IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-514

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC, STEVE A. MCKENZIE, and BRENDA G. LAWSON,

Petitioners.

vs.

WENDY BETTS, DONNA REUTER, et al.,

Respondents.

/

L.T. Case Nos.: 4D08-493, 4D08-494

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS' REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Plaintiff Tiffany Kelly does not dispute that the United States Supreme Court, in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), held that the Federal Arbitration Act ("FAA") preempts state rules that condition enforcement of arbitration agreements on the availability of class action procedures, and reaffirmed that courts must enforce arbitration agreements according to their terms. Rather, Kelly contends that Concepcion does not apply if a plaintiff proves that he or she cannot vindicate his or her rights in arbitration. But the only basis of that argument is that she cannot vindicate her rights without a class-action procedure—specifically class attorney fees.

Kelly's own authority, however, shows that courts do enforce arbitration agreements that preserve statutory rights. And Kelly does not dispute that her arbitration agreement—as the Fourth DCA held—"preserved her substantive rights," including the right to attorney fees. Moreover, Concepcion rejected the argument that arbitration agreements cannot be enforced where small-value claims might "slip through the legal system." Nevertheless, as "evidence" that her rights cannot be vindicated, Kelly submits affidavits from three attorneys who say that they would not take her case if class attorney fees were not available. Such evidence, however, as the Eleventh Circuit recently observed, only substantiates the public-policy arguments that Concepcion rejected. Accordingly, Concepcion

moots the question certified by the Fourth DCA; if the question is considered, Concepcion dictates that the answer is "no."

Kelly also argues that the arbitration clause violates Florida public policy. But she does not dispute that the Legislature sets public policy, and that its policy choices bind trial courts, or that the Legislature has determined that an award of attorney fees—which are available here—is sufficient incentive for consumers to vindicate their rights under FDUTPA. Kelly's arguments that the arbitration agreement is "exculpatory" are identical to her vindication arguments, and they fail for the same reason. Thus, even if public policy is considered, the certified question still should be answered "no," and the Fourth DCA's decision quashed.

Finally, Kelly argues the same "exculpatory effects" make the arbitration agreement unconscionable under Florida contract law. But the trial court held that the agreement is not unconscionable. And the issue is not properly before this Court because Kelly did not appeal that holding, and unconscionability is not part of the question certified by the Fourth DCA. Even if it is considered, the uncontested evidence shows that the arbitration agreement is not unconscionable.

ARGUMENT

I. STANDARD OF REVIEW

"[N]o deference is given to the judgment of the lower court" when this Court reviews a certified question of public importance, and Kelly does not address

MCA's authority that review is *de novo*. See Initial Br. at 9. Instead, Kelly argues that this Court should defer to the "lower court's findings of fact," citing Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 266 (Fla. 4th DCA 2006). Answer Br. at 15. Alterra, however, recites the standard applied by the district court to a "trial court's factual findings," Alterra, 937 So. 2d at 266, whereas this Court "exercise[es] appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice." Jackson v. State, 926 So. 2d 1262, 1266 (Fla. 2006) (citation omitted). Moreover, the Fourth DCA's certified question does not require this Court to review any fact issue; rather, the question assumes that a hypothetical trial court has been "persuaded by evidence" that a consumer would not be able to retain competent counsel. McKenzie v. Betts, 55 So. 3d 615, 629 (Fla. 4th DCA 2011).

II. THE FAA PREEMPTS STATE LAW THAT INTERFERES WITH THE ENFORCEMENT OF ARBITRATION AGREEMENTS.

Kelly does not dispute: (i) that the FAA applies; (ii) that Concepcion reiterates the established rule that the purpose of the FAA is to enforce arbitration agreements according to their terms; and (iii) that the FAA preempts any state law that conditions enforcement of arbitration clauses on the availability of class procedures. Initial Br. at 12-17. Rather, Kelly argues that Concepcion does not apply where a plaintiff proves that, because an arbitration agreement bars class arbitration, he or she cannot vindicate his or her statutory rights. See Answer Br.

at 17. The sole basis of that argument is Kelly's claim that she must have a class-action procedure, because that procedure—specifically the availability of class attorney fees—is the only way she could attract "competent counsel." See id. at 26-28. As shown below, however, Concepcion itself forecloses that argument.

A. Concepcion Considered and Rejected the Basis of Kelly's Argument That She Cannot Vindicate Her Statutory Rights.

Kelly makes the straw-man argument that MCA claims that, under Concepcion, the FAA "now mandates enforcement of its class action ban (if not all class action bans) in *every* case, no matter how the state law at issue analyzes the enforceability of such terms; no matter what kinds of claims are raised; and no matter what factual findings are made by the court." Answer Br. at 13 (Kelly's italics). Similarly, Kelly argues that "Concepcion does not hold that *every* class action ban in an arbitration clause is *always* enforceable in *every* case." Id. at 16 (Kelly's italics). But that is not MCA's argument.

