

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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

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

Appellants/Respondents,

v.

PNR, INC., a Florida corporation,

Appellee/Petitioner.

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE FACTS AND OF THE CASE

This brief is respectfully being filed on behalf of the Respondents, Beacon Property Management, Inc. (“Beacon”) and Mr. Ernest Willis (“Willis”).

The Petitioner, PNR, Inc. (“PNR”), has filed a brief herein which contains a significant number of factual inaccuracies and unsupported conclusions regarding the events leading up to the litigation between the parties and the course of the subsequent legal proceedings. Beacon and Willis respectfully submit that the vast majority of these assertions are completely collateral to the single and insular legal issue that has been accepted for review.

Most, if not all, of the unsupported and collateral matters raised by PNR have already been refuted by Beacon and Willis in their briefs to the Florida Fourth District Court of Appeal and rejected by the Fourth District when it ruled that verdicts should have been directed in Beacon’s and Willis’s favor on all claims brought against them by PNR. In the interest of brevity, and in an effort to avoid having this appeal devolve into an unnecessary discussion over legally insignificant facts, Beacon and Willis respectfully direct the Court to their prior briefs. See App. Items 1 and 3.

For the Court’s benefit, the following is a truncated discussion of the salient facts and events which have given rise to the present review.

¹ At the time of this writing, the Florida Fourth District Court of Appeal had not completed its Index to the Record. For the Court’s convenience, Respondents will reference the trial transcript as follows: (T. [page number]); citations to the Respondents’ Appendix, filed herewith, will be referenced as (App. [Item number] - [page number]). Respondents apologize for any inconvenience or confusion inherent in this citation system.

Identification of Parties and Relevant Corporations

This business dispute arose from the assignment of a restaurant lease.

Ocean One North, Inc. (“Ocean One”) owned the building where the subject restaurant was located, and was at all times relevant the landlord for the premises.

Ocean One had four equal shareholders, Willis, his wife Sunday, Matt Giacomino, and his wife Carol. (T. 784, 1408).

PNR was formed by Mr. James Robinson and his wife Michelle for the purpose of purchasing an existing restaurant located in the Ocean One building (Goodfellas), and obtaining an assignment of lease from Ocean One toward that end. Mr. Robinson was a successful executive in the food supply and distribution business prior to embarking on his restaurant venture. (T. 381-88). Prior to entering into the purchase agreement and assignment for the restaurant, PNR engaged legal counsel to review the necessary legal papers, and engaged an accountant to conduct due diligence. (T. 421-22, 424-25, 490-92, 586, 589). The restaurant and lease transaction was completed in early September 1994. See App. Item 6, “Lease” and subsequent “Assignment of Lease.”

Beacon was a property management company jointly owned by Ernie and Sunday Willis. Among other clients, Beacon had a contract with Ocean One to

manage the Ocean One property from July 1989 until July 1994. (T. 799, 1411-13); App. Item 5, p. 1. The Beacon management agreement expired by its own terms two months prior to PNR's purchase of the restaurant. Id. Significantly, and undisputedly, the management agreement between Beacon and Ocean One did not require Beacon to maintain or repair the premises.² Id.; (T. 904-06).

The Lawsuit

In July of 1995, a portion of the north wall in the building's electrical room separated from the foundation, which resulted in the City of Boca Raton declaring a section of the building uninhabitable; this was the section where the restaurant was located. (T. 455-57, 1194). The structural failure in the building caused the restaurant to be shut down for approximately five months. This event, combined with the later temporary wrongful eviction of PNR from the restaurant by Giacomino (individually), and personnel problems with its primary chef, led to the closing of the restaurant by PNR. (T. 527, 530, 974, 649, 1149, 542-43).

Following the failure of the restaurant, PNR filed a ten-count complaint against the various defendants, Ocean One, Beacon, Willis, and Giacomino. A

² As discussed at greater length *infra*, the Fourth District specifically found that the duty to maintain the premises rested solely with the landlord, Ocean One. Beacon Property Management, Inc. v. PNR, 785 So. 2d 564, 567 (Fla. 4th DCA 2001).

review of the Second Amended Complaint reveals that each and every count of the complaint, regardless of the “titled” cause of action and regardless of the defendant or defendants sued, contains the very same allegations of wrongdoing and seeks the very same economic damages. See generally App. Item 4, ¶¶ 1-43; App. Item 1, pp. 8-10. Further, PNR makes no distinction whatever between corporations and individuals, and provides no allegations regarding whether alleged acts of individuals were performed in the scope of their duties for corporations, or were allegedly done for personal gain. Instead, PNR filed a multi-count lawsuit against multiple corporate and individual defendants based on one blanket allegation: that the defendants “fail[ed] to properly and adequately maintain the premises.” Id.

Prior to the commencement of the trial, PNR settled its claims against Giacomino for a paltry \$22,500, at which point Giacomino became PNR’s “star” witness against his former partner, Ernie Willis. Ocean One, which had sold the subject building prior to the filing of the lawsuit, did not defend the claims against it, and was not represented at trial. The trial therefore essentially became an effort to pin all of the blame for the failure of the restaurant on Willis, individually, and on Beacon, Willis’s property management company. The problem was, however, that there was no evidence introduced at trial tending to show that either Beacon or

Willis had a duty to maintain the Ocean One building -- a failing which was fatal to PNR's claims against them.

