IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC11-1462
L.T. No. 3D08-2088

JAMES SOPER, *et al.*,

Petitioners,

v.

TIRE KINGDOM, INC.,

Respondent.

BRIEF OF RESPONDENT TIRE KINGDOM, INC. ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

Respondent Tire Kingdom, Inc. (Tire Kingdom) operates a multi-state chain of tire and automotive repair stores. Appendix "A" at 10.[1] In compliance with Florida law, Tire Kingdom requires every service customer to sign an estimate, which discloses, among other things, a "shop fee." (A:10-11). Every Tire Kingdom store "posts signs in its customer service area to inform Tire Kingdom customers about these charges." (A:11). Tire Kingdom's advertisements and discount coupons usually disclose the shop fee, but it "occasionally has failed to include this disclosure in an advertisement or discount coupon." (A:11-12).

Tire Kingdom store managers are given a "free range on pricing," and regularly provide discounts to customers upon request, even without a coupon. (A:12-13). "Tire Kingdom has found that strict adherence to customer discount, price adjustment, and coupon account requirements to be 'impossible of enforcement' in the milieu in which it operates." (A:14).

Petitioners Dishkin and Soper are lawyers and "social acquaintances" of would-be class counsel, who initiated the action after Dishkin and Soper each had their vehicles serviced at Tire Kingdom stores, for which they presented discount coupons that did not include a reference to shop fees. (A:3-10). Although "Tire Kingdom has no record of [Dishkin] presenting a coupon" for a $16.99 oil change, the invoice reflects that she was charged that price and that she received a $5.00

[1] Although sued as "Tire Kingdom, Inc.," the actual party defendant is TBC Retail Group, Inc., d/b/a Tire Kingdom.

"[s]pecial [c]redit." (A:3-4). The invoice included a $1.70 shop fee, which was explained in a capitalized disclosure. (A:4). Dishkin "'looked at' the invoice and signed it before paying for the service," but testified that she had not noticed the shop charge until she later reviewed the invoice. (A:4-5).[2]

Soper presented a coupon for tire maintenance service, but his Land Rover was not covered. (A:5-6). The store manager still extended the discount to Soper, who signed an estimate that included a $3.60 shop fee and the same disclosure that appeared on Dishkin's invoice. (A:6-8). His final invoice charged him $25.24, the amount set forth on the estimate. (A:8-9).[3] "Thirty days later, his counsel filed [a] class action complaint," which also named Dishkin as a plaintiff. (A:5, 10).

The trial court certified two classes of Tire Kingdom customers (one statewide and one limited to Miami-Dade County, but otherwise identical) "who either (1) 'used or benefitted' from a discount coupon that failed to disclose the store would add a 'shop fee' to the discounted price advertised on the coupon or (2) were 'overcharged' for a service at Tire Kingdom by the 'imposition of a shop fee based upon a percentage of the retail price of the service, rather than the advertised or charged price.'" (A:2).[4] The trial court based its certification on two

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[2] Although the store had "at least four signs prominently posted in the public area of the store – two affixed at the customer counter, one affixed to the wall in the same area, and a fourth perched on a stand in the customer waiting room – Dishkin stated that she did not 'specifically recall' seeing any of the signs." (A:5).

[3] Like Dishkin, Soper "did not recall" seeing several signs in the Tire Kingdom store advising of the shop fee charge and claimed that "he did not notice the 'shop fee' charge on the invoice until he got home that day." (A:9-10).

[4] Although petitioners accuse the Third District of "failing to accord appropriate deference to the trial court's findings," Petitioners' Brief on Jurisdiction (PB) at 2,

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factors: (i) "Tire Kingdom repeatedly and with only non-material variations published the same advertisements," and (ii) the putative class members "were all victims of overcharges by [Tire Kingdom] either through the omission of the shop fee in the advertisements or being charged a shop fee based on the retail price." (A:16). The purported "common issues" are whether Tire Kingdom's representations were false and misleading, and whether class members are entitled to recover. (A:16-17). The Third District reversed the class certification, holding that petitioners had failed to establish the commonality and typicality elements – and that the trial court had committed legal error in ruling otherwise. (A:15-28).

