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

CASE NO. 3D17-1254

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.
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APPELLEES' ANSWER BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PREFACE[1]

Appellants, JOHN M. BENNETT and NANCY L. BENNETT[2] appeal a Final Judgment of Attorney's Fees and Costs rendered April 27, 2017 and the Order Granting Defendants' Motion for Attorney's Fees and Costs against Plaintiffs and Plaintiffs' Counsel Pursuant to F.S.§57.105 (2012) rendered January 26, 2017[3] in favor of Appellee, JAMAL M. WILSON ("Wilson").

Appellees reject Appellants' "Statement of the Case and Facts" as inaccurate, speculative, incomplete and argumentative. Accordingly, Appellees substitute the following, which sets forth a summary of the relevant course of the proceedings and the evidence critical to the issues in this appeal, construed in the proper light.

STATEMENT OF THE CASE AND OF THE FACTS

This instant appeal deals solely with an award of fees and costs against

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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.

"MA" is for Appellants' Appendix to the Brief in the main appeal, Case No. 17-001.

"SA" is for Appellants Appendix on this appeal.

"AB" is for Appellant's Brief

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

2 Appellants counsel is also now a litigant since the award of fees is against counsel also. Counsel repeatedly alleged this created a conflict of interest for counsel in arguments to the trial court below, but apparently these arguments were as disengenous as the ones now made in this appeal.

3 Appellants also appealed several other orders but did not raise any issue regarding same in the initial brief so said orders are not relevant any longer to the appeal and

Appellants, and counsel, for violating F.S. §57.105 (2015). Though related to the main appeal (Case No. 17-0001) regarding the issuance of a summary judgment against all their claims, this appeal deals solely with an award of attorney's fees based on F.S. §57.105 (2015) in favor of one Appellee, JAMAL WILSON. Appellants were sanctioned for having absolutely no evidence at all to support their scandalous claims and frivolous suit against him individually.

Accordingly, much of Appellants' brief, dealing with issues from the main appeal, related to the Declaratory Relief count and the claims of Truth in Lending violations, are ignored in this answer brief. (AB 27-32)

The core issues on this appeal are whether the Appellants had any good faith basis upon which to sue WILSON and whether the procedural protections of F.S. §57.105 (2015) were followed. Since Appellants never had any basis whatsoever to sue WILSON, the sanctions were appropriate. Since the statutory procedures were complied with, the orders should be affirmed. Finally, since Appellants admittedly never raised these issues in the trial court below, Appellants' have waived their right to even argue the procedural claims in this appeal.

The following are the basic facts and statement of the case relevant to this appeal. For a more detailed recitation of all the facts and circumstances, see the Answer Brief filed in the main appeal (Case No. 17-0001).

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should be ignored.

In or about April of 2012, Appellants went on the internet to explore their options to obtain government assistance for their circumstances wherein their mortage was almost twice the value of their home. On April 17, 2012, Appellants applied for a Harp II government backed loan. (MA. 295-pg.9) This loan was created by the Federal government after the 2008 recession to help people whose mortgages far exceeded the value of their home. (MA. 295-pg.9) Appellant's home was only worth approximately $120,000 at the time with an outstanding loan and mortgage due of almost $220,000 to their then lender. (MA.42, para. 2) Appellants had their own broker, Mr. Jurdi of Advance Mortgage, assist them in contacting LF LOANS. (MA. 297-pg. 18)

Appellants signed loan applications and other documents, under oath and penalty of perjury, acknowledging that there would be private mortgage insurance (hereinafter "PMI) payments which was required as part of this specialized government assistance loan. (MA. 42, paras. 3a and 3b)

On June 12, 2012, the loan was closed by Stewart Title Guaranty Company. (MA. 42, para. 4; A. 93) On that date, Appellants executed documents at closing including a mortgage and note to LF LOANS, the original lender, in the amount of $232,900. (MA. 42, para. 4). For some reason still unknown to everyone, the loan was closed with PMI being left off of the final documents.

