IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1387
DCA NO. 4D15-4561

MARIE ANN GLASS,
Petitioner

v.

NATIONSTAR MORTGAGE, LLC.,
Respondent

AMICUS CURIAE BRIEF OF KORTE & WORTMAN, PA IN SUPPORT OF PETITIONER MARIE ANN GLASS

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

Korte & Wortman, PA, (hereinafter "KW") is a foreclosure defense firm that represented over a thousand homeowners throughout Florida during the foreclosure crisis. Delivering competent, quality, streamlined defense representation to already struggling homeowners rests in large part in allowing them to pay KW a reduced monthly payment, with the contingency that any attorney's fees awarded by a court would belong to the firm. In a handful of cases resolved in favor of the homeowners, KW applied for reciprocal Fla. Stat. §57.105(7) fees pursuant to the mortgage contract/ promissory note's unilateral attorney's fees provision, which became bilateral by operation of the statute. For the last decade, KW was routinely awarded such fees by both trial and appellate courts, if the homeowner prevailed.

In 2017, without any prompt or change in statute from the Legislature, the district courts took it upon themselves to make homeowners forfeit their prevailing party attorney's fees if their dismissal was shaped in any way from succeeding on the affirmative defense of standing. See Nationstar Mtg., LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017), citing Bank of New York Mellon Trust Co., N.A., v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017). Fitzgerald and Glass's "cursed-success" exception has denied and even reversed entitlement to fees awards to KW's other similarly situated clients. See SC18-377, SC17-1620. KW is interested in its clients' statutory rights and expectations being safeguarded by this Court.

SUMMARY OF ARGUMENT

Previously, the district courts of appeal uniformly allowed §57.105(7) to provide reciprocal fees to the prevailing party, where the other party had sought to enforce a contract that contained a unilateral attorney's fees provision. Bank of New York v. Williams, 979 So. 2d 347 (Fla. 1st DCA 2008) (awarding attorney's fees to prevailing party homeowners, *even where they prevailed on the affirmative defense of standing*); Nudel v. Flagstar Bank, FSB, 60 So. 3d 1163 (Fla. 4th DCA 2011) ("defendant is entitled to recover … as a prevailing party under subsection 57.105(7) … after the court granted a motion to dismiss"). Under Glass and Fitzgerald's vogue, new logic, now if a foreclosure homeowner wins on standing as an affirmative defense, then the homeowner essentially proved that "no contract exists between the parties," and if no contract exists, then there is no contract on which to apply reciprocal fees provided under Fla. Stat. §57.105(7). Succinctly put, success on standing brings about the curse of forfeiting reciprocal fees ordinarily available under Fla. Stat. §57.105(7).

Previously, courts recognized only two exceptions to the uniform application of §57.105(7) availability. The first was where the defendant denied that he was a party to the contract, and upon defeating the contract action, sought to hypocritically enforce the attorney's fees provision of that same contract he was purportedly not a party to. The second exception was if the contract itself never came into existence, e.g., if it was void *ab initio* for some reason, then a non-

existent contract's attorney fee provision (or any other provision for that matter) could not be enforced. The Florida Supreme Court makes that distinction between no contract ever existing, versus a contract that was simply unenforceable, with the latter making §57.105(7) reciprocal fees available. See David v. Richman, 568 So. 2d 922 (Fla. 1990); Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989).

Glass and Fitzgerald however represent an unwarranted extension of those two outlined exceptions for declining to assess reciprocal fees under §57.105(7). Now a defendant *who has never denied being a party to the contract* (who readily admits his/her signature on the mortgage/note), if successful on standing as an affirmative defense, is denied reciprocal fees because he inadvertently proved that "no contract existed between the parties." The Glass-Fitzgerald preoccupation with success on standing meaning "no contract exists between the parties" is the wrong focus and should not be conflated to mean that "no contract exists" per se.

