IN THE SUPREME COURT OF THE STATE OF FLORIDA
SC09-1849

CASE NO. 3D06-2579
L.T. CASE NO.: 03-28811 CA 21

LAZARO E. SOSA,

Plaintiff/Appellee/Petitioner

v.

SAFEWAY PREMIUM FINANCE COMPANY

Defendant/Appellant/Respondent

ON APPEAL FROM AN OPINION OF THE THIRD DISTRICT COURT OF APPEAL

AMENDED REPLY BRIEF OF PETITIONER LAZARO E. SOSA

Date: November 23, 2010

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VI. THIS COURT HAS JURISICTION

In its Jurisdictional Brief, the Plaintiff argued two separate bases for conflict jurisdiction. In Section III A of that brief, Plaintiff argued that there was conflict with *Smith v. Foremost Ins. Co.*, 884 So. 2d 341 (Fla. 2d DCA 2004), which was a class action based upon whether the Appellee insurers and the service fees they charged the Appellants were governed by the premium financing statutes and therefore subject to the penalties in § 627.835, Fla. Stat. Jurisdictional Brief at p. 9. In Section II B of the Jurisdictional Brief, Plaintiff argued that the Third District Court of Appeal misapplied the commonality test. In its Answer, Defendant completely ignores the issue of conflict with regard to the misapplication of the test for commonality set forth in *Safeway Premium Finance Co. v. Sosa,* 15 So. 3d 8 (Fla. 3d DCA 2009), and focuses solely on the *Foremost* case.

With regard to commonality, Plaintiff relied on *Olen Properties Corp. v. Moss*, 981 So. 2d 515 (Fla. 4th DCA 2008), *Foremost*, 884 So. 2d 341, and *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261 (Fla. 5th DCA 2002). As set forth in Section I A of the Plaintiff's Initial Brief, which along with the Plaintiff's

[1] "App.-__" refers to the Appendix filed by Defendant Safeway Premium Finance Company in the Third District Court of Appeal, followed by a description of the relevant document or testimony. "Supp. App.-__", refers to the Supplemental Appendix filed by the Plaintiff Lazaro E. Sosa, followed by a description of the relevant document or testimony.

Jurisdictional Brief is incorporated herein by reference, the proper test for commonality is whether the plaintiff has been subject to the *same course of conduct* as that of the putative class members. Initial Brief at 24-32. The Court in *Sosa* focused on the individual actions of the non-Safeway employees (in other words, non-parties to the action) in the mailroom when reviewing the individual applications as they came in. However, the proper focus is on the course of conduct of *the Defendant* whereby it established a process allowing customers to be systematically overcharged. Thus, commonality was easily demonstrated. Therefore, the *Sosa* Opinion conflicts with other Courts of Appeal with regard to the application of the test for commonality and Defendant ignored that argument in completely the jurisdiction section of its Answer Brief.

As set forth in pages 27-28 of the Initial Brief, the broad view regarding the *Foremost* Opinion is that the defendant claimed: 1) it was not subject to the statute at issue; and 2) if it was subject to the statute it did not charge either a service charge or interest rate in violation of the statute. The issue of whether its actions were done "knowingly" in violation of the § 627.835, Fla. Stat., when clearly defendant was making the case it was not, was left for the trier of fact to determine. The Court of Appeal did not step in and decide that issue as it clearly is one for a trier of fact. It is clear from that opinion that a class action can be maintained when there is a knowing element in a statute. Defendant ignores the case of *Equity*

Residential Properties Trust v. Yates, 910 So. 2d 401 (Fla. 4th DCA 2005), wherein the Court of Appeal left the issue of whether there was a willful violation of Chapter 501, Florida's Deceptive and Unfair Trade Practices Act ("FDUPTA") to the trier of fact. It is a question of fact for a jury to decide if the Defendant acted knowingly in overcharging its customers. *See e.g. Kimbrell v. Great American Ins. Co.*, 420 So. 2d 1087, 1088 (Fla. 1982) (question of whether insured knowingly rejected uninsured motorist coverage or knowingly selected coverage in a lesser amount than which insurer is required to make available is an issue to be decided by the trier of fact).[2]

For the aforementioned reasons, there is a clear conflict between the Third District's opinion in *Sosa* and that of the other District Courts of Appeal. This matter should be heard on its merits.

