

SUPREME COURT OF FLORIDA

CASE NO. SC14-1375

PETER DIAMOND, et al.,

Petitioners,

v.

PORSCHE CARS NORTH
AMERICA, INC.,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

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

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I. STATEMENT OF THE CASE AND FACTS

The instant case joins a long line of certified class actions to be decertified after review by the Third District Court of Appeal.¹ The Panel here held that differences in the individual circumstances of the class members precluded certification, despite having similar holdings reversed in *Sosa v. Safeway Premium Fin. Co.*, 73 So.3d 91 (Fla. 2011) and *Soper v. Tire Kingdom, Inc.*, 124 So.3d 804 (Fla. 2013). In doing so, the Panel exceeded its authority by adopting a new standard for “unfair trade practices” in conflict with the definition set forth in this Court’s decision in *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773 (Fla. 2003), as well as decisions from four of the five District Courts of Appeal.

The instant case was brought by four Porsche customers on behalf of the class of Florida Porsche customers who were damaged when their headlights were stolen by thieves who exploited a weakness in the design of the headlight retention system. Porsche’s design, unlike the design of other makes and models, provided little to no resistance to removal by thieves. As a result, Porsche owners suffered theft at a significantly disproportional rate.² After becoming aware of this problem, Porsche and its parent company jointly considered several design

¹ By our count, the Third District has decertified or otherwise disposed of 17 of the 19 certified class actions it has reviewed over the last ten years.

² For example, the evidence below demonstrated that during the relevant time frame, almost half of all the headlights stolen in Coral Gables were stolen from Porsches.

solutions that would reduce the risk of headlight theft in current and future models.³ Ultimately, nothing was done with respect to the issue, and Porsche instead continued to profit from its customers' ongoing losses through the sale of replacement headlights. The trial court certified an unfair trade practice class of all Porsche customers who had suffered damages from headlight theft, as well as two unjust enrichment sub-classes.

The Third District reversed the class certification. In doing so, the court adopted a definition of unfair trade practice that had never before been used in any Florida decision. The court then held that whether or not a potential class member had knowledge of the risk of theft before purchasing or leasing their car was a defense to both the FDUTPA and Unjust Enrichment Claims, and, because such knowledge would require individual inquiry, class certification was inappropriate on both claims

As we will demonstrate below, that conclusion is in express and direct conflict with this Court's opinion in *Sosa*, and the unfairness standard adopted is in express and direct conflict with this Court's decision in *PNR, Inc.*

II. ISSUE PRESENTED ON JURISDICTION

³ If the Court were to grant review and look to the trial court's opinion and the record, it would learn that contrary to this Court's directive in *Sosa*, The Third District "gave no deference to the trial court's factual findings" and instead conducted its own review of the record, adopting Porsche's position on many of the disputed facts. *Sosa* at 103.

WHETHER THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *SOSA v. SAFEWAY PREMIUM FIN. CO.*, 73 SO.3D 91 (FLA. 2011) AND *PNR, INC. v. BEACON PROP. MGMT., INC.*, 842 SO.2D 773 (FLA. 2003).

III. SUMMARY OF THE ARGUMENT

In the interest of preserving space for our substantive arguments, we would request the Court's indulgence in allowing us to skip the summary of argument.

IV. ARGUMENT

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

The Third District's analysis in the instant case mirrored that of two recent decisions that this Court has quashed.

Here, the Third District held that class certification was inappropriate because "the individual knowledge and experience of the consumer is an important element of the cause of action and its defense, there can be no class-wide proof that injury was not reasonably avoidable." Opinion at 17.

This rationale is no different than the one the Third District used to decertify the class in *Sosa*, which was rejected by this Court: "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* at 110 (quoting *Sosa v. Safeway Premium Fin. Co.*, 15 So. 3d 8, 11 (Fla. 3rd DCA 2009))

And it is no different than the rationale set forth in *Tire Kingdom, Inc. v. Dishkin*, 81 So.3d 437, 449 (Fla. 3d DCA 2011):

To make this determination, it follows that each class member's Tire Kingdom experience—including the precise language of each advertisement, the class member's awareness of Tire Kingdom's shop-fee signage, and the class member's conversations with Tire Kingdom employees—would have to be explored to determine Tire Kingdom's liability to each class member.

After reviewing only the jurisdictional briefs, this Court quashed *Tire Kingdom* for failure to follow *Sosa*. See *Soper v. Tire Kingdom, Inc.*, 124 So.3d 804 (Fla. 2013).