The language of the §57.105(7) statute never required "a party" seeking to enforce the contract to be an actual party to the contract. Non-parties to the mortgage contract and note, *like servicers*, are routinely allowed to enforce same upon a showing of authorization. So, if a "non-party to the contract" servicer successfully prosecutes a mortgage foreclosure action to final judgment and is then entitled to fees under the mortgage provision, should not a homeowner likewise be able to receive reciprocal fees under Fla. Stat. §57.105(7) if the homeowner prevails? This particular irony is captured in another pending case of amicus--

Lakmaitree v. 21st Mortgage Corp., SC17-1620, which has been stayed pending Glass. The conundrum of a servicing case exposes Glass and Fitzgerald's blatant attempt to make statutory improvements from the bench as being fraught with the peril of unaccounted for factual iterations unraveling the newfangled logic.

Glass's making the failure to prove *enforceability of a contract* synonymous with the *non-existence of the contract*, not only erases the David-Katz distinction, it leaves prevailing party litigants advancing and insuring the costs of multiple vexatious litigation concerning this same note and mortgage, thereby negating the "equalizing" purposes behind Fla. Stat. §57.105(7). It leads to an asymmetrical outcome where a mortgage contract "exists" so long as a bank is able to prove its *case to enforce* on one of its multiple tries permitted under Florida equity jurisprudence, but the contract magically disappears just as the borrower needs it.

In the average foreclosure complaint, banks maintain their "right to enforce" the mortgage contract and note, *and even seek fees under those loan documents*. So, Glass and Fitzgerald implicate principles of litigation estoppel by allowing the bank to hold inconsistent positions by inoculating banks in continuing to prosecute an ill-advised foreclosure on unforgiving facts and sparing them the natural consequences of reciprocal attorney's fees owed under Fla. Stat. §57.105(7). See Rosenberg v. Metrowest, 116 So. 3d 642 (Fla. 5th DCA 2013). Glass and Fitzgerald turn banks into blessed beneficiaries of defendant's lawyering in being relieved of any statutory obligation to pay for reciprocal fees under the normal

operation of Fla. Stat. §57.105(7). Glass invites gamesmanship by the bank and the misuse of court resources to bring multiple (and sometimes simultaneous) foreclosure actions on the same poor, unprovable evidence, issues present in both Lakmaitree, SC17-1620 *supra*, and another case of amicus-- Salmon v. Foreclosed Assets Sales and Transfer Partnership, SC18-377, also stayed pending Glass.

ARGUMENT

I. The district courts have added statutory language to Fla. Stat. §57.105(7) to manufacture a legal reality at odds with aims of the statute.

Glass and Fitzgerald represent a radical shift in court policy as to whether Fla. Stat. §57.105(7) can compel mutuality to award reciprocal fees, without any change in statute by the Florida Legislature. Now, if a homeowner prevails at a foreclosure trial on the affirmative defense of standing, then the necessary corollary is to assume that "no contract exists between the parties," making reciprocal fees otherwise awardable under §57.105(7), dead on arrival.

> Simply put, to be entitled to fees pursuant to the reciprocity provision of section 57.105(7), the movant must establish that the parties to the suit are also entitled to enforce the contract containing the fee provision. A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract.

Glass, at 899; see also Fitzgerald, at 117, 119 ("[b]ecause Fitzgerald successfully obtained a judgment below that the Bank lacked standing to enforce the subject mortgage and note against her, we find that no contract existed between the Bank

and Fitzgerald that would allow Fitzgerald to invoke the reciprocity provisions of section 57.105(7)"). But is this what the Florida Legislature intended—for courts to undercut a statutory provision it put forward to equalize lop-sided contracts?[1]

Glass's preoccupation with *no contract existing between the parties* is dissonant with how Fla. Stat. §57.105(7) reads:

> (7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

The statute itself does not talk about whether the contract itself must exist "between the parties," this is simply an extra-statutory qualification that Fitzgerald and Glass wrongly read into the statute. Fla. Hurricane Prot. & Awning, Inc. v. Pastina, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) ("the statute means what it says and says what it means, nothing more, mothing less"). The statute does not even require the person that brought the action to be a party to the contract, *per se*. The

[1] Florida Statutes §57.105(7) clearly abrogates the common law. The Florida Supreme Court has held that the "award of attorney fees to the prevailing party 'is a matter of substantive law properly under the aegis of the legislature,' in accordance with the long-standing American Rule adopted by this Court." Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla. 1985). Employing "strict construction" is not a device in the judicial tool box to excuse or ignore the plain language of a statute designed to level the playing field. Fla. Hurricane Prot. & Awning, Inc. v. Pastina, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) ("fees can derive only from either a statutory basis or an agreement between the parties," and "strictly constru[ing] the wording of section 57.105(7)" "is to provide mutuality of attorney's fees as a remedy in contract cases" because "the statute is designed to even the playing field, not expand it beyond the terms of the agreement").

