**IN THE SUPREME COURT FOR THE STATE OF FLORIDA**

BETZAIDA FONTE, Plaintiff-Petitioner,

vs.

AT&T WIRELESS SERVICES, INC., Defendant-Respondent.

CASE NO. SC 5-1247

LOWER TRIBUNAL CASE NO. 4D04-219

# RESPONDENT AT&T WIRELESS SERVICES, INC.'S BRIEF ON JURISDICTION

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## PREFACE

Petitioner, Betzaida Fonte, was the Appellant/Plaintiff below and is referred to here as "Ms. Fonte" or "Petitioner."

Respondent, AT&T Wireless Services, Inc., was the Appellee/Defendant below and is referred to here as "AT&T Wireless." It is a separate and distinct company from AT&T Corp. and was acquired by Cingular Wireless LLC in October of 2004.

## STATEMENT OF THE CASE AND FACTS

This case involves the enforceability of an arbitration clause in a contract for wireless services. Ms. Fonte purchased a cellular phone and wireless service through an AT&T Wireless authorized dealer. (App. 1). At the time she purchased the phone, she entered into an arbitration agreement. (App. 2).

Approximately eight months after purchasing the wireless services, Ms. Fonte filed a purported class action against AT&T Wireless alleging breach of contract, fraud, and a violation of The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") based on two relatively small rate changes. (App. 3). In response, AT&T Wireless filed a Motion to Compel Arbitration. (App. 3-4). The trial court held an evidentiary hearing, made detailed findings of fact and conclusions of

law, and granted AT&T Wireless' Motion. (App. 4). Ms. Fonte appealed the trial court's Order to the Fourth District Court of Appeal, making the same arguments she makes in her Jurisdiction Brief. (App. 4).

The Fourth District Court of Appeal engaged in a detailed and thorough review of the trial court's Order. Since the issue presented a mixed question of law and fact, the Fourth District reviewed the trial court's factual findings to determine whether they were supported by competent, substantial evidence and engaged in a de novo review of the trial court's application of the law.

The Fourth District reversed in part and affirmed in part. (App. 9). The Fourth District held that a provision in the agreement prohibiting any award of attorneys' fees under FDUTPA was void. (App. 5). Based on a severability clause in the Agreement, however, the Fourth District held that the provision could be severed from the rest of the Agreement without affecting the intent of the parties to arbitrate. (App. 5). The Fourth District next reviewed the facts found by the trial court in its unconscionability analysis and agreed that there was an absence of procedural unconscionability. (App. 7). The Fourth District held that Ms. Fonte's reliance on ***Romano v. Manor Care, Inc.***, 861 So. 2d

59 (Fla. 4th DCA 2003) and *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999), was "misplaced" because both cases were distinguishable on the facts. (App. 7-8). The Fourth District affirmed the trial court and ordered that the parties shall proceed to arbitration. (App. 9).

The Fourth District's opinion did not announce new law and did not contain any language suggesting a conflict between its decision and any other cases. The court applied well-established principles of appellate review and clearly explained the factual distinctions between the facts of this case and the cases relied on by Ms. Fonte. The Fourth District did not certify any questions as being of great public importance. In fact, at no point during or after the appeal did Ms. Fonte even request that the Fourth District certify the matter as one of great importance. The time in which Ms. Fonte could do so has now lapsed.

## SUMMARY OF ARGUMENT

Petitioner's Brief fails to address the single issue before this Court at this time: Jurisdiction. Instead of addressing the jurisdictional basis for Supreme Court review, as required by the Florida Rules of Appellate Procedure, Petitioner simply rehashes the same merits arguments that were made during the proceedings before the Fourth District Court

of Appeal and argues that the Fourth District erred in affirming the trial court's Order compelling arbitration.

This Court's jurisdiction is strictly prescribed by Article V of the Florida Constitution. Without a constitutional basis for review, this Court cannot and should not exercise its discretionary jurisdiction. First, there can be no conflict jurisdiction in this case because the decision under review by the Fourth District Court of Appeal, on its face, does not expressly or directly conflict with any decision from another district court of appeal or of this Court on the same question of law. The case relied on by Ms. Fonte to establish conflict, *Romano v. Manor Care, Inc.,* 861 So. 2d 59 (Fla. 4th DCA 200), is also from the Fourth District Court of Appeal, the court that issued the opinion at issue. Even accepting Ms. Fonte's arguments as true, this would form the basis for an "intradistrict" conflict and this Court does not have discretionary jurisdiction over intradistrict conflicts.

