IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

Case No. 3D17-0001

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.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
Lower Court Case No. 12-41600-CA-22

INITIAL BRIEF
&
PETITION FOR CERTIORARI REVIEW OF POST-JUDGMENT ORDER

REX E. RUSSO, ESQ.
Attorney for Appellants/Petitioners
2655 LeJeune Rd., PH 1-D
Coral Gables, FL 33134
305-442-7393

TABLE OF CONTENTS

(Bookmarks (tabs) should be opened in the pdf reader to "jump" to the content items. The referenced pages of this brief may also be quickly accessed by using the page locator of your pdf reader.)

TABLE OF CITATIONS

CASES:

STATUTES AND REGULATIONS:

(All cited federal statutes and regulations remain unchanged from time of the initiation of this action before the lower court in 2012.)

RULES:

OTHER AUTHORITIES:

INTRODUCTION

This is an appeal from a summary final judgment dismissing all defendants in an action invoking statutory remedies under the federal Truth-in-Lending Act (TILA), stating an action for forgery, and requesting a declaratory decree, all evolving from a mortgage loan transaction in which homeowners' signatures were forged to a required disclosure document that was then used by the mortgagee, in violation of TILA, to bill more than what was actually disclosed to the homeowners. This court has jurisdiction pursuant to Florida Rules of Appellate Procedure, Rule 9.030(b)(1)(A).

This is also a common law petition for certiorari review of a post-judgment order of the lower court awarding to the mortgage originator an entitlement to sanctions pursuant to Florida Statutes §57.105. This court has jurisdiction pursuant to Florida Rules of Appellate Procedure, Rules 9.030(b)(2)(A) and 9.030(b)(3).

(Ax ?, L?/¶?)	Shall refer to the appendix of the record on appeal prepared and indexed by the Appellants and filed with this brief, followed by the page number of the appendix, and occasionally followed by a numbered paragraph or line number on the referenced page.
(R ?, L?/¶?)	Shall refer to the record on appeal prepared and indexed by the clerk of the lower court, followed by the page number of the record, and occasionally followed by a numbered paragraph or line number on the referenced page.
Lower Court	Shall refer to the 11th Circuit Court, in and for Dade County, Florida, Judge – Michael A. Hanzman, presiding.

Homeowners	Shall refer to John M. Bennett and Nancy L. Bennett, his wife; Plaintiffs below and Appellants/Petitioners herein.
Mortgage Originator	Shall refer to "Jamal M. Wilson," a Florida licensed mortgage originator, qualifier and sole corporate member of LF Loans; a Defendant below and an Appellee/Respondent herein.
Mortgage Broker	Shall refer to "Home Loan Alliance, LLC f/k/a Leverage Financial, LLC d/b/a LF Loans," that first held the subject mortgage; a Defendant below and an Appellee/Respondent herein.
Mortgagee	Shall refer to "GTE Federal Credit Union," the holder of the equitable interest in the subject mortgage; a Defendant below and an Appellee/Respondent herein.
MERS	Shall refer to "Mortgage Electronic Registration Systems, Inc.," holder of the legal title to the subject mortgage; a Defendant below and an Appellee/Respondent herein.
Closing Agent	Shall refer Stewart Title Company and/or Stewart Title Guaranty Company, closing agent for the mortgage broker and a non-party throughout these proceedings.
TILA	Shall refer to the federal "Truth-in-Lending Act," 15 U.S.C.§1601 et seq. (as in effect on 06/12/2012).

Regulation Z	Shall refer to 12 C.F.R. §1026.1 *et seq.* (effective date of 12/30/2011) which contains regulations implementing TILA.
APR	Shall refer to "Annual Percentage Rate" which expresses total finance charges as a percentage of the actual yearly cost of funds loaned over the term of the loan.
PMI	Shall refer to "private mortgage insurance".

STATEMENT OF THE FACTS

A home refinancing loan extended to the homeowners was closed by an agent chosen by the mortgage broker [Ax 106, first full paragraph].[1] Mortgage originator is the sole corporate member of the mortgage broker organized under Florida law as a limited liability corporation [Ax 9, ¶5&6]. At closing, homeowners gave a promissory note secured by a home mortgage to the mortgage broker [Ax 180&183] and signed a multitude of other documents [Ax 297, p17 Bennett depo, L12–13]. Mortgage broker then immediately transferred the equitable interest in the mortgage [AX 98] to mortgagee while the mortgage itself was recorded in the public records of Miami-Dade under the name of MERS as nominee (i.e. holding only a title interest

[1] The only relevance of this document is that it clearly shows that the closing agent was the lender's agent. It is not otherwise relevant or applicable to the facts herein. The problem here was not a "non-numeric clerical error" subject to correction without the necessity of corrected disclosures.

in the mortgage).[2]

Upon receipt of the first monthly mortgage statement from mortgagee, homeowners noticed that the amount being charged was oddly less than the principal and interest amount that had been stated to them at closing [Ax 297, p19 Bennett deposition, L25 to p20, L16]. To avoid a potential future problem, the homeowners called mortgagee to inform them of this difference [Ax 297, p20 Bennett deposition, L17 to p20, L19] which had to do only with the principal and interest, and not PMI. Mortgagee's response was that the monthly amount due by homeowners was actually higher, and stated an amount that was even higher than the amount disclosed to homeowner's in documents signed at closing [Ax 297, p20 Bennett Deposition, L21 to L25]. Those documents signed and received by homeowners at closing included a Truth-in-Lending Disclosure Statement [Ax 97], a Payment Letter to Borrower [Ax 99], and an Initial Escrow Account Disclosure Statement [Ax 100], all of which disclosed the monthly payment amount as $1,237.96, and none of which disclosed the higher amount of $1,338.88 being charged by mortgagee [Ax 262]. Furthermore, like

---

[2] "A mortgage, under Florida law, is intangible personal property." *Great Southwest Fire Ins. Co. v. DeWitt*, 458 So. 2d 398, 400 (Fla. 1st DCA 1984) citing to *Seaboard All-Florida Ry. v. Leavitt*, 105 Fla. 600, 141 So. 886 (1932). As with all property interests, legal title can be separate from equitable title. See, *Hutchens v. Maxicenters, U.S.A.*, 541 So. 2d 618 (Fla. 5th DCA 1988). "The common law concept of trusts is based on dividing title to property into two concepts, one legal and the other equitable." *Hutchens* at 623.

those documents, none of the other documents signed at the closing imposed a PMI payment upon the homeowners. Those other signed documents include the HUD-1 Settlement Statement [Ax 93], the Estimate of Fees and Costs [Ax 108], and the Itemization of Amount Financed [Ax 120].

At homeowners' request, mortgagee sent its copy of the Payment Letter to Borrower to the homeowners [Ax 297, Bennett depo. p20, L 25 to p21, L15 at Ax 298]. Homeowners realized mortgagee's Payment Letter to Borrower contained their forged signatures [Ax 298, L7–15; Ax 310, ¶4]. Unlike the Payment Letter to Borrower that was disclosed and signed at closing, the forged one was $100.92 higher due to an added line item for PMI [compare Ax 99 with AX 101].

