IN THE SUPREME COURT OF FLORIDA

Case No.: SC09-1849

LAZARO E. SOSA, in his own right and on behalf of all persons similarly situated

Petitioner,

vs.

SAFEWAY PREMIUM FINANCE COMPANY, a Florida corporation,

Respondent.
_____/

LOWER TRIBUNAL CASE NO(S).
3D06-2579, 03-28811

JURISDICTIONAL BRIEF OF RESPONDENT

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INTRODUCTION

This is an appeal from a decision of the Third District Court of Appeal. This jurisdictional brief will demonstrate why this Honorable Court should not exercise its discretionary jurisdiction to review the decision *sub judice*. *See*, Art. V §3(b)(3)(4)(5), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(v) and (vi). Throughout this brief, the Petitioner, LAZARO E. SOSA, will be referred to as either as "Petitioner" or "Sosa." The Respondent, SAFEWAY PREMIUM FINANCE COMPANY, will be referred to as either "Respondent" or "Safeway."

STATEMENT OF THE CASE AND FACTS

The instant case involved a putative class action claim in which Sosa sought to establish that Safeway had liability under the Florida Premium Finance laws when it mistakenly overcharged him a $20 service fee in addition to the fees authorized by statute. The law in question only allowed for a private cause of action if the statutory violation was intentional. The trial court granted certification and Respondent filed an interlocutory appeal. On April 8, 2009, the Third District Court of Appeal reversed the trial court's certification of the class in this case because Sosa could not allege that Safeway had "intentionally" violated Florida Statute Section 627.840(b) when it mistakenly overcharged him the $20 fee.

Key to its decision was the Third District's determination that a violation of the premium finance statute in question was only actionable if Safeway had

"knowledge" that it was in violation of the statute, i.e, that the violation was intentional. *Safeway Premium Finance Co. v. Sosa*, 15 So.3d 8, 10 (Fla. 3d DCA 2009); *see also*, Fla. Stat., § 627.835 (2002).

At the time Mr. Sosa was mistakenly overcharged by Safeway, Safeway had a system in place to ensure that individuals were not overcharged and that the subject statutory provisions were complied with. Moreover, prior to Sosa filing his lawsuit, Safeway's system recognized its error in having overcharged Mr. Sosa and corrected it. As such, the Third District determined that under such circumstances, Sosa could not allege that Safeway's overcharge was intentional. *Safeway Premium Finance Co. v. Sosa*, 15 So.3d 8, 12-14 (Fla. 3d DCA 2009)(Shepherd, J., concurring).

Petitioner Sosa motioned the Third District Court of Appeal for rehearing, and rehearing *en banc*. These motions were denied by the Third District on August 28, 2009. Significantly, the cases certified by Petitioner to be contrary to the Third District's opinion for purposes of their Motion for Rehearing *En Banc* did not include any of the decisions relied on in Petitioner's Jurisdictional Brief herein, including *Smith v. Foremost Insurance Company*, 884 So.2d 341 (Fla. 2d DCA 2004). After the motions for rehearing and rehearing *en banc* were denied, the instant appeal followed.

SUMMARY OF ARGUMENT

Safeway respectfully requests that this Court decline jurisdiction to review the Third District's decision because there is no basis under the Florida Constitution, or the rules of appellate procedure, to invoke its discretionary jurisdiction. Foremost, the legal principles expressed in the decision are not in express and direct conflict with either a decision of the Supreme Court or another District Court of Appeal. Nor does the decision meet any of the specifically enumerated criteria under Art. V, §3(b)(3)(4) or (5), of the Florida Constitution or Florida Rule of Appellate Procedure 9.030(a)(2).

In an attempt to "create" conflict, Petitioners misconstrue the Third District's holding in *Safeway Premium Finance Co. v. Sosa*, 15 So.3d 8 (Fla. 3d DCA 2009), wrongfully stating that it precludes "any claim for a knowing violation of a statute" from being certified as class action. *See* Petitioner's Brief at p.7. This is simply not the case. The Third District's opinion in *Sosa* does not preclude "any claim" for a knowing violation of the premium finance statutes from being maintained as a class action; rather the opinion simply states that in this particular case, under these particular circumstances, there can be no "knowing" violation.

Accordingly, the decisions cited in Petitioner's jurisdictional brief are not in direct and express conflict with the opinion at issue. Therefore, this Court should

not entertain the Petitioner's request and should deny jurisdiction.

ARGUMENT

Article V, Section 3 of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2) provide the limited instances where this Court can exercise its discretionary jurisdiction. The District Court decisions cited in Petitioner's brief do not fall into any of the categories listed either in the Constitution or the Rule. A jurisdictional basis exists when the District Court's decision expressly and directly conflicts with a decision of either the Supreme Court or another District Court of Appeal on the same question of law. Art. V, §3 (b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(iv),(v).

