IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-749
(L.T. No. 1D06-4294)

BRUMOS MOTOR CARS, INC.,
a Florida Corporation,

Petitioner,

vs.

CAROLYN C. MONTGOMERY, *et al.*,

Respondents.

On Discretionary Conflict Review of a Class Certification
Decision of the First District Court of Appeal

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The claims in the court below arise out of Brumos Motor Cars, Inc.'s ("Brumos") alleged practice of adding a $379.70 flat fee to the price of its motor vehicles denominated "Administrative & State Fees" (the "Fee"). According to the Appellees, Brumos' practice of adding the Fee is a "per se" violation of Florida's Deceptive and Unfair Trade Practices Act. Fla. Stat. § 501.201, *et seq.* (2005) ("FDUTPA" or the "Act"). In the court below, Appellees sought to represent, in the form of a class, former customers who purchased or leased a vehicle from Brumos, and were charged the Fee.

Brumos moved to dismiss, asserting that each of the customers that leased an automobile (the "Lease Customers") during the time period relevant to the Complaint is a party to a Lease Agreement. Each of the Lease Agreements contains an arbitration provision requiring all disputes between the parties, including claims arising under FDUTPA, to be resolved through mandatory binding arbitration, and including broad class action waivers.

The evidence before the Trial Court was more than sufficient to support the enforceability of the arbitration provisions. For example, Brumos placed its Lease Customers on immediate and unambiguous notice that any disputes between the parties would be resolved through mandatory binding arbitration. The Lease Agreements themselves advised customers to thoroughly read the entire document,

contained the Florida State Motor Vehicle Lease Act Disclosures, disclosed the existence of the arbitration provision on the front of the document, and required Lease Customers to initial the disclosure. On a related note, the Appellees proffered two Lease Customers in support of their assertion that the arbitration provisions were unenforceable; both testified they elected not to read the Lease Agreements before signing them.

In the face of this paltry evidence, the trial court nevertheless denied Brumos' Motion to Dismiss, and in an over-reaching order prepared by Appellees' counsel and executed by the Trial Court without revision, invalidated literally thousands of arbitration provisions as unconscionable, contrary to Florida public policy and lacking in mutual assent and consideration (the "Trial Court Order"). Brumos filed a timely appeal of the Trial Court Order with the First District Court of Appeal (the "District Court"). After briefing and oral argument, a panel of the District Court issued an Opinion (the "Panel Opinion")[1] holding that the arbitration provisions in this case are "irreconcilably at odds with the remedial purpose of FDUTPA, contrary to public policy of this state, and unenforceable" because they

[1] *See* Appendix. Subsequent references to the Appendix will appear as the abbreviation "App." followed by the page number (i.e., App. 1.)

prohibit consumers from "pursing class relief for small but numerous claims against motor vehicle dealers."[2]

The Panel Opinion expressly and directly conflicts with the Fourth District Court of Appeal's decision in *Fonte v. AT&T Wireless Services, Inc.*, 903 So.2d 1019 (Fla. 4th DCA 2005). Moreover, in reaching its decision, the District Court interpreted Section 501.976, Florida Statutes in a manner that is inconsistent with its express terms and, more importantly, in a way that misapplies this Court's decision in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828, 831 (Fla. 1990) and other cases involving statutory prevailing party attorney's fees. Brumos' timely motion for rehearing, rehearing *en banc* or certification was denied on March 19, 2008, and on April 17, 2008, Brumos filed its notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The Panel Opinion is in express and direct conflict with both a decision from the Fourth District Court of Appeal and misapplies a decision from this Court. As a result, this Court has jurisdiction under Article V, § 3(b)(3) of the Florida Constitution, and should accept jurisdiction over this case to resolve the conflict.

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[2] *See* App. 22. The Court declined to address the trial court's alternative reasons for invalidating the arbitration provisions. App. 7, n.9.

ARGUMENT

I. THE DISTRICT COURT'S ERRONEOUS DECISION INVALIDATING THE ARBITRATION PROVISIONS AT ISSUE CONFLICTS WITH A DECISION FROM THE FOURTH DISTRICT COURT OF APPEAL THAT SQUARELY HELD THAT FDUTPA CONTAINS NO NON-WAIVABLE RIGHT TO SEEK CLASS RELIEF AND MISAPPLIES THIS COURT'S DECISIONS REGARDING STATUTORY PREVAILING PARTY ATTORNEY'S FEES.

