IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: _____
5th DCA Case No. 5D05-2565

RICHARD BASCIANO,

Petitioner,

v.

BANKERS TRUST COMPANY,
and LENNAR PARTNERS, INC.,

Respondents.

_____/

BRIEF ON JURISDICTION OF PETITIONER, RICHARD BASCIANO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASE LAW

STATEMENT OF FACTS AND CASE

On July 12, 2007, the Fifth District Court of Appeal ("5th DCA") rendered its its opinion (the "Opinion") reversing a Final Judgment ("Judgment") in favor of Petitioner, RICHARD BASCIANO ("Basciano"), and against Respondents, BANKERS TRUST COMPANY ("Bankers"), and LENNAR PARTNERS, INC. (collectively "Lennar"), by issuing its Order Denying Basciano's Motion for Rehearing, Rehearing En Banc, and Certification to this Court. The trial court had entered the $1.6 million Judgment after a jury found that Lennar had engaged in deceptive or unfair conduct violating Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") involving a $16.2 million loan serviced by Lennar and secured by a hotel owned by 3835 McCoy Road Orlando Hotel, L.C. ("3835"), a limited liability company in which Basciano had a substantial interest and an over $4 million investment.

SUMMARY OF ARGUMENT

This Court has jurisdiction over this case pursuant to Article V, Section 3(b)(3) of the Florida Constitution because the Opinion directly and expressly conflicts with, and is in fact diametrically opposed to, authority from this Court and multiple district courts of appeal. It is exceedingly important that this Court exercise its discretion to review the Opinion. If the Opinion remains standing, it will eviscerate innumerable otherwise valid and enforceable FDUPTA causes of action, leaving many Florida

consumers without any redress under the Act or otherwise. That dire result would directly contravene the Legislature's intentions in enacting FDUPTA.

ARGUMENT

I. THE OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT'S DECISION IN PNR, INC. V. BEACON PROPERTY MANAGEMENT, INC., AND MULTIPLE DISTRICT COURTS OF APPEAL THAT HAVE REPEATEDLY HELD THAT FDUTPA CLAIMS ARE SEPARATE, DISTINCT FROM, AND WHOLLY INDEPENDENT OF CLAIMS FOR BREACH OF CONTRACT.

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution ("Art. V, § 3(b)(3)"), this Court has discretionary jurisdiction over decisions issued by district courts of appeal that directly and expressly conflict with a decision from this Court or another district court of appeal. This Court may exercise its "conflict jurisdiction" when a district court of appeal announces a legal principle that conflicts with a decision from this Court or a sister court. Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). "It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under" Article V, § 3(b)(3).

Based on these standards, this Court clearly has discretion to exercise conflict jurisdiction over the 5th DCA's Opinion because it announced legal principles regarding the viability of FDUTPA claims in the absence of an enforceable contract that are diametrically opposed to this Court's decision in PNR, Inc. v. Beacon Property Management, Inc., 842 So.2d 773 (Fla. 2003) and

multiple decisions from district courts of appeal. Those decisions have repeatedly and uniformly held that FDUTPA claims are separate, distinct from, and wholly independent of breach of contract claims.

In this case, the Opinion erroneously held that Basciano could not assert a viable FDUTPA claim against Bankers and Lennar because Basciano did not have an enforceable contract with them. The Opinion states in pertinent part:

> On appeal, Appellants' primary argument is that **Mr. Basciano is precluded from asserting claims of** negligent misrepresentation and **FDUTPA violations** based on the August 1999 discussions with Lennar because, at best, **the result of those discussions was an agreement to agree in the future. Appellants contend that such an understanding creates no enforceable contract and that the same conduct and representations cannot form the basis for Mr. Basciano's other claims as they are merely derivative of an otherwise unenforceable agreement. We agree.**
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> * * *
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> **We further conclude that the trial court erred when it failed to grant summary judgment or JNOV on Mr. Basciano's negligent misrepresentation and FDUTPA claims as those claims were premised on the same conduct and representations that were insufficient to form a contract and are merely derivative of the unsuccessful contract claim. To hold otherwise would allow every failed breach of contract claim to morph into a negligent misrepresentation or FDUTPA claim.** The well-established laws governing contracts should not be so casually dismissed. (emphasis supplied; citations omitted)

This Court expressly rejected this reasoning in PNR by stating:

> Contrary to the position articulated in the dissenting opinion of Justice Wells, **this opinion does not operate to convert every breach of contract or breach of lease case into a claim under the Act. Indeed, such a construction would be precluded by the FDUTPA,**

> **which only reaches conduct that is unfair or deceptive as judged by controlling case law.** To the extent an action giving rise to a breach of contract or breach of lease may also constitute an unfair or deceptive act, such a claim is and has always been cognizable under the FDUTPA. Our holding today merely remands the case to the district court for consideration under appropriate law and changes nothing with regard to such issue.