VII. REPLY TO SECTIONS II AND III OF THE ANSWER BRIEF

[2] As will be discussed *infra*, in *Yates*, the Court of Appeal found that pursuant to the civil statute at issue there, [w]illful violations occur when the person **knew or should have known** that his or her conduct was unfair or deceptive." 910 So. 2d at 403. Contrary to the argument set forth in Section II of the Answer, the standard of a willful violation of a civil statute is a question of fact and in *Yates* was accorded a lower burden of proof than that in a criminal context. No matter what standard is applied, it is a question of fact for the trier of fact.

In Section II Defendant discusses the standard for "knowingly" violating a statute and claims there was no knowing violation.[3]

A. Whether Defendant Knowingly Violated the Statute is a Question of Fact for the Trier of Fact

In Section II of its Answer, the Defendant argues that a knowing violation of a statute requires the same standard as that applied to a penal statute. Defendant relies upon *Mogavero v. State*, 744 So. 2d 1048 (Fla. 4th DCA 1999). In that matter, the defendant was criminally charged with and convicted of two counts of acting without a brokerage license. Thus, it was not a civil statute and, in any event, whether the defendant acted knowingly was a question of fact for a jury. The other cases relied upon by defendant all relate to criminal charges except one. *See*, *Shearer v. State*, 754 So. 2d 192 (Fla. 1st DCA 2000) (criminal excavation of an archeological site without a permit - jury question); *Padilla v. State*, 753 So. 2d 659 (Fla. 2d DCA 2000) (plea of *nolo contendre* and discussion of *mens rea* – not applicable here).

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[3] In various places in its Answer, Defendant claims that it had no notice the manual system was insufficient. Answer at p. 16. Mr. Ferrer and Mr. Machul both admitted they knew the manual system did not work. Tab E-Affidavit of Ferrer at ¶¶ 14-15, 28. And App.-Tab G at 25 lines 18-25 and 26 line 1. Indeed, Mr. Machul testified that the UNICORP computer system still uses names and addresses to this day. App.-Tab G at 19. The Defendant was and still is on notice that its system is flawed.

The one non-criminal case Defendant cites is *Roche Sur. & Cas. Co. Inc. v. Dep't of Fin. Services*, 895 So. 2d 1139 (Fla. 2d 2005). In that case, the appellant challenged a determination regarding whether or not there was a knowing and willful failure to pay build-up funds due to a bond agent upon discharge of liabilities pursuant to § 648.29(3), Fla. Stat. The Court of Appeal specifically held that whether there was a knowing or willful violation of the statute was a question of fact. *Id.* at 1141 (emphasis supplied). Thus, even Defendant's own cases stand for the proposition that the issue of whether or not the Defendant knowingly violated §627.840, Fla. Stat. is for a trier of fact to determine. Beyond that, it is clear that the standard to be applied for the knowing or willful violation of a civil, rather than a criminal statute, is different.[4]

B. The Trial Court Conducted a Rigorous Analysis

At the end of Judge Shepard's concurrence, he argues that the trial court failed to conduct a rigorous analysis of the facts and thus abused its discretion. *Sosa*, 15 So. 3d at 14-15. First, as set forth in the Statement of the Case and Facts

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[4] As set forth above, in *Yates* the Court of Appeal found that pursuant to the civil statute at issue there, FDUPTA, "…[w]illful violations occur when the person **knew or should have known** that his or her conduct was unfair or deceptive." 910 So. 2d at 403. Contrary to the argument set forth in Section II of the Answer, the standard of a knowing or willful violation of a civil statute in *Yates* was accorded a lower burden of proof than one in a criminal context. Regardless, under either standard it remains a question of fact for the trier of fact.

in the Initial Brief, it is clear that a rigorous analysis was conducted and the facts revealed that Plaintiff had met his burden as found by the trial court. Defendant claims that the trial court held a mere "one-half day non-evidentiary hearing." Answer p. 31. Defendant argues this point in various parts of the Answer. *See* Answer pp. 11, 19 and 31. The attempt to argue that there was no evidentiary hearing is false and is merely an attempt to shift the standard of review in this matter from an abuse of discretion to the one proposed by the Defendant at p. 19 of the Answer.