The evidence showed that Beacon had no duty to maintain the property

As discussed more fully in the Argument section of this brief, all of the evidence introduced at trial unerringly proved that Beacon had no duty, contractual or otherwise, to maintain or repair the Ocean One property. The property management agreement, which PNR repeatedly referenced during trial as proof of such a duty, actually demonstrates the contrary -- as Giacomino himself admitted on cross-examination:

Q: Now, on Page number 2 there are four letters, A, B.C. and D, which specifically spell out the duties and the services that Beacon Property Management were going to perform for Ocean One North, Inc.; am I correct?

A: You're right.

Q: Okay, Would you please tell the Court what services Beacon Property Management was going to perform for Ocean One North, Inc.

A: Collection of rents and other charges and to take any action that the owners may authorize.

Q: Okay.

A: Payment of all bills including taxes, electric, water, agent fees and other expenses as may be authorized.

Q: Okay. What about Paragraph Number C?

A: Provide accurate accounting of all income and expenses and remit the balance to the owners or receive balance from owners, as the case may be.

Q: In Paragraph D?

A: D, to act as liaison between owners as landlord and the tenants.

Q: Okay. Now does that complete the category under Paragraph 2, Services and Duties of Agent?

A: Yes.

* * *

Q: Okay. Would you please tell the Court where you see any words describing maintenance of the building and the obligations Beacon Management had with the maintenance of the building at Ocean One North, Inc.

A: It was - - I don't see it in this agreement.

Q: Thank you.

A: Under expenses maybe, but - -

Q: But it's nowhere in that agreement?

A: No.

Q: And that's the only written agreement between the parties?

A: That's correct. That I know of.

(T. 904-06); App. Item 5.³

More importantly, the Beacon agreement to collect rents and act as a tenant liaison unquestionably expired (by its very terms) in July 1994, two months before PNR took assignment of the restaurant lease.

Finally, irrespective of the expired Beacon agreement, PNR later (in September 1994) entered into a written lease assignment agreement with Ocean One which specifically stated that Ocean One had the maintenance and repair duties for the property, as Giacomino was forced to concede on cross:

Q: Mr. Giacomino, this is the lease that was originally entered into between Boca Restaurant Corporation and Ocean One North, and subsequently assigned to PNR; is that correct, sir?

A: That's correct, sir.

Q: Would you please locate the very last sentence of Paragraph Number 19 and read that to the Court?

³ As discussed at length in Beacon's and Willis's Initial Brief in the Fourth District, there was a fatal inconsistency in the jury's verdict regarding Beacon. App. Item 1, pp. 25-26. PNR's allegations that Beacon "failed to maintain or repair the premises" were offered as the sole basis for PNR's FDUTPA claim against Beacon (Count VI) as well as PNR's claim that Beacon breached its (expired) property management agreement (Count IV). *Id.* at 9; App. Item 4, ¶¶18, 20, 25-26. The jury inconsistently found that Beacon had not breached its management contract, yet still found Beacon liable under FDUTPA. This fact underscores the myriad of problems remedied by the Fourth District's rulings in this case.

A: “The lessor shall maintain and keep in good repair the major structural components of the building.”

Q: Who was the lessor in this lease, sir?

A: The lessor was Ocean One North, Inc.

(T. 1025); App. Item 5.

The evidence showed that Willis had no individual duty to maintain the premises

PNR’s Second Amended Complaint contains no allegation whatsoever that Willis committed any wrongful act or undertook any duty outside or beyond the scope of his duties as an officer of Ocean One or Beacon. There was likewise no evidence introduced at trial that Willis, individually, had or undertook a duty to maintain or repair the Ocean One property. Not one witness testified about a non-corporate act on the part of Willis which in any way related to the maintenance or repair of the subject building. These facts are beyond dispute.

Instead, PNR utilized the trial forum -- and has since utilized its appellate briefs, including its Initial Brief to this Court -- to personally attack Willis, and to use the falling-out between Willis and Giacomino as some sort of collateral proof that Willis had a “selfish” motive to drive PNR out of the Ocean One building so it

could be sold.⁴ This theory ignores the lack of pleading or proof of non-corporate acts by Willis, and does not get any stronger with repetition.

As the Fourth District expressly understood, to the extent that Ocean One was able to sell the building for greater profit after the restaurant lease was terminated, any act by Willis or Giacomino toward this end was by definition an act on behalf of, and for the benefit of, Ocean One. See infra. Individual liability therefore could not attach.⁵

The Fourth District held that neither Beacon nor Willis can be held liable under FDUTPA as a matter of law

Following a jury verdict against Beacon and Willis on several of PNR's cause of action against them, including PNR's FDUTPA claims, Beacon and Willis appealed to the Florida Fourth District Court of Appeal. On appeal, Beacon and

⁴ PNR also improperly asserts that Willis's violations were so malicious as to support a claim for punitive damages. PNR Initial Brief, p. 16. As this Court is aware, violations of FDUTPA cannot give rise to punitive damages as a matter of law. See Rollins v. Heller, 454 So. 2d 580 (Fla. 3d DCA 1984).

⁵ In the Fourth District, Beacon and Willis pointed out the inherent paradox in PNR's continuous "selfish motive" charges against Willis, which have been revived in PNR's Initial Brief herein. Id. 4-5, 18. To wit, PNR fails to see the inconsistency of arguing that Willis had a self-interested desire to rid the Ocean One building of tenants, yet at the very same time undertook an alleged fraudulent scheme to induce PNR to enter into the lease assignment for the restaurant. Yet again PNR has opted not to address this paradox.

Willis argued that the trial court erred in failing to direct verdicts in their favor on all claims raised against them.