I. The Third District's Decision Does Not Expressly And Directly Conflict With The *Smith v. Foremost Insurance* Decision.

The Third District's decision in the instant case reviewed §§ 627.840 and 627.835, Fla. Stat. (2002) and determined that class certification for violations of § 627.840 based on the damages specified in § 627.835 required for the overcharges to be "intentional." This holding is not in direct and express conflict with the Second District's decision in *Smith v. Foremost Insurance Company*, 884 So.2d 341 (Fla. 2d DCA 2004) which interpreted different statutory provisions, did not involve the certification of a class, and did not dispute intent.

In fact, the issues determined by the Third District in the instant case had nothing to do with the questions considered by this Second District in the *Smith*

case. While the *Smith* case may have involved a class action, it differs from the instant case in significant ways: 1) there is no indication from the body of the *Smith* opinion that a class had been or was ever certified; 2) the statutory provision being interpreted was part of the insurance code, not the premium finance code; 3) the case was on a different procedural posture than the case at bar; and 4) the question of whether a class action could be maintained where a requirement of the underlying cause of action was "knowledge" and/or "scienter" was never discussed.

In *Smith*, the Second District was faced with the question of whether an insurance company, which had charged service fees under a payment plan for premiums, fell under the auspices of the insurance statutes regulating premium financing by insurance companies: Fla. Stat. § 627.901, *et seq*. The court determined that the insurance company had indeed financed the policies and reversed a lower court's entry of summary judgment which had ruled otherwise. The Second District then affirmed the trial court's denial of a cross-motion for summary judgment in favor of the insured finding as follows:

> We affirm the denial of Smith's cross-motion for summary judgment. A question of material fact remains as to whether the service charges Foremost assessed to Smith and others similarly situated were "substantially more than that provided in s[ection] 627.901," which would subject Foremost to part XV of the code, see § 627.902, and penalties for any noncompliance.

Smith, 884 So.2d at 345. In essence, the Second District remanded for trial the question of whether there had even been a violation of Fla. Stat. § 627.901 (setting caps on service charges) and noted, *in dicta*, that a violation would trigger the penalty provisions under Part XV of the Code, i.e., Fla. Stat. § 627.835. Accordingly, whether or not the potential statutory violation at issue in *Smith* warranted application of the penalty provisions in § 627.835 had not yet been considered by the lower court and was never an issue raised before the Second District.

By contrast, in *Sosa*, Respondent admitted that statutory violations had mistakenly occurred. Thus, the central issue determined in *Sosa* was whether Petitioner could maintain, either as an individual or as the representative of a class, a private cause of action under Florida Statute 627.835 where he could not allege the requisite "knowing" violation.[1]

[1] Florida Statute 627.835, only provides a remedy for an intentional violation: "Any person, premium finance company, or other legal entity who or which knowingly takes, receives, reserves, or charges a premium finance charge …" In the *Sosa* opinion, the Third District interpreted "knowingly" to mean that defendant acts with "knowledge, consciously, willfully, and intentionally." *Safeway Premium Finance Co. v. Sosa*, 15 So.3d at 10. The court then gave several examples of how a premium finance company could unknowingly violate section 627.840(b): "[W]here an insured changes his or her name or his or her address from one six-month premium application to the next, leading Safeway to treat the applications as though they were from different individuals, or the company generated more than one bill to the same address in twelve-month period or committed other mistakes, unintentionally, in the processing of an application." *Id.* at 11. "[T]here are multiple explanations for any given failure of the manual

At best, the *Smith* case could stand for the concept that under the right circumstances, a class action may be maintainable under the penalty provisions of § 627.835. However, this is not contrary to the ruling in *Sosa*. A review of the concurring opinion in *Sosa* reveals that prior to February 16, 2001, Safeway did not have a system in place to ensure compliance with the premium finance statutes. Thus, as recognized by Judge Shepherd, for the period of time from December 10, 1999 until February 16, 2001, a class action lawsuit could have been certified for Respondent's "knowing" violations.

Sosa's overcharge, however, occurred in June of 2003, well after a manual review system had been put in place to ensure that Safeway was in compliance with the subject statute.[2] Thus, Sosa's claim was not typical of the claims of

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process, ranging from a change of name or address by the premium finance customer during a prior policy period, purchase of the subsequent policy in another family member's name, the premium finance application being incorrectly completed, or human error in the review process." *Id.* at 13 (Shepherd, Jr., concurring).

