IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1953

BRIAN SUSI,

Petitioner,

v.

AUTONATION, INC., a Delaware corporation,
authorized to transact business in Florida, and
MULLINAX FORD SOUTH, INC., a Florida corporation,
d/b/a AUTONATION FORD MARGATE,

Respondents.

**ON DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT**

BRIEF ON JURISDICTION OF RESPONDENTS AUTONATION, INC. and MULLINAX FORD SOUTH, INC. d/b/a AUTONATION FORD MARGATE

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PREFACE

The Petition seeks review of an Opinion of the Fourth District Court of Appeal that enforces an arbitration agreement executed by the parties in conjunction with Petitioner's purchase of an automobile from Respondent Mullinax Ford South, Inc.

Petitioner Brian Susi will be referred to as the "Mr. Susi."

Respondent AutoNation, Inc. will be referred to as "AutoNation."

Respondent Mullinax Ford South, Inc., d/b/a AutoNation Ford Margate, will be referred to as "AutoNation Ford Margate."

Together AutoNation and AutoNation Ford Margate will be referred to as the "AutoNation Defendants."

Mr. Susi's Petition will be cited as "P__" to indicate the cited page or pages.

Mr. Susi's Appendix will be cited as "A__-__" to indicate document and page.

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STATEMENT OF THE CASE AND OF THE FACTS

I. Introduction

The AutoNation Defendants object to Mr. Susi's Statement of the Case and Facts because it impermissibly goes outside the Fourth District's Opinion and, therefore, outside the record before the Court (P1-4).[1]

Rather than move to strike Mr. Susi's version of the background, however, the AutoNation Defendants provide below a proper Statement of the Case and of the Facts based on the Opinion.

II. Background

Mr. Susi's lawsuit arose from his purchase of a car from AutoNation Ford Margate (A1-1). In conjunction with the purchase Mr. Susi executed an Arbitration Agreement that applied to claims arising from or related to any service on the car, dealings (A1-1).

Eight months after Mr. Susi purchased the car he brought it back for warranty work (A2). Two weeks later, when he picked up the car, he noticed damage that was done during the warranty work (A1-2). AutoNation Ford Margate had the damage repaired at its own cost, but Mr. Susi was not satisfied and obtained an estimate for further repairs (A1-2).

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[1] *See* Fla. R. App. P. 9.120(d) (limiting a petitioner's appendix to "a conformed copy of the decision of the district court of appeal"); Fla. R. App. P. 9.210(b)(3) (requiring references to the "appropriate pages of the record").

When AutoNation declined to pay for the further repairs, Mr. Susi filed suit against both AutoNation Ford Margate and AutoNation and sought an award of attorney's fees on various grounds (A1-2). The AutoNation Defendants filed a motion to stay litigation pending arbitration under the Arbitration Agreement, which expressly includes servicing the vehicle, negotiations and interactions with AutoNation Ford Margate, tort claims, and numerous other subjects as within the scope of arbitration (A1-2-3). Mr. Susi objected to arbitration on the basis that his claims were related to "negligence and misrepresentations" rather than servicing of the car (A1-3).

At the hearing on the AutoNation Defendants' motion the court held that the Arbitration Agreement did not extend over AutoNation Ford Margate's servicing of the car eight months after Mr. Susi's purchase (A1-3).

The AutoNation Defendants appealed the trial court's decision to the Fourth District and sought an award of attorney's fees on the same grounds raised by Mr. Susi. On August 31, 2016, after the parties completed the briefing, the Fourth District issued its Opinion upholding the AutoNation Defendants' right to arbitrate Mr. Susi's claims and entered the Order granting them appellate attorney's fees conditioned on their ultimately prevailing in the trial court proceedings (A1).

SUMMARY OF ARGUMENT

The Fourth District's Opinion does not expressly and directly conflict, or conflict in any other way, with *Basulto v. Hialeah Automotive*, 141 So. 3d 1145 (Fla. 2014), *Seifert v. U.S. Home Corporation*, 750 So. 2d 633 (Fla. 1999), or any other case cited in Mr. Susi's jurisdictional brief.