The Fourth District ultimately found that Beacon and Willis were legally entitled to directed verdicts on all counts. Beacon v. PNR, 758 So. 2d 564. With respect to the FDUTPA claim, the Fourth District ruled that as a matter of law no FDUTPA claim could lie against Beacon or Willis since neither had a duty to maintain or repair the Ocean One property.

PNR sued the **corporate landlord**, two of its investors, and a management company hired by the landlord to superintend the building. The landlord did not appear or defend; and one of the two investors settled with PNR before trial. . . . **The lease required the landlord to maintain the premises.** Plainly a failure to make repairs, allowing the premises to deteriorate to the point that code provisions were violated would be a substantial breach of the lease, entitling the tenant to a number of remedies. A breach of the lease covenant to maintain the premises, however, **cannot be charged against anyone but the landlord.** The effect of a successful DUTPA claim under these circumstances would be to give the tenant a remedy against **third parties for a duty that rests with the owner of the premises.**

Id. at 567 (emphasis supplied).

_____The Fourth District, in what is plainly dicta, then opined that as to Ocean One (as landlord), no liability could be found under FDUTPA absent a showing of deceptive or unfair “methods” or “practices” toward PNR and/or other tenants.

Id. at 567-68. This discussion had nothing to do with Beacon or Willis, however,

as the opinion itself makes clear.

6

This Court Grants Discretionary Jurisdiction

Following the denial of its post-appeal motions, PNR asked this Court to exercise its discretionary jurisdiction to review the Fourth District's interpretation of the FDUTPA statute. That is, PNR sought review of the court's ruling that a plaintiff in a FDUTPA case must demonstrate deceptive or unfair "methods or practices" on the part of a defendant in order to recover under the statute. See generally, PNR's Petition for Discretionary Jurisdiction. On April 12, 2002, this Court accepted jurisdiction to address this statutory interpretation ruling by the Fourth District court.

SUMMARY OF ARGUMENT

The Petitioner has requested that this Court issue an advisory opinion, something the Court historically has refused to do. The statutory interpretation issue for which Petitioner has obtained review is plainly dicta, and any decision the Court renders would nonetheless have no binding legal effect on Respondents Beacon and Willis.

⁶ At best, the Fourth District was opining that under its reading of FDUTPA, neither Beacon's nor Willis's alleged conduct would be actionable **even if they did** have a duty to maintain the premises -- which they did not.

With respect to Beacon and Willis, the Fourth District Court of Appeal found that as a matter of law neither had a duty to maintain or repair the subject premises, much less that either had breached such a duty, and that therefore verdicts should have been directed in their favor on Petitioner's FDUTPA claims against them. This is the sole ruling the Fourth District made with respect to the FDUTPA claims against Beacon and Willis.

The Fourth District thereafter went on to opine whether a landlord that has committed a single breach of a lease obligation to maintain and repair the premises can be liable under FDUTPA absent proof that the landlord had engaged in deceptive or unfair "methods or practices." The court ultimately ruled that the use of the plural in the statute controlled, and that a single breach of a lease maintenance term is not actionable under FDUTPA.

It is plain from the opinion that the Fourth District's statutory interpretation ruling (in dicta) had nothing whatsoever to do with Beacon and Willis, as the court had previously ruled that they had no duty to maintain or repair the subject premises. Whether a single act is sufficient to bring FDUTPA liability is a question which can only apply to a defendant that has a legal duty cognizable under the statute.

Beacon and Willis nonetheless respectfully submit that FDUTPA should not be applied in commercial leasing situations such as this wherein sophisticated business entities, represented by counsel and other professional advisors, enter into a lease assignment agreement.

Lastly, Beacon and Willis submit that by applying the plain language of the FDUTPA statute the Fourth District court was acting consistent with long-settled

Florida law governing statutory interpretation, and its ruling should therefore be upheld.

ARGUMENT

I. Standard of Review

The Court herein is being asked to review the Fourth District's interpretation of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA).⁷ As such, the standard of review is *de novo*. See Lee County Electric Cooperative, Inc. v. Jacobs, 2002 WL 825704, *2 (Fla. May 2, 2002) (interpretation of a statute is subject to *de novo* review); Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998) ("In reviewing this appeal we recognize first that judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review."); see also Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000) (pure questions of law are subject to *de novo* review).

II. Petitioner is Improperly Seeking An Advisory Opinion

It has long been the policy of this Court, and of all Florida courts, not to give advisory opinions. Absent an actual case or controversy between the parties, wherein the Court's ruling will have a legally binding effect on the parties, the Court has been notably reluctant to provide guidance regarding the constitutionality of, or the proper interpretation and scope of, a Florida statute.

For the adjudication of questions concrete legal issues must be present in

⁷ Florida Statute chapter 501, et. seq. (2000)

actual cases -- not abstractions. This is as true of declaratory judgments as in any other field. . . . If the construction or validity of a statute or an ordinance is drawn in question, the courts will not entertain an action based thereon, seeking a determination as to either the construction or the validity thereof, where there is no controversy as to the violation of the statute or ordinance. In these circumstances, there is no justiciable controversy.