First, the trial court's ruling that the putative class members "were all victims of overcharges" to find commonality was an impermissible merits finding:

> [N]ot only are the trial court's impressions not supported by the record, but also they constitute improper incursion by the trial court into the merits of the case.… [A] trial court considering whether an action may be maintained is not to focus on the merits of the case, but only on the requirements of the [class action] rule, lest the cold neutrality of the trial judge expected in these important decisions be placed in jeopardy. The trial court crossed that line in this case by reaching its own preliminary conclusions on the merits of the case at the class action stage of the litigation. This alone is a sufficient ground upon which to reverse the class determination.

(A:17-18) (citations omitted).

Second, the trial court's commonality findings merely listed "questions that will be decided by an ultimate fact finder," which is insufficient to establish

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6-9, they fail to note that the parties submitted "the class determination to the trial court based solely upon affidavits, depositions and the … record." (A:3 n.4).

commonality, because "[a]n incantation of ultimate legal issues, however variously and creatively they might be couched, does not suffice to meet the commonality element." (A:18). Third, the trial court ignored that recovery of damages turns on each customer's specific experience:

> [T]he plaintiffs here claim that each class member "pa[id] more than was bargained for." To make this determination, it follows that each class member's Tire Kingdom experience – including the precise language of each advertisement, the class member's awareness of Tire Kingdom's shop-fee signage, and the class member's conversations with Tire Kingdom employees – would have to be explored to determine Tire Kingdom's liability to each class member…. [C]ollective proof of individualized transactions cannot be used to prove the indispensable element of causation….

(A:22-23). "[A]llowing so-called 'common proof' to substitute for individually proving each class member's unique claim is **legal** error that cannot hide behind the abuse of discretion standard." (A:24) (citation omitted; original emphasis).

Addressing typicality, the court held that '"[m]erely pointing to common issues of law is insufficient to meet the typicality requirement when the facts required to prove the claims are markedly different between class members."' (A:25-26) (quoting *Olen Props. Corp. v. Moss*, 981 So. 2d 515, 520 (Fla. 4th DCA 2008)). The trial court's "belief" that Tire Kingdom "engaged in a 'common scheme'" does not fill that gap, because "the factual basis of the claims asserted by the plaintiffs do not have the same basic structure as those of the certified class," such that "the representation that might be given to the few will not be found to be adequate for those that differ significantly." (A:26) (citations omitted).

As the Third District ultimately concluded:

> [I]n complex cases, such as this, where no one set of operative facts establishes liability, where no single proximate cause applies to each defendant, and where individual issues outnumber common issues, trial courts should be hesitant to certify class actions.

(A:28).

SUMMARY OF ARGUMENT

In *Sosa v. Safeway Premium Finance Co.*, --- So. 3d ---, 2011 WL2659854 (Fla. July 7, 2011), this Court overturned a Third District decision reversing an order granting class certification. There the "conflict" between *Sosa* and this case both begins and ends. The Third District's decision in this case applies the correct standard of review, acknowledging that an abuse of discretion must be found, except in the instance of legal error, and there is no hint of the *de novo* review that this Court found wanting in *Sosa*. The Third District held that the trial court had committed legal errors in its class-certification analysis which – even standing alone – warranted reversal. And, in the few instances in which the court determined that the record did not support a finding, the opinion reflects that the court was *reviewing* a finding, not engaging in a *de novo* certification analysis.

Nor is there any conflict in the court's determination that the trial court erroneously found the commonality and typicality elements to have been satisfied. Indeed, the Third District presaged – by one day – this Court's holding that "[t]he primary concern in the consideration of commonality is whether the representative's claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory." *Sosa*, *supra* at *10 (citations omitted). And, on typicality, the court's analysis precisely tracks the established governing precepts. There is no basis –

and no reason – to grant review of a decision that merely applies established precedent to overturn an erroneous class certification.

