IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

CASE NO. 3D17-0001

Lt. Case No. 12-41600- CA (22)

JOHN M. BENNETT, and
NANCY L. BENNETT, his wife

Appellants/Petitioners,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., HOME LOAN ALLIANCE, LLC F/K/A LEVERAGE FINANCIAL, LLC, D/B/A LF LOANS, JAMAL M. WILSON, and GTE FEDERAL CREDIT UNION,

Appellees/Respondents.
_____/

APPELLEES' ANSWER BRIEF AND RESPONSE TO PETITION FOR CERTIORARI

Respectfully submitted,

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PREFACE[1]

Appellants, JOHN M. BENNETT and NANCY L. BENNETT (jointly "Borrowers") appeal a Final Summary Judgment in favor of all of the appellees, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), HOME LOAN ALLIANCE, LLC f/k/a LEVERAGE FINANCIAL d/b/a LF LOANS ("LF LOANS"), JAMAL M. WILSON ("Wilson") and GTE FEDERAL CREDIT UNION ("GTE").

Appellees reject Borrowers' "Statement of the Case and Facts" as incomplete, inaccurate, speculative and argumentative. Accordingly, Appellees substitute the following, which sets forth a summary of the course of the proceedings and the evidence, construed in its proper light.

STATEMENT OF THE CASE AND OF THE FACTS

In or about April of 2012, Borrowers went online and explored their options in seeking a government assisted loan. (A. 295-pg. 9) On or about April 17, 2012, Borrowers applied for a Harp II loan which was a government program designed to

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1 The parties are referred to as they stand before this Court or by proper name. The following symbols are adopted for reference:

"R" for Record on Appeal.
"SR" is for Supplemental Record on Appeal.
"A" is for Appellants' Appendix.
"SA" is for Appellees' Appendix.
"AB" is for Appellant's Brief

Unless otherwise indicated, all emphasis has been supplied by Appellees.

assist Americans whose mortgages far exceeded the value of their home and whose income met certain guidelines. (A. 295-pg.9) The Borrowers' home was only worth approximately $120,000 at the time but the Borrowers owed almost $220,000 to their then lender. (A.42, para. 2) Borrowers needed this special government assistance being offered since they could not otherwise refinance this home and reduce their expenses. (A. 295, pg. 9) Borrowers had their own broker, Mr. Jurdi of Advance Mortgage, assisting them. (A. 297-pg. 18)

Borrowers and their broker then contacted LF LOANS. As part of the application process, Borrowers repeatedly signed numerous documents under oath and penalty of perjury acknowledging that there would be private mortgage insurance (hereinafter "PMI) payments as part of this specialized government loan. (A. 42, paras. 3a and 3b) Specifically, on April 17, 2012, Borrowers executed the following two documents with mortgage insurance disclosed, to wit: (i) the original application which listed mortgage insurance in the specific monthly amount of $103.35; and, (ii) a Truth-In-Lending Disclosure Statement listing the total monthly escrow amount of $237.60 for "taxes, insurance and private mortgage insurance". (A. 42, para.3a) On May 9, 2012, Borrowers executed another application due to a minor increase in the loan amount requested; Borrowers again acknowledged, under oath, that there would be PMI on this loan in both the application and the Truth-in-Lending Disclosure Statement. (A. 42, para. 3b) On June 12, 2012, the loan was closed by Stewart Title

Guaranty Company. (A. 42, para. 4; A. 93) On that date, Borrowers executed documents at closing including a mortgage and note to LF LOANS, the original lender, in the amount of $232,900. (A. 42, para. 4) The interest rate had now gone down to 3.875% from the previously disclosed higher amount. (A. 42, para. 4)

After the loan was closed, the loan was assigned by LF LOANS to GTE. The first monthly payment to be made was due on August 1, 2012. At some point after the closing, Borrowers received a monthly statement from GTE that included as part of the charges an amount for PMI in the amount of $100.92 to go into the Borrowers' escrow account. (A. 43, para. 5)

Borrowers allege they called GTE, objected to the charge for mortgage insurance, and claim they then received "among other documents, a document titled PAYMENT LETTER TO BORROWER, in which there is an itemized monthly amount for 'MMI/PMI INSURANCE" which Borrowers claim had signatures that were not theirs. (A. 43, paras. 6-7)

On July 20, 2012, Borrowers' attorney sent a letter to GTE, copied to LF LOANS and Stewart Title Guaranty Company, wherein counsel wrote, in relevant part:

> * * * Your Loan Statement includes an amount that is exactly $100.92 higher than any of the prior disclosures given to the borrowers at closing due to the inclusion of PMI Insurance. Be advised, the Payment Letter to Borrower you presented is not the same as the one signed by the borrowers at closing and undoubtedly contains forged signatures.