After the loan was closed, it was assigned by LF LOANS to GTE. (AB 8) The first monthly payment was due on August 1, 2012. At some point after the

closing, Appellants 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 Appellants escrow account. (MA. 43, para. 5) This is the exact amount of PMI that was on the applications Appellants had repeatedly signed, under penalties of perjury, up until the day of closing when somehow PMI was left off the final documents. (MA 42)

Appellants allege they called GTE, objected to the charge for PMI, and claim they thereafter received from GTE, "among other documents, a document titled PAYMENT LETTER TO BORROWER, in which there is an itemized monthly amount for 'MMI/PMI INSURANCE". (AB 9) Appellants claim this document was a forgery meaning the signatures were not Appellants. (MA. 43, paras. 6-7)

On July 20, 2012, Appellants' 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.**

(MA. 103-4) (Emphasis added)

On July 16, 2012, Appellee, JAMAL WILSON, on behalf of LF LOANS, the original lender, responded to this attorney advising that mortgage insurance was a requirement on all HARP loans during the refinance process and that the Appellants were aware of the requirement of PMI for this loan. (MA. 243) WILSON attached to his response the documents Appellants had signed, under oath, in the application process showing the disclosure of PMI for this loan. (MA. 243) WILSON further advised that apparently the title company had erred and he was working on correcting the situation. (MA. 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. (MA. 243)

On July 19, 2012, Appellants' counsel wrote Wilson back, stating that his clients would not be "resigning anything." (MA. 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." (MA. 44, para. 10) Counsel threatened litigation and stated, **"Your veiled threats do not impress me. Suck it up and do the right thing before it bites you."** (MA. 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". (MA. 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".** (MA. 44, para. 11) (emphasis added)

On July 30, 2012, just twenty days into the sixty day grace period extended by Appellants, WILSON wrote to Appellant's 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…."** (MA. 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. (MA. 44, para. 13)

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).

(MA.45, para. 15)

In the Fraud in the Execution count against WILSON and LF LOANS, Appellants 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." (MA.45, para. 15a)(Emphasis added);

Appellants further 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". (MA.45, para. 15b)

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

In the litigation, 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, 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. (MA.46, para.16: Order docketed July 30, 2014)

Appellant moved for reconsideration and shortly thereafter also filed a Notice of Appeal of this interlocutory order. (MA.46, para. 17: Motion docketed August 7, 2014; Notice of Appeal docketed August 29, 2014).

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

Eight months later, Appellants set their Motion for Reconsideration for hearing now that a new judge had taken over the division. The new judge granted the motion in part, reinstating the TILA count and the declaratory relief count and giving Appellants leave to amend its pleadings. (MA.46, para. 19: Order docketed March 18, 2015).

Appellants' amended their Complaint on or about April 6, 2015. This amended pleading was dismissed. (MA.46, para. 20)

On April 28, 2015, Appellees served their Motion for Sanctions Pursuant to F.S. §57.105 which Appellants thereafter rejected. (MA.342-6)

On or about February 3, 2016, Appellants filed their Second Amended Complaint seeking the following relevant to this appeal, to wit: 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).4

On September 19, 2016, Appellees filed their Amended Motion for Summary Judgment and for Attorney's Fees based on F.S. §57.105 (2016). (MA.40-308) The basis for the motion for summary judgment relevant to this appeal was that after four years of litigation, no evidence existed that LF LOANS or WILSON were in any manner responsible for the forgery and additionally, there was no evidence that Appellants had suffered any damages.5 (MA.40-308)

The basis for the claim for attorney's fees was the F.S.§57.105 motion Appellees had provided to Appellants on April 28, 2015, over a year prior, providing the required 21 day safe harbor notice. (MA.342-6) That motion, delivered to Appellants after three years of litigation, provided Appellants with notice that their claims were not supported by any facts or law and gave Appellants the opportunity to drop their false, unsupported claims. (MA.342-6) Of relevance to the issues on this appeal, the motion stated as

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4 Appellants also sought declaratory relief and attorney's fees against MERS and GTE claiming doubt as to their rights regarding mortgage insurance and sought statutory damages, rescission, and attorney's fees under TILA against LF LOANS, GTE and MERS(Counts II and III, Second Amended Complaint, pps. 28, 32, 34 et seq).(A.46, para. 20)

5 Summary Judgment was also sought on Counts II and III of the Second Amended Complaint for declaratory relief and TILA violations since the PMI was removed from the loan within the statutory grace period (and the same grace period voluntarily granted by Appellants). Therefore no doubt or controversy existed and no evidence of any TILA violations. Furthermore, the law had long established that MERS could not

follows, to wit:

