IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1265
(Consolidated with Case Nos.
SC14-1266 and SC14-1267)

LEWIS BROOKE BARTRAM and
THE PLANTATION AT PONTE
VEDRA, INC.,

Appellants,

vs.

U.S. BANK NATIONAL ASSOCIATION
and PATRICIA J. BARTRAM,

Appellees.

On Appeal from the Fifth District Court of Appeals of Florida
L.T. Case No. 5D12-3823

INITIAL BRIEF OF LEWIS BROOKE BARTRAM

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STATEMENT OF THE CASE AND OF THE FACTS

I. Introduction

This appeal presents the important question of whether a foreclosing lender, having elected to accelerate a borrower's indebtedness and sue on the entire mortgage obligation, can avoid the statutory limitations through a remarkable mechanism that silently, unintentionally and improperly cancels that acceleration. Because the mortgage's acceleration here was the triggering event for the five year statute and because that event occurred in 2006, Respondent U.S. Bank, N.A. ("U.S. Bank") had no further right to seek foreclosure in 2012. And yet, the Fifth District Court of Appeal improperly and inexplicably cast aside the original 2006 acceleration and treated the mortgage as if it were subsequently reinstated, subsequently accelerated, and, thus, subsequently reactivated for purposes of statutory limitations. None of the legal requirements, however, for reinstatement of the mortgage were ever met or even attempted. Instead, contrary to settled contractual and even constitutional principles, the Fifth District's analysis automatically erased the undisputedly valid acceleration of the entire principal balance and reinstated *sub silentio* the defaulted mortgage, based entirely upon a dismissal without prejudice of an earlier foreclosure action.

This judicial bailout of dilatory lenders – untethered to any analysis of contract principles – was based on a fundamental misinterpretation of this Court's

decision in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004). The narrow and considered ruling of this Court in *Singleton*, however, provides no warrant for the errant interpretation given to it by several courts, including the Fifth District below. A near-unanimous jurisprudence across the country has rejected the result reached by the Fifth District, holding instead that an acceleration, once properly accomplished, is not retroactively eliminated by a later dismissal of the lawsuit. Rather, reinstatement requires a mutual agreement or, at a minimum, affirmative acts withdrawing the acceleration by the lender that are communicated to the borrower.

The Fifth District's decision recognizes neither the contractual foundation of acceleration nor the intentions of the parties. Moreover, it serves to reward egregious litigation delays and will result in both an increase in the flood of aged foreclosure actions clogging the dockets and a lack of certainty regarding the enforceability of seemingly abandoned mortgage obligations. Such would operate not only to the detriment of borrowers, but also to the principles of Florida's jurisprudence that protect contracts from judicial abrogation and amendment.

The Fifth District's ruling is not necessary to safeguard lenders who are even minimally diligent. The Legislature has judged that five years is a sufficient time period to commence a foreclosure action, and experience teaches that this is so. This Court should not override that determination. Accordingly, Petitioner Lewis

Brooke Bartram ("Bartram") respectfully requests reversal of the Fifth District's decision.

II. The Mortgage

Bartram entered into a residential mortgage in February 2005 with the predecessor in interest to U.S. Bank. R. II: 248-64; R. III: 474-90.[1] While the duration of the mortgage term was 30 years, upon default of the monthly payment terms or certain other specified terms, the mortgage authorized the lender to accelerate the balance owed and pursue recovery of the full obligation. *Id.* In the event of an acceleration of the debt, the mortgage also permitted a reinstatement of the monthly installment obligations, which could only be exercised by Bartram, the borrower, on certain, specified conditions. The reinstatement provision of the mortgage reads, in pertinent part, as follows:

> If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Interest discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Interest. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all

[1] Record ("R.") citations are to the volume and page numbers in the record on appeal before the Fifth District Court of Appeal.

> expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged…. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred….

R. II: 259-60 at ¶ 19; R. III: 485-86 at ¶ 19.

Significantly, pursuant to the mortgage, this contractual right to reinstatement after acceleration belonged only to Bartram. *Id.* The contract does not address reinstatement by the lender.

III. The 2006 Foreclosure Action by U.S. Bank

On May 16, 2006, U.S. Bank (through its then-counsel, Law Offices of David J. Stern, P.A.) filed in the Seventh Judicial Circuit a mortgage foreclosure suit against Bartram, his ex-wife Patricia J. Bartram ("Patricia") (the holder of a second mortgage on the subject property), and The Plantation at Ponte Vedra, Inc. ("Plantation"), a homeowners' association that had filed a lien against the mortgaged property for assessments. R. III: 469-72. U.S. Bank alleged a payment default, proper acceleration of the balance owed, and sued for the entire unpaid balance. R. III: 469 at ¶¶ 8, 9.

As the Fifth District found below, "[a]t no time during the pendency of the 2006 case did Bartram ever deny that he had defaulted and neither did he ever challenge the acceleration of the debt." *See U.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007, 1009 (Fla. 5th DCA 2014).[2] It is also undisputed that Bartram never attempted to exercise his right to reinstatement under the mortgage. Correspondingly, U.S. Bank did not act at any time to withdraw the 2006 acceleration.

U.S. Bank's pursuit of its 2006 foreclosure action was intermittent and half-hearted, at best. Nearly five years after filing suit and accelerating the debt, that chronic indifference culminated in U.S. Bank's failure to attend a case management conference scheduled for May 4, 2011. The trial court noted that "[t]here was no appearance by the Plaintiff or Plaintiff's counsel and this case is approximately five years old and four years beyond time standards." R. III: 433. As a result, the trial court issued an Order of Dismissal on May 5, 2011, involuntarily dismissing U.S. Bank's action, without prejudice. *Id.* In that Order of Dismissal, there was no ruling, finding, or even mention concerning a cancellation of acceleration. Nowhere does the record indicate that Bartram's

[2] The opinion below is at Tab A to the Appendix to Plantation's Initial Brief.

mortgage was ever reinstated. Nor was any document filed in court, or communicated to Bartram, advising him that the mortgage was reinstated.

U.S. Bank did not ask for reconsideration of the Order of Dismissal. It did not appeal the Order of Dismissal. It did not file a new foreclosure action.[3] Instead, it continued to do nothing.

IV. The 2011 Foreclosure Action by Patricia

In the meantime, less than two months prior to the dismissal of U.S. Bank's 2006 foreclosure action, Patricia filed in the Seventh Judicial Circuit on March 23, 2011 her own mortgage foreclosure action against Bartram, U.S. Bank and Plantation. R. I: 1-5. U.S. Bank answered Patricia's Complaint on June 27, 2011 (after the dismissal of U.S. Bank's 2006 foreclosure action), asserting that its mortgage was superior to Patricia's. R. I: 47-51. U.S. Bank did **not** bring a cross-claim against Bartram.

