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

Case No. 3D17-1254

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

Appellants,

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.

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

INITIAL BRIEF

REX E. RUSSO, ESQ.
Attorney for Appellants
1550 Madruga Ave., #323
Miami, FL 33146
305-442-7393
e-Mail: RexLawyer@prodigy.net

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INTRODUCTION

This is an appeal from a final judgment awarding the Appellee(s) sanctions in the form of attorney's fees and costs pursuant to Florida Statutes §57.105 against the Appellants following entry of summary judgment in favor of the Appellee in an action brought by the homeowner Appellants who invoked statutory remedies under the federal Truth-in-Lending Act (TILA) and stated an action for forgery. This court has jurisdiction pursuant to Florida Rules of Appellate Procedure, Rule 9.030(b)(1)(A). There is pending before this court a related appeal [Case No. 17-0001] from the underlying summary judgment which has been fully briefed and argued, but no opinion has yet been rendered.

(Ax ?, p?, 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 page number thereon (when multiple pages are shown on an indexed page), 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 Miami-Dade County, Florida, Judge – Michael A. Hanzman, initially presiding, but the honorable Rodolfo Ruiz then sitting in the division entered final judgment following an evidentiary hearing as to the amount.
Homeowner's Counsel	Shall refer to Rex E. Russo, counsel for the homeowners below, and herein, and an Appellant herein.

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 to 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).
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 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

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[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.

[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.

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 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

Plaintiffs second amended complaint [Ax 8] (the operative complaint) states 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 did not support the motion for summary judgment by filing an affidavit**, nor any other verified document, stating that he neither forged homeowners' signatures, nor was he complicit in the forgery. According to the mortgage originator's unsworn pre-suit statement, the forgery 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 Payment 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 [from Ax 310, to 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 filed a timely appeal from the summary judgment which remains pending before this court.

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 to 379, L10].

In response to the lower court's inquiry, mortgage originator's counsel stated that a "safe harbor" letter had been served 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 previously filed of record.

Although the lower court that stated time would be provided to submit further

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[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 and opposing counsel were referring to a "letter" or a "motion" or both [Ax 385, L15 to Ax 386, L20].

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 §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" motion based on different grounds then the embedded motion.

Homeowners also responded on January 3, 2017 by filing their own memorandum in opposition [Ax 354] to the issue of entitlement. 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. However, 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 [Ax 367] to allow the lower court to consider the

mortgage originator's motion for sanctions as embedded in the motion for summary judgment [Ax 348, ¶2].

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 considering that post-judgment jurisdiction was reserved solely by the motion of the mortgage originator[4] for reconsideration of the order denying the §57.105 motion for sanctions as embedded in the motion for summary judgment.

An evidentiary hearing concerning the amount of awardable fees was held on April 26, 2017 resulting in judgment against both the homeowners and their undersigned counsel [Ax 432–436]. A notice of appeal from the final judgment awarding fees was timely filed [Ax 430–431]. This appeal includes an appeal from the order to reconsider the denial of the embedded §57.105 motion [Ax 329], and the order finding the originator to be entitled to such sanctions [Ax 368–370].[5] By this appeal, appellants are

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[4] As stated earlier, the motion for reconsideration of the embedded order was initially presented by both the mortgage originator and MERS, but MERS later dropped their demand [Ax 376, L22 to Ax 377, L5; Ax 378, L18–21; Ax 379, L5–10].

[5] Homeowners' initial brief before this court on appeal from the final summary judgment included a petition for certiorari review of the lower court order that found the originator entitled to §57.105 sanctions. However, this court has yet to determine whether the petition for certiorari raised the jurisdictional

challenging solely the issue of entitlement to such sanctions both on procedural grounds and legal grounds. Accordingly, the appellants **are** challenging the reasons for the award, but **are not** challenging the findings as to the amount awarded — should this court nevertheless determine that reason was present for sanctions, and the motion for sanctions was properly presented.

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prerequisite, and thus no order pursuant to Rule 9.100(h) has issued. Accordingly, the issues raised in the petition for certiorari are restated in this appeal. Had an order to show cause been entered in the prior appeal, this court's review would have been limited to whether procedural and statutory requirements were adhered to by the lower court. In recognition of that limitation, the argument within the petition previously filed was restricted to that context. *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). Here on appeal, the factual content leading up to the lower courts' orders, and the legal challenge thereto, are properly presented.