Second, as for Ms. Fonte's claim that this case presents an issue of great public importance, discretionary review is not appropriate because the Fourth District did not certify the question under review as one of great public importance. At no point did Ms. Fonte even request that the issue be

certified. Finally, Ms. Fonte's remaining arguments based upon general public policy do not give rise to discretionary jurisdiction under the Florida Constitution. Ms. Fonte has failed to establish any type of jurisdictional basis for discretionary review of this appeal and therefore her petition should be dismissed.

## ARGUMENT

### I. Petitioner's Brief Does Not Address A Constitutional Basis for the Exercise of this Court's Discretionary Jurisdiction

Petitioner's Second Corrected Jurisdiction Brief fails to establish any grounds for this Court's jurisdiction. Instead, Ms. Fonte attempts to re-argue the merits of the case - an effort wholly out of place in this posture. She argues that the Fourth District Court of Appeal erred in affirming the trial court's Order by failing to adequately consider substantive unconscionability. Ms. Fonte is requesting certiorari review of the Fourth District's opinion without providing this Court with a proper jurisdictional basis.

This Court's jurisdiction is strictly prescribed by Article V of the Florida Constitution. The categories of jurisdiction set out in Article V are the sole and only bases for approaching this Court for certiorari review of the District Courts of Appeal. *See Lawyers Title Ins. Corp. v.*

*Little River Bank & Trust Co.,* 243 So. 2d 417 (Fla. 1970). Ms. Fonte's Brief fails to show the existence of any conflict or other constitutional ground which would entitle this Court to discretionary jurisdiction. In the absence of a clear jurisdictional basis, there is no right to a "second appeal." The Fourth District's decision was final and this finality cannot be circumvented by a further appeal or certiorari. *See generally Griffin v. State*, 367 So. 2d 736 (Fla. 4th DCA 1979); *Vetrick v. Hollander*, 464 So. 2d 552 (Fla. 1985) (without jurisdictional basis, petition for discretionary review must be dismissed because Supreme Court of Florida does not have common law certiorari jurisdiction).

Ms. Fonte took full advantage of her opportunity to appeal the trial court's ruling. The Fourth District engaged in a thorough analysis of the case and applied well-established Florida law. In *City of Jacksonville v. Florida First National Bank of Jacksonville*, 339 So. 2d 632 (Fla. 1976), the Court stated:

> The absence of a jurisdictional foundation for our review in this case is not a mere technicality. It is a matter of constitutional significance. In this case, the First District Court of Appeal did a thorough and thoughtful job of analyzing Florida case law in order to apply it to the facts of a particular controversy before it. This is precisely what the framers of Article V and the people of

Florida expect district court judges to do. *Id.* at 634. Similar to the petitioner in *City of Jacksonville*, Ms. Fonte received a thorough and thoughtful analysis of her case. Without a constitutional basis, she is not entitled to Supreme Court review.

## II. The Decision Under Review Does Not Expressly and Directly Conflict (and Petitioner Does Not Even Argue That It Conflicts) With a Decision from Another District Court of Appeal or of this Court on the Same Question of Law; Therefore Conflict Jurisdiction Does Not Exist.

Article V, § 3(b)(3) of the Florida Constitution permits the exercise of discretionary jurisdiction only where the decision under review "expressly and directly conflicts with a decision of **another district court of appeal** or of this Court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv) (emphasis added). This Court does not have jurisdiction because Ms. Fonte has failed to point to a decision of **another** district court of appeal or of this Court that is in express or direct conflict with the decision of which she seeks review. Rather, Ms. Fonte relies upon a prior decision of the Fourth District, *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. 4th DCA 2003), as the basis for this Court's jurisdiction. Even if these opinions did conflict, this would only create an "intradistrict" conflict and this

Court does not have discretionary jurisdiction over intradistrict conflicts.