> The one actually signed by the borrowers and presented by them to me for my review includes no amount for PMI insurance. * * * The borrowers have no contractual obligation to pay the amount in your Loan Statement and have no desire to acquire PMI insurance. * * * **However, we demand that this matter be fully rectified within 60 days.**

(A. 103-4) (emphasis added)

On July 16, 2012, JAMAL WILSON of LF LOANS, the original lender, responded to Borrowers' attorney advising that mortgage insurance was a requirement on all HARP loans during the refinance process and that the Borrowers were aware of the requirement of PMI for this loan. (A. 243) Wilson attached to his response the documents Borrowers had signed, under oath, in the application process showing the disclosure of PMI for this loan. (A. 243) Wilson further advised that apparently the title company had erred and he was working on correcting the situation. (A. 243) He also advised that due to the nature of HARP loans, the mortgage insurance could not be removed and asked that the borrowers resign the correct documents. (A. 243)

On July 19, 2012, Borrowers' counsel wrote Wilson back, stating that his clients would not be "resigning anything." (A. 44, para. 10) Counsel stated his clients had "no legal obligation to do so, and if proper disclosures had been made, including the amounts required, they might have opted to not proceed." (A. 44, para. 10) Counsel threatened Wilson with litigation and stated, **"Your veiled threats do**

not impress me. Suck it up and do the right thing before it bites you." (A. 44, para. 10) (emphasis added)

On July 20, 2012, Wilson responded to Borrowers' counsel, stating that he was not making any threats or demands, that he was taking every step to remedy the situation, and that they were "working through all the options". (A. 44, para. 11) Wilson stated that **if the mortgage insurance company can make a change to the policy and remove it, "we will be happy to take that action".** (A. 44, para. 11) (emphasis added)

On July 30, 2012, just twenty days into the sixty day grace period, WILSON wrote to Borrowers' counsel stating "We have finally gotten a response from the MI company. **We are able to remove the MI from this loan .....Your clients MI portion of their monthly payment will be returned...."** (A. 44, para. 12) (emphasis added)

On October 17, 2012, GTE sent the borrower the monthly payment statement which now reflected that the PMI charge had been removed. (A. 44, para. 13)

On November 14, 2012, GTE returned to Borrowers the $302.76 they had paid into their escrow account, under protest, for the payments due August 1st, September 1st and October 1st for PMI. (A. 44, para. 14)

On October 23, 2012, Borrowers filed their lawsuit alleging three separate counts for relief, to wit:

1) damages for "Fraud in the Execution" against LF LOANS and JAMAL WILSON;

2) for a declaratory decree against MERS and GTE that this loan did not require mortgage insurance; and,

3) for statutory damages and for rescission of the loan, both pursuant to the federal Truth-In-Lending Act (TILA) against all defendants claiming statutory errors in the closing documents (Complaint dated October 23, 2012).

(A.45, para. 15)

In the Fraud in the Execution count, Borrowers alleged that at the time of closing of the loan, "none of the documents presented to the Plaintiffs for review and execution, **nor any previously signed by the Plaintiffs for the loan given**, contained disclosure to the Plaintiffs, nor an acknowledgement by the Plaintiffs, that the Plaintiffs would be responsible for payment of a premium for mortgage insurance." (A.45, para. 15a)(emphasis added);

Borrowers alleged that "LF LOANS directly, at the direction of WILSON, or through their agents, forged the signatures of the Plaintiffs to the subject PAYMENT LETTER TO BORROWER so as to include an amount for PMI that was not agreed to by the Plaintiffs". (A.45, para. 15b)

In the count claiming a TILA violation, Borrowers alleged it was a TILA

violation when after the closing, Defendant GTE attempted to charge PMI. (A.45, para. 15d)

Appellees moved to dismiss the pleading for failing to state any cause of action and for being below the jurisdiction of the circuit court. The trial court dismissed the Fraud in the Execution count with prejudice as no such action existed in Florida, dismissed the Declaratory Judgment count with prejudice as there was no controversy nor doubt; and, dismissed the TILA count as being below the jurisdictional limit of the circuit court. (A.46, para.16: Order docketed July 30, 2014)

Borrower moved for reconsideration and shortly thereafter also filed their Notice of Appeal. (A.46, para. 17: Motion docketed August 7, 2014; Notice of Appeal docketed August 29, 2014)

This appellate Court dismissed the appeal for lack of jurisdiction. (A.46, para. 18: Order dismissing Appeal docketed October 14, 2014).

Eight months later, a new trial judge heard the Motion for Reconsideration and granted it in part, reinstating the TILA count and the declaratory relief count and giving the Borrowers leave to amend its pleadings. (A.46, para. 19: Order docketed March 18, 2015).

Borrowers' amended their Complaint on or about April 6, 2015 which pleading was again dismissed by the court. (A.46, para. 20) On April 28, 2015,

Appellees served their Motion for Sanctions Pursuant to F.S. §57.105 which Appellants thereafter rejected. (A.342-6) On or about February 3, 2016, Borrowers filed their Second Amended Complaint seeking the following, to wit:

a) damages and attorney's fees against LF LOANS and WILSON for the forgery claiming that Plaintiffs never had any knowledge of mortgage insurance and that LF LOANS directly or through their agents, **at the direction of WILSON**, forged the Plaintiffs' signatures. (Second Amended Complaint, pps. 9, 16)(emphasis added);

b) declaratory relief and attorney's fees against MERS and GTE claiming Plaintiffs are in doubt as to their rights regarding mortgage insurance; (Second Amended Complaint, pps. 28, 32) and,

c) for statutory damages, rescission, and attorney's fees under TILA against LF LOANS, GTE and MERS, based on the claim that the loan documents that did not provide for mortgage insurance. (Second Amended Complaint, pps. 34 et seq).