ARGUMENT

I. THE THIRD DISTRICT APPLIED THE CORRECT STANDARD OF REVIEW.

Petitioners' overarching theme is that the Third District's decision should be reviewed because its analysis conflicts with *Sosa v. Safeway Premium Finance Co.*, --- So. 3d ---, 2011 WL2659854 (Fla. July 7, 2011), in which this Court overturned an earlier Third District decision.[5] This Court did so upon a holding that the Third District had erred "in making its own factual findings as to whether Sosa and the putative class members satisfied" Rule 1.220 of the Florida Rules of Civil Procedure, and in "afford[ing] no deference to the trial court's actual factual findings" in "a de novo review." *Id.* at *1. Because the claims of the class representative and class members were "based on the same legal theory," – a statutory violation – which "arose from the same course of conduct that caused a similar injury," *i.e.*, "overcharging Sosa and the putative class members an additional service charge of $20 twice in a twelve-month period," this Court held that the trial court had correctly certified the class. *Id.* at *13-14, 19.

Petitioners essentially concede that they cannot show – on the face of the two opinions, *e.g.*, *Reaves v. State*, 485 So. 2d 829, 830 & n.3 (Fla. 1986) ("[t]he

[5] The Third District's opinion issued on July 6, 2011, one day *before* this Court issued *Sosa*. Without giving the Third District any opportunity to address *Sosa* (or even to amend its passing reference to the Third District's decision in that case), petitioners filed their discretionary-review notice on July 8, 2011.

only facts relevant to our decision … are those facts contained within the four corners of the decisions allegedly in conflict") – that the Third District misapplied the governing review standard. (PB:7). For all of Petitioners' fulminating, the Third District's decision largely faults the trial court for *legal* errors: (i) basing a class-certification decision on the purported merits of the claims; (ii) "allowing so-called 'common proof' to substitute for individually proving each class member's unique claim"; and (iii) "[m]erely pointing to common issues of law … to meet the typicality requirement when the facts required to prove the claims are markedly different between class members." (A:17-18, 24-26) (quoting *Olen Props. Corp. v. Moss,* 981 So. 2d 515, 520 (Fla. 4th DCA 2008)).

The Third District strictly followed the established review standard, as reaffirmed in *Sosa, supra*, at *8 (appellate court "reviews a trial court's order on class certification for an abuse of discretion, examines the trial court's factual findings for competent, substantial evidence, and reviews conclusions of law de novo") (citations omitted). The Third District expressly recognized that the "abuse of discretion standard" applies on review (A:24), except for *legal* error. (A:17-18; 24-26).[6] And, when the court deemed the documentary evidence legally

[6] Indeed, any notion that the Third District misunderstood the governing standard is conclusively refuted by the court's analysis of the Rule 1.220(a) requirement. First, in passing on the commonality element, the court expressly ruled that "the trial court's impressions" were "not supported by the record." (A:17). Then, in ruling on typicality, the court faulted the trial court for "its belief that Tire Kingdom engaged in a 'common scheme'" when "[t]he evidence does not support such a conclusion." (A:26). When addressing adequacy, however, the court "agree[d] with the trial court that the plaintiffs presented sufficient evidence to satisfy this element," such that – the trial court *did not err* in finding that plaintiffs

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insufficient to support a legal conclusion, it expressly said so. (A:15, 26).[7]

Indeed, petitioners tip their hand even further when they go beyond the four corners of the record to suggest that, should the Court "broaden its gaze to the trial court's opinion and the record," the conflict that petitioners fail to demonstrate would become apparent. (PB:9 n.3). Petitioners' argument is thus revealed: this Court overturned the Third District in *Sosa*, therefore the Third District's decision in this case *must* somehow conflict with this Court's *Sosa* opinion. That argument is defeated by the Third District's extensively detailed analysis.

II. THE THIRD DISTRICT APPLIED THE CORRECT LAW ON THE COMMONALITY AND TYPICALITY ELEMENTS.

Petitioners' accusation that the Third District misstated commonality and typicality principles (PB:3-6, 9-10) is unavailing. On commonality, the Third District correctly declared that "[t]he primary concern" in the commonality element is "'whether the representative members' claims arise in the same practice or course of conduct that give rise to the other claims and whether the claims are based on the same legal theory.'" (A:16) (citations omitted). The court cited

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were adequate representatives. (A:27).

[7] As noted, petitioners filed their discretionary-review notice the day after this Court issued its *Sosa* opinion and two days after the Third District's opinion, *see* n.4, *supra*, and the Third District's opinion includes a passing reference to its own *Sosa* decision. (A:26). But the proposition for which the Third District cited its *Sosa* opinion was *endorsed* by this Court. *Sosa*, *supra* at *8 (appellate court "examines a trial court's factual findings for competent, substantial evidence"). This Court ultimately disagreed *on the merits* in *Sosa*, but that does not convert the Third District's brief reference into a basis for discretionary review.

Powell v. River Ranch Prop. Owners Ass'n, Inc., 522 So. 2d 69, 70 (Fla. 2d DCA 1988) – the *same decision* cited in *Sosa* – to hold that "[t]he primary concern … is whether the representative's claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory." *Sosa*, *supra* at *10 (citations omitted).[8]

And the Third District's recognition that "[a]n incantation of ultimate legal issues, however variously and creatively they might be couched, does not suffice to meet the commonality element of our class action rule" (A:18) (citation omitted), actually presages this Court's own recognition that the "core of the commonality requirement is satisfied if the questions linking the class members are substantially related to the resolution of the litigation." *Sosa*, *supra* at *11 (citation omitted).[9] Finally, any notion that the Third District conflated commonality with the predominance element (PB:5) is confuted by the Third District's careful explication of the difference between those concepts. (A:15, n.11) ("[s]ince the

[8] The Third District also cited *Morgan v. Coats*, 33 So. 3d 59, 64 (Fla. 2d DCA 2010), for an explication of the commonality standard (A:19), and this Court also relied on *Morgan* for the holding quoted in the text. *Sosa*, *supra* at *10.

[9] Petitioners seem to be believe that the Third District citation to *Wal-Mart Stores, Inc. v. Dukes*, --- U.S. ---, 131 S. Ct. 2541 (2011), in discussing commonality (A:18-19), means that the court "seemingly misconstrued the *Wal-Mart* opinion to require a narrower focus than this Court permitted in *Sosa*." (PB:6). That argument is difficult to follow. As the Third District correctly noted, Florida courts often look to federal law to interpret the Florida class-action rule. (A:14, n.10), That this Court did not address the *Wal-Mart* decision in *Sosa* hardly – in petitioners' words – "invites the kind of undue constriction of the commonality analysis the district court has undertaken here" (PB:6), and, regardless, certainly does nothing to substantiate the existence of a conflict of *Florida* decisions.

predominance requirement of subsection (b)(3) is obviously more stringent than that prescribed by subdivision (a)(2), a proposed class which fails to meet this element necessarily fails to meet the requirements of Florida Rule of Civil Procedure 1.220(b)(3)") (citation omitted).

Petitioners' attempt to confect conflict on the typicality prong (PB:9-10) fares no better. Quoting *Olen Props.*, 981 So. 2d at 520, the Third District held that "merely pointing to common issues of law is insufficient to meet the typicality requirement when the facts required to prove the claims are markedly different between class members." (A:25-26).[10] The court did *not* "reject[] typicality on the ground that Plaintiffs' claims would require proof of unspecified facts that differ from those of the class members." (PB:10). Rather, the court held that typicality had not been shown because "the factual basis of the claims asserted by the plaintiffs do not have the same basic structure as those of the certified class," such that "the representation that might be given to the few *will not be found to be adequate for those that differ significantly*." (A:26) (emphasis added).

CONCLUSION

Based on the foregoing, Tire Kingdom requests the Court to deny discretionary review.

[10] Contrary to petitioners' suggestion, conflict does not exist because the Third District "made no mention of antagonism." (PB:10). The opinion states – in language almost identical to that used in *Sosa*, *supra* at *18 – that typicality "focuses on the sufficiency of the named plaintiffs *and the relationship between their claims and the class's claims*." (A:5) (citations omitted; emphasis added).

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.