IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC01-960

Fourth DCA No.: 4D00-2276
L.T. No.: CL 99-10954 AI

SEARS AUTHORIZED TERMITE AND PEST CONTROL, INC. f//k/a ALL AMERICA TERMITE AND PEST CONTROL, INC.

Petitioner/Defendant,

vs.

SHELLEY SULLIVAN,

Respondent/Plaintiff,
_____/

On Review of a Decision by the
Fourth District Court of Appeal

ANSWER BRIEF OF RESPONDENT, SHELLEY SULLIVAN

Respectfully submitted,

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, SHELLEY SULLIVAN ("Sullivan" or "Ms. Sullivan") is in disagreement with SEARS AUTHORIZED TERMITE AND PEST CONTROL, INC. f//k/a ALL AMERICA TERMITE AND PEST CONTROL, INC.'s ("Sears") Summary of Facts to the extent that Sears omits the following relevant information:

Based on representations made by Sears as to Sears' ability to eradicate pests, Ms. Sullivan contracted with Sears to spray her house with extermination chemicals. (App. D, p 2) (references are to the Appendix to Initial Brief) On August 23, 1995, a Sears representative visited Ms. Sullivan at her home. (App. D, p 2) At this time Ms. Sullivan entered into a one-page Pest Control Customer Agreement (hereinafter referred to as the "Agreement") for the eradication of ants, roaches, spiders, crickets, silver fish and palmetto bugs in Ms. Sullivan's house. (App. C) The Agreement, which was drafted entirely by Sears, contains the following provision:

> ARBITRATION
> The purchaser and All America Termite & Pest Control, Inc. d/b/a Sears Authorized Termite & Pest Control agree that any controversy or claim between them **arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.** This contract/agreement is subject to arbitration pursuant to the Uniform Arbitration Act of the American Arbitration Association. The arbitration award may be entered in any court having jurisdiction. In no event shall either party be liable to the

> other for **indirect, special or consequential damages or loss of anticipated profits**. (App. C) (*emphasis supplied*)

Sears treated Ms. Sullivan's house with chemicals for the above-referenced bugs. Sullivan alleges that on August 29, 1995, a Sears representative advised Sullivan that Sullivan would have no pests for one year, and if Sullivan saw pests, they would be dead. (App. D, p 3) The Complaint alleges that on or about November 16, 1995, and again shortly thereafter, Ms. Sullivan sustained insect bites which were later diagnosed as having been caused by a brown recluse spider(s). (App. D, p 3) After this date, Sears returned to treat Ms. Sullivan's home and assured her that the chemicals sprayed would take care of the brown recluse spider problem. (App. D, p 3) Thereafter Ms. Sullivan was repeatedly bitten by brown recluse spiders, suffering serious, disfiguring and painful wounds. (App. D, p 3)

The factual and legal allegations contained in the Complaint include, but are not limited to, the following:

a) Based on representations made by Sears television advertisements, Ms. Sullivan contacted Sears. An authorized representative came to Ms. Sullivan's home and provided her with pamphlets on Sears' pest control system; (App. D, p 2,3)

b) Ms. Sullivan relied on Sears' promises to eradicate pests, including spiders, and entered into the Agreement with Sears; (App. D, p 2)

c) Sears breached its duty to: (1) refrain from making false representations concerning the efficacy of their pest control treatment to eradicate brown recluse spiders; (2) test its extermination chemicals to assure the efficacy on eradicating brown recluse spiders; (3) warn Ms. Sullivan that the source of her problem was indeed brown recluse spiders and that the chemicals used by Sears were known to be ineffective in exterminating brown recluse spiders; (4) use full strength chemicals rather than diluted chemicals; (5) use reasonable care in applying the extermination chemicals so as to insure that infested areas containing brown recluse spiders were eradicated; (6) properly train its staff in the preparation and application of the chemicals to properly treat for brown recluse spiders; (App. D. p 3, 4)