word "party" has no qualifier in front of it, like *contracting* party. The only word qualifying "party," is the article "*a*." The party could be *a* party to the contract or simply *a* party-litigant. *Whichever one* brings the *enforcement action* on a contract containing a one-sided attorney's fees provision, a court may compel mutuality of that fees provision to the other party if the other party prevailed. H&R Block Bank v. Perry, 205 So. 3d 776, 781-82 (Fla. 2d DCA 2016). "[A] party," is just described as someone "required to take an[] action to enforce the contract." §57.105(7).

In foreclosure cases, rarely will the original payee under the note and mortgage bring the suit to foreclose/enforce, and whether the correct successor bank has the right to enforce is not always clear.[2] Florida Statute's 57.105(7)'s broad usage of the word "*a party*" covers many categories of parties bringing actions to enforce the mortgage contract-- agents, successors in interest banks, a

[2] "Proof of entitlement to enforce a note secured by a mortgage can be problematic in 'this era of securitization of mortgage debt and computerized banking.'" Ham v. Nationstar Mortg., LLC, 164 So. 3d 714, 719 (Fla. 1st DCA 2015), citing Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 312 (Fla. 2d DCA 2013) (Altenbernd, J., concurring). As Judge Altenbernd also observed, "the financial institutions have brought these problems upon themselves by the complex methods of securitization and their own sloppy recordkeeping." Focht, 124 So. 3d at 313; see also Ruscalleda v. HSBC Bank, 43 So. 3d 947, 949 (Fla. 3d DCA 2010) (HSBC and American Home Mortgage simultaneously within a week of each other attempted to foreclose the same mortgage "in two different divisions of the circuit court"); Salmon v. Foreclosed Assets and Sales Transfer Partnership, 162 So. 3d 1142 (Fla. 4th DCA 2015) longed for the simplicity of banking in *It's a Wonderful Life*, and the promissory note and mortgage staying put in one place following origination (like the bank vault). Id., at 1143 ("[T]he note was bundled, securitized, and indorsed to a series of holders with inscrutable acronyms … until the note ended up with U.S. Bank Trust, N.A.")..

former payee somewhere on the chain. Given that courts would never deny enforcement/standing to a servicer-non-party to the mortgage contract and note,[3] if all the elements of privity and/or authorization were proven up to enforce same, it is anomalous that for application of reciprocal fees under Fla. Stat. §57.105(7), the defendant is now strapped with an obligation to make sure that both parties are found to be parties to the contract, as if the statute even required such a predicate.

Thus, Glass puts forward a reality that so long as the bank has standing, then a contract will inevitably "exist between the parties," and the mortgage's unilateral fees provision stays intact to avail itself to the winner. However, the moment the little-guy borrower wins on standing, suddenly "no contract exists between the parties." To a borrower, it certainly looks like "a contract exists" when a bank might need it, but magically disappears when a bank might be required to pay. Pastina, 43 So. 3d at 896 ("[t]o rule otherwise would be tantamount to re-writing the contract between the parties"). This asymmetrical risk of litigation and negation of the very purpose of §57.105(7) is better captured in another post Glass

[3] Courts routinely allow *non-parties to a mortgage contract* to bring an enforcement action, awarding fees if so provided for under the mortgage contract, assuming that non-party bank prevails. Mortgage Elec. Registration Sys. v. Revoredo, 955 So. 2d 33 (Fla. 3d DCA 2007) (an entity acting as a collection and litigation agent for current owner of notes and mortgages has standing); Houk v. PennyMac Corp., 210 So. 3d 726, 734 (Fla. 2nd DCA 2017) (a "servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but it must present evidence, such as an affidavit or a pooling and servicing agreement, demonstrating that the real party in interest granted the servicer authority to enforce the note"); Elston/Leetsdale, LLC v. CW Capital Asset Mgmt., 87 So. 3d 14, 17 (Fla. 4th DCA 2012).

case, Lakmaitree v. 21st Mortgage Corp., SC17-1620, which is a "non-party" servicer case presently pending before this court.

