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.

_____/

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

PETITIONER'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases page

Statutes

SUMMARY OF ARGUMENT

The statement in the arbitration award in this case that "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction" indicates that Moser prevailed on her statutory claim. The statement is not an improper determination of entitlement to fees. Indeed, in its Answer Brief, Barron Chase concedes that the statement refers the entitlement issue to a court of competent jurisdiction, as required by this Court's decision in *Turnberry Associates v. Service Station Aid, Inc.,* 651 So.2d 1173 (Fla. 1995).

The decision of the Second District, which reversed the circuit court's award of attorneys' fees to Moser, inexplicably makes no mention whatsoever of this statement in the arbitration award.

During the 4½ hour hearing on Moser's petition for attorneys' fees, the circuit court heard testimony indicating that NASD awards, which are prepared by NASD staff, typically do not specify the basis for liability. The circuit court also heard testimony that by prevailing on her negligence-based claims, Moser also prevailed on her statutory claims. Furthermore, the circuit court heard testimony that there are different methods for calculating damages, so that the amount of damages awarded is not determinative of the basis for liability. The

circuit court had the discretion to weigh the conflicting testimony presented by the parties' witnesses. The fact that the circuit court disagreed with Barron Chase's sole witness does not make the case reviewable *de novo* by the district court.

If this Court does not consider the language of the arbitration award conclusive as to the issue of the basis for liability, Moser requests that this Court reverse the decision of the Second District with directions that the circuit court remand the case back to the arbitration panel for clarification of the award.

Such request is neither untimely nor waived. Florida Statutes Section 682.10, which provides for such remand for clarification, places no time limit on a remand for clarification by the court in a post-arbitration court proceeding. Clarification of the award to specify whether Section 517.301 was a basis for liability does not constitute a "second bite at the arbitration apple."

The circuit court's conclusion that interest on the attorneys' fee award should accrue from the date of the arbitration award is completely consistent with *Quality Engineered Installation, Inc. v. Higley South, Inc.,* 670 So.2d 929 (Fla. 1996). The language of *Higley South* specifically states that interest accrues from the date of an arbitration award. Furthermore, because Section 517.211(6) provides for an award of prevailing party attorneys' fees, Moser's entitlement to

fees, even though not reduced to judgment until after the hearing in the circuit court, became fixed as of the date she prevailed on her claim with the arbitration award in her favor. Finally, allowing the accrual of interest from the date of the arbitration award serves as a deterrent to delay, a reason articulated by this Court in *Higley South*.

Barron Chase is demanding a level of particularity and perfection in the arbitration award that simply does not exist in the NASD arbitration system. The awards are drafted by NASD staff from information provided by the panel of arbitrators on a form given to them by the NASD. The panel members are not all lawyers. Specific findings are neither required nor encouraged. The NASD staff provides the same form to panels throughout the country. NASD staff makes no attempt to have the award conform to the statutes or case law of a particular state.

Barron Chase has seized on the shortcomings of the NASD system to preclude Moser from recovering the attorneys' fees she is entitled to as a prevailing party under the Florida Securities and Investor Protection Act.

This Court should reverse the decision of the Second District and allow Moser to recover the attorneys' fees the circuit court correctly awarded to her under Florida law after a full hearing on her petition for such fees.

ARGUMENT

I. The Circuit Court Correctly Concluded that Moser Prevailed on Her Statutory Claim, Thereby Entitling Her to An Award of Attorneys' Fees.

A. The Statement in the Award That "The Claimant's Request for Attorneys' Fees Is Referred to a Court of Competent Jurisdiction" Can Only Mean That Moser Prevailed on Her Statutory Claim.

In her arbitration proceeding, Moser asserted a statutory claim under Section 517.301 of the Florida Securities and Investor Protection Act. Section 517.211(6) provides for an award of prevailing party attorneys' fees for Section 515.301 claims.

The arbitration award in Moser's favor stated "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction." The inclusion of that language in the arbitration award can only mean that Moser prevailed on her statutory claim. There is no other logical reason for the arbitrators to have referred the attorneys' fees issue to the circuit court.

The Second District reversed the award of attorneys' fees on the grounds

that a basis for the fees was not stated in the arbitration award. Inexplicably, the opinion of the Second District made no mention whatsoever of the statement in the arbitration award that "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction."

