SUPREME COURT OF FLORIDA
CASE NO. SC05-1907
L.T. CASE NO. 2D04-2719

AMERICAN HONDA MOTOR
COMPANY, INC.,

Petitioner,

v.

JENNIFER CERASANI

Respondent.

REPLY BRIEF OF PETITIONER, AMERICAN HONDA MOTOR COMPANY, INC.

CARLTON FIELDS, P.A.
4000 Bank of America Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055
By: WENDY F. LUMISH
Florida Bar No. 334332
JOHN R. BLUE
Florida Bar No. 6999
MATTHEW J. CONIGLIARO
Florida Bar No. 63525

Counsel for Petitioner American Honda Motor Company, Inc.

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Although Cerasani's Answer Brief is 50 pages long with 125 footnotes, it fails to address the core arguments of Honda's appeal. There is no dispute Cerasani has a warranty from Honda or that some courts have found a lessee to have a valid claim under the Act where a related sale is demonstrated. But the core issues are whether the warranty accompanying her vehicle is a "written warranty" as defined by the Act and whether a "written warranty" is required where a plaintiff is a category three consumer. The decision below erred regarding both issues.

I. THE COURT HAS JURISDICTION BECAUSE THE DECISION BELOW CONFLICTS WITH SELLERS.

Cerasani first argues that no conflict exists between the decision below and Sellers v. Frank Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988). She claims the decision below concerned her status as a category two and three consumer, while Sellers concerned only a claim as a category one consumer. (Ans. Br. at 10). That argument is flatly contradicted by the following passage from the First District's decision which rejected the plaintiffs' category three claim precisely because no sale had taken place:

Section 2301(3) states:

> The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and *any other person who is entitled by the terms of such*

> *warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).*
>
> (Emphasis added.)
>
> Appellants argue that the language emphasized above covers them whether the transaction be treated as a lease or a sale, but the law seems to be clear that there must be an identifiable purchase and sale before the provisions of the Magnuson-Moss Act apply.

526 So. 2d at 156 (emphasis in original). Thus, Sellers addressed all three categories of consumers. Whether the Act requires a sale, as Sellers held, presents a significant conflict issue that should be resolved by this Court.

Cerasani also overlooks an additional nationally significant dimension to the conflict between Sellers and the decision below. The Act's sale requirement comes from its definition of "written warranty," and Sellers applied that requirement, notwithstanding the plaintiffs' claim to be category three consumers. Yet the court below held that a category three consumer may pursue a claim regardless of whether the warranty at issue qualifies as a "written warranty" under the Act. Thus, Sellers and the decision below conflict over whether the "written warranty" definition, with its sale requirement, applies to category three consumers.

II. CERASANI IS NOT A CATEGORY ONE CONSUMER.

As a right-for-any-reason argument, Cerasani contends that she qualifies as a category one consumer because the Lease bears enough indicia of a sale to be classified as one. (Ans. Br. at 18-22). Cerasani raised this point in her appeal to

the Second District, but that court implicitly and correctly rejected it. Cerasani 's Lease is not a sale disguised as a lease.

In Sellers, the lease payments and up-front costs totaled nearly as much as the agreed-upon value of the vehicle, but the First District did not find a sale. Here, on the other hand, nothing about the Lease establishes a sale. The Lease expressly declares, in bold type, that the transaction was a lease, not a sale. The Lease further reflects the parties' agreement that the vehicle was worth $15,772.68 and that Cerasani agreed to pay only $7,343.64 (including taxes and fees) to use that new vehicle for three years, after which it would still have a value of $10,472.50. She could then either buy it for that price or return it. Thus, it is even clearer here than in Sellers that the transaction was a lease, not a sale.

III. CERASANI IS NOT A CATEGORY TWO CONSUMER.

There are two critical elements that Cerasani must demonstrate to bring a claim under the Act as a category two consumer: (1) Honda's warranty qualifies as a "written warranty," and (2) the vehicle was transferred to Cerasani at a time when that warranty was already in effect. Cerasani's complaint lacks both elements.