The focus on whether the successful dismissal based on standing made the contract "between the parties" non-existent, adds an extra statutory burden neither contemplated by statute, nor the mortgage contract, especially when courts tolerate foreclosure actions by *non-parties to the contract*, and even award them fees under the mortgage contract to which they were not a party. All borrowers are entitled to the statutory remedies found in the §57.105(7) legislation, when they entered into their mortgage contracts. Those remedies should not be erased by the judiciary.

II. Glass Conflates Unenforceability of a Contract with Non-Existence of a Contract, and conflicts with David v. Richman, 569 So. 2d 922 (Fla. 1990) and Katz v. Van Der Noord, 546 So. 2d 1047, 1049 (Fla. 1989).

The Florida Supreme Court in David v. Richman, 568 So. 2d 922 (Fla. 1990), made a quantifiable distinction between *existence* and *nonexistence* of a contract. Attorney's fees are available if the contract is valid, but "is merely found to be unenforceable," and is "distinguish[able from a] situation" "where no contract has ever existed." David, at 924 citing Katz v. Van Der Noord, 546 So. 2d 1047, 1049 (Fla. 1989) (when litigation ensues in connection with a *validly formed contract*, attorney's fees may be recovered under a prevailing party provision even though the contract is later held to be *unenforceable*) and Leitman v. Boone, 439 So. 2d 318, 320 (Fla. 3d DCA 1983) ("distinction between no contract at all and a

contract that is unenforceable," "makes all the difference …"). Glass concedes that the plaintiff bank bears the burden of proof to show it can *enforce the note and mortgage* on which it filed suit. Glass at 898. So, when a plaintiff bank fails in *its* burden of proof that *it* bears, how does that become the problem of the defendant?[4]

The very purpose of Fla. Stat. §57.105(7) was to "even the playing field" for the economically disadvantaged to have counsel to defend against cases that should never been prosecuted by the plaintiff in the first place. Pastina, *infra*; Inland Dredging Co., LLC v. Pan City Port Auth., 406 F.Supp.2d 1277, 1282 (N.D.Fla. 2005) ("[i]f a note gives the holder the right to recover fees incurred in enforcing the note, then, under §57.105(7), the debtor also may recover fees if it prevails in litigation with respect to the note. The statute is clear enough when applied to circumstances of this type"). Fitzgerald concurs that the purpose of Fla. Stat. §57.105(7) was to "statutorily transform a unilateral attorney's fees contract provision into a reciprocal one." Fitzgerald at 117. However, both Glass and Fitzgerald fuse the David-Katz distinction between *unenforceability* and *non-existence* to be able to make the leap that a contract's unilateral fee provision cannot transform into a reciprocal obligation where *no contract exists between the parties*. Fitzgerald, at 117, 119; Glass at 899.

[4] In the past, courts have neutrally applied *substantive* "fees" legislation and not declined to allow prevailing party homeowners in foreclosure actions to receive reciprocal fees as is statutorily permissible under Fla. Stat. §57.105(7), ***even when the defense prevailed on was standing***. Nudel, Williams, *infra*.

The cases relied upon by Fitzgerald and Glass to overreach are inapposite and involved prevailing party-defendants speaking out of both sides of their mouth, resulting in the contract being non-existent, versus merely unenforceable.[5] In Fitzgerald, the appellate court even noted that the Florida Community Bank's reversal was "because Rios's successful, principal defense was that **she was a nonparty** to the mortgage contract." Fitzgerald at 120, citing Florida Community Bank, 197 So. 3d at 1116. Similarly, Glass broadly references Florida Medical Ctr. v. McCoy, 657 So. 2d 1248 (Fla. 4th DCA 1995) as standing for the proposition that where there is no contract between the parties, "there is no basis to invoke the compelled mutuality provisions" of the statute. Glass, slip op. at 3-4. But McCoy is

