No. SC01-1507

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PNR, INC.,
Petitioner,
vs.
BEACON PROPERTY MANAGEMENT, INC., et al.,
Respondents.

REPLY BRIEF

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ARGUMENT

I. BEACON WAS RESPONSIBLE FOR MAINTENANCE

Respondents' attempt to avoid the need to support the Forth District's erroneous DUTPA holding by advancing the false notion that Beacon was not responsible for property maintenance.[1] Respondents attempted this position at trial and the jury clearly did not believe them. Once it is established that Beacon was responsible for maintenance, as PNR proved at trial, Respondents' arguments necessarily fail.

Jim Robinson, PNR's president, testified about maintenance problems:

Q. When you had talked to Mr. Giacomino about your complaints, what would he tell you?

A. He would keep referring me to – – well in fact, it was the reason I wrote this letter [plaintiff's exh. 15], put it in writing to Beacon Property Management.

Q. Why did he tell you that?

A. Because as he had led me to believe, they were responsible for the things that I was talking about, particularly tar and water leakages.

Q. The maintenance items?

A. The maintenance, yes.

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[1] In their Answer Brief Respondents repeatedly accuse Petitioner of stating factual inaccuracies yet they fail to point a single one out to the Court.

Q. So Mr. Giacomino told you that Beacon Property Management was responsible for the maintenance?

A. That's correct.

(T-449, PX 15, T-452). Later, Mr. Giacomino, co-owner of Ocean One testified extensively regarding Beacon's responsibility for maintenance.

Q. Okay. Now, at the time you entered into the corporation with Mr. Willis, did Ocean One North, Inc. hire Beacon Property Management as the management company for the property.

A. Yes.

Q. And that - - did that include all of the property you just told us about?

A. Yes.

Q. The building and the land?

A. Yes.

Q. What were Beacon Property Management's responsibilities as the property management company?

A. To oversee the daily operation of the building, to collect rents, to lease spaces, to make minor repairs.

Q. What types of repairs?

A. Well, air conditioning, roofing, landscaping, maintenance.

Q. Maintenance, what about painting?

A. Painting, yes.

Q. Waterproofing?

A. Yes.

Q. What other types of - - so we all have an understanding of what types of maintenance was required for the property, be descriptive as you can in terms of what Beacon's responsibilities were?

A. Well, one was, of course, daily cleaning, make sure the building was clean, makes sure the grass was cut, landscaping. If there were any problems with the air conditioning, call in an air conditioning man to repair the air conditioning. Same thing with roofing, or whatever; whatever was required.

(T-791-93). The point was then crystalized by the following exchange:

Q. Now, there's been a question raised, so I just want to be clear on this point.

Do you have any doubt whatsoever that Beacon Property Management, pursuant to the agreement that you had, was responsible for all the maintenance, things that you told us about earlier?

A. No.

(T-798). Despite Respondents best efforts at trial, based upon this evidence, the jurors had no doubt about Beacon's responsibility for maintenance.

Giacomino himself complained to Beacon and Willis verbally and in writing about their maintenance failures. (T-802). Contrary to its assertions, Beacon was responsible for maintenance through the date of the collapse and continued to collect rent. (T-799). At the beginning of its contract term, Beacon actually performed maintenance duties. (T-800). It was not until later, when Willis began positioning himself to freeze Giacomino out and extinguish PNR's lease that Beacon deliberately ignored its maintenance duties. It was at this time, approximately 1993, that the

property began receiving code violations. (T-801). Not surprisingly, this was about the same time Willis orchestrated the unilateral purchase of the mortgage on the property to the detriment of Giacomino. (T-867-69). In light of the foregoing Beacon cannot truthfully deny its responsibility for maintenance.

A. THE FOURTH DISTRICT INVADED THE JURY'S FACT FINDING PROVINCE

The six jurors who decided this case, heard all of the above evidence, including what the Respondents' assert here, before holding Beacon and Willis responsible. In light of this extensive evidence it is, to say the least, difficult to understand how the Fourth District reached its findings. At the very least the above evidence was sufficient to support the jury's findings and to dissuade the Court from second guessing them.