As discussed in the Notes to Florida Rule of Appellate Procedure 9.030, this Court's jurisdiction over purely intradistrict conflicts, was terminated by the 1980 Amendment to Rule 9.030. *See also Jones v. State*, 790 So. 2d 1194, 1196 n.1 (Fla. 1st DCA 2001) (recognizing that Florida Supreme Court does not have jurisdiction over alleged intradistrict conflicts). There is an established procedure for the resolution of intradistrict conflicts; it is through en banc proceedings as set out in Florida Rule of Appellate Procedure 9.331. Ms. Fonte could have requested an en banc rehearing under Rule 9.331(d), she failed to do so. In addition, the Fourth District which has previously issued en banc opinions on cases dealing with enforceability of arbitration provisions, chose not to do so in this case. *See generally Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005) (en banc opinion regarding on a case dealing with enforceability of arbitration provision).

There is a rule of law which states that in cases of genuine intradistrict conflict, it is the decision that was issued later in time that overrules the former as the decisional law in the district. *See State v. Walker*, 593 So.

2d 1049 (Fla. 1992) (citing *Little v. State*, 206 So. 2d 9 (Fla. 1968)). Therefore, even if there was any conflict between the Fourth District's opinion in this case and its earlier decision in *Romano*, this opinion would control.

Further, there is no express or direct conflict on the face of the decision which would provide the Court with discretionary jurisdiction. Pursuant to Article V, section 3(b)(3), the Court can only exercise its subject-matter jurisdiction over opinions of a district court that address a point of law, within the four corners of the opinion itself, that is contrary to a decision of the Court or another district court of appeal. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). The Fourth District's decision in this case does not meet that requirement. The Fourth District's opinion, however, distinguished its *Romano* decision on the facts. *See generally Hill v. Hill*, 778 So. 2d 967 (Fla. 2001) (finding that Court cannot exercise discretionary jurisdiction where there is no express and direct conflict within the four corners of the opinion).

## III. Discretionary Jurisdiction May Not Be Exercised to Pass on a Question Which Has Not Been Certified of Great Public Importance

Although the Florida Constitution also permits the exercise of discretionary jurisdiction to "pass upon a

question certified to be of great public importance" that section does not provide jurisdiction in this matter because the Fourth District did not certify any question to be of great public importance. Article V, § 3(b)(5), Fla. Const; Fla. R. Civ. P. 9.030 (a)(2)(A)(v).

This Court may only review questions of great public importance that are **actually certified** by a district court of appeal. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 92 n.1 (Fla. 1995); *see also Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22, 23 (Fla. 1961)(“Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it does not pass upon a question of great public interest . . .”). The Fourth District did not certify that the decision involved a question of great public importance. Therefore, there is no basis for discretionary jurisdiction.

Ms. Fonte claims that this case is of particular importance due to the nature of her claims and the class action relief sought. Ms. Fonte’s case did not present a question of first impression or one of great public importance. As stated above, the analysis that the Fourth District engaged in to determine whether the arbitration provision was unconscionability is a well-established analysis

of the facts found by the trial court. The Fourth District applied this analysis to the unique facts of Ms. Fonte's case and determined there was no procedural unconscionability.

Similarly, the grounds for this Court's exercise of discretionary jurisdiction, as established by the Florida Constitution, do not include appeals to general public policy, like Ms. Fonte asserts here. Article V, § 3(b), Fla. Const.; Fla. R. App. P. 9.030 (a)(2)(A). Ms. Fonte's complaint about AT&T Wireless has been fully aired and does not give rise to jurisdiction here.

## CONCLUSION

This Court should dismiss Ms. Fonte's petition for review because she has not established a basis for this Court's discretionary jurisdiction under Article V of the Florida Constitution. Ms. Fonte exercised her right to appeal the trial court's Order to the Fourth District. The Fourth District engaged in a thorough analysis and de novo review of the law applied by the trial court. There is simply no basis for a common law certiorari in this case to allow Ms. Fonte a second appeal.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to George A. Hanson, Esq. and Amy E. Bauman, Esq., Stueve Siegel Hanson Woody LLP, 330 W. 47th Street, Suite 250, Kansas City, Missouri, 64112; and Carl F. Schoeppl, Esq., Schoeppl & Burke, P.A., 4651 North Federal Highway, Boca Raton, FL 33431-5133 on this ___ day of September, 2005.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
DAVID P. ACKERMAN

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