PNR, 842 So.2d at 777, n. 2 (emphasis supplied). As such, contrary to the 5th DCA's Opinion, this Court specifically found in PNR that the requirement of proving deceptive or unfair conduct prevents a breach of contract claim from easily "morphing" into a FDUTPA claim. Simply put, a FDUTPA claim gains its viability by being based upon "unfair or deceptive" conduct, and simply does not rely upon the existence of a contract.

The 5th DCA's Opinion in this case is also directly contrary to Fendrich v. RBF, L.L.C., 842 So.2d 1076 (Fla. 4th DCA 2003). In Fendrich, the court specifically held that a prospective purchaser of real estate could prosecute a FDUTPA claim against the seller even though the court found that the reservation form executed by parties was not an enforceable contract. Id. at 1079-80. This conclusion is fully in accord with PNR and directly contrary to the 5th DCA's finding that Basciano's FDUPTA claim was "merely derivative of an otherwise unenforceable agreement" and, therefore, Basciano has no valid FDUTPA claim.

The Opinion also directly and expressly contradicts three other decisions from the district courts of appeal holding that FDUPTA claims are separate and

distinct from breach of contract claims and operate independently of any contract. See Management Computer Controls, Inc. v. Charles Perry Construction, Inc., 743 So.2d 627 (Fla. 1st DCA 1999); Sarkis v. Pafford Oil Co., 697 So.2d 524 (Fla. 1st DCA 1997); and Delgado v. J.W. Courtesy Pontiac GMC-Truck, 693 So.2d 602, 606 (Fla. 2d DCA 1997), citing Pinellas County Dept. of Consumer Affairs v. Castle, 392 So.2d 1292, 1293 (Fla. 1980). These cases respectively state in pertinent part as follows:

> The unfair trade (FDUTPA) claim is an **independent statutory claim** that is severable from all the remaining claims. **It does not arise out of the contract, nor does it exist solely for the benefit of the parties to the contract.** Management Controls, 743 So.2d at 632 (emphasis supplied).
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> Even if such an action (a FDUTPA claim) could be characterized as a statutory tort, it would not be barred by the economic loss rule because **it is plainly independent of the contract. The purpose of this statute is not merely to provide a remedy for an individual but to protect consumers at large from unfair trade practices. A party who asserts a claim under the statute must prove the existence of an unfair or deceptive act or practice. The elements of this statutory action are independent of the elements of a simple breach of contract and the remedies available for a " willful" violation of the statute, as alleged in the amended complaint, are not the same as those available in a contract action.** Sarkis, 697 So.2d at 528 (emphasis supplied; citations omitted).
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> (T)he remedies of the FDUTPA are 'in addition' to other remedies available under state or local law. Delgado, 693 So.2d at 606.
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The foregoing demonstrates that the 5th DCA, in issuing the Opinion, stands alone and diametrically opposed to this Court and other courts. It cites no authority to support its holding that Basciano's FDUTPA claim cannot stand because it is not founded upon a contract. That is because no such authority exists, and indeed Florida law expressly rejects that position. In sum, the 5th DCA's Opinion expressly and directly conflicts with this Court's authority and that of other district courts of appeal, meriting this Court's review of the Opinion.

II. IT IS VITALLY IMPORTANT THAT THIS COURT EXERCISE ITS CONFLICT JURISDICTION AND ACCEPT THIS APPEAL BECAUSE THE 5TH DCA'S OPINION IS DIRECTLY CONTRARY TO FDUTPA'S LANGUAGE AND LEGISLATIVE INTENT. IF LEFT STANDING, THE OPINION WILL VITIATE INNUMERABLE OTHERWISE ENFORCEABLE FDUTPA CLAIMS AND LEAVE CONSUMERS WITHOUT ANY REMEDY FOR DAMAGES SUFFERED FROM DECEPTIVE AND UNFAIR PRACTICES.