> Plaintiffs allege that Defendants GTE and LF Loans determined that a disclosure document showing the MI was "fraudulent." This never occurred. This allegation is pure fantasy by the Plaintiffs' counsel in his pleadings.
>
> Plaintiffs allege "LF Loans directly, at the direction of Wilson, or through, their agents, forged the signatures of the Plaintiffs." Even assuming these signatures were forged, no one knows who did this and counsel's allegations are again without any factual basis and false.
>
> Plaintiffs allege "Wilson promised to correct the fraudulent action," but this is false. Wilson made a business decision to avoid legal expenses and paid for the entire MI ($5,449.86) and thus Plaintiffs received a free benefit of this gratuitous payment despite their notice that MI was federally required for this special loan program. Plaintiffs knew about this **before instituting this lawsuit** and thus this action is not only fraudulent but in utter bad faith.
>
> Plaintiffs allege they have suffered a direct loss as a consequence of Defendants' fraudulent action in that they have to pay the PMI under protest yet this is false. Plaintiffs did not need to make the payments, only made three payments, knew that the insurance had been paid in full yet kept making the payments, and then were credited/refunded the three payments they had made which total sum was $302.76. Plaintiffs knew these facts and that the money they had advanced was being credited/refunded **before instituting this lawsuit.**
>
> (MA.342-6)

Appellants chose to reject the safe harbor offer, instead pursuing the 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 along with an Affidavit of John Bennett (MA. 312-320; A. 309-11).

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be sued.

The affidavit did not controvert any of the evidence or arguments Appellees made regarding the lack of evidence against WILSON on the forgery. (MA. 309-11)

On November 21, 2016, the trial court ruled, granting Appellees final summary judgment and denying Appellees' motion for fees and costs. (MA. 321-2) The Order docketed on November 29, 2016.

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

Appellants filed nothing in opposition to the Motion for Reconsideration.

On December 13, 2016, the trial court held the hearing on the Motion for Reconsideration. Appellants argued that the case was not frivolous. (MA. 380-3) Regarding the safe harbor letter and motion, Appellant did not raise any procedural argument whatsoever. (MA. 386-8) The trial court granted Appellees Motion for Reconsideration of the denial of fees and costs, but did not grant or deny fees, instead setting the matter of entitlement to fees 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). (MA. 329)

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

On January 3, 2017, Appellees filed 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. (MA. 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". (MA. 367)

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

On January 4, 2017, Appellants filed their Memorandum in Opposition to Fees and Costs. (MA. 354-366) Appellants again never once raised any procedural or technical issue with the motion for F.S. §57.105 fees. (MA. 354-366). Instead, besides raising the same arguments, Appellants now inserted their counsel as a material witness with his unfounded, improper claims of having hearsay discussions with an unidentified person who allegedly pointed at WILSON as being the forger and other frivolous and non-admissible hearsay. (AB. 23)

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). (MA. 368-70) The Order Granting Entitlement to Fees and Costs was docketed on January 26, 2017.

On April 26, 2017, the evidentiary hearing concerning the amount of fees and costs occurred. (MA 432-436) On April 27, 2017, the trial court entered Final

Judgment of Fees and Costs. Of the approximately $50,000 plus in fees expended by Appellees, the court awarded the $34,840 in fees sought by Appellees after they had parsed out the time spent on matters related solely to the other Appellees besides WILSON. The court also awarded the agreed upon taxable costs of $3,463.51 for a total sum awarded of $38,303.50, to be split equally by Appellants and their counsel. (MA 432-436).

Appellants filed a notice of appeal from this Final Judgment. (MA 430-411)

SUMMARY OF THE ARGUMENT

Despite four years of litigation, Appellants failed to offer any evidence to support their allegation that "LF LOANS, directly or through their agents, at the direction of Wilson," caused the creation of an allegedly forged document they allegedly received from GTE. With no evidence at all, let alone a good faith basis, Appellants had no legitimate right to sue LF LOANS and WILSON for the allegedly forged document.