Homeowners' counsel sent a letter to the mortgagee demanding that the matter be rectified within 60 days so that the homeowners would be charged the correct monthly amount as per the disclosure documents, and copied the mortgage broker and the loan originator [Ax 103]. Additional demands made by homeowners' letter included a return of the overage payments (made by the homeowners during the interim), assurance of redaction of documents with MERS (so as to avoid any later confusion should the loan or servicing be sold), and payment of $500 for the homeowners' attorneys fees. In response, mortgage originator stated that the forgery was committed by his closing agent [Ax 243]. In a later response to the demand letter, the mortgage originator responded stating [Ax 257]: "We are **able to remove**

the MI from this loan, as an exception from the MI company. Your clients MI portion of their monthly payment **will be returned and removed** from any future payments. This change **will be reflected** in their next payment coupon." [Bold emphasis added.] But, for the three months following, monthly statements continued at the undisclosed higher amount [Ax 262; Ax 310, ¶5, 7&8]. Homeowners' reasonable assumption was that the reference to the "next payment coupon" meant for the very next month after the response, and not sometime further in the future after the PMI charge was removed [by inference]. Furthermore, the mortgage originator's communication neither addressed the demand to reimburse the homeowner's attorney's fees in the amount of $500, nor did it provide any assurance that the forged documents would be redacted from the loan files held by mortgagee and MERS [compare the demand Ax 103 with the response Ax 257].

Approximately 90-days past the expiration of the 60-day cure period allowed by their demand letter, homeowners filed their action [Ax 434]. After the complaint was filed, homeowners received their monthly statement for the subsequent month which for the first time correctly stated the monthly payment amount as disclosed to them at closing [Ax 310, ¶7 & ¶8]. Later still after suit was filed, a check was sent to reimburse the homeowners for the portion of the monthly payments the homeowners had overpaid (i.e. those itemized for PMI) [Ax 89; Ax 310, ¶7] . About a year after suit was filed, a copy of a check that was stated to have been sent by

mortgage originator to the mortgage insurer in order to remove the necessity of monthly PMI charges, was sent to the homeowners [Ax 259–260]. However, a copy of the mortgage originator's check showing the back of the check and the date it was transacted has not been produced for the record.

STATEMENT OF THE CASE

Following two motions to dismiss, and two amendments of the complaint, the plaintiffs proceeded under their second amended complaint [Ax 8] stating a count for forgery against the mortgage broker and the mortgage originator, a count for declaratory relief against MERS and the mortgagee, and a count for rescission under TILA against the mortgage broker, mortgagee, and MERS. All defendants, represented by one attorney, filed what is primarily a general denial [Ax 37] accompanied by several affirmative defenses [Ax 38].

In furtherance of their defenses, the united defendants filed a motion for summary judgment [Ax 40] supported by nothing more than the homeowners' deposition transcripts [Ax 292–303, Ax 304–308] and some documents marked for identification at their depositions [Ax 56–291]. As best as can be discerned, the summary judgment raised an un-pled affirmative defense of accord and satisfaction [Ax 47]; argued that the homeowners have not met their burden of proving who committed the forgery [Ax 48]; argued that there are no damages to support the

forgery claim [Ax 48]; and argued that MERS was not liable. Embedded in the motion for summary judgment was the defendants' motion for sanctions pursuant to Florida Statutes §57.105 [Ax 54–55]. Mortgage originator filed **no affidavit**, or other verified document, stating that he neither forged homeowners' signatures, nor was he complicit in the forgery he stated was committed by the closing agent acting for his company (i.e. the mortgage broker) [Ax 243]. Mortgagee filed **no affidavit** stating from whom mortgagee obtained the forged instrument, although the allegations state that mortgagee determined that "the apparent signatures of the Plaintiffs to the PAYMENT LETTER TO BORROWER were forged and in place prior to the acquisition of the mortgage interests" by mortgagee [Ax 10, ¶15].

Homeowners submitted the affidavit of plaintiff John Bennett in rebuttal to factual statements both asserted in, and implied by, defendants' motion [Ax 309]. Homeowners' affidavit specifically stated that the Disclosure Letter to Borrower, which was received from the mortgagee, was a forgery [Ax 310, ¶4&6]; that the final loan amount did not include a mortgage insurance premium [Ax 309–310, ¶2&3]; that the closing agent verified that the stated payment amount was correct [Ax 310, end of ¶3]; and, that there was no apparent attempt to comply with homeowners' demands until after suit had been filed [Ax 310, ¶7&8]. Additionally, the homeowners filed a memorandum of law [Ax 312] which included argument that the closing agent was the mortgage broker's agent [Ax 315]; that a sufficient rebuttal to the motion did not

require the homeowners to prove that the forgery was committed by the mortgage originator, his company, or someone under the mortgage originator's direction [Ax 315]; and that partially complying with the homeowners' pre-suit demands, after suit had been filed (i.e. "stuffing the cookie back into the jar"), could not support the defense of accord and satisfaction [AX 312–315].

Following the summary judgment hearing, on November 29, 2016 the court entered a final judgment dismissing homeowners' entire action while denying defendants' embedded request for sanctions under Florida Statutes §57.105 [Ax 321]. Homeowners brought the issues before this court for review by filing a timely notice of appeal from that summary final judgment [Ax 330].

POST-JUDGMENT STATEMENT OF THE CASE

The same day as the entry of the summary final judgment, mortgage originator and MERS filed a motion asking the lower court to reconsider their claims for sanctions under Florida Statutes §57.105 as embedded in the motion for summary judgment [Ax 323]. During the course of the hearing on the motion for reconsideration, defendants' counsel further limited the motion to just the claim of the mortgage originator, thus abandoning the claim of MERS [Ax 376, L22 to Ax 377, L5; Ax 378, L18–21; Ax 379, L5–10]. It was asserted that the mortgage

originator paid all of the fees for the defense [Ax 376, L10–15; Ax 378, L23–25].

In response to the lower court's inquiry, mortgage originator's counsel stated that a "safe harbor" demand had been made in 2015 [Ax 383, L16–20].[3] Homeowners' counsel objected since no "safe harbor" letter (or motion) was in the court's file [Ax 385, L14–20], and objected again when the lower court judge asked to see the defendants' "safe harbor" letter [Ax 386, L1 to 20]. Mortgage originator's counsel then handed the lower court judge what was purported to be the "safe harbor" letter (or motion) [Ax 385, L15 to Ax 388, L14]. The letter (or motion, or both) was neither marked for identification, nor presented for review by homeowners' counsel, nor filed of record.

Although the lower court stated time would be provided to submit further statements supporting reasons for suing the mortgage originator for the forgery [Ax 389, L10–15], the very next day the lower court granted the mortgage originator's motion for reconsideration of sanctions by vacating the summary final judgment to the extent it denied the mortgage originator's fees and costs pursuant to the embedded

---

[3] The lower court judge referred to a "safe harbor letter" [Ax 383, L16–17]. However, Fla. Stat. §57.105 never mentions a "letter". Under the statute, a claim for sanctions commences with a motion pursuant to §57.105(4) that is served, but not filed with or presented to the court unless the opposing party has not complied with the demands of the motion within 21 days. Mortgage originator's counsel refers to both a letter and a motion [Ax 383, L18 to 20]. Homeowners' counsel also started using the terms interchangeably although it was uncertain whether the court was referring to a "letter" or a "motion" or both [Ax 385, L15 to Ax 386, L20].