It is respectfully submitted that the Fourth District exceeded its proper role and invaded the jury's province when it began to "weigh evidence." It is not the function of a reviewing court to substitute its judgment for the jury's. Industrial Waste Service, Inc. v. Henderson, 305 So. 2d 42, 44 (Fla. 3d DCA 1974) (citations omitted). "It is the role of the finder of fact, whether a jury or trial judge, to resolve conflicts in the evidence and to weigh the credibility of witnesses. Great deference is afforded to the finder of fact because it has the first hand opportunity to see and hear the witnesses testify." Ferry v. Abrams, 679 So. 2d 80, 81 (Fla. 5th DCA 1996). Where there is competent evidence to support the jury's verdict it must be sustained by the district

court. Espino v. Anez, 665 So. 2d 1080, 1081 (Fla. 3d DCA 1996).[2]

B. PETITIONER DOES NOT SEEK AN ADVISORY OPINION

Once the truth that Beacon was responsible for maintenance is accepted, then Respondents argument, that this Court's decision will be advisory, necessarily fails. If it was Beacon's duty to maintain the property and this duty was breached then Beacon is liable for damages under the DUTPA. Especially where Willis and Beacon deliberately caused the dilapidation of the building and the demise of the tenants. See discussion infra pp. 7-8. Therefore, the jury was certainly justified in concluding that Willis and Beacon's acts were immoral, unethical, oppressive and substantially injurious to PNR. They were likewise justified in awarding substantial damages. Accordingly, since a reversal of Fourth District will reinstate the damages award against Willis and Beacon this Court's opinion will clearly not be merely advisory.

C. THE FOURTH DISTRICT'S DUTPA HOLDING IS NOT DICTA

[2] Ironically, the Fourth District confessed its sin when it remarked that "[w]e have carefully examined the evidence. . ." Respectfully, it is not the role of appellate courts to examine thousands of pages of trial transcript and documentary evidence in the search for the truth. Such fact and finding and weighing of evidence is the exclusive province of the jury.

As this Court already concluded when it accepted jurisdiction in this case, the Fourth District's application of the DUTPA is not superfluous dicts as Respondents contend. Likewise, the "entire holding" was not limited to the finding that Beacon was not the landlord. These arguments were not successful in Respondents' brief on jurisdiction and repetition has not improved them. Accordingly, despite what Respondents have *told* this Court about the scope of its review, it is not limited to application of the DUTPA to commercial landlords. It is respectfully submitted that since the Fourth District's holding substantially increased the evidentiary burden of all claimants, review necessarily extends to application of the DUTPA to all who violate it and all who are protected by it. Therefore, the Court's decision here has everything to do with Beacon and Willis.

If this Court concludes that the jury's determination that Beacon was responsible for maintenance should not have been disturbed on appeal, then reversal reinstates the damages award. Stated differently, if this Court concludes that the Fourth District incorrectly interpreted the DUTPA by requiring PNR to show that Beacon's maintenance failures were "regular and systematic " or "habitual and customary, action" then reversal and reinstatement of the damages award is required.[3]

[3]Even under the Fourth District's incorrect analysis Beacon is liable. Since PNR clearly proved that, at least with respect to the property at issue, Beacon's maintenance failures were a "regular and systematic" course of conduct.

In short, if a single deceptive act or practice is enough then Beacon and Willis are certainly liable for violating the DUTPA

II. WILLIS IS PERSONALLY LIABLE UNDER DUTPA

A. WILLIS ENGAGED IN SELF DEALING

In their Answer Brief Respondents make the overtly false statement that "there was no evidence introduced at trial that Willis acted self-interestedly." (Ans. Brief p. 22). Nothing could be further from the truth. There was an entire body of evidence showing Willis' self dealing. Giacomino himself sued Willis and Beacon for fraud, self-dealing and deliberately trying to freeze him out of Ocean One even before PNR sued. Also, an important part of Giacomino's lawsuit against Beacon and Willis was their deliberate failure to maintain the property causing waste and dilapidation. (T-880).

Giacomino testified in detail that initially it was his and Willis' plan that Ocean One purchase the first mortgage on the property which the bank was selling at a substantial discount. (T-864-65). Then "the next thing I knew, the contract expired and a day or two, three later, he [Willis] ended up buying the mortgage himself." (T-867). Giacomino also testified that Willis' purchase of the mortgage was without his knowledge or consent and that placed him in a "terrible position" because Willis had

the ability to "wipe [him] out". [T-868-69, 881]. Therefore, Respondents' statement that there was no evidence that Willis acted self-interestedly is patently false.

