Case No. SC21-159

In the

Supreme Court of Florida

STEVEN J. PINCUS,
individually and on behalf of all others similarly situated,

Plaintiff/Appellant,

v.

AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendant/Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT STEVEN J. PINCUS

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"Restatement"). (Br. of Appellee, p. 29). The Restatement is contrary to precedent, but even if the Court adopts it, Mr. Pincus's claims nonetheless survive.[1]

Next, ATS tries to reframe the question as "whether the contours of a common law unjust enrichment claim fits [sic] these facts in the first instance." (Br. of Appellee, p. 36). "In other words, is an unjust enrichment claim a one-size-fits-all proxy for a private right of action for any alleged statutory violation?" *Id.* ATS shouts that the answer must be no, and ominously warns that holding otherwise "would create an army of private attorneys general to police the Florida Statutes." *Id.* "This would create chaos," ATS cautions. *Id.*

ATS's argument and its dire warning deserve short shrift. The question is *not* whether unjust enrichment is "a one-size-fits-all proxy for a private right of action for any alleged statutory violation." Mr. Pincus does not contend that all statutory violations automatically create unjust enrichment claims. The question is simply whether each claim plead in the First Amended Complaint satisfies the bedrock elements of unjust enrichment. As explained in Mr. Pincus's initial merits brief, the answer is yes.

[1] The Restatement is further discussed in section **III**, *infra*, in response to the *amicus curiae* brief submitted by the Florida Office of Financial Regulation.

Moreover, Mr. Pincus respectfully submits that the idea of "private attorneys general" policing the Florida Statutes would be a positive development. It would not "create chaos," as ATS fears. On the contrary, it would promote law and order in the most patriotic and philosophically American way possible: through private enforcement by the people, for the people. And it would ensure that governments and their confederates cannot betray the citizenry by flouting Florida law without consequence, as they did here. As Professor Brian Fitzpatrick writes, "we often refer to class action lawyers as *private attorneys general*." BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). "[A]s with just about everything else, we should favor the *private* attorney general over the public one." *Id.* at 19.

According to ATS, "executive agencies" should be "responsible for the consistent implementation and enforcement of the Legislature's enactments." (Br. of Appellee, p. 36). But for all the years that ATS used its illegal surcharge to rob the citizens of Florida, no "executive agency" has ever challenged, investigated, or even *questioned* its conduct. Only now, after a private citizen has directly challenged ATS's conduct in court, is due process to be found. This is not chaos. This is justice.

ATS cites numerous cases to repeat that "unjust enrichment claims cannot be based on alleged wrongs." *Id.* at 11. But this misstates Mr. Pincus's case. "Liability in unjust enrichment has in principle nothing to do with fault. **It has to do with wealth being in one person's hands when it should be in another's.**" *Taxinet, Corp. v. Leon*, 16-24266-CIV, 2018 WL 3405243, at *7 (S.D. Fla. July 12, 2018) (emphasis added). This is precisely the case here. Mr. Pincus's unjust enrichment claims are not based upon a "wrong" committed by ATS. This is not a tort case. Rather, Mr. Pincus's claims are based upon "wealth being in one person's hands when it should be in another's." *Id.* The "wealth" is the $7.90 fee, and it is currently in ATS's hands when it should be in Mr. Pincus's.

Concordantly, all of ATS's cases are unavailing. *Tilton* was decided against the plaintiff not because the defendant violated a statute, but because the plaintiff did not confer a direct benefit on the defendant and thus could not satisfy the elements of her unjust enrichment claim. *Tilton v. Playboy Entertainment Group, Inc.*, No. 8:05-cv-692-T-30TGW, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007). Specifically, the plaintiff had based her unjust enrichment claim on the defendant's wrongful conduct (illegally filming her and distributing the film), rather than any benefit directly conferred upon defendant by plaintiff. *Id.* This is distinguishable from the instant case, where

Mr. Pincus's claim is based upon the benefit he directly conferred on ATS: $7.90. Because Mr. Pincus directly handed that sum on ATS, and because it would be inequitable for ATS to keep it, ATS was unjustly enriched by that amount.

