

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1375

L.T. No. 3D11-12-2829

PETER DIAMOND, et al.

Petitioners,

vs.

PORSCHE CARS NORTH
AMERICA, INC.,

Respondent.

**BRIEF OF RESPONDENT
PORSCHE CARS NORTH AMERICA, INC. ON JURISDICTION**

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF Appeal

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STATEMENT OF THE CASE AND OF THE FACTS

At this stage, the only relevant facts are those appearing “within the four corners of the majority decision.” Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Those facts are clearly and succinctly set forth at pages two through five of the Third District’s decision. (Appendix A (“A”) at pp. 2-5).

Respondent, Porsche Cars North America, Inc. (“**Distributor**”), was the Appellant below. It is the exclusive United States distributor of vehicles and parts designed and manufactured by the German company, Porsche AG (“**Porsche**”). Petitioners were Appellees below, are the four named plaintiffs who purchased or leased Porsche vehicles in Miami-Dade County, had High Intensity Discharge Headlights (“**Headlights**”) stolen from those vehicles, and paid insurance deductibles to have the stolen Headlights replaced.

The trial court certified a class to pursue claims for violation of the Florida Deceptive and Unfair Trade Practices Act, §§501.201 *et seq.*, Fla. Stats. (“**FDUTPA**”), and two subclasses to pursue unjust enrichment claims. (A: 7-8). Petitioners’ FDUTPA claim is based only on allegations of “unfair” acts and practices. (A: 6). To certify the FDUTPA class, the trial court “defined unfair trade practice as one that ‘offends established policy’ and ‘is immoral, unethical, oppressive, unscrupulous or substantially injurious to customers.’” Id. at 9. This definition is derived from a 1964 Federal Trade Commission policy statement and

was cited in passing by this Court in PNR, Inc. v. Beacon Property Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003). (A: 8, 13).¹ Using this general definition, the trial court “reasoned ‘an individual class member’s pre-purchase knowledge of the potential risk of theft is not relevant to the Plaintiff’s FDUTPA claim.’” Id. at 14.

The Third District reversed the trial court’s certification order, concluding that the predominance requirement of Fla. R. of Civ. P. 1.220(b)(3) could not be satisfied. (A:18-19). Central to this holding was the Third District’s conclusion of law that the trial court should have used and applied the updated definition of “unfair trade practice” announced by the FTC in a 1980 Policy Statement. Id. at 14 (citing FTC Policy Statement on Unfairness (Dec. 17, 1980) (“**1980 Policy Statement**”)).² The updated definition established a three-pronged test for ‘unfairness,’ which requires that the injury to the consumer, among other things, “‘must be an injury that consumers themselves could not reasonably have avoided.’” Id. at 10 (quoting 1980 Policy Statement). Applying this definition, the Third District concluded that “[i]n the present case the class representatives . . . are

¹ That 1964 FTC Policy Statement is the Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Fed. Reg. 8355 (1964) (the “**1964 Policy Statement**”).

² An excerpt of the 1980 Policy Statement is appended to the Third District’s decision as pages 20-22, and is reprinted in full at H.R. Rep. No. 156, Pt. 1, 98th Cong. 34 (1983).

unable to show that the injury was not ‘reasonably avoidable’ on a class-wide basis” and, therefore, cannot satisfy the predominance requirement. Id. at 18.

SUMMARY OF ARGUMENT

Petitioners attempt in two ways to convince this Court that it has conflict jurisdiction to review the Third District’s decision. Neither has merit.

First, Petitioners contend that the Third District’s decision conflicts with this Court’s opinion in Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91 (Fla. 2011). In making this argument, Petitioners mischaracterize Sosa as constituting a sweeping change in Florida law that collapsed the commonality and predominance requirements for class certification into one inquiry in cases where plaintiffs predicate their claims on “the same common course of conduct by the defendant and the same legal theory.” However, as Sosa makes clear, the requirements of commonality and predominance remain distinct. The Third District applied the predominance analysis required by Sosa.

Second, Petitioners attack the Third District’s endorsement of the updated definition of an “unfair trade practice” announced by the FTC in the 1980 Policy Statement. As an initial matter, the 1964 and 1980 definitions do not conflict. The 1980 Policy Statement definition is an evolutionary refinement of the definition set forth in 1964. Neither does the Third District’s holding with regard to the 1980 definition render its decision inconsistent or in conflict with this Court’s decision

in PNR, 842 So. 2d 773, nor any case from any other Florida district court.

Accordingly, this Court should decline to find it has conflict jurisdiction.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION IN THIS CASE REGARDING *PREDOMINANCE* IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISION IN SOSA REGARDING *COMMONALITY*.