Nearly a year later, though, on March 6, 2012, nearly six years after U.S. Bank brought its since-dismissed foreclosure action against Bartram and expressly accelerated his debt, U.S. Bank's loan servicer sent a notice of default to Bartram claiming that he was in default of the U.S. Bank mortgage as a result of past due

[3] The statute of limitations on a mortgage foreclosure action is five years, § 95.11(2)(c), Fla. Stat., so, arguably, U.S. Bank had 11 days from the date of dismissal to bring a new and still timely action for the accelerated debt.

mortgage payments. R. III: 435-36. Bartram then filed a cross-claim against U.S. Bank on April 26, 2012, challenging its ability to further enforce its mortgage. R. I: 168-72. After briefing and oral argument, on July 30, 2012, the trial court entered summary judgment in favor of Bartram against U.S. Bank based on his statute of limitations argument, finding that U.S. Bank's delay in pursuing its claim led to the cancelation of its mortgage. R. III: 443-45.

V. The Fifth District's Decision

On U.S. Bank's subsequent appeal of the summary judgment entered in favor of Bartram, the Fifth District, in an opinion dated April 25, 2014, reversed, "conclud[ing] that the statute of limitations does not bar the subsequent foreclosure action," *Bartram*, 140 So. 3d at 1008 – notwithstanding the fact that there was no subsequent foreclosure action by U.S. Bank. In effect, the Fifth District held that the dismissal of the languidly pursued foreclosure lawsuit by the trial court in 2011 rescinded the acceleration by the Bank in 2006. In so ruling, the Fifth District relied heavily on this Court's decision in *Singleton* and quoted it at length. *See Bartram*, 140 So. 3d at 1011-12, 1013. The Fifth District's ruling was as follows:

> Based on *Singleton*, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits. Therefore, we conclude that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the

> subsequent foreclosure action on the subsequent defaults is brought within the limitations period.

Id. at 1014. While referring to "subsequent defaults," no such events were identified. Nor did the Fifth District explain how there could be a new and subsequent payment default after the entirety of the debt had been accelerated and become due in 2006.

As a matter of great public importance, the Fifth District certified the following question to this Court: "Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?" *Id.* This Court accepted jurisdiction by Order dated September 11, 2014. 2014 WL 4662078.

STANDARD OF REVIEW

This appeal presents no disputed issues of material fact and instead concerns only issues of law. The standard of review for summary judgment is *de novo*. *See, e.g., Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). *See also Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190

(Fla. 2013) (when the underlying facts are not in dispute, the applicability of the statute of limitations is an issue of law for *de novo* review).

SUMMARY OF ARGUMENT

For multiple reasons, the decision of the Fifth District should be vacated. It relies almost exclusively on an unwarranted and legally untenable expansion of the narrow res judicata decision of this Court in *Singleton*. That expansion would undo the dictates of the governing statute of limitations and the terms of contractual agreements, both to the detriment of constitutionally protected rights.

As is explained below, *Singleton* is an appropriate, equity-based decision merely holding that a dismissal with prejudice of a mortgage foreclosure action will not necessarily prevent, on res judicata grounds, the filing of another foreclosure action based on subsequent acts of default. It says nothing about the statute of limitations. It says nothing about the requirements for reinstating an accelerated mortgage so as to establish a renewed contractual obligation to make periodic installment payments. And it says nothing suggesting that the equitable considerations underlying res judicata have any applicability to revising either the statute of limitations or the contractual agreement of the parties.

In short, *Singleton* does not support the Fifth District's result, which is that, by virtue of nothing more than the dismissal without prejudice of a foreclosure action predicated upon valid acceleration, the mortgage is reinstated, the statute of

limitations is re-set, and the borrower is required again to make only monthly mortgage payments. According to the Fifth District's outcome, this mechanism is deployed even when the lender takes no affirmative action and never informs the borrower of the judicially created reinstatement. In fact, the decision under review presents the automatic reinstatement scenario even when the terms of the mortgage itself do not permit the lender to reinstate the mortgage once it has been accelerated. Not only is such a result not found in *Singleton*, but it also flies in the face of myriad legal authorities and settled principles of law.

Florida law provides that acceleration of a debt eliminates periodic payment obligations and creates an obligation for the entire liability. Moreover, because Florida law requires that acceleration must be communicated to be effective, logically, the same rule must apply to reinstatement (sometimes referred to as deceleration).

Florida law embraces other tenets that the Fifth District did not follow. Tolling of the statute of limitations is not permitted unless those reasons are explicitly enumerated by the Legislature. Florida law further recognizes that an accrued statute of limitations defense is a property right that cannot be taken away. Florida law is also clear that contractual rights conveyed by mortgages are constitutionally protected. Each one of these concepts is violated by the decision of the Fifth District.

The proper rule that should apply in these circumstances – and which was, in fact, implicitly applied by the circuit court below – is that, once a mortgage debt has been accelerated due to a default, there cannot be a reinstatement of the mortgage and the reinstitution of periodic payment obligations unless permitted by the terms of the mortgage. Moreover, it is also essential that any such reinstatement be placed into effect by an affirmative act by the lender and communicated to the borrower. Because Florida law fixes a valid acceleration as the pivotal event for accrual purposes, the failure to reinstate a properly accelerated debt before the expiration of the statute of limitations precludes any further action by the lender to enforce the borrower's payment obligations.

Almost every state that has considered this issue has ruled in conformity with this analysis. It is only the misinterpretation and mistaken extension of *Singleton* by the Fifth District and federal courts in Florida that have caused Florida to become an outlier in its treatment of accelerated mortgage debts. This Court should rectify that error and establish a clear rule of law that is consistent with its own precedent, gives certainty to the parties to a mortgage, and necessitates simply that lenders adhere to the minimal requirement of pursuing their foreclosure actions within five years of their voluntary election to accelerate a debt.

