

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARIE ANN GLASS,)	SC CASE NO.: SC17-1387
)	
Petitioner,)	
)	DCA CASE NO.: 4D15-4561
vs.)	
)	LOWER COURT CASE:
NATIONSTAR MORTGAGE, <i>et al.</i>)	NO. 502013DR027304 NBFJ
)	
Respondent.)	
_____	/	

INITIAL BRIEF ON THE MERITS
OF PETITIONER MARIE ANN GLASS

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Statement of the Case and of the Facts

This appeal contests the interpretation of section 57.105(7), *Florida Statutes*, so as to deny an unopposed motion for appellate fees filed upon the voluntary dismissal of a foreclosure appeal where the underlying loan documents had a fees provision favoring the lender only.

The Verified Complaint filed by Respondent Nationstar Mortgage LLC purported to allege an action to foreclose a reverse mortgage and identified as attachments a "Home Equity Conversion Loan Agreement" ("Loan Agreement") and other loan documents [R-19]; however, the Loan Agreement was not attached to the original pleading. R-25-57. By agreed order [R-112], Respondent amended by interlineation to change the exhibits to the Verified Complaint to the documents appended to a Notice of Filing [R-113], including the "Adjustable Rate Note (Home Equity Conversion)" (the "Debt Instrument") [R-129-133], the "Adjustable Rate Home Equity Conversion Mortgage" (the "Reverse Mortgage") [R-134-145], and the Loan Agreement. R-114-128. The only default alleged was "non-payment of taxes and/or insurance for the subject property." Verified Complaint at ¶7; R-21.

The Debt Instrument provides for an award of attorney's fees in paragraph 7(c):

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, the debt enforced through sale of the Property may include costs and expenses, including

reasonable and customary attorney's fees, associated with enforcement of this Note to the extent not prohibited by applicable law....

R-132. The Reverse Mortgage at paragraph 20 also provides for the award of attorney's fees and costs:

20. Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 20, including, but not limited to reasonable attorneys' fees and costs of title evidence.

R-140. Petitioner Marie Ann Glass ("Glass") moved to dismiss the Verified Complaint, as amended, based on four arguments:

(1) Failing to pay taxes is not a cognizable breach giving rise to a right to foreclose as the Loan Agreement at Section 2.10.5 [R-118] provided that Lender shall pay such "property charges" as "Loan Advances."

(2) The Complaint exhibits contravene the allegation that non-payment of taxes was a default as the Reverse Mortgage reflected a credit line of \$412,500, and the Complaint alleged only \$205,397.93 as having been funded, leaving in excess of \$200,000 on the equity line to fund taxes and insurance.

(3) Failing to allege compliance with the Loan Agreement's claims procedure that required "approval by an authorized representative of the Secretary" in order to default rendered the pleading defective.

(4) The exhibits showed Plaintiff lacked standing to assert the claims alleged as it is not the "Lender" under the Reverse Mortgage, and the Complaint failed to allege any assignment from Lender; Plaintiff's status as "holder" did not afford standing as the Debt Instrument was not a negotiable instrument.

R-168. Thus, in addition to lack of standing, Glass argued that the pleading must allege compliance with any claims procedure set

forth in the Reverse Mortgage or an avoidance of it, and thus the Complaint was defective for failing to allege approval of the Secretary of the Department of Housing and Urban Development ("HUD"). R-173-74. Glass also argued that non-payment of taxes was not a default making the Reverse Mortgage balance due as the Loan Agreement specified that Lender would advance those funds, and the credit limit had not been exceeded.

The trial court dismissed, with leave to amend, without specifying which argument prevailed. R-176. The record has no hearing transcript. The late-filed Amended Complaint [R-179-232] alleged no substantive changes. Glass argued that Respondent had failed to amend and reiterated the same four arguments in a renewed motion to dismiss. R-234-35. The trial court dismissed with prejudice, again without specifying the prevailing argument. R-245. When Respondent moved for rehearing [R-246-258], the trial court entered an order to hear it [R-275], but after hearing argument reconfirmed the dismissal with prejudice, again without specifying the prevailing argument. R-281. The record does not disclose the basis for dismissal as Respondent filed no transcripts.

On appeal, Respondent argued that all the arguments for dismissal were legally insufficient and that it should have been given leave to amend. R-289-309. Glass answered that each of the arguments was an independent, legally sufficient basis for dismissal. The Answer Brief's Table of Contents summarized the

distinct arguments supporting dismissal:

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A.	Physical Possession of Non-Negotiable Debt Instrument in Name of Different Lender Failed to Allege Standing.	8
B.	Remedy for Alleged Non-Payment of Taxes/Insurance Is for Lender to Pay as Loan Advances..	13
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R- 312. The Answer Brief's Statement of the Case [at p.1] alluded to at least one alternative argument to standing:

Appellee Marie Ann Glass ("Glass") contested standing based on possession of a non-negotiable instrument and argued that the alleged breach was not a basis to foreclose under the reverse mortgage, among other arguments. R-214-225.

R-316. Respondent argued that HUD approval was a condition precedent and that the pleading requirement was satisfied by alleging compliance with all such conditions generally. Glass reiterated that HUD approval was a claims procedure that had to be specifically alleged. Glass also argued that compliance with HUD regulations incorporated into the loan documents was a statutory condition precedent, and thus the failure to allege compliance rendered the pleading defective. R-334. *See Palma v. JPMorgan Chase Bank*, 208 So.3d 771 (Fla. 5th DCA 2016) (holding that compliance with HUD regulations was condition precedent under loan terms).

Rather than file a reply brief, Respondent filed a notice of

voluntary dismissal, and the Fourth District dismissed. Supplemental Record ("SR")-6. The Fourth District's "Corrected Opinion" recites that "[a]fter briefing, Nationstar filed a notice of voluntary dismissal...." R-351. In the Opinion on Motion for Rehearing En Banc (the "Opinion"), however, the Fourth District deleted the fact that Respondent had filed a notice of voluntary dismissal. R-409. Thus, lack of standing was not the basis for Glass prevailing on appeal; Respondent voluntarily dismissed.