d) Sears breached the warranty of fitness for a particular purpose by providing exterminating chemicals that were defectively prepared, applied or inadequately suited for their intended purpose; (App. D, p 6)

e) Sears breached its implied warranty of merchantability by selling a defective product that did not conform to its affirmations and promises in a number of ways including but not limited to: the exterminating chemicals were improperly prepared; the exterminating chemicals were improperly applied; the exterminating chemicals were of inadequate strength; and the exterminating chemicals were inappropriate for their use; (App. D, p 8)

f) Sears, by and through its employees/agents, made oral and written material misrepresentations of fact regarding the quality, appropriateness, and effectiveness of its exterminating chemicals to induce Ms. Sullivan into purchasing Sears' services and products and after Ms.

Sullivan advised Sears that she had been bitten by a brown recluse spider; (App. D, p 9, 10)

g) Sears knew that its exterminating chemicals would not perform in such a fashion as to conform with the reasonable expectations of Ms. Sullivan to provide effective, long lasting protection from brown recluse spiders, even though Sears knew from its own employees, agents or servants that the exterminating chemicals were defective or ineffective. (App. D, p 12, 13)

SUMMARY OF ARGUMENT

Ms. Sullivan hired Sears to eradicate bugs and spiders from her home. She signed a one page form contract, drafted entirely by Sears which has an arbitration clause for claims "arising out of or relating to the interpretation, performance or breach of any provision of this Agreement." (App. C) The arbitration clause is absolutely silent as to any mention of the parties' intent to arbitrate personal injury or tort claims. Nor does the arbitration clause indicate that the parties intended to waive their constitutional right to a jury trial. Therefore, the Fourth District Court of Appeal was correct in holding that the trial court erred in compelling arbitration of Ms. Sullivan's personal injury and tort claims.

All Sears had to do was state in the Agreement that personal injury and tort claims were subject to arbitration. It didn't. Therefore, pursuant to the rulings in Seifert v. U. S. Homes, 750 So.2d 633 (Fla. 1999); Terminix International Co. v.

Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996); and, Terminix International Co. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997), the Fourth District Court of Appeal's decision reversing the trial court's order compelling arbitration should be affirmed.

In actuality, there is no conflict between the Fourth District Court of Appeal's opinion in this case and the decision in Ponzio because the arbitration agreement in Ponzio was broader than the one in Michaels and the present case.

ARGUMENT

I. MS. SULLIVAN'S PERSONAL INJURY TORT CLAIMS ARE NOT ARBITRABLE ISSUES WITHIN THE ARBITRATION PROVISION OF THE SEARS AGREEMENT.

While arbitration provisions are generally favored by the courts, they are contractual in nature and construction of such provisions and the contracts in which they appear are a matter of contract interpretation. Seifert v. U. S. Home Corp., 750 So.2d 633 (Fla. 1999). The law is well settled that in Florida there are three elements for courts to consider when ruling on a motion to compel arbitration of a dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and, (3) whether the right to arbitration has been waived. Terminix International Co. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997); Seifert, *supra*.

The present case requires analysis of the second prong only, to wit: does the arbitration clause encompass Ms. Sullivan's tort claims for personal injuries. Ms. Sullivan should not be required to arbitrate her personal injury claims because, under the Sears Agreement, there is no arbitrable issue.

Ambiguous provisions of a contract for arbitration should be construed against arbitrating a dispute. Terminix International Co. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996); Seifert, *supra*. The absence of any mention of the parties' rights in the event of personal injuries arising out of any alleged tortious conduct creates ambiguity and uncertainty as to the intent of the parties. Seifert, 750 So.2d at 641. It is a well established rule of construction to construe the provisions of a contract against its drafter. *Id*.