(A.46, para. 20)

On September 19, 2016, Appellees filed their Amended Motion for Summary Judgment and for Attorney's Fees based on F.S. §57.105 (2016). (A.40-308) The basis for the motion for summary judgment was as follows, to wit:

1) on Count I for damages against LF LOANS and Wilson for the alleged

forged document, no evidence existed that LF LOANS or Wilson were in any manner responsible for the forgery and additionally, there was no evidence that Borrowers had suffered any damages;

2) on Count II for declaratory relief that the Borrowers were not to be charged PMI on this loan, that no doubt or controversy existed since the documents admitted that PMI was not being charged on this loan and additionally, the law had long established that MERS could not be sued;

3) on Count III for TILA violation, there was no evidence of any violation in the closing and TILA has no application to post closing issues.

The basis for attorney's fees was the motion Appellees had provided to Borrowers on April 28, 2015 providing the required 21 day notice that Borrowers claims were not supported by material facts or law which Borrowers had rejected, instead pursuing this case despite having no factual or legal basis to do so. (A. 342-6)

On November 10, 2016, Appellants filed their memorandum in opposition to summary judgment and BENNETT'S affidavit (A. 312-320; A. 309-11). The affidavit did not controvert any of the evidence or arguments Appellees had made other than to claim that the lawsuit was filed on October 23rd without the Appellants having yet received the monthly statement dated October 17th which statement no longer had PMI contained on it. (A. 309-11)

On November 21, 2016, after considering all the papers filed and full argument

of counsel for all parties, the trial court ruled, granting Appellees final summary judgment and denying Appellees' motion for fees and costs. (A. 321-2) The Order docketed on November 29, 2016.

On November 29, 2016, Appellees timely filed their Motion for Reconsideration of the order denying attorney's fees and costs. (A. 323-8)

Appellants chose to not file any opposition to the Motion for Reconsideration.

On December 13, 2016, the trial court held the hearing. Appellants argued that the case was not frivolous. (A. 380-3) Regarding the safe harbor letter and motion, Appellant did not raise any procedural argument. (A. 386-8) After hearing full argument of counsel, the trial court granted Appellees Motion for Reconsideration of the denial of fees and costs; setting the matter of entitlement to be heard on January 5, 2017. The court specifically ordered that all matters the parties wished be considered be filed in advance of the hearing. (Order docketed on December 14, 2016). (A. 329)

On December 27, 2016, Borrowers filed their Notice of Appeal of the Order Granting Final Summary Judgment. (A. 330)

On January 3, 2017, Appellees filed in this Court their Urgent Motion to Dismiss Premature Appeal or alternatively, to Relinquish Jurisdiction to Address Issues Related to the Order on Appeal so that the trial court could hold the hearing on entitlement to fees and costs. (A. 347) On January 4, 2017, this Court granted the motion to relinquish jurisdiction, ordering that jurisdiction was being "temporarily relinquished to the trial

court for a period of thirty (30) days from the date of this order for the purposes stated in the motion". (A. 367)

On January 3, 2017, Appellees filed their Compliance with Court Order in preparation for the court ordered hearing on entitlement to fees. (A. 333-346)

On January 4, 2017, Appellants filed their Memorandum in Opposition to Fees and Costs. (A. 354-366) Notably, Appellants again never once raised any issue of any technical or procedural defect with service of the motion for F.S. §57.105 fees. (A. 354-366)

On January 5, 2017, after considering Appellants arguments and papers, the trial court determined that Appellees were entitled to attorney's fees and costs based on F.S. §57.105 (2015). (A. 368-70) The Order Granting Entitlement to Fees and Costs was docketed on January 26, 2017.

SUMMARY OF THE ARGUMENT

Despite four years of litigation, Borrowers failed to offer any evidence whatsoever supporting their allegation that "LF LOANS, directly or through their agents, at the direction of Wilson," caused the creation of the allegedly forged document upon which all of Appellees' claims are based. Without evidence, it is axiomatic that LF LOANS and Wilson are entitled to final summary judgment on this unsupported claim. Borrowers' argument that Wilson's business decision to pay for the government required PMI was an admission of guilt for the forgery was

legally without merit. Borrowers claim that Wilson, as the sole owner of LF LOANS, was therefore responsible for the forgery was equally without legal merit as was Borrowers claim that Wilson, as the broker, was statutorily responsible for the forgery. Furthermore, as Borrowers were never damaged since payment of money into their own escrow account is not legal damage on top of which the $302.76 were returned before the pleading was filed, no legal claim existed on Count I for forgery against anyone. Damages are a required element of a claim for fraud or forgery.

With no evidence supporting the allegations, no damages, and no law supporting their arguments, the trial court was eminently correct in granting final summary judgment on the claim on Count I for forgery.

Given the written documents in July of 2012 verifying that PMI was no longer charged on this loan, there was no actual doubt or controversy when the lawsuit was filed. Accordingly, no legal basis supported a declaratory relief action. Furthermore, MERS was legally exempt from suit. Final summary judgment on Count II was proper.

The federal Truth in Lending Act ("TILA") applies solely to the process of applying for and closing of a loan. Borrowers' entire TILA claim related to the post-closing receipt of a document charging PMI and then a forged document that was provided post-closing that was never part of the closing of the loan. Since

TILA does not apply to post closing issues, final summary judgment on this basis was appropriate.