ISSUES PRESENTED FOR REVIEW

I. AS A MATTER OF LAW, DID THE LOWER COURT MAKE SUFFICIENT FINDINGS AS REQUIRED BY FLORIDA STATUTE §57.105?

II. DID THE LOWER COURT ABUSE ITS DISCRETION IN FINDING THAT THE HOMEOWNERS AND THEIR COUNSEL FILED AND MAINTAINED THE ACTION IN BAD FAITH WITHOUT A REASONABLE POSSIBILITY OF SUCCESS WHEN APPLYING EXISTING LAW TO THE MATERIAL FACTS, AND WITHOUT A REASONABLE EXPECTATION OF SUCCESS BASED ON A GOOD FAITH ARGUMENT FOR EXTENDING OR MODIFYING EXISTING LAW?

III. AS A MATTER OF LAW, WAS THE SERVICE AND FILING OF THE MOTION LEADING TO ENTRY OF SANCTIONS AGAINST THE HOMEOWNERS AND THEIR ATTORNEY IN STRICT ACCORDANCE WITH THE REQUIREMENTS OF FLORIDA STATUES §57.105?

STANDARD OF REVIEW

"The standard of review for an award of attorney's fees, whether based on contract or statute, is abuse of discretion." *Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc.*, 122 So. 3d 487, 490 (Fla. 3d DCA 2013), citing to *Universal Beverages Holdings, Inc. v. Merkin*, 902 So. 2d 288, 290 (Fla. 3d DCA 2005). "When the issue is the entitlement to fees based on the interpretation of a statute, however, the standard of review is de novo." *Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc.*, 122 So. 3d 487, 490 (Fla. 3d DCA 2013), citing to *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007); *Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 971 (Fla. 2d DCA 2006).

SUMMARY OF ARGUMENT

The lower court abused its discretion in granting sanctions against the homeowners and their counsel because the courts findings of fact stated in support do not equate to bad faith. Furthermore, the lower court abused its discretion by making generally conclusory, non-specific, findings of fact that are not supported by competent substantial evidence in the record.

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 requirement of §57.105 by failing to show that the homeowners were served the motion for sanctions, as embedded in defendants' motion for summary judgment, at least 21 days prior to the filing of the embedded motion with the court. The filing of a different motion, as an attachment to the defendant's memorandum in support of entitlement to sanctions filed just two days before the hearing on entitlement, and more then 30 days after summary judgment, was untimely filed even if it were to be deemed properly filed with the court.

ARGUMENT

I. THE LOWER COURT FAILED TO MAKE DETAILED FINDINGS IN THE ORDER AWARDING ENTITLEMENT TO FEES SUFFICIENT TO SHOW THAT THE HOMEOWNERS' CLAIM, AS INITIALLY PRESENTED TO THE COURT THROUGH THE TIME OF THE SUMMARY FINAL JUDGMENT, WAS UNSUPPORTED BY MATERIAL FACTS.

A. Homeowners Automatically Prevail on this Appeal If They Prevail on the Pending Appeal from the Summary Judgment.

Florida Statutes §57.105, as applicable to the discussion in this brief, states in relevant part:

> **57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.—**
> (1) Upon the . . . 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.
>
> . . . . .
>
> (3) Notwithstanding subsections (1) and (2), **monetary sanctions may not be awarded**:
>
> (a) Under paragraph (1)(b) **if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law**, as it applied to the material facts, with a reasonable expectation of success.
>
> (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

. . . . .

(4) A **motion by a party seeking sanctions** under this section **must be served but may not be filed** with or presented to the court **unless, within 21 days after service** of the motion, **the challenged . . . claim, . . . is not withdrawn** or appropriately corrected.

As worded, Florida Statutes §57.105(1) very clearly states that an attorney fee sanction is only applicable against a losing party and its counsel. Should the homeowners prevail on their main appeal taken from the entry of summary judgment, then it is axiomatic that this court then reverse the judgment for attorney fee sanctions.

B. Lack of Detailed Findings by the Lower Court to Support the Finding of Bad Faith is Insufficient to Sustain the Award of Sanctions.