Since Sears drafted the subject Agreement, any doubt as to the scope of the arbitration provision whatsoever must be resolved in favor of Ms. Sullivan. The Sears arbitration provision is at best ambiguous. One thing is clear though, the parties never intended for this case to be arbitrated at all. The Agreement, which was drafted entirely by Sears, contains the following provision:

> ARBITRATION
> The purchaser and All America Termite & Pest Control, Inc. d/b/a Sears Authorized Termite & Pest Control agree that any controversy or claim between them **arising out of**

> **or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.** This contract/agreement is subject to arbitration pursuant to the Uniform Arbitration Act of the American Arbitration Association. The arbitration award may be entered in any court having jurisdiction. In no event shall either party be liable to the other for **indirect, special or consequential damages or loss of anticipated profits**. (App. C) (*emphasis supplied*)

The Agreement does not contain a provision stating that arbitration applies to all disputes, either in contract or tort. The Agreement does not contain a provision requiring the arbitration of tort or common law claims. The Agreement does not contain a provision requiring arbitration for personal injury claims. The Agreement does not contain a provision providing that the parties waive their right to a jury trial for any contract or tort disputes. The Agreement does not contain a provision requiring arbitration for all disputes which would not have arisen but for the contract and resulting relationship between the parties. (App. C)

Throughout these proceedings, Sears has argued that because Sears would not owe any duties to Sullivan but for the Agreement, all liability "arises" out of the Agreement and must be arbitrated. The mere fact that Ms. Sullivan entered into the Agreement with Sears, and that this dispute may not have arisen but for the Agreement, is clearly not sufficient to compel arbitration in this case:

> ... the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement.
>
> ... for a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue, the resolution of which requires reference to or construction of some portion of the contract itself. Seifert, 750 So.2d at 638.

None of the allegations in Ms. Sullivan's Complaint raise issues the resolution of which require reference to or construction of any specific portion of the Agreement itself. Under Sears' position, whenever there is a contractual relationship between two parties which is memorialized by an agreement containing an arbitration provision, those parties are required to arbitrate all disputes, because without the contractual relationship there would not have been a dispute in the first place. This is an absurd result which this Court in Seifert rejected.

Sears continues to argue that because Sullivan alleged that she contracted with Sears to "eradicate" pests, and Sears agreed to only "Control" pests this somehow magically requires interpretation of the Agreement. However, this only requires using common sense (or at best) referring to a dictionary, not the Agreement. Query: Is it truly Sears' contention that they sold to Ms. Sullivan only the obligation for at least

one year to "control" pests such as ants, roaches, spiders, crickets, silverfish and palmetto bugs and not the obligation to kill 'em dead? How does Sears propose to "control" spiders by exercising restraint or directing influence over without killing them? (Initial Brief p.7) If this is truly Sears' contention then Ms. Sullivan's claims for pre-contractual fraudulent inducement, and misrepresentation, clearly have merit and should be heard by a jury. Furthermore, Sullivan's Complaint alleges that Sears' representative made oral representations prior to the Agreement to induce Sullivan to enter into it. Sullivan did not even include the Agreement in the Complaint.

II. THERE IS NOTHING CONTAINED IN THE AGREEMENT TO INDICATE THAT EITHER PARTY INTENDED TO INCLUDE TORT CLAIMS OR PERSONAL INJURY CLAIMS WITHIN THE SCOPE OF THE ARBITRATION PROVISION.

There is nothing in the Agreement whatsoever to indicate that the parties contemplated that tort claims or personal injury claims would require arbitration. This is fatal to Sears' claim for arbitration. This Court has confirmed that the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily rests on **the intent of the parties**. Seifert, 750 So. 2d at 636. (*emphasis supplied*)

SEIFERT v. U. S. HOME CORP.