The Opinion acknowledges that Glass filed a timely motion for appellate fees and costs. *Nationstar Mortg. LLC v. Glass*, 219 So.3d 896, 897 (Fla. 4th DCA 2017). Respondent filed no response in opposition to either the initial motion filed before the dismissal [SR-3-5] or the renewed motion, arguing that the voluntary dismissal made Glass a prevailing party in the appeal. SR-8-10. In denying the fees motion, the Fourth District cited the standing argument, but ignored the other arguments made below and on appeal. In response to Glass's unopposed motion for fees, the Fourth District argued:

The Borrower prevailed in the circuit court based on her argument that the Lender lacked standing under the contract. On appeal, she argued that the court correctly dismissed the Lender's complaint for lack of standing. In a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract.

Id. at 898. In this "situation," however, Glass prevailed after

having offered four distinct arguments before the trial court and then prevailed on appeal because Respondent/Appellant voluntarily dismissed before a decision on the merits. Having entered an order dismissing the appeal [SR-11], the Fourth District had not ruled upon the standing issue. The record contains no definitive ruling that Respondent lacked standing. Whether Respondent actually did have standing is unknown and was never decided by any court. Respondent has never disavowed its allegation that it had standing to pursue the right and remedies under the Debt Instrument, Reverse Mortgage and Loan Agreement.

Standard of Review

The outcome in this case depends upon the interpretation of section 57.105(7), *Florida Statutes*. Because this case is one of statutory interpretation, the standard of review is de novo. *Continental Cas. Co. v. Ryan Inc. E.*, 974 So.2d 368, 373 (Fla. 2008). “[W]here entitlement [to fees] depends on the interpretation of a statute or contract the ruling is reviewed de novo.” *Mihalyi v. LaSalle Bank, N.A.* 162 So.3d 113, 114 (Fla 4th DCA 2014) (citing *Stevens v. Zakrzewski*, 826 So.2d 520, 521 (Fla. 4th DCA 2002)).

Summary of Arguments

In the Opinion, the Fourth District re-wrote the record on appeal to change the precedent and practice of awarding attorney’s fees to parties that prevail in foreclosures and other contract actions by obtaining a dismissal. Reading section 57.105(7),

Florida Statutes, as precluding a party that prevailed by obtaining a dismissal from the trial court and a voluntary dismissal of the appeal when standing was raised as one of several arguments should be reversed for three, independent reasons:

A) Denying fees when the defendant prevails on lack of standing contravenes the express language of section 57.105(7) and adds a restriction not stated in this remedial statute that defeats its remedial purpose. Section 57.105(7) requires that fees be awarded in any action on a contract having a one-way fees provision; it does not limit liability to only a party to the contract.

B) As section 57.105(7) is a prevailing party statute, denying prevailing party fees upon dismissal of the appeal contravenes the holding of *Thornber v. City of Walton Beach*, 568 So.2d 914 (Fla. 1990) and its progeny. Denying fees whenever standing is merely argued creates a new, impermissible collateral tier of litigation on the issue of standing.

C) Denying fees to a defendant forced to defend a claim premised on the claimant's assertion of standing because the claimant fails to properly allege or prove standing improperly inverts principles of litigation estoppel. Litigation estoppel precludes one from occupying inconsistent positions "in the course of litigation or dealing in pais." *Hodkin v. Perry*, 88 So.2d 139, 140 (Fla. 1956). A claimant cannot allege standing in filing suit and then disavow that status to evade liability for fees. Such a rule encourages baseless claims and denies defendants the ability to defeat such improper claims.

I

Reading Section 57.105(7) so as to Deny Fees to Defendants Who Defeat Claims Based on Lack of Standing Contravenes Express Language and Policy Underlying Statute

A. Plain Language of Section 57.105(7) Does Not Require Payer to Be Party to Contract, Only That Action Be Brought on Contract

"As with any case of statutory construction, we begin with the

'actual language used in the statute.'" *Continental Cas. Co. v. Ryan Inc. E.*, 974 So.2d 368, 374 (Fla. 2008) (citing *Borden v. East-European Ins. Co.*, 921 So.2d 587, 595 (Fla.2006)). "This is because legislative intent is determined primarily from the text." *Id.* (citing *Maggio v. Florida Dept. of Labor & Employment Sec.*, 899 So.2d 1074, 1076-77 (Fla.2005)). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Fla. Convalescent Ctrs. v. Somberg*, 840 So.2d 998, 1000 (Fla.2003) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984)). "The rules of statutory construction require that courts give statutory language its plain and ordinary meaning, unless the words are defined by statute." *State v. Cohen*, 696 So.2d 435, 437 (Fla. 4th DCA 1997). In construing a statute, a court "cannot take the liberty of supplying a word"; rather, it is "obligated to give meaning to all words chosen by the legislature." *Atlantic Coast Line R. Co. v. Boyd*, 102 So.2d 709, 712 (Fla. 1958).

Section 57.105(7) provides as follows:

(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....

(Emphasis added). Where an attorney's fees provision runs only in favor of one party, the statute affords attorney's fees to the

other party "in any action, whether as plaintiff or defendant, with respect to the contract." In denying fees, the Fourth District improperly re-drafted the statute to interlineate restrictive language absent from the statute. The Fourth District deleted the modifier "any" from "any action" and re-drafted the provision "when that party prevails in any action" to read: "when that party prevails in **an action brought by the other contracting party.**" One who is not a party to the contract cannot recover fees; however, anyone purporting to bring "any action" on a contract having a one-way fees provision is liable for fees when the contracting party on the receiving-end of the fees provision is sued and prevails.

Construing section 57.105(7) so as to limit the right to recover fees against only the other contracting party improperly imposes a limitation and adds words to the statute not placed there by the Legislature. To restrict the right to recover fees to the single circumstance where the action is brought by the other contracting party is "to invoke a limitation or to add words to the statute not placed there by the Legislature. This we may not do." *Chaffee v. Miami Transfer Co.*, 288 So.2d 209, 215 (Fla. 1974). The statute expansively applies to "any action, ... with respect to the contract." The Fourth District concluded, however, that "where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in

that same contract.” *Nationstar*, 219 So.3d at 898. The Fourth District imposes a privity restriction not contained within the statute’s text and improperly conflates contractual and statutory fees claims. To recover under a contractual fees provision, both the claimant and the payer must be parties to the contract. Section 57.105(7) does not, however, require the payer to be in privity, only that the claim arise from “any action” on the contract.