Rather, under Concepcion, Kelly's arbitration agreement is enforceable because, as the trial court found, the agreement "preserved her substantive rights." [A.111]; Initial Br. at 5. That factor—whether an arbitration agreement preserves the substantive rights that would be available in court—is the touchstone of the Supreme Court's vindication-of-statutory-rights analysis.

Kelly argues that Concepcion—because it cites two cases, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), and Gilmer v.

Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), that refer to vindication of statutory rights—"does not disturb" Supreme Court precedent that statutory claims are arbitrable only if the claimant "may vindicate its statutory cause of action in the arbitral forum." Answer Br. at 16. But Concepcion cites those cases for unrelated reasons, and neither case establishes any test for vindication of statutory rights. Rather, both cases enforced arbitration agreements, holding that arbitration should be compelled, pursuant to a valid arbitration agreement, so long as the party "does not forgo the substantive rights afforded by the statute[.]" Answer Br. at 17 (quoting Mitsubishi, 473 U.S. at 628). Here, the district court expressly ruled that the arbitration agreement "preserved [Kelly's] substantive rights." McKenzie, 55 So. 3d at 619 [A.124]. And Kelly does not dispute that, as in Concepcion, the arbitration provision here grants her several rights that make the arbitration process more flexible and less costly, including the advancement, upon request, of all upfront costs of arbitration. Initial Br. at 4-5. Moreover, Kelly cites no "vindication" case from the Supreme Court—and MCA is aware of none—in which the ability to retain counsel is even a factor. The test is whether the arbitration agreement preserves statutory rights, which is the undisputed case here.

Thus, Kelly is simply wrong that "the only way to harmonize Concepcion with the rule of law set forth in Mitsubishi … is to hold that a class action ban … cannot be enforced if it would prevent parties from vindicating their statutory

rights." Answer Br. at 16. Kelly's argument ignores Concepcion's recognition—by rejecting the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"—that Congress intended the FAA to apply to small-value consumer claims. Concepcion, 131 S. Ct. at 1753. Nor is Kelly's claim "small value." Although she claims not to understand how MCA determined that she seeks damages exceeding $24,000, Answer Br. at 6 n.4, her own complaint demands return of both principal and interest—which the parties stipulated to be $7,810—and demands that that amount be trebled, with an additional penalty of double interest under her Florida Lending Practices Act claim. First Am. Compl. ¶¶ 61, 82 [R1.117, R1.120].

B. **Kelly Misrepresents the Holding of Concepcion.**

Kelly not only misconstrues Concepcion; she misrepresents it. She argues that Concepcion "stands for the proposition that only those categorical rules of state law that permit uniform invalidation of arbitration clauses pose a conflict with the FAA: 'When state law prohibits outright the arbitration of *a particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA.'" Answer Br. at 20 (quoting Concepcion, 131 S. Ct. at 1747) (Kelly's italics). But Kelly quotes Concepcion's description of the easy case that was not before the Court. Immediately after her quotation, the Supreme Court explains that the question is "more complex when a doctrine normally thought to be generally

applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." Concepcion, 131 S. Ct. at 1747 (emphasis supplied). That "more complex" question is the issue decided by Concepcion, which held that the FAA preempts any state law—categorical, mechanical or otherwise—that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 1748.

Indeed, the Eleventh Circuit, compelling arbitration of a FDUTPA claim under Concepcion, recently rejected Kelly's argument that "Concepcion only preempts inflexible, categorical state laws that mechanically invalidate class waiver provisions in a generic category of cases, without requiring any evidentiary proof regarding whether parties could vindicate their statutory rights in arbitration." Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1213-14 (11th Cir. 2011).[1] Cruz is not an outlier. Kelly does not cite a single case decided after Concepcion in support of her argument that she cannot vindicate her statutory rights without a class action. However, in the past few months alone, numerous courts have held that the FAA preempts state rules that "would invalidate the class waiver simply because the claims are of small value, the potential claims are

[1] Kelly argues that her claims are more "complex" than those in Cruz, Answer Br. at 22, but does not explain how. She admits that many of the issues relevant to her usury claim have been decided, id. at 7-8, and the Supreme Court has held that any "potential complexity should not suffice to ward off arbitration." Mitsubishi, 473 U.S. at 633 (permitting arbitration of complex antitrust claim).

numerous, and many consumers might not know about or pursue their potential claims absent class procedures." Cruz, 648 F.3d at 1212-13; see also Litman v. Cellco P'ship, 655 F.3d 225, 230-31 (3d Cir. 2011) (on remand from the Supreme Court after Concepcion, holding that FAA preempts New Jersey Supreme Court rule prohibiting class-action waivers in consumer adhesion contracts, where claims are "small value"); Fensterstock v. Educ. Fin. Partners, 426 F. App'x 14, 15 (2d Cir. 2011) (reversing, after Concepcion, prior decision that class action waiver was unconscionable because small-value claims made individual actions economically impractical). As one district court recently noted, "it is incorrect to read Concepcion as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake." Kaltwasser v. AT&T Mobility LLC, 2011 WL 4381748, at *6 (N.D. Cal. Sept. 20, 2011).