In Seifert, this Court held that a wrongful death claim against a house builder was not subject to an arbitration agreement contained in the purchase and sale contract. Claims in Seifert included strict liability, negligence, and breach of express and implied warranty. The arbitration provision in Seifert is much broader than that contained in the Sears' Agreement: "Any controversy or claim arising under or related to this Agreement or to the Property . . . or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative shall be..." mediated/arbitrated. *Id*. at 635. The Sears Agreement contains no provision for arbitration of claims arising from representations made by its agents. Ms. Sullivan's Complaint contains allegations relating to representations made by Sears' representatives, which do not fall under the arbitration provision. (App. D)

Like the Sears Agreement in the present case, the arbitration provision in Seifert did not make mention of tort or personal injury claims:

> **The absence of any mention of the parties' rights in the event of personal injuries or death arising out of any alleged tortious conduct such as that which allegedly occurred in this case creates ambiguity and uncertainty as to the intent of the parties. *Id*. at 641.**

> **Further, nothing within the agreement indicates the parties contemplated that death or injuries to persons might occur and that, in the event such injuries did occur, any resulting tort claims would be subject to arbitration**. In sum, there is no reference in the agreement signed by the parties to tort claims under the common law for future injuries to persons. **Accordingly, we hold that the tort claim in this case does not have a sufficient relationship to the agreement as to require submission of the case to arbitration**. *Id.* at 642, 643 (*emphasis supplied*)

As in Seifert, the Sears Agreement contains no provision to indicate that either Sears or Ms. Sullivan intended to include tort claims for personal injuries within the scope of either the contract in general, or the arbitration provision in particular. Nor does the Sears Agreement indicate that Sears or Ms. Sullivan contemplated that death or injuries might occur. Thus, even looking at the arbitration provision in a light most favorable to Sears, it is ambiguous and unclear at best. It must fail pursuant to the ruling in Seifert.

Furthermore, this Court in Seifert noted that the only reference in the arbitration provision to damages related solely to property and not to personal injuries suffered by either party as a consequence of the tortious conduct of the other. *Id*. at 641. In the Sears Agreement, the only mention of damages states that neither party shall be liable to the other for indirect, special, or consequential damages or loss of anticipated

profits. As in Seifert, there is no mention whatsoever for damages arising out of a personal injury or tortious conduct. (App. C) Clearly, if Sears had intended so, the Agreement could have contained a provision relating to personal injury damages such as disability, disfigurement, pain and suffering, mental anguish, loss of capacity for the enjoyment of life, medical expenses, lost wages, or loss of earning capacity. Once again, Sears, in drafting its arbitration clause, failed to include the necessary language to make Ms. Sullivan's claims arbitrable.

TERMINIX v. MICHAELS

Seifert expressly approved the decision, rejecting arbitration, of Terminix International Co. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). In Michaels, a homeowner brought an action against a termite extermination company for negligence and strict liability in connection with the company's ultra hazardous activity of applying dangerous chemicals relating to pest control. The Michaels court affirmed the trial court's order denying arbitration. The arbitration clause in Michaels was **identical** to the instant Sears Agreement, stating as follows:

> The purchaser and Terminix agree that any controversy or claim between them **arising out of or relating to the interpretation, performance, or breach of any provision of**

this agreement shall be settled exclusively by arbitration.

Michaels, 668 So. 2d at 1014. (*emphasis supplied*)

Michaels held that the personal injury claim, including that resulting from pesticide poisoning, did not relate to the interpretation, performance or breach of "any provision" of the agreement (which includes matters concerning the application of pesticide to the home and resulting condition of the property). *Id*. at 1015 (*emphasis original*) Therefore the protection of persons was not within the subject matter of the contract. *Id*. As in Michaels, Ms. Sullivan's injuries do not arise out of or relate to the interpretation, performance or breach of any provision of the Agreement. Nor does the Agreement mention anywhere that it covers the protection of persons. As in Michaels, Ms. Sullivan's injuries arise out of the negligent application of applying dangerous chemicals relating to pest control, not to any provision of the Agreement. Again, none of the counts in the Complaint require interpretation of specific provisions in the Agreement.