§57.105 motion [Ax 329]. Within the lower court's order, a hearing was scheduled for January 5, 2017 on the issue of mortgage originator's entitlement to fees and costs pursuant to the embedded §57.105 motion.

On January 3, 2017, just two days prior to the scheduled January 5th hearing before the lower court, and more than 30 days from the date of the November 29, 2016 final judgment, mortgage originator filed a memorandum of law in support of his motion for sanctions [Ax 333]. Within the mortgage originator's memorandum there is no reference to an attached document. However, attached to defendant's memorandum in support of his embedded motion for §57.105 fees was a copy of a "safe harbor" letter that had previously been served on the homeowners.

Homeowners also responded on January 3, 2017 to the lower court order setting hearing on the issue of entitlement by filing their own memorandum in opposition [Ax 354]. Homeowners' memorandum objected to the jurisdiction of the lower court in light of the interim notice of appeal to this court, and otherwise responded as to the contentions raised by the embedded §57.105 motion.

Also on January 3, 2017, mortgage originator moved for an order of this court relinquishing jurisdiction so that the lower court could consider entitlement to §57.105 sanctions at the hearing scheduled by the lower court for January 5, 2017 [Ax 347]. On January 4, 2017, without awaiting a response from the homeowners (in fact — before homeowner's counsel was aware of the motion before this court), this

court relinquished jurisdiction to the lower court for a period of thirty days "for the purpose(s) stated in the motion" [Ax 367]. That is, this court relinquished jurisdiction so the lower court could hear the mortgage originator's motion for sanctions as embedded in the motion for summary judgment [Ax 348, ¶2], which motion was expanded upon by the motion for reconsideration, and upon reconsideration scheduled for hearing on the issue of entitlement by the lower court's order.

Following the January 5, 2017 hearing on the issue of the mortgage originator's entitlement to §57.105 sanctions, the lower court entered an order finding "defendants' motion" was "in all respects" granted [Ax 368, ¶1]. No explanation is given in the order as to what "in all respects" means, nor why "defendants" are referred to in the plural (MERS' claim was abandoned at the motion for reconsideration leaving just the mortgage originator) and considering that post-judgment jurisdiction was reserved solely by the motion for reconsideration of the order denying mortgage originator's §57.105 motion for sanctions as embedded in the motion for summary judgment. An evidentiary hearing to establish the amount of sanctions (attorney's fees) is presently scheduled for March 14, 2017.

ISSUES PRESENTED FOR REVIEW

I. WERE THE FACTS SO CLEARLY UNDISPUTED ON HOMEOWNERS' TILA CLAIMS AS TO ALLOW THE DEFENDANTS SUMMARY JUDGMENT AS A MATTER OF LAW FOR THOSE CLAIMS, OR AS A MATTER OF LAW SHOULD SUMMARY JUDGMENT HAVE BEEN DENIED?

II. WERE THE FACTS SO CLEARLY UNDISPUTED ON HOMEOWNERS' FORGERY CLAIM AS TO ALLOW THE DEFENDANTS SUMMARY JUDGMENT AS A MATTER OF LAW FOR THAT CLAIM, OR AS A MATTER OF LAW SHOULD SUMMARY JUDGMENT HAVE BEEN DENIED?

III. WERE THE FACTS SO CLEARLY UNDISPUTED ON HOMEOWNERS' REQUEST FOR DECLARATORY RELIEF AS TO ALLOW THE DEFENDANTS SUMMARY JUDGMENT AS A MATTER OF LAW ON THAT ACTION, OR AS A MATTER OF LAW SHOULD SUMMARY JUDGMENT HAVE BEEN DENIED?

IV. HAVE POST-JUDGMENT PROCEEDINGS, LEADING TO ENTRY OF SANCTIONS AGAINST THE HOMEOWNERS AND THEIR ATTORNEY, VIOLATED A SUBSTANTIAL REQUIREMENT OF LAW RESULTING IN HARM TO THE HOMEOWNERS WHICH IS NOT REPARABLE IN A LATER APPEAL?

STANDARD OF REVIEW

Appeals from entry of summary judgment are reviewed by this court *de novo*. *Tropical Glass & Const. Co. v. Gitlin*, 13 So. 3d 156, 158 (Fla. 3d DCA 2009). This court must consider the record evidence in the light most favorable to the homeowners as the non-moving party. *Tropical Glass* at 158. If any doubt exists, the summary judgment must be reversed. *Tropical Glass* at 158. Accordingly, in the first instance, for summary judgment to withstand appellate review, the facts must be so

crystallized that nothing remains but questions of law. *Suncoast Cmty. Church of Boca Raton, Inc. v. Travis Boating Ctr. of Fla.*, 981 So. 2d 654, 655 (Fla. 4th DCA 2008). In continued review, when ascertaining whether there has been a proper application of law to the crystal clear facts, the court's standard of review remains *de novo*. See, *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (standard of review for pure questions of law is *de novo* and no deference is given to the lower court judgment). Summary judgment is not an opportunity to determine the credibility of witnesses or weigh the evidence. *Hernandez v. United Auto. Ins. Co., Inc.*, 730 So. 2d 344 (Fla. 3d DCA 1999).

Review of the lower court's post-judgment order allowing for sanctions pursuant to Florida Statutes §57.105, brought before this court on a petition for certiorari, is limited to whether the lower court departed from an essential requirement of law (i.e. failed to provide procedural due process, or apply the law correctly) and whether such departure resulted in material injury to the homeowners that cannot be remedied on a later direct appeal. *United Real Estate Ventures, Inc. v. Village of Key Biscayne*, 26 So. 3d 48 (Fla. 3d DCA 2009).

SUMMARY OF ARGUMENT

TILA, being in derogation of common law, has provisions that must be strictly enforced for the benefit of the homeowners. Mortgage originator's assertion that his

company's closing agent was responsible for the forged document, and consequently the resulting non-disclosure of TILA required terms, factually implicated the mortgage broker in the forgery as the principal of the closing agent. The resulting incorrect TILA disclosures triggered homeowners' statutory right of rescission, as well as statutory damages under TILA, against mortgage broker, mortgagee, and MERS regardless of any actual damages suffered by the homeowners.

Both the common law, and a specific statute addressing mortgage brokers, extends liability arising from the forged document to the mortgage originator. Although the actual damages arising from the forgery may have been rendered minimal by curative acts taken by the mortgage broker and mortgage originator, those curative acts were not shown to be fully in place, if at all, prior to the filing of the action against said defendants. Therefore, accord and satisfaction, based merely upon the defendants' post-litigation proffer, was not an allowable defense. Yet, the proffer is an indication of the mortgage originator's liability.

Florida Statutes §57.105, also being in derogation of the common law, likewise required strict compliance with the established statutory framework. Mortgage originator deviated from an essential "due process" requirement of §57.105 by failing to notify the homeowners of defendant's intent to seek such sanctions, and the reason why sanctions would be sought, in advance of the motion being filed with the lower court. Failure of mortgage originator to comply with the statute, and the subsequent

order of the court finding defendant to be entitled to such sanctions, payable in equal amounts from homeowners and their counsel, put the homeowners in conflict with their counsel. The continuously exacerbating material harm to homeowners arising from that conflict is not correctable by a subsequent appeal.

