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' BRIEF ON DISCRETIONARY JURISDICTION

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STATEMENT OF THE FACTS AND OF THE CASE

As an initial matter, Respondents Beacon Property Management, Inc. ("Beacon") and Ernest W. Willis ("Willis") take great issue with the Petitioner's Statements of Facts, wherein Petitioner improperly goes far beyond the salient facts set forth in the Fourth District's opinion, often misrepresenting key matters in the process. This strategy has long been rejected by this Court for jurisdictional petitions. Reaves v. State, 485 So. 2d 829 (Fla. 1986):

> The only facts relevant to our decision to accept or reject petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinion. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citation to the record, as petitioner provided here.

Id. at 830, n. 3. Accord Hardee v. State, 534 So. 2d 706, 708, n. 1 (Fla. 1988); White Construction Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984).

Beacon and Willis therefore respectfully request that the Court take no consideration of the numerous, and often inaccurate, extraneous facts provided by Petitioner herein.

With respect to the Fourth District's holding on Petitioner's claims against Beacon and Willis under Florida's Deceptive and Unfair Trade Practices Act,

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Florida Statutes section 501.201 *et seq.* ("FDUTPA"), there are two critical facts: 1) Ocean One, Inc. was the landlord of the subject property, and 2) the lease agreement entered into by Petitioners required the landlord to maintain the property. In a very simple and straightforward ruling, the Fourth District held that because Ocean One, Inc., as landlord of the property, was the only party with a legal obligation to maintain the Ocean One property, Beacon and Willis could not be held liable under FDUTPA for allegedly failing to maintain those premises:

> PNR sued the corporate landlord, two of its investors, and a management company hired by the landlord to superintend the building. . . . **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**.

Beacon Property Management v. PNR, Inc., 785 So. 2d 564, 566-67 (Fla. 4th DCA 2001) (emphasis supplied).

Having determined that neither Beacon nor Willis had any duty to maintain the property, the Fourth District held that the trial court erred in failing to direct a verdict in their favor on Petitioner's FDUTPA claims against them. Id. at 567. The court went on to opine that it would be a slippery slope indeed if every breach

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of a commercial property lease gave rise to a FDUTPA claim, and that the statute appears to preclude such an action by its own terms. Id. ("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."). The court further pointed out that the plain language of FDUTPA appears to require more than a single unfair or deceptive act before liability under the Act can attach. Id. It is important to note, however, that this discussion by the Fourth District had nothing whatever to do with the actual holding of the case -- which was that the only viable FDUTPA claim in this case would be against the landlord, Ocean One, Inc.

Finally, it is both outrageous and fundamentally inaccurate for Petitioner to imply that the Fourth District somehow deemed a directed verdict in Beacon's and Willis's favor proper on grounds not raised by them on appeal. Petition, p. 6, n. 1. While Beacon and Willis did argue that FDUTPA had no application in this commercial leasing situation, their foremost argument was precisely the one accepted by the Fourth District: that because neither Beacon nor Willis had any duty to maintain the premises, *i.e.*, neither was the landlord, they were entitled to a directed verdict on Petitioner's maintenance-based FDUTPA claims.

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SUMMARY OF ARGUMENT

The Court should decline to exercise its discretionary jurisdiction in the present case. The Petitioner's entire conflict argument is based on a misapprehension of the holding of the Fourth District Court of Appeal. The Fourth District was clear and concise in its decision that because Beacon and Willis had no legal duty to maintain the property at issue, a verdict should have been directed in their favor on Petitioner's claims against them under Florida's Deceptive and Unfair Trade Practices Act. Ignoring the actual holding by the Fourth District, the Petitioner seeks to convince the Court that conflict jurisdiction is present based on the dicta which follows the Fourth District's finding that Beacon and Willis had no cognizable legal duty here. Respondents respectfully submit that mere dicta should not give rise to conflict jurisdiction in this Court, and the most recent decision of this Court on the issue of dicta and conflict jurisdiction appears to support this assertion.

Nonetheless, the statutory interpretation set forth in the Fourth District's dicta in this case is not in express and direct conflict with any of the appellate decisions cited by Petitioner on the same question of law. It is only through inference and by extrapolating from what is **not** specifically set forth in these opinions that the hint of a possible conflict is even approached. This is simply not

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a proper basis for discretionary jurisdiction.

Lastly, the strict rules governing this Court's discretionary jurisdiction simply do not permit review of a decision which is purportedly "contrary to the stated legislative intent" of a statute.

ARGUMENT

I. The Fourth District's Opinion is Not in Express and Direct Conflict with the Decisions of Other Florida Appellate Courts Cited by Petitioner

A. Petitioner Misapprehends the Actual Holding of This Case

Petitioner's conflict argument regarding the Fourth District's ruling on the FDUTPA claims asserted against Beacon and Willis is predicated entirely on an inaccurate reading of the court's well-reasoned opinion. Simply stated, Petitioner seeks herein to avoid the Fourth District's clear holding that because only Ocean One, Inc. (the landlord) had an actionable duty to maintain the Ocean One property, the trial court erred in failing to direct a verdict in favor of Beacon and Willis on Petitioner's claims that they each failed to properly maintain the property in violation of FDUTPA. See Beacon Property Management v. PNR, Inc., 785 So. 2d at 567 ("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

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remedy against third parties for a duty that rests with the owner of the premises.").

Petitioner instead seeks to obscure the conflict issue by focusing on the dicta which followed the court's holding, wherein the court reasoned that under its reading of the FDUTPA statute, neither Beacon's nor Willis's alleged conduct here would be actionable even if they **were** deemed to have had a duty to maintain the property. See Petition, p. 6-7. Beacon and Willis respectfully submit that the court's superfluous discussion of how this case might have been decided if the facts were fundamentally different is of no moment for the purposes of conflict jurisdiction.

