LAWYER

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[A]s "something of a legal oddity," once pleaded by the defendant, standing must be proved by the plaintiff at trial.

The Second District Court of Appeal rendered an instructive opinion addressing the "legal oddity" of standing in *Winchel v. PennyMac Corp.*, 42 Fla. L. Weekly D1517b, 2017 WL 2882711 (Fla. 2d DCA July 7, 2017).[1] Trial lawyers should be aware of this decision and the issue of standing in litigation.

In *Winchel v. PennyMac*, PennyMac sought to enforce a note against Gregory Winchel and to foreclose on his mortgage. But the attachments to the complaint, which was originally filed by JPMorgan Chase, did not, "standing alone," evidence JPMorgan Chase's entitlement to enforce the note. And Winchel had asserted as an affirmative defense that JPMorgan Chase lacked standing when it filed the complaint — commonly called a defense of "no standing at inception."

At trial, Winchel's counsel failed to appear. PennyMac, which substituted in as the plaintiff, presented evidence but did not demonstrate that JPMorgan Chase could enforce the note. Nonetheless, the foreclosure magistrate found that PennyMac had proved its case. So the trial court entered a final judgment of foreclosure.

On appeal, Winchel argued for reversal because PennyMac failed to prove that standing existed at the inception of the foreclosure action. PennyMac countered that Winchel failed to object to standing during trial or in his exceptions to the magistrate's report and recommendation, thereby failing to preserve this issue for appeal.

The Second DCA explained that standing is an affirmative defense; therefore "the defendant must put it in play." *Winchel*, 2017 WL 2882711, at *2. But standing is "something of a legal oddity" because once it is pleaded by the defendant, standing must be proved by the plaintiff at trial. *Id.* And the Second DCA held PennyMac failed to meet its burden: "Having been set with the burden to prove standing at inception once Mr. Winchel pleaded it as an affirmative defense, PennyMac failed to carry it, and the final judgment must be reversed." *Id.* at 3.

The Second DCA rejected PennyMac's argument that Winchel could not raise standing on appeal. After Winchel raised standing in his answer, PennyMac became obligated to prove it. The issue thus went to the sufficiency of the evidence. So an "exception to the general rules of preservation" applied. *Id.* at *4 n.4. Under Florida Rule of Civil Procedure 1.530(e), after a nonjury trial, the sufficiency of the evidence to support a judgment can be raised on appeal regardless of whether a party objected at trial or made a post-trial motion.

The Court remanded the case for entry of judgment in Winchel's favor, explaining that, "[w]e do not ordinarily give a party who has failed to prove its case at trial a do-over by remanding for retrial." *Id.* at *5.

Winchel provides important lessons for trial lawyers on both sides of the aisle:

- If a good faith basis exists to challenge standing, defendant's counsel must "put it in play." Defendants should assert standing as an affirmative defense or risk waiving it.
- Plaintiffs' counsel must prove standing if it is "in play." Even if proceeding against an absent defendant, an earlier filed affirmative defense triggers plaintiff's obligation of proof. This is especially important because an appellate court's review of standing is *de novo*. Prevailing at trial without proving standing can prove to be a pyrrhic victory.

[1] As of the date of writing, this opinion has not been released for publication in reports, and is subject to revision or withdrawal.

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