Appellants continue to advance frivolous arguments to try to defeat their obligation for fees. They erroneously claim that they did not need any evidence until trial. They further raise, for the first time on appeal, that the F.S.§57.105 motion was never delivered to them, but this is a fraud on the court, as it was, and this argument was completely waived by never once raising this issue in the court below. The motion for fees was always based on the motion served on Appellants on April 28,

2015.

The sanctions enacted by the legislature provided by F.S. §57.105 (2015) were designed for the above facts. The Final Judgment Awarding Fees should be affirmed.

ARGUMENT

Appellants' brief, no different than their brief in the main action, rambles wildly, with an amazing number of "red herring" arguments, smokescreens and non-relevant facts. The fundamental flaw with Appellants' entire position is their claim that they need not have any evidence until the trial. Naturally there is no legal citation for this novel and improper claim. Appellants' suit against WILSON was in bad faith, based solely on counsel's speculation.

I THE TRIAL COURT WAS EMINENTLY CORRECT IN AWARDING FEES AGAINST APPELLANTS AND THEIR COUNSEL PURSUANT TO F.S. §57.105 (2016) AND PROVIDED SUFFICIENT SPECIFICITY THAT NO EVIDENCE EXISTED TO SUPPORT THE CLAIMS AGAINST APPELLEE JAMAL WILSON INDIVIDUALLY

Appellants admit no evidence exists regarding who allegedly forged the offending document. After four years of litigation, with all the tools of discovery at their disposal, Appellants actually argue, without any legal citation or support for this claim, that they need no evidence to support their claim until trial. Appellants further argue that despite their lack of any evidence, because Appellee did not put into the record an affidavit that he did not commit the forgery, summary judgment

was improper.6 Appellants again offer no citation or legal basis for this claim. Indeed, none could ever be provided because this is not the law.

As all are well aware, it is the movants burden to prove the absence of a genuine issue of material fact. As this Court stated in *Delgado v. Laudromax, Inc.*, 65 So3d 1087, 1088 (Fla. 3d DCA 2011): "[A] summary judgment motion triggers evidentiary burdens on both the moving and opposing party. The moving party, Laundromax, 'has the initial burden of demonstrating the nonexistence of any genuine issue of material fact,' and once Laudromax provides competent evidence to make that showing, Delgado 'must come forward with counterevidence sufficient to reveal a genuine issue.'"*Valderrama v. Portfolio Recovery Asocs., LLC,* 972 So.2d 239 (Fla. 3rd DCA 2007).

In the case at bar, once Appellee provided record evidence that Appellants had no facts to support their claims against WILSON, the burden shifted to Appellants to come forward with some evidence which Appellants never did. *Id.* Using Appellants own testimony that they had no knowledge whatsoever as to who committed the forgery, Appellee thus proved the lack of support for their lawsuit's allegations that it was at WILSON "direction." Despite this affirmative evidence, Appellants then provided no evidence whatsoever prior to the summary judgment

6 Appellants did obtain discovery from Appellee, having deposed Jamal Wilson and are well aware that Appellee WILSON denied having any involvement with the

hearing on this issue. The court below properly entered final summary judgment for WILSON on this claim given that there was not a "scintilla" of evidence to support the allegations.

This is the first of several grounds for sanctions since Florida law requires that a good faith basis exist factually before ever filing a lawsuit against anyone. As F.S. §57.105 states:

> (1) Upon the court's initiative or motion of any party, the court **shall** award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

The legislature expressly created this law to put a burden on attorneys to perform a diligent investigation and to have some good faith basis before filing a lawsuit as opposed to the previous concept that lawsuits could be filed and then one could hope to prove the allegations through discovery. Furthermore, the legislature determined that at any time if one determined that a good faith basis to continue no

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allegedly forged document Appellants claim GTE sent to them.

longer existed, it is the attorney's obligation to discontinue with the claim.

Thus "when initially presented" or "at any time before trial" during a lawsuit, when the losing party or their attorney **knew or should have known that the claim was not supported by the material facts** necessary to establish the claim, yet continued on, fees should be awarded. (Emphasis added)

In the instant matter, at all times from the beginning of the lawsuit to even today, Appellants have known that there were no facts, let alone material facts, supporting in any manner their claim that JAMAL WILSON individually committed the forgery or directed that it be done. Indeed, this scandalous allegation and this part of their lawsuit was a fraud on the court from the beginning.