ARGUMENT

I. General Principles: Acceleration and Reinstatement

The concept of acceleration of payments due under a contract following default is explicitly embedded in different types of contracts. Installment contracts, rental contracts and mortgages typically share this feature. *E.g.*, *Parise v. Citizens Nat'l Bank*, 438 So. 2d 1020, 1021-22 (Fla. 5th DCA 1983) (mortgage context); *CB Institutional Fund VIII v. Gemballa U.S.A., Inc.*, 566 So. 2d 896, 897 (Fla. 4th DCA 1990) (landlord-tenant context); *McKenna v. Camino Real Village Ass'n, Inc.*, 877 So. 2d 900, 901-902 (Fla. 4th DCA 2004) (condominium assessments context). Any right of acceleration derives from a contract, and if the right of acceleration is exercised, it effectively transforms the obligor's obligation from making periodic payments over a period of time, typically years, to an immediate obligation to pay the entire principal balance set forth in the contract.[4] Along with the lender's proper exercise of the right to accelerate under the contract (typically following default), Florida law further requires an affirmative act of notice to the borrower. *Pici v. First Union Nat'l Bank of Fla.*, 621 So. 2d 732, 733

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[4] *See* Andrew J. Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, Fla. B. J. Sep./Oct. 2014 31, 31 ("Acceleration transforms a loan from a long-term installment contract with a monthly payment plan to a loan whose entire remaining principal balance is immediately due.").

(Fla. 2d DCA 1993) (notice to borrower required for valid acceleration; "internal, unannounced decision" insufficient), *review denied*, 629 So. 2d 132 (Fla. 1993).

Once the lender has exercised its contractual right of acceleration, the parties' legal rights and obligations change dramatically. For instance, if provided for in a typical mortgage, default interest begins to accrue on the entire loan balance. Moreover, acceleration of a mortgage has been held to cut off the debtor's right to make partial payments, *Pici*, *supra*, and to receive a prepayment discount. *Casino Espanol de la Habana, Inc. v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) ("[u]pon acceleration, it became impossible to prepay the note, as the date of maturity had already passed"), *review denied*, 581 So. 2d 163 (Fla. 1991).

Most fundamentally, a proper acceleration following default, as admittedly occurred here, causes all principal to be due as of the date of acceleration. Consequently, it is universally accepted that the statute of limitations for enforcement of the note and mortgage contracts starts to run, at the latest, on the date of acceleration. *Spencer v. EMC Mortgage Corp.*, 97 So. 3d 257, 260-61 (Fla. 3d DCA 2012) (alternative holding that acceleration triggered running of statute of limitations on enforcement of note and mortgage); *Cadle Co. v. Rhoades*, 978 So. 2d 833, 834 (Fla. 3d DCA 2008) (statute of limitations on debt action ran since

creditor's acceleration of debt in demand letter occurred more than five years before suit was brought).[5]

Equally settled is the principle that, once a right of acceleration has been properly exercised, courts have no general discretion to cancel, reverse or undo the acceleration. To the contrary, this Court in *David v. Sun Fed. Sav. & Loan Ass'n*, 461 So. 2d 93, 94-96 (Fla. 1984), held that a lender has the constitutionally protected right to exercise a contractual acceleration clause in accordance with its terms by virtue of Article I, Section 10 of the Florida Constitution. Irrespective of how sympathetic the claims of an individual debtor may be, an acceleration once exercised cannot be "abrogated or impaired" in the absence of proof of the "circumstances which are regarded in law as sufficient grounds." *Id.* at 95, *quoting Campbell v. Werner*, 232 So. 2d 252, 256 (Fla. 3d DCA 1970). These legally

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[5] *See also Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (mortgage foreclosure cause of action accrued upon acceleration of debt); *Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1981) (acceleration after default by "clear and unequivocal action" communicated to debtor triggers running of statute of limitations on note); *Smith v. F.D.I.C.*, 61 F.3d 1552, 1561 (11th Cir. 1995) ("[w]hen the promissory note secured by the mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked or the stated dated of maturity, whichever is *earlier*") (Florida law) (emphasis in original); *In re Brown*, 2014 WL 983532 at *1 (Bankr. M.D. Fla. Feb. 11, 2014) ("[w]here a lender has accelerated a loan and made the borrower responsible for the full balance of the loan, the statute of limitations begins to run at the time when the mortgagee exercises the right to accelerate").

sufficient grounds are narrowly circumscribed and only include established doctrines such as a voluntary and valid waiver of acceleration, estoppel, or an agreement to reverse an acceleration. *See New England Mut. Life Ins. Co. v. Luxury Home Builders, Inc.*, 311 So. 2d 160, 163 (Fla. 3d DCA 1975).

Remarkably, in complete disregard of these settled principles, the Fifth District concluded that the 2006 acceleration was erased by the first trial court's dismissal of that foreclosure action without prejudice. This surprising assumption was made even though the trial court's order said nothing whatsoever about acceleration, much less about cancelling it. In fact, as far as the record reflects, neither the lender nor the borrower even requested cancellation of acceleration. Without any analysis of the contractual issues, the Fifth District simply assumed that a dismissal that was utterly silent about acceleration nonetheless eliminated it. But, like other contract rights exercised between parties, acceleration establishes entitlements and liabilities that a court cannot abrogate, especially through an order that did not even purport to do so.

Equally clear is the reality that nothing about any supposed reinstatement was communicated to Bartram. This lack of communication, in writing or otherwise, is critical. Not only in legal terms but also as a matter of fairness, a borrower should know if only monthly installments are due, rather than the entire balance. Just as the original trial court and the lender never uttered a word about

reinstatement, it is clear that at no time was Bartram ever informed that he could avail himself of the opportunity to pay the un-accelerated obligation and thereby save his home.

Stated bluntly, the result reached by the Fifth District was necessarily premised upon a fiction requiring an erasure of the 2006 acceleration that was never adjudicated, requested, or even disclosed. It is a fiction necessary to support an impermissible tolling of the statute of limitations, and it is a fiction without any basis in law.

II. *Singleton* Does Not Stand for the Propositions for which it Has Been Cited

A. *Singleton* is a narrow res judicata decision

The predominant authority upon which the Fifth District relied in reversing the trial court is *Singleton*. In doing so, however, the Fifth District (and various federal district court decisions) have extended *Singleton* far beyond its language and well outside its context. A review of *Singleton* reveals that its grounds are narrow and do not support the broad and misguided rule of law applied by the Fifth District.

In *Singleton*, this Court addressed the issue of res judicata, not the statute of limitations. As is discussed in Section III below, those two issues are fundamentally different and raise concerns that are far from parallel. Even within

the context of res judicata, moreover, *Singleton* treads lightly and is not the statute of limitations steamroller into which it has been transformed.

Singleton repeatedly and cautiously speaks in a limited fashion. Its holding is merely that "a dismissal with prejudice in a mortgage foreclosure action does **not *necessarily*** bar a subsequent foreclosure action on the same mortgage." *Singleton*, 882 So. 2d at 1005 (emphasis added). That restrained holding is reiterated later using the following language: "[W]hen a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is **not *necessarily*** barred by res judicata." *Id.* at 1006-07 (emphasis added).