Concepcion, as Cruz shows, also disposes of Kelly's argument that Concepcion does not control because the "particular facts" here purportedly show that she could not vindicate her rights in individual arbitration. Cruz, 648 F.3d at 1214. Kelly attempts to distinguish Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019, 1025 (Fla. 4th DCA 2005), in which the Fourth DCA held that nothing in FDUTPA or its legislative history "suggests that the legislature intended to confer a non-waivable right to class representation." She argues that, in Fonte,

there was "no evidence … to suggest that the plaintiff there would be unable to vindicate her rights individually." Answer Br. at 24. Kelly also argues that she has presented such evidence here—specifically the affidavits of three attorneys stating that they would not take her case if class procedures were not available. Answer Br. at 5. But the plaintiffs in Cruz presented identical evidence, which was rejected because it "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in Concepcion—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted." Cruz, 648 F.3d at 1214.

With an elaborate chart, Kelly argues that the Fourth DCA's rule in this case is different from the Discover Bank rule struck down by Concepcion, because that rule was purely mechanical whereas the rule here is fact-specific. Answer Br. at 27-28. But the Concepcion plaintiffs "repeatedly emphasized" to the Supreme Court that the Discover Bank "rule was a 'fact-specific' inquiry that only screened out class action bans 'in circumstances where they would ... be exculpatory.'" Cruz, 648 F.3d at 214. And the intensely fact-specific nature of the rule that Kelly proposes is precisely the problem. She admits that Florida courts would have to make the "'case-by-case' determination … whether, under the particular facts of the case, the plaintiffs can prove that the contract term at issue in their cases effectively prevents them from vindicating their statutory rights." Answer Br. at

30. Such a determination would turn motions to compel arbitration into mini-trials on the merits, requiring plaintiffs to prove that they would lose in individual arbitration. As a recent court observed, that approach is "unworkable …. [E]very court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case." Kaltwasser, 2011 WL 4381748, at *6.

C. **The FAA Applies in State Courts.**

Kelly also argues that Concepcion "is limited to cases which arose in federal court." Answer Br. at 33. But the sole basis of that argument is that Concepcion went to the Supreme Court from a federal court, and that Justice Thomas, who was the fifth vote in Concepcion, has consistently stated that the FAA does not apply in state court. Id. Thus, Kelly argues, the Supreme Court would have decided the "FAA preemption issue" here differently if that issue "had reached the U.S. Supreme Court in *this* case, and not *Concepcion*." Id. at 34 (Kelly's italics). A litigant's speculation as to Supreme Court votes is not the law, and the Supreme Court has repeatedly held that the FAA applies in both state and federal courts. See, e.g., Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272-73 (1995) (refusing to reconsider "well-established law" that the FAA "applies in both federal and state courts").

III. THE AGREEMENT DOES NOT VIOLATE PUBLIC POLICY.

Kelly does not dispute: (i) that the Legislature sets public policy; (ii) that legislative policy choices are binding on trial courts; (iii) that the Legislature did not grant a non-waivable right to class actions in FDUTPA actions; and (iv) that the Legislature has determined that an award of attorney fees is the incentive for consumers to vindicate FDUTPA and other statutory rights. Initial Br. at 17-30.

Nevertheless, Kelly argues that well-established Florida public policy forbids the enforcement of an arbitration clause that would "exculpate" a defendant from liability for violating Florida's consumer protection statutes. Answer Br. at 35-43. Kelly's arguments, however, are virtually identical to her arguments that the arbitration agreement prevents her from vindicating her statutory rights, and fail for the same reasons set forth above and in MCA's initial brief.

Moreover, Kelly concedes that most of her authority does not even involve arbitration. Answer Br. at 38. And all of her other authority are cases in which, unlike here, arbitration agreements eliminated rights that were available under the statutes at issue, such as the right to seek attorney fees or punitive damages. See, e.g., Holt v. O'Brien Imports of Ft. Myers, Inc., 862 So. 2d 87, 88-89 (Fla. 2d DCA 2003) (arbitration clause prohibited arbitrator from awarding injunctive relief, as authorized by FDUTPA); Lacey v. Healthcare & Ret. Corp. of Am., 918 So. 2d 333, 334 (Fla. 4th DCA 2005) (arbitration clause waived punitive damages

authorized by statute); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 266 (Fla. 4th DCA 2006) (arbitration clause capped non-economic damages and waived statutory right to punitive damages). Here, the Fourth DCA ruled that the arbitration agreement "preserved [Kelly's] substantive rights," including the right to recover attorney fees. McKenzie, 55 So. 3d at 619 [A.124] (emphasis supplied).