Appellants have thrown up other arguments to try to defeat this fee award. Each argument itself is devoid of any factual or legal basis.

Appellants now argue that because WILSON "accused his closing agent as being the forger," that is a sufficient basis to sue WILSON.7 Appellants inject a false statement into this record, never raised below, that this closing agent was WILSON's by attaching a generic document to their Appendix (SA 106) and claiming this form states that Stewart Title was WILSON's closing agent. The

7 Appellants 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…

document does not support this bold faced and erroneous claim. Second, and of even greater relevance, Appellants never raised this issue below. By failing to raise this issue with the trial court, Appellants waived their right to argue this on appeal. *Dober v. Worrell*, 401 So.2d 1322, 1324 (Fla. 1981)("We…. hold that it is inappropriate for a party to raise an issue for the first time on appeal from a summary judgment").

Indeed, Appellants never sued WILSON based on any claim that he was vicariously responsible for the forgery, as the broker or as an individual. The pleadings in the lawsuit, from the original complaint through and including the Second Amended Complaint upon which summary judgment was granted, each stated emphatically and affirmatively that the forgery was done "at the direction of WILSON."

Appellants also now try to argue that there was a basis to sue WILSON because some unidentified person told Appellants counsel that WILSON forged the document. This assertion was made for the first time long after summary judgment had been entered and was provided by counsel in an unsworn memorandum filed just days before the hearing to determine whether fees would be awarded. Putting aside the lack of credibility of this claim8, no evidence of any kind was provided to

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8 Appellants counsel had already been caught during the hearing on summary

support this claim.

Appellants suggest on appeal that this unsworn information provides a good faith basis upon which to support their lawsuit. The trial judge, however, noting the untimely nature of these claims, combined with Appellee's objection to this unsworn, inadmissible hearsay, gave no credence to the non-evidentiary information. This Court should do the same. Four years of litigation later, Appellants still cannot provide any evidentiary basis to have sued Wilson on allegations of forgery.

As a final point, Appellants admitted they suffered no damages as a result of the alleged forgery. Appellants made three voluntary payments of $100.92 each into their own escrow account with GTE in August, September and October of 2012. In November of 2012, this money was returned to Appellants from their escrow account. Appellants nevertheless brought the claim for forgery without the requisite legal element of damages and pursued it for four years after their escrow money had been returned to them.

It is a rock solid principle of law that one must have damages to bring a claim for forgery. "It is fundamental that a person is not entitled to recover damages if he

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judgment making unfounded claims such as counsel's attempt to assert that case had been settled. When it was shown that Appellants had not accepted the offer but rather had rejected it by their own conduct, Appellant's counsel then admitted that there never was any settlement.

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.*

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.

Similarly, in *Morgan Stanley Company, Inc. vs. Coleman (Parent) Holdings, Inc.*, 955 So. 2d 1124, (Fla. 4th DCA 2007), the court held "[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.

With no damages or injury, the lawsuit against WILSON for forgery was spurious.

Moreover, just 20 days after Appellants gave a 60 day window for the PMI issue to be solved, Appellants were advised in writing that the PMI due on the life of this loan had been paid in full thus saving Appellants over $36,000.

The trial court considered this issue and determined that Appellants had pursued this claim against WILSON in utter bad faith in violation of F.S. §57.105 (2015).

Appellants then argue that the trial judge did not provide sufficient findings to support its conclusion of bad faith. An examination of the Order Granting Defendant's Motion for Attorney's Fees and Costs proves this assertion to lack merit. The judge stated in the order the following facts and findings, to wit:

> The Court finds that Plaintiffs and their counsel filed a Complaint which they knew, or should have known, was not supported by the material facts necessary to establish the claims, nor would the claims have been supported by the application of then-existing law to those material facts.
>
> Among other reasons, Plaintiffs and Plaintiffs' counsel knew that no evidence existed to support the allegation 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." Plaintiffs

and their counsel were not acting in good faith when filing allegations without any evidence to support same.

The Court further finds that within three (3) weeks of the lawsuit, Plaintiffs were made whole.

The Court specifically finds that the case was not supported by material facts or application of existing law to those facts.

