IN THE SUPREME COURT OF FLORIDA

Case No.: SC17-1387

L.T.: 4D15-4561

MARIE ANN GLASS,

PETITIONER,

VS.

NATIONSTAR MORTGAGE, LLC, ETC., ET AL.

RESPONDENT.

FREDERICK AND JANELLE SABIDO AND OPPENHEIM PILELSKY, P.A.'S AMICUS BRIEF IN SUPPORT OF PETITIONER

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IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THIS CASE

Frederick and Janelle Sabido, clients of Oppenheim Pilelsky, P.A., recently prevailed on appeal in the mortgage foreclosure matter of *Sabido v. The Bank of New York Mellon f/k/a The Bank of New York, Successor to JP Morgan Chase Bank, National Association, as Trustee for Cwalt, Inc. Alternative Loan Trust 2007-J1*, 2017 WL 6506443 (Fla. 4th DCA 2017). Although they prevailed, on the same day, the Fourth District denied their motion for appellate attorney's fees. In a clarification opinion which is now pending discretionary review of this Court, SC18-409, the Fourth District held the Sabidos were not entitled to attorney's fees because the Bank was not a party to the subject note and mortgage. *Sabido v. Bank of New York Mellon*, 2018 WL 735950 (Fla. 4th DCA Feb. 7, 2018).

Oppenheim Law is a foreclosure defense firm which has represented more than a thousand borrowers in foreclosure actions, and currently represents the Sabidos and other similarly situated borrowers facing denial of prevailing party attorney's fees where (1) the plaintiff is not an original party to the contract and (2) standing has been successfully challenged.

The Amici seek to provide a practical perspective on the consequences and implications of eliminating section 57.105(7) as a remedy where standing is disproven.

SUMMARY OF ARGUMENT

The Fourth District's ruling in *Glass Nationstar Mortgage LLC v. Glass*, 219 So. 2d 896 (Fla. 4th DCA 2017), stands for the proposition that a defendant borrower cannot recover attorney's fees pursuant to section 57.105(7) of the Florida Statutes where the plaintiff bank is not an original party to the contract and the defendant borrower has successfully disproven the bank's standing to bring the lawsuit. The decision should be reversed. *Glass* abrogates the plain and logical meaning of section 57.105(7) and endangers access to counsel and access to courts.

ARGUMENT

I. *Glass*, and its progeny. abrogate section 57.105(7).

"[T]he purpose behind section 57.105(7)[1] is to provide mutuality of attorney's fees as a remedy in contract cases." *Fla. Hurricane Protection and Awning, Inc. v. Pastina*, 4 So. 3d 893, 895 (Fla. 4th DCA 2010) (citing to *Mediplex Constr. of Fla., Inc v. Shaub*, 856 So. 2d 13, 15 (Fla. 4th DCA 2003)). "The

[1] Section 57.105(7) provides that

(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.

statute is designed to even the playing field, not expand it beyond the terms of the agreement." *Pastina*, 4 So. 3d at 895. Judge Farmer, dissenting in *Mediplex*, articulated why the legislature felt compelled to make bilateral a unilateral attorney's fee provision:

> Unilateral fee provisions are usually seen in form contracts prepared by commercial entities. Many of these forms govern consumer transactions. The unilateral fee provision tucked away in the legal text of a form contract effectually deprives many consumers of access to the courts to redress contractual breaches. But typically consumers lack sufficient bargaining power to coax business entities into recasting such fee provisions. And commercial parties need no leveling in negotiating contract terms. Thus the purpose behind section 57.105(7) is obviously that the Legislature found bilateral provisions necessary to have representation and, thereby, meaningful access to the machinery of justice in contractual disputes affecting important consumer and family interests.

Mediplex, 856 So. 2d at 16 (Farmer, J., dissenting).

Residential mortgages and promissory notes contain unilateral fee provisions drafted by and in favor of the bank. Section 57.105(7) renders reciprocal such unilateral attorney's fee provisions in order to remedy borrowers' unequal bargaining power in the mortgage transaction. For years, Florida courts have granted attorney's fees to borrowers via section 57.105(7). Indeed, the Fourth District granted fees in fifty-one (51) of fifty-six (56) mortgage foreclosure cases

decided prior to *Glass*, even where the plaintiff bank was not the "original" contracting party and when the defendant borrower proved the bank lacked standing. *See*, App. A. *Glass*, and its progeny, are an aberration. Although *Glass* cites section 57.105(7) as the basis of the ruling, the ruling violates the spirit and express language of the provision.

In holding that a borrower cannot recover attorney's fees after prevailing on a lack of standing defense against a bank who is not the original bank named in the note or mortgage, *Glass* incorrectly limits "party" to mean the original mortgagee with whom the borrower contracted. "Party" appears in section 57.105 at least 23 times, 3 of them in subsection (7). None of the other 20 references have anything to do with one's status with respect to a contract. To the contrary, these 20 references implicate one's status in the litigation (i.e., plaintiff, defendant). Treatment of "party" in subsection (7) as the original mortgagee amounts to complete disregard of the remaining 20 invocations of the word. Courts should not generate dual meanings of "party" where the legislature did not intend duality. As long as a *party plaintiff* files suit to enforce a contract with a unilateral attorney fee provision, and seeks recovery of fees thereunder, the defendant borrower should be entitled to fees if he or she prevails, even if on a lack of standing argument.

II. ***Glass*** **endangers access to competent counsel and qualified legal representation.**

Financial distress is the theme of practically every mortgage foreclosure action. Financial difficulties may preclude the borrower from making timely payments. Those financial difficulties may be the result of loss of employment, death, or disease. The inability to make a payment or two often snowballs into delinquency when the only way to catch up and become current is to remit a lump sum, which the borrower does not have the means to do. Because of the inherent financial distress, legal representation in the foreclosure context contains more than a usual risk of non-payment.