ARGUMENT

I. INCORRECT DISCLOSURE DOCUMENTS PRECLUDE, AS A MATTER OF LAW, THE ENTRY OF SUMMARY JUDGMENT DISMISSING DEFENDANTS UNDER THE COUNT DEMANDING ENFORCEMENT OF TILA'S RESCISSION RIGHTS.

Homeowners' main cause of action seeks to enforce their rights to rescind the mortgage for TILA and Regulation Z violations [Ax 14 to Ax 15, ¶36]. Codified in 15 U.S.C. §1601 et seq., the Truth-in-Lending Act (TILA) specifically states that its purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and protect the consumer against inaccurate and unfair credit billing... practices." *15 U.S.C. §1601(a)*. On review following entry of summary judgment denying the TILA claim, this court "must interpret every possible inference in favor of the non-movant" (i.e. the homeowners herein). *RV-7 Prop., Inc. v. Stefani De La O, Inc.*, 187 So. 3d 915 (Fla. 3d DCA 2016) citing to *Campaniello v. Amici P'ship*, 832 So. 2d 870, 872 (Fla. 4th DCA 2002); see also, *Moore v. Morris*,

475 So. 2d 666, 668 (Fla. 1985) (record must be read favorably toward the nonmoving party). It was long ago stated that the "remedial scheme of TILA is designed to deter generally illegalities which are only rarely uncovered and punished, and not just to compensate borrowers for their actual injuries in any particular case." *Williams v. Public Finance Corp.*, 598 F.2d 349, 356 (5th Cir. 1979). Accordingly, the rescission right is extended against mortgagee as assignee of the mortgage. See, *15 U.S.C. §1641(c)*.

An examination of TILA violations first draws attention to the forged Payment Letter to Borrower [Ax 15, ¶35; Ax 36], although it is believed that further discovery would have revealed that the closing package submitted to mortgagee contained other forged disclosure documents. The payment amount is a defined TILA disclosure, which when incorrect supports an action for violation. *15 U.S.C. §1602(v); 15 U.S.C. §1639(a)(2)(A).* Defendants never contested the forgery of the Payment Letter to Borrower with sworn testimony necessary to overcome the homeowners' affirmation that their signatures were not genuine [Ax 310, ¶4]. As a consequence of the forged document, or more likely — "documents," mortgagee felt justified to charge homeowners a monthly amount that was in excess of the amount disclosed to the homeowners at closing [compare Ax 262 with later monthly statement Ax 161].

It is difficult to imagine how the mortgagee could have relied on a single forged document if other disclosure documents in its file were not consistent with the

forged Payment Letter to Borrower. Note that on the Federal Truth In Lending Disclosure Statement (signed by homeowners at closing), next to the words "includes mortgage insurance," the box is not checked [Ax 97]. Note that the monthly payment amount shown in the Federal Truth In Lending Disclosure Statement (signed by homeowners at closing) reflects the same amount as in the Payment Letter to Borrower which was signed at closing [Ax 99]. TILA states that the finance charge "shall be disclosed more conspicuously than other terms." *15 U.S.C. §1632(a)*. Accordingly, one would expect the mortgagee to look primarily at the Federal Truth In Lending Disclosure Statement as the guiding document in its file. So, the Federal Truth In Lending Disclosure Statement in the mortgagee's file might also be a forgery and show the same fraudulent payment amount as in the forged Payment Letter to Borrower — although there is also the possibility that mortgagee is actually the one that forged the Payment Letter to Borrower, and not the closing agent as professed by the mortgage originator (but unlikely).

Under TILA, specifically §1026.4(b)(5) of Regulation Z,[4] PMI is to be

[4] At TILA's inception, authority to implement regulations was in the hands of the Federal Reserve Board. However, since July 21, 2011, TILA's general rule making authority was transferred to the Consumer Financial Protection Bureau (CFPB) pursuant to provisions enacted by the Dodd–Frank Wall Street Reform and Consumer Protection Act. Although regulations implementing the statute are still formally referred to as Regulation Z, they are now codified at 12 C.F.R. §1026.1 *et seq*., whereas in the past they were codified at 12 C.F.R. §226 *et seq*. See Consumer Financial Protection Bureau (Press release)*, CFPB Lays Out Implementation Plan for New Mortgage Rules* (February 13, 2013).

considered as part of the overall finance charge [see, Ax 15, ¶41 of complaint]. Had PMI been included in the overall finance charge, the APR disclosed to the homeowners in the required Federal Truth-In-Lending Disclosure Statement would have been significantly higher [Ax 97]. An understated amount of payment, leads to an understated finance charge, which leads to an understated APR, each of which is a material incorrect disclosure. For the purposes of rescission, "the term material disclosures means the required disclosures of the annual percentage rate, the finance charge, the amount financed, and the payment schedule." *12 C.F.R. §1026.23(a)(3)(ii).* See also, *Rowland v. Magna Millikin Bank of Decatur, NA*, 812 F. Supp. 875, 879 (C.D. Ill. 1992). Failure to make proper disclosures extended homeowners' right to rescind to three years. *15 U.S.C. §1635(f); 12 C.F.R. §1026.23(a)(3)(i)*; and see, *Rowland* at 879.

Disclosure requirements under TILA impose a "strict liability" standard upon the mortgage originator, mortgage broker, and mortgagee. *Rowland* at 878. Accordingly, TILA requirements are to be liberally construed in favor of the homeowners, but strictly construed against the mortgagee. *Ellis v. Gen. Motors Acceptance Corp.*, 160 F. 3d 703, 707 (11th Cir. 1998) ("TILA is a consumer protection statute, and as such must be construed liberally in order to best serve Congress' intent."); and see, *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 417 (7th Cir. 1980) (requiring "strict adherence to the required terminology

under (TILA) and regulations."). The court in *No. 2 Galesburg*, while acknowledging that many TILA violations are technical violations that do not necessarily demonstrate egregious intent by the lender, stated that the intent of congress was to hold lenders liable — even for technical violations or minor deviations. *No. 2 Galesburg* at 416-17; *Cowen v. Bank United of Texas, FSB*, 70 F. 3d 937, 941 (7th Cir. 1995) (stating that "hyper-technicality" reigns in TILA cases).

Case law is replete with examples of cases where technical TILA defects led to rescission. *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142 (11th Cir.1994) (interest rate made to look lower than it really was by charging fees that should have been reflected in the interest rate), abrogated in part on other grounds by *Veale v. Citibank, F.S.B.*, 85 F.3d 577 (11th Cir. 1996); *Harris v. Schonbrun*, 773 F.3d 1180, 1184 (11th Cir. 2014) (lender obtained signed post-dated waiver of rescission right, and failed to provide two copies of notice as to right of rescission); *Iroanyah v. Bank of Am.*, 753 F.3d 686, 689 (7th Cir. 2014) (failed to specify frequency of payments or provide two copies of rescission notice); *Rowland v. Magna Millikin Bank of Decatur, NA*, 812 F. Supp. 875 (C.D. Ill. 1992) (document given to borrower illegible); *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1303–1304 (D. Del. 1990) (oral disclosures although recorded do not qualify); *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1138 (11th Cir 1992) (understated finance charge). However, forgery is neither a just act nor a mere technical oversight and therefore

ought to be treated more harshly. *Cf, Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475 (5th Cir. 1995) (forgery of retail installment contract).

