IN THE SUPREME COURT OF FLORIDA

CASE NO.

JAMES SOPER, et al.

Petitioners,

vs.

TIRE KINGDOM, INC.,

Respondent. /

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

This case presents the questions of whether the Third District's decision is consistent with this Court's decision in *Sosa v. Safeway Premium Fin. Co.*, No. SC09-1849 (Fla. July 7, 2011), and, further, whether *Sosa* is harmonious with the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 2011 WL 2437013 (U.S. June 20, 2011). The day before this Court released its opinion in *Sosa*, quashing the Third District's decertification of a consumer class action, another panel of the Third District issued an opinion reversing another consumer class action – this one under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") – using the same analytic model now discredited by the Court's opinion in *Sosa*. *Sosa* did not involve FDUTPA claims, so this case presents an important opportunity to clarify how the standards of Rule 1.220 of the Florida Rules of Civil Procedure apply in the frequently litigated context of FDUTPA claims.

The trial court certified two classes of automotive service customers – one statewide and one for Miami-Dade County – who claim to have been damaged by Tire Kingdom's practice of charging a 10% "shop fee" that it did not disclose in its advertisements for discounted automotive services (such as for oil changes or tire rotation). Each class encompassed two different sub-classes of class

members: those whose discount coupons failed to disclose the shop fee, and those whose discount coupons did disclose shop fee, but failed to reveal that Tire Kingdom calculates its 10% shop fee based on the undisclosed retail price of the service rather than the advertised discounted price. The the Third District reversed the class certification order. Its opinion addressed only the commonality and typicality prongs of Rule 1.220(a). Its commonality analysis focused on what it considered to be the individualized issues that would arise in Plaintiff's and the class members' FDUTPA claims.

Both in that analysis and that of the typicality prong, the district court appears to have engaged in a *de novo* review of the record rather than an explanation of how the trial court's findings were an abuse of discretion or were unsupported by substantial competent evidence. As we demonstrate below, these approaches are in express and direct conflict with three points of law set forth in *Sosa*.

II. ISSUE PRESENTED ON JURISDICTION

A. WHETHER THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *SOSA v. SAFEWAY PREMIUM FIN. CO.*, NO. SC09-1849 (Fla. July 7, 2011).

III. SUMMARY OF ARGUMENT

The district court's decision is in express and direct conflict with this Court's recent decision in *Sosa* which held, in pertinent part, that: (1) the commonality prong of Rule 1.220(a) does not involve an analysis of individualized issues in the proof of the class members' claims or defenses thereto, but instead the question of whether the class members' claims arise from a common course of conduct by the defendant and advance the same legal theory; (2) a class certification order must be reviewed for an abuse of discretion, not *de novo*; and (3) the typicality analysis looks to a similarity in legal theories and lack of antagonism between the class representatives and class members. The Third District's opinion in *Tire Kingdom* conflicts with all of these propositions.

IV. ARGUMENT

A. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *SOSA v. SAFEWAY PREMIUM FIN. CO.*

1. The Third District's Commonality Analysis Conflicts With *Sosa*

The Third District's commonality analysis not only mimicked the approach this Court has rejected as "erroneous," *Sosa*, slip op. at 30, but it took that analysis a step further in the wrong direction, importing into the Rule 1.220(a)

commonality analysis principles applicable only to the predominance analysis under Rule 1.220(b)(3).

In *Sosa*, this Court evaluated another case in which the Third District decertified a consumer class action for ostensible failure to satisfy the commonality prong of Rule 1.220(a). In language that could apply equally to this case, this Court explained that "[t]he Third District's reason for the reversal was that 'there would be different circumstances for each individual member of the class which would serve as the base for and as defenses to the additional premiums charged.'" *Sosa*, slip op. at 30 (quoting *Sosa v. Safeway Premium Fin. Co.*, 15 So. 3d 8, 11 (Fla. 3rd DCA 2009)). This Court noted that the district court's "focus[] only on the possibility of mere factual differences in the individual circumstances surrounding each of the putative class members' claims and the variances in defenses to them" was mistaken because the commonality requirement is more easily satisfied: the plaintiffs need only show that "the class members predicated their claims on the same *common course of conduct by the defendant* and *the same legal theory*." *Id.* at 30-31 (emphasis in original). This Court quashed the Third District on this point because the *Sosa* plaintiffs had adequately shown that the defendant had engaged in a "common course of conduct and business practice." *Id.* (emphasis omitted).