As far as the Fourth District's *conclusion* that Willis did not self-deal, this was impermissible fact finding. The court was distracted by the evidence that the property was sold for a profit. At the same time the Court ignored the more important evidence that the sale occurred as a result of, not in spite, of Beacon and Willis' deceptive and unfair acts. It was these acts which were successful in getting rid of PNR. Willis admitted to Giacomino that he wanted to get rid of the tenants and sell the property. (T-847). Giacomino candidly testified that "it made it easier to sell the building with the restaurant gone". (T-883). The court also ignored the evidence that the sale took place on the eve of PNR's trial out of fear that PNR might win a judgment. Giacomino admitted that PNR's lawsuit "pressured" the sale. (T-1045). It is difficult to understand how the Fourth District overlooked this clear evidence of self dealing.

B. WILLIS PARTICIPATED IN THE TORTS

The evidence discussed above clearly shows that Willis participated in the deceptive and unfair acts which caused PNR's damages. Beacon, like every other corporation, acts through its officers, in this case Willis. As in Anden v. Litinsky, 472 So. 2d 825, (Fla. 4th DCA 1985), Willis' participation in the tortious acts render him

personally liable without requiring the corporate veil to be pierced. See also, Rollins v. Heller, 454 So. 2nd 580 (Fla. 3d DCA 1984). Moreover, "[I]t is well established that an officer of a corporation who commits or participates in a tort, whether or not it is in furtherance of corporate business and whether or not by authority of the corporation, is liable to the injured party whether or not the corporation is liable." P.V. Construction Corp. v. Sidney Kovner, 538 So. 2d 502, 594 (Fla. 4th DCA 1989).[4]

III. THE DUTPA APPLIES IN COMMERCIAL CASES

In their Answer Brief Respondents argue that the DUTPA should not be applied in "commercial lease situations." (Ans. Brief p. 25). There is no legal authority to carve out such a large exception to the Act's broad coverage. Moreover, there is no good public policy reason to refuse commercial tenants protection against unscrupulous landlords. The additional protections that Florida law provides to these residential tenants are necessary to protect families in their homes. However this has no bearing on the protections extended to legitimate businesses by the DUTPA. However, Respondents' lengthy comparison of commercial and residential tenancies in this case is misplaced.

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[4]Willis' attempt to find support for his failed efforts to avoid personal liability in PNR's complaint is seriously misguided. The complaint, which withstood all Defendants' motions directed toward it during the course of the litigation, was not part of the eight days of evidence upon which the jury relied when it found Willis personally liable.

However, PNR's case against Beacon and Willis is not a landlord/tenant dispute. PNR sued Beacon and Willis for violations of the DUTPA after being deliberately run out of business. Simply because Willis happened to be an officer of Ocean One, does not make it a landlord tenant case. Even if the landlord is liable for breaching the lease, under these facts, Beacon and Willis are no less liable for the DUTPA violations.

The facts here are certainly unique enough to set this case far apart from a pure landlord/tenant case. PNR was the victim of a series of intentional common law and statutory torts perpetuated by Willis and the companies he controlled. Whether this case involved a lease, franchise agreement or other commercial contract is not important. Whether a tenant or a franchisee, PNR is still protected by the DUTPA as a legitimate business enterprise. It is the nature of the tortious acts committed which give rise to a DUTPA claim not, the person or entity against whom they are committed. For this reason court's interpreting the DUTPA have been careful not to place blanket restrictions on its protection based upon the "myriad" of different cases which arise in business. Similarly an injured person or business rights do not depend upon their level of sophistication.

Although PNR's case against Beacon and Willis is not a landlord/tenant matter, other states have applied their "little FTC" acts to a commercial lease. See, Boulevard

Associates v. Sovereign Hotels, Inc., 868 F. Supp. 70 (S.D. N.Y. 1994), (commercial landlord could recover against tenant under the Connecticut Unfair Trade Practices Act for willful non-payment of rent and breach of its lease). For these reasons the court should not carve out an inflexible and draconian exception to all cases which are in any way connected to a lease as Respondents propose.