A. The Panel Opinion Conflicts with the Fourth District Court of Appeal's Decision in *Fonte v. AT&T Wireless Services, Inc.*

This Court should accept jurisdiction in this case because the Panel Opinion directly and expressly conflicts with the Fourth District Court of Appeal's decision in *Fonte v. AT&T Wireless Services, Inc.*, 903 So.2d 1019 (Fla. 4th DCA 2005). In the Panel Opinion, the Court found as follows:

> In sum, we conclude that the contractual provisions at issue here which purport to prohibit consumers from pursuing class relief for small but numerous claims against motor vehicle dealers based upon alleged violations of section 501.976, Florida Statutes (2005), are irreconcilably at odds with the remedial purposes of FDUTPA, contrary to the public policy of this state, and unenforceable for that reason.

In contrast, in *Fonte*, the Fourth District Court of Appeal found as follows:

> We find that neither the text nor our review of the legislative history of FDUTPA suggests that the legislature intended to confer a non-waivable right to class representation.

Fonte, 903 So.2d at 1025 (4th DCA 2005).

In *Fonte*, the plaintiff brought a FDUTPA class action complaint against the defendant after the defendant refused to waive an early termination penalty in connection with the termination of plaintiff's telephone service. The early termination penalty was $175, or less than one-half of the Fee at issue in this case. *Id.* at 1023.

The *Fonte* arbitration agreement provided that the "*arbitrator [could] not . . . order consolidation or arbitration on a class wide or representative basis. . . .*" *Id.* at 1022 (emphasis in original). The trial court granted the defendant's motion to compel arbitration, and the plaintiff appealed. On appeal, the plaintiff argued that the arbitration provision was void as a matter of law because it defeated the remedial purposes of FDUTPA by preventing her from pursuing her claims as a class action. *Id.* at 1024-25.

The Fourth DCA rejected this argument, however, holding that the arbitration clause's bar on class representation did not defeat any of the remedial purposes of FDUTPA, and noting that "neither the text nor our review of the legislative history of FDUTPA suggests that the legislature intended to confer a non-waivable right to class representation." *Id.* at 1025.

Not surprisingly, *Fonte* was discussed extensively at oral argument before the District Court. Significantly for present purposes, counsel for Appellees acknowledged that the District Court would be hard pressed to invalidate Brumos'

arbitration provisions on public policy grounds without creating a conflict with *Fonte:*

> Judge Wolf: If we decide in favor, are we going to have to declare—in your favor—are we going to have to declare [conflict] possibly for the Fourth District.
>
> Mr. Dowdy [sic]:I think that it would be hard to reconcile the two opinions. The reasoning in the Fourth—in our brief we argued about we think the reasoning is wrong, but, you know, especially if you decide on public policy grounds, yes, I think there will be a conflict.

Despite counsel's concession, the District Court held that a FDUTPA plaintiff has a non-waivable right to class relief, but refused to certify conflict with *Fonte.*

B. The District Court Misinterpreted Section 501.976, Florida Statutes and Misapplied this Court's Decisions Regarding Statutory Prevailing Party Attorney's Fees

The District Court attempted to avoid certifying conflict with *Fonte* by interpreting Section 501.976 in a manner entirely inconsistent with the express terms of the statute. In doing so, the District Court misapplied this Court's decisions regarding statutory prevailing party attorney's fees, which gives rise to jurisdiction in this Court under Article V, § 3(b)(3) of the Florida Constitution.[3]

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[3] *See e.g., Aguilera v. Inservices, Inc.*, 905 So.2d 84, 86 (Fla. 2005)(accepting jurisdiction based on conflict created by misapplication of decisional law); *Knowles v. State,* 848 So.2d 1055, 1056 (Fla. 2003)(same);

Section 501.976, Florida Statutes, prohibits motor vehicle dealers from engaging in a number of practices, defining those practices as deceptive or unfair. § 501.976, Fla.Stat. (2005). The statute provides, in pertinent part:

> In any civil action resulting from a violation of this section, when evaluating the reasonableness of an award of attorney's fees to a private person, the trial court ***shall consider*** the amount of actual damages in relation to the time spent.

§ 501.976, Fla.Stat. (2005)(emphasis supplied). According to the District Court, "[d]isallowing class relief effectively prevents consumers with small individual claims based upon . . . violations of section 501.976 . . . from vindicating their statutory rights" because "attorney's fees are limited by" the statute.[4] The District Court read the above-quoted language as a cap on prevailing party attorney's fees exclusive of Section 501.976, and as such has misapplied this Court's decision in *Quanstrom. Quanstrom*, 555 So.2d at 831.

In *Quanstrom*, this Court clarified its holding in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) which held, among other

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Robertson v. State, 829 So.2d 901, 904 (Fla. 2002)(stating that misapplication of decisional law creates conflict jurisdiction); *Acensio v. State*, 497 So.2d 640, 641 (Fla. 1986)(accepting jurisdiction based on conflict created by misapplication of decisional law).

[4] App. 16, n.14.

things, that when the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingent risk multiplier when awarding a statutorily directed reasonable attorney fee. *Rowe,* 472 So.2d at 1151. The *Quanstrom* court emphasized that the words "must consider," as used in *Rowe*, do not mean "must apply." Instead, the phrase merely means that a trial court must consider whether or not to apply a contingency fee multiplier when awarding a statutorily directed reasonable attorney's fee. *Quanstrom*, 555 So.2d at 831.

Likewise, the Legislature's use of the words "shall consider" in Section 501.976 does not mean that a trial court "shall limit" prevailing party fees based on the amount of actual damages in relation to the time spent on the matter. It instead specifies one of the factors that a trial court must consider in awarding prevailing party attorney's fees. On that note, the District Court's effort to distinguish between the methods for calculating lodestar attorney fees in a cases arising under Sections 501.976 and 501.211, respectively, suggests that a trial court need not consider the amount of actual damages in relation to the time reasonably expended on the matter in cases proceeding under the latter statute. In so holding, the District Court has misapplied a long line of cases from this Court establishing the method that trial courts are to employ in calculating lodestar attorney fees in public policy enforcement cases. *See e.g., Quanstrom*, 555 So.2d at 833-34; *Rowe*, 472 So.2d at 1150-51.

The lodestar figure in such cases is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for the services of the prevailing party's attorney. *Rowe,* 472 So.2d at 1150-51; *Quanstrom,* 555 So.2d at 833-34. Under the approach mandated by this Court, trial courts ***must always consider*** the reasonableness of the number of hours expended independently from the reasonableness of the hourly rate when calculating a lodestar fee. *Rowe,* 472 So.2d at 1150-51.

According to this Court, "reasonably expended" means the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute and not the number of hours actually expended. *In re Platt,* 586 So.2d 328, 333-34 (Fla. 1991). Significantly for present purposes, "the magnitude of the case should be a consideration" in performing the calculation. *Id.*; *see also, Baratta v. Valley Oak Howmeowners' Assoc. at the Vineyards, Inc.*, 928 So.2d 495, 499 (Fla. 2d DCA 2006); *General Motors Acceptance Corporation v. Laesser,* 791 So.2d 517, 519 (Fla. 4th DCA 2001).

Similarly, this Court has mandated that trial courts consider and apply twelve factors in calculating a lodestar fee in a public policy enforcement case. *Quanstrom,* 555 So.2d at 834. Among other things, trial courts must consider "the amount involved and the results obtained." *Id., see also, R. Martin Salzgeber, DDS P.A. v. Kelly,* 826 So.2d 366 (Fla. 2d DCA 2002); *Franklin & Marbin P.A. v.*

Mascola, 711 So.2d 46 (Fla. 4th DCA 1998); *D&A Excavating Serv., Inc. v. J.I. Case Co.,* 555 So.2d 1256 (Fla. 4th DCA 1999).

The *Quanstrom* holding is consistent with Rule 4-1.5(b)(1)(D), Rules Regulating the Florida Bar. Under this Rule, one of the factors that must be considered in determining a reasonable fee is "the significance of, or amount involved in, the subject matter of the representation . . . ." R. Regulating Fla. Bar 4-1.5(b)(1)(D). In short, trial courts must always consider the amount of actual damages in relation to the time reasonably expended on the matter, and the District Court's suggestion to the contrary represents a misapplication of Rule 4-1.5, Rules Regulating the Florida Bar and *Quanstrom* and its progeny.

II. CONCLUSION

Based on the express and direct conflicts shown to exist, this Court should accept jurisdiction and reverse the improper decision invalidating the arbitration provisions at issue in this case.

Respectfully submitted,

Brant, Abraham, Reiter, McCormick & Greene, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to: Michael Lindell, Esq., Lindell, Farson & Pincket, P.A., 12276 San Jose Boulevard, Suite 126, Jacksonville, FL 32223 and John Mills, Mills & Carlin, P.A. 865 May Street, Jacksonville, FL 32204 this _____ day of April, 2008.

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Christopher J. Greene

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(d), Florida Rules of Appellate Procedure, counsel for the Appellant hereby certifies that this Jurisdictional Brief is prepared on Times New Roman 14-point type.

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Attorney

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