Petitioners acknowledge in their Brief on Jurisdiction that “the Third District held in the instant case that [Petitioners] failed to satisfy the *predominance* requirement, while the opinions in Sosa and [Soper v. [Tire Kingdom], Inc., 124 So. 3d 804 (Fla. 2013)] held that the respective plaintiffs failed to satisfy the *commonality* requirement.” (Petitioners’ Brief on Jurisdiction (“PB”) at 4 n. 4) (emphasis supplied).³ Petitioners boldly claim, however, that “this is a distinction without a difference” because the commonality analysis in Sosa “is no different than the predominance analysis.” Id. Based on this misreading of Sosa, Petitioners argue that to meet both the commonality *and* predominance requirements for class certification, “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*.’” (PB: 4) (quoting Sosa, 73 So. 3d, [110]). Petitioners are wrong. Sosa did not eliminate the *predominance* requirement and

³ Petitioners repeatedly reference this Court’s opinion in Tire Kingdom, but do not point to anything in particular in that two-sentence opinion that is in express and direct conflict with the Third District’s decision in this case. (See PB: 3-5).

Petitioners' attempt to manufacture conflict between the Third District's holding and this Court's holding in Sosa should be rejected outright.

In Sosa, this Court independently addressed the commonality and predominance elements and made clear that they remain separate and distinct. See Sosa, 73 So. 3d at 111-114 (stating, e.g., "The predominance and commonality requirements parallel one another, but are not identical."). As opposed to Petitioners, who choose to proceed as if such language does not exist, the Third District quoted Sosa's discussion of the predominance requirement as follows:

[A] class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact. A class representative accomplishes this if he or she, by proving his or her own individual case, necessarily proves the case of the other class members.

(A: 8-9)(quoting Sosa, 73 So. 2d at 112) (emphasis in Sosa). Moreover, in Sosa, this Court went on to explain that:

[w]hether class claims predominate also requires consideration of how the resolution of the class claims will affect each class member's underlying cause of action. See [InPhyNet Contracting Srvcs., Inc. v.] Soria, 33 So. 3d 766,] 772 [Fla. 4th DCA 2010] (" 'To assess the impact of a common question on the class members' claims, a . . . court obviously must examine not only the defendant's course of conduct towards the class members, but also *the class members' legal rights and duties.*' "(alteration in original) (quoting Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Srvcs., Inc., 601 F. 3d 1159, 1170 (11th Cir. 2010)).

73 So. 2d at 112.

After engaging in the analysis mandated by this Court, the Third District concluded that the trial court erred by ruling that common issues predominated.

(A: 8-9, 14-15). Specifically with regard to the FDUTPA claim, the Third District reasoned that “[g]iven the nature of the claim in this case—that the Headlights functioned properly as headlights but were too attractive and susceptible to theft—an individual class member’s knowledge of the risk of theft goes to the heart of his or her claim.” (A: 15) (Emphasis supplied). For this reason, the Third District concluded that demonstrated differences between the named class representatives were “fatal to the class action” because “to resolve the issues there would need to be a series of mini-trials to ascertain each absent class member’s knowledge of these matters.” Id.

The Third District applied the same predominance analysis to Petitioners’ unjust enrichment claims and concluded that such claims “turn on individual facts,” which were different even as to the named plaintiffs. (A: 18-19).

In sum, the Third District’s detailed application of the predominance requirement in this case was strictly in line with the analysis required and performed by this Court in Sosa and, therefore, no conflict exists with regard to Sosa to give this Court jurisdiction.

II. THE DEFINITION OF AN “UNFAIR TRADE PRACTICE” USED BY THE THIRD DISTRICT IS AN EVOLUTIONARY REFINEMENT OF, AND NOT IN CONFLICT WITH, THE GENERAL DEFINITION REPEATED IN PNR, INC. V. BEACON PROPERTY MGMT., INC.

Petitioners’ attempts to manufacture conflict where none exists do not stop with their misreading of Sosa. They carry over to Petitioners’ unfounded

contention that the Third District applied a novel and inappropriate definition of “unfair trade practice” when analyzing their FDUTPA claims. Specifically, they argue that because the Third District used the FTC’s 1980 Policy Statement definition of unfair trade practice, which is not the exact same definition quoted by this Court in PNR, a conflict exists that must be remedied through further appellate review. However, no such conflict exists, much more, one that is sufficient to trigger this Court’s jurisdiction.⁴

As the Third District explained, “[t]he references” by this Court in PNR and other district court cases to the general definition of “unfair trade practices” “are not rejections of” the updated definition set forth in the 1980 Policy Statement. (A: 13-14). Rather, the 1980 Policy Statement definition is simply an evolved, more refined definition that is more suitable for application.

The evolutionary history of the definition and limits of what are “unfair methods of competition” under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), upon which FDUTPA is based, was examined by the U.S. Court of Appeals for the District Columbia Circuit in Am. Fin. Svcs. Ass’n v. FTC., 767

⁴ Petitioners also spill considerable ink on a statutory construction argument as to why the Third District was wrong in concluding that Florida has adopted the 1980 Policy Statement definition of an “unfair trade practice.” Since this is a merits issue and not one properly argued in Jurisdictional Briefs, Distributor will not substantively respond to it and instead refers the Court to the detailed analysis set forth in the Third District’s decision at pages nine through fourteen as to why the Third District’s conclusion is the correct one.

