbitrators to indicate "their opinion" regarding a prevailing party's entitlement to a fees award from the circuit court, since such entitlement "opinions" are plainly outside the scope of the arbitrators' authority under *Turnberry*. The Opinion simply reminds arbitrators that courts cannot know which claims a party prevailed on if the arbitration award is silent on this issue and some claims raised by the prevailing party support entitlement to fees and some claims do not. The Court should decline discretionary jurisdiction in this case.

**CERTIFICATE OF COMPLIANCE**

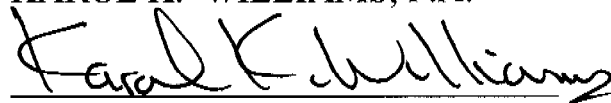
I hereby certify that the foregoing Respondent's Jurisdictional Answer Brief was produced in 14 point proportionately spaced Time New Roman font.

  
**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., 1324 Ft. Harrison Avenue, Clearwater, FL 33756 and Allan J. Fedor, Esq., 10225 Ulmerton Road, Suite A, Largo, FL 33711 on this 4<sup>th</sup> day of November, 1999.

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