[2] The manual process was described in the concurring opinion in detail:

"During the years Safeway financed Sosa's policies, Safeway employed a manual process to check each incoming proposed premium finance agreement by customer name to determine whether the applicant was a former Safeway customer and, if so, whether he had been charged a twenty-dollar service charge within the preceding six-month period. If so, a second Safeway employee performed an additional records check to determine whether the insurance contract was cancelled for non-payment. [footnote omitted] If the twenty-dollar service charge had been improperly assessed, then the balance due under the premium finance agreement would be reduced by that amount. Safeway instituted this process on February 16, 2001, in response to a Florida Department Insurance audit, which found instances

individuals who had been charged the $20 fee prior to the February 16, 2001 establishment of the review system; and he therefore lacked standing to raise any such claim on behalf of such a class:

> Although, in a proper case, we might remand with the direction there be a separate adjudication for this group of potential claimants, we cannot consider that alternative here because Sosa's claim is not typical of that group of potential claimants.

Sosa, 15 So.3d at 14 (Shepherd, J., concurring). As such, *Sosa* does not stand for the proposition that a class action can never be certified when one is asserting a claim under Florida Statute Section 627.835. Rather, because Safeway had taken measures to ensure compliance with the statute, and was not merely charging everyone the $20 fee, "willfulness" or "intent" could not be imputed under these circumstances.

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of overcharges in Safeway's records. According to Safeway, no computerized process existed in the industry that could perform this task at the time.

Finally, it is important to note that the manual review of each proposed finance agreement received by Safeway during this period was undertaken immediately upon arrival of the proposed agreement in the Safeway mailroom. Thus, only if the manual check failed to accomplish a required reduction might there be a statutory offense of the type alleged by Sosa in this case. Accordingly, the necessary legal inquiry with respect to proposed financing agreements received by Safeway after February 16, 2001, is whether Safeway's manual system failed to accomplish a service charge adjustment that should have been accomplished, and, if so, whether the failure was a "knowing[ ]" failure within the meaning of section 627.835 of the Florida Statutes." *Sosa*, 15 So.3d at 12-13 (Shepherd, J., concurring).

Even assuming for sake of argument that the Third District's rationale in *Sosa* is at odds with the Second District's reasoning in the *Smith* decision, such indirect conflict does not confer this Honorable Court with jurisdiction. *See Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980)("It is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction.") Indeed, as expressed by this Court in the case of *Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888, 889 (Fla. 1986), "'[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." *Id*. quoting from *Reaves v. State*, 485 So.2d 829, 230 (Fla. 1986).

II. The Third District's Decision Does Not Expressly And Directly Conflict With Any Other District Court Decision.

The District Court's decision in this case is not in express and direct conflict with any of the four other cases cited in Petitioner's Brief. None of the additional cases cited by petitioner involved "knowing" violations and/or questioned whether the particular facts of the case involved a "knowing" violation.

In, the case of *Equity Residential Properties Trust v. Yates*, 910 So.2d 401 (Fla. 4th DCA 2005), for example, the common question presented to the court was whether the early termination "fees" being charged by the landlord were in violation of Florida law. It was never disputed, and thus it was unnecessary to

prove, that the charges were intentional. In the cases of *Olen Properties Corporation v. Moss*, 981 So.2d 515 (Fla. 4th DCA 2008), *Smith v. Glen Cove Apartments Condominiums Master Association, Inc.*, 847 So.2d 1107 (Fla. 4th DCA 2003), and *Terry L. Braun P.A. v. Campbell*, 827 So.2d 261 (Fla. 5th DCA 2002), intent was not a part of the cause of action, and thus, did not have to be proven on a class wide basis.

Thus, the *Sosa* decision is consistent with established precedent requiring a uniform and consistent act on the part of the defendant as proof of intent. In other words, claims requiring individualized inquiry into state of minds are not maintainable as class actions because "they are inherently diverse as a matter of law" and "each depends on its own facts.'" *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) *quoting Osceola Groves, Inc. v. Wiley*, 78 So.2d 700, 702 (Fla. 1955); *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977); *see also, Black Diamond Properties v. Haines*, 940 So.2d 1176 (Fla. 5th DCA 2006; *Humana, Inc. v. Castillo***,** 728 So.2d 261 (Fla. 2d DCA 1999).

CONCLUSION

As there is no express and direct conflict, Respondent respectfully requests that this Court enter an order denying Petitioner's notice to invoke the discretionary jurisdiction of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via United States Mail this 15th day of December 2009 to EDUARDO GOMEZ, ESQ., Alvarez, Carbonell & Gomez, P.L., 2330 Ponce de Leon Boulevard, Suite 201, Coral Gables, FL 33134 and RONIEL RODRIGUEZ, IV, ESQ., 20533 Biscayne Boulevard, Suite 1243, Aventura, FL 33180.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Jurisdictional Brief of Respondent complies with the font standards in Rule 9.210, Florida Rules of Appellate Procedure. This Brief utilizes Times New Roman 14 point font.

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