Ignoring the court's ruling on the threshold matter of duty, Petitioner goes on to allege that conflict somehow arises from the Fourth District's "conclusion" that a FDUTPA claim necessarily requires a finding of a pattern or systematic method of conduct by a defendant. See Petition, pp. 6-9. Because this portion of the court's opinion was not the basis for its holding that a directed verdict should have been granted in Beacon's and Willis's favor, however, the correctness of the court's statutory analysis simply does not give rise to an express and direct conflict. The issue of whether or not a pattern of conduct by Beacon or Willis was required (or even occurred) does not even become ripe for consideration absent a finding that either or both had a duty to maintain the Ocean One property. When

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Petitioner failed to demonstrate such a duty at trial, there was no need to address any alleged conduct by them under the statutory scheme.

The Fourth Circuit's plain holding of "no duty" is unassailable, and the Court should not be misled by Petitioner's desperate attempt to draw attention to matters which have no effect on that holding.

B. The Dicta Contained in the Fourth District's Opinion Does Not Conflict with the Decisions Cited by Petitioner

While it is plain from the opinion in this appeal that the "methods and practices" interpretation of the statute was not the basis for the Fourth District's holding on the FDUTPA claims, Beacon and Willis nonetheless submit that such a holding would not represent a lack of uniformity with the decisions of other Florida District Courts of Appeal or this Court.[1] To the extent that dicta can ever give rise to conflict jurisdiction, which is not conceded, there is simply no express and direct conflict between the Fourth District's dicta here and the decisions cited by Petitioner that is apparent from the four corners of the respective opinions.

Whether dicta which is inconsistent with the holding of another Florida

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[1]The Court should take no consideration of the Petitioner's gratuitous citation to several decisions of the Florida Fourth District and the federal Eleventh Circuit (See Petition, p. 8-9), as discretionary jurisdiction based on conflict does not include alleged intra-district conflicts nor state/federal conflicts. Fla.R.App.P. 9.030(a)(2)(iv).

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appellate court can give rise to conflict jurisdiction under Fla.R.App.P. 9.030(a)(2)(iv) has been the subject of contrasting rulings in this Court. Compare Sunad v. City of Sarasota, 122 So. 2d 611 (Fla. 1960) and Sweet v. Josephson, 173 So. 2d 444 (Fla. 1965) (permitting dicta to give rise to jurisdiction), with Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (finding no conflict certiorari jurisdiction based on dicta). Beacon and Willis respectfully submit that to the extent that conflict jurisdiction cannot be created by dicta, the present petition should be denied outright.

Regardless, a review of the four corners of the opinions cited by Petitioner here establishes that the Fourth District's dicta is not in express and direct conflict with any of those cases on the same question of law. See generally Fla.R.App.P. 9.030(a)(2)(iv); Department of Health and Rehabilitative Services v. National Adoption Counseling Services, 498 So. 2d 888, 889 (Fla. 1986) ("As we recently noted in *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In other words, so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction."). The problem with Petitioner's conflict argument here is that not one of the decisions cited expressly or directly ruled on whether FDUTPA claims are legally viable in breach of commercial lease

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scenarios. Similarly, none of Petitioner's cases expressly or directly address the legal question of whether the inclusion of the "methods and practices" language in FDUTPA requires a finding of more than a single act of deceptive or unfair business behavior. These matters were simply not at issue in any of the opinions cited by Petitioners. Accordingly, the Court's discretionary jurisdiction is not invoked, and cannot be exercised.

The best that Petitioner can do here is to opine that because each of the courts in the cited cases did not expressly accept or reject a "methods and practices" interpretation of FDUTPA, and **apparently** permitted -- without any analysis -- a FDUTPA claim to go forward based on a single transaction, the Fourth District's dicta in this case represents a contrary or conflicting ruling. See Petition, pp. 7-9.[2] This is precisely the type of inferential or "implied" conflict which this Court has rejected as a basis for review. See Reaves v. State, 485 So. 2d 829; Department of Health v. National Adoption, 498 So. 2d 888. The pending petition should therefore be denied.

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[2]Tellingly, Petitioner spends most of his effort discussing what the courts in the cited opinions **didn't** hold or require. Id.

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II This Court does not have Jurisdiction Over a Decision Which is Allegedly "Contrary to the Stated Legislative Intent" of a Florida Statute

Petitioner's final argument for jurisdiction is that the Fourth District's decision here is "contrary to the stated legislative intent" of Florida's DUTPA statute, Section 501.201 *et seq.* See Petition, pp. 9-10. This is not a proper basis for invoking this Court's discretionary jurisdiction, and Respondents respectfully submit that this Court should not take any consideration of this argument.

The limited bases for the exercise of this Court's discretionary appellate jurisdiction are set forth in Florida Rule of Appellate Procedure 9.030(a)(2). Nowhere in this jurisdictional statute is the Court granted the power to review decisions which purportedly run counter to the legislative intent of a statute. *Id.*[3] Accordingly, the present petition should be denied with respect to this particular jurisdictional plea out of hand.

CONCLUSION

Based on the foregoing, the Respondents respectfully request that this Court decline to exercise its discretionary jurisdiction to hear this appeal.

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[3]Cf. 12A Fla. Jur.. 2d, Courts and Judges § 122 (1998) ([T]he Supreme Court does not have jurisdiction where the contention is that the decision of the district court of appeals is in conflict with a Florida statute."), citing Standard Accounting Insurance Co., 196 So. 2d 440 (Fla. 1967); Pickman v. State, 164 So. 2d 805 (Fla. 1964).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 6TH day of August, 2001 to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all font size 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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