Similarly, ATS misstates the holding in *Taxinet, Corp. v. Leon*. No. 16-24266-Civ-Moreno, 2018 WL 3405243, at *7 (S.D. Fla. July 12, 2018). In *Taxinet*, the court dismissed the plaintiff's claim because it was inadequately pleaded, and because "an unjust enrichment claim cannot be predicated on an alleged wrongdoing for which an independent basis for recovery exists." *Id.* at *7. Nonetheless, the *Taxinet* court permitted the plaintiff to replead his unjust enrichment claim. *Id.*

ATS also cites *Buell v. Direct General Insurance Agency, Inc.*, 267 Fed. App'x 907 (11th Cir. 2008). But *Buell*, an unpublished decision, is entirely distinguishable. In *Buell*, the Eleventh Circuit considered whether a plaintiff could recover under Florida common law for contracts sold by unlicensed insurance agents. There was no applicable statutory cause of action. Although the court ultimately held in favor of the defendant, it did so for a reason not applicable here: "[a]s to the allegations of sales by unlicensed agents, *Florida law specifically provides that such contracts are enforceable*." *Id.* at 910 (emphasis added). This distinction is pivotal. In *Buell*,

the legislature affirmatively found the contracts at issue to be enforceable, notwithstanding the lack of licensure. This scenario is the exact opposite of both *Silver Star* and the instant case.

ATS's citations to *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 552 (Fla. 2012), and *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994) are not relevant to this case. These cases dealt with *statutory* causes of action and are unrelated to unjust enrichment and the facts of this case. ATS's warning that plaintiffs will use unjust enrichment claims to circumvent the holdings in those cases is pure fearmongering.

B. ATS's Illegal Surcharge Was an Illegal Extraction.

ATS next contends that it did not commit an illegal extraction because "[t]he convenience fee was not compulsory." (Br. of Appellee, p. 34). In other words, ATS's decision not to impose the fee on mailed payments somehow launders the otherwise illegal fee on electronic payments. This is wrong for at least two reasons.

First, the convenience fee is indeed compulsory for anyone attempting to pay electronically. For any accused driver who is unwilling or unable to pay by mail, the convenience fee is mandatory. The fact that ATS afforded one payment method that did not implicate its unlawful fee does not change this.

comply with them.[2] Section 215.322(5) permits local governments to accept credit cards and impose convenience fees, but only in "an amount sufficient to pay the service fee charges by the financial institution, vending service company, or credit card company for such services." "The use of convenience fees to offset service fees is an approved method as permitted by paragraph 215.322(3)(c), F.S., ***provided that fees do not exceed the total cost to the state agency*** and are not received by the state." Fla. Admin. Code 69C-4.0045 (2014). (emphasis added).

It is undisputed that ATS's extra charge exceeds the service fee it pays for credit card processing, so it cannot be a lawful "convenience fee" under Florida law. Thus, the argument that ATS's fee is solely for "processing credit cards," and *not* for transmitting civil penalties to the City, is at best wordplay. For the foregoing reasons, the Court should hold that ATS violated § 560.204(1) by unlawfully taking compensation in the amount of $7.90 for transmitting Mr. Pincus's civil penalty to the City.

[2] Even if it were a lawful convenience fee under § 215.322, the fee would still be prohibited under § 318.121, which prohibits additional fees "[n]otwithstanding any general or special law, or municipal or county ordinance," as discussed *infra*.

B. Count III States a Claim for Unjust Enrichment.

Next, the OFR argues that even if ATS did violate § 560.204(1), Mr. Pincus still has not stated a claim for Unjust Enrichment. To reach this conclusion, the OFR entreats the Court to adopt a two-part test: "(1) does the statute endow the plaintiff with a 'legally protected interest'?; and (2) does the statute reflect an intent to make that interest nonactionable through unjust enrichment?" (Br. of *Am. Cur.*, p. 10).

The OFR then applies this test to side with ATS. First, the OFR argues Chapter 560 does not endow Mr. Pincus with a legally protected interest, citing *Buell* and *Silver Star*, 739 F.3d 579 (11th Cir. 2013). "Unlike the statute in *Silver Star*, this statute does not render the penalty transaction void or unenforceable." *(*Br. of *Am. Cur.*, p. 12-13). In other words, because the statute does not use the words "void" or "unenforceable," Mr. Pincus has no legally protected interest, and ATS may continue operating as an unlicensed money transmitter for compensation, despite the express statutory prohibition on the same. *Id.*

This is wrong. A statute need not use the words "void" and "unenforceable" to create a legally protected interest. Here, the statute expressly prohibits engaging in the activity of a money transmitter "for compensation." § 560.204(1). This is the same as declaring the transaction

"noncompensible," which is itself essentially the same as "void" or "unenforceable" in this context. Thus, by prohibiting unlicensed money transmission "for compensation," the legislature endowed those who pay for money transmission with a legally protected interest.