Bartram has no quarrel with this reasoning and does not dispute that foreclosure actions involving different and subsequent invocations of default are not necessarily barred by res judicata if, for example, the first action was dismissed with prejudice due to the failure to establish a valid acceleration. What *Singleton* does not decide – and was not asked to decide – is whether there can be different payment defaults after a valid acceleration of a debt if the debt was not thereafter reinstated.

B. *Singleton* does not authorize automatic reinstatement after acceleration

To be sure, *Singleton* discusses acceleration, but its language does not at all support the conclusion that the dismissal of a first foreclosure action on an accelerated debt serves automatically to reinstate the debt and thereby permit future payment defaults. *Singleton* merely observes that, "[w]hile it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue." *Id.* at 1007. This narrowly stated principle does not address, much less determine, whether reinstatement is required before there can be a new and subsequent acceleration.

Indeed, *Singleton* does not even remotely treat the issue of whether an already validly accelerated indebtedness for which each and every monthly payment had already become due requires reinstatement. The narrow position of *Singleton* is confirmed by its following language regarding acceleration:

> For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. ***In those instances***, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure ***under those circumstances*** should not bar a

> subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Id. (emphasis added).

Thus, where it has been established that there was no valid default or, if there was a default and no valid acceleration in the first instance, the entire principal balance has not become due and the parties are returned to the same relationship with the same pre-existing obligations. That holding is not disputed by Bartram, but it is simply inapplicable to the situation here. Bartram has never challenged the validity of U.S. Bank's original acceleration of the debt or that there was a payment default. *See Bartram*, 140 So. 3d at 1009. Accordingly, the illustrative circumstances presented in *Singleton* are strikingly absent.

U.S. Bank, instead, chose to accelerate, validly and successfully doing so.[6] Then, it inexplicably elected to abandon pursuit of its foreclosure action until after the statute of limitations expired on a new action, at a time when its action had been involuntarily dismissed. Because the accelerated debt was never reinstated, Bartram could not have committed a post-acceleration periodic payment default, since his only payment obligation after acceleration was payment of the entire debt. Indeed, "[t]he obligations to pay each installment merged into one obligation

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[6] As the Fifth District noted below, "there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." *Id.*

to pay the entire balance on the note." *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987, 992 (Ohio 2008). That is what Bartram was sued for by U.S. Bank in 2006 (R. III: 469-72), and the statute of limitations has expired on that involuntarily dismissed claim.

C. The Fifth District and recent federal decisions misinterpret ***Singleton***

Disregarding these principles, the Fifth District's decision is one in a series of recent decisions (mostly from Florida federal courts), all mistakenly premised upon the same improper extension of *Singleton*'s limited holding. The Fifth District relied extensively (*see Bartram*, 140 So. 3d at 1013) on the Middle District of Florida's decision in *Dorta v. Wilmington Trust Nat'l Ass'n*, 2014 WL 1152917 (M.D. Fla. Mar. 24, 2014),[7] a case cited in other cases that extend *Singleton*. The federal trial judge's *Dorta* decision is not one to be followed, however, because, upon analysis, it ignores some of the most critical language in *Singleton* and extensive contrary jurisprudence. *Dorta*, which involves a *pro se* borrower, erroneously asserts that *Singleton* "hold[s] that even where a mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's

[7] The Middle District of Florida's decision in *Dorta* is currently on appeal to the Eleventh Circuit, where it is pending as Case No. 14-11884. By Order dated October 9, 2014, the Eleventh Circuit stayed the *Dorta* appeal until after the resolution of the instant appeal before this Court.

foreclosure action is unsuccessful ***for whatever reason***, the mortgagee still has the right to file later foreclosure actions – and to seek acceleration of the entire debt – so long as they are based on separate defaults." *Id.* at *6 (emphasis added).[8]

As explained above, *Singleton* says no such thing, and the *Dorta* court's misinterpretation of *Singleton* led directly to the error committed below. Like the Fifth District, other courts subsequently addressing this issue have also relied on the broad language of *Dorta*, as opposed to the actual text and context of *Singleton*.

In support of its decision, the Fifth District also discusses *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp.2d 1271 (S.D. Fla. 2013), *Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403 (Fla. 4th DCA 2012), and *PNC Bank, N.A. v. Neal*, 147 So. 3d 32 (Fla. 1st DCA 2013). *See Bartram*, 140 So. 3d at 1012-13. None of these cases addresses reinstatement, and *Star Funding* and *Neal* are both one paragraph decisions that do not add to the analysis.

The erroneous interpretation of *Singleton* is further exemplified by *Matos v. Bank of New York*, 2014 WL 3734578 (S.D. Fla. July 28, 2014). In *Matos*, the

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[8] Inconsistently, *Dorta* also distinguishes *Singleton* because the first action in *Dorta* was dismissed without prejudice for lack of prosecution, with the court emphasizing that such dismissals "are not considered adjudications of the merits, and therefore there was no effective acceleration of the Note and Mortgage." *Id.* at *6, n. 3. Here, in contrast, it has been determined that U.S. Bank's acceleration of Bartram's mortgage was effective. *Bartram*, 140 So. 3d at 1009.

district court misquotes *Singleton* as advising that "adjudication denying acceleration and foreclosure action … does not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven." *Id.* at *2. In actuality, the ellipses in *Matos* delete the limiting phrase "under those circumstances," with "those circumstances" being the examples provided in *Singleton* and absent here – a mortgagor prevailing on the merits by demonstrating that she was not in default or that the mortgagee had waived reliance on the defaults. *Singleton*, 882 So. 2d at 1007. This is the obviously important difference between *Singleton*'s actual holding that an earlier acceleration does not preclude **every** lawsuit and the miscast holding that it does not preclude **any** lawsuit.

These courts have misread *Singleton*. Other Florida case law, though, like the overwhelming majority of courts across the country which have addressed the issue, properly embraces the principle that acceleration triggers the running of the statute of limitations. Most noteworthy, in *Spencer*, 97 So. 3d at 260, the Third District observed that, where acceleration occurred more than five years before a second foreclosure action was filed (the first was dismissed for lack of

prosecution), enforcement of the note and mortgage was likely barred by the statute of limitations.[9]

III. The Statute of Limitations Is Predicated on Different Considerations than Res Judicata

Further separating *Singleton* from the present case is its extensive equitable analysis concerning res judicata considerations that have little pertinence to the statute of limitations. More specifically, *Singleton* identifies potentially "inequitable results" if the judicially created doctrine of res judicata were to prevent a mortgagee from acting upon a new and subsequent default in the event an earlier default could not be established. This Court said that "justice would not be served if the mortgagee was barred from challenging the subsequent default payment ***solely*** because he failed to prove the earlier alleged default." *Singleton*, 882 So. 2d at 1007-08 (emphasis added).