The Opinion itself recognizes that the statute imposes only two requirements to recover fees:

The plain language of section 57.105(7) has two requirements. First, the party must have prevailed. Second, the party had to be a party to the contract containing the fee provision.

Id. The “plain language” of the statute does not include a provision limiting the right to recovery of fees against an actual party to the contract. Glass prevailed and is indisputably a party to the Debt Instrument and Reverse Mortgage containing the one-way fees provisions. Thus, under the Fourth District’s own reading of the “plain language” of section 57.105(7), Glass is entitled to the award of fees at both the trial level and on appeal.

The Opinion purports to follow *Bank of New York Mellon Tr. Co. v. Fitzgerald*, 215 So.3d 116 (Fla. 3d DCA 2017), reversing a fees award in a case in which the trial court entered an involuntary dismissal after trial when the claimant failed to prove standing. In this case, neither the trial court nor the Fourth District

entered a definitive order that Plaintiff/Appellant/Respondent lacked standing; the dismissal orders did not specify the basis for dismissal nor did the trial court conduct a trial to ascertain that Respondent lacked standing. Moreover, *Fitzgerald's* restrictive interpretation of section 57.107(7) is not only unsupported by the text of the statute, but is also unsupported by the analysis in the cases cited. The *Fitzgerald* court argued that the reciprocal fees provision "cannot transform a contract's unilateral fee provision into a reciprocal obligation where, as here, no contract exists between the parties." Section 57.105(7) does not, however, require the payer to be a party to the contract, but only the fee claimant. Most of the cases cited in *Fitzgerald* involve defendants seeking fees who were not subject to suit under the contract, not defendants who affirmed their status as a contracting party. See *Hanna v. Beverly Enterprises-Fla.*, 738 So.2d 424 (Fla. 4th DCA 1999) (affirming denial of fees under section 57.105(2) because claimant was not party to contract; having been sued in personal capacity and having signed contract only as guardian, he prevailed by disavowing that he was contracting party); *Florida Med. Ctr., Inc. v. McCoy*, 657 So.2d 1248, 1252 (Fla. 4th DCA 1995) (finding that defendant did not incur obligations under contract containing fees provision, no basis existed to invoke mutuality provision of section 57.105(2)); *Florida Cmty. Bank, N.A. v. Red Road Residential, LLC*, 197 So.3d 1112, 1114 (Fla. 3d DCA 2016) (fee

claimant was not party to contract; she asserted that she never signed mortgage and that signature on it was fraudulent); *Bank of New York Mellon v. Mestre*, 159 So.3d 953, 957 (Fla. 5th DCA 2015) (holding that no contractual basis for attorney's fees existed where signatures on mortgage were fraudulent, and thus no contract had ever existed); *Novastar Mortg., Inc. v. Strassburger*, 855 So.2d 130, 131 (Fla. 4th DCA 2003) (holding that fee claimants were purchasers of foreclosed property, not parties to mortgage, and thus not entitled to attorney's fees under mortgage and section 57.105(7) because they were not parties to mortgage). By contrast, Glass is admittedly a party to and has not disavowed that she is a party to the Debt Instrument and the Reverse Mortgage.

Fielder v. Weinstein Design Group, Inc., 842 So.2d 879, 880 (Fla. 4th DCA 2003) is cited in *Fitzgerald* as "finding that individual who was not a party to the contract cannot recover prevailing party fees nor can such fees be assessed against him." *Fielder*, however, involved contractual fees, not statutory fees under section 57.105(7). In *Fielder*, the husband was dismissed as he was not a party to the contract. *Id.* at 880. The case did not address section 57.105(7), but whether Mrs. Fielder was a prevailing party in defending the claim brought against her, thus entitling her to fees under a prevailing party attorney's fee provision in the contract at issue. Section 57.105(7) was not at issue and is inapplicable to contracts affording the right to both

contracting parties to recover prevailing party attorney's fees.

Fitzgerald and the Opinion cite *HFC Collection Ctr., Inc. v. Alexander*, 190 So.3d 1114 (Fla. 5th DCA 2016), which does involve a plaintiff who escaped liability for fees and failed to prove standing; however, the rationale of that case likewise rests on inapposite cases. In *Alexander*, a cardholder could not collect fees against a plaintiff who failed to establish standing based on assignments. *Alexander*, however, also relies on cases in which the fee claimant was not a party to the contract, including *McCoy, Mestre, Strassburger, and Surgical Partners, LLC, v. Choi*, 100 So.3d 1267 (Fla. 4th DCA 2012). In *Surgical Partners*, the defendant avoided the enforcement of an employment contract by successfully arguing that the agreement never became effective because of the failure of a condition precedent. *Id.* at 1268. The award of attorney's fees under that same agreement was reversed because the contract never became legally effective, and thus could not be enforced by either party. *Id.* at 1269. Thus, *Alexander* relies on the infirm basis of cases in which the fee claimant is not a party to the contract, not where a party purporting to sue under the contract is found to lack standing. As explained below, *Alexander* is also premised on a lie told by the losing claimant to each of the tribunals. Thus, *Alexander* and its progeny, *Fitzgerald* and the Opinion, stand for the dubious proposition that liability for fees under Section 57.105(7) can be manipulated by the claimant and

avoided totally by the simple expedient of lying to the court.

**B. Statute Should Be Read so as to
Effect Its Remedial Purpose, Not Defeat It**

Both the Opinion and *Fitzgerald* depart from the clear, unambiguous language of section 57.105(7) by adding restrictive language absent from in the statute. In re-writing the statute, these cases have undermined the statute's remedial purpose and improperly imposed contract restrictions on a statutory right. A right to recover attorney's fees may arise by contract or by statute. The Fourth District's reading improperly imports and imposes a privity requirement inherent only when the basis for fees is contractual to a statutory claim where that privity requirement is not supported by the statutory text or the remedial purpose. The Fourth District concludes that to be entitled to fees under section 57.105(7), "the movant must establish that the parties to the suit are entitled to enforce the contract containing the fee provision." *Nationstar*, 219 So.3d 899. The section 57.105(7) right, however, arises by statute, not contract.