Ervin v. City of North Miami Beach, 66 So. 2d 235, 236 (Fla. 1953) (citing Anderson on Declaratory Judgments, Vol. 1, Second Edition, pp. 66, 77); cf. Askew v. City of Ocala, 348 So. 2d 308, 310 (Fla. 1977) (“[C]ourts have no power to entertain a declaratory judgment action which involves no present controversy as to the violation of the statute, and **where the judgment sought will not constitute a binding adjudication on the rights of the parties.**”) (emphasis supplied); Santa Rosa County v. Administrative Commission, 661 So. 2d 1190 (Fla. 1995) (same).⁸

In the present case, review has been granted to address the Fourth District’s interpretation of the FDUTPA statute as it applies to parties charged with a legal duty to fairly and honestly deal with consumers. Specifically, the Court has agreed to review whether a commercial landlord who has breached a lease agreement by failing to properly maintain and repair the premises which is the subject of the lease can be found liable under FDUTPA. Because, as the Fourth District held, neither Beacon nor Willis was the landlord in this case, and neither had a legal duty to maintain or repair the subject premises, the Court’s resolution as to the proper scope of FDUTPA will not have any legally binding

⁸ See generally Department of Insurance v. Dade County Consumer Advocate’s Office, 492 So. 2d 1032, 1043 (Fla. 1986) (Boyd, J., Adkins, J., and Shaw, J., dissenting) (“The plenary power to adopt regulatory policy in the interest of the public welfare lies with the legislature. The legislature, in other words, makes law. Courts, in performing their function of adjudicating cases and controversies within their jurisdictions, interpret and apply the law when there is a dispute or conflict regarding how it applies.”).

effect on Beacon or Willis. Beacon and Willis therefore respectfully submit that the Court has been asked to give an impermissible advisory opinion, and that it should decline to do so.

___A. The Fourth District’s Statutory Interpretation Ruling is Pure Dicta, Which Will Not Affect the Outcome of this Case

A plain reading of the Fourth District’s opinion makes it clear that with respect to Beacon and Willis, the court simply held that because neither Beacon nor Willis was the landlord, and because neither had a legally cognizable duty to maintain or repair the property, the trial court erred in failing to grant Beacon and Willis a directed verdict on PNR’s FDUTPA claims against them. Beacon v. PNR, at 567. This is the court’s holding -- and entire holding -- as it relates to the FDUTPA claims brought against Beacon and Willis.

Despite the absence of an appeal on behalf of Ocean One, however, the court then went on to evaluate whether a landlord which has a contractual obligation to maintain the premises (like Ocean One) can be held liable under FDUTPA for breaching that duty absent a showing that such acts were the “methods and practices” of the landlord, as opposed to a single breach of a single lease agreement. Id. at 567-68.⁹ Because this statutory analysis has nothing whatever to do with Beacon and Willis, it is purely dicta. See Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 344 (Fla.

⁹ Early in its opinion, the Fourth District expressed its intention to address Ocean One’s conduct notwithstanding its lack of appearance. Id. at 566 (“We granted oral argument primarily to consider PNR’s argument that **the landlord’s conduct** in “intentionally neglecting” the [sic] demised premises and failing to make necessary repairs “causing it to violate nearly every basic code provision” amounted to unfair and deceptive trade acts or practices[.]”).

1986) (statements in prior case concerning coverage of Florida Marketable Record Title Act to certain lands were dicta, as such lands were not at issue in that case); Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) (“[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle, or applicable law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple.”); Town of Lantana v. Pelczynski, 290 So. 2d 566, 568 (Fla. 4th DCA), aff’d, 303 So. 2d 326 (Fla. 1974) (“Since the Supreme Court ruled that the statute did not apply to the acts complained of, the remainder of the decision pertaining to the constitutionality of the statute is obiter dictum, and we would be justified in finding that, though persuasive, it is not binding precedent.”).

Further, any reversal of the Fourth District’s statutory interpretation dicta would have no binding effect as against Beacon and Willis, since they had no legal duty to maintain or repair the premises. In other words, if the Court finds that a landlord who breaches its contractual duty to maintain and repair premises, even on one occasion, can be liable under FDUTPA, liability still cannot be assessed against Beacon and Willis, given that Ocean One had the undisputed duty to maintain the property at issue. The present appeal is thus an impermissible attempt by PNR to obtain an advisory opinion. For these reasons, Beacon and Willis respectfully submit that the Court should decline to hear this appeal.

1. The Fourth District Plainly Held that as a Matter of Law Neither Beacon nor Willis (Individually) had a Duty to Maintain or Repair the Property

Admittedly, the Fourth District has sown some confusion here by addressing whether Ocean One could be held liable under FDUTPA under the facts of this case even though Ocean One did not appear at trial to contest the claims against it and did not appeal the ultimate finding of liability under FDUTPA. Beacon and Willis respectfully submit, however, that there is no confusion about which portions of the Fourth District's opinion contains the FDUTPA holding vis-à-vis Beacon and Willis as opposed to the dicta regarding Ocean One (or commercial landlords generally).

With respect to Beacon and Willis, the Fourth District found as follows:

PNR sued the **corporate landlord**, two of its investors, and a management company hired by the landlord to superintend the building. The landlord did not appear or defend; and one of the two investors settled with PNR before trial. . . . **The lease required the landlord to maintain the premises.** Plainly a failure to make repairs, allowing the premises to deteriorate to the point that code provisions were violated would be a substantial breach of the lease, entitling the tenant to a number of remedies. A breach of the lease covenant to maintain the premises, however, **cannot be charged against anyone but the landlord.** The effect of a successful DUTPA claim under these circumstances would be to give the tenant a remedy against **third parties for a duty that rests with the owner of the premises.**

Id. at 567 (emphasis supplied).