Finally, given Borrowers failure to ever have any evidence to support the claims, Appellees are entitled to attorney's fees pursuant to F.S. §57.105. Borrowers' new argument on appeal, that the procedural method of service was not complied with, having never been raised before, is therefore waived. Moreover, Borrowers falsely allege in their brief that they had not been served with the motion in advance of its being filed with the court yet admitted below that they had received the motion2 and thus their arguments concerning notice to this Court should be wholly disregarded.

Borrowers brought their claims on pure factual speculations. Borrowers speculated that LF LOANS and WILSON committed the forgery without a shred of evidence supporting this spurious allegation. Borrowers now inject new arguments and claims to this Court such as Stewart Title Guaranty, the closing agent, being LF LOAN's agent when there is no record evidence of this, and indeed, the statement is false.3 The awarding of sanctions in this case is exactly the purpose of F.S. §57.105 (2015) and should be affirmed.

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2 Indeed, had this issue not been admitted, Appellees would have filed in the trial court the email from Borrowers in May of 2015 **referencing the notice of 57.105 and advising of the time within which Borrowers intended to respond!**

3 This factual claim was never raised below nor would it have stood as it was the Borrowers who selected the closing agent, not Appellees.

ARGUMENT

As a preliminary matter, Appellees point out that Borrowers entire brief hinges on pure speculations, rambling "red herring" claims, dicta from inapplicable law and erroneous burdens of proof. Additionally, Borrowers make new arguments, never before raised in the trial court below, with no record support. This Court should ignore all of Borrowers claims that are without record support.

Though Borrowers admit to having no evidence whatsoever as to who allegedly forged the document, Borrowers suggest that they need no such evidence because the Appellees did not provide affirmative proof in the record that they did not do it.4 Borrowers actually argue they were entitled to go to trial without any evidence. Naturally Borrowers offer no legal basis for these spurious arguments.

Indeed, Borrowers turn the law of Florida upside down with this idea that they, as the suing party, do not need any evidence to go to trial, rather it is the defendant's burden to disprove Borrowers' speculations. Borrowers' argument on this basis deserves sanctions for it is a completely unfounded position in violation of every principle of Florida law that the plaintiff must initially provide, at a minimum, some evidentiary proof supporting the plaintiffs claim before being permitted to

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4 Borrowers have obtained discovery from Appellees including deposing Jamal Wilson and have had the right to do so for the past four years. Borrowers are well aware that Appellees deny having any involvement with the document Borrowers claim was sent to them and was a forgery.

proceed with their allegations. Indeed, in the absence of any evidence, without putting on any case at all, Appellees would be entitled to a directed verdict. *Myers v. Atlantic Coast Line Railroad Company*, 112 So.2d 263 (Fla. 1959)

Similarly, Borrowers repeatedly speculate as to what other documents might currently exist to support their claims. Borrowers' argument that there must be other forgeries, despite none existing after four years of litigation, is another example of the meritless arguments Borrowers advance. Despite all the legal tools at Borrowers' disposal to discover evidence, Borrowers' failure to locate any testimony, a single document or any other shred of evidence, to support any of their speculations that LF LOANS or Wilson ever had anything to do with the allegedly forged document Borrowers allegedly received long after the closing, defeats all of Borrowers' claims and proves the trial court was correct in granting final summary judgment and in awarding sanctions.

I. THE TRIAL COURT WAS EMINENTLY CORRECT IN GRANTING FINAL SUMMARY JUDGMENT ON ALL CLAIMS

The parties agree that in considering summary judgment, a trial court must "interpret every possible inference in favor of the non-movant". *RV-7 Prop., Inc. v. Stefani De La O, Inc.* 187 So.3d 915 (Fla. 3rd DCA 2016) citing to *Campaniello v. Amici P'ship,* 832 So.2d 870, 872 (Fla. 4th DCA 2002). In the case at bar, giving every benefit of doubt to the Borrowers, no evidence exists to support the

allegations and claims. The trial court did not weigh any evidence. There was nothing to weigh. Borrowers simply asserted speculations without ever having any evidence.

The fundamental basis for all of their claims is Borrowers' allegation that at some point after the closing of this loan, they received a document from GTE5 that was forged. Without any knowledge as to who may have committed the forgery, without any investigation whatsoever let alone the type of diligence required by law, Borrowers threatened Wilson, GTE, LF Loans and Stewart Title Guaranty with litigation. Borrowers made demands without legal or factual basis including demands for attorney fees without providing any legal basis for such a demand. Despite repeatedly signing documents under oath that PMI was required by the government for this specialized welfare loan yet, including acknowledging the specific monthly amount of PMI, Borrowers obtained a windfall here by pure luck but the bottom line is there was no disclosure violations in the loan documents since no PMI was charged to Borrowers on this loan. Borrowers admitted receiving the notice that PMI had been removed from the loan yet still went forward with the lawsuit, months after all issues were cured and despite there being no legal damages. Borrowers sued despite the cure occurring within the sixty (60) day

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5 GTE was assigned this loan after it closed. GTE had no involvement in the closing.

window Borrowers themselves offered. This litigation was frivolous at all times.