In the case below, the Third District employed the very same, flawed commonality analysis that it had used in *Sosa*, again focusing on possible individualized issues rather than upon Tire Kingdom's common business practice underlying the putative class members' claims. The district court ignored two aspects of Tire Kingdom's admitted business practices which underlie the class claims.[1] Instead, it focused on its belief that "individualized proof would be required." *Tire Kingdom*, slip op. at 21; *see id.* at 22 (listing individualized issues). This focus misunderstands the requisites of the commonality prong of Rule 1.220(a).

The Third District also apparently believed that the analysis of commonality mirrors the predominance analysis under Rule 1.220(b)(3). As part of its commonality analysis, it invoked authorities pertinent to a Rule 1.220(b)(3) predominance analysis, concerning the inappropriateness of "'common proof'" as a stand-in for individual determinations. *Id.* at 24-25 (citing *Rollins v. Butland*, 951 So. 2d 860, 873-75 (Fla. 2nd DCA 2006), and *Kia Motors Am. Corp. v. Butler*,

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[1/]The first involves the practice of disseminating coupons over the internet which promoted a discounted service price but failed to disclose a shop fee, and charging customers with those coupons a shop fee nonetheless. The second involves the practice, in cases where Tire Kingdom's coupons advertised a discounted service price and did mention a 10% shop fee, of basing the shop fee upon the undiscounted retail price of the service, rather than the advertised discounted price.

985 So. 2d 1133, 1138 (Fla. 3rd DCA 2008)).[2] As this Court made clear in *Sosa*, this type of inquiry concerning proof and the possibility of individualized determinations is not pertinent to the commonality inquiry.

The Third District's approach to commonality below runs afoul of the rule in *Sosa* in another respect. This Court recognized that the commonality requirement may be satisfied "if the common or general interest of the class members is in . . . the general *question* implicated in the action." *Sosa*, slip op. at 24-25. In other words, it suffices "if the questions linking the class members are substantially related to the resolution of the litigation." *Id*. at 25. The Third District seemingly misconstrued the *Wal-Mart* opinion to require a narrower focus than this Court permitted in *Sosa*, suggesting that the type of common questions the U.S. Supreme Court rejected in a nationwide employment-discrimination case against the nation's largest retailer apply to a FDUTPA class of Florida consumers. *See Tire Kingdom*, slip op. at 18-19 & n.12. This Court in *Sosa* rejected an entreaty to address *Wal-Mart* in the context of a consumer class action,

[2/] The pages from these opinions which the Third District cited plainly contain those courts' Rule 1.220(b)(3) analyses. That is self-evident from the page cited in *Kia*. In *Rollins* it can be seen from a look back to the beginning of the cited discussion. *See Rollins*, 951 So. 2d at 869.

but that silence invites the kind of undue constriction of the commonality analysis the district court has undertaken here.

2. The Third District Employed the Wrong Standard of Review

In *Sosa*, this Court also faulted the Third District for having failed to give any "deference to the trial court's factual findings" and "ma[king] its own independent determination as to whether Sosa satisfied the requirements of Rule 1.220." *Sosa*, slip op. at 15. In the case below, the Third District has committed the same error once again, an approach now in direct conflict with this Court's holding in *Sosa* that a district court must "*apply*[] the abuse of discretion standard of review to the trial court's grant of class certification," not just purport to do so. *Id.* (emphasis added).

It is admittedly difficult to demonstrate the district court's failure to abide by this standard of review based on the four corners of an opinion which selectively recites the facts in the record without giving any deference to, and omitting reference to, different facts found by the trial court. However, the few places in its opinion that the district court does quote the trial court's factual findings are like protruding threads of error which, when pulled, suffice to demonstrate that the district court failed to employ the proper standard of review.

In its discussion of commonality, the district court repeated the trial court's factual finding that "'Tire Kingdom repeatedly and with only non-material variations published the same advertisements across Miami-Dade County and the State of Florida.'" *Tire Kingdom*, slip op. at 16 (quoting trial court order). It assailed the trial court's fact-finding as "not supported by the record." *Id.* at 17. Yet the district court's own recapitulation of the evidence concerning Tire Kingdom's advertisements does not demonstrate that supposed lack of support in the trial court's characterization of the evidence. If anything, they shed light on the district court's impermissible foray into *de novo* review. The district court notes that Plaintiff Dishkin's internet coupon for a $16.99 oil change "did not mention shop fees, hazardous material disposal charge, or any other charge, including taxes." *Id.* at 3. Similarly, Plaintiff Soper's coupon for a $19.99 "tire maintenance" also "did not mention shop fees, hazardous material disposal charge, or any other charge, including taxes." *Id.* at 6. It did state that it applied to "Most Cars and Light Trucks." *Id.* And Tire Kingdom's Vice-President of Marketing admitted that some coupons "failed to include" the disclosure of a shop fee. *Id.* at 12. The district court minimized those instances. As to the coupons that did disclose the shop fee, the district court noted that their "language . . . does

not appear to be uniform." *Id.* at 11. Some say "Plus Shop Fee" while others say "Plus Shop Fee at 10%." *Id.*