The Fourth District accordingly refused to allow any recovery under FDUTPA as to Beacon and Willis on the basis that Ocean One was the only party with any duty to maintain or repair the

premises at issue. Id. This is the end of the FDUTPA analysis with respect to Beacon and Willis.

2. The Remainder of Opinion Regarding FDUTPA Relates to Ocean One Only

Having established that as a matter of law any breach of the lease covenant to maintain or repair the premises may only be chargeable as against Ocean One (*i.e.*, the landlord), the Fourth District went on to evaluate whether such a breach could rise to the level of a FDUTPA violation by Ocean One. Again, this analysis and the statutory interpretation conducted as a part of the analysis pertained only to Ocean One, as the Fourth District had already found **no legal duty** on the part of Beacon or Willis which might conceivably lead to FDUTPA liability. As such, this analysis is pure dicta, and should have no effect on the Fourth District's holding vis-à-vis Beacon and Willis.

That the court's statutory interpretation exercise was directed solely toward Ocean One (and commercial landlords generally) is apparent from the opinion itself. Id. at 567 ("We do not read DUTPA to mean that the kind of **breaches of commercial leases** involved here directly concern consumer protection or Florida's interest in insuring fair methods of competition, not to mention deceptive trade practices.") (emphasis supplied); Id. at 568 ("A single instance of doing something does not make it a method or practice. **Evidence that the landlord acted in a particular way with this tenant** does not prove 'a regular and systematic way of' competition, or 'a habitual or customary action or way of doing something.'") (emphasis supplied); Id. ("Equally, the evidence does not suggest any effect on competition in the relevant market of **commercial landlords.**") (emphasis supplied).

Based on the above, Beacon and Willis respectfully submit that any error committed by the Fourth District in its statutory interpretation -- which is the sole subject on review -- does not and should not have any legal effect on the Fourth District's finding that Beacon and Willis could not be held liable under FDUTPA as a matter of law.

___B. Beacon Had No Duty to Maintain the Property

Because the statutory interpretation issue which gives rise to this Court's review has no application to Beacon or Willis, there is simply no reason to allow PNR to re-argue the Fourth District's holding that a verdict should have been directed in Beacon's and Willis's favor on PNR's FDUTPA claims against them. Because PNR has grossly misstated the record in an effort to make such a re-argument, however, Beacon and Willis feel compelled to re-establish the complete lack of contractual or legal duty on the part of Beacon or Willis to maintain or repair the premises at issue.

It was undisputed in this case that Beacon was not the landlord, and the Fourth District so noted. At one time, Beacon did have an agreement with Ocean One to manage the property -- but not to maintain it -- on Ocean One's behalf, but that management agreement had expired by its own terms two months before PNR took assignment of the restaurant lease. *See infra*. These critical facts were undisputed at trial, and established by PNR's own "star" witness, Matt Giacomino (Mr. Willis former partner):

Q: Okay. Would you please tell the Court where you see any words

describing maintenance of the building and the obligations Beacon Management had with the maintenance of the building at Ocean One North, Inc.

A: It was - - I don't see it in this agreement. . . .

Q: But it's nowhere in that agreement?

A: No.

Q: And that's the only written agreement between the parties?

A: That's correct. That I know of.

(T. 904-06, 799, 1411-13); App. Item 5.

Mr. Giacomino further conceded that the subsequent lease agreement plainly stated that maintenance and repair duties for the premises fell to Ocean One, as the landlord and lessor:

Q: And isn't it true that Ocean One North, Inc. had the full responsibility under the terms of this lease, specifically under Paragraph Number 19, to maintain and keep in good repair the structural components of the building?

A: Yes.

(T. 1025-26); App. Item 6 ("Lease"), ¶19.

PNR produced no evidence or testimony contrary to Giacomino's above testimony regarding the limits of the expired Beacon property management agreement with Ocean One (*i.e.*, rent collection and tenant liaison duties) or the subsequent lease agreement between PNR and Ocean One.

Moreover, it was established at trial, and not disputed, that upon taking an assignment of the restaurant lease two months after the expiration of the Beacon management agreement, PNR dealt exclusively

with Giacomino regarding its tenancy at Ocean One. PNR made all of its lease payments to Giacomino (and not Beacon), who deposited those checks into a separate Ocean One account that he established sometime after Beacon ceased its management duties for the building. (T. 485, 521-22, 646, 912-13, 944-45, 1430-31).¹⁰

Based on the above undisputed facts, the Fourth District was correct in finding that Beacon had no duty to maintain the premises in this case, either contractual or common law, and that therefore a verdict should have been directed in Beacon's favor on the FDUTPA claim.¹¹ Beacon respectfully submits that this holding should not be disturbed.

___C. Willis Had No Duty as an Individual to Maintain the Property

It was undisputed in this case that Willis was not the landlord, and the Fourth District so noted. Rather, Willis was an officer of Ocean One, the corporation that owned the subject building. Nowhere in PNR's complaint was it alleged that Willis acted outside the scope of his duties with the corporation, and PNR's present bluster notwithstanding, there was no evidence introduced at trial that Willis acted

¹⁰ Giacomino also testified that following the expiration of the Beacon contract, he personally removed the sign at the Ocean One building identifying Beacon as the management company for the property. (T. 1437-38).