A. Cerasani's Honda Warranty Is Not A "Written Warranty."

There is no dispute that a category two consumer can bring a Magnuson-Moss Act claim based on an express warranty only where that warranty qualifies as a "written warranty" under the Act. 15 U.S.C. § 2301(3), 2310(d)(1). The issue,

then, is whether Cerasani has properly pled the existence of such a warranty. As Honda's Initial Brief showed, she has not done so. First, a "written warranty" exists only in the context of a sale, and despite her allegations, the Lease confirms no pre-lease sale occurred here. Second, the sale she alleges is not one that would give rise to a "written warranty" because the warranty was not made in connection with that sale. Finally, Cerasani's argument that the sale requirement can be met by the sale from the manufacturer to the dealer likewise fails as a matter of law.

1. No Sale Took Place.

Cerasani alleges that she selected a vehicle at Crown Honda, which Crown Honda then sold it to Honda Leasing, which in turn leased the vehicle to her. She claims that "sale" satisfies the Act's requirement. As a threshold matter, that "sale" never occurred.

Cerasani does not deny that the Lease, which was attached to and made a part of her complaint, expressly reflects a direct lease from Crown Honda to her. R. 1:86 at Ex. A; Pet. App. 3. But she maintains that her allegations of a pre-lease sale should control at this time. (Ans. Br. at 27, n.100.)[1] Who leased her the vehicle, however, is a legal conclusion that need not be accepted. E.g., W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So. 2d 297, 300 (Fla.

[1] The Court may wonder why Cerasani would plead such a sale if it did not occur. Honda suggests that the answer lies in the multitude of suits her counsel has filed using nearly identical complaints. While allegations of a pre-lease sale may apply in some cases, they do not apply to Honda, as the Lease confirms.

1st DCA 1999).

Moreover, Cerasani offers no authority or explanation for how the terms of this controlling document can be ignored. They cannot be. She has not obtained reformation of the lease, and she cannot proceed under the Lease for purposes of obtaining warranty service, making payments, and bringing a warranty claim under the Act but then simply disavow who the Lease says leased her the vehicle.

Cerasani relies on numerous cases in which plaintiffs who had leased vehicles were found to have pled valid claims under the Act. (Ans. Br. at 31-41). In most of those cases, however, it was undisputed that there was a pre-lease sale. Indeed, the earliest of those cases expressly distinguished Sellers based on the lack of a sale there, stating, "In *Sellers*, there was no sale by the manufacturers incident to the lease agreement and the court determined to expand Magnuson-Moss to pure leases would require legislative action." Cohen v. AM Gen. Corp., 264 F. Supp. 2d 616, 619-20 (N.D. Ill. 2003). Athough Cerasani pled a sale in this case, the Lease confirms her erroneous pleading must be rejected. As such, this case is just like Sellers and unlike Cohen and others where a pre-lease sale occurred.

2. Even If The Alleged Sale Took Place, It Would Not Have Satisfied The Act's Sale Requirement For A "Written Warranty."

Second, the sale Cerasani alleges between Crown Honda and "Honda Leasing" does not meet the Act's sale requirement. Not every sale of a product will

satisfy the Act's requirements. Rather, the Act requires "an initial sale to a buyer in which warranties are made." Sellers, 526 So. 2d at 156 (emphasis added). In the language of the Act, the warranty must be made or undertaken "in connection with" the sale, and the buyer must purchase the product for purposes other than resale. 15 U.S.C. § 2301(6). Consequently, if a sale takes place, but the warranty is not triggered by the sale, then that sale is not a qualifying sale under the Act and the warranty is not a "written warranty" as the Act defines that term. That is the case with the alleged sale to "Honda Leasing."

Some courts have held that a pre-lease sale from a dealership to a financing company qualified as a sale under the Act because it was connected to the making of a warranty. But in those cases, the manufacturer's warranty was triggered by the pre-lease sale. For instance, in Cohen, the court explained:

> [A] plain reading of the Act forces us to simply look for a warranty exchange in connection with a sale. Defendant clearly sold the vehicle to [a financing company] and, when doing so, made a series of promises in connection with this sale. This is enough for the warranty to meet the first part of the definition of "written warranty" in 15 U.S.C. § 2301(6).