On attorney's fees, unlike the facts of *Basulto*, which is not even mentioned in the Opinion, in this case the Fourth District's Order does not mention section 501.2105, Florida Statutes, or award the AutoNation Defendants attorney's fees. The Order merely returns the issue of entitlement to the trial court conditioned on its determination that the AutoNation Defendants are ultimately the prevailing parties.

On the AutoNation Defendants' right to compel arbitration, unlike the facts of *Seifert*, there is no mention in the Opinion, or any record before this Court, of any of the arguments made by Mr. Susi in his jurisdictional brief.

Even if the Court had discretionary review jurisdiction, however, the Opinion and Order should be approved because they correctly interpret and apply controlling Florida law in holding that Mr. Susi's claims fell squarely within the scope of the Arbitration Agreement and contingently granting the AutoNation Defendants' request for appellate attorney's fees.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE OPINION OR THE ORDER AND ANY CASE FROM THIS COURT OR ANY DISTRICT COURT.

A. The Court's jurisdiction requires a conflict with a decision of this Court or a district court.

The Court's conflict jurisdiction is governed by section 3(b)(3) of article V of the Florida Constitution, which requires that the decision of a district court of appeal "expressly and directly" conflict with a decision of another district court or this Court.

A "conflict" is the "announcement of a *rule of law* which conflicts with a rule previously announced" or the "application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). Under the first test the facts are immaterial, but under the second they are critical. *See id.*

In this case, the standards are not met and the Court is, therefore, without jurisdiction.

B. There is no conflict between the Order and *Basulto*.

The Court should reject Mr. Susi's first argument for two reasons. First, the Order contains no mention of the basis on which the Fourth District held that the AutoNation Defendants might be entitled to an award of attorney's fees if they ultimately prevailed below. Mr. Susi's arguments, like his Statement of the Case and

Facts, impermissibly goes outside the record before the Court. Because the Order is silent on the basis of the Fourth District's decision, it cannot expressly and directly conflict with *Basulto* or any other case, and the Court is without conflict jurisdiction.

Second, although there is no basis to conclude that the only grounds for the Order are either section 501.2105 or section 559.921, Florida Statutes, even if they were the Order is correctly conditioned on the AutoNation Defendants ultimately prevailing in defeating Mr. Susi's claims under the Florida Deceptive and Unfair Trade Practices Act, sections 501.201, *et seq.*, and the Florida Motor Vehicle Repair Act, sections 559.901, *et seq.* Under both statutes, a prevailing defendant may be entitled to an award of attorney's fees and costs. *See Humane Soc. of Broward County v. Fla. Humane Soc.*, 951 So. 2d 966, 967 (Fla. 4th DCA 2007); *United American Lien and Recovery Corp. v. Primicerio*, 924 So. 2d 848, 851 (Fla. 4th DCA 2006).

These statutory awards, however, must frequently be conditional if they are entered, as the Order was here, in appellate litigation before the trial litigation is finalized. These conditional orders for parties who prevail on appeal are consistent with Florida Rule of Appellate Procedure 9.400(b) when further proceedings are contemplated below. *See, e.g., Teachers Ins. Co. v. Silva*, 119 So. 3d 1260, *1 (Fla. 2d DCA 2012); *City of Hialeah v. Crespo*, 786 So. 2d 42, *1 (Fla. 3d DCA 2001). In contrast, not one of the cases cited by Mr. Susi involves a conditional order.

Furthermore, *Basulto* is silent on the reason that the Court held the buyers were not entitled to an award of attorney's fees, but in other cases the Court has held that section 501.2105 provides for an award of attorney's fees to a prevailing party in a FDUTPA action. *See Hubbel v. Aetna Cas. & Sur Co.*, 758 So. 2d 94, 95 (Fla. 2000). Again, therefore, there is no conflict jurisdiction.

C. There is no conflict between the Opinion and *Seifert* or any other case cited by Mr. Susi.

The Court should also reject Mr. Susi's waiver, estoppel, and enforceability arguments because even if the Opinion cited any of the cases that Mr. Susi cites, which it does not, the Opinion does not announce a rule of law that conflicts with a rule announced in any of them or apply a rule of law to produce a result different from any of them.