[5] See Florida Community Bank v. Red Road Residential, LLC, 197 So. 3d 1112 (Fla. 3d DCA 2016) (wife claiming someone forged her signature on mortgage contract, but then asking for fees under the same mortgage contract to which she claimed she was not a party); HSBC Bank USA, N.A. v. Frenkel, 208 So. 3d 156, 158 (Fla. 3d DCA 2016) ("as Frenkel Trust [which was awarded the fees] was not a party to the mortgage containing the subject fee provision, it is therefore unable to derive the benefit of section 57.105(7)'s fee reciprocity"); Bank of New York Mellon v. Mestre, 159 So. 3d 953, 957 (Fla. 5th DCA 2015) (after court determined that Mestres signatures were forgeries, Mestres were no longer parties to the contract to be able to recover fees on a contract that basically didn't exist); Sand Lakes Hills Homeowner's Ass'n. v. Busch, 210 So. 3d 706 (Fla. 5th DCA 2017) ("Busches did not consent to the ARD" and the trial court ruled the ARD ineffective as to the Busches [so as not to] affect their title," so the Busches cannot now rely on the attorney's fees provision in the ARD for the recovery of attorney's fees); cf. HFC Collection Center, Inc. v. Alexander, 190 So. 3d 1114, 1115 (Fla. 5th DCA 2016) (Alexander agreed that "she entered into a written credit card agreement, but denied that the copy attached to the complaint was valid because it did not bear her signature" and "claimed that the charges in question were not authorized by her" and that she "notified American Express" and "did not owe American Express for those charges.").

also like the line of credit card cases where the defendant basically proves *that the defendant* is not liable under the contract, which is a very different proposition than the defendant arguing that *the original plaintiff* was not the real party in interest. So, when *the defendant* Mrs. McCoy was found not liable, [6] she likewise could not receive the blessing of fees either, a holding that is substantively no different than Mestre, Busch, Florida Community, Frenkel, *supra*, where courts found that a prevailing party was barred from taking advantage of fees provision within a contract, where that prevailing party had denied the very existence of the contract.

It was that palpable inconsistency that caused the courts in those instances to conclude that a contract, *whose very existence was denied,* could not provide a basis for triggering the application of §57.105. The difference in those cases is that the defendants were claiming they are not bound by the contract sought to be enforced. *In contrast here, most mortgagor-debtors neither deny the existence of the mortgage or note, nor dispute that their signatures are on the loan instruments*. Most borrowers are saying we owe the money (or maybe some of it), but we're not

[6] In McCoy, both Mrs. and Mr. McCoy signed a hospital authorization to pay a bill, and the question presented was whether Mrs. McCoy was liable after the death of Mr. McCoy. Mrs. McCoy argued that she signed as his agent, and "the hospital lost on its contention that Mrs. McCoy agreed to become liable for the payment of her husband's bill." McCoy at 1251. Thus, the appellate court determined

> in order to be responsible for fees, one first had to be responsible for the bill. But the unappealed result of the trial was that under the agreement Mrs. McCoy had not assumed a responsibility for payment of the hospital bill. It follows that she also did not incur an obligation to pay attorney's fees.

McCoy at 1252.

sure that it is to *this* plaintiff bank, which is usually not the original payee, but a securitized successor bank, who may or may not have the right to enforce.

The case law pre-Fitzgerald and pre-Glass appreciated this difference. Compare Nudel, Williams, *infra*, with Alexander, 190 So. 3d at 1118 ("[t]he fact that no contract was formed is dispositive of the issues presented" and Alexander had pled that though there was a contract, the version attached to the complaint did not represent her signature); Busch, 210 So. 3d at 709 ("stranger to a contract cannot recover attorney's fees based on the contract"). Glass and Fitzgerald however overextended or blurred this previously understood distinction. Without any meaningful case law or statutory authority to support the extension, it was one bridge too far to conflate the failure to prove up the *right to enforce a note* with the "*non-existence of the contract as between the parties*," just to eschew reciprocal fees for delinquent homeowners. The bank can procedurally and substantively foil its own case to enforce a thousand ways, subjecting itself to §57.105(7) fees, but it does not make the contract prosecuted under *become nonexistent*.

