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IN THE SUPREME COURT OF FLORIDA

LES KROL,	**Fla. S. Ct. No.: SC19-952**
Appellant	**DCA NO.: 5D18-2149**
v.	**Trial Ct. No. 2017-CA-049992**
GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD	
Appellee.	

APPELLANT'S REPLY BRIEF

On Appeal from the Fifth District Court of Appeal

State of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……...**ii-iv**

I. The validity of *Larrain v. Bengal Motor Co.* was not appealed by either party……...……...……...**1 - 3**

II. The Applicability of the Single Document Rule is not dependent on whether or not arbitration constitutes informal dispute resolution……..……**3 - 13**

A. The FTC's power under the MMWA was not limited to regulation of the informal dispute resolution procedure…….…..…**4 - 6**

B. The FTC is the party expressly responsible for determining what items must be included in a written warranty pursuant to the single-document rule ……**6 - 8**

C. *Davis* supplemented *Cunningham*, it did not overrule it ……**8 -12**

CONCLUSION……...……**12 - 13**

CERTIFICATE OF SERVICE……**14**

CERTIFICATE OF COMPLIANCE……..**15**

TABLE OF AUTHORITIES

CASES PAGES

Anheuser-Busch Co., Inc. v. Staples,

125 So. 3d 309, 312 (Fla. 1st DCA 2013) ……..……....2

Cunningham v. Fleetwood Homes of Georgia, Inc.,

253 F.3d 611 (11th Cir. 2001)……...…….….8, 9,12

DaimlerChrysler Corp. v. Mathews,

848 A.2d 577 (Del. Ch. Ct. 2004)……..…….10,11,12

Davis v. Southern Energy Homes, Inc.,

305 F.3d 1268 (11th Cir. 2002)…….…….9,10,12

Gibbs-Bolender v. CAG Acceptance, LLC,

2015 WL 685217, (D. Nev. 2015)…….……10

Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300 (E.D. Mich. 2004)……10

Krol v. FCA US, 273

So. 3d 198 (Fla. 5th DCA 2019)……..……..1,3

Larrain v. Bengal Motor Co. Ltd.,

976 So.2d 12 (Fla. 3d DCA 2008)……...……...1, 2, 3,10

Mady v. DaimlerChrysler Corp.,

59 So.3d 1129 (Fla. 2011)……...……4, 6

Polyglycoat Corp. v. Hirsch Distribs., Inc.,

442 So. 2d 958, 960 (Fla. 4th DCA 1983)……..……..2

Porter v. Chrysler Group LLC,

2013 WL 6768218 (M.D. FLA 2013)……..……..9,10

Redditt v. State,

84 So. 2d 317, 320 (1955)……...……2

TGB Marine, LLC v. Midnight Express Power Boats, Inc.,

2008 WL 3889578 (S.D. Fla. 2008)…….……12

STATUTES/LEGISLATIVE HISTORIES/ARTICLES PAGES

15 U.S.C. §2301……...…….4

15 U.S.C. §2302…….…….4,5,7

15 U.S.C. §2303……...…….5

15 U.S.C. §2304……...…….5

15 U.S.C. §2306……...…….5

15 U.S.C. §2309…….5,6

15 U.S.C. §2310……...…….6

15 U.S.C. §2311……...…….5

16 C.F.R. §701.3…….……7,8

40 Fed.Reg. 60 (Dec. 31, 1975)…….……8

Philip J. Padovano, Waiver, 2 Fla. Prac., App. Practice § 8:10 (2017 ed.)……..2

I. The validity of *Larrain v. Bengal Motor Co.* was not appealed by either party.

Respondent's entire response is premised upon the presumption that the Fifth District Court of Appeals was charged with making a decision in regard to the federal Magnuson-Moss Warranty Act ("MMWA")'s single document rule in the prior proceedings. However, while it is true that this Court has undertaken this appeal in order to resolve the conflict between the decisions in *Krol v. FCA US,* 273 So. 3d 198 (Fla. 5th DCA 2019) and *Larrain v. Bengal Motor Co. Ltd.,* 976 So.2d 12 (Fla. 3d DCA 2008), it is important to note that the Fifth District Court of Appeals took it upon itself to unnecessarily create this conflict.