The Opinion's reading of the statute destroys reciprocity altogether. Whenever the defendant prevails, the defendant has succeeded in defeating the claimant's right to enforce the contract to obtain recovery. The Fourth District itself has stated that the holding of *the* Opinion is much broader than when the borrower prevails based on standing:

The borrowers interpret our holding in *Nationstar*

Mortgage LLC v. Glass, 219 So.3d 896 (Fla. 4th DCA 2017) as precluding an award of attorney's fees to a prevailing borrower *only* if the borrower prevailed because the bank failed to prove standing. Yet nothing in *Glass* limits the holding to the standing issue. The holding in *Glass* was broader, focusing on a failure to prove entitlement to enforce a mortgage and note:

[W]here the foreclosing plaintiff does not establish its *right to enforce* the mortgage note at the time of filing of the suit, there is no ability to enforce the terms of the note, including the provision regarding attorney's fees.

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.

Id. at 898, 899 (emphasis added).

Here, the borrowers successfully argued that the Bank ... failed to establish its entitlement to enforce the note and mortgage. "[W]here a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract." *Id.* at 898.

Sabido v. The Bank of New York Mellon, 2018 WL 735950 (Fla. 4th DCA Feb. 7, 2018). Thus, the Fourth District holds that whenever defendants defeat a contract claim, they are not entitled to fees under section 57.105(7). If a defendant defeats the contract claim with a statute of limitations defense, no fees. Notice or failure of condition precedent defense? No fees. Payment defense? No fees. The Opinion eviscerates the reciprocal nature of section 57.105(7) by precluding a prevailing defendant from ever recovering fees. The Opinion contravenes the provision in section 57.105(7)

allowing recovery "whether as plaintiff or defendant." Under *Nationstar/ Sabido*, a successful defendant would never recover fees because successfully defending entails the plaintiff's failure to establish an entitlement to enforce the contract claim.

Section 57.105(7), *Florida Statutes*, was intended to afford a statutory right to recover fees to a disadvantaged class subject to contracts of adhesion and in situations of unequal bargaining power in which the contractual right to recover was drafted only for the benefit of the drafter. Section 57.105(7) vests a fees right in a class of claimants, *i.e.*, the economically disadvantaged party to a contract who does not have the bargaining power to draft the contract provisions or to contest one-sided terms. Thus, in leases granting fees only to "Landlord," the statute gives the prevailing "Tenant" the right to fees when prevailing in any cause of action brought on the lease. For notes granting fees to "Lender," the statute gives the prevailing "Borrower" the right to fees in any action brought on the note. Section 57.105(7) shifts the fees obligation from the party incurring them to the party that wrongfully engaged in litigation giving rise to those fees. Affording these fees to the disadvantaged class assures that the class will be able to obtain representation when meritless claims are brought against members of the disadvantaged class. The proper interpretation of section 57.105(7) so as to effect its intended remedial purpose is to award fees to the class of contracting

parties who prevail in a contract action brought against them when the fees provision is drafted against them, regardless of who files the action on the contract.

The Debt Instrument and the Reverse Mortgage award "Lender" a contractual right to fees. These contractual fees provisions are a one-way street leading to liability in just one direction: the borrower who is the other contracting party paying. That contractual right accrues only to Lender, i.e., the named contracting party, its successors or its assigns (or agent servicer). To recover under that contractual right, the claimant and party claimed against must be in privity, and the claim for fees must be within the circumstances defined for awarding fees under that provision. By contrast, section 57.105(7) vests a statutory right to fees in the contracting party that is on the receiving-end of a one-way fees provision, but the statute does not require privity for the payer to be liable. That statutory right vested in the non-drafter extends to "any action" on the contract, regardless of who brings the action, regardless of whether that party pursuing the contract claim is actually a contracting party or not. The 57.105(7) statutory fees provision is not restricted in its direction, but rather is a sword and shield (awarding fees as defendant or plaintiff). The statute protects the economically disadvantaged contracting party from attack on any and all fronts, from all directions, by making any party that brings "any action"

on the contract potentially liable for fees, provided that the action is the type covered by the fees provision.

Thus, where a note allows "Lender" to collect fees against "Debtor," Section 57.105(7) affords Debtor a right to prevailing party fees against not only "Lender," but any and all persons purporting to be the lender or to otherwise seek to hold Debtor liable under the note. Anyone who professes to be "Lender" or otherwise launches an attack against Debtor on the note and loses is and should be subject to Debtor's statutory claim for fees under section 57.105(7). The statute protects a class of economically disadvantaged parties from the expense of unfair contract litigation. Allowing fees only against a party that is actually in privity but disallowing fees in a more egregious case against someone who does not even have standing to pursue the claim makes no sense from a jurisprudential or policy standpoint. The more culpable misconduct, the more baseless litigation should be more subject to an attorney's fees penalty. If anything, the party lacking standing should be held all the more liable for fees in a fight on a contract that the claimant had no right to start.

Fitzgerald and the Opinion rest on a narrow and constrained reading of section 57.105(7) that is derived by adding language that is not in the text. The Opinion cites *Sand Lake Hills Homeowners Ass'n, Inc. v. Busch*, 210 So.3d 706, 709 (Fla. 5th DCA 2017) for the proposition that the statute is in derogation of

common law, and thus must be strictly construed. It is, however, also a remedial statute. "A remedial statute is one which confers or changes a remedy." *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 298 (Fla. 4th DCA 2005) (citing *Campus Communs., Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002)). "When a statute is both in derogation of the common law and remedial in nature, that rule of strict construction should not be applied so as to frustrate the legislative intent." *Irven v. Dep't. of Health & Rehabilitative Servs.*, 790 So.2d 403, 406 (Fla. 2001) (citing *Golf Channel v. Jenkins*, 752 So.2d 561, 566 n. 4 (Fla. 2000) and *Stokes v. Liberty Mut. Ins. Co.*, 213 So.2d 695 (Fla. 1968)). "The statute should be construed liberally in order to give effect to the legislation." *Id.*

Courts have, in practice, read the provisions of section 57.105(7) broadly as a remedial statute so as to mandate reciprocity of the right to fees to a party not designated in the contract as the awardee of fees. Although Section 57.105(7) and its predecessor (Section 57.105(2)) used the permissive "may" regarding the trial court's authority to award a prevailing party attorney's fee, "the discretion granted by use of 'may' pertains to the determination of a prevailing party in an action founded on a contract." *Landry v. Countywide Home Loans, Inc.*, 731 So.2d 137, 140 (Fla. 1st DCA 1999) (citing *Hutchinson v. Hutchinson*, 687 So.2d 912, 913 (Fla. 4th DCA 1997)). The *Landry* court concluded that once

the prevailing party determination has been made, "we believe section 57.105(2) now mandates that contractual attorney's fees provisions be reciprocal obligations...." *Id.* (citing *Jakobi v. Kings Creek Village Townhouse Ass'n*, 665 So.2d 325, 326 (Fla. 3d DCA 1995)). Under *Landry*, section 57.105(7) (successor to subsection (2)) makes the right to fees accruing under the Reverse Mortgage and Debt Instrument reciprocal as Glass prevailed below by involuntary dismissal and on appeal by voluntary dismissal. *Landry* reads section 57.105(7) as mandating fees to the prevailing defendant/mortgagor, without exception.