TERMINIX v. PONZIO

Terminix International Co. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997) is the primary case relied upon by Sears and the trial court, and certified to this Court by the

Fourth District Court of Appeal as being in conflict with the Fourth District Court's decision in the present case. In Ponzio, homeowners brought a personal injury action based on a pest control service's negligent failure to control or eradicate pests. The Ponzio court held that the claim fell within the scope of the arbitration clause contained within the pest control services contract. However, the arbitration provision litigated in Ponzio states:

> **The purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration...**
>
> **Neither party shall sue the other where the basis of the suit is this agreement...** Ponzio, 693 So.2d at 105. (*emphasis supplied*)

The Sears Agreement, and the identical arbitration provision in Michaels, are much narrower in scope than the arbitration provision in Ponzio. They require arbitration only for claims " **... arising out of or relating to the interpretation, performance or breach of any provision of this agreement**..." (*emphasis supplied*) The Ponzio court distinguished the Michaels case on the basis of this phrase alone:

> Michaels can be distinguished on the basis that the arbitration provision there, in providing for arbitration or any controversy or claim **'arising out of or relating to the interpretation, performance, or breach of any provision**

of this agreement' is narrower than the provision here.
Ponzio, 693 So.2d at 108. (*emphasis supplied*)

Furthermore, the Sears Agreement does not contain the broad arbitration language contained in Ponzio that "Neither party shall sue the other where the basis of the suit is this agreement...," further distinguishing the present case and Agreement from Ponzio. Throughout these proceedings, Sears continues to ignore, and still has not addressed, the fact that the arbitration provision in Ponzio was much broader than the arbitration provisions in Michaels and in the instant case. The decision in Michaels, dealing with an arbitration provision identical to the Sears provision, is controlling. Not the Ponzio decision, which dealt with a broader arbitration provision.

SEARS' AGREEMENT FAILS UNDER
SEIFERT, MICHAELS AND PONZIO

Simply put, Sears failed to draft the Agreement in such a way so as to resolve any doubt or ambiguity as to the arbitrability of personal injury or tort claims. Nowhere does the Agreement provide in any manner that the parties intended to arbitrate personal injury or tort claims.

In Michaels, the court noted that the trial "... court harbored considerable doubt as to whether the personal injury claim came within the arbitration clause ..." and held that the court should grant arbitration only when satisfied that there is no doubt

that an agreement to arbitrate the subject dispute was made." *Id*. 668 So.2d at 1015. (*emphasis original*) The trial court in the present case even indicated that it was unclear as to whether Ms. Sullivan's claims fall within the arbitration provision of the Agreement. (App. E) The only thing to which there is no doubt in the present case is that the entire Agreement is void of any mention of arbitrating personal injury or tort claims!

III. THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN DENYING ARBITRATION BECAUSE THE AGREEMENT DOES NOT CONTAIN ANY LANGUAGE INDICATING THE PARTIES' INTENT TO WAIVE THE RIGHT TO TRIAL BY JURY FOR PERSONAL INJURY CLAIMS.

The Florida Constitution has expressly made the right to trial by jury basic to our jurisprudence. The right to a jury trial is set forth in the Declaration of Rights of the Florida Constitution under article I, section 22, which states, "The right of trial by jury shall be secured to all and remain inviolate." According to Webster's inviolate means "not violated; kept sacred or unbroken". Webster's New World Dictionary, 2nd College Ed. (1984) "The constitutional right to a trial by jury is not to be narrowly construed." In re Forfeiture of 1978Chevolet Van, 493 So.2d 433, 435 (Fla. 1986).

"Under our system of jurisprudence, trial by jury is an organic right and should under no circumstances be denied." Orr v. Avon Florida Citrus Corporation, 177 So. 612, 614 (Fla. 1938). Neither should Ms. Sullivan's.

The Courts should be reluctant to deny a citizen the sacred right to a jury trial. That is especially true in the present case where Ms. Sullivan has in no way knowingly waived her right to a jury trial for personal injury claims.

In affirming the trial court's order denying arbitration, this Court in Seifert held that requiring the plaintiff to submit her tort claim to binding arbitration would deprive her of her rights to a trial by jury, due process and access to the courts. Seifert, 752 So.2nd at 642. In so holding, this Court in Seifert noted that the lower courts, when dealing with arbitration provisions, have failed to consider the visibility or clarity of the purported agreement, the relative strength and knowledge of the parties, the voluntariness of the agreement, and the substantive fairness of the agreement. *Id*. at 642.

Sears is one of America's largest retailers and exterminators. The relative strength and knowledge of Sears in preparing this Agreement clearly outweighs Ms. Sullivan's. It would be inherently unfair to hold that by signing the adhesion contract prepared by Sears that Ms. Sullivan was knowingly and voluntarily waiving her right

to a trial by jury for personal injury and tort claims. This is especially true since the arbitration provision specifically fails to indicate that she would be doing so by signing the Agreement.

This court in Seifert stated:

> ...courts should ... craft a balancing test to determine whether parties waived their constitutional rights by agreeing to arbitration. It is wrong to stretch contractual interpretations to uphold a purported arbitration agreement where such an agreement would waive constitutional rights.
>
> **Neither the statutes validating arbitration clauses nor the policy favoring such provisions should be used as a shield to block a party's access to a judicial forum in every case. Further, in the absence of express language in the parties' contract mandating arbitration of such disputes, we conclude that such a result is not required here. To deprive petitioner of these certain rights simply because she and her husband signed a contract which contained an arbitration provision, the language of which provides no indication that tort claims arising under the common law were contemplated or included, would clearly be unjust.** *Id*. (*emphasis supplied*)

It would clearly be unjust to allow Sears to block Ms. Sullivan's constitutional right to access to the courts and her right to a jury trial simply because Sears inserted an arbitration clause which clearly does not indicate Ms. Sullivan's intention to waive those fundamental rights. There simply is no interpretation of the arbitration

provision in the present case which would stretch so far as to deny Ms. Sullivan her constitutional rights.

IV. THE FOURTH DISTRICT COURT OF APPEAL'S OPINION IN THIS CASE IS IN ACCORD WITH THIS COURT'S DECISION IN SEIFERT; THERE IS NO CONFLICT WITH THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN PONZIO

Sullivan would argue that there is, in fact, no actual conflict between the Fourth District Court's decision in the present case and with the Fifth District's decision in the Ponzio case. As the Fourth District noted, in the present case and in Michaels, the arbitration provision in Ponzio was much broader than the narrow arbitration provisions in the present case and Michaels. This Court in Seifert quashed the Fifth District's decision in Ponzio when it approved Michaels. Michaels and this case are not in actual conflict. The only reason that arbitration was ordered in Ponzio was the more expansive language of the arbitration clause in that case. The Ponzio decision did not address the more narrow arbitration provision contained in Michaels and the present case.

The Fourth District Court of Appeal confirmed this again in the present case:

> The seemingly more expansive language of the arbitration clause in Ponzio, may account for the reason why conflict

> with Michaels was not certified to the Florida Supreme Court. However, the Supreme Court approved our decision in Michaels. *See*, Seifert v. U. S. Home Corp., 750 So.2d 633 (Fla. 1999)

Sullivan v. Sears Authorized Termite and Pest Control, Inc., 780 So.2d 996, 999 (Fla. 4th DCA 2001) In fact, the Fifth District in Ponzio did not certify any conflict between its decision and the Fourth District's decision in Michaels. This is further evidence that the decisions are not in conflict.