Similarly, Chapter 560 also does not "reflect an intent to make that interest nonactionable through unjust enrichment." The OFR contends that "the regulatory scheme does not authorize private actions for damages through an unjust enrichment claim," but this is not the test. (Br. of *Am. Cur.*, p. 14). The test is not whether the statute *authorizes* unjust enrichment claims, but whether the statute reflects the intent to make such claims *nonactionable*. *Id.* at 8. In other words, for Mr. Pincus to prevail, the statute need not expressly *authorize* unjust enrichment claims; it must simply not *prohibit* them.

There is nothing in Chapter 560 that prohibits Mr. Pincus's claim. The OFR contends § 560.204(1) reflects an intent to make Mr. Pincus's claim nonactionable, but points to no specific provision prohibiting it. Instead, the OFR makes vague references to the whole regulatory scheme, arguing that its "statutory features" make clear the statute is meant to be enforced by the OFR. *Id.* at 14.

Nothing in Chapter 560 reflects an intent to make enforcement exclusive to OFR, nor make Mr. Pincus's claim *nonactionable*. The legislature intended to make it unlawful to engage in money transmission for compensation without a license, and consequently, any agreements for the same must necessarily be void, unenforceable, and noncompensible. If it wanted to make enforcement exclusive to OFR, it could have easily done so.

C. The OFR's Arguments Further Support Counts I and II.

Finally, if the Court adopts the test endorsed by the OFR, Mr. Pincus's claims in Counts I and II must also survive. Although not discussed by the OFR, both sections 316.0083(1)(b)4 and 318.121 endow Mr. Pincus with legally protected interests, and neither statute reflects an intent to prohibit Mr. Pincus's unjust enrichment claims.

i. Section 316.0083(1)(b)4.

It is elementary that Florida citizens have a legally protected interest in not being unlawfully extorted by state actors when paying statutory civil penalties. This is the essence of the doctrine of illegal extraction, discussed in II.B., *supra*. One way the Florida legislature sought to protect that interest was by enacting section 316.0083(1)(b)4. This provision endows Florida citizens with a legally protected interest against state actors inflating their civil penalties through "commission" schemes like the one operated by ATS.

Similarly, nothing in section 316.0083 reflects an intent to make Mr. Pincus's interest nonactionable through an unjust enrichment claim. Accordingly, because § 316.0083(1)(b)4 endows Mr. Pincus with a legally protected interest, and because the statute does not reflect an intent to make that interest nonactionable, Mr. Pincus's unjust enrichment claim in Count I survives under the test proposed by the OFR.

ii. Section 318.121.

Section 318.121 endows citizens with a legally protected interest against additional fees that might otherwise be added to their civil traffic penalties. By its terms, this prohibition attaches to civil traffic penalties even where another statute or ordinance might otherwise apply: "***Notwithstanding any general or special law, or municipal or county ordinance***, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter." § 318.121, Fla. Stat. (emphasis added).

This language reflects the legislature's intent to prohibit all unexempted charges, even if another statute or ordinance would otherwise apply. In other words, even if ATS's fee were a lawful "convenience fee" under § 215.322, it would still be prohibited by this statute because it is an additional fee.

Thus, section 318.121 endowed Mr. Pincus with a legally protected interest, and there is nothing in section 318.121 that reflects an intent to make that interest nonactionable through an unjust enrichment claim. Accordingly, Mr. Pincus's claim in Count II should survive.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Notice has been E-filed using the E-filing Portal and that a copy has been sent via email to the following parties this 12th day of July, 2021:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.045(e) and 9.210 of the Florida Rules of Appellate Procedure, the undersigned counsel hereby certifies that this Brief is submitted in 14 point Arial font, and contains 5,490 words, exclusive of caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, and signature block.

/s/ Bret L. Lusskin, Esq.