Only paragraphs numbered 4 and 5 of the lower court order attempt to demonstrate the lower court's reasoning [Ax 369] for awarding sanctions. The lower court's first finding that the homeowners 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" constitutes an abuse of discretion because the finding is wholly without support in the record and is nothing more than a conclusion without supporting "detailed and specific" factual reference as required by Florida Statutes §57.105. *Jean-Pierre v. Glaberman*, 192 So. 3d 613 (Fla. 4th DCA 2016); *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002) ("a finding of bad faith conduct must be predicated on a high degree of specificity in the factual findings").

A proper award of fees under the statute requires the lower court to "find that the action was 'frivolous or so devoid of merit both on the facts and the law as to be completely untenable.[']" *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1000 (Fla. 4th DCA 2016), quoting from *Chue v. Lehman*, 21 So. 3d 890, 891–92 (Fla. 4th DCA 2009) and from *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1093–94 (Fla. 3d DCA 2004). Instead, the lower court's award appears to be based on mortgage originator's argument that the homeowners would never be able to prove with absolute certainty that the mortgage originator, or someone acting under him at his mortgage brokerage firm, committed the forgery. "[L]ack of concrete proof of that fact at the time of filing does not mean [the] complaint was frivolous. A party does not need to have conclusive evidence to prove its case at the time of filing in order to avoid sanctions. Instead, like here, where the party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts." *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). As long as there exists at least "some triable set of facts" under which the defendant could be liable, the action is not frivolous. *Ferlanti* at page 1000. None of the findings of the lower court approach an explanation as to how the action was beyond "some triable set of facts." Such findings "must be based upon substantial competent evidence presented to the court" but there is nothing in the order that can be matched to the record before the lower court. *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615, 618 (Fla. 4th DCA 2006).

Homeowners' claim was supported by the material fact that the Payment Letter

to Borrower, which the mortgagee relied upon to bill an undisclosed amount to the homeowners, was a forgery containing non-authentic signatures of the homeowners [Ax 10, ¶14; Ax 36]. The homeowners verified by affidavit that the payment letter to borrower relied upon by the mortgagee did not contain their authentic signatures [Ax 309, ¶2]. On the other hand, the mortgage originator never filed an affidavit disavowing his involvement in the forgery, or disavowing his capacity on behalf of the mortgage broker, nor was there any affidavit filed backing the defense that the omission of PMI was a "mistake".

Additional reasoning for the action taken against the mortgage originator was shown in the homeowners' response to the second motion for §57.105 fees filed by the mortgage originator just two days before the hearing on entitlement [Ax 333–341] wherein the homeowner's responded with their own memorandum divulging information that was arguably confidential [Ax 354–363]. In that memorandum, homeowner's counsel stated that in response to his pre-suit letter sent to the participants at the closing, a representative of the Stewart Title contacted the homeowner's counsel and stated that Stewart Title "followed instructions received from LF Loans precisely, that LF Loans and specifically Jamal Wilson were responsible for the forged document, and that [homeowners'] counsel would quickly see how fast Jamal Wilson took responsibility while alluding that this was not the first occurrence of a forgery coming out of LF Loans" [Ax 355, ¶5].

Sure enough, the mortgage originator *appeared* to take the lead for all defendants

in response to the homeowners' demand for actual damages and attorney's fees as allowed for under TILA [Ax 257]. Mortgage originator stated that they were "able to" resolve the problem by correcting the amount being billed, and that the correction would be reflected in the next billing cycle. Homeowners understood that meant the change would be reflected in the very next billing cycle sent to the homeowners — not the next cycle after the correction was made sometime in the future. Furthermore, other than stating they were "able to" correct the amount being billed, defendants made no response to the demand that MERS confirm that the loan file was redacted of forged documents, nor was there any response to the demand for attorneys fees [Ax 103–104]. Instead, statements containing the incorrect monthly payment amount were sent by the mortgagee to the homeowners for the next two billing cycles [Ax 300, p32, L12 to 301, p33, L7; Ax 262]. It then appeared that the mortgage originator was not speaking on behalf of the mortgagee at all when he asserted that billed amount would be correctly reflected in the "next payment coupon" [Ax 257]. Mortgage broker's reply alone was, in any event, insufficient to bind the mortgagee to any promise or agreement. Each one of those subsequent monthly statements from the mortgagee (sent in August for September's payment, and in September for October's payment) constituted a new and independent violation of TILA; and, additional reasons to file the action.