Just a few weeks after the issue of the error regarding PMI was raised, Wilson wrote to the Borrowers that the PMI for this loan was now taken care of. Rather than being damaged, Borrowers received a massive windfall because they did not have to pay the required PMI charge thus saving over $36,0006 over the life of the loan. Despite their repeated acknowledgments, in writing, under oath and penalty of perjury, that PMI was part of the loan, Borrowers were given a loan that did not have PMI. When the issue came up after closing, it was dealt with such that the disclosure documents were thus all accurate. Borrowers' lawyer's threats to the assignee that now held the loan, the original lender and others with litigation and improper claims for damages were improper. After getting notice that the PMI was no longer being charged, Borrowers still sued based on speculations and false assertions. Borrowers continued with the lawsuit even after their escrow money was returned to them.

This is exactly the type of lawsuit the legislature created F.S. §57.105 to end. This case was simply an improper attempt to obtain attorney's fees for counsel and damages where none exist for the client on unwarranted claims.

a. <u>There was Never Any Violatoin of Any Truth in Lending Law</u>

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6 The monthly payment of $100.92 totals $36,332 over the 360 monthly payments due on this loan.

Borrowers first argue that the federal statutory Truth in Lending laws provide statutory relief in the form of automatic damages, attorney's fees and rescission of this loan. Borrowers never address, however, that TILA does not govern this post-closing error where PMI was demanded nor where a forged document, never part of the closing, suddenly appears. Indeed, TILA is quite specific in stating that it applies to disclosures that are part of the closing of a loan. 15 USC 1601 et seq Borrowers' entire claim being based on the forged document they received after the closing, allegedly received from a party that had no connection to the closing of this loan, is thus not conduct covered by TILA.

In their brief, Borrowers provide an extensive and convoluted overview of the general purposes of TILA, string cite to a large number of cases and dicta within said cases that deal with a myriad of legal and factual defects in closings of loan, but never once provide a single case where some post-closing misconduct was held to be a TILA violation. Nor do Borrowers provide any cogent analysis of any kind connecting any of the cases cited, or statutory law, to the facts at bar. Indeed, all of the cases cited simply stand for examples of situations wholly different from the instant one and provide no support for Borrowers' arguments.

Furthermore, while Borrowers point out correctly that TILA requires that PMI is to be considered in determining the overall finance charge, Borrowers' claim that any mistake is a violation is without legal support. On its face, TILA requires

that violations must exceed certain proscribed mathematical tolerances to be actionable. *12 CFR 1026.18(d); 1026.23(g)* Thus even *arguendo* if the PMI issue was to be considered covered by TILA, no evidence exists in the record that the issue rises to the level beyond the tolerances provided by TILA.

Borrowers inadvertently acknowledge this critical point undermining their own arguments in quoting dicta from *Beach v. Great Western Bank,* 670 So.2d 986, 992 (Fla. 4th DCA 1996) where the court explained that a borrowers rights under TILA exist for "material violations of TILA disclosures". Given that no evidence existed of any violation, let alone a material violation, Appellees were entitled to summary judgment on the TILA claims.

Borrowers' action was an application of "Alice in Wonderland" type logic. Since Borrowers claimed that there never was PMI on this loan, the disclosures at closing were completely correct. Nevertheless, Borrowers attempt to seek TILA statutory damages based on the statements after the closing regarding PMI which, within the sixty day cure period offered, were cured and did not apply to the loan.

One cannot claim that there never was PMI on the loan, have the claim that arose for PMI long after the closing removed from the loan during a period of time one has expressly agreed to within which the issue needs to be cured yet then seek TILA violations for closing documents that did not disclose that very issue that now does not exist. Plaintiffs are equitably estopped from this claim.

As noted in *Major League Baseball vs. Morsani,* 790 So.2d 1071, 1076 (Fla. 2001):

> The doctrine of equitable estoppel has been a fundamental tenet of Anglo American jurisprudence for centuries:
>
> "Estoppe," says Lord Coke, "cometh of the French word *estoupe,* from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead [otherwise]."
>
> Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* 1 (3d ed.1923).
>
> The doctrine, which was part of the English common law when the State of Florida was founded, was adopted and codified by the Florida Legislature in 1829.
>
> Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position:
>
> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy."
>
> The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury.

State ex rel. Watson v. Gray, 48 So.2d 84, 87-88 (Fla.1950) (quoting 3 *Pomeroy's Equity Jurisprudence* § 804 (5th ed.1941)).

In the case at bar, Borrowers maintained at all times that there never was mortgage insurance on this loan. Borrowers falsely testified they never knew about it despite their acknowledgments of PMI in writing, under oath, and expressly gave Appellees sixty days from July 10, 2012 to cure the issues which would have given until September 8, 2012 to do so. Appellees notified Borrowers, in writing, on July 30, 2012, just twenty days later, that the mortgage insurance had been removed from the loan. This occurred even prior to any voluntary payments of $100.92 by Borrowers into their monthly escrow account for said insurance. Borrowers therefore cannot now be heard to complain of a TILA violation that mortgage insurance should have been disclosed at closing.

Furthermore, TILA itself provides for a sixty (60) day window to cure errors of the type that occurred at bar. Regulation Z, Subpart D, §108. Thus both statutorily, and based on Borrowers own express representation, Appellees had sixty days to "cure" the issue and did so by getting the mortgage insurance removed from the loan once and for all.

Finally, as a matter of law, MERS cannot be held liable for any alleged TILA violations. MERS is a national electronic registration system and acts as the nominee for the beneficial owner of the mortgage loan. It is not a lender nor is it the

lender on this loan. As such, it is not a creditor nor assignee as defined in TILA which are the only parties to which TILA applies. No Florida case addresses the issue, but other courts have, consistently stating that MERS has no TILA liability for such alleged violations. *Blau v. Am Servicing,* 2009 WL 3174823 (D. Ariz, Sept. 28, 2009) (MERS, as the nominee, cannot be liable for any TILA violation regarding disclosure prior to MERS being so nominated); *Ridha v. Mortgage Elec. Registration Sys., Inc.,* 2010 WL 4867416 (E.D. Mich, Nov. 23, 2010) (TILA does not apply to MERS "because [MERS] did not originate the loan and therefore do[es] not meet the definition of 'creditor' under the TILA"); *Slimm v. Bank of Am. Corp.,* 2013 WL 1867035 (D.N.J., May 2, 2013) ("the Court dismisses this claim against Defendant MERS, as it has previously been recognized by numerous federal courts that MERS is neither a creditor nor assignee as defined by TILA, and therefore cannot be held liable under its terms". *See Cannon v. U.S. Bank, N.A.,* 2011 WL 2117015 (D.Haw. May 24, 2011) ("Defendant MERS is neither a creditor nor assignee as defined by TILA."); *Ward v. Sec. Atl. Mortg. Elec. Reg. Sys., Inc.,* 858 F.Supp.2d 561, 567 (E.D.N.C.2012); *Reyes v. WMC Mortg. Corp.,* 2012 WL 1067560, (N.D.Cal. Mar. 28, 2012); *Stovall v. Nat'l Default Servs. Corp.,* 2011 WL 1103582, (D.Nev. Mar. 23, 2011); *GMAC Mortg., LLC v. McKeever,* 2010 WL 2639828 (E.D.Ky. June 29, 2010); *Horton v. Country Mortg. Servs., Inc.,* 2010 WL 55902 (N.D.Ill. Jan.4, 2010); *Pennington v. EquiFirst Corp.,* 2011 WL 322818

(D.Kan. Jan. 31, 2011); and, *Hartman v. Deutsche Bank Nat'l Trust Co.,* 2008 WL 2996515 (E.D. Pa, Aug. 1, 2008).

b. **No Evidence Existed that Appellees Forged Any Instrument**

Borrowers then argue that summary judgment on the claim for forgery should not have been granted because Appellees did not put into the record any evidence "disavowing" the forgery. Borrowers again use general dicta from inapplicable cases to attempt to create smoke where no smoke exists, let alone a fire causing smoke. Borrowers point out the legal principle that summary judgment should only be granted cautiously in cases involving fraud. *Lewis v. Kranz,* 599 So.2d 253 (Fla. 3rd DCA 1992), *Nessim v. DeLoache,* 384 So 2d 1341 (Fla. 3rd DCA 1980).

This is one of those cases. The principle of law does not state that summary judgment cannot be granted in cases of fraud or forgery, only that one should be granted "cautiously". Given that no evidence exists in the case at bar of any kind that Appellees had anything to do with the forgery, despite four years of litigation, no need for further caution existed and the trial court recognized that summary judgment was appropriate.

Borrowers claim that the original lender, LF LOANS, and its principal, Jamal Wilson, "either directly or through its agents", committed the forgery or that Wilson "directed" that it be done, was pure speculation. With not a single evidentiary basis for these allegations, Borrowers had no right to sue these parties.

Now, in this Court, Borrowers argue that Wilson "accused his closing agent as being the forger".7 Several problems exist with this new claim. First, Wilson's speculations in an email to counsel are not evidence as to who actually did the forgery. Second, there is no evidence in the record that this title company, Stewart Title Guaranty Company, was anyone's agent8. Third, no evidence was ever put forth that it was Stewart Title Guaranty, or anyone else for that matter, that created this forged document. Even assuming the forged document, it is not appropriate to sue as the forger whomever one chooses without some good faith basis to believe that this litigant was the responsible wrongdoer. In this case Borrowers went forward with their aspersions without any basis at all, let alone a good faith basis, and then, despite four years of opportunity to discover who the wrongdoer was,

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7 Borrowers point to Wilson's statement in an email dated July 16, 2012 wherein he states, "I don't have corroboration from the title company but my thought process is that they mistakenly got the initial documentation signed realized the error and transposed the necessary docs…

8 Borrowers' counsel attempts to argue in this Court that the title company was Appellees' agent using a document that has nothing to do with the issue when in fact this was not raised below, no record evidence exists to support the statement, and the truth is Borrowers select closing agents and did so in this case. Borrowers' counsel has repeatedly been caught making false claims in this matter such as the claim that Borrowers accepted a settlement offer which Borrower later had to admit was false, the claim that counsel did not receive the 21 day notice of frivolous claims under F.S. §57.105 which Borrower quickly retracted from, and now this unwarranted assertion. This Court should not condone such unprofessional and unethical misconduct by counsel and should sanction counsel as appropriate.

came up without the proverbial scintilla of evidence to be claiming Appellees did anything wrong.

Finally, the statutory liability which Borrowers argue makes Wilson liable specifically states that it applies only "if a mortgage loan transaction is made in violation of any provision of this chapter"....F.S. §494.0019(1)(2012). In the case at bar, the Borrowers admit that the alleged forged document came long after the mortgage loan transaction. This post-closing occurrence was not a part of the actual loan transaction. Borrowers attempt to use this statutory liability to the facts at bar is wholly misplaced. No proof exists that the forgery was done by anyone associated with the broker. The only evidence in the record is that this document allegedly was sent to the Borrowers by GTE, an assignee of the original lender, more than a month after the loan had closed. Given that the forgery was not part of the loan transaction, the law governing broker's liability does not apply.

Absent evidentiary proof after four years, Borrowers allegations on the claim against LF LOANS and Wilson of forgery are without merit.

Furthermore, Borrowers suffered no damages as a result of the forgery. Borrowers admit that PMI was supposed to be part of this loan, admit that they voluntarily chose to make payments to their own escrow account when the statements in July, August and September came from GTE containing $100.92 each month for PMI, admit that the October statement correctly removed the charge for

PMI and admit that their $302.76 was returned to them in November of 2012. Furthermore, Borrowers received a windfall in excess of $36,000 when Wilson decided to pay the PMI in full. Borrowers offered no evidence of any damage as a result of the alleged forgery.

Additionally, the damages being claimed are for payments by Plaintiffs to their own escrow account for the note and mortgage, not to LF LOANS or to WILSON, and which payments were not caused by any improper act on LF LOANS or WILSON part. In *Parker v. Dudley*, 527 So. 2d 240 (Fla. 5th DCA 1988) (, a claim by the payor against the payee on cashier's checks that the payee never cashed, but allegedly was negligent in returning such that the checks were lost, was held to be legally insufficient because the payor had no damages. Since the only rightful recipient of the funds on a cashier's check would be the payee, the payor had full recourse to the funds back from the bank.

Borrowers never had any legal damages.

It is axiomatic that to bring a claim for forgery or fraud, there must be damage. In the absence of any damages, Borrowers' claim on Count I for forgery was without any legal or factual basis. . "It is fundamental that a person is not entitled to recover damages if he has suffered no injury". *Bank of Miami Beach vs. Newman,* 163 So. 2d 333 (Fla. 3rd DCA 1964). In that case involving a forged check, Plaintiffs alleged no injury or damage. The case was dismissed which the

appellate court affirmed. *Id.*

As noted by the court in *Morgan Stanley Company, Inc. vs. Coleman (Parent) Holdings, Inc.*, 955 So. 2d 1124, (Fla. 4th DCA 2007), "[I]t is fundamental that '[a]ctual damages and the measure thereof are essential as a matter of law in establishing a claim of fraud." *Nat'l Equip. Rental, Ltd. V. Little Italy Rest. & Delicatessen,* 362 So.2d 338, 339 (Fla. 4th DCA 1978). Damage is of the very essence of an action for fraud or deceit.' *Casey v. Welch,* 50 So.2d 124, 125 (Fla.1951). Without proof of actual damage the fraud is not actionable. *Id.; Stokes v. Victory Land Co.,* 128 So. 408 (Fla. 1930); *Pryor v. Oak Ridge Dev. Corp.,* 119 So. 326 (Fla. 1928); *Wheeler v. Baars,* 15 So. 584 (Fla. 1894); *Nat'l Aircraft Servs., Inc. v. Aeroserv Int'l, Inc.,* 544 So.2d 1063 (Fla. 3d DCA 1989). Thus, to prevail in an action for fraud, a plaintiff must prove its actual loss or injury from acting in reliance on the false representation.

Borrowers then make the claim that Wilson's paying of the PMI is somehow a "tender" of monies due to them which they claim they did not accept. No tender ever occurred. No monies were due to Borrowers, rather Wilson made a business decision and paid a third party insurer on this government loan that required PMI. This payment is not an admission of any kind nor a tender of a disputed amount. All of the cases Borrower cites to as support for this proposition deal with a factual situation where a specific sum was in dispute between two parties and one

"tendered" the disputed amount. These are not remotely the facts at bar. Appellants' arguments in this regard are fundamentally wrong.

Borrowers' claims regarding potential punitive damages are another "red herring" argument given that Borrowers have no idea who committed the forgery. Furthermore, punitive damages are not supportable when there are no compensatory damages. *Morgan Stanley, supra,* at 1132 ("punitive damages ...cannot stand where, as here, no legally cognizable damage was shown as a result of the alleged fraud").

c. **Borrowers Received Written Confirmation that PMI was Removed from this Loan**

In another specious argument, Borrowers claim that the action for declaratory relief presented an actual controversy because Appellees never "contested the elements pled" by Borrowers in their pleading. Again, Borrowers create a legal burden of proof that has never existed in Florida law, i.e., that a plaintiff need not provide any proof at all to support allegations, rather the party sued has the burden of proof. As the law has always required the party suing to come forward with at least a prima facie case to support its allegations, Borrowers are again without legal basis in their argument

Borrowers claim that they were in doubt as to their rights regarding PMI is specious in the face of Borrowers' admissions, before any litigation ever occurred,

that they had Wilson's written confirmation that there was no longer any PMI charge on the loan. The trial court inquired on this point, learning that Borrowers had received the October statement in 2012 which no longer had PMI on it, that Borrowers had received a copy of the check from Wilson that paid the PMI in full for the life of the loan, that every monthly statement received after October of 2012 had no PMI charge, that Borrowers had never again paid into escrow any PMI charge, and that no action had ever occurred against Borrowers for failing to pay the PMI charge.

To be entitled to declaratory relief, there must be an actual controversy and need for the declaration. Speculations into the future about possibilities are insufficient grounds for declaratory relief. *May v. Holley,* 59 So.2d 636, 639 (Fla.1952). The Florida Supreme Court specifically stated:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

In a case similar to the one at bar, summary judgment on a declaratory relief action was affirmed where the defendant had waived the claim for medical bills and thus no actual controversy existed. *Ahern ex. rel Situated vs. Mayo Clinic Corp.,* 180 So. 3d 165 (Fla. 1st DCA 2015). *See Martinez v. Scanlan,* 582 So.2d 1167, 1171 (Fla.1991) (explaining that to seek a declaratory judgment there "must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction"). Given the lack of an actual controversy, any declaration under Chapter 86 would be an advisory opinion, which this Court has repeatedly stated is inappropriate. *See Apthorp v. Detzner,* 162 So.3d 236 (Fla. 1st DCA 2015); *see also McCarty v. Myers,* 125 So.3d 333 (Fla. 1st DCA 2013).

After completing its inquiry, the trial court in the instant case correctly concluded that there was no actual controversy nor could any reasonable person in good faith be in doubt as to any rights. Final summary judgment was properly entered on this claim.

Furthermore, as explained more fully above with respect to the TILA action against MERS, MERS could not legally be sued and thus the summary judgment as to MERS was proper also.

d. **Borrower has Waived the Right to Argue that the Service Requirements of F.S. §57.105 were Not Complied With**

In this appeal, Borrowers raise for the first time the argument that the strict requirements of F.S. §57.105 were not complied with. Putting aside that the motion was e-served on Borrowers,9 the issue was not raised below and therefore has been waived no different that the requirements of original service of a lawsuit are waived by failing to object timely. *Parrra v. Raskin,* 647 So.2d 1010,1011 (Fla. 3rd DCA 1995) (failure to raise fact that service of process did not occur in the statutorily required 120 days in a pre-answer motion or in the answer waives the issue); *Brivas Enterprises Inc. v. Plinski,* 976 So.2d 1244 (Fla. 3rd DCA 2008).

Borrowers argue that the requirements of F.S. §57.105 are to be strictly construed but so are the statutes governing service of process and as has been shown, such rights are easily waived. *Carter v. Lil' Joe Records,* 829 So.2d 953 (Fla. 4th DCA 2002). ("statutes that govern service of process are to be strictly construed to insure that a defendant receives notice of the proceedings"; *Sierra Holding v. Inn Keepers Supply,* 464 So.2d 652 (Fla. 4th DCA 1985) ("Absent strict compliance with the statutes governing service of process, the court lacks personal

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9 Again, if Borrowers are attempting to imply that the motion was not provided to Borrowers in April of 2015, Borrowers' own e-mail just a few weeks later would disprove forever such a false claim. However, this was not raised below and therefore this evidence is not of record, highlighting that Borrowers have waived the

jurisdiction over the defendant.")

A litigant waives its rights by taking action that is inconsistent with those rights such as defending an action without preserving one's right to contest service of process, failing to assert certain affirmative defenses or failing to plead specific issues in defense of a claim. Generally speaking, "'waiver" is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right". 92 C.J.S. Waiver p. 1041.

In the case at bar, Borrowers never once raised an issue with the service of process of the Motion for F.S. §57.105 fees in the trial court below. Instead, Borrowers chose to defend the motion on the merits. Borrowers lost the motion and right so as there never were facts, let alone material facts, to support the claims. Borrwers have waived their right to now argue this point for the first time concerning service of the motion on appeal.

Highlighting Borrowers' mistaken position is their reliance on *Matte v. Caplan,* 140 So. 3d 686 (Fla. 4th DCA 2014). In that matter, the issue of compliance with the procedural technicalities of service of the 21 day notice by motion was objected to at the time the motion was initially raised in the trial court. As the district court noted within the opinion, "... at the hearing on the attorney's

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right to make any such claim.

fees motion, appellee objected to the section 57.105 sanction, because appellant had failed to serve the motion in accordance with Florida Rule of Judicial Administration 2.516." *Id.* at 686.

Borrowers counsel then points out that he has a conflict of interest with his client but claims he has not withdrawn due to not having sufficient time to do so. Given that the trial court ruled on January 5, 2017 that Appellees were entitled to fees based on the action being frivolous in violation of F.S. §57.105, and counsel thereafter filed discovery on January 27th, the initial brief on February 27th, several other filings in both the trial court and this court in March, and then appeared at a hearing Borrowers set in March, counsel's excuse for not withdrawing is as spurious and in bad faith as the rest of the arguments advanced in this appeal.

CONCLUSION

For all of the foregoing reasons, the Final Summary Judgment should be affirmed.

There are no disputed issues of fact. Borrowers have no evidence as to who committed the forgery. There was no actual controversy or doubt regarding PMI when the lawsuit was filed. The federal Truth in Lending law does not apply to the facts at bar since the closing was without error and the post-closing forged document is not governed by TILA. Sanctions for this frivolous litigation were appropriate; any technical procedural issue with notice of the motion was waived.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Answer Brief has been computer generated in Times New Roman 14-point size font in compliance with Fla.R.App.P. 9.210(a).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail on this 15th day of March, 2017 to: Rex E. Russo, Esq., Attorney for Appellants/Petitioners, 1550 Madruga Avenue, Suite 323, Coral Gables, FL 33146 (rexlawyer@prodigy.net).

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