Not only are these observations lodged in the separate landscape of res judicata, they do not apply to facts of the present case. There is no evidence of a

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[9] *See also Deutsche Bank Trust Co. Americas v. Beauvais*, No. 12-49315, 2014 WL 1869412 (Fla. 11th Cir. Ct. Jan. 29, 2014) (where lender filed foreclosure action and accelerated debt, only to have the action dismissed without prejudice for failure to appear at a case management conference, and then sued again more than five years after filing the prior suit, summary judgment was proper for the borrower, with *Singleton* "wholly irrelevant to the issue of the statute of limitations"); *Bank of America, N.A. v. Lynn*, No. 13-1155, 2013 WL 8357641 (Fla. 14th Cir. Ct. Oct. 9, 2013) (same).

subsequent default in monthly payments by Bartram. Indeed, after there was an indisputably effective acceleration of the debt – with no reinstatement of the note and mortgage – the only existing payment obligations mandated payment of the entire principal. Accordingly, what should prevent U.S. Bank from pursuing Bartram is not "solely" the fact that it unsuccessfully sued him once before. In this case, the bank's claim is precluded not under res judicata because it is a second effort, but because it is an effort that comes much too late under the statute of limitations. Anchored upon distinct doctrines, res judicata was not conceived to rescue an extremely dilatory party that sat on its legal rights until they expired.

U.S. Bank accelerated its debt more than five years earlier, did not reinstate the debt, and did nothing to pursue its claim until after the statute of limitations expired subsequent to the involuntary dismissal of its foreclosure action. Even assuming that equitable factors could trump the statute of limitations, which they may not, see Section VI below, the equities are not with U.S. Bank here.

IV. Decisions from Other States Widely Reject the Concept of Automatic Deceleration and Reinstatement of a Previously Accelerated Debt

The clear majority of states to have considered the issue strongly support the position urged by Bartram – that there is no such thing as "automatic deceleration" and that, once a mortgage has been accelerated, it must be reinstated in accordance with recognized contract principles. This requires, at a minimum, an affirmative

act by the lender to withdraw the acceleration and at least a communication to the borrower that the event of acceleration has been cancelled. Without clear communication of reinstatement, the borrower is deprived of any ability – after a valid acceleration – to save the property from foreclosure by paying only the past due installments, at the typically much lower non-default rate of interest. Based on such public policy reasons, and relying on settled maxims of contract law, the courts of states that have reached the issue have overwhelmingly rejected on statute of limitations grounds untimely mortgage foreclosure actions brought after acceleration where there was no proper reinstatement of the mortgage.

A. New York

New York law is well established and mandates proper reinstatement of an accelerated mortgage before there can be an action for a subsequent installment payment breach. Indeed, New York courts explicitly and consistently reject the basis for automatic, unilateral and uncommunicated reinstatement relied upon by U.S. Bank here – dismissal without prejudice of its first action. *See, e.g., Clayton Nat'l, Inc. v. Guldi*, 763 N.Y.S.2d 493, 494 (N.Y. App. Div. 2003) (affirming dismissal of foreclosure action on statute of limitations grounds because the dismissal of a prior foreclosure action for lack of personal jurisdiction "did not constitute an affirmative act by the lender to revoke its [original] election to accelerate"). *See also Secured Equities Invs., Inc. v. McFarland*, 753 N.Y.S.2d

264, 266 (N.Y. App. Div. 2002) (directing summary judgment against lender due to expiration of statute of limitations where it failed to submit admissible evidence to support its contention that the earlier foreclosure action that it dismissed was a nullity because there had been no proper acceleration).[10]

B. Texas

Applying these same principles, the state and federal courts of Texas have uniformly rejected the reasoning of the Fifth District. An especially thorough analysis is found in *Murphy v. HSBC Bank USA*, 2014 WL 1653081 (S.D. Tex. Apr. 23, 2014), in which, two days before the Fifth District decided *Bartram*, the federal court granted summary judgment for the borrower on statute of limitations grounds. In *Murphy*, the lender accelerated a note and mortgage due to payment

[10] Other New York decisions along the same lines include *Arbisser v. Gelbelman*, 730 N.Y.S.2d 157, 158 (N.Y. App. Div. 2001) (directing summary judgment for borrower on statute of limitations grounds because lender's withdrawal of his original foreclosure action did not undo the acceleration of the mortgage), *EMC Mortgage Corp. v. Patella*, 720 N.Y.S.2d 161, 162-63 (N.Y. App. Div. 2001) (affirming dismissal of second foreclosure action because "the dismissal of the prior foreclosure action by the court [for failure to appear at a status conference] did not constitute an affirmative act by the lender revoking its election to accelerate"), and *Federal Nat'l Mortgage Ass'n v. Mebane*, 618 N.Y.S.2d 88, 89-90 (N.Y. App. Div. 1994) (directing dismissal of foreclosure action where the initial action was dismissed for lack of prosecution because there was no affirmative act of revocation of acceleration within the limitations period and it "cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate").

defaults and commenced a foreclosure action for the entire debt, which action was subsequently abated and dismissed. *Id.* at *2. More than four years (the applicable Texas statute of limitations) after the original acceleration and action, the lender accelerated again and brought a new foreclosure action. *Id.* at *3. The court held that the cause of action accrued as of the date of the first acceleration, *id.*, and the dismissal of the first action did not constitute an effective abandonment of acceleration and reinstatement. *Id.* at *9. Because there was no abandonment of acceleration by agreement of the parties or continued acceptance of payments, the statute of limitations continued to run and had expired before the second action was commenced. *Id.* at *10. Using language wholly applicable here, the court found that to allow the lender "to unilaterally 're-accelerate' … would make a nullity of the statute of limitations." *Id.*

The ruling in *Murphy* followed the same outcome a month earlier in *Callan v. Deutsche Bank Trust Co. Americas*, 11 F. Supp.3d 761 (S.D. Tex. 2014), in which the lender accelerated a note and mortgage, brought and voluntarily dismissed two foreclosure actions, and then brought a third foreclosure action more than four years after the original acceleration. The lender sent a notice of rescission of acceleration just days before the fourth anniversary of the original acceleration. *Id.* at 764-65. On cross motions for summary judgment, the court, citing numerous authorities, held that there cannot be a unilateral rescission of

acceleration over the borrower's objection or failure to agree, or where the borrower has detrimentally relied on the acceleration. *Id.* at 770. The court found that the lender "is unabashedly trying to extend the statutorily defined limitations period after twice trying and failing to foreclose on its lien. Equity demands that [the lender] cannot assert its right of acceleration to the end of the limitations period, only to abandon that right to extend the statute of limitations by another four years." *Id.*