Billing the incorrect amount is not making adjustments "necessary to assure that the [homeowners would not] be required to pay an amount in excess of the charge actually disclosed." See, 15 USC §1640(b). Nor, was continuing to bill the incorrect

amount "fully rectifying the matter" as required by the homeowner's demand [Ax 104]. Just as TILA permits a damages claim to be stated by a debtor for failure of the lender to respond to the debtor's notice of rescission, TILA permits a rescission claim to be stated when a demand for actual damages is not complied with by the lender. See, *Belini v. Washington Mut. Bank, Fa*, 412 F.3d 17, 19 (Fed. 1st Cir. 2005)

The lower court's only additional reasoning for the sanctions award is its finding that "within three weeks of the lawsuit, Plaintiffs were made whole" [Ax 368, ¶5]. No explanation in the order clarifies whether the court meant "within three weeks" before the lawsuit was filed, or "within three weeks" after the lawsuit was filed. However, argument from the entitlement hearing indicates that the court meant "within three weeks" after the lawsuit was filed [the lower court judge speaking: "your client had been made whole by early November" — Ax 404, p31, L14–15; suit filed on October 23, 2012 as shown at Ax 426]. Furthermore, there are only two reasonable interpretations of what the lower court meant by "made whole," but neither interpretation supports a reasonable conclusion that the homeowners were ever "made whole".

i. Once the Storm Hits (i.e. once Suit was Filed or an Obligor Made Known the Error), Defendants Could No Longer Take Safe Harbor Refuge (i.e. Utilize the Liability Exemption Provided by 15 USC §1640(b)).

On the one hand, the lower court may have found that the defendants were "made

whole" by defendants correcting their "mistake" in accordance with 15 USC §1640(b)[6]. However, for the defendants to obtain "safe harbor" any correction of the "mistake" had to commence with the defendants issuing notification to the homeowners of the error **"prior to** the institution of an action ... **or the receipt of written notice of the error from the obligor**" (i.e. from the homeowners), and the correction then had to be concluded within sixty days after the error was discovered by the defendants. *Lirtzman v. Spiegel, Inc.*, 493 F. Supp. 1029, 1033 (USDC, N. D. Ill., 1980) (right to cure terminated when suit filed first; but note, the statute states "... or the receipt of written notice of the error from the obligor"). Yet, no findings were made by the lower court as to when the "mistake" was supposedly discovered by defendants, nor when the forgery was committed, nor that the homeowners were notified of the error by defendants, nor when such notice was supposedly given to the homeowners, nor whether such notice was prior to the defendants being notified of the error by the homeowners, sufficient to conclude

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[6] 15 USC §1640(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, **if** within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and **prior to** the institution of an action under this section or **the receipt of written notice of the error from the obligor**, **the creditor or assignee notifies the person concerned of the error** and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

that the "correction" was in fact made within the 60 days limitation of 15 USC §1640(b).

In fact, no notice of the error was given by defendants to the homeowners. The homeowners are the ones who first made known the error, both as to the incorrect amount charged, and as to the forged instrument [Ax 103–104]. Accordingly, defendants could not avail themselves of the cure provision otherwise allowed them under 15 USC §1640(b). *Lirtzman v. Spiegel, Inc.*, 493 F. Supp. 1029, 1033 (USDC, N. D. Ill., 1980). So, such a finding that the homeowners were thus "made whole," as the premise for the finding that the homeowner's acted in bad faith in continuing their action, is an abuse of discretion lacking legal or equitable support.

ii. Once the Time Expired to Meet the Homeowners' Pre-Suit Settlement Offer, the Door Was Closed on the Offer and then Locked Shut by the Filing of the Lawsuit.

On the other hand, the lower court may have found that the homeowners' demands for actual damages (Ax 103–104) as allowed for under 15 USC §1640(a)(1) were met, albeit after the time expired to comply with the homeowners' demands[7], and after the lawsuit had been filed. Actually, the homeowners' full demands were not met at any time. What little attention to correction was given by the defendants during the 60-days allowed by the homeowner's demand did not amount to the "matter being fully

[7] Homeowners had to decide upon a reasonable amount of time for the defendants to comply with their demands. Since TILA does not appear to set any time for a lender to comply with a demand for restitution or actual damages, it was decided that 60 days would certainly be reasonable.

rectified" [Ax 104] as required. As threatened by the demand letter, that failure led "to the filing of legal action" [Ax 104] because defendants violations continuing by billing the incorrect amount.