The failure to prove up the *right to enforce* could be for a number of reasons,[7] including something as basic as a servicer not having the proper

[7] The constant transfer of negotiable instruments, including the multiplicity of repetitive foreclosure suits being filed on the same note and mortgage, has left a series of landmines for successor banks in their ability to enforce an asset with a compromised litigation history. For context, amicus points out that courts have not hesitated to neutrally apply applicable *procedural* rules to bind successive assignees. See Villalona v. 21st Mortg. Corp., 195 So. 3d 1199 (Fla. 4th DCA

authorization necessary to prosecute on behalf of the principal. Or the failure to enforce could be the result of not re-establishing the elements of a lost note under Fla. Stat. §673.3091, which was one of three grounds for dismissal in the currently pending Lakmaitree, SC17-1620 case. Or a significant pleading defect—like selecting a default date already adjudicated in a prior unsuccessful foreclosure action and subject to res judicata,[8] or having no evidence of meeting the conditions precedent to file, or from allowing the wrong bank to file suit-- a standing defect incurable through substitution of party, which is exactly what occurred in the pending Salmon, SC18-377 case. [9] None of those failures however necessarily translate into a contract *not existing per se*, or a contract failing to be formed.

2016) (applying Rule 1.420(d) to 21st Mortgage because costs and fees of prior action were not yet paid); Nolan v. MIA Real Holdings, LLC, 185 So. 3d 1275 (Fla. 4th DCA 2016) (applying Rule 1.420(a)(1)'s two dismissal rule to a third foreclosure action brought by a successor bank, and binding it to litigation history subjected on the note and mortgage by different first foreclosing bank).

If successor banks are bound by the prior litigation history on the mortgage and note, and held legally responsible for encumbrances *procedurally* engendered by prior holders, then successive assignees are *statutorily responsible* for paying the reciprocal fees *substantively* provided for under Fla. Stat. §57.105(7), if their own shortcomings in proof fail to overcome the defense of standing asserted.

[8] Bartram v. U.S. Bank, N.A., 211 So. 3d 1009, 1020 (Fla. 2016) ("critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action").

[9] Salmon v. Foreclosed Assets and Sales Transfer Partnership, 162 So. 3d 1142 (Fla. 4th DCA 2015) reversed a summary judgment, alerting the bank that there was a glaring standing problem with the wrong party --U.S. Bank-- filing suit. Id. at 1143 ("U.S. Bank had "sold the note on August 9, 2012, twenty days before it filed suit," "through an assignment [to FASTP]," "there [was] a question of fact as

The denial of §57.105(7) prevailing party attorney's fees, after the bank fails to deliver the quantum of proof necessary *to enforce* the note, creates a "heads I win, tails I win" ending for the banks, where the only downside risk to bringing improvident cases is the ability to repetitively refile, with the upside being the

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to whether U.S. Bank, N.A. had standing to file suit on August 29, 2012"). Interestingly, Salmon was awarded unconditional appellate attorney's fees under §57.105(7) alongside that 2015 opinion.

On remand, FASTP did not voluntarily dismiss its foreclosure case. Instead, it *simultaneously* initiated a third foreclosure action against Salmon in 2015, and attempted to consolidate the two actions to avoid prevailing party fees from a voluntary dismissal in the 2012 case and abatement under Rule 1.420(d). Though Salmon successfully opposed the consolidation bath, the net effect was still the inefficient use of court resources to manage the same case out of two different courtrooms, risk of inconsistent verdicts, and the vexatious running up of Salmon's fees and costs to defend multiple litigations concerning the same res.

After these shenanigans were foiled, FASTP elected to try the defective case. Naturally, FASTP lost at trial. Its own witness admitted that it allowed the wrong entity—U.S. Bank—to file suit. Thus, the Salmon SC18-377 appeal takes up Fitzgerald and Glass's punishing logic to make "no contract as between the parties," where FASTP was not only before the court, it was the correct successor party to the contract. FASTP's loss however was due to FASTP's decision to allow the wrong party (U.S. Bank) to file suit, a defect it inherited. Even appreciating the legal consequences of this defect, FASTP still persisted with the suit.

Unfortunately, Glass will only encourage more of this behavior by banks which knowingly bring improper suits to just continue to misuse judicial resources, instead of voluntarily dismissing a troubled case. The appellate court even signaled to FASTP an alternate way to salvage its case for enforcement. See Salmon, 162 So. 3d at 1143 (could show U.S. Bank [the filing plaintiff had] "authority to file suit on behalf of FASTP"). Yet, FASTP failed on this front as well at trial, and its curious post appeal litigation choices demonstrate a lack of merit in continuing or bringing suit, confirming the need for leveling via reciprocal §57.105(7) fees.