Texas decisions make clear the circumstances in which acceleration can be properly revoked so that the note and mortgage are reinstated – circumstances indisputably not present here. For instance, in *Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347 (Tex. Ct. App. 2012), the court found, for summary judgment purposes, that there was sufficient evidence of abandonment of acceleration and reinstatement of the loan through the lender's subsequent acceptance of monthly loan payments, calculation of interest at the non-default rate, and an oral agreement to treat the note according to its original terms. *Id.* at 355. *See also Clawson v. GMAC Mortgage, LLC*, 2013 WL 1948128, at *1, 3 (S.D. Tex. May 9, 2013) (the lender effectively abandoned acceleration and reinstated the note when it recorded a notice rescinding the acceleration three months later and expressly restored the note to its original terms and conditions). This contrasts sharply with the position of U.S. Bank in the present case, in which there is neither evidence of any

reinstatement nor evidence of any abandonment of its demand for the entire principal plus interest.

C. Nevada, Arizona, Minnesota, Nebraska, Louisiana and Connecticut

It is not just New York and Texas that reject the views of U.S. Bank. Reported decisions from other states further demonstrate the prevailing viewpoint that, absent a contractually valid reinstatement, the statute of limitations begins to run upon acceleration and does not cease running once there has been a dismissal.

In *Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158, 2009 WL 1470032 (Nev. 2009), the Nevada Supreme Court affirmed the entry of summary judgment against a foreclosure action as time-barred where, after acceleration, the original foreclosure action was voluntarily dismissed without prejudice. Emphasizing the legal principle that should govern here, the Nevada Supreme Court held as follows:

> Because an affirmative act is necessary to accelerate a mortgage, the same is needed to decelerate. Accordingly, a deceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor. Here, if [the lender] intended to revoke the acceleration of the debt due under the note, it should have done so in a writing documenting the changed status. The voluntary dismissal did not decelerate the mortgage because it was not accompanied by a clear and unequivocal act memorializing that deceleration.[11]

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[11] U.S. Bank's position is even less meritorious than the lender in *Cadle* that voluntarily dismissed its first action, since U.S. Bank's first (and only) foreclosure

Id. at *1. Florida should adhere to the same logical rule, which is entirely consistent with its existing jurisprudence that acceleration must be properly exercised and communicated to the borrower. *See, e.g., Pici*, 621 So. 2d at 734 (acceleration "can not be effected absent notice to the debtor in some form").

Arizona also followed the majority rule in *Wood v. Fitz-Simmons*, 2009 WL 580784 (Ariz. Ct. App. Mar. 6, 2009), affirming summary judgment in favor of borrowers. After the lender originally accelerated and sued for foreclosure, the action was dismissed for lack of prosecution. *Id.* at *1. On appeal, the court rejected arguments that the abandonment of the first action or subsequent acceptance of partial payments served to reinstate the mortgage and thereby extend the statute of limitations. "An affirmative act by the lender is necessary to revoke the acceleration of a debt once that option has been exercised. And where a debt has been accelerated by the filing of a lawsuit, a trial court's dismissal of the action is not by itself sufficient to revoke the acceleration and extend the limitations period." *Id.* at *2 (citations omitted). Likewise, "the acceptance of partial payments by the lender after the debt has been accelerated is not sufficient to

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action was involuntarily dismissed by the trial court – certainly not "a clear and unequivocal act memorializing" a lender's decision to decelerate and reinstate. *Id.*

constitute such a reaffirmation" of a debt so as to prevent the bar of the limitations period. *Id.*

Similarly, in *Driessen-Rieke v. Steckman*, 409 N.W.2d 50, 52-53 (Minn. Ct. App. 1987), the Minnesota Court of Appeals affirmed summary judgment for the borrower on statute of limitations grounds. Holding that, to waive acceleration, affirmative action by the lender was required, the court found that the act of extending the time for payment did not constitute such a waiver. *See also Jones v. Burr*, 389 N.W.2d 289, 293 (Neb. 1986) ("[o]nce the purchase price was accelerated, unless the parties entered into some other valid agreement waiving the acceleration, or unless the sellers took some positive action which would in law constitute a waiver, the entire amount under the contract remained due and owing").

Louisiana adheres to the same reasoning. In *Harrison v. Smith*, 814 So. 2d 42 (La. Ct. App. 2002), the trial court's determination that a mortgage foreclosure action brought more than five years after acceleration and the filing of a first foreclosure action was barred by the five-year statute of limitations was affirmed. "Where steps are taken to accelerate a note more than five years before the institution of a suit, a promissory note is not enforceable because it prescribes." *Id.* at 45. The voluntary dismissal of the original suit did not stop the statute of limitations from running because the mortgagee did not "enter into any new

agreement [with the mortgagor] to reinstate payment of the installments provided in the note." *Id.* The court flatly rejected the argument that a voluntary dismissal of a foreclosure action made the acceleration of the indebtedness disappear. "We find no legal basis to construe this principle of restoring matters to their former status upon dismissal of a suit without prejudice to mean that a note once accelerated will be reinstated as if it were not accelerated." *Id.* at 46.

Connecticut has also joined the prevailing view. Applying the statute of limitations, the court found that for purposes of accrual of the statute of limitations, there can be no reinstatement once there has been acceleration. *See Cadle Co. v. Prodoti*, 716 A.2d 965, 967 (Conn. Super. Ct. 1998) ("[i]t is undoubtedly true that the statute of limitations clock begins to run ***irreversibly*** when an optional acceleration clause is exercised by a demand of full payment before all installments become due") (emphasis added).

Each of these jurisdictions soundly rejects the idea of an automatic reinstatement upon dismissal. All such authorities require that U.S. Bank cannot avoid the statute of limitations.

D. Res judicata decisions from the highest courts of Ohio, Maine and Kentucky support rejecting the Fifth District's position

Even in the distinguishable, judicially conceived context of res judicata, other states reject the concept of automatic and unilateral deceleration that has

been wrongly attributed to *Singleton*. A thorough analysis was undertaken by the Ohio Supreme Court in *Gullotta*. There, summary judgment in favor of the lender (U.S. Bank) was reversed. The lender filed and voluntarily dismissed two foreclosure actions, both of which purported to accelerate the debt. 899 N.E.2d at 988. After the filing of a third foreclosure action, the Ohio Supreme Court deemed it barred by res judicata, concluding that the loan had never been reinstated. *Id.* at 990. Importantly, for present purposes, the court refused to accept U.S. Bank's attempt to rely on different dates of default, and emphasized that "[t]he key here is that the whole note became due upon Gullotta's breach, not just the installment he missed." *Id.* at 991. Once U.S. Bank "invoked the acceleration clause of the note, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Id.* at 992.