Kelly also argues that a class action waiver is exculpatory notwithstanding the availability of attorney fees, because the applicable statutes "do[] not guarantee an award of attorney's fees to prevailing plaintiffs" and also provide that consumers may be liable for a defendant's attorney fees if they bring frivolous claims. Answer Br. at 42. But Kelly cites nothing for the untenable proposition that a plaintiff must be guaranteed to recover attorney fees in arbitration, and does not dispute that the Legislature has determined that attorney fees provide the incentive for counsel to pursue consumer claims. Initial Br. at 25-30.[2]

IV. FLORIDA PUBLIC POLICY CANNOT BE DETERMINED BY TRIAL COURTS ON AN AD HOC, CASE-BY-CASE BASIS.

Kelly does not separately respond to MCA's showing that the Fourth DCA's subjective, *ad hoc* approach to whether an arbitration clause violates public policy would turn simple consumer disputes into costly and complex "battles of the

[2] Kelly's statement that the Lending Practices Act does not provide for attorney fees, Answer Br. at 41 n.15, is incorrect. See Fla. Stat. § 687.147. Kelly also argues that there is no attorney fee provision in the Consumer Finance Act, but that statute is not at issue because it contains no private right of action. Initial Br. at 7 n.1 (citing McKenzie, 55 So. 3d at 617-18 n.2).

experts." Initial Br. at 31-33. She does not dispute that the court's approach would create the risk of inconsistent results, and foster instability by placing a new and uncertain burden on commerce and ordinary business relationships. Id. Kelly merely argues, in passing, that "MCA is wrong." Answer Br. at 30. But she admits that Florida courts will have to make "'case-by-case' determination[s] …whether, under the particular facts of the case, the plaintiffs can prove that the contract term at issue in their case effectively prevents them from vindicating their statutory rights." Answer Br. at 30. She cannot have it both ways.

V. THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE.

The trial court held that the arbitration agreement was not unconscionable, and Kelly did not appeal that ruling. McKenzie, 55 So. 3d at 629 [A.134]. The only question certified by the Fourth DCA is whether a class-action waiver violates public policy, id., which Kelly concedes is "distinct from holding that a contract is unenforceable because it is unconscionable." Answer Br. at 44. Accordingly, the issue of unconscionability should not be considered here. See Major League Baseball v. Morsani, 790 So. 2d 1071, 1080 n.26 (Fla. 2001) (declining to address claims outside the scope of the certified question).

Nevertheless, the record shows that Kelly's arbitration agreement is not unconscionable. Kelly concedes that a clause is unconscionable only if it is "both procedurally unconscionable and substantively unconscionable." Answer Br. at 23

n.8 (emphasis supplied). The trial court ruled that "[h]ere, there was no procedural unconscionability," [A.114], and Kelly ignores the trial court's findings: (i) that "Kelly is a very bright, articulate woman" with a year of college education at the time she signed the contract [A.110]; (ii) that "Kelly had the opportunity to read the arbitration clauses; MCA did nothing to lead her to believe that she should not; and she had the intellect to understand them" [A.114]; (iii) that MCA did not pressure Kelly to sign the contract or rush her when she reviewed it [id.]; and (iv) that Kelly was given a one day right of rescission which she did not exercise. [Id.].

Instead, Kelly argues that the arbitration agreement is procedurally unconscionable because it was contained in an adhesion contract where there was unequal bargaining power. Answer Br. at 45-48. However, "the times in which consumer contracts were anything other than adhesive are long past." Concepcion, 131 S. Ct. at 1750. And Concepcion also rejects an argument based on "roughly equivalent bargaining power," holding that "[s]uch a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases." Id. at 1749 n.5 (citations omitted). Accordingly, if this Court reaches the issue, it should affirm the trial court's ruling that the arbitration agreement is not unconscionable because it is "not procedurally unconscionable." [A.115].

The trial court also found that the arbitration agreement gave Kelly "a choice of arbitrators; required MCA to advance the costs of arbitration; and preserved her

substantive rights." [A.110-11]. Thus, for all of the reasons stated above and in MCA's initial brief, the arbitration agreement is not substantively unconscionable.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in their Initial Brief on the Merits, Petitioners respectfully submits that this Court should decline to answer the certified question and instead quash the Fourth DCA's decision. If the Court reaches the certified question, however, the answer should be "no." In either event, the Court should remand the case to the trial court with instructions to order Kelly's individual dispute to arbitration.

Dated: November 7, 2011

Respectfully submitted,

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I CERTIFY that this brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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