¹¹ PNR's argument that it should be permitted to sue Beacon under FDUTPA in light of its lack of contract remedy against it (PNR Initial Brief, p. 17), ignores two important points: First, the jury specifically found that PNR failed to prove that Beacon breached its property management contract. Second, no remedy or recovery should be due in the absence of a legal duty, and PNR cannot prove a cognizable duty which might bring coverage under FDUTPA.

self-interestedly or to the detriment of Ocean One. The Fourth District specifically concluded that Willis did not so act, and Willis respectfully submits that there are no legal grounds for reversing this finding. See id. at 569 (“The conduct of these agents [of Ocean One] proved at trial was entirely consistent with benefiting the landlord and lacked any evidence of an ulterior purpose or the lack of an honest belief that they were benefiting their employer. The fact that the defendant investor desired to see the building sold and in fact profited from the ultimate sale is only stronger evidence of acting on behalf of the corporate entity whose shares he owned.”).¹²

It is unassailable that PNR’s complaint contains no allegations whatever that Willis violated FDUTPA by acting outside the scope of his duties as an officer of Ocean One, or that Willis and the corporation were one and the same. In Count IV of its complaint, PNR attributes the very same acts to Ocean One, Beacon, and Willis, making no distinctions between the entities or corporate forms. App. Item 4, ¶¶ 25-26 (wherein Ocean One, Beacon, and Willis are all generally alleged to have “fail[ed] to properly and adequately maintain the premises.”).

PNR ignores the very real legal differences between the acts of a corporation, the acts of a corporate officer on behalf of a corporation, and the acts of an officer for personal gain outside the scope of his duties for the corporation. The Fourth District, however, properly applied the law governing issues such as this, notwithstanding PNR’s pastiche approach to pleading. See infra.

¹² See also id. at 568 (“There is no evidence that any of the defendant investor’s dealings with PNR, whether individually or on behalf of the management company he controlled, amounted to a fraud or a misrepresentation.”).

There was likewise no evidence introduced at trial that Willis undertook any duty in his individual capacity to “maintain and keep in good repair” the premises at the Ocean One building. What the evidence did show was that Willis had no business dealings with PNR or its officers during the course of the lease agreement with Ocean One. Instead, PNR’s lease agreement was with the corporation, and during the course of all dealings between PNR and Ocean One, PNR always dealt directly with Matt Giacomino. *See supra*. Florida law holds that under these indisputable facts the only parties which could be found to have violated FDUTPA are Ocean One, and **upon proper allegations and proof** of individual wrongdoing (*i.e.*, piercing the corporate veil), Matt Giacomino. *See Anden v. Littinsky*, 472 So. 2d 825 (Fla. 4th DCA 1985) (finding individual liability upon proof that corporation’s president “treated the corporation and himself interchangeably,” and that all negotiations and contractual performance was undertaken by the president individually).¹³

Because there was a complete lack of pleading and proof that Willis had an individual duty to maintain the premises and that Willis individually breached that duty, the Fourth District was entirely correct in directing a verdict on Willis’s behalf on the FDUTPA claim. Willis respectfully submits that this holding should not be disturbed here.

¹³ *Cf. Sloan v. Sax*, 505 So. 2d 526 (Fla. 3d DCA 1987) (officer can only be liable for interference with the corporation’s contract upon specific pleading and proof that the corporate agent was acting outside the scope of his or her corporate duties, that he or she had selfish ulterior purposes for bringing about a breach of the contract, and that the breach is not in the best interest of the corporation); *O.E. Smith’s Sons, Inc. v. George*, 545 So. 2d 298 (Fla. 1st DCA 1989) (same); *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381 (Fla. 4th DCA 1999) (same). As noted above, the Fourth District correctly found in this case that a verdict should also have been directed in Willis’s favor on PNR’s intentional interference claim because PNR failed to plead and prove that Willis had committed any acts outside of the scope of his corporate duties or for selfish reasons detrimental to the corporation. *Beacon v. PNR*, at 569.

III. FDUTPA Should Not Apply in Commercial Lease Situations

Assuming that Beacon and Willis are deemed to be landlords or otherwise under a duty to maintain the Ocean One premises, which is denied, Beacon and Willis respectfully submit that it would be an ill-advised expansion of the FDUTPA statute to apply its dictates in commercial leasing situations involving sophisticated business entities represented in the transaction by legal counsel.

Contrary to PNR's assertion, Beacon and Willis have never argued that FDUTPA does not apply in any commercial setting or that corporations are not entitled to the protections of the statute. See PNR Initial Brief, at 14-15. Rather, Beacon and Willis submit that the dramatic distinctions drawn by the Florida Legislature between residential leases and commercial leases, including the clear effort to provide extensive protections and remedies to residential lessees that are not likewise extended to commercial lessees, strongly militate against applying FDUTPA in commercial leasing situations. Moreover, given that the primary principal of PNR was a highly successful and sophisticated businessman who engaged legal counsel to review agreements and an accountant to conduct due diligence prior to entering into the business opportunity/lease assignment, Beacon and Willis submit that this commercial transaction is simply not of the type covered -- or intended to be covered -- under FDUTPA.¹⁴

An exhaustive review of Florida law revealed no case in which FDUTPA was applied in a

¹⁴ This argument was presented to the Fourth District, but the court deemed it unnecessary to reach this statutory question in light of its other legal findings. Beacon v. PNR, at 567.

commercial leasing situation. In the trial court, PNR argued for the application of FDUTPA based on Kingston Square Tenants Association v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566 (S.D. Fla. 1992), a case involving residential tenancy leases. There are critical differences in how the Florida Legislature has treated residential leases as opposed to commercial leases, however, and Kingston Square therefore does not support an extension of FDUTPA's consumer protections to commercial lease transactions like that presented here.