The issues that were before the Fifth District Court of Appeal in this matter were as follows:

> 1. Whether the MMWA allowed for binding arbitration (an issue which Petitioner has chosen not to pursue in his appeal to this Court); and,
>
> 2. Whether the trial court erred in failing to apply *Larrain* which, as the only Florida Appellate ruling on the topic, was binding precedent upon the trial court.

AR 18-68.

Petitioner did not challenge the validity of *Larrain* himself, and Respondent did not and has not filed a cross-appeal challenging the validity of the *Larrain* decision. AR358-404. Thus, in making its own ruling regarding the validity and applicability of the single document rule, which conflicted with the ruling in

Larrain, the Fifth District Court of Appeal went beyond the questions presented to it on appeal, and in doing so unnecessarily decided an issue not even before it. As a result, the Fifth District Court of Appeal disturbed a ruling which had been the law of Florida for more than ten years, and which had been entirely consistent with existing case law throughout the nation.

An appellate court should not address issues that were not raised by the parties to an appeal. *Anheuser-Busch Co., Inc. v. Staples*, 125 So. 3d 309, 312 (Fla. 1st DCA 2013). *See also Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (an appellate court should not "depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention.")

"The function of an assignment of error is to point [to] the specific error claimed to have been committed by the court below, in order that the reviewing court and opposing counsel may see on what point the appellant seeks reversal and to limit argument and review to such point."*Redditt v. State,* 84 So. 2d 317, 320 (1955); *See also* Philip J. Padovano, Waiver, 2 Fla. Prac., App. Practice § 8:10 (2017 ed.) ("Failure to pursue the argument on appeal or review is a waiver of the point."). The assignment of error in this case was framed solely by Petitioner, and it did not include a challenge of *Larrain*.

Respondent had the opportunity to file a cross-appeal requesting that the Fifth District Court of Appeals examine the *Larrain* Court's decision in regard to the single document rule, but it declined to do so. Thus, Petitioner contends that the Fifth District Court of Appeal's decision to make a ruling on a matter, which was not expressly appealed to it, was inappropriate and unnecessary. As a result, Petitioner contends that this Court should reverse the Fifth District Court's decision and restore *Larrain* as the law of Florida in regard to the single document rule under the MMWA.

II. The Applicability of the Single Document Rule is not dependent on whether or not arbitration constitutes informal dispute resolution.

In attempting to convince this Court to undermine the disclosure requirement at the very heart of the MMWA, Respondent has put forth a "straw man" argument in an attempt to distract the Court from the actual issue before it. Respondent has taken the position that in order to resolve the conflict between the Fifth District Court of Appeal Decision in *Krol* and the Third District Court of Appeal's decision in *Larrain* "this Court will have to answer whether arbitration is an informal dispute settlement procedure." *See* Respondent's Answer Brief, pp 7. Respondent later went on to state "[m]ake no mistake, for Petitioner to prevail in this appeal, Petitioner must establish arbitration is an informal dispute settlement mechanism within the authority of the FTC. *See* Respondent's Answer Brief, pp

16. However, this simply is not the case. The decision as to whether or not binding arbitration constitutes an informal dispute settlement procedure is completely irrelevant to the Court's decision in this matter. This Court need only decide (as the Fifth District Court of Appeals should have done – that was the issue presented to it) whether, assuming a warrantor can require binding arbitration, does that requirement have to be contained within the language of the written warranty itself as both FTC regulations and established case law require.