Section 57.105(7) mitigates that inherent risk and renders affordable and feasible that which is otherwise not. It renders reciprocal what is otherwise a one-sided fee provision, and thus allows attorneys to undertake foreclosure matters and represent foreclosure borrowers notwithstanding their inability to afford their services in the short-term. The mutuality of the provision allows attorneys to serve as strong advocates for their clients regardless of the clients' means. Attorneys can focus on defending their rights and interests. Judge Farmer's dissent in *Mediplex*, though it centers on a non-foreclosure matter, captures the connection between the statute and legal representation:

> It is certainly apt to say that this bilateral statute opened the courthouse doors for the Schaubs. Victims of the health care system, brought to the end of their health care coverage by the conduct of Mediplex, found their representation only through an alternative contingency fee agreement and this mutuality statute. I am confident that without this statute no decent law firm (and few lawyers) would have been willing to take on Mediplex and St. Mary's. If judges were to read the statute to make fees-for-fees categorically unavailable under section 57.105(7), the excessive litigation of the fee issue recounted by Judge Fine in the final judgment would eliminate an essential reason for having this statute and discourage any future willingness by lawyers to do what these lawyers did.

Mediplex, 856 So. 2d at 20, Farmer J., dissenting. In abrogating section 57.105(7), *Glass* and its progeny obliterate the incentive to take on foreclosure matters. This fundamentally changes, if not eliminates, the attorney-client relationship in the foreclosure arena since the relationship is usually based upon a quasi-contingent arrangement vis-à-vis the attorney fee provision.

Respondent may argue *Glass* and *Sabido* bar recovery only where the plaintiff bank is someone other than the original party to the underlying note and mortgage, and where lack of standing has not been successfully disputed. Reality does not support that position. The reality is that the great majority of foreclosure cases are not filed by the original contracting party but rather by an assignee, transferee, endorsee, or trustee—and thus not the original contracting bank.

Moreover, one of the most crucial and omnipresent defenses to foreclosure is the plaintiff's lack of standing, which the Fourth District has preserved in countless cases.[2] Given these two realities, *Glass* and *Sabido* practically guarantee that borrowers will **always** be denied recovery of fees under section 57.105(7). This is despite the mutuality principle which drove the enactment of this statutory provision. This is also in contravention of this Court's express recognition that the purpose of prevailing party attorney fee awards is not to provide a monetary incentive to the prevailing litigant but instead to make the prevailing party whole:

> The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. In certain causes of action, attorney fees historically have been considered part of litigation costs and the award of these costs is intended not **only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole.** It can be argued that, rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system. The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed.

[2] A standing defense is not a "technical intricacy." Time and time again, Florida courts have recognized that the standing analysis goes to the merits of a foreclosure case. *See, e.g., Winchel v. PennyMac Corp.*, 222 So. 3d 639, 643 (Fla. 2d DCA 2017). ("Once put at issue by a defendant, then, standing becomes a part of the prima facie case that a foreclosure plaintiff must prove in order to secure a judgment.").

Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla. 1985), holding modified by *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) (emphasis added). Moreover, as referenced above, these attorney's fees do not necessarily flow directly to the prevailing borrower but rather to the attorneys representing them in the quasi-contingent context.

Glass is so broad that it is bound to affect parties in non-foreclosure actions. "Simply put, to be entitled to fees, the movant must establish that the parties to the suit are also entitled to enforce the contract containing the fee provision." *Glass*, 210 So. 3d at 899. Under this logic, in any consumer collection action with a one-sided prevailing party attorney fee, including student loan lawsuits, the borrowers would not be entitled to recover attorney's fees as long as they successfully argue that the named plaintiff does not have the right to sue them (even though the plaintiff hypocritically seeks recovery of attorney's fees when filing the suit). This statutory construction precludes countless categories of borrowers, in various areas of the law, from recovery of attorney's fees under section 57.105(7). Because of its breadth, the foreclosure context is not the only one which *Glass* will adversely affect.

III. ***Glass undermines the gatekeeping function of the court.***

Glass, and its progeny, also erode the gatekeeping function of the courts. Florida's district courts have taken a firm stance with respect to the issue of standing. *See, e.g.*, *Peoples v. SAMI II Trust 2006-AR6, Bank of New York as Successor in Interest to JP Morgan Chase Bank, N.A. as Trustee*, 178 So.3d 67 (Fla. 4th DCA 2015) ("'The first lesson in 'Foreclosures 101': a lender must prove it has standing before the complaint is filed to foreclose on a mortgage.'"). This principle has served as a reminder to banks of the standard to which they must adhere when filing a foreclosure lawsuit. Under *Glass*, banks will have free reign. They can file suit no matter who they are, whether or not they have possession of the original note, because there are no consequences. There will be no recourse or liability if their ability to enforce the note and mortgage is disproven. Borrowers will have to pay for representation against lawsuits that should not have been brought in the first place, with no ability to be made whole for having to defend such wrongful litigation. Banks' unfettered ability to sue without any consequence will propel countless new, unfounded filings and further congest the court system. The result is to seriously impair the duty of courts to protect the interests of all parties.

CONCLUSION

The Sabidos, and Oppenheim Pilelsky, P.A., respectfully request that the Court reverse *Glass* and hold that a borrower who has prevailed in a mortgage foreclosure action based upon the argument that the plaintiff lacks standing or has failed to enforce a note and mortgage is entitled to attorney's fees under section 57.105(7) regardless of whether the plaintiff bank is a signatory or party to the underlying note and mortgage.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2018, a true and correct copy of the foregoing was filed and served electronically on the following counsel of record:

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

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