Despite this Court's clear rejection of the Third District's practice of decertifying class actions based on the individual distinctions between potential class members, the Third District continues this practice. As this Court explained in *Sosa*, in language that could apply equally to this case, the Third District'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 improper. Instead, 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).⁴ This Court quashed the Third District on this point because the *Sosa*

⁴ We acknowledge that the Third District held in the instant case that we failed to satisfy the predominance requirement, while the opinions in *Sosa* and *Tire Kingdom* held that the respective plaintiffs failed to satisfy the commonality requirement. However, this is a distinction without a difference. The rationale in each was that individual issues would predominate over common issues, which is

plaintiffs, like the Plaintiffs here, had adequately shown that the defendant had engaged in a “common course of conduct and business practice.” *Id.* (emphasis omitted).

The common thread running through *Sosa*, *Tire Kingdom*, and the instant opinion is the Third District’s focus on potential differences between the prospective class members, no matter how immaterial, rather than on the undisputed uniformity of the Defendant’s conduct towards all potential class members.

The knowledge of individual class members is immaterial in determining Porsche’s liability under both this Court’s definition of unfairness, as we will discuss below, and the unjust enrichment claim. The Panel’s conclusion that a class member’s knowledge of the risk of *potential* theft before they purchased or leased their car somehow acts as a defense to Porsche’s conduct under an unjust enrichment claim essentially revives the defense of assumption of risk, a defense that was abrogated by this Court in *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977), and was never a defense to an unjust enrichment claim in the first instance.⁵

no different than the predominance analysis. Indeed, the authority that the *Tire Kingdom* panel cited to in support of its holding specifically dealt with the predominance analysis. *Tire Kingdom* at 448 (citing *Rollins v. Butland*, 951 So. 2d 860, 873-75 (Fla. 2nd DCA 2006), and *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1138 (Fla. 3rd DCA 2008)).

⁵ There is a significant difference between knowledge of the existence of a potential risk, and an acceptance that an event will actually occur. If knowledge of a potential risk of a defect served as a complete defense to products liability claims, then anyone injured in the future as a result of a GM ignition switch failure

B. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *PNR, INC. v. BEACON PROP. MGMT., INC.*, AND OPINIONS FROM FOUR OF THE FIVE DISTRICT COURTS OF APPEAL.

In *PNR, Inc.*, this Court defined an unfair practice as "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla. 2003). All four DCA's that have had occasion to utilize the definition of an unfair trade practice have used this definition.⁶ The Third District's opinion here readily acknowledges that it is adopting a definition of unfairness that has never before been utilized by any Florida Court in the past.

Respectfully, in adopting this new standard, the Third District has exceeded its authority. As this Court explained in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973):

To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.... They are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however,

would be barred from making a claim because the risk has been so well publicized.

⁶ The Third District's opinion cites to four of the eleven District Court cases utilizing the definition: *Suris v. Gilmore Liquidating, Inc.*, 651 So.2d 1282, 1283 (Fla. 3d DCA 1995); *Cummings v. Warren Henry Motors, Inc.*, 648 So.2d 1230, 1233 (Fla. 4th DCA 1995); *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451, 453 (Fla. 1st DCA 1985); and *Rollins, Inc. v. Butland*, 951 So.2d 860 (Fla. 2d DCA 2006). It fails to mention that the *PNR, Inc.* definition has also been utilized in a recent 11th Circuit decision (*Hetrick v. Ideal Image Dev. Corp.*, 372 Fed. Appx. 985, 992 (11th Cir. 2010)) and 103 Florida Federal District Court decisions, 97 of them issued since 2003.

bound to follow the case law set forth by this Court.

Hoffman at 434, 439. Trial courts within the Third District now face the potential for “great confusion and much delay” described in *Hoffman*, as they are now faced with a new definition of unfairness that conflicts with the definition utilized not only by this Court, but also by two previous Third District panels. *Hoffman* at 434.

To give this Court a true idea of how far afield the Third District has wandered in adopting this three part standard, we would first refer the Court to Fla. Stat. §501.203(3), which states that a violation of FDUTPA may be based upon *any* of the following:

- (a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;
- (b) The *standards* of unfairness and deception set forth and interpreted by the Federal Trade Commission *or the federal courts*;
- (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices. (emphasis supplied)

The Third District’s opinion itself acknowledges that the standard it is adopting is merely “*one of the* ‘standards of unfairness’ interpreted by the Federal Trade Commission and federal courts.” Opinion at 11 (emphasis supplied). But rather than treating it as merely one, the Third District treats it as the *only* applicable standard, ignoring all other sections of the statute that adopt other standards.