In the present case, the Fourth District specifically relied on the rulings in Michaels, and of this Court in ruling that Sullivan's claims are not arbitrable:

> We believe there are a number of similarities between the negligence claim at issue in this appeal and the wrongful death claim reviewed in Seifert. Thus, a reversal of the trial court's decision is warranted.
>
> First, this claim like the one in Seifert, is predicated upon a tort theory of common law negligence. In Seifert, the negligence claim for wrongful death was based on U.S. Home's breach of its *duty to exercise reasonable care* in designing, manufacturing, and assembling new homes in a manner that would prevent the air conditioning unit from pulling in carbon monoxide from the garage and distributing it throughout the home. Here, the negligence claim for personal injuries is based on Sears' breach of its duty to exercise reasonable care in applying the exterminating chemicals so as to ensure brown recluse spiders were eradicated from the infested areas. In Seifert, the complaint also asserted a breach of *duty to warn* of a known dangerous condition and of defects that U.S. Home

> knew or should have known would render the home unreasonably dangerous to use by anyone, not just the Seiferts. Here, the complaint alleged Sears failed to warn Sullivan that the source of her insect problem was brown recluse spiders and that the chemicals used by Sears were known to be ineffective in exterminating brown recluse spiders.
>
> Second, in Seifert, the Court found significant the fact that the dispute did not create a "significant relationship" to the contract because none of the allegations in the complaint referred to or mentioned the sales agreement between the Seiferts and U.S. Home. In this case, none of the allegations in the negligence claim refer to or mention the Pest Control Agreement.
>
> Third, similar to the agreement in Seifert, in this case there is nothing within the Pest Control Agreement to indicate that either party intended to include tort claims for personal injuries arising under the common law within the scope of either the contract in general or the arbitration provision in particular. The one page contract used by Sears is similar to the abbreviated two page contract used by U.S. Home in that it addresses limited terms. Equally significant, the arbitration provision refers to damages typical of contract claims (*i.e.*, indirect, special, or consequential damages) not tort claims. Sullivan, 780 So.2d 1001 (emphasis original).

CONCLUSION

Seifert confirmed that no party may be forced to submit a dispute to arbitration that the party did not intend to agree to arbitrate; policy favoring arbitration cannot serve to stretch a contract beyond the scope originally intended by the parties; and, the

general rule is that arbitration is required only if controversies are disputes which the parties have agreed to submit to arbitration. Seifert, 750 So.2d at 642. Ms. Sullivan never agreed to submit her personal injury or tort claims to arbitration.

Sears should heed the advice contained in Senior Justice Overton's concurring opinion in Seifert:

> The authors of these arbitration provisions need to go back to the drafting board. **If the intent is to provide for arbitration broadly for all claims, contract and tort, such a provision should make that intent clear.** I would suggest that such a provision should reflect (1) that the arbitration provision applies to all disputes, contract or tort, that would not have arisen but for the contract and resulting relationship between the parties; and (2) that the parties by this provision waive their rights to a jury trial on all such contract or tort disputes. *Id*. at 643. (*emphasis supplied*)

Until Sears comes up with an arbitration provision that clearly states the intent of the parties to arbitrate tort and personal injury claims, as well as to waive their right to a jury trial, injured customers such as Ms. Sullivan should not be denied their right to a jury trial in a court of law. There simply is no rational way to conclude that by signing the Sears Agreement Ms. Sullivan intended to waiver her right to a jury trial for personal injury or tort claims against Sears.

For the foregoing reasons, this Court should affirm the decision of the Fourth District Court of Appeal in this case reversing the trial court's Order Granting

Defendant's Motion to Abate and Compelling Arbitration. To the extent that the present case may be in conflict with Ponzio, this Court should again affirm the validity of the Fourth District Court of Appeal decision in Michaels, and in the instant case, and disapprove of the Fifth District Court of Appeal decision in Ponzio.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of July, 2001, to: JOHN A. TURNER, ESQUIRE, Arnstein & Lehr, Attorneys for Petitioner/Sears, 515 North Flagler Drive, Suite 600, West Palm Beach, FL 33401.

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By: _____
WILLIAM M. JULIEN
Florida Bar No.: 0003743

CERTIFICATE OF COMPLIANCE

The size and style of font used in this petition is Times New Roman 14 point.

_____
WILLIAM M. JULIEN
Florida Bar No.: 0003743

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