None of these facts, as stated by the district court, undermine the trial court's finding that the "variations" in Tire Kingdom's discount advertisements were "non-material." Materiality, of course, is determined with reference to the claims at issue. And both types of discount coupons – those that failed to disclose the shop fee at all, and those that disclosed the shop fee but not the fact that it was calculated based on the undisclosed retail price – are alleged to be unfair and deceptive trade practices, just for different sub-classes of customers. *See id.* at 2, 20. Thus, nothing in the district court's opinion demonstrates that the trial court's finding of fact lacked record support. This Court in *Sosa* stated that for a district court properly to demonstrate how a trial court's fact-finding was unsupported in the record, it must "point[] to the lack of competent, substantial evidence supporting the trial court's order[.]" *Sosa*, slip op. at 15. The district court did not do that here.

Nor did it defer to the trial court, or demonstrate how its fact-finding was unsupported in the record, on the issue of typicality. The district court simply asserted, without elaboration, that the record was "devoid of evidence" supporting the trial court's finding that "Tire Kingdom engaged in 'a common scheme.'" *Tire*

Kingdom slip op. at 26 (quoting *Safeway Premium Fin. Co. v. Sosa*, 15 So. 3d 8 (Fla. 3rd DCA 2009), *quashed sub nom. Sosa v. Safeway Premium Fin. Co.*, No, SC09-1849 (Fla. July 7, 2011)).

In summary, here as in *Sosa* "the Third District made its own findings . . ." *Sosa*, slip op. at 15.[3]

3. The District Court's Typicality Analysis Conflicts With *Sosa*

The typicality standard the district court invoked conflicts with that articulated in *Sosa*. The "key" to the typicality inquiry is that the class representative have "the same legal interest" and "endure[] the same legal injury as the class members." *Sosa*, slip op. at 41. This Court emphasized that "[m]ere factual differences between the class representative's claims and the claims of the class members will not defeat typicality," provided that "there is a strong similarity in the legal theories upon which the claims are based and when the claims of the class representative and class members are not antagonistic to one another." *Id.* at 41-42. The district court did not apply this relatively low bar. Notwithstanding that it acknowledged that the Plaintiffs alleged "the same theories

[3]If the Court were to grant review, and broaden its gaze to the trial court's opinion and the record, it would learn that the district court ignored many of the trial court's findings and instead chose to view the record according to its own lights, which happen to be quite dim on consumer class actions.

of recovery" as each class member, it rejected typicality on the ground that Plaintiffs' claims would require proof of unspecified facts that differ from those of the class members. *Tire Kingdom*, slip op. at 25-26. This conclusion conflicts with *Sosa*, which holds that typicality exists irrespective of factual differences, so long as the legal theories are the same and there is no antagonism. The district court made no mention of antagonism (and there is none), so it should not have found typicality lacking.

V. CONCLUSION

The Court should invoke its jurisdiction in this case for three reasons: (1) to quash the district court's errors, (2) to clarify explicitly the point this Court impliedly made in *Sosa*, that *Wal-Mart* does not change Florida law on the requirements of commonality, and (3) to address the nettlesome question of the circumstances in which FDUTPA claims are amenable to class treatment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

s/Stephen F. Rosenthal
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 18th day of July, 2011, to: Elliot H. Scherker, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131-3224; Scott A. King, Esq., Thompson Hine LLP, 2000 Courthouse Plaza, N.E., Post Office Box 8801, Dayton, Ohio 45401-8801; Richard H. Critchlow, Esq., Kenny Nachwalter, 201 S. Biscayne Boulevard, Suite 1100, Miami, Florida 33131-4327; Jon Herskowitz, Esq., The Herskowitz Law Firm, Penthouse One, Suite 1704, 9100 South Dadeland Boulevard, Miami, Florida 33156; Seth E. Miles, Esq., Grossman Roth, P.A., 2525 Ponce de Leon Blvd. Suite 1150, Coral Gables, Florida 33134.

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