The highest courts in other states apply the same reasoning. In *Johnson v. Samson Constr. Corp.*, 704 A.2d 866 (Me. 1997), a foreclosure action on an accelerated debt had been dismissed with prejudice for failure to file a conference report. When a second foreclosure action was then brought, it was ruled to be barred by res judicata, even though the lender – like U.S. Bank here – attempted to rely on payment defaults subsequent to the filing of the first complaint. *Id.* at 868. Affirming a trial court's summary judgment, the Maine Supreme Judicial Court held that the lender "cannot avoid the consequences of his procedural default in

this second lawsuit by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit." *Id.* at 869. *See also Hamlin v. Peckler*, 2005 WL 3500784, at *2 (Ky. Dec. 22, 2005) (in dictum, stating that "when the mortgagee sought recovery of the entire unpaid indebtedness and sought to subject the real property upon which the mortgage lien had been granted to payment of the indebtedness, a default was asserted with respect to every installment of the debt, foreclosing assertion of some subsequent claim of default").

This Court should reverse the decision of the Fifth District and clarify that *Singleton* does not condone unilateral, automatic or undisclosed reinstatement of validly accelerated debt merely upon dismissal of the original action. Instead, at least some affirmative act is required by the lender, as well as communication of that reinstatement to the borrower. Rejecting the Fifth District's holding would not only be consistent with longstanding Florida case law, but it would also establish a paradigm that conforms with most jurisdictions that have considered the issue.

V. The Fifth District Impermissibly Impaired the Contract Rights of Bartram in Violation of Article I, Section 10 of the Florida Constitution

As described earlier, this Court held in *David* that a mortgagee's contract rights to acceleration under a loan agreement were protected from impairment by the Florida Constitution, Article I, Section 10. "Safeguarding the validity of such

contracts, and assuring the right to enforcement thereof, is an obligation of the courts which has constitutional dimension." 461 So. 2d. at 95. In this case, it is manifest that this principle applies even-handedly. To be sure, in most cases, the borrower may be unhappy with acceleration and at times the occasion for judicial forgiveness may see compelling. Nevertheless, a lender is entitled to expect that courts will accord full validation to proper events of acceleration. In the present situation, the consequences of validation may favor the borrower, but the law must be the same.

According to the mortgage, only Bartram, the borrower, has the right to pursue reinstatement, and the mortgage requires various undertakings by the borrower to undo an acceleration of the mortgage debt. R. I: 259-60 at ¶ 19; R. III: 485-86 at ¶ 19. That never occurred here. Further, even if the contract could be construed to accord reinstatement rights to U.S. Bank, there never was any indication of an intention to reinstate by U.S. Bank, any affirmative act of reinstatement by U.S. Bank, or any communication of reinstatement to Bartram. The record indicates only a successful, valid and effective acceleration of the debt by U.S. Bank under the mortgage contract. *See Bartram*, 140 So. 3d at 1009.

On these facts, Bartram had the right to hold U.S. Bank to its acceleration under the contract, which, as a result, led to the expiration of the limitations bar. Equally certain is the reality that the trial court in the original foreclosure had no

authority to cancel the acceleration and did not purport to do so. Accordingly, it was error of a constitutional dimension for the Fifth District to disregard the contractual reinstatement provision and instead create an automatic and uncommunicated reinstatement to relieve U.S. Bank from its failure to comply with the statute of limitations.

Thus, not only did the Fifth District misinterpret *Singleton* to render the statute of limitations applied to mortgage foreclosure actions "a nullity," *Murphy*, 2014 WL 1653081, at *10, its ruling also ignored the mortgage contract between the parties. By effectively eliminating the parties' reinstatement provision and rewriting their contract for the lender's benefit, that decision ignored the prohibition on impairment of contract contained in the Florida Constitution. *See, e.g.*, *Morton v. Zuckerman-Vernon Corp.*, 290 So. 2d 141, 145 (Fla. 3d DCA 1974) (reversing trial court order relieving borrower of obligation to pay interest under provisions of note and mortgage as an unconstitutional impairment of contract), *cert. denied*, 297 So. 2d 32 (Fla. 1974).

VI. Judicial Rewriting of the Statute of Limitations Contravenes Separation of Powers Principles and Abrogates Legislative Power

In substance, the Fifth District's decision has created a judicial exception to the provision in Florida Statutes § 95.11(2)(c) for a five year statute of limitations for "[a]n action to foreclose a mortgage." Such innovation is an impermissible

encroachment upon legislative authority in violation of separation of powers principles. Article II, Section 3 of the Florida Constitution prohibits one branch of government from exercising powers belonging to another branch. *See Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (Florida's strict separation of powers jurisprudence precludes encroachment on the powers of one branch of government by another), *cert. denied*, 543 U.S. 1121 (2005).

This fundamental principle has been long embraced in Florida where, "[u]nder the doctrine of the separation of the powers of government, the lawmaking function is assigned exclusively to the Legislature." *Pursley v. City of Fort Myers*, 100 So. 366, 367 (Fla. 1924). "Courts construe and interpret the laws, but they do not make them. They should never assume the prerogative of judicially legislating." *Hancock v. Board of Public Instruction of Charlotte County*, 158 So. 2d 519, 522 (Fla. 1963). *Accord State v. Egan*, 287 So. 2d 1, 7 (Fla. 1973) ("Under our constitutional system of government ... courts cannot legislate"). As this Court has expressed the judicial philosophy behind this core value philosophy, "[t]he proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal." *Baker v. State*, 636 So. 2d 1342, 1343 (Fla. 1994).

There is no doubt that the field of limitations is fundamentally legislative in nature. "At common law, there were no fixed time limits for filing lawsuits.

Rather, fixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001). As this Court held in *Major League Baseball*, given the statutory command that "no disability or other reason shall toll the running of any statute of limitations except those specified," the list of eight possible bases for tolling provided in Florida Statutes § 95.091 is the "exclusive list of conditions that can 'toll' the statute of limitations." *Id.* at 1075. Of particular relevance to this case, the pendency of a suit on the same matter, later dismissed, is not included in the statute.

