IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC01 – 1507
DISTRICT COURT CASE NO.: 4D 99-627

BEACON PROPERTY MANAGEMENT, INC.
a Florida corporation, and
ERNEST W. WILLIS, individually,

Appellants/Respondents,

v.

PNR, INC., a Florida corporation,

Appellee/Petitioner.

ACADEMY OF FLORIDA TRIAL LAWYERS' AMICUS CURIAE BRIEF

Submitted by:

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STATEMENT OF THE CASE

This Amicus Curiae brief is respectfully being filed on behalf of the Academy of Florida Trial Lawyers.

In Beacon Property Management v. PNR, Inc., 785 So. 2d 564, 568 (Fla. 4th DCA 2001) (rehearing denied), the court held that the operative words of §501.204 (1), Fla. Stat., are "methods" and "practices." The court then stated that the ordinary meaning of "method" is a means or manner of procedure, especially a systematic way of accomplishing something, and the ordinary meaning of "practice" is a habitual or customary action or way of doing something. Id. Based on its interpretation of what constituted the operative words of §501.204 (1), the court held that a single instance of doing something does not make it a method or practice. Id.

In reaching this decision, however, the court failed to explain why it did not include "acts" as an operative word of §501.204(1). Thus, the court omitted any discussion of the ordinary meaning of the noun "act," which clearly states a singular definition. The result of this omission by the court is the establishment of a new requirement that plaintiffs allege and prove multiple violations in order to bring an action under §501.204 (1).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals erroneously omitted or ignored the operative words “acts,” and “act,” as they appear throughout Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA). Florida law requires that the word “acts” be construed both in the plural, and the singular. The legislative intent of FDUTPA was clearly that the statute apply to instances of single violations, which is further illustrated by the repeated use of the word “act” as a singular noun throughout the statute.

The legislature has specifically indicated requirements for frequency, or general patterns of practice, in other statutes. If the legislature intended such a requirement in FDUTPA it would have stated so. The legislature also intended that in construing FDUTPA, great weight and consideration be given to its federal predecessor, the Federal Trade Commission Act, as well as to interpretations of that statute by federal courts. Federal courts have interpreted the statute to proscribe single acts of unfair or deceptive conduct.

The Fourth District Court of Appeals has improperly attempted to modify, or to limit FDUTPA in a manner that the legislature did not intend. There is simply no basis for now instituting numerosity as a new standard

threshold for determining if the violation permits application of FDUTPA.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRONEOUSLY OMITTED THE WORD "ACTS" AS ONE OF THE OPERATIVE WORDS OF §501.204 (1)

In Beacon Property Management v. PNR, Inc., 785 So. 2d 564 (Fla. 4th DCA 2001) (rehearing denied), the court erroneously omitted "acts" as one of the operative words in §501.204 (1), and in doing so removed one of the most important remedies provided by Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). Had the court included "acts" in its discussion of the ordinary meaning of the statute's operative nouns, it would have defined the word as "something done; deed." See Random House Webster's Dictionary 7 (1993).

The word "acts" appears twice in §501.204 (1). Florida's legislature has enacted specific rules related to the interpretation of statutory language. §1.01 (1), Fla. Stat. (2001), provides:

> §1.01 Definitions. In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:
>
> (1) **The singular includes the plural and vice versa**."
>
> (Emphasis added.)

Therefore, the word "acts" in 501.204(1) includes a single "act." It is apparent that the legislature specifically intended to prohibit even a single instance of unconscionable, unfair, or deceptive conduct. Further evidence of this intent is found throughout the statute, as follows:

> §501.207 (1) (a): The enforcing authority may bring: An action to obtain a declaratory judgment that an **act** or practice violates this part.
>
> §501.2077 (2): Any person who is willfully using, or has willfully used, a method, **act**, or practice in violation of this part, which method, **act**, or practice victimizes or attempts to victimize senior citizens or handicapped persons….
>
> §501.2105 (1): In any civil litigation resulting from an **act** or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party.
>
> §501.211 (1): Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an **act** or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.
>
> §501.212 (1): This part does not apply to: An **act** or practice required or specifically permitted by federal or state law.
>
> See §501.201, et seq. (Emphasis added.)

"Acts" is clearly an operative word in §501.204 (1), and should have been given consideration by the Beacon

court. To underscore the importance of the flawed decision by the Fourth District Court, it is noteworthy that the Fifth District Court of Appeals subsequently agreed with the erroneous FDUTPA holding in Beacon without further discussion or analysis. See Keech v. Yousef, 815 So. 2d 718 (Fla. 5th DCA 2002). However, the Fourth District Court's interpretation of the requirements of §501.204 (1) simply cannot be read in *pari materia* with the sections of statute cited above, and therefore these decisions should be quashed.