To effect its remedial purpose, section 57.105(7) must be read as affording a right to a contracting party that is on the receiving-end of a one-way contractual fee provision to recover fees from anyone who brings "any action" on that contract. And loses, for whatever reason. Allowing a plaintiff that is not a contracting party to profess standing as a party entitled to recover under the contract and recover contractual attorney's fees to then evade liability for fees when that claim is defeated by lack of standing defeats the legislative intent of protecting parties like Glass. In granting a right to collect fees to the "Borrower," "Debtor," "Tenant," or "Mortgagor," the Legislature sought to afford those classes that do not exercise control in drafting such contracts the remedy of recovering fees when they prevail on "any action" on the contract. Whether that Borrower/

Debtor/Tenant prevails because the other party had no right due to lack of standing or due to lack of a contract breach makes no substantive difference. When a plaintiff files "any action" on a contract claiming to be "Lender," "Payee," "Landlord" or "Mortgagee" and loses, section 57.105(7) makes that plaintiff liable for the fees to the contracting party, not because of privity or because plaintiff is actually a party to the contract, but because the statutory right to fees accrues against anyone bringing a losing action on a contract that has been negotiated by parties with unequal economic power or resources so as to make one party subject to liability for fees running only in one direction. The non-contracting plaintiffs cannot complain when they are liable for fees on a failed contract action; they had the option to bring or not bring the suit. The purpose of the statute is to discourage plaintiffs from bringing suits that they may not win. Letting plaintiffs file actions and then escape fees liability when they are unable to establish the first element of the cause of action (standing) defeats the policy of discouraging unfounded (or weakly supported) litigation.

II

Opinion Expressly and Directly Conflicts with *Thornber* and Creates New Tier of Review to Determine Rationale for Dismissals

A. Section 57.105(7) Is "Prevailing Party Statute" Affording Fees to Defendants Procuring Any Dismissal

When a claim is voluntarily dismissed and a prevailing party fees statute applies, the defendant is generally deemed to be the

prevailing party entitled to attorney's fees. *Thornber v. City of Walton Beach*, 568 So.2d 914, 919 (Fla. 1990); see also *Yampol v. Schindler Elevator Corp.*, 186 So.3d 616 (Fla. 3d DCA 2016) (affirming award of attorney's fees to appellees as "prevailing parties" under §718.303(1), Fla. Stat., following voluntary dismissal). The voluntary dismissal of a foreclosure likewise makes the mortgagor a prevailing party for the purposes of fees. See, e.g., *Tunison v. Bank of America*, 144 So.3d 588, 589 (Fla. 2d DCA 2014) (reversing denial of fees where mortgage "contains a provision allowing attorney's fees to the mortgagee if it is required to take action to enforce its rights" and mortgagee dismissed before hearing on motion to dismiss); *Mihalyi v. LaSalle Bank, N.A.* 162 So.3d 113, 115 (Fla 4th DCA 2014) (holding voluntary dismissal made mortgagor prevailing party: "Assuming the request for attorney's fees is properly pled, '[t]he award is mandatory [under section 57.105(7)], once the lower court determines that a party has prevailed,'" citing *Holiday Square Owners Ass'n v. Tsetsenis*, 820 So.2d 450, 453 (Fla. 5th DCA 2002)); *Landry v. Countrywide Home Loans, Inc.*, 732 So.2d 137, 139 (Fla. 1st DCA 1999) (citing *Thornber* for general rule that "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party," and thus concluding trial court abused its discretion in denying mortgagors' request for attorney's fees under section 57.105(7) when mortgagee voluntarily dismissed).

The *Thornber* rule has the virtue of simplicity: dismissal, for whatever reason, makes the defendant the prevailing party entitled to recover fees. Section 57.105(7) is a prevailing party statute. As Respondent dismissed its appeal, Glass should be entitled to fees under the section 57.105(7) prevailing party fees statute pursuant to *Thornber*. Glass did not prevail on appeal because of lack of standing, but because Respondent dismissed its appeal. Respondent did not even contest Glass's right to prevailing party fees. Consistent with *Thornber*, the voluntary dismissal of the appeal should have entitled Glass to prevailing party fees under section 57.105(7), a prevailing party statute.

That a mortgagor achieving an involuntary dismissal based on standing is a prevailing party entitled to fees under section 57.105(7) was recognized in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008) and *Nudel v. Flagstar Bank, FSB*, 60 So.3d 1163 (Fla 4th DCA 2011). In *Williams*, the complaint was dismissed because the bank failed to show it owned the mortgage and note, and thus lacked standing. The borrower was, nonetheless, entitled to prevailing party fees under Section 57.105(7).

The mortgagor's right to prevailing party fees in cases dismissed with prejudice recognized in *Williams* was arguably expanded by the Fourth District in *Nudel v. Flagstar Bank, FSB*, 60 So.3d 1163 (Fla. 4th DCA 2011). In *Nudel*, the trial court dismissed the case without prejudice for lack of standing. *Id.* at 1164.

Citing *Williams*, the *Nudel* court explained that for the purposes of determining “prevailing party,” “we see no reason to distinguish between a voluntary dismissal without prejudice and a court’s involuntary dismissal without prejudice.” *Id.* at 1165. The *Nudel* court then adopted *Williams*: “We agree with *Williams* and conclude that *Nudel* was a prevailing party entitled to recover attorney’s fees.” *Id.* at 1165. The *Nudel* court also rejected the bank’s estoppel argument and invoked estoppel principles as militating against excusing the bank from liability for prevailing party fees: “Flagstar may not seek affirmative relief under the mortgage and then take the position that the provisions of the mortgage do not apply to it.” *Id.* Thus, under *Nudel*, which adopts *Williams*, Glass is a prevailing party at the trial court level for obtaining a dismissal with prejudice on the actions on the Debt Instrument and Reverse Mortgage, just as in *Williams*, and on appeal due to Respondent’s voluntary dismissal.