Months passed before there was any correction of the amount billed and a return of the overage amounts paid. But, the defendants' partial fulfillment was both after the time allowed for by the homeowners' demand letter, and after suit had been filed. For certain, suit was filed before the correctly billed amount was received [Ax 310, ¶7&8)]. And of course, the homeowners' attorney's fees were never paid, although those amounted to actual damages upon the homeowners as well.

a. The Mortgagee Did Not State "I Do" to the Mortgage Originator's Proposal.

If the mortgagee was in agreement with mortgage originator's reply stating defendants were "able to remove" the excess charge, then the mortgagee could have, and should have, stopped billing the incorrect amount, and immediately returned the overage payments received. It then appeared that the mortgage originator was not speaking for the mortgagee at all — and under any construction the mortgage broker's reply alone did not bind the mortgagee. Perhaps the mortgage originator wishfully hoped the mortgagee would bare or share the cost to cure the "mistake" and the mortgagee disagreed to do so — because the mortgagee was also pointing the finger at the mortgage originator.

b. Mortgagee's Response to Mortgage Originator Was "You Do."

Consistent with the mortgagee pointing the finger at the mortgage originator, the mortgagee obtained a hold-harmless agreement putting the onus of their defense on the mortgage originator and mortgage broker [Ax 401, p20, L21 to L25; loan originator's attorney speaking: "Jamal Wilson ... paid all of the fees... He paid these fees because of contractual indemnification clauses"][8]. Accordingly, neither the mortgagee's post-demand decision to correct the PMI error, nor post-litigation decision to make the homeowners "whole" in the eyes of the mortgagee by return of the overage payments[9], acted to either eviscerate the injury that had already occurred or moot this case. *Higginbotham v. Ford Motor Credit Company*, No. 07-13281, page 10 (Fed. 11th Cir., March 24, 2008) (unpublished)[10] [Ax 444]. So, such a finding that the homeowners were thus "made whole," as the premise for the finding that the homeowner's acted in bad faith in continuing their action, is an abuse of discretion lacking legal or equitable support.

C. Lack of Intent to Deceive Is Irrelevant to the Tila Action Filed.

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[8] The Hold Harmless and Indemnification Agreement is not part of the record.

[9] Regulation Z, specifically 12 CFR §1026.4(b)(5), states that **PMI is to be included in the calculation of the "finance charge,"** so clearly there was no correction of the "charge" within the time required by 15 USC §1640(b).

[10] As per the local rule of the U.S. Eleventh Circuit: "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." See, *11th Cir. R. 36-2*.

Defendants asserted a defense that the homeowners knew there was going to be PMI on the mortgage loan. For a lender to make such an assertion, the disclosure ought to be properly made or there is a TILA violation. The homeowners filed an affidavit stating that was not their understanding [Ax 309, ¶2&3]; stating that they did not want PMI [Ax 309, ¶3]; and, stating that the documents they signed prior to the closing did not contractually bind them to PMI as their signatures thereon were only acknowledging disclosure of what could become binding (not what would become binding) [Ax 309, ¶2&3]. Defendants argument in defense, which is essentially a false defense of justifiable reliance or estoppel, does not alter the fact that there was a forgery, but it does seek to explain why there was a forgery and give false justification for the forgery.

According to the defendants, the forgery came about because of a "mistake" in failing to include PMI in the disclosure documents and add the amount to the Payment Letter to Borrower — that is referring to the letter the homeowners did sign at closing. Mistakes come about because of negligence. Certainly forgery is not a "mistake" as the act itself is intended. Defending the action as a "mistake" could never undermine the action taken by the homeowners. *In re Ralls*, 230 B.R. 508, 517 (Bankr. E.D. Pa., 1999) (borrower does not have to prove deceit for recovery under TILA).

If the defendants had uncovered a "mistake" then TILA obligated the defendants to correct their "mistake" within 60 days. Someone among the defendants decided to "fix" their "mistake" by forging the homeowners' signatures on a Payment Letter to

Borrower which included the higher monthly amount. That "someone," or at least the responsible "someone," was by all indications of the mortgagee having obtained a Hold Harmless and Indemnification Agreement [Ax 401, p20, L21 to L25], and statements made by Stewart Title [Ax 355, ¶5], none other than the loan originator (Jamal Wilson) acting as the responsible principal of LF Loans (the mortgage broker). No sworn statement of fact was presented to lead the homeowners to believe otherwise and dissuade them from proceeding with their action. *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1000 (Fla. 4th DCA 2016) (as long as there exists at least "some triable set of facts" the action is not frivolous). So, a finding that the homeowners essentially lacked reason to point the finger at the mortgage originator as the responsible party for the forgery, lacking record support, amounts to an abuse of discretion.

II. DEFENDANTS' CLAIM FOR §57.105(1) SANCTIONS FAILED TO ADHERE TO THE STRICT STATUTORY REQUIREMENT THAT THE MOTION BE SERVED A MINIMUM OF 21 DAYS IN ADVANCE OF FILING, AND OTHERWISE FAILED TO FOLLOW THE RULE REQUIRING THAT A CLAIM FOR ATTORNEY'S FEES BE FILED WITHIN 30 DAYS OF FINAL ADJUDICATION.

Defendants' motion for §57.105 sanctions, whether based on the §57.105 motion embedded in the motion for summary judgment or based on the later untimely motion that was not ever properly filed, was either not made in strict adherence with the method prescribed by the statute or filed in accordance with Florida Rules of Civil Procedure, Rule 1.525, and accordingly is void – even if it were otherwise meritorious.[11] *Matte v.*

[11] It was not otherwise meritorious!

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). Being in derogation of common law, Florida Statutes §57.105 must be strictly followed procedurally, and failure to do so is an affront to due process. *Orange County Buld. v. Strickland Const.*, 913 So. 2d 718 (Fla. 5th DCA 2005) (§57.105 not strictly followed).

A. The Motion for Sanctions Embedded in the Motion for Summary Judgment Fails Because it Was Not Served at Least 21 Days in Advance of Filing with the Court.

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. *Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc.*, 122 So. 3d 487, 490–491 (Fla. 3d DCA 2013) (abuse of discretion because record evidence failed to support finding of compliance with the notice requirements of section 57.105(4)).

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 — there being no other motion for such sanctions then filed. Homeowners' subsequently filed notice of appeal from the entry of summary judgment [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].

B. The Motion for Sanctions Attached to Defendant's Memorandum in Support of Entitlement to §57.105 Sanctions Fails Because the Motion Was Not Filed with the Lower Court Within 30-days of the Summary Judgment.

Although mortgage originator never filed a "safe harbor" motion that had previously been served in accordance with the requirements of Florida Statutes §57.105(4), a document titled as such [Ax 342 to 346] was attached to mortgage originator's memorandum that was filed just two days prior to the hearing on entitlement pursuant to the embedded §57.105 motion [Ax 333 to 341]. This late "safe harbor" document was not filed as a separate motion and only appears in the record as an

attachment to defendant's memorandum. If that "safe harbor" document had been separately filed, or if it is deemed to have been separately filed although it was an attachment to the memorandum, then it was 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."[12] 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

[12] 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), but see *Isla Blue Dev., LLC v. Moore*, No. 2D-161718 (Fla. 2d DCA, June 14, 2017) (mail service is sufficient notice, conflict certified). 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 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].

lower court to consider the motion attached to the defendant's memorandum, or any motion other than the embedded motion.

The second §57.105 motion presented by the mortgage originator just two days prior to the motion for entitlement states reasons for potential §57.105 sanctions that are different from those stated in the acted upon motion embedded in defendants' motion for summary judgment [AX 54–55] for which no "safe harbor" notice was provided. If this "safe harbor" document is the one previously shown to the court but not marked for identification, then the difference was also recognized by the lower court judge [Ax 387, L2–24]. As previously stated, defendant's counsel handed something to the court (a paper, a motion, a letter) which in turn was not marked for identification, filed of record, or even shown to the homeowners' counsel.

CONCLUSION

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. "When attorney fees are improperly awarded, a "species of social malpractice [results] that undermines the confidence of the public in the bench and bar.... [I]t brings the court into disrepute and destroys its power to perform adequately the function of its creation."" Judge Lewis dissenting in *First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 984 (Fla. 2013), citing to *Baruch v. Giblin*, 122 Fla. 59, 164 So. 831, 833 (1935).

WHEREFORE, the court must reverse the lower court order allowing §57.105 sanctions.

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 August 1, 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.]