A. The FTC's power under the MMWA was not limited to regulation of the informal dispute resolution procedure.

Contrary to the position taken by Respondent, the Federal Trade Commission was granted broad and wide-ranging powers in regard to the MMWA. One need look no further than the formal title of the statute itself: the Magnuson-Moss Warranty***-Federal Trade Commission Improvement Act***, to see that Respondent's argument is without merit. *See* 15 U.S.C. §2301 *et. seq.* (emphasis added); *see also Mady v. DaimlerChrysler Corp.*, 59 So.3d 1129, 1130 (Fla. 2011) ("Mady ultimately filed an action against DaimlerChrysler for breach of written warranty pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act"). As the formal name of the statute implies, Congress delegated a number of powers to the FTC which go well beyond simply regulating the Informal Dispute Resolution Procedures. *See* 15 U.S.C. §2302(a) (the power to proscribe rules regarding the required content of written warranties);

§2302(b)(1)(A) (the power to proscribe rules regarding requirements for providing a consumer with the terms of written warranty); 15 U.S.C. §2302(b)(1)(B) (the power to proscribe rules regarding presentation and posting of warranty information); 15 U.S.C. §2302(b)(3) (the power to proscribe rules regarding extension of the time warranties and service contracts to make up for time a consumer is deprived of his product because of a warrantor's failure to comply with its warranty terms); 15 U.S.C. §2302(c) (the power to proscribe rules regarding waiver of the condition that warrantors may not condition coverage on the use of a particular service or product); 15 U.S.C. §2302(d) (the power to proscribe rules regarding substantive warranty provisions that may be incorporated into warranties); 15 U.S.C. §2303(c) (the power to proscribe rules regarding waiver of requirement to designate a warranty as full or limited); 15 U.S.C. §2304(a)(4) (the power to proscribe rules regarding what constitutes a reasonable number of repair attempts); 15 U.S.C. §2304(b)(3) (the power to proscribe rules regarding defining the duties of warrantors in regard to different categories of products with full warranties); 15 U.S.C. §2306(a) (the power to proscribe rules regarding the manner in which the terms of service contracts shall be disclosed); 15 U.S.C. §2309(b) (the power to proscribe rules regarding rule-making procedures for warranties and practices regarding used vehicle); 15 U.S.C. §2311(c)(2) (the power to proscribe rules regarding whether or not more protective state statutes

should govern instead of the MMWA); 15 U.S.C. §2310(c)(1)(the power to seek injunctions or restraining orders against warrantors for violation of the MMWA). As this Court has previously expressly recognized, the very purpose of the federal Act (including its empowerment of the FTC) is broad-based consumer protection. *See Mady v. DaimlerChrysler Corp.*, 59 So.3d 1129, 1132 (Fla. 2011) ("the MMWA's overarching concern to provide consumer protection").

Furthermore, 15 USC § 2309(b) expressly commands that;

> The Commission shall, initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices … to the extent necessary **to supplement the protections offered the consumer by this chapter, [and] shall prescribe rules dealing with such warranties and practices**.

Thus, the text of the statute doesn't just give the FTC the authority to regulate within the limits of the language of the MMWA, it expressly gives the FTC the authority to expand and enhance the protections afforded by Congress itself. Accordingly, so long as the FTC's regulations are protective of consumers, they are valid even if they do reach beyond the language of the MMWA itself.

B. The FTC is the party expressly responsible for determining what items must be included in a written warranty pursuant to the single-document rule.

It is unsurprising that Respondent would make attempt to argue in favor of limiting the powers of the FTC in this case as, pursuant to applicable law, the FTC

is the party responsible for determining what items must be included in the text of the written warranty pursuant to the MMWA. The MMWA specifically empowers the FTC to require inclusion in the written warranty of any of the following items among others:

> (7) ***The step-by-step procedure*** which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.
>
> (8) Information respecting the availability of ***any*** informal dispute settlement procedure offered by the warrantor …..

15 U.S.C. § 2302(a)(emphasis added).

Moreover, Congress enabled the FTC to "prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer ...." 15 U.S.C. § 2302(b)(1)(B). In accordance with the powers granted to it by Congress, the FTC promulgated 16 C.F.R. 701.3, which requires warrantors to clearly and conspicuously disclose ***in a single document*** in simple and readily understood language, the following items of information:

> (5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation ...