In its Answer Brief, Barron Chase contends that the language of the award constitutes an improper finding of entitlement to fees by the arbitrators and is thus "devoid of legal effect." Respondent's Answer Brief, p. 4.

Barron Chase's contention is without merit. The language of the award merely indicates that Moser prevailed on her statutory claim.

Furthermore, Barron Chase concedes that the arbitrators in this case rendered an award in accordance with the decision of this Court in *Turnberry Associates v. Service Station Aid, Inc.,* 651 So.2d 1173 (Fla. 1995).

In its Answer Brief, Barron Chase states:

"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." (*emphasis added*) Respondent's Answer Brief, p. 14.

The arbitrators did not determine entitlement to fees or award fees. The arbitrators properly referred the fee issue to the circuit court. That referral of attorneys' fee issue to the circuit court, which Barron Chase concedes complied

with *Turnberry*, can only mean one thing: Moser prevailed on her statutory claim and can therefore be awarded prevailing party attorneys' fees by the circuit court.

B. The Circuit Court's Decision is Not Reviewable *De Novo* By the Second District Simply Because The Circuit Court Disagreed with Barron Chase's Interpretation of the Arbitration Award.

During the 4½ hour hearing on Moser's petition for attorneys' fees, the circuit court heard testimony from several witnesses for Moser that:

(1) NASD awards typically do not include findings as to the basis for liability (T-39-40; 78);

(2) there are different methods of calculating damages, and awards do not usually indicate the method or formula used to determine damages (T-55-56);

(3) the awards are prepared by NASD staff (T-56);

(4) liability under F. S. §517.301 requires only a negligence standard, so that a finding of negligent misrepresentation will constitute fraud under F.S. §517.301 (T-40); and

(5) the language of the award indicated that Moser prevailed on her statutory claim (T-95-96).

The circuit court also heard testimony from Barron Chase's witness who concluded that (1) Moser did not pursue a Section 517.301 claim, based on the "relief requested" portion of the award (T-130-131); and (2) the award did not contain any indication that Moser prevailed on a statutory claim (T-128-129).

The circuit court had the opportunity to hear and weigh the conflicting opinions of the witnesses as to whether the award indicated that Moser had prevailed on her statutory claim. Furthermore, the circuit court had the opportunity to hear testimony concerning the preparation of NASD awards and their usual content.

The circuit court agreed with Moser, based on such testimony, that the arbitrators found that Barron Chase violated Section 517.301. Contrary to Barron Chase's contention, the fact that the circuit court disagreed with Barron Chase's sole witness does not make the case reviewable *de novo* by the district court.

Furthermore, contrary to Barron Chase's argument, the circuit court did hear testimony that Moser's recovery under her common law theories was tantamount to recovery under her statutory theory. The court heard testimony that liability under Section 517.301 requires only a negligence standard, so that a

finding of negligent misrepresentation will constitute fraud under Section 517.301. (T-40)

Barron Chase's suggestion that perhaps the award was based solely on claims of negligent hiring and/or negligent supervision is completely specious. The award found both Barron Chase and Carl Allen, the individual broker who serviced Moser's account, jointly and severally liable. Barron Chase's liability as principal stems from the liability of its agent. Because Mr. Allen's liability could not be based on the negligent hiring or supervision of himself, those claims could not be the only bases of liability for the award.

C. Clarification of the Arbitration Award Pursuant to Florida Statutes Section 682.10 Does Not Constitute "A Second Bite At the Arbitration Apple."

Moser maintains that the language of the arbitration award stating "The Claimant's request for attorneys' fees is referred to a court of competent jurisdiction" constitutes a finding of liability under Section 517.301. However, if this Court disagrees, Moser requests that this Court reverse the decision of the Second District with directions to the circuit court to remand the case back to the arbitrators for clarification of the award pursuant to Florida Statutes Section

682.10.

Contrary to Barron Chase's assertion, this request is neither untimely nor waived.

Florida Statutes Section 682.10 provides for remand to the arbitrators under two different circumstances: "[o]n application of a party to the arbitration," or "if an application to the court is pending under s. 682.12...by the court." F.S. §682.10.