There can be little genuine dispute that Florida provides special protections for residential lessees which are not provided for commercial lessees, as both the Florida courts and the Legislature have held landlords in residential leasing situations to a higher standard of care vis-à-vis tenants. For example, the Florida Legislature has imposed heightened duties on residential landlords for the maintenance and repair of leased premises. See Fla. Stat section 83.51 (“**Landlord’s obligation to maintain premises.**”) Similarly, this Court has abrogated the common law principle of *caveat lessee* for residential tenancy situations. See Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981).

These same protections are not afforded to tenants in commercial leasing situations, as *caveat lessee* still applies in such transactions, and there is no commercial lease equivalent to Fla. Stat. section 83.51. See Veteran’s Gas Co. v. Gibbs, 538 So. 2d 1325 (Fla. 1st DCA 1989) (*caveat lessee* still applies in commercial lease settings); Stolzenberg v. Forte Towers S., Inc., 430 So. 2d 558 (Fla. 3d DCA 1983) (same); Haskell Co. v. Lane Co., Ltd., 612 So. 2d 669 (Fla. 1st DCA 1993). See also City of St. Petersburg v. Competition Sails, Inc., 449 So. 2d 852, 853 (Fla. 2d DCA 1984) (“At the outset, it is important to note that this case involves a commercial lease. Therefore, the statutory

obligations placed upon Florida Landlords who lease residential premises are inapplicable. *See* § 83.51 Fla. Stat.”). The dramatically different treatment of residential and commercial landlords is consistent with Florida’s public policy of protecting consumers and unsophisticated (and unrepresented) parties in consumer transactions generally; the very considerations which gave rise to FDUTPA. Beacon and Willis respectfully submit that it would therefore be inconsistent with Florida public policy to expand FDUTPA to include commercial leasing situations.

Kingston Square, wherein FDUTPA was applied to a leasing transaction, does not invite a contrary result here. In Kingston Square, a group of public housing tenants brought suit against their corporate landlord for failing to adequately maintain and/or make necessary repairs to their housing premises, resulting in various health and safety risks. 792 F. Supp. at 1569. Among the various federal and Florida causes of action alleged by the tenants were claims for breach of the implied warranty of habitability, pursuant to Fla. Stat. section 83.51 (discussed herein), and for violations of FDUTPA. *Id.* at 1574-75. With respect to the FDUTPA claim, the landlord argued that the Act had no application because a residential lease was not a “consumer transaction” as defined by the Act. The court agreed with the landlord that the plain language of FDUTPA did not evince coverage for leases of real property, but nonetheless permitted the tenants to pursue this claim based on an administrative rule promulgated by the Department of Legal Affairs (DLA) to clarify the coverage of FDUTPA -- Florida Administrative Code section 2-11.003 (1993). *Id.* at 1575. Department of Legal Affairs v. Father & Sons Moving & Storage, 643 So. 2d 22 (Fla. 4th DCA 1994); Holly v. Auld, 450 So. 2d 217 (Fla. 1984). *See also Carson v. Miller*, 370 So. 2d 10 (Fla. 1979); Ross v. Gore, 48 So. 2d 412 (Fla. 1950).

It has also been accurately stated that 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*. To do so would be an abrogation of legislative power. American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) (emphasis added).

Id. at 219 (emphasis in original).¹⁵

Beacon and Willis submit that the Fourth District scrupulously followed this well-established rule of statutory interpretation when applying the plain language of FDUTPA to this case, and that the court's interpretation should be affirmed.

¹⁶ In its opinion, the Fourth District noted that by its very terms, FDUTPA was intended to remedy deceptive or unfair "methods of competition" or "trade practices" -- plural -- and thereby concluded that because PNR failed to demonstrate anything more than Ocean One's breach of a single lease agreement, PNR could not prove a FDUTPA violation as a matter of law.

¹⁵ The recognized exceptions to this rule are where a literal interpretation would lead to an absurd or unreasonable conclusion, or where there are "cogent reasons" to believe that the statute, as written, does not accurately reflect the legislative intent. Holly v. Auld, at 219.

¹⁶ The Court should be aware that this statutory interpretation issue was not briefed by either party below.

The operative words of section 501.204(1) are *methods* and *practices*. The ordinary meaning of the noun *method* is “a means or manner of procedure, especially a regular and systematic way of accomplishing something.” The ordinary meaning of the noun *practice* is “a habitual or customary action or way of doing something.” [] A single instance of doing something does not make it a method or practice. Evidence that **the landlord** acted in a particular way with this tenant does not prove “a regular and systematic way of” competition, or “a habitual or customary action or way of doing something.” The evidence is limited to the lease in question and does not imply the existence of a method, or of a habitual or customary pattern of conduct. Equally, the evidence does not suggest any effect on competition for the relevant market of **commercial landlords**. Consequently, we conclude that the judgments based on DUTPA must be set aside.

Beacon v. PNR, at 568 (bolded emphasis supplied).

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Beacon and Willis respectfully submit that the Fourth District’s decision to apply the plain and unambiguous language of the FDUTPA statute was absolutely correct under Florida law, and that this Court should likewise apply the plain and unambiguous language in its *de novo* review.

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There has been no showing that applying the strict pluralized reading of FDUTPA would lead

¹⁷ As discussed above, the Fourth District’s discussion at this juncture of its opinion of how “the landlord” acted toward PNR, and the market for “commercial landlords,” makes it plain that the court was concerned with the application of FDUTPA to Ocean One -- the undisputed and sole landlord -- and not Beacon or Willis. Again, because the court had already ruled that neither Beacon nor Willis had any duty to maintain the premises, and thus, that no FDUTPA claim was cognizable as to them, the statutory interpretation which followed is purely dicta.