Salmon, SC18-377, and to some degree Lakmaitree, SC17-1620 (which is a recycled lost note foreclose suit, thrice dismissed for having the same anemic evidence), expose Glass and Fitzgerald's failed logic by asking why the repeated failure to meet the burden of proof, or irresponsibility in allowing the wrong party to file suit, should be shouldered by the borrower in being denied §57.105(7) fees otherwise available.

costs and fees of the prior failed litigations being rolled over as damages sought in successive foreclosure attempts against to recoup from the borrower. Glass's stripping reciprocal fees from prevailing party homeowners will only reinforce a kind of moral hazard to persist on an ill-advised case with unforgiving facts.[10]

III. The Glass Decision Conflicts with Litigation Estoppel cases

Bank of New York v. Williams, 979 So. 2d 347 (Fla. 1st DCA 2008) was once followed by the Fourth District, see Nudel v. Flagstar Bank, FSB, 60 So. 3d 1163, 1164 (Fla. 4th DCA 2011). Williams awarded Fla. Stat. §57.105(7) attorney's fees to a homeowner who was successful in obtaining a Rule 1.420(b) involuntary dismissal because the proof showed that "the Bank failed to show that it owned the mortgage **and** associated promissory note," and therefore "**lacked standing** to institute the foreclosure action." Williams at 347 (emphasis added).[11]

[10] After HFC Collection Center, Inc. v. Alexander, 190 So. 3d 1114 (Fla. 5th DCA 2016) went back on remand, the county court likewise recounted a long history of hide-the-ball tactics by the bank to avoid fees, and still went ahead and awarded fees under the David-Katz distinction. (2/6/17 HFC Order Granting Sanctions, In the County Court of Orange County, 2011 CC56310(72)); see also Salmon, *infra*.

[11] The mortgage and note are inseparable and work in tandem. Though it is the promissory note that the bank is seeking to enforce, the mortgage controls what is owed on the note. Both instruments generally contain their own respective unilateral attorney's fees provisions, and banks cite both when asserting their rights. Because foreclosure litigation involves the right to enforce *both*, this court should reject any superficial, "mortgage plus note, mortgage without note" differences between Glass and Fitzgerald as a basis upon which to distinguish, when the logic of both cases is equally flawed as to standing.

The First DCA reasoned that if a voluntary dismissal would have entitled Williams to reciprocal prevailing party fees, then certainly an involuntary dismissal (*even one premised on standing*) would entitle her to fees under Fla. Stat. §57.105(7). So, denying Petitioner Glass and those similarly situated with her, i.e. fellow petitioners Salmon and Lakmaitree, their statutorily mandated fees after achieving a successful outcome is akin to the old adage—*let no good deed go unpunished.* The deprivation occurs only *after* the defendant has underwritten the cost of the heavy lifting to achieve the success of an involuntary dismissal.

In the same vein, the new interpretation of §57.105(7) affords banks the opportunity to claim some kind of right of enforcement either as an owner of the note, a holder, a "non-party" servicer, and get fees under the contract when successful. But then, if the bank has a blundered attempt to meet its own burden of proof, Glass judicially spares the plaintiff from the statutorily reciprocal penalties of other contractual aspects, e.g., the attorney's fees provisions. Sousa v. Palumbo, 426 So. 2d 1072, 1073 (Fla. 4th DCA 1983), rejected this kind of logic:

> Upon prevailing against appellant's action [seeking to enforce or interpret the rights or obligations of the parties] the appellees were entitled to fees and costs. Furthermore, in our view, the appellees should not be estopped to invoke this provision because they claimed in defense that there was no enforceable contract. To estop the appellees in such cases is to ignore the plain meaning of the attorneys' fees provision that provides for fees and cost to the prevailing party. ***Indeed, if anyone should be estopped it should be the appellant who claims that the agreement is valid and enforceable against the appellees, but seeks to deny validity and enforceability of the attorneys' fee provision.***