IV. THE FOURTH DISTRICT'S INTERPRETATION OF THE DUTPA LEADS TO AN UNREASONABLE RESULT

A. THIRD PARTIES CAN BE RESPONSIBLE FOR MAINTENANCE

Once the Fourth District categorized this as a landlord/tenant case, it ignored the most important evidence. The court's conclusion that a breach of the duty to maintain the premises, cannot be charged against anyone except the landlord is not only legally wrong but it also ignores business realities. Often times, particularly in a commercial context, landlords hire third parties to maintain their properties. It follows that where a hired maintenance company breaches its duty to maintain the property it is liable for damages. Just as when a maintenance company is sued for such failures in a slip and fall personal injury case. Further where it is proven that for purely selfish reasons and ulterior motives the maintenance company, through the acts of its principal, caused the property to become so dilapidated that it violated nearly every basic building code this

conduct creates liability in tort under the DUTPA.

Taken literally, the Fourth District's conclusion amounts to an unlawful restriction on the right to freely contract by prohibiting property owners from hiring third parties to assume responsibility for property maintenance. The decision also allows the culpable party to escape liability. Such a draconian application of the DUTPA is unreasonable and inconsistent with its remedial purpose.

B. IT IS UNREASONABLE TO REQUIRE MORE THAN A SINGLE DECEPTIVE ACT OR PRACTICE

As discussed at length in PNR's initial brief, requiring a plaintiff to prove that the defendant committed more than a single deceptive act or practice is inconsistent with the legislative intent; the broad remedial purpose of the DUTPA, which was significantly strengthened by the 1993 amendments; and all interpretive Florida cases.

The Fourth District has placed an evidentiary burden on plaintiff which is not found in the statute. Requiring claimants to prove not only the deceptive acts committed against them, but also to prove that the defendants act's are "habitual and customary" or "regular and systematic" is unreasonable. Such an onerous requirement eviscerates the Act's protections and would unfairly eliminate many viable claims.

This Court should not condone the Fourth District's re-writing of this important remedial legislation and thereby deny many Florida citizens its protections. The Court

also must not condone the Fourth District's clear invasion of the jury's sacred fact finding province.

C. THE COURT SHOULD NOT CHANGE FLORIDA LAW WHICH IS CONSISTENT WITH MANY OTHER STATE AND FEDERAL COURTS

This Court of Appeal should follow the decisions of other state and federal courts. In addition to Illinois and Georgia, which Respondents mention, other state and federal courts have held a single act is sufficient. Drybrough v. Acxiom Corp., 172 F.Supp. 2d 366 (D. Conn. 2001)(a single act may be basis of a DUTPA claim); Klein v. Earth Elements, Inc., 69 Cal.Rptr.2d 623 (Cal. App.1st Dist. Div. 4 1997)(liability can be based on single transaction and does not require showing of ongoing wrongful business conduct). Breckenridge v. Cambridge Homes, Inc., 246 Ill. App. 3d 810 (Ill. App. Ct. 2d Dist. 1993) (complaint under consumer fraud and Deceptive Business Practices Act need not prove pattern or practice of deceptive acts; single deceptive act is sufficient to support recovery). See also, Podolsky v. First Healthcare Corporation, 58 Cal. Rptr. 2d 89 (Cal. App. 2d, Dist. Div. 5 1996); Lake County Grating Company of Libertyville, Inc. v. Advance Mechanical Contractors, 275 Ill. App. 3d 452 (Ill. App. Ct. 1995).

CONCLUSION

For the foregoing reasons Petitioner respectfully requests this Honorable Court

reverse the decision and/or quash the opinion of the Fourth District in this case as it relates to Petitioner's DUTPA claims, reinstate Petitioner's damages award against Respondents, find Petitioner to be the prevailing party, and award Petitioner all attorneys fees and costs incurred herein including fees and costs of appeal, and grant all such other and further relief as the Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was

served via Federal Express on David Maher, Esquire, Harke & Clasby, LLP, Miami Center, Suite 1050, 201 South Biscayne Boulevard, Miami, Florida 33131 and Harry J. Ross, Esquire, Law Office of Harry J. Ross, 6100 Glades Road, Suite 211, Boca Raton, Florida 33434, this _____ day of June, 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 Times New Roman 14 point.

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