While a FDUTPA cause of action and a breach of contract claim may exist together (and often do), a defendant's conduct will frequently be unfair and deceptive without a contract in place, but still a violation of FDUTPA. That way, wronged consumers can have a remedy even if they do not have a contract. FDUTPA accordingly reaches false advertising claims and a myriad of other deceptive trade activities that occur without a contract in place.

Two statutes, sections 501.204(1), Florida Statutes and 501.203(8), Florida Statutes, confirm this point, and they respectively read as follows:

* * *

> (1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of **any trade or commerce** are hereby declared unlawful. (emphasis supplied)
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> (8) **"Trade or commerce" means the advertising, soliciting, providing, offering**, or distributing, whether by sale, rental, or otherwise, of **any good or service, or any property, whether tangible or intangible**, or any other article, commodity, **or thing of value,** wherever situated. "Trade or commerce" shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity. (emphasis supplied)
>
> * * *

The breadth of FDUTPA represented by these provisions is no surprise considering that "…by enacting FDUTPA, the legislature clearly intended to establish a new cause of action for the benefit and protection of the consuming public." Delgado, at 606.

In the present case, Defendants' conduct falls directly within the scope of these statutes and the legislature's intent. The Opinion, however, improperly attempts to rewrite these statutes to limit the scope of conduct actionable under FDUTPA to that which will support a breach of contract claim. In so doing so, the Opinion incorrectly concludes that a statutory FDUTPA cause of action is somehow "derivative" of a common law contract claim.

The Opinion, if left standing, could lead FDUTPA down a very dangerous path. Specifically, in the Fifth District and any other districts that follow the

Opinion, any consumer who has a contract with a party that has unfairly or deceptively treated them would lose the sweeping protection that FDUTPA provides. Simply put, consumers would lose valid, valuable, and established causes of action.

That undesirable path mirrors the course on which courts were headed with the economic loss rule. After Florida adopted the economic loss rule, courts began applying it to more and more non-breach of contract causes of action. In many cases, it got to the point where if two parties had a contract, the wronged party had no cause of action other than that for breach of contract, no matter what other wrongs the party had suffered. It appeared as though the economic loss rule might swallow all causes of action other than breach of contract. Finally, this Court had seen enough and intervened in Moransais v. Heathman, 744 So.2d 973 (Fla. 1999).

In Moransais, this Court, concerned with the vast and ill-advised economic loss rule expansion, drastically limited the rule's applicability. It stated in pertinent part as follows:

> The situations in *HTP, Ltd., PK Ventures, A.R. Moyer, Max Mitchell,* and *First American Title Insurance Co.* serve as reminders of the distinct limitations of the economic loss rule. Today, we again emphasize that by recognizing that the **economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action,** such as those for neglect in providing professional services.

After Moransais, courts have been much more circumspect in applying the economic loss rule, such that wronged parties retain their rights to pursues well-established and valid cause of action, no matter whether a contract exists.

As with Moransais, this Court has the opportunity to protect well-established and extremely important causes of action, *i.e.*, FDUTPA actions when no contract exists. If left standing, the Opinion could have the same malignant effect as did the various decisions that vastly expanded the economic loss rule, *i.e.*, stripping many wronged parties of valid causes of action. In spite of the plain language and policy of FDUTPA, courts could start refusing FDUTPA claims relating to advertising, offering, soliciting, and the like simply because no contract is reached.

The legislature never intended that result, just like this Court never intended the vast economic loss rule expansion to result from its announcement of the rule. If this Court acts now and reverses the Opinion, however, the chipping away of FDUTPA does not have to go as far as the expansion of the economic loss rule. This Court can, once and for all, highlight the breadth of FDUTPA that the legislature originally intended, and preserve FDUTPA actions no matter the contractual status.

CONCLUSION

The foregoing demonstrates that this Court has discretionary jurisdiction to review the Opinion, and further demonstrates that this Court should exercise that discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was by facsimile and U.S. Mail on this ___ day of August 2007 to: KIMBERLY A. ASHBY, Akerman, Senterfitt, P.O. Box 231, Orlando, FL 32802; and PHILLIP D. PARRISH, Phillip D. Parrish, P.A., One Datran Center, 9100 S. Dadeland Boulevard, Penthouse One, Suite 1710, Miami, FL 33156.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing Respondent's Brief on Jurisdiction complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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