A. RESCISSION UNDER TILA IS A RIGHT – NOT A DISCRETIONARY EQUITABLE REMEDY.

Rescission rights under TILA are found at 15 U.S.C. §1635. TILA further empowers regulators to establish "additional requirements, classifications, differentiations, or other provisions," and to "provide for such adjustments and exceptions for all or any class of transactions," if the regulators determine such provisions to be necessary and proper to carry out the intended purposes of TILA. *15 U.S.C. §1604(a)*. Pursuant to that authority, the regulators enacted Regulation Z which is found at 12 C.F.R. §1026.1 *et seq*. Section 1026.23(d) of Regulation Z governs how TILA's right of rescission under §1635 progresses.

Homeowners have a right of rescission because the mortgage loan constitutes "a credit transaction in which a security interest... [was] acquired in [homeowners'] principal dwelling" [Ax 74, ¶6; Ax 159, Ax 113, Ax 294, p5 of Bennett depo, L10 to 12]. *12 C.F.R. §1026.23(a)(1)*.[5] Once homeowners rescinded by filing their action

[5] Do not equate a mortgage on a "principal dwelling" with a "residential mortgage transaction" exempted under 12 C.F.R. §1026.23(f)(1). A "residential mortgage transaction" is defined as "a transaction in which a mortgage... is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." *15 U.S.C. §1602(x*). The mortgage herein was by a new creditor paying-off an existing mortgage, so none of the exemptions to rescission are applicable.

and serving the defendants, the mortgage became void from the homeowners' perspective. See, *12 C.F.R. §1026.23(d)(1)*. Upon being served the rescission complaint, defendants technically were required to return "any money or property ... given to anyone in connection with the transaction," within 20 calendar days of service. *12 C.F.R. §1026.23(d)(2)*. MERS and the mortgagee should have then also taken "any action necessary to reflect the termination of the security interest." *12 C.F.R. §1026.23(d)(2)*. That is, the mortgagee and MERS should have recorded a termination of the mortgage in the public records and ceased billing the homeowners.

If the pled violation of the Truth in Lending Act is present, then rescission is a matter of statutory right, it is not a discretionary common law equitable remedy. Although Regulation Z and TILA §1635(b) refer to the termination of a "security interest," TILA §1635(a) specifically refers to a "right to rescind the transaction." *Handy v. Anchor Mortg. Corp.*, 464 F. 3d 760, 765 (7th Cir. 2006). "The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law." *Beach v. Great Western Bank*, 670 So. 2d 986, 992 (Fla. 4th DCA 1996), affirmed by *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997) (note court did not agree that rescission was an equitable right under common law, but instead found that under TILA rescission is a new statutory right).

TILA results in a cancellation of the security agreement as a right exercised by operation of law, not by judicial discretion to award equity. See, *12 C.F.R. §1026.23.*

Stated succinctly, TILA is not a codification of equitable rescission. *Jesinoski v. Countrywide Home Loans, Inc*., 135 S. Ct. 790, 793 (2015). Nevertheless, TILA is subject to some equitable considerations. So, when mortgage lenders facing rescission have challenged the order of implementation as prescribed by 15 U.S.C. §1635 (i.e. return to borrower all funds received; record a cancellation of the mortgage; then receive loan proceeds from the borrower) because they wanted assurance that the borrower would comply, the courts have typically reordered the exchange of funds and cancellation of the lien within the purview of 15 U.S.C. 1635(b). In those cases the courts first determined the amount of payments to be returned to the property owner, then subtracted that amount along with any statutorily awarded damages from the amount lent and arrived at the "net amount" the property owner must return to the lenders. At that point, the courts allowed the property owner a reasonable amount of time to obtain funds, or acquire new loans, to pay-off the determined "net amount." Finally, once the "net amount" was paid to the lenders, those courts ordered the liens released of record. See, *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1142-1143 (10th Cir. 2012) (explaining reason for equitable intervention); *Iroanyah v. Bank of Am.*, 753 F.3d 686, 690 (7th Cir. 2014) (altered process explained). "[R]escinding a loan transaction requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position

they occupied prior to the loan agreement." *Handy*, 464 F.3d at 765 (7th Cir. 2006), quoting *Barett v. JP Morgan Chase Bank*, *N.A.*, 445 F.3d 874, 877 (6th Cir. 2006). In addition to releasing the mortgage, the defendants are required to return to homeowners every payment received by defendants, for whatever purpose, in order to put the homeowners back in the position the homeowners had prior to the loan agreement. *Handy*, 464 F.3d at 765–66.

Underscoring that rescission under TILA is a right, not a remedy, is the fact that defendants' required actions do not effect the homeowners' termination of the mortgage. MER's obligation is to reflect the termination, and the mortgagee's and loan originator's obligations are to return all payments. *Cocroft v. HSBC Bank USA., N.A.*, No. 10C3408, 2012 WL 1378645, at *3 (N.D. Ill. Apr. 20, 2012). Mortgagee's obligation is to "reflect" not "effect" the termination. So, failure of mortgagee to immediately return the funds, or any other inconsistent act, does not change the fact that the homeowners exercised their right of rescission. *Id.*

B. TILA DOES NOT REQUIRE PROOF OF ACTUAL DAMAGES BEFORE HOMEOWNERS MAY OBTAIN RESCISSION AND STATUTORILY PRESCRIBED DAMAGES.

As a statutory cause of action, actual damages are not a requirement to the homeowners' maintaining their simultaneous demand for rescission and statutory damages. *Harris v. Schonbrun*, 773 F.3d 1180 (11th Cir. 2014). As here, the

borrower in *Harris* alleged that the mortgage lender violated TILA by failing to comply with a particular TILA requirement. Like the homeowners herein, the borrower in *Harris* rescinded her loan, and received an award of statutory damages, attorneys fees and costs as provided for under TILA. The trial court in *Harris* ordered rescission compliance, but denied the request for statutory damages, fees and costs reasoning that there were no actual damages. Rescission was affirmed by the *Harris* appellate court, but the court otherwise reversed the lower court, and remanded for a consideration of the statutory damages, fees and costs which are mandatory under TILA. The *Harris* court specifically stated that: "The district court must award statutory damages "regardless of the ... belief that no actual damages resulted or that the violation [of section 1635] is *de minimis*." *Harris* at 1185.

C. AT ANY TIME THE DEFENDANTS COULD HAVE ACKNOWLEDGED THE HOMEOWNERS' RIGHT TO RESCISSION AND MITIGATED THE IMPACT OF THE TILA VIOLATION.

Homeowners did not set out to get the max for *de minimis*. Prior to seeking rescission, the homeowners gave defendants the option of correcting the amount being charged so that the monthly statement would reflect only the amount disclosed at closing, provided defendants did so within 60 days, and returned the excess portions paid under protest by the homeowners to avoid a declared default, and paid $500 in attorney's fees, and assured the homeowners that forged documents were

redacted from the loan files held by mortgagee and by MERS [Ax 103–104]. Homeowners were not even demanding that their statutory damages get paid. Defendants responded that they would partially comply with homeowners' demands [Ax 257]. However, as of the time of the filing of the action before the lower court, defendants had not complied with the demand [Ax 310, ¶7&8].