Consistent with *Williams*, the First District awards prevailing party attorney’s fees to borrowers who obtain a dismissal based on lack of standing. See, e.g., *Walton v. Deutsche Bank Nat’l Tr. Co.*, 201 So.3d 831 (Fla. 1st DCA 2016) (holding that evidence was insufficient to prove trustee had right to enforce note when it filed complaint; October 19, 2016, order granting appellant’s motion for attorney’s fees); *Lacombe v. Deutsche Bank Nat’l Tr. Co.*, 149 So.3d 152 (Fla. 1st DCA 2014) (holding trustee lacked

standing to bring foreclosure action; October 14, 2014, order granting appellant's motion for fees).

The Second District precedent and practice has likewise been to award attorney's fees to borrowers that prevail based on lack of standing. See, e.g., *Peters v. Bank of New York Mellon*, 2017 WL 2304263 (Fla. 2nd DCA May 26, 2017) (reversing foreclosure judgment for bank for failing to prove ownership of lost note that it attempted to reestablish and enforce; May 26, 2017, order granting appellant's motion for attorney's fees under the provisions of the mortgage and §57.105(7)); *Digiovanni v. Deutsche Bank Nat'l Tr. Co.*, 2017 WL 1277737 (Fla. 2nd DCA April 5, 2017) (holding judge was not permitted to independently research mortgagee's renaming to establish standing; April 5, 2017, order granting appellant's motion for attorney's fees pursuant to §57.105(7); May 16, 2017, order denying rehearing); *Corrigan v. Bank of America, N.A.*, 189 So.3d 187 (Fla. 2nd DCA 2016) (holding that evidence was insufficient to demonstrate that mortgagee or its predecessors had standing when original complaint was filed; February 5, 2016, order granting appellant's motion for attorney's fees filed pursuant to mortgage and §57.105(7)); *Stoltz v. Aurora Loan Servs., LLC*, 194 So.3d 1097 (Fla. 2nd DCA 2016) (holding that substituted servicer failed to establish that initial servicer was holder with standing; July 6, 2016, order granting appellant's motion for attorney's fees).

Federal courts have likewise followed *Williams* in reading

Section 57.105(7) as affording borrowers prevailing on lack of standing a right to attorney's fees. In *Sequoia Fin. Sols., Inc. v. Warren*, 660 Fed.Appx. 725 (11th Cir. 2016), the lender failed to establish that it owned the note, and thus the case was dismissed without prejudice for lack of standing. In affirming the award of attorney's fees to the borrowers, the Eleventh Circuit concluded that the award was mandatory:

The [borrowers] seek attorneys' fees under a Florida statute providing that, "[i]f 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." Fla. Stat. § 57.105(7). The award of attorneys' fees under § 57.105(7) is mandatory for the prevailing party. *Holiday Square Owners Ass'n, Inc. v. Tsetsenis*, 820 So.2d 450, 453 (Fla. 5th DCA 2002).

The note and mortgage at issue in this case provided that the holder/lender would be entitled to "reasonable attorneys' fees" incurred in enforcing those agreements. Because both agreements contained a provision allowing for the holder/lender to collect attorneys' fees in enforcing them . . . the borrowers may receive attorneys' fees under § 57.105(7) because they prevailed when the district court dismissed the case.

Id. at 727-28. The Eleventh Circuit's opinion affirmed the district court's opinion adopting *Williams* as stating Florida law:

In cases factually similar to this one, Florida courts have held that defendants are entitled to attorney's fees when a foreclosure action is involuntarily dismissed due to the plaintiff's lack of standing. See, e.g., Bank of N.Y. v. Williams, 979 So. 2d 347 (Fla. 1st DCA 2008) (mortgagor was the prevailing party after the court involuntarily dismissed the bank's foreclosure action for lack of standing)....

Florida law thus instructs that Defendants are the prevailing parties in this case and entitled to attorney's fees pursuant to section 57.105(7).

Sequoia Fin. Sols., Inc. v. Warren, 2015 WL 13022722, at *3 (M.D. Fla. Jan. 28, 2015). Thus, the federal courts bound by *Sequoia* hold that borrowers prevailing based on lack of standing are entitled to fees under 57.105(7).

In this case, the Fourth District never ruled on the issue of standing because Respondent dismissed its appeal. The Fourth District re-wrote the trial court record to ascribe lack of standing as the trial court's basis for dismissing. The trial court never stated which of the four arguments raised was the basis for dismissing. The Fourth District then re-wrote its opinion to try to obviate direct and express conflict with *Thornber*. Omitted from the Opinion is the recitation of the fact included in the panel decision that "[a]fter briefing, Nationstar filed a notice of voluntary dismissal and we dismissed the appeal." "Corrected Opinion on Motion for Attorney's Fees," entered April 12, 2017, at p. 1; R-351. Thus, Glass prevailed in the appeal not based on any standing argument, but because Respondent, claiming standing as "Lender" under the operative loan documents and reiterating that argument on appeal, voluntarily dismissed its appeal. The Fourth District's deletion of that fact in the Opinion does not change it. The Opinion creates two new tiers of appellate review premised on having to ascertain the basis of a trial court's involuntary

dismissal and then intuiting the basis of a voluntary dismissal of an appeal. Under this new procedure, the right to prevailing party fees under Section 57.105(7) becomes a function of the trial court's selection of one or more alternative bases for dismissal and intuiting the subjective intent underlying a claimant's voluntary dismissal. To the extent that the Opinion ever allows a prevailing defendant to recover fees (*Sabido* seems to preclude a prevailing defendant that defeats a contract action from ever recovering), the Opinion creates ambiguity and uncertainty that undermines the simplicity and clarity of the *Thornber* rule.

As Section 57.105(7) is a prevailing party fees statute, under *Thornber*, Respondent's voluntary dismissal of its appeal makes Glass the prevailing party entitled to fees. In denying those appellate fees, the Fourth District directly and expressly violated the *Thornber* rule and created a new and unprecedented doctrine whereby fees under a prevailing party statute are denied upon a voluntary dismissal if the claimant has even alleged the issue of lack of standing in pleadings or briefs. *Thornber* does not authorize an "argument" exception to awarding fees upon a voluntary dismissal of a case involving a prevailing party fees statute. Departing from *Thornber* creates an untenable new category of post-litigation litigation over the issue of the underlying basis for any dismissal.