¹⁸ PNR’s only response to the “plain meaning” rule is to assert -- in a footnote -- that the Fourth District read the plain language of the statute “too literally.” See PNR Initial Brief, at 12, note 4. Beacon and Willis respectfully submit that literal interpretation of the plain language utilized by the Legislature is the appropriate role for the courts.

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to absurd results in this case or any other, and Beacon and Willis submit that no such showing can reasonably be made here. If the Legislature wanted a single act of deceptive or unfair conduct to be actionable under this statute, it could have worded the statute in the singular, but it did not. It is therefore not the province of this Court to subvert or alter the clear and express intention of the Legislature.

___B. Several Other States Have Interpreted Their Respective “Little FTC Acts” in the Same Manner

_____ In applying the plain language of FDUTPA to reach its conclusion that proof of deceptive or unfair “methods or practices” by a defendant is required to recover under FDUTPA, the Fourth District aligned itself with several other states’ courts interpreting their respective “Little FTC Acts.” Stated otherwise, the Fourth District’s opinion is not as remarkable as PNR seeks to imply.

There is a clear split of authority nationwide on whether a single deceptive or unfair trade practice is remediable under consumer protection statutes patterned on the federal FTC Act, but the Fourth District’s opinion appears to put the court in with the majority of state courts which have squarely addressed this issue. See, for example, Callaham v. First American Title Insurance Co., 837 P. 2d 769, 773 (Colo. Ct. App. 1992) (sale of real estate: “[T]he trial court found that the [Consumer Protection Act] does not apply to the circumstances here which involve a single transaction, rather than a course of conduct, from which a party claims some misrepresentation.”); Benchmark Investments, LLC v. Elms at Mystic, LLC, 2002 WL 194492, *3 (Conn. Super. Ct. January 11, 2002) (“The split of authority within the courts of this state as to whether a single act may constitute a CUTPA violation

does not require citation. This jurist, however, believes that the better reasoned opinions are those that agree that the legislature's use of the plural 'acts or practices' in General Statutes § 42-110b, instead of the singular, has significance as to what may constitute a CUTPA violation. This court has therefore repeatedly concluded that the allegation of a single act is insufficient to state a claim for violation of CUTPA.” (citations omitted); McLaughlin v. Watercraft International, Inc., 1997 WL 537862 (Wash. Ct. App. 1997) (isolated acts, unlikely to be repeated and not affecting a number of consumers do not give rise to claim under consumer protection act). But see Kleczek v. Jorgensen, 2002 WL 539113 (Ill. App. Ct. April 10, 2002) (single deceptive practice or misrepresentation actionable under consumer protection act); Catrett v. Landmark Dodge, Inc., 560 S.E. 2d 101 (Ga. Ct. App. February 11, 2002) (single instance of an unfair or deceptive practice is actionable).¹⁹

___C. There is No Conflict with Prior Decisions, as None Expressly or Squarely Addressed the Scope of the Statute

Conceding that the statutory interpretation decision reached by the Fourth District (albeit in dicta) is not in direct and express conflict with any prior FDUTPA decision of any Florida appellate court, PNR resorts to implying that several courts would come to a different conclusion.²⁰ Specifically, PNR takes great pains to cite

¹⁹ Cf. Borden v. Pope Jeep-Eagle, Inc., 407 S.E. 2d 128, 178 (Ga. Ct. App. 1991) (in case involving purchase of automobile, court held that alleged deceptive act must have impact on consumer marketplace: “The law is well-settled in Georgia that even though a single instance of an unfair or deceptive act can be a sufficient basis for a claim under the FBPA, that act does not apply to suits based on deceptive practices which occur in transactions that are essentially private.”).

²⁰ Beacon and Willis respectfully reassert that given the clear lack of direct and express conflict, this Court should not have granted discretionary review here, for

the Court to several decisions where liability under FDUTPA was assessed or upheld where there was apparently a sole deceptive or unfair trade act. See PNR Initial Brief, at 11-13.

These decisions are of dubious value in this appeal, however, given the complete lack of statutory interpretation or discussion in all of them. PNR has not and cannot point to any Florida case where the court squarely or expressly addresses the proper scope of FDUTPA given the “methods and practices” language applied by the Fourth District. It is likely, if not certain, that the defendants in those cases failed to raise the statutory argument under review here and/or failed to properly preserve such argument for appeal. In short, the absence of analysis in these cases makes them unhelpful here, and more importantly, they do not in any way support the challenge made by PNR to the Fourth District’s interpretation of FDUTPA.

CONCLUSION

For the above reasons, Beacon and Willis respectfully request that the decision of the Fourth District should not be disturbed as it relates to claims raised

the reasons set forth more fully in their response brief on jurisdiction.

against them. Beacon and Willis respectfully submit that the Court should not render any substantive legal decision in this case, as such decision would constitute an impermissible advisory opinion. To the extent that the Court does render a substantive ruling, however, Beacon and Willis respectfully request that the Court not disturb the Fourth District's holding that a verdict must be directed in Beacon's and Willis's favor on PNR's FDUTPA claims against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via 1st Class U.S. Mail this ____ day of May, 2002 to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all font size and other requirements set forth in Florida Rules of Appellate Procedures 9.210. The foregoing brief is in Times New Roman, 14 point font.

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