Only after the action had been filed [docket filing date, Ax 434] was the monthly statement corrected [compare Ax 262 with Ax 261, and see Ax 310, ¶5, 7&8]. Only after the action was filed were the payments exceeding the disclosed amount returned [Ax 89; Ax 310, ¶7]. It was more than a year after the action was filed that a non-transacted copy of a check supposedly used by mortgage originator to cure the problem was produced [Ax 259–260]. At no time did the defendants tender the demanded $500 attorney's fees which, in light of such untimely tender and additional legal services incurred by the homeowners, would have been refused. At no time did defendants give an assurance that the mortgage files held by MERS and the mortgagee had been redacted of all forged documents.

Upon receiving the action seeking rescission, the defendants needed to do little more than acknowledge the homeowners' rights to rescission and right to statutory damages. Had the defendants acknowledge those rights, the parties would have turned the clock back such that defendants would have returned all payments received from the homeowners between June 2012 and November 2012; the homeowners

would have returned the funds received under the mortgage; and, the mortgage would have been cancelled of record. But, the defendants would have had to additionally pay the homeowners' costs and attorney's fees for services provided — up to that time. If defendants disagreed with the amount of fees and costs demanded, they could have proffered an amount with an offer in accordance with Rule 1.442 of the Florida Rules of Civil Procedure, or they could have proceeded directly to have the lower court determine the amount of awardable costs and fees allowed the homeowners pursuant to TILA §1640(a)(3). *Harris v. Schonbrun*, 773 F.3d 1180 (11th Cir. 2014) (attorney's fees mandatory after rescission).

Once rescission was declared, it was to late for defendants to correct their bad acts and oversights. Defendants could not then avoid rescission by "stuffing the cookie back into the cookie jar." Actually, getting caught "stuffing the cookie back into the cookie jar" is a fair indication of liability. That is essentially what happened when the mortgage originator, on behalf of the mortgage broker, paid an amount to the mortgage insurer in order to reduce the monthly payments down to the disclosed payment amount (Ax 269–270), and when the mortgage lender returned the overage payments (Ax 291). But, the disclosed payment amount was not reflected on the monthly statements until after suit was filed, and the overage payments were not returned until after suit was filed [Ax 310, ¶7&8]. See, United States Supreme Court opinion in *Campbell–Ewald Company v. Gomez*, 136 S. Ct. 663, 675 (2016) wherein

Justice Thomas in his concurring opinion stated that: "[A] tender of the amount due was deemed "an admission of a liability" on the cause of action to which the tender related."), citing to *Cottier v. Stimpson*, 18 F. 689, 691 (Ore. 1883) (explaining that a tender constitutes "an admission of the cause of action"); and see, *The Rossend Castle Dillenback v. The Rossend Castle*, 30 F. 462, 464 (S.D.N.Y. 1887) (same). "Even when a potential defendant properly effectuated a tender, the case would not necessarily end. At common law, a plaintiff was entitled to "deny that [the tender was] sufficient to satisfy his demand" and accordingly "go on to trial."" *Campbell-Ewald Co.* at 675.

II. DISPUTED ISSUES OF MATERIAL FACT AND UNDISPUTED MATERIAL STATEMENTS OF FACT PRECLUDE, AS A MATTER OF LAW, ENTRY OF SUMMARY JUDGMENT DISMISSING DEFENDANTS UNDER THE FORGERY COUNT.

Forgery is recognized as a species of fraud in Florida and has been most closely related to fraud in the execution. *Schwartz v. Guardian Life Insurance Company of America*, 73 So. 3d 798, 807 (Fla. 4th DCA 2011) (forgery is a species of fraud); *Blanco v. Novoa*, 854 So. 2d 672 (Fla. 3d DCA 2003) (deed created with forged signatures stated as "fraud in the execution"); *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 999 (11th Cir. 1986) (an appeal to the 11th Circuit from the Southern District Court wherein forgery, fraud in factum, and fraud in the execution are interchanged); *McCaddin v. Southeastern Marine Inc.*, 567 F.Supp.2d 373, 381 (E.D.N.Y. 2008) (forgery is an act giving rise to fraud in the execution).

However, when speaking of forgery the label of "fraud in the execution" should be avoided when action is brought by the party whose signature was forged. "Fraud in the execution" implies the necessity of detrimental reliance, whereas requiring reliance upon the bad act by the party whose signature was forged would be inapposite and counterintuitive.

A. DEFENDANTS PRESENTED NEITHER AN AFFIDAVIT NOR OTHER EVIDENCE DISAVOWING THE MORTGAGE ORIGINATOR'S INVOLVEMENT IN THE FORGERY.

The record before this court must be read with the admonition in mind that summary judgment is granted cautiously in cases involving fraud. See, *Lewis v. Kranz*, 599 So. 2d 253 (Fla. 3d DCA 1992). "A principal is civilly liable for the tortious acts of his agent which are found to be within the course and scope of the agent's employment, even where the agent's acts or representations are fraudulent or deceitful, and even though the principal was not cognizant of his agent's misrepresentations." *Nessim v. DeLoache*, 384 So. 2d 1341, 1344 (Fla. 3d DCA 1980). "It [was] not established conclusively in the record that the appellee..., as an agent of the defrauding principal, was not a participant in a conspiracy to defraud." *Lewis v. Kranz*, 599 So. 2d 253 (Fla. 3d DCA 1992). In fact, mortgage originator accused his closing agent as being the forger [Ax 243], which would as a matter of law make the mortgage broker liable as the principal, and most likely the mortgage

originator as the person conducting the brokerage and responsible for loan origination activities [Ax 9, ¶6]. See, *§494.001(21), Fla. Stat. (2012);* and *§494.0035(1)*, *Fla. Stat. (2012).*

Mirroring the mortgage originator's accusation, the allegations of the complaint set forth that the forgery was committed by the mortgage broker, or its agents, who were under the direction of the mortgage originator [Ax 10, ¶16]. Furthermore, it was determined by mortgagee that the apparent signatures of the homeowners to the Payment Letter to Borrower were forged and in place prior to the acquisition of mortgage interests by the mortgagee [Ax 10, ¶15]. As it stands presently, mortgage originator has received a summary judgment although he might actually be the one who forged the document, or he was otherwise complicit.

B. AS THE QUALIFYING MORTGAGE ORIGINATOR, SOLE OFFICER, AND SOLE DIRECTOR OF THE MORTGAGE BROKER, THE MORTGAGE ORIGINATOR IS LIABLE FOR THE FORGERY AS A MATTER OF STATUTORY LAW.

As the qualifying mortgage originator and sole corporate member of mortgage broker, the mortgage originator, by statutory presumption, is liable for the unlawful transaction along with the mortgage broker. Florida Statutes §494.0019(1) states:

> If a mortgage loan transaction is made in violation of any provision of this chapter, the person making the transaction **and every licensee, director, or officer who participated in making the transaction** are jointly and severally liable to every party to the transaction in an action for damages incurred by the party or parties **[bold emphasis added]**.

Forgery is a device, scheme or artifice intended to defraud, and is specifically unlawful in the course of a mortgage loan transaction. *§494.0025(4)(a), Fla. Stat. (2012)*; see for example, *Zaremba v. State*, 452 So. 2d 1026 (Fla. 4th DCA 1984). Likewise, the forged document constitutes a knowing and willful falsification of a material fact (i.e. the monthly payment) which is also specifically unlawful in the course of a mortgage loan transaction. *§494.0025(5), Fla. Stat. (2012).* "There is no requirement for actual fraud to have been committed and thus, there is no heightened pleading requirement." *Linville v. Ginn Real Estate Co.*, 697 F. Supp.2d 1302, 1309 (M.D. Fla. 2010) (action pursuant to Fla. Stat. §494.0025(4)).

The only way for the mortgage originator as the sole corporate member of the mortgage broker [Ax 9, ¶6] to escape liability would have been for him to show that he acted in good faith, was without knowledge of the forged document, exercised due diligence, and could not have known of the forged document. See, *§494.0019(1) Fla. Stat. (2012).* This remains a highly disputed issue of fact as the record is devoid of any sworn statement by the mortgage originator supporting such a contention.

C. ACTUAL DAMAGES WERE PRESENT UNDER THE FORGERY COUNT AT THE TIME THE ACTION WAS FILED.

One of the arguments presented by the defendants at the summary judgment motion hearing was that the count for forgery lacked sustainable actual damages [Ax 41]. Essentially, the defendants' argument is the same as their argument regarding

accord and satisfaction of the TILA violations. Homeowners' argument in rebuttal is the same argument made above — a wrong doer can not simply "stuff the cookie back into the jar" after suit is filed and avoid an action for the wrong committed. Although the actual damages resulting from the forgery became small once the mortgagee stopped billing for the PMI amount, and then arguably became non-existent when the mortgagee tendered the overage amounts [Ax 291], since there was no acceptance of defendants' tender, the action remains live at least for the amount of $302.76 (the overage payments), and of course for such punitive damages that might later be allowed into the pleading. See, *Fla. R. Civ. P. 1.190(f)* and *§768.72(1), Fla. Stat. (2012)*. Since the intent of the forgery was obviously to skirt the strict disclosure requirements of TILA and its ramifications, there is sufficient reason to allow a punitive award even with only minimal damages existing.

III. IN THE ABSENCE OF AN ASSURANCE THAT THE FORGED DOCUMENT HAS BEEN REDACTED FROM THE LOAN FILES HELD BY MERS AND THE MORTGAGEE, AS A MATTER OF LAW, THE COUNT FOR DECLARATORY RELIEF REMAINS A VIABLE CAUSE OF ACTION THAT WAS NOT SUBJECT TO SUMMARY JUDGMENT OF DISMISSAL.

Florida Statutes, Chapter 86, governs actions for declaratory relief before the courts. Section 86.021, titled "Power to Construe" states that, "any person claiming to be interested or who may be in doubt about his or her rights under a ... contract, or other article, memorandum, or instrument in writing ... may have determined any question of construction or validity arising under such ... contract ... or other article,

memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder."

Homeowners, in accordance with the statute, properly pled all the elements necessary to have their rights regarding payment of the disputed PMI determined by the lower court. Defendants never contested the elements pled by affidavit, or otherwise. It could not rightfully be that the lower court entered summary judgment dismissing this count on the premise that the homeowners have not defaulted under the mortgage. Florida Statutes §86.031 states that "[a] contract may be construed either before or after there has been a breach of it." It could not rightfully be that the lower court entered summary judgment dismissing this count because there exists another adequate remedy available to the homeowners. Florida Statutes §86.111 states that "[the] existence of another adequate remedy does not preclude a judgment for declaratory relief." It could not rightfully be that the lower court entered summary judgment dismissing this count under the belief that allowing an action for declaratory relief precludes other actions. Florida Statutes §86.011 states in part that "no action or procedure is open to objection on the ground that a declaratory judgment is demanded."

Florida's Supreme Court has stated that "res adjudicata" "is founded upon the sound proposition that there should be an end to litigation and that in the interest of

the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered for the same cause by interminable litigation." *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla.1952). Homeowner's count for declaratory relief was specifically directed to MERS and Mortgagee and was primarily aimed at achieving an end to all litigation regarding the issue of the forged disclosure document by requiring a redaction of the forged documents so that any mortgage holder subsequently acquiring equitable ownership or servicing rights would necessarily be informed of the proper monthly payment amount. Provisions of the declaratory relief act are supposed to be liberally administered and construed. See, *§86.101, Fla. Stat. (2012).*

IV. DEFENDANTS' CLAIM FOR §57.105(1) SANCTIONS, EMBEDDED WITHIN THEIR MOTION FOR SUMMARY JUDGMENT, FAILED TO ADHERE TO THE STRICT REQUIREMENT THAT SUCH MOTION BE SERVED IN ADVANCE OF FILING IN ORDER TO NOTIFY HOMEOWNERS OF DEFENDANTS' INTENT AND REASON TO SEEK SUCH SANCTIONS.

The lower court order granting mortgage originator's entitlement to sanctions under §57.105 is not noticed for direct appellate review because the order remains a non-appealable interlocutory order under current rules of the court. *Fla. R. App. P. 9.130.* Generally, an order awarding "entitlement" to fees for later determination is non-appealable. *Kling Corp. v. Hola Networks Corp.*, 127 So. 3d 833 (Fla. 3d DCA

2013). However, since defendants' motion for §57.105 sanctions was not been made in strict adherence with the method prescribed by the statute, it was voided – even if it were otherwise meritorious.[6] *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014) (§57.105 is in derogation of common law and must be strictly construed; although motion admittedly received by opposing counsel, failure to strictly adhere to service requirements rendered motion ineffective).

Many Florida courts have undertaken certiorari review to determine whether a party was afforded the proper process as procedurally and statutorily required. *Globe Newspaper Co. v. King*, 658 So. 2d 518, 520 (Fla. 1995) (appellate courts have certiorari jurisdiction to review whether lower courts have complied with procedural requirements of statute); *Tenet S. Fla. Health Sys. v. Jackson*, 991 So. 2d 396, 399 (Fla. 3d DCA 2008) (granting certiorari where trial court incorrectly found that pre-suit notice required by statute was not necessary); *Corbo v. Garcia*, 949 So. 2d 366, 368 (Fla. 2d DCA 2007) (granting certiorari where order incorrectly dispensed with statutory presuit requirements); *Central Fla. Reg'l Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th DCA 1998) (granting certiorari where corroborating expert opinion required by statute not filed); including one very much on point, *Orange County Buld. v.*

[6] It was not otherwise meritorious! But, certiorari review is limited in this instance to whether procedural and statutory requirements were adhered to, and not whether the factual findings are supportive of the lower court's order.

Strickland Const., 913 So. 2d 718 (Fla. 5th DCA 2005) (§57.105 not strictly followed).

Defendants MERS and mortgage originator impermissibly incorporated their Florida Statutes §57.105 motion for sanctions within their motion for summary judgment [Ax 54]. The embedded motion for fees and costs fails to conform to the statutory requirements for obtaining such sanctions. A party seeking sanctions under §57.105 must show that they are proceeding on a motion that was served on the opposing party but not filed with the court until at least 21 days have past since service of the motion, and "the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." *§57.105(4), Fla. Stat. (2012)*. The embedded motion was not served upon the homeowners in advance of defendants' §57.105 motion being filed with the court.