B. Appellate Court Improperly Intuits Basis for Dismissal Not Supported by Record and Creates New Tier of Appellate Review

In denying Glass's motion based on lack of standing, the Fourth District reads into the orders of the trial court and into the record below words that are not there, stating: "Glass prevailed in the circuit court based on her argument that Nationstar lacked standing under the contract." *Nationstar*, 219 So. 3d at 898. The trial court's initial order of dismissal with leave to amend did not state the basis. R-244. The initial order of dismissal with prejudice [R-245] did not state lack of standing as the basis for dismissal nor did the order reinstating the order to dismiss with prejudice. R-8.

Glass made four different arguments in support of dismissal; the record has no hearing transcripts to reflect the trial court's rationale in dismissing. The record below is devoid of evidence as to which one of the four rationales the trial court adopted in deciding to dismiss with prejudice. Thus, the factual premise of the Opinion that the trial court dismissed based on standing is unsupported by the record. Having dismissed this appeal, the Fourth District never addressed the merits of the arguments raised below. Unlike in *Fitzgerald*, no court ever issued any order that Respondent lacked standing.

In denying the fees motion, the Fourth District argues: "In a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the

contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract." In this "situation," Glass prevailed after having offered four different arguments requiring a dismissal and prevailed on appeal because the Appellant voluntarily dismissed the appeal before a decision on the merits. Having dismissed the appeal, the Fourth District had not ruled upon the standing issue.

It is not within the purview of an appellate court to re-write the trial court's orders that were appealed to add a rationale that the trial court itself never articulated. *See, e.g., Butler v. Yusem*, 3 So.3d 1185, 1186 (Fla. 2009) (where appellate court concluded that trial court "misapplied the term 'due diligence' to express its conclusion that ... [the party] did not justifiably rely on representations.... [t]he Fourth District erred by recharacterizing the trial court's ruling as a lack of justifiable reliance.").

The Fourth District's argument premised on intuiting which one of the four arguments the trial court adopted in dismissing as a premise for denying attorney's fees is the same species of speculation rejected in *Lanahan Lumber Co., Inc. v. McDevitt & Street Co.*, 611 So.2d 591 (Fla. 4th DCA 1993), which reversed the denial of a contractual attorney's fees claim in an arbitration action. In *Lanahan*, a party sought to avoid paying prevailing party fees in accordance with a contractual fees provision based on

intuiting the basis of the arbitrators' decision. The *Lanahan* court rejected the trial court's speculation that the arbitrators' award was based on repudiating the contract in order to deny a contractual fees claim because there was no transcript of the arbitration proceedings and no evidence in the record as to why the party prevailed on the merits in the arbitration other than the contract in evidence. *Id.* at 592. Thus, the trial court erred when it went beyond the express provisions of an arbitration order to intuit the arbitrators' rationale and then deny attorney's fees based on that supposition. Similarly, an appellate court should not attempt to divine the rationale of the trial court in entering an order that does not articulate a specific rationale so as to deny prevailing party fees awarded against the party that filed suit and claimed authority to enforce that contract.

"Without an adequate record of the proceedings below, the appellate court cannot properly resolve factual issues to conclude the trial court's judgment is not supported by evidence or an alternate theory." *JPMorgan Chase v. Combee*, 883 So.2d 330 (Fla. 1st DCA 2004). Affirming dismissal due to counsel's failure to attend a case status conference, the *Combee* court reasoned that "[w]ithout knowing the factual context, neither can an appellate court reasonably conclude that the trial court so misconceived the law as to require reversal." *Id.* The trial court's decision "could well be supported by evidence adduced at trial [or hearing] but not

stated in the judge's order or otherwise apparent in the incomplete record on appeal." *Id.* at 332.

Just as the *Combee* court was not going to intuit what transpired at a case management conference sans a transcript, an appellate court should not try to intuit which of four rationales the trial court adopted in dismissing. The Fourth District relinquished jurisdiction to adjudicate standing when it entered the order dismissing the appeal. It then essentially adjudicated an appellate issue not before it; not posited in any argument raised by Respondent as no opposition was filed to either fees motions; and premised on an incomplete record.

As support for denying fees based on its re-reading of the orders on appeal, the Opinion purports to adopt *Fitzgerald*; however, that case is factually inapposite in that it proceeded to a non-jury trial, and the trial court entered an order of dismissal after finding that the plaintiff lacked standing based on the evidence. The lack of standing in *Fitzgerald* was an adjudicated fact that served as the only basis for involuntary dismissal. The record in this case does not establish which one of the four valid arguments was the basis for dismissal at the pleading stage. Respondent's actual standing (or lack thereof) was never tried and established, but merely alleged. The Opinion rests on a fact finding that was never made by the trial court and ascribes a specific rationale to an order that the trial court itself did not

make. An appellate court should not ascribe a specific rationale to an order or ruling when that rationale is not articulated in the record. The reading of section 57.105(7) should not hinge upon choosing among equally valid, alternative arguments for dismissal to determine if a right to fees arises.

Respondent's failure to allege specifically compliance with a statutory condition precedent offered a valid independent, alternative basis for dismissing. As in *Palma v. JPMorgan Chase Bank*, 208 So.3d 771 (Fla. 5th DCA 2016) and *McIntosh v. Wells Fargo Bank, N.A.*, 226 So.3d 377 (Fla. 5th DCA 2017), the Debt Instrument and the Reverse Mortgage incorporate HUD regulations apposite to reverse mortgages.¹ "Our courts have repeatedly affirmed that failure to comply with a statutory condition precedent, absent waiver or estoppel, requires dismissal." *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389, 393 (Fla. 4th DCA 2003); see also *Hosp. Corp. of Am. v. Lindberg*, 571 So.2d 446, 449 (Fla. 1990) ("We therefore hold that, in medical malpractice actions, if