Consistent with *Seifert*, 705 So. 2d at 637, the Opinion explains that the language of the Arbitration Agreement is broad because it includes both "arising from" and "relating to" tort claims, servicing the vehicle, dealings between AutoNation Ford Margate and Mr. Susi, any oral representations, and disputes regarding the arbitrability of any issue (A1-5-6). There is no conflict with *Seifert.*

On the issues of waiver and estoppel, *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005), and *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077, n.12 (Fla. 2001), explain their parameters, but in this case there is no evidence that either was the basis of the Opinion. Nor is there any evidence

of either in the record before the Court, and once again Mr. Susi's accusations have no support. As the Opinion explains, the trial court ruled strictly on the basis of its perpetuity conclusion and Mr. Susi's other arguments "lack merit" (A1-6). There is no conflict with *Raymond James* or *Major League Baseball*.

For the same reason there is no express and direct conflict with *Roth v. Cohen*, 941 So. 2d 496, 500 (Fla. 3d DCA 2006). In *Roth*, the litigant demanding arbitration filed suit in circuit court instead of instituting arbitration proceedings. *See id.* at 499-500. The Third District held that this choice was inconsistent with the litigant's later argument that he had the right to arbitrate his claims. *See id.* at 500. Here, in contrast, the only record before the Court is that Mr. Susi sued the AutoNation Defendants and that they responded with a motion to stay litigation pending arbitration (A1-2). There is no evidence that they took any action inconsistent with that motion. There is no conflict with *Roth.*

Finally, on the issue of enforceability, there is no conflict with *Basulto*, 141 So. 3d at 1156-57, *Park Benziger & Company, Inc. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681 (Fla. 1980), or *Sound City, Inc. v. Kessler*, 316 So. 2d 315 (Fla. 1st DCA 1975). In *Basulto*, 141 So. 3d at 1156, there was evidence of "competing dispute resolution provisions" which contemplated "the enforcement of a different remedy whose terms and conditions are irreconcilable with the terms and conditions of each

of the other conflicting provisions." There is no such evidence before this Court and, thus, no conflict with *Basulto.*

Park Benziger, 391 So. 2d at 682, holds that a contract with no termination date is terminable at will by either party, but as the Opinion states, in *Sound City*, 316 So. 2d at 317, quoting 17 Am. Jur. 2d, Contracts, §§ 329-330, pp. 764-66, the court explained that the absence of a termination date requires that a reasonable time is implied. And a reasonable time:

> depends on the subject matter of the contract, the situation of the parties, their intention and what they contemplated at the time the contract was made, and the circumstances attending the performance.

Here, consistent with *Park Benziger* and *Sound City*, there is no evidence that Mr. Susi terminated the Arbitration Agreement, or that he had the right to do so given its terms, or that arbitration agreements are unilaterally terminable in general. As the Opinion states, however, there is evidence of the subject matter of the contract – servicing the car – and the parties' intention – arbitration of any dispute arising from or relating to servicing the car, the parties' dealings, purported representations, and disputes regarding the right to arbitration. There is no conflict with *Park Benziger* or *Sound City.*

D. The Opinion and Order correctly apply Florida law.

While the AutoNation Defendants do not believe there is any basis for the Court to exercise its conflict jurisdiction, even if the Court finds that it has jurisdiction despite the lack of any express and direct conflict, the Opinion and Order should be approved. The Opinion correctly applies Florida's arbitration law in holding that the Arbitration Agreement covered Mr. Susi's claims, and the Order correctly applies Florida law in contingently granting the AutoNation Defendants' request for appellate attorney's fees. There is no evidence supporting any of Mr. Susi's arguments regarding either of them.

CONCLUSION

For the foregoing reasons, the Court should find that it is without conflict jurisdiction or, alternatively, approve the Fourth District's Opinion and Order.

CERTIFICATE OF SERVICE

We certify that a correct copy of this document was furnished by e-mail to the persons on the attached Service List this 21st day of November 2016.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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