F. 2d 957 (D.C. Cir. 1985). In that case, the court recognized that Congress specifically stated the standard of “unfair” practices in broad terms “to allow the [FTC] to respond to evolving market conditions and practices.” Id. at 969. In 1964, the FTC “determined that enough cases had been decided to enable the Commission to identify three criteria used in determining whether a practice, which is neither anticompetitive nor deceptive, is nonetheless unfair to consumers”, and issued its 1964 Policy Statement identifying these criteria. Id. at 971. The court further noted that in 1972, the U.S. Supreme Court cited this criteria with approval in [Fed. Trade Comm’n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972)].” Am. Fin., 767 F. 2d at 971.

As the D.C. Circuit then explained, the next major step came in 1980 when the FTC responded to Congressional criticism over the “vagueness and breadth of the unfairness doctrine.” Am. Fin., 767 F. 2d at 970 (citing 1980 Policy Statement). In its 1980 Policy Statement, the FTC noted that “ ‘[t]he present understanding of the unfairness standard is the result of an evolutionary process.’ ” Am. Fin., 767 F. 2d at 970-971 (quoting 1980 Policy Statement at 35). Indeed, in its 1980 Policy Statement, the FTC “stated that since Sperry & Hutchinson, ‘the Commission has continued to **refine** the standard of unfairness in its cases and rules, and it has now reached a **more detailed sense of both the definition and the limits of these criteria.**’ ” Id. at 971 (quoting 1980 Policy Statement at 36)

(emphasis supplied). Thus, “[t]he Commission’s [1980] Policy Statement was basically a refinement of [the] earlier three-part standard of unfairness it had set out in 1964.” Am. Fin., 767 F. 2d at 970-971.

There is simply nothing in PNR to suggest that by referring in passing to a prior definition of “unfair practice,” this Court intended to write that definition in stone for application in all future cases. As the Third District correctly reasoned, “[t]he issue of whether the 1980 definition became part of Florida law was simply not before those courts.” (A: 14).⁵ Indeed, as this Court stated in PNR:

[t]he only issue we address is whether the FDUTPA may be applied in a private cause of action arising from unfair or deceptive acts involving a single party in a single transaction or directed to a single contract.

842 So. 2d at 775 (emphasis supplied). In other words, this Court’s reference to the general definition of “unfair practice,” as used in the 1964 Policy Statement was mere dicta because the precise definition of the phrase was not germane to the

⁵ PNR is the only case that Petitioners specifically cite as conflicting with the Third District’s decision regarding the definition of “unfair trade practices.” (PB: 6). Without specifically identifying a conflict, however, Petitioners mention in a footnote that the Third District cited to four cases from district courts in which the definition from the 1964 Policy Statement was referenced. (PB: 6 n. 6 (citing 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); Rollins v. Butland, 951 So. 2d 860 (Fla. 2d DCA 2006))). First, Suris is a Third District case and, therefore cannot give rise to conflict jurisdiction. Moreover, none of the cited cases are in conflict with the Third District’s decision in this case.

limited issue before it.⁶ Id. at 777.

Accordingly, the Third District's endorsement and application of the definition of "unfair trade practice" set forth in the 1980 Policy Statement is not in conflict with this Court's holding in PNR and, therefore, no conflict exists with regard to PNR to give this Court jurisdiction.

CONCLUSION

For the foregoing reasons, this Court does not have jurisdiction or discretion to review the decision of the Third District Court of Appeal and should, therefore, deny review.

⁶ Petitioners fare no better to the extent they meant to assert conflicts with the three cases from other district courts mentioned in the Third District's decision. None rely on the general definition of an "unfair trade practice" for their holdings or establish that it is the exclusive definition to be applied. See Cummings, 648 So. 2d at 1233 (overturning an order of dismissal in a case alleging "unfair and deceptive" practices, namely, concealing the true nature of an agreement between the plaintiff and defendant); Urling, 468 So. 2d at 453 (overturning directed verdict in favor of defendant on FDUTPA claim based on trial court's improper conclusion that evidence of fraud or deceit was necessary to sustain a finding of a FDUTPA violation); Rollins, 951 So. 2d at 873-874 (reversing certification of a class to assert a FDUTPA claim and rejecting the appellees' attempt "to prove the FDUTPA damages claim for the class by presenting proof of the Appellants' alleged common schemes and business practices" because allowing appellees to do so would preclude appellants from being able to "defend against individual claims where there may be no liability," which would "by any standard . . . amount to a violation of substantive due process of law").

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CERTIFICATE OF SERVICE

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