¹The Reverse Mortgage was issued pursuant to 12 U.S.C. § 1715z-20(j), titled the "Insurance of home equity conversion mortgages for elderly homeowners." Thus, the provisions of the Debt Instrument and Reverse Mortgage track the regulations apposite to HUD-insured reverse mortgages. The requirement to obtain HUD approval in order to foreclose for any alleged breach of an "obligation of the mortgagor under the mortgage [that] is not performed" is imposed by 24 CFR §206.27(c)(2). The requirement to notify the Secretary and receive approval before even notifying the mortgagor that the reverse mortgage is due and owing are statutory requirements imposed by 24 CFR §§206.125(a)(1) and (2).

a presuit notice is served at the same time as a complaint is filed, the complaint is subject to dismissal with leave to amend."); *Levine v. Dade County Sch. Bd.*, 442 So.2d 210, 212-13 (Fla. 1983) (holding that complaint against school board was properly dismissed with prejudice where plaintiff failed to provide written notice to Department of Insurance required by section 768.28(6), and time for compliance expired); *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So.2d 1376, 1377 (Fla. 4th DCA 1997) (finding that failure to provide notice under section 770.01 prior to commencing libel suit required dismissal). Thus, failing to allege HUD approval, a statutory condition precedent, was another basis to dismiss, independent of the standing issue. The Opinion holds, however, that if lack of standing is even argued, correctly or not, the defendant forfeits any 57.105(7) fees claim.

The Fourth District's parsing of the record to deny Glass's fees motion by ascribing lack of standing as the basis among the four rationales for dismissal shall, as described above, have the unintended consequence of creating an entire new tier of appellate review in every foreclosure case. If a mortgagor prevails at trial and then on appeal based on any reason other than standing, under the rationale of *Nationstar*, the mortgagee should then be entitled to escape liability for prevailing party attorney's fees otherwise accruing under section 57.105(7) by arguing mortgagee's own lack of

standing. Under the Fourth District's rationale, mortgagees' about-face in initially claiming standing then disavowing standing to avoid fees is not only permitted, but invited. Under *Sabido*, a standing defense need not even be alleged for the mortgagor/defendant to lose fees; whenever the mortgagor defeats the mortgagee's claim seeking enforcement, the winning defendant/mortgagor forfeits any right to fees.

The Opinion will also have the unintended consequences of discouraging counsel from arguing standing as a defense and causing trial courts to decide the right to attorney's fees by selecting among available defenses. If failure of a notice condition precedent and lack of standing are both viable defenses, counsel has to decide whether to risk foregoing the latter defense in the interests of obtaining prevailing party fees under the first defense. The trial court that finds both defenses are potentially established then adjudicates entitlement to fees based on its selection among available defenses. On appeal, a losing lender would be arguing that it in fact lacks standing in order to avoid fees liability. Thus, in every case in which standing is raised as a defense, the appellate court will have to perform a second tier of appellate review on the standing issue to decide entitlement to fees for the prevailing defendant where the attorney's fees provision runs only in favor of the other contracting party. Insofar as the Fourth District itself reads the Opinion broadly in

Sabido, whenever the defendants win they lose the right to fees.

That the Fourth District culled through the four arguments supporting dismissal to select one as a rationale for denying fees militates against denying fees under section 57.105(7) premised on lack of standing. If the purpose of section 57.105(7) is to protect the economically disadvantaged borrower/tenant/debtor/mortgagor from having to incur fees when wrongfully sued on a contract where fees only run in favor of the drafter, that statutory right should arise whenever or however that borrower/tenant/debtor/mortgagor prevails and should not be denied because lack of standing is among a group of legal arguments for having prevailed.

III

Allowing Mortgagor to Change Positions to Avoid Liability by Disavowing Standing Claimed in Filing Suit Violates Principles of Litigation Estoppel

Estoppel is most commonly invoked to preclude a party who has prevailed based on one argument from changing positions so as to prejudice the opponent. Litigation estoppel, however, arises without one having prevailed on any claim and without detrimental reliance. It precludes any change that is "so inconsistent with that previously assumed by... [a party] as to work a quasi-estoppel." *Hodkin*, 88 So.2d at 140. In *Hodkin*, the plaintiff had supported a by-law allowing doctors then practicing in the district to be staff members with full privileges; he had no objection to it so long as it was to be used only against other

doctors coming into the area, but deemed it illegal when it was enforced against him. *Id.* The volte face was barred by estoppel:

[T]he plaintiff cannot now be heard to say that the by-law is invalid, merely because the 'shoe is on the other foot,' since his present position is so inconsistent with that previously assumed by him as to work a quasi-estoppel against him under the rule of *Campbell v. Kauffman Milling Co.*, 1900, 42 Fla. 328, 29 So. 435, that a party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions.

Id.

"A litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions." *Montero v. Compugraphic Corp.*, 531 So.2d 1034, 1036 (Fla. 3d DCA 1988) (citing *Rigg v. Vernell*, 428 So.2d 668 (Fla. 3d DCA 1982); *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So.2d 38 (Fla. 1st DCA 1970), *cert. denied*, 240 So.2d 641 (Fla.1970)). In *Montero*, the court rejected a party's attempt to raise a defense based on a contractually shortened limitation period, while arguing the contract offer was never accepted. If the offer never became a binding contract, then the time-bar provisions in that offer would also be invalid. Principles of estoppel precluded one party from arguing that no contract existed and that a time-limiting provision in the contract bars the action.

The principles of litigation estoppel are equally apposite to attorney's fees claims. See, e.g., *Rosenburg v. Metrowest Master Ass'n, Inc.*, 116 So.3d 641, 644 (Fla. 5th DCA 2013) ("Rosenburg is

estopped from denying liability for the attorney's fees because, by bringing suit, he held himself out to be a 'member' of the Master Association with standing to sue under section 720.305(1).... Rosenberg cannot now change his position in order to avoid liability for attorney's fees").

In *MCG Fin. Servs., L.L.C. v. Technogroup, Inc.*, 149 So.3d 118 (Fla. 4th DCA 2014), a party was estopped from claiming in opposition to a fees motion the completely inconsistent position that parties it had sued were not in fact parties to the contract:

[L]itigants are not permitted to take inconsistent positions in judicial proceedings and [] a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose."

Id. at 120 (citing *Fed'd Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So.2d 38, 41 (Fla. 1st DCA 1970)). The MCG court read *Nudel* as an estoppel case that precludes a bank from suing on a mortgage and then seeking to avoid fees owