Filing # 92740653 E-Filed 07/17/2019 10:55:06 PM

RECEIVED, 07/17/2019 10:55:29 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

LES KROL,

Petitioner,

v.

GIBSON AUTO SALES, INC.,
d/b/a GIBSON TRUCK WORLD,

Respondent.

_________________________________/

Case No. SC19-952
DCA Case No. 5D18-2149
T.C. Case No. 2017-CA-049992

On Petition for Discretionary Review of a Decision of the Fifth District Court of Appeal of Florida

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Respondent's Brief on Jurisdiction

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STATEMENT OF THE CASE AND FACTS

Petitioner, Les Krol ("Petitioner") seeks this Court's jurisdiction to review *Krol v. FCA US, LLC*, -- So. 3d ---, 2019 WL 2062796 (Fla. 5th DCA 2019)[1] based on certified conflict with the Third District's opinion in *Larrain v. Bengal Motor Co. Ltd.,* 976 So. 2d 12 (Fla. 3d DCA 2008). This Court has jurisdiction. *See* Art. V, § 3(b)(4), Fla. Const.

In the underlying case, Petitioner brought suit under the Magnuson-Moss Warranty Act ("MMWA") in the Fifteenth Circuit Court against Respondent, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Gibson Auto" or "Respondent") after purchasing a vehicle from Respondent. AR, 5.[2] As part of the purchase of the vehicle, Petitioner executed a Retail Installment Sales Contract and Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"). AR, 103-105. Pursuant to the Arbitration Agreement, Petitioner and Gibson Auto agreed to arbitrate nearly any type of dispute that could arise between them. *See Id.* Based on the Arbitration Agreement and in response to Petitioner's complaint, Gibson Auto moved to compel arbitration. AR, 100-105.

[1] References to *Krol* are to the Fifth District Court's opinion included in Petitioner's appendix to the Amended Jurisdictional Brief filed with this Court. References are to the page number in number in such appendix and will be preceded by "A."

[2] The appellate record is contained in the appendix to the Petitioner's initial brief to the Fifth District Court of Appeal. References are to the page number in such appendix and will be preceded by "AR."

The trial court agreed with Gibson Auto and granted the motion to compel arbitration. AR, 250-254. The trial court recognized that the "Arbitration Agreement ha[d] a broad arbitration clause" and was particularly persuaded by *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), where the Eleventh Circuit Court of Appeals "thoroughly analyzed the MMWA and concluded that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA claims," and by *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. 2d DCA 2003), where the Second District Court of Appeal compelled the arbitration of MMWA claims. AR, 253-254. Petitioner appealed this order.

The Fifth District Court of Appeal again agreed with Gibson Auto and provided that "[a]fter considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims." A 4. Accordingly, the Fifth District held that (1) MMWA claims could be subject to binding arbitration and that (2) the Federal Trade Commission's ("FTC") single-document rule did not apply to a binding arbitration agreement.

As to its first holding, the Fifth District applied the *McMahon* and *Chevron* Test. A 7-12. After thoroughly analyzing each of the *McMahon* factors, the court concluded that Congress did not intend to prohibit binding arbitration of MMWA claims and that "the Supreme Court has repeatedly enforced binding arbitration of

statutory claims where the purpose of the statute was consumer protection." A 7-10. The Fifth District then conducted the *Chevron* test, noted that "[t]he only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable," and concluded that it did not have to defer to the FTC's interpretation. A 10-12. In doing so, the Fifth District explained that the FTC only had authority to regulate informal dispute settlement mechanisms, which did not include binding arbitration, and that the FTC's position was based on an unwarranted and former view disfavoring arbitration. *Id.*

As to its second holding, the Fifth District concluded that the FTC's single-document rule did not apply to binding arbitration agreements because the FTC could only regulate informal dispute settlement procedures, which did not include binding arbitration. A 12-16. The court certified that this holding was in conflict with *Larrain*, which relied upon the Eleventh Circuit's former view of the MMWA reflected in *Cunningham v. Fleetwood Homes of Georgia*, 253 F.3d 611 (11th Cir. 2001). A 13-16. The court did not follow *Cunningham* and aptly noted that the "the Eleventh Circuit subsequently reversed positions in *Davis,* making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation." A 15. The court also relied upon *Patriot Mfg. Inc. v. Dixon,* 399 F. Supp. 2d 1298 (S.D. Ala. 2005), and *Patriot Mfg. Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005) as both of these explained the effect of *Davis* and the incorrect interchangeable

use of “binding arbitration” and “informal dispute settlement procedure” by other courts. A 15-16. This petition followed.

SUMMARY OF THE ARGUMENT

Petitioner has broadly requested this Court’s jurisdiction to review *Krol* based on conflict with *Larrain*. Respondent agrees with Petitioner that this Court should grant review based on the certified conflict between the Fifth District’s opinion in *Krol* and the Third District’s opinion in *Larrain* as to whether the FTC’s single document rule applies to binding arbitration agreements. This specific question of law merits this Court’s review because the cases expressly and directly conflict on the identical legal issue.

However, in *Krol*, the Fifth District also held that MMWA claims could be subject to binding arbitration. Respondent disagrees with Petitioner’s broad jurisdictional request regarding the arbitrability of MMWA claims as Petitioner has failed to cite to any conflicting Florida decision on that issue. Instead, the Second District has previously subjected MMWA claims to arbitration in *Consuegra* and the Third District has expressed no opinion on the issue in *Larrain*.

ARGUMENT

Petitioner has requested this Court’s jurisdiction pursuant to Article V, §3(b)(3) of the Florida Constitution, which gives this Court discretionary jurisdiction to review “any decision of a district court of appeal” that “expressly and

directly conflicts with a decision of another district court of appeal … on the same question of law." This Court's jurisdiction to review cases based on an alleged conflict is "strictly described" by the Florida Constitution and applies only to a narrow class of cases. *Lawyers Title Ins. Corp. v. Little River Bank & Trust Co.*, 243 So. 2d 417, 417 (Fla. 1970); *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 200 (Fla. 1976).

Respondent agrees that this Court should accept jurisdiction to settle the conflict between *Krol* and *Larrain* regarding the applicability of the single document rule to binding arbitration agreements. However, this Court should not accept jurisdiction as to the Fifth District's holding that MMWA claims are subject to binding arbitration because there is no conflict in Florida on that issue. *See Dep't of Health and Rehab. Servs. v. Nat'l Adoption Counsel. Serv., Inc*, 498 So. 2d 888, 889 (Fla. 1986) (holding implied conflict is not a basis for jurisdiction and stating "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision").

I. The Fifth District's Decision in Krol regarding the Inapplicability of the Single Document Rule to Binding Arbitration Agreements Conflicts with the Third District's Decision in Larrain

The *Krol* decision conflicts with *Larrain* as to the applicability of the FTC's single document rule to binding arbitration agreements because both cases addressed the same issue, but reached different conclusions. These circumstances create a basis

for this Court to exercise conflict jurisdiction. *Wallace v. Dean*, 3 So. 3d 1035, 1054 (Fla. 2009); *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166–67 (Fla. 2006).

In *Larrain*, the Third District found "that the clear language of the MMWA expresse[d] Congress' intent that any arbitration agreement must be disclosed within the written warranty and not as a stand-alone document." 976 So. 2d at 14. The court acknowledged that the FTC had rulemaking authority over the MMWA and that under the single document rule warrantors needed to disclose the availability of informal dispute settlement mechanisms within the warranty. *Id.* (*citing* 15 U.S.C. § 2302(a)(8) and 16 C.F.R. § 701.3(a)(6)). Then, based on *Cunningham* and without any analysis of it, the Third District concluded that the single document rule applied to arbitration agreements. 976 So. 2d at 14-15. Interestingly, the dissent in *Larrain* specifically provided that reliance on *Cunningham* was flawed based on *Patriot Mfg. Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005) and that "perplexingly [*Jackson*] was not brought to the attention of this Court until the eve of oral argument." *Id.* at 15.

In contrast, in *Krol*, the Fifth District held "that the FTC's single-document rule does not apply to binding arbitration agreements." A 16. In doing so, the court first acknowledged that "[u]nder Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract." *Mnemonics, Inc. v. Max Davis Assocs.,* 808 So. 2d 1278, 1280 (Fla.

5th DCA 2002); *See Wilson v. Terwillinger,* 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014). A 12-13. The court then analyzed *Cunningham*, where the Eleventh Circuit in 2001 concluded that a stand-alone arbitration agreement violated the FTC's single document rule, and acknowledged that the Third District adopted *Cunningham* in *Larrain*. A 13-14.

However, the Fifth District declined to follow *Larrain* because it noted that the Eleventh Circuit had receded from *Cunningham* and that in 2002 "reversed positions in *Davis*, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration." A 15. The court also correctly recognized that courts across the country are divided on this issue, but that "[t]he courts that have refused to follow *Cunningham* have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms 'binding arbitration' and 'informal dispute settlement procedures' are interchangeable." A 14-15.

The Fifth District also heavily relied on *Dixon* and *Jackson*, where the southern district of Alabama and the Alabama Supreme Court explained *Davis*' effect on *Cunningham* and both concluded that the FTC's single document rule did not apply to binding arbitration agreements because binding arbitration was not an informal dispute settlement procedure. A 14-16. Based on these, the court made clear

that it would not accept the premise that binding arbitration is an informal dispute settlement mechanism and thus subject to the FTC's rulemaking authority. A 16. Further, the court reasoned that "[b]y enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would 'encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has ‚seen fit to create.'" A 16 (*quoting Dixon*, 399 F. Supp. 2d at 1309.).

Accordingly, the Fifth District's opinion in *Krol* regarding the applicability of the FTC's single document rule to binding arbitration agreements expressly and directly conflicts with the Third District's opinion in *Larrain*. This Court should grant jurisdiction to resolve this specific conflict.

II. The Fifth District's Decision in Krol regarding the Arbitrability of Magnuson Moss Claims does not Conflict with any Other Florida District Court Decision

Petitioner has broadly requested that this Court accept jurisdiction over *Krol* based on the conflict with *Larrain.* However, Petitioner has failed to cite to a single Florida case that conflicts with the first holding in *Krol* regarding the arbitrability of MMWA claims. In fact, in *Larrain*, the Third District specifically provided that it "express[ed] no opinion on whether arbitration agreements are enforceable in conjunction with a MMWA claim." 976 So. 2d at 15. Accordingly, this Court has

not been presented with a conflict in Florida regarding the arbitrability of MMWA claims and this Court cannot accept jurisdiction on this issue.

Notably, since the initiation of these proceedings, Petitioner has not cited to a single Florida case holding that MMWA claims could not be subject to binding arbitration. In fact, the trial court noted that it was particularly persuaded by *Consuegra* as "it was the only case provided to this Court from a Florida District Court of Appeal regarding the arbitrability of MMWA claims." AR 253-254. Then, the Fifth District also referenced *Consuegra* and noted that "[i]n Florida, only the Second District has commented on the arbitrability of MMWA claims." A 4. Additionally, in its Amended Brief on Jurisdiction, Petitioner again failed to cite to a single Florida case that conflicts with the holding in *Krol* regarding the arbitrability of MMWA claims. The undersigned has also conducted her own research and has been unable to find any conflicting Florida opinions on this issue.

Thus, since this Court has not been presented with any conflict in Florida regarding the arbitrability of MMWA claims, this Court should not exercise its jurisdiction over this issue.

CONCLUSION

Petitioner has broadly requested this Court's jurisdiction to review *Krol* based on conflict with *Larrain*. However, Petitioner has failed to differentiate between the two separate holdings in *Krol,* (1) that MMWA claims can be subject to binding

arbitration, and (2) that the FTC's single-document rule does not apply to binding arbitration agreements. The only relevant question for the purposes of determining whether this Court should accept jurisdiction of this appeal is whether both of the holdings in *Krol* conflict with *Larrain*. *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962) (noting that the test of jurisdiction is not whether the Florida Supreme Court believes the underlying decision is correct, but whether there is a conflict with other court's decisions). Petitioner cannot pass this test as to both holdings. This Court should exercise conflict jurisdiction to decide whether the FTC's single document rule applies to binding arbitration agreements due to the conflict between *Krol* and *Larrain.* However, this Court should not broadly accept Petitioner's jurisdictional request because there is no conflict in Florida regarding the arbitrability of MMWA claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2019, I electronically filed the foregoing with the Clerk of the Court using the statewide e-Filing Portal, which served a copy of this document 952on the following parties, pursuant to Florida Rule of Judicial Administration 2.516:

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner's Initial Brief on Jurisdiction complies with the font requirements of Rule 9.210(a)(2), *Florida Rules of Appellate Procedure*.

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