> (6) Information respecting the availability of ***any*** informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter.

16 C.F.R. 701.3(a) (emphasis added). Thus, the MMWA is clear that the FTC is the party responsible for delineating the items warrantors are required to disclose with the text of a written warranty.

C. *Davis* supplemented *Cunningham*, it did not overrule it.

As detailed in Petitioner's initial brief, in *Cunningham v. Fleetwood Homes of Georgia, Inc.,* 253 F.3d 611 (11th Cir.2001), the Eleventh Circuit ruled that an arbitration agreement in a document separate from the warranty violates the MMWA. In *Cunningham,* the mobile home at issue came with a written warranty from the manufacturer. However, the arbitration agreement in that case, like the arbitration agreement in the instant case, was a separate document that the plaintiffs' executed as part of the sales transaction. *Id.* The *Cunningham* court recognized that an integral provision of the MMWA was to remedy consumer confusion by requiring that "all material terms be presented in clear language in a single document. The single document rule reinforces these concerns by requiring warrantors to present all information relevant to the warranty in one place, where it might be easily located and assimilated by the consumer." *Id.* at 621 (citing 40 Fed.Reg. 60,168, 40 Fed.Reg. 60,172, 40 Fed.Reg. 60,175 (Dec. 31, 1975)). After

reviewing the MMWA's text and legislative history, the court concluded that to compel arbitration where the arbitration agreement was not in the warranty itself "contravenes the text, legislative history, and purpose of the Magnuson–Moss Warranty Act." *Id.* at 622.

Respondent erroneously argues *Cunningham* is no longer good law and that the 11th Circuit receded from it when it issued its ruling in *Davis v. Southern Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir.2002). However, not only will a simple Shepardization of *Cunningham* show it is in fact still good law, but Courts within the 11th Circuit have continued to cite to *Cunningham* in regard to the single document rule after the decision in *Davis* was issued.

For example, in *Porter v. Chrysler Group LLC*, the Court followed *Cunningham* decision in finding that Defendant was not entitled to arbitration where the arbitration clause was not included inside the applicable warranty. *Porter v. Chrysler Group LLC*, 2013 WL 6768218 (M.D. FLA 2013) In fact, in regard to Defendant's failure to bring *Cunningham* to the Court's attention, it was noted:

> The Court is quite troubled by Defendant's utter failure to cite to *Cunningham,* which plainly controls the disposition of this motion. Defendant belatedly-and improperly-attempted to distinguish *Cunningham* in its motion for leave to file a reply, in which it pointed to *Davis v. Southern Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir.2002). However, *Davis* does nothing to recede from *Cunningham,* so this argument is unavailing.

Id.

Furthermore, following *Davis*, several other courts have held that the single document rule bars binding arbitration under similar circumstances to those presented in *Davis* and here. *See Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300 (E.D. Mich. 2004) (MMWA barred arbitration where warranty was contained in purchase agreement and arbitration agreement was contained in separate warranty registration document); *DaimlerChrysler Corp. v. Mathews*, 848 A.2d 577 (Del. Ch. Ct. 2004)(Manufacturer could not compel binding arbitration as failure to include a reference to an arbitration provision in the warranty ran afoul of the MMWA and rendered the arbitration process unenforceable); *Larrain v. Bengal Motor Co., Ltd.*, 976 So.2d 12 (Fla. 3rd DCA 2008)(Dealer's stand-alone arbitration agreement, signed by vehicle buyers separately from the vehicle's warranty, violated the MMWA's single document rule); *Gibbs-Bolender v. CAG Acceptance, LLC*, No. 2:14-CV-01684-APG, 2015 WL 685217, at *6 (D. Nev. 2015), *certified question withdrawn*, 131 Nev. 1283 (2015) (Most Courts have found single documents rule voids arbitration agreement contained in a separate document); *Porter v. Chrysler Group LLC*, 2013 WL 6768218 (M.D. FLA 2013)(Because the arbitration agreement was not contained within the warranty, it "runs afoul of the disclosure requirements" of the MMWA and cannot be enforced here).