Although the lower court granted defendants' motion for summary judgment, the lower court in the same order denied defendants' embedded §57.105 motion for sanctions [Ax 321–322, ¶3]. Defendants then filed their motion for reconsideration of their embedded §57.105 motion [Ax 323]. Defendants' motion for reconsideration was granted [Ax 329] and the lower court then schedule a hearing on the issue of defendants' entitlement to §57.105 sanctions — as presented by their embedded motion. Homeowners' subsequently filed notice of appeal [Ax 330] stayed further action by the lower court. But this court, on the mortgage originator's motion [Ax

347], relinquished jurisdiction to allow the lower court to consider the issue of entitlement to sanctions under defendants' embedded motion [Ax 367]. An order was then entered by the lower court finding the defendants entitled to §57.105 sanctions [Ax 368].

Although mortgage originator never filed a "safe harbor" motion that had previously been served in accordance with the requirements of Florida Statutes §57.105(3), a document titled as such was attached to mortgage originator's memorandum in support of his claimed entitlement to fees pursuant to the embedded §57.105 motion [Ax 333]. The "safe harbor" document was not filed as a separate motion, and if had been separately filed then it would have been untimely. Florida Rules of Civil Procedure, Rule 1.525 states: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party."[7]

---

[7] The crux of homeowners' argument on this point is based on defendant's non-compliance with the time deadline of Rule 1.525 (assuming a "safe- harbor" motion had been actually filed) and not on defendants' failure to adhere to the service requirements under Rule 2.517 of the Florida Rules of Judicial Administration as in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014). However, had there been a timely filing of a "safe harbor" motion, the homeowners could have presented the same Rule 2.517 issues as were presented in *Matte*. Homeowners' counsel finds no record of any email received on or about the date of the so called "safe harbor" motion. The only copy received was apparently by mail. More importantly, mortgage originator gave no indication in his memorandum to the lower court that the "safe harbor" motion was attached or

Furthermore, this court relinquished jurisdiction to allow the lower court to proceed on the motion stated in the mortgage originator's motion for relinquishment [Ax 347–349, ¶2] which refers back to the original improperly embedded motion. This court gave no jurisdictional authority to the lower court to consider any other motion.

While homeowners would have a subsequent right to appeal, should a judgment amount for §57.105 sanctions be entered, a departure from the essential requirements of law arose from the improperly embedded motion for sanctions that led to the lower court's order of entitlement. Furthermore, the lower court's entitlement order will cause material injury to the homeowners for which there is no adequate remedy by a later appeal. This material injury comes about effectively since the lower court's order naturally infused the homeowners with doubt regarding their counsel's competence and representation. More importantly, this injury is not curable with a later appeal because the lower court's order created a conflict of interests between counsel and the homeowners. That conflict could effectively deny the homeowners' continued counsel. If the opportunity had been provided, for these

---

incorporated [Ax 333]. Likewise, the email notice that mortgage originator's memorandum was filed with the lower court gave no indication that the "safe harbor" document was attached to the memorandum. Such notice is a key component of the service rule. See, *Fla. R. Jud. Admin. 2.517.* Consequently, because of insufficient notice, homeowners' counsel was unaware that the "safe harbor" document was attached to the mortgage originator's memorandum until after the hearing on entitlement. The "safe harbor" document was not even mentioned at the hearing [Ax 396-419].

same reasons, the homeowners would have contested this court's order relinquishing jurisdiction to the lower court.

The mere consideration by the lower court of entitlement to §57.105 sanctions placed the homeowners and their counsel in conflict. *Kerzner v. Lerman*, 849 So. 2d 1185, 1187 (Fla. 4th DCA 2003) (§57.105, Florida Statutes, "appears to set up an inherent conflict between a client and his or her attorney"); see also *Khoury v. Estate of Kashey*, 533 So. 2d 908 (Fla. 3d DCA 1988), and *Mullins v. Kennelly*, 847 So. 2d 1151 (Fla. 5th DCA 2003). Technically, the conflict required homeowners' counsel to prepare to immediately withdraw from further representation of the homeowners — both in the lower court and before this court. See, *Rules Regulating The Florida Bar, Rules of Professional Conduct, Rule 4-1.7(a)(2).*[8] However, with the lower court hearing scheduled the very next day after jurisdiction was relinquished, there was insufficient time to withdraw, inform the homeowners, or even contemplate such action.[9]

---

[8] Counsel for appellants has their conditional consent to proceed at this time in accordance with the waiver of conflict provision of Rule 4-1.7(b).

[9] The court should consider making it a policy to not relinquish jurisdiction for proceedings under §57.105(1) or (2) when counsel representing an appellant also represented that party before the lower court. At a minimum, the policy should be for this court to retain jurisdiction in such cases until appellant's counsel is provided a reasonable opportunity to respond. Even if there were sufficient time to withdraw, since the effect upon an appellant from the conflict could leave them unrepresented, relinquishing jurisdiction to consider §57.105 sanctions is overbearing for an appellant. Such harm is not correctable by a later appeal, especially if no counsel is available to appellant.

If homeowners' counsel asserted that he "acted in good faith, based on the representations of his... client as to the existence of... material facts" then there would have been the potential for only the homeowners to suffer any possible monetary sanction. *§57.105(3)(b), Fla. Stat. (2012)*. If, on the other hand, the lower court found that the action was not "supported by the application of then-existing law to those material facts" then there would have been the potential for only homeowners' counsel to suffer any possible monetary sanction. *§57.105(3)(c), Fla. Stat. 2012.* If proceedings before the lower court are allowed to continue then the conflict between homeowners' counsel and homeowners will reach a heightened state. Defendant's sought after sanctions would result in a monetary judgment being equally suffered by counsel and clients, and the right to appeal the initial determination as to liability will have then ripened for both homeowners' counsel and homeowners. It would be difficult, or impossible, for counsel to continue under those circumstances.

CONCLUSION

For each count of the complaint, as to each defendant, there remains a significant disputed issue of fact. As a matter of law, the lower court should not have entered summary judgment on any count. Undisputed facts are such that, if anything, they fully support the homeowners claims.

Competent and zealous representation by counsel of one's choosing is a bedrock of our system of jurisprudence. Directly tied to that concept, at the other end

of the spectrum, are the sanctions afforded by §57.105. However, being in derogation of the common law, the provisions of §57.105 must be strictly followed, both procedurally and substantively, and never more so than when such strict enforcement keeps intact zealous representation — instead of chilling zealous representation out of existence for many.

WHEREFORE, as a first order of action, this court should immediately grant the homeowners' petition for certiorari and reverse the lower court order allowing §57.105 sanctions. Thereafter, the court should reverse the lower court's entry of final summary judgment and remand for further proceedings consistent with the findings of this court on the law.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), that the preceding computer generated brief has been prepared in Times New Roman 14-point font and is proportionally spaced.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Scott Jay Feder, attorney for the Appellees/Respondents herein, Defendants below, by e-mail delivery to scottj8@aol.com, on this February 24, 2017.

/s/

Rex E. Russo
Florida Bar #0331597

[An electronic copy of this brief was sent via e-mail to the court pursuant to administrative order, A03D05-1.]