First, Defendant did not object below to the evidentiary hearing proceeding on the various depositions, affidavits and other evidence filed in the trial court. Indeed, defense counsel clearly stipulated to the manner in which the evidentiary hearing was held. Thereafter, the issue was not raised in the Court of Appeal. Since the form of the evidentiary hearing was not objected to and raised below, Defendant cannot raise it for the first time before this Court to claim that it was somehow prejudiced, when it clearly was not. An appellate court may not decide issues that were not ruled on by a trial court in the first instance. *See e.g. Alamagan Corp. v. Daniels Group, Inc.*, 809 So. 2d 22, 26 (Fla. 3d DCA 2002).

A half-day evidentiary hearing is significant. Defendant claims that the trial court was supposed to "orally" pronounce its findings. After giving a recitation of the "written" findings of the trial court in its Answer, the Defendant states: "Nor

did the trial judge orally record the factual findings relating to the above requirements or explain how Mr. Sosa had standing." Answer at 15. Why would the trial court "orally" have to record its findings of fact when it did so in writing? Defendant ignores that the trial court did indeed consider a substantial amount of evidence in conducting its rigorous analysis. The trial court's order states it reviewed: Plaintiff's Class Action Complaint; Defendant's Answer and Affirmative Defenses; Plaintiff's Motion for Class Certification and Incorporated Memorandum of law; Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification; Defendant's responses to Plaintiff's Interrogatories; Defendant's Power Point Presentation; and the *remainder of the Court's file*. App. Tab-C. The "remainder of the Court's file" included four affidavits and 4 depositions in addition to multiple motions and memoranda of law. *See* Docket at http://www2.miami-dadeclerk.com/civil/Search.aspx. To claim that the trial court failed to conduct an evidentiary hearing and a rigorous analysis is belied by the Record before this Court and below and, regardless, Defendant failed to object to the manner in which the hearing was held.[5] The Court of Appeal

[5] Defendant claims that it offered to place Mr. Ferrer on the stand but that the trial court determined it was unnecessary. Answer at 11. The reason the trial court deemed it unnecessary was because the question the trial court asked was answered by a proffer from defense counsel, Ms. Abate, herself. App. Tab M, 44:18-45:-12. Ms. Abate was quite content to argue the hearing based on the evidence before the trial court and at no time objected to the manner of the conduct of the proceedings

applied the wrong standard of review to the findings of the trial court rather than according it the deference required under the abuse of discretion standard. The trial court conducted a rigorous analysis.

C. Commonality

With regard to commonality, the Defendant relies heavily on the incorrect proposition that a series of mini-trials would be required to determine if each individual was knowingly overcharged. Answer at 31-34. The Defendant remains stuck in the mailroom.

As set forth in Plaintiff's Initial Brief, it is the Defendant's "course of conduct" that established a system whereby the Defendant admitted it knew or should have known would result in overcharges. *See* Statement of Facts Initial Brief and Section I A therein.

D. Typicality

The trial court did not abuse its discretion in finding that the low threshold required to show typicality was met. Indeed, the Court of Appeal agreed on that point except for a distinction it made for the class members for the period

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below. To argue before this Court that the Defendant was improperly precluded from presenting evidence is simply unsupported by the Record and a mischaracterization of the facts and counsel's strategy below.

December 10, 1999 through February 16, 2001. But, as set forth in Section II of the Initial Brief, even that parsing is an improper application of the law.[6]

VIII. THE PLAINTIFF HAS STANDING TO BRING SUIT

Defendant argues that Plaintiff lacks standing to bring his suit. Answer Brief at Section IV. The Third District Court of Appeal ignored the Defendant's argument regarding standing in its Opinion and found there was standing as there is no discussion of it in the Opinion. The Court of Appeal would not have written on the other issues before it if there was no case or controversy to opine on in the first instance. The Defendant's argument can be reduced to the following two points: 1) that the trial court allegedly found that standing was a question for the trier of fact; and 2) that there was allegedly no "case or controversy" because the Plaintiff had received a waiver of $20.00 on its third six month contract even though there had been a violation of § 627.840, Fla. Stat. over a six month period. The Defendant's arguments fail as: 1) the first issue was never raised below and,