As explained in Section I above, the Fifth District expressly found that U.S. Bank successfully accelerated Bartram's debt on May 15, 2006, *Bartram*, 140 So. 3d at 1009, at which time its cause of action on Bartram's obligation accrued. *Cadle*, 978 So. 2d at 834, *Smith*, 61 F.3d at 1561. The Fifth District's decision, however, would create a new exception to the statute of limitations that makes accrual of a cause of action inoperative if a mortgage foreclosure action based on that accelerated debt is later dismissed for any reason. Creating exceptions to the statute of limitations is properly done only by the Legislature, not the courts. *See, e.g., Federal Ins. Co. v. Southwest Florida Retirement Ctr., Inc.*, 707 So. 2d 1119, 1122 (Fla. 1998) ("when construing statutes of limitations, courts generally will not write in exceptions when the legislature has not"). Ironically, while Florida

courts have held that the pendency of a lawsuit does not toll the statute of limitations for a separate, later filed lawsuit,[12] the Fifth District's result is that a ***dismissal*** of the first lawsuit effectively tolls the statute of limitations for the second action.

Illustrating the separation of powers doctrine is *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002). In *Davis*, this Court unanimously refused to expand the delayed discovery doctrine to suspend the accrual of causes of action for limitations purposes beyond those instances specified by the Legislature in the statute itself. "To hold otherwise would result in this Court rewriting the statute, and, in fact, obliterating the statute." *Id.* at 711. Likewise, here, the Fifth District has served to obliterate the statute of limitations for mortgage foreclosure actions on accelerated debts. If the statute of limitations is to be changed in those circumstances, the decision to do so exclusively belongs to the Legislature.

In disregard of these principles, the Fifth District has essentially stated that to protect the rights of mortgage creditors, as opposed to mortgage debtors, the allegedly harsh effect of the statute of limitations should be judicially overridden.

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[12] *See, e.g.*, *McBride v. Pratt & Whitney*, 909 So. 2d 386, 388 (Fla. 1st DCA 2005) ("when an action is dismissed, the statute of limitations is not tolled during the period that the dismissed action was pending; rather, the statute will run as if the dismissed action had never been filed"), and cases cited therein.

But weighing the public policy considerations behind a statute of limitations – and choosing which side to prefer – are quintessentially legislative functions.[13] If upon consideration of the issue, following input from the public, the Legislature opts to revise the statutory time limits for bringing mortgage foreclosure actions, such is its prerogative. It is not permissible, though, for the courts to do so. Significantly, even if the Legislature were to act, any change would have to be prospective, for it is settled that a defendant has a vested right in the extinguishment of a statute of limitations that has already run. *Wood v. Eli Lilly & Co.,* 701 So. 2d 344, 346 (Fla. 1997) ("once a claim is extinguished by the statute of limitations, it cannot be revived" by either a court decision or legislative action). Accordingly, it was a violation of separation of powers for the Fifth District to create a new exception to the applicable statute of limitations for the benefit of extremely dilatory mortgagees.

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[13] In actuality, statutes of limitations express a legislative desire to protect defendants. *See Major League Baseball*, 790 So. 2d at 1074-75 ("[a] prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims" because "'how resolutely unfair it would be to award one who has willfully or carelessly slept on his rights an opportunity to enforce an unfresh claim'") (quotation omitted).

VII. Considerations of Public Policy also Counsel Rejecting the Fifth District's Decision

Along with its relative isolation from case law elsewhere, the edict of the Fifth District – that acceleration is automatically and retroactively evaporated, leaving no trace, through a dismissal of a foreclosure action for non-prosecution – rests upon a legal fiction. The Fifth District's ruling does not rely on any evidence of the actual intentions of lenders, who may not have intended a reinstatement irrespective of a dismissal on procedural grounds.

Ironically, while the rule of the Fifth District would unfairly benefit grossly dilatory foreclosing banks, it would also eliminate acceleration in many cases where the lender would not want to be stripped of a valid acceleration. After all, most lenders presumably do not delay for more than five years. And yet, while the most inexcusably late lenders might be rescued by the Fifth District, others would unintentionally and improperly lose the considerable benefit of a valid acceleration whenever a dismissal without prejudice occurs. For a mortgagee that refiles, for example, within four years after the original acceleration, the District Court's holding would nonetheless provide that the original acceleration disappeared upon dismissal without prejudice. At a minimum, confusion would ensue over the status of the mortgage obligation and whether the originally-accelerated debt is still

accelerated. Nor does the Fifth District's ruling even consider what might be the highly relevant understanding of borrowers. In the Fifth District's scenario that authorizes unilateral and silent reinstatements, borrowers need not even be told that their loans are no longer accelerated or reinstated, just as no one ever told Bartram.

In short, the Fifth District's ruling has all the defects one would expect of judicial lawmaking. Inevitably, some individual situations might invite compassion for a plaintiff who has allowed the statute of limitations to expire. Such is not the case here, given the extraordinarily dilatory practices of U.S. Bank. But that issue is ultimately irrelevant, because such sympathy, if any, cannot be properly considered when statutes of limitations expired.[14]

U.S. Bank sat on its rights, in disregard of a clear statute of limitations, and has now, as a result of a longstanding legislative enactment, lost the ability to enforce those rights. This situation is not meaningfully different than any other potential plaintiff who has allowed a statute of limitation to expire. Indeed, it is no

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[14] Even if one were to examine the issue as one of common law, "[o]nly in very few instances and with great hesitation" has the Court abrogated or modified any part of the common law, "and then only when there was a compelling need for change and the reason for the law no longer existed." *Raisen v. Raisen*, 379 So. 2d 352, 354 (Fla. 1979) (interspousal immunity retained pending legislative action), *cert. denied*, 449 U.S. 886 (1980). In general, it is the province of the Legislature and not the courts to change the common law (as the Legislature so often does). *Egan*, 287 So. 2d at 6-7.

different than had Bartram's mortgage been unpaid upon maturity after 30 years – rather than have the maturity date accelerated by U.S. Bank – and then U.S. Bank waited over five years to bring suit. No one would contend such an action was timely. Clearly, in light of the 2006 acceleration, this one is too late.

CONCLUSION

The decision of the Fifth District Court of Appeal should be reversed and the summary judgment entered by the Seventh Judicial Circuit Court in favor of Bartram on his cross-claim against U.S. Bank should be reinstated.

With regard to the certified question, Bartram contends that it is improperly phrased because, as is explained above, there can be no payment defaults by the mortgagor until the accelerated mortgage has been reinstated and such reinstatement has been communicated to the mortgagor. The certified question should be rephrased as follows, and answered in the affirmative: Does acceleration of payments due under a note and mortgage in a foreclosure action trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee unless there has been an effective reinstatement of the mortgage and thereafter payment defaults occurring subsequent to the reinstatement?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Lewis Brooke Bartram was served via electronic mail, this 7th day of November 2014, upon the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: /s/ Daniel F. Blonsky