Therefore, Plaintiffs, and counsel's, decision to file the action and to pursue it for four years despite knowing there was no evidence to support these material allegations of the Complaint, Amended Complaint and Second Amended Complaint (each time making the identical allegation as stated in paragraph 4), are actions not in good faith and justify an award of attorney's fees, pre-judgment interest and costs, pursuant to F.S. §57.105(2012), in equal parts, from Plaintiffs and Plaintiffs' counsel, to Defendants.

The claim that the trial judge did not make specific findings of fact to support the finding of bad faith is itself bad faith. This Court should grant further sanctions for the frivolous arguments Appellants assert in their brief.

II. THE PROCEDURAL REQUIREMENTS OF F.S. §57.105 WERE COMPLIED WITH CORRECTLY

Appellants raise other arguments on appeal never raised in the trial court below such as their new claims that the strict requirements of F.S. §57.105 were not complied with. Appellants claim the motion was never provided to them, was not filed timely, and even suggest that service was not done in compliance with the rules. Since the motion was served on them properly, their claims are more of the same bad faith exhibited in the case in the trial court below and now on appeal.

Appellants never raised any of these issues below and thus have waived any

argument regarding service of the motion. *Dober, supra.* at 1324.

Appellants try to avoid this legal waiver by claiming that because the requirements of F.S. §57.105 are to be strictly construed, they are not waived by failing to object in the trial court below. However, Appellants do not provide any legal basis for this bold claim and furthermore, by looking at analogous circumstances such as the statutes governing service of process, the lack of validity in Appellant's argument is revealed. Original service of process statutes are to be strictly construed. *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 jurisdiction over the defendant."). The strict requirements of F.S. §57.105 are no more strict than the requirements of original service of process which are waived by failing to object timely. *Parra 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).

Thus the idea that strict compliance with a statute eliminates the need to object or raise the issue in the trial court is just another unsupported, frivolous claim

Appellants advance on appeal.

Appellants make this claim with more allegations that are outside the record on appeal because the issue was not raised below. This is wholly improper. There is no record developed on the facts regarding compliance with delivery of the motion to Appellants because there was no issue raised. Appellants should not be rewarded now due to their failure to raise the issue below.

Based on fundamental appellate principles, Appellants failure to object in the trial court below waives their right to argue this point on appeal.

III. APPELLANTS ARGUMENT CONCERNING THEIR CLAIMS FOR DECLARATORY RELIEF AND TRUTH IN LENDING VIOLATIONS ARE NOT RELEVANT TO THIS APPEAL

Appellants' arguments relating to the counts in the lawsuit for declaratory relief and for truth in lending ("TILA") violations have no relevance to the issues on this appeal. Regardless of how this Court deals with those issues in the main appeal, the F.S. §57.105 sanctions awarded by the trial court remain based on Appellants lawsuit against WILSON for forgery that was initiated and prosecuted without a shred of evidence or good faith basis. With no damages from the forgery and with no evidence as to who allegedly committed the forgery, summary judgment on this claim should be affirmed and the sanctions therefore should be affirmed.

Accordingly, no response to Appellants arguments concerning TILA or the improperly filed declaratory relief action are necessary.

Regarding Appellants claims of an "embedded" motion and the actual motion, these are 'red herring' arguments designed solely to confuse. The motion for summary judgment rightly contained a claim for fees within it. There was no need for the actual motion delivered to the Appellants over a year prior to be filed at that time. When the trial court stated on December 13, 2016 that it would hold a hearing to consider the issue of fees, the actual motion was timely filed within 30 days and considered. Appellants claims regarding the motion and the timeliness of filing for fees are as devoid of merit as the rest of their arguments.

CONCLUSION

For all of the foregoing reasons, the Final Judgment of Attorney's Fees and Costs rendered April 27, 2017 and the Order Granting Defendants' Motion for Attorney's Fees and Costs against Plaintiffs and Plaintiffs' Counsel Pursuant to F.S.§57.105 (2012) rendered January 26, 2017 should be affirmed.

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 18th day of August, 2017 to: Rex E. Russo, Esq., Attorney for

Appellants/Petitioners, 1550 Madruga Avenue, Suite 323, Coral Gables, FL 33146 (rexlawyer@prodigy.net).

Respectfully submitted,

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