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[6] The Defendant's argument in the Answer regarding the fact that the other putative class members were repaid after suit was filed and, therefore, their claims were not typical of the Plaintiff's claim is incorrect for the reasons set forth in Section II of the Initial Brief. It is also incorrect in that Defendant seeks a "get out of jail" free card by paying $20 to some of those individuals overcharged and not paying them the full statutory claim and interest thereon - all the while never informing the customers why they were even sent a $20 refund check for the statutory violation in the first instance. The Defendant violated the statute. It cannot "unring the bell."

the argument is waived as a matter of law and, while not waiving the objection to it being raised for the first time on appeal before this Court the trial court's order does not hold that the issue of Plaintiff's standing is for the trier of fact; and 2) the full statutory damages and interest were never paid to Plaintiff, or the other putative class members for that matter.

A. The Defendant Waived its Standing Argument with Regard to the Wording of the Trial Court's Order and Notwithstanding that Fact the Trial Court's Order did not Find the Issue of Standing to be a Question of Fact for a Jury

Nowhere in its Initial Brief before the Court of Appeal did the Defendant argue that the trial court ruled that the issue of standing is for the trier of fact. *See* Defendant's Initial Brief in Court of Appeal at 14-19. Therefore, the argument is waived as a matter of law. *See e.g. Alamagan Corp.*, 809 So.2d at 26. Moreover, without waiving the objection to the aforementioned argument being made for the first time before this Court, the Defendant is incorrect. The trial court did not rule that the issue of standing was for the trier of fact.

As set forth in Defendant's own cases, it is axiomatic that in every claim, for a case or controversy to exist, the plaintiff must allege and prove that "he personally suffered injury." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987). Answer at p. 39. A party has standing when he has a sufficient stake in a justiciable controversy and has an injury in fact which relief is likely to redress.

See Chinchilla v. Star. Cas. Ins. Co., 833 So. 2d 804 (Fla. 3d DCA 2002). Here, the trial court specifically found:

> The court finds the plaintiff may have a redressable injury. The question of whether or not Defendant's actions were done knowingly is a jury question and not to be taken into consideration to determine standing.

App.-C. Thus, the trial court properly found that a violation of the statute, which is a jury question, provides the Plaintiff with a redressable injury. The trial court specifically stated that standing was *not* an issue for the trier of fact. The Plaintiff has standing to bring his claim and the trial court did not leave the issue to be determined by a jury.

B. The Plaintiff has Standing as he was not Compensated In Full for all of his Statutory Damages as a Result of Defendant's Violation of § 627.835, Fla. Stat.

The remedy of a violation of § 627.835, Fla. Stat. is as follows:

Fla. Stat. § 627.835: Excessive premium finance charge; penalty.

> Any person, premium finance company, or other legal entity who or which knowingly takes, receives, reserves, or charges a premium finance charge other than that authorized by this part **shall thereby forfeit the entire premium finance charge to which such person, premium finance company, or legal entity would otherwise be entitled**; and any person who has paid such unlawful finance charge may personally or by her or has legal or personal representative, by suit for recovery thereof, recover from such person, premium finance company, or legal entity **twice the entire amount of the premium finance charge so paid.**

Defendant attempted to argue below that Plaintiff did not have standing because, in spite of the overcharge and the six month violation of the statute, Defendant waived the $20.00 charge on the third contract on November 17, 2003, 24 days prior to the filing of the suit.[7] However, as set forth above, the violation of the statute occurred when the Plaintiff was overcharged the $20.00 on May 24, 2003, on his second contract in violation of § 627.840, Fla. Stat. The waiver was on the third contract six months later and not the second contract. The Defendant could have charged the additional $20.00 on the third contract as that would have been 12 months after the first contract was signed. The statute does not state that a waiver of a service charge on a subsequent finance contract, or even a refund, acts to cure the statutory violation. Defendant is attempting to rewrite the statute.