As we noted above, we located 104 Florida federal court decisions applying the *PNR, Inc.* standard. Conversely, we located only 11 Florida federal court

decisions applying the three part standard the Third District purports to adopt here, and of those 11 cases, 9 were FTC enforcement actions. The three part standard has been utilized in only two FDUTPA cases brought by private plaintiffs -- *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices*, 715 F. Supp. 2d 1265, 1280 (S.D. Fla. 2010), and *Burrows v. Purchasing Power, LLC*, 2012 WL 9391827 (S.D. Fla. 2012), which cited *Court Reporting Firms* as its only authority. And even the court in *Court Reporting Firms* applied both the three part standard and the *PNR, Inc.* standard, which it called the “more malleable test.” *Court Reporting Firms* at 1280.

The reason for this disparity is rather obvious. Prior to *Court Reporting Firms* and now the instant case, it was abundantly clear that the three part standard codified into federal statutory law in 1994 in 15 U.S.C. §45(n) was applicable solely to enforcement actions brought by the FTC itself, and the unfairness standard set forth by this Court in *PNR, Inc.* was applicable to FDUTPA claims brought by private plaintiffs.⁷

When this Court’s rules of statutory construction are properly applied, there is no basis to conclude that the Legislature intended the law to be otherwise.⁸

⁷ §45(n) places a limitation on the ability of the Federal Trade Commission to declare an unfair trade practice unlawful. Placing a similar limitation on Plaintiffs bringing FDUTPA claims would clearly impact the remedial purpose of the statute, and run afoul of the directive of §501.202 to liberally construe the provisions of the statute.

⁸ While we recognize that this Court generally declines to find conflict jurisdiction arising from violations of the rules of statutory construction, we nevertheless felt it was important to raise the issue here, not as an independent basis for conflict jurisdiction, but as a cumulative one.

Contrary to the opinion of the District Court, this conclusion is reinforced, rather than undermined, by the lack of any substantive changes to Fla. Stat. §501.204(2) during its amendments in 2003, 2006, and in 2013. §501.204(2) states “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to §5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), as of July 1, 2013,” **not** to §45(n) . Fla. Stat. §501.204(2) (emphasis supplied)

The standard codified in §45(n) has been Federal law for 20 years. Over that time frame, Florida Courts and federal courts applying Florida law (prior to 2010) had never utilized the §45(n) standard in a privately filed FDUTPA case. Yet the Legislature, which is presumed to know the state of the law when it amended the statute in 2003, 2006, and 2013, did not amend FDUTPA to adopt §45(n) or suggest that Florida Courts should give weight to the federal courts’ interpretation of *any section of 15 U.S.C. §45 other than §45 (a)(1)*. By determining that Florida law has adopted subsection §45(n) as the one and only definition of unfairness, the instant opinion breaks with established binding precedent and fails to follow the directives of this Court related to the rules of statutory construction.

As a final note, the Third District’s opinion not only conflicts with the *PNR, Inc.* standard for unfairness, it conflicts in the manner in which it applied the §45(n) standard. In *PNR, Inc.*, this Court held that in cases involving deception, FDUTPA applies an objective, reasonable consumer standard, explaining that a deceptive act is “a representation, omission, or practice that is likely to mislead the

consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla. 2003) (emphasis added). As reiterated in *Davis v. Powertel, Inc.*, 775 So.2d 971, 974 (Fla. 1st DCA 2006), consumers do not need to prove actual reliance to prevail on a FDUTPA claim for deception.

The Third District here has applied a subjective, individual consumer standard, (which, by its very nature, would preclude class certification of almost any unfairness claim under FDUTPA) despite the fact that the §45(n) standard contains the language “not *reasonably* avoidable by consumers.” In light of this language, it is clear that an objective, reasonable consumer standard applies to unfairness cases, and not just to deception cases. For that reason, we do not concede that adoption of the 45(n) standard would necessarily preclude class certification in the instant case.

V. CONCLUSION

The Court should grant review in this case for two reasons: (1) to quash the District Court’s errors, and (2) to clarify, once and for all, the now very conflicting and murky circumstances in which FDUTPA claims are amenable to class treatment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing electronically served this 21st day of July, 2014, to: **Fredrick McClure, Esq., E. Colin Thompson, Esq.**, DLA PIPER (US) *Attorneys for Respondent*, 100 North Tampa Street, Suite 2200, Tampa, Florida 33602-5809 (Fredrick.mcclure@dlapiper.com; colin.thompson@dlapiper.com;) and **William F. Kiniry, Jr., Esq.**, DLA Piper, LLP (US), One Liberty Place, 1650 Market Street, Suite 4900, Philadelphia, PA 19103 (William.kiniry@dlapiper.com).

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WE HEREBY CERTIFY that the above and foregoing Petitioner's Brief on Jurisdiction is typed in Times New Roman, 14pt. font.

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