264 F. Supp. 2d at 620 (emphasis added). More recently, in Mesa, the Third District explained that the manufacturer's warranty there applied to "the first retail purchaser, and each subsequent purchaser," and thus when the dealer sold the vehicle to the financing company, that sale satisfied "the 'in connection with the sale' prong of the 'written warranty' definition." 904 So. 2d at 457.

In this case, by comparison, Honda's Warranty would not have been triggered by any alleged sale between Crown Honda and "Honda Leasing." Coverage begins under Honda's Warranty at the earliest of three occasions:

> This warranty begins on the date the vehicle is put into use in one of the following ways:
>
> - The vehicle is delivered to the first purchaser by a Honda dealer.
> - The vehicle is leased.
> - The vehicle is used as a demonstrator or company vehicle.

(R.1:86 Ex. B, at 12) (A. 4:18) (emphasis added). Cerasani has never pled or even argued that the "sale" between the dealer and the financing company was accompanied by delivery of the vehicle to "Honda Leasing." The remaining two instances are inapplicable to any sale between Crown Honda and "Honda Leasing" because such would not be a lease and the vehicle was not used as a demonstrator.

In her Answer Brief, Cerasani does not argue that she pled the dealership delivered the vehicle to "Honda Leasing" as was required by the Warranty for that supposed sale to trigger the Warranty's coverage. Instead, she misstates the Warranty's terms, arguing "Honda's written warranty states it takes effect upon the first retail sale . . . ." (Ans. Br. at 27 n.100). That may have been true of the manufacturers' warranty in Mesa (which Cerasani's same counsel brought and argued on appeal), but it is not true of Honda's Warranty. The mere fact "Honda Leasing" allegedly purchased the vehicle from Crown Honda would not trigger

Honda's Warranty -- the vehicle would have had to be delivered by the dealership to the purchaser, "Honda Leasing," between the time Cerasani selected it and when she drove it home. Cerasani has pled neither that the warranty was triggered nor that such a delivery occurred.

Accordingly, the alleged sale between Crown Honda and "Honda Leasing" cannot qualify as a sale "in connection with" the making of the warranty. Absent such a sale, Honda's Warranty is not a "written warranty" under the Act.

3. The Sale From The Manufacturer To The Dealer Did Not Satisfy The Act's Sale Requirement For A "Written Warranty."

Finally, Cerasani contends that even if Honda can prove the sale she alleges from Crown Honda to "Honda Leasing" never took place, then the Act's sale requirement can still be satisfied by the sale of the vehicle from the manufacturer, Honda, to the dealer, Crown Honda. (Ans. Br. at 38-39). She is incorrect on this point for the same reason the alleged sale from Crown Honda to "Honda Leasing" was insufficient: Cerasani never alleged any facts showing that the manufacturer's sale to the dealership triggered coverage under the Honda Warranty and therefore was a sale in connection with the making of that warranty.

Indeed, the terms of Honda's Warranty make plain that the vehicle's sale to the dealership could never trigger Honda's Warranty, since none of the three triggering circumstances (delivery by dealership, lease, use as demonstrator) would

ever be satisfied by a sale from the manufacturer to a dealership. It is thus impossible for a sale from Honda to a dealer to trigger Honda's Warranty. As a result, the sale of the vehicle from Honda to Crown Honda is not a sale in connection with the making of Honda's Warranty, and Cerasani cannot rely on that sale to meet the sale requirement necessary to establish the existence of a "written warranty" as defined by the Act. Cf. Mesa v. BMW of N. Am., LLC, 904 So. 2d 450, 457 (Fla. 3d DCA 2005) (holding sale from manufacturer to dealership may qualify as a sale under the "written warranty" definition if the dealer's purpose was not resale, where warranty took effect with the first retail purchase).

B. No Transfer "During The Duration Of" Honda's Warranty

In addition to establishing the existence of a "written warranty," to qualify as a category two consumer, Cerasani must have been transferred the vehicle "during the duration of" a written or implied warranty as defined by the Act. 15 U.S.C. § 2301(3). See Voelker v. Porsche Cars, Inc., 353 F.3d 516, 524 (7th Cir. 2003) (holding leased vehicle was not transferred to the plaintiff during the duration of a written warranty because the warranty did not take effect until the plaintiff leased the vehicle).