In *DaimlerChrysler Corp. v. Matthews*, the Court explained that the disclosure requirements of the MMWA should be applied as expansively as possible in finding:

> But the central holding of *Cunningham*—that binding arbitration provisions cannot be enforced where they are not referred to in the warranty—did not rest solely on a strict reading of the text of the FTC's one-document rule. Whether or not the specific terms of Rule 701.3(a)(6) require disclosure of binding arbitration provisions in the warranty, the Court of Appeals for the Eleventh Circuit in *Cunningham* read §2302(a) and the FTC's one-document rule, as well as the legislative history and purposes of the MMWA, to establish the broader principle that a warrantor is required to "disclose in a single document all relevant terms of the warranty." …

DaimlerChrysler Corp. v. Matthews, 848 A.2d 577, 589 (Del. Ch. 2004). The Court then went onto explain that it would be improper to interpret the MMWA in a way that would allow a warrantor to hide a binding arbitration agreement in a separate document by stating:

> …. it simply cannot be that either body would permit warrantors to hide such provisions—which by definition deprive a consumer of his right to judicial review of his claims—in a stack of paperwork handed to him at the time of sale, while also requiring warrantors to disclose in the warranty itself any nonbinding informal dispute settlement procedure that at most would defer the consumer's right to judicial review until the consumer first resorted to such procedure. It should not be presumed that the federal authorities would enact an incoherent policy of consumer protection. Indeed, a fair

> reading of 15 U.S.C. §§ 2302(a)(8) and (9) refutes any argument that Congress harbored such a bizarre intent.

DaimlerChrysler Corp. v. Matthews, 848 A.2d 577, 589 (Del. Ch. 2004).

Additionally, a trial court within the Eleventh Circuit has expressly rejected the argument advanced by Respondent here, and held that the two decisions at issue do not contradict one another. In *TGB Marine, LLC v. Midnight Express Power Boats, Inc.,* the court specifically analyzed the argument that *Cunningham* was overruled by *Davis:*

> Defendant asserts that the *Cunningham* decision was overruled *"sub silentio"* by a later panel of the Eleventh Circuit Court of Appeals. In *Davis v. Southern Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir.2002), the Court answered the question not decided by Cunningham, that warrantors can include binding arbitration provisions in the warranty itself and not be in violation of the MMWA. Davis is distinguished on its facts, however, as that decision stated that its parties "signed a binding arbitration agreement contained within the manufactured home's written warranty." 305 F.3d at 1270. As already described above, the arbitration clause in this case, which is nonbinding, was not contained within the warranty.

TGB Marine, LLC v. Midnight Express Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, at *4 (S.D. Fla. 2008). Thus, not only is Respondent's argument that *Cunningham* was overruled by *Davis* without merit, to the extent the lower Court relied upon such a premise, the decision was made in error.

CONCLUSION

The Fifth District Court of Appeals unnecessarily took up an issue that

neither party had appealed, and in doing so unnecessarily complicated the legal analysis and created a conflict among the districts that need not exist. Furthermore, other courts, including federal courts interpreting this federal statute, have expressly rejected the analysis applied by the Fifth District Court of Appeals and now proffered by Respondent as support for a matter not properly at issue. For those reasons, and for the reasons articulated in Petitioner's initial brief, this Court should affirm the Third District Court of Appeal's holding in *Larrain v. Bengal Motor Co*., reverse the Fifth District Court of Appeals and negate the conflict created by it.

WHEREFORE, Petitioner prays this Court will affirm the Third District Court of Appeal's holding in *Larrain v. Bengal Motor Co*., and reverse the Fifth District Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 25th day of September, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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