Pursuant to the statute, the Defendant forfeits the entire premium finance charge, and Plaintiff can bring an action for *twice* the amount of the premium finance charge so paid once there is a violation. That amount was not paid to Plaintiff, nor was the interest earned on the overcharge. The Court of Appeal, along with two Circuit Court judges, properly rejected the Defendant's standing

[7] Defendant asserts the waiver on the third contract six months after the violation of the statute was 29 days, but suit was filed on December 10, 2003.

argument. Further, the Defendant attempted to "pick off" the Plaintiff after suit was filed by sending him a $20.00 check. That check was never cashed.[8]

Defendant relies upon *United Automobile Ins. Co. v. Diagnostics of South Florida, Inc.*, 921 So. 2d 23 (Fla. 3d DCA 2006). However, that case is inapplicable. In that matter the claim of the plaintiff was paid in full and to the extent the payment may have been untimely, "….the undisputed evidence shows the applicable $2,000 deductible….would not have been met…." *Id.* at 25. In this matter, it is undisputed by Defendant's own admission that Plaintiff was overcharged $20.00. App.-F, Affidavit of Ferrer at ¶ 5, plaintiff was "erroneously charged an additional charge of $20.00." There is no evidence that Plaintiff was paid the full amount of the statutory damages, or knowingly accepted a partial payment, or in any way released his claim against the Defendant.

For those reasons, Defendant's reliance on *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, (Fla. 3d DCA 2000) (all sums paid in full), *Graham v. State Farm Fire & Cas. Co.*, 813 So. 2d 273 (Fla. 5th DCA 2002) (full payment plus interest) are likewise misplaced.

Defendant's attempt to "pick off" the Plaintiff after suit was filed by sending him an additional $20.00, which he never cashed, was likewise devoid of full

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[8] In footnote 8, Defendant makes a poor attempt to explain away the attempt to "pick off" the Plaintiff.

payment. The statute provides for payment of twice the entire amount of the charge so paid. *See* § 627.835, Fla. Stat. Because there is a case and controversy and Plaintiff has suffered a redressable injury, the Defendant's standing argument fails.

IX. GENERAL REBUTTAL

There remain two general areas that require a Reply - whether there were allegations in the Complaint and Motion for Class Certification that the Defendant knowingly violated the statute and the scope of discovery below.

Defendant claims that the Plaintiff failed to allege that Defendant "knowingly" violated the statute. Defendant is incorrect. In the Complaint, Plaintiff alleged knowing violations of the relevant statutes. *See* Tab-D at ¶¶ 1, 10-20, and 25-27. In the Motion for Class Certification, the Plaintiff alleged a knowing violation of the relevant statute and incorporated the Complaint by reference. *See* Tab-A at 10-11: "Whether the Premium Finance Company knowingly violated Section 627.840 Florida Statutes." The Motion also incorporated the relevant provisions of the Complaint regarding a knowing violation thereafter. *Id.* Thus, the assertion of the Defendant in the Answer and the statement in the Opinion of the Court of Appeal that there was a failure to allege a knowing violation of the statute is simply incorrect.

The Defendant claims that the discovery below was not limited to non-merits based discovery. Answer at 11. However, it clearly was and the Defendant cannot point to anything in the Record to indicate otherwise. The Docket reveals a June 4, 2004, motion to stay class action discovery and a renewed motion to stay class action discovery filed on June 28, 2004. *See* Docket. Plaintiff could not take the deposition of the provider of Defendant's software. Additionally, there were no depositions of the individuals that supposedly checked the applications.[9] The limited non-merits based discovery reveals that the findings of the trial court after the evidentiary hearing are supported by the Record and it did not abuse its discretion in certifying the class below.

X. CONCLUSION

For the aforementioned reasons and those set forth in the Initial Brief, this Court properly reverses the Court of Appeal's Opinion below and remands this matter to the trial court as it did not abuse its discretion by certifying the class in this matter.

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[9] Oddly, Defendant continues to claim that Safeway employees allegedly checked the applications [Answer at p. 3] when Mr. Ferrer and Mr. Machul testified during their depositions that *no Safeway employees even worked in the mailroom*. App.-Tab F at 29 lines 14-17 and App.-Tab G at 40 lines 9-18, respectively (emphasis supplied). Indeed, only UAI employees worked in the mailroom. *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail to: Maria Elena Abate, Esq., Krista S. Kovalcin, Esq., One Financial Plaza 23rd Floor, 100 S.E. Third Avenue, Ft. Lauderdale, FL 33394 (954) 492-1144 on this 23rd day of November, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

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