Until now, the district courts would not allow parties who had sought to enforce a contract avoid liability later for a failure in proof by taking an inconsistent position. Nudel v. Flagstar Bank, FSB, 60 So. 3d 1163, 1165 (Fla. 4th DCA 2011) ("we reject [the bank's] argument of estoppel…. Flagstar may not seek affirmative relief under the mortgage and then take the position that provisions of the mortgage do not apply to it"); Rosenberg v. Metrowest, 116 So. 3d 641, 644 (Fla. 5th DCA 2013) ("Rosenberg is estopped from denying liability for attorney's fees because, by bringing suit, he held himself out to be a "member" of the Master Association with standing to sue, … [so] Rosenberg cannot now change his position in order to avoid liability for attorney's fees"); Montero v. Compugraphic Corp., 531 So. 2d 1034, 1036 (Fla. 3d DCA 1988) ("[a] litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions…"). Yet, Glass basically reinvents a new legal reality for the losing party to avoid its obligations under the contract it just sought to enforce.

Equitable estoppel prevents a litigant from changing positions where it was successful with the prior theory so as to prejudice an opponent. Litigation estoppel is different and precludes any change that is "so inconsistent with that previously assumed … as to work a quasi-estoppel." Hodkin v. Perry, 880 So. 2d 139, 140 (Fla. 1956); Montero v. Compugraphic Corp., 531 So. 2d 1034, 1036 (Fla. 3d DCA 1988). Litigation estoppel does not spare a party from having to suffer reciprocal attorney's fees where the party seeking enforcement asserted its own rights to fees

under the contract. MCG Financial Servs., LLC v. Technogroup, Inc., 149 So. 3d 118, 119 (Fla. 4th DCA 2014) (where both parties argued that they were "contract[ually]" entitled to fees "recover[y]," the non-prevailing party was "estopped from arguing … the completely inconsistent position that [it was] not [a] part[y] to the contract, where it had based its case on its claim that [the prevailing party was] bound by the contract").

Glass however spares the bank claiming standing to enforce the contract, including a right to fees thereunder, from having to suffer the consequence of a reciprocally applied fees provision following its failure in proof, thereby conflicting with longstanding litigation estoppel cases. Panel Glass cursorily attempted to touch the estoppel problem, but *en banc* Glass avoided this 800 pound gorilla altogether. Nationstar Mortg., LLC v. Glass, 2017 Fla. App. LEXIS 5062 (Fla. 4th DCA Apr. 12, 2017).

But accounting for pesky precedent is always difficult when one district court (Glass) is bent on showing quick solidarity with another (Fitzgerald), makes a quick grab for standing, despite the appellant bank already having elected to voluntarily dismiss, just to reach a certain outcome. Glass and Fitzgerald violate Federalism 101's prohibition of making law from the bench, by doing a complete about face on awarding fees through a change in court policy, without any change in statute. And in that endeavor, the district courts fail to account for the myriad of factual scenarios and legal precedent that could unravel this new wind of doctrine.

CONCLUSION

Glass's problem is not that it read into an undeveloped record, but that it constitutes an unabashed exercise to add requirements to the statutory language of Fla. Stat. §57.105(7) to undercut its purpose, to ignore longstanding precedent and then conflate well understood legal distinctions. Denying §57.105(7) reciprocal fees was limited to a defendant's hypocrisy in denying the existence of the contract while simultaneously seeking fees thereunder. Now, under Glass and Fitzgerald, the defendant, *who has not distanced himself from the contract*, is punished for proving that *the plaintiff* does not have the right to enforce the contract. This overextension or conflation of the David-Katz *unenforceability–nonexistence* distinction creates an asymmetrical risk of litigation that only the "little-guy" defendant bears. In the same vein, refashioning a plaintiff bank into a "non-party" to avoid reciprocal fees conflicts with the litany of litigation estoppel cases holding a party bound to its own representations concerning standing.

The parties to a mortgage contract, and their respective counsel, are entitled to rely on, as well as to account for, the remedy of reciprocal fees available under §57.105(7) provided by the Florida legislature. Courts should not be able to re-write the statute to eviscerate its purpose, while struggling homeowners basically subsidize repetitive, feeble attempts to foreclose by the wrong banking entity. Amicus Curiae asks this Court to reverse and correct Glass, and it predecessor Fitzgerald for the aforementioned reasons.

So dated, this the 26th of March 2018.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that this Jurisdictional Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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