II. THE LEGISLATURE HAS PREVIOUSLY INDICATED IN THE STATUTE IF MORE THAN ONE VIOLATION IS REQUIRED

Based on a full reading of the statute, it is clear that the legislature not only intended to prohibit single acts that violate the statute, but, in fact, carved out the only exception by defining exactly when "an act" that otherwise created a violation was exempt. See §501.212 (1). The legislature has previously exhibited its ability to specify when proscribed conduct required more than a single act. §626.9541, Fla. Stat., is subtitled "Unfair methods of competition and unfair or deceptive acts or practices defined." See Part IX. Unfair Insurance Trade Practices (2001).

§626.9541 (1) (a-h) defines and itemizes a plethora of unfair acts or practices without stating any requirement

that such acts or practices be performed regularly, systematically, habitually, or customarily. However, §626.9541 (1) (i) (3), specifically requires such a showing, as follows:

"(i) Unfair claim settlement practices –

(3) Committing or performing with **such frequency as to indicate a general business practice** any of the following:" (Emphasis added.)

Had the legislature intended the statute to import a more specific and definite meaning, it could easily have chosen words to express any limitation it wished to impose. American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968)

III. FEDERAL COURTS HAVE INTERPRETED THE FEDERAL TRADE COMMISSION ACT TO PROSCRIBE SINGLE ACTS OF UNFAIR OR DECEPTIVE CONDUCT

§501.204 specifically states that the legislature intended for FDUTPA to be construed in consideration of the Federal Trade Commission Act, 15 U.S.C. §41, from which FDUTPA was derived, and that great weight be given to the interpretations of federal courts. 15 U.S.C. s. 45 (a) (1), employs language almost identical to that used in §501.204 (1), proscribing "unfair or deceptive acts or practices." The federal statute also states:

> 15 U.S.C. s. 45 (a) (3) (B) (b): Proceeding by Commission; modifying and setting aside orders
>
> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive **act** or practice in or affecting commerce....
>
> (Emphasis added.)

Courts have interpreted the Federal Trade Commission Act to proscribe single acts of unfair conduct. See Fox Film Corporation v. Federal Trade Commission, 296 F. 353 (2nd Cir. 1924) (holding that **one act** that constitutes an unfair practice may of itself be offensive to the statute, and that Congress intended prevention of acts that amount to unfair methods of competition, whatever their inception) (emphasis added); Moir v. Federal Trade Commission, 12 F.2d 22 (1st Cir. 1926) (affirming that it was not necessary to show the practice complained of had become the general practice). Florida's legislature specifically required its courts to give due consideration and great weight to the federal statute, as well as the federal decisions cited above.

IV. THE PLAIN LANGUAGE OF THE STATUTE WAS IGNORED

Respondent's Answer Brief correctly states Florida law relating to statutory interpretation. (Ans. Brief p.

31.) Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms of its reasonable and obvious implications. American Bankers Life, 212 at 778. Unfortunately, the Fourth District Court of Appeals ignored the word "acts" in §501.204 (1), and the liberal use of the word "act," throughout the statute in reaching a decision that obliterates the reasonable and obvious intention of FDUTPA.

The holding in Beacon suggests that the threshold requirements of a class action are necessary before FDUTPA is implicated. However, in its well-reasoned decision in Davis v. Powertel, Inc., 776 So.2d 971 (Fla. 1st DCA 2001) (rehearing denied), the court stated that "the standard of proving that **an act** is deceptive and therefore a violation of the Deceptive and Unfair Trade Practices Act is the same in a class action as it is in an action initiated by an individual consumer." (Emphasis added.)

It is clear, based on the plain language of the statute, as well as on the language of Florida courts in Davis, and the string of holdings cited in Petitioner's Initial Brief, that the Fourth District Court of Appeals decision

attempts to modify, and to limit, FDUTPA in a manner that the legislature did not intend.

CONCLUSION

It is respectfully submitted that the court below erroneously excluded “acts” as an operative word in §501.204 (1), and also omitted or ignored the definition and the implication of the words “acts,” and “act,” as they appear throughout FDUTPA. Therefore, for the reasons stated above, it is respectfully requested that this Court quash the holding of the Fourth District Court of Appeal as it relates to the requirement that a plaintiff allege and prove that a violation of FDUTPA is regular, systematic, habitual, or customary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express on David Maher, Esq., Harke & Clasby, LLP, Miami Center, Suite 1050, 201 South Biscayne Boulevard, Miami, Florida 33131; Harry J. Ross, Esq., Law Office of Harry J. Ross, 6100 Glades Road, Suite 211, Boca Raton, Florida 33434; and C. Vincent LoCurto, Esq., Brown, LoCurto & Robert, LLP, 101 NE Third Avenue, Second Floor, Fort Lauderdale, Florida 33301, this 18th day of July, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the rules relating to font size contained in Fla.R.App.P. 9.210. and is typed in Courier New 12 point.

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