The 20-day time limit, referred to by Barron Chase, applies only to applications to the arbitrators for modification, correction, or clarification made by a party to the arbitration after receipt of the award, when no court proceeding is pending.

Once a court proceeding under Florida Statutes Section 682.12, 682.13, or 682.14 has been commenced, the 20-day time limit simply does not apply. The court may request clarification from the arbitrators at any time.

In addition, such remand does not involve a "second bite at the arbitration apple," as Barron Chase maintains. Clarification of the award to specify the basis for liability does not request or require a reevaluation of the merits of the case or the amount of damages awarded by the panel.

Two examples of NASD orders clarifying the basis for liability, rendered

by the arbitrators after a remand from the circuit court, are attached hereto in Appendix, No. 1.

II. The Circuit Court's Conclusion That Interest on the Attorneys' Fees Award Should Accrue from the Date of the Arbitration Award Is Completely Consistent with the Holding and Reasoning of this Court in *Higley South*.

In its Answer Brief, Barron Chase maintains that Moser cannot be awarded interest on the attorneys' fee award retroactive to the date of the arbitration award because the arbitrators had no authority to determine her entitlement to attorneys' fees.

However, the circuit court's conclusion that interest on the attorneys' fee award should accrue from the date of the arbitration award is completely consistent with *Quality Engineered Installation, Inc. v. Higley South, Inc.,* 670 So.2d 929 (Fla. 1996) for three reasons.

First, the language of *Higley South* specifically provides for the accrual of interest from the date of an arbitration award. In that decision, this Court stated:

> "The First, Third, and Fifth District Courts have 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....We agree with the First, Third, and Fifth District Courts." *Higley South*, 670 So.2d at 931 *(emphasis added)*.

Second, because F.S. §517.211(6) provides for an award of *prevailing party* attorneys' fees, Moser's entitlement to fees, even though not reduced to judgment until after the hearing in the circuit court, became fixed as of the date she prevailed on her claim with the arbitration award in her favor.

Third, allowing the accrual of interest on the attorneys' fees award from the date of the arbitration award serves as a deterrent to delay by the obligated party. In *Higley South*, this Court stated:

> "Using the date of the entitlement as the date of accrual serves as a deterrent to delay by the party who owes the attorneys fees..." *Higley South*, 670 So.2d at 931.

An NASD arbitration often results in lengthy post-arbitration litigation.

The claimant must confirm the award in court to have a final judgment and to obtain an attorneys' fee award. The respondent may attempt to vacate the award. These post-arbitration proceedings may be filed simultaneously by the parties in different courts. Once a court has rendered a decision on a post-arbitration matter, there is the possibility of appeal, as happened in the present case.

Allowing the accrual of interest on an attorneys' fee award from the date of the circuit court judgment, as urged by Barron Chase, encourages delay by the party found liable in the arbitration proceeding.

Thus, although a respondent may deem it unfair for interest to accrue before the amount of fees has been determined, it is similarly unfair for the claimant to prevail in arbitration, and thus be entitled to prevailing party attorneys' fees under Section 517.211(6), but be denied interest on that amount for as long as the respondent can delay the final judgment awarding fees.

In *Higley South*, this Court determined that the burden of nonpayment should be placed on the party who is ultimately obligated to pay fees. Thus, the circuit court's decision in the present case, which held that Moser is entitled to interest on the attorneys' fee award retroactive to the date of the arbitration award, is completely consistent with *Higley South*.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Second District in this case, as requested in Petitioner's Initial Brief.

Dated: May 17, 2000.

Respectfully submitted,

_____

ALLAN J. FEDOR, ESQ.
FBN: 845574

_____

FRANELL FEDOR, ESQ.
FBN: 845582

Fedor & Fedor
10225 Ulmerton Rd., Suite 8A
Largo, FL 33771
(727) 581-6100

Attorneys for Petitioner
KATHRYN B. MOSER

96714rep.wpd

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.

_____
Allan J. Fedor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Karol K. Williams, Esq., 3825 Henderson Blvd., Ste. 301, Tampa, FL 33629 by U.S. Mail this _____ day of May, 2000.

_____
Allan J. Fedor

APPENDIX TO PETITIONER'S REPLY BRIEF

INDEX

Tab No.