The discussion above, showing that Honda's Warranty would not have been triggered by the sale from Crown Honda to "Honda Leasing" or Honda to Crown Honda, also applies to show that the warranty was simply not in effect prior to her

lease of the vehicle. Cerasani's response is to misstate the terms of Honda's Warranty by claiming it began with the "first retail sale," when its terms show that is not the case. (Ans. Br. at 27 n.100). Erroneous statements about the warranty and evasive arguments cannot overcome the terms of Honda's Warranty and the Lease. Cerasani never shows how the warranty could have already been in effect when Cerasani leased her vehicle.

For all of these reasons, Cerasani has no "written warranty" under the Act and no claim under the Act as a category two consumer. The Second District's decision to the contrary should be reversed.

IV. CERASANI IS NOT A CATEGORY THREE CONSUMER.

A. Cerasani's Honda Warranty Is Not A "Written Warranty."

Honda demonstrated above that its warranty on Cerasani's vehicle does not qualify as a "written warranty" as the Act defines that term. See part III-A-2, supra. Thus, the only issue for the Court's separate examination regarding Cerasani's category three argument is whether a category three consumer may bring a claim under the Act based on an express warranty that does not meet the Act's "written warranty" definition. The Second District found that a "written warranty" as defined by the Act is not required, but Cerasani's Answer Brief makes no attempt to defend that conclusion.

B. A "Written Warranty" Is Required For A Category Three Consumer.

In Sellers, the First District applied the sale requirement from the Act's "written warranty" definition to reject the plaintiffs' argument they could proceed as category three consumers absent a sale. Likewise, many other courts have held the Act's sale requirement applies to express warranty claims under the Act and thus directly or implicitly held the "written warranty" element applies to category three claims. DiCintio v. DaimlerChrysler Corp., 768 N.E.2d 1121 (N.Y. 2002); D.L. Lee & Sons, Inc. v. ADT Sec. Sys., Inc., 916 F. Supp. 1571, 1580-81 (S.D. Ga. 1995), aff'd, 77 F.3d 498 (11th Cir. 1996); Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 389 S.E.2d 293 (N.C. Ct. App. 1990); Corral v. Rollins Protective Servs. Co., 732 P.2d 1260, 1267 (1987); see also Parrot v. DaimlerChrylser Corp., 108 P.3d 922, 927 (Ariz. Ct. App. 2005) ("We have determined that Parrot had a 'written warranty,' which also applies to prong three.").

In the decision below, the Second District reached the opposite conclusion and found that a category three consumer may sue over a warranty that does not meet the Act's "written warranty" definition. Honda acknowledges that several courts have recently reached the same conclusion, including the Third District in Mesa, and that a nationally significant split of authority exists on this issue. Voelker v. Porsche Cars, Inc., 353 F.3d 516, 524 (7th Cir. 2003); Ryan v. American Honda Motor Corp., Case No. A-16 Sept. Term 2005 (N.J. Feb. 27,

2006); Mesa, 904 So. 2d at 457; Brophy v. DaimlerChrysler Corp., 2005 WL 2693308 (Fla. 2d DCA 2005); Dekelaita v. Nissan Motor Corp., 799 N.E.2d 367, 372, 374 (Ill. Ct. App. 2003).

Despite the recent cases relied upon by Cerasani, no serious examination of the Act can reasonably lead to the conclusion that by proceeding as a category three consumer, a Magnuson-Moss Act plaintiff can enforce a warranty that does not qualify as a "written warranty" under the Act. The court that first reached that conclusion did so with nearly no analysis, apparently relying simply on the fact the category three language from the following definition of "consumer" refers to "such warranty" and "the warranty" and not to an "implied or written warranty":

> [1] a buyer (other than for purposes of resale) of any consumer product, [2] any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and [3] **any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)**.

15 U.S.C. § 2301(3) (numbering and emphasis added); see Dekelaita, 799 N.E.2d at 372, 374. The subsequent cases simply restated Dekelaita's conclusion.

Reading the category three language to permit a cause of action based on any warranty -- an undefined term under the Act -- makes two unsupportable presumptions. First, it presumes the "such warranty" and "the warranty" references in the category three portion of the sentence stand alone and do not refer to the

"implied or written warranty" referenced previously in the same sentence.

Second, and most important, it presumes that an entire cause of action can be based on this portion of the definition of "consumer." To the contrary, the Act's only private cause of action is set forth in 15 U.S.C. § 2310(d)(1). That section permits a consumer -- *however defined* -- to bring a claim against a supplier, warrantor, or service contractor only for failure to comply with a written warranty, an implied warranty, a service contract, or an obligation under the Act. Even if "consumer" were defined to include all persons, it would not change that 15 U.S.C. § 2301(d)(1) permits consumers to sue for violation of only those four items, and nothing else. Notably, there is no dispute that a category one consumer must enforce a "written warranty," not just any express warranty, when the category one language makes no mention of a warranty at all.

Furthermore, it makes no sense to require a "written warranty" for claims by category one and two consumers but not for a claim by a category three consumer. Such a reading makes the third category of the "consumer" definition swallow the first and perhaps the second categories, essentially rendering the "written warranty" definition meaningless under the Act.

The cases Cerasani relies upon do not attempt an analysis of the Act. They simply declare, *ipse dixit*, that a "written warranty" is not required where a plaintiff qualifies as a category three consumer. Not one of those cases ever explained how

that conclusion can be reconciled with the elements of the cause of action expressly set forth in 15 U.S.C. § 2301(d)(1). It cannot.

Tellingly, and consistent with the lack of analysis from every court ever to rule a "written warranty" is not required of a category three consumer, Cerasani's Answer Brief never attempts to defend the Second District on this point. She argues that she could enforce Honda's warranty under Florida law, and she argues that the warranty is a "written warranty" under the Act, but she never once explains how she can bring a suit under 15 U.S.C. § 2310(d)(1) based on a warranty that does not qualify as a "written warranty" under the Act. Cerasani does not defend the Second District's conclusion because it is indefensible on its merits.

Mere zeal for expanding consumers' rights is insufficient grounds to ignore the plain language of a federal statute. It may be an appropriate policy decision to decide that any warranty enforceable under state law may be the subject of a federal claim under the Magnuson-Moss Act. But that is a policy decision for Congress to make regarding the Act, not the courts. Sellers, 526 So. 2d at 156 (eliminating the Act's sale requirement would amount to "judicial legislation" and was "a matter for legislative decision"). Congress is aware that lessees have warranty enforcement rights under state law -- it cannot be overemphasized that Cerasani and all Florida lessees have enforcement rights under Florida's Lemon Law -- and if Congress decides not to amend the Act to permit such claims, then

that decision should be respected by this Court.

When this Court engages in its analysis of the Act and recognizes the cause of action Congress expressly defined, the Court should approve Sellers, quash the decision below, and hold that Cerasani must allege and prove the existence of a written warranty for her to pursue a claim under the Act as a category three consumer, just as she must do as a category one or two consumer. Honda should be permitted to defend Cerasani's claim by demonstrating the lack of a "written warranty" in this case.

CONCLUSION

For all of the foregoing reasons, the decision of the Second District should be quashed. The Court should approve the First District's decision in Sellers.

Respectfully submitted,

_____

CARLTON FIELDS, P.A.
4000 Bank of America Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

By: WENDY F. LUMISH
Florida Bar No. 334332
JOHN R. BLUE
Florida Bar No. 6999
MATTHEW J. CONIGLIARO
Florida Bar No. 63525
Counsel for Petitioner Honda American Motor Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this ___ day of March 2006 to: **ALEX D. WEISBERG, ESQ**., *Counsel for Respondent,* Krohn & Moss, Ltd., Sunrise Professional Center, 5975 W. Sunrise Blvd., Suite 215, Sunrise, FL 33313; and **THEODORE F. GREENE, III, ESQ.,** *Counsel for Respondent*, Law Offices of Theodore F. Greene, LC, P.O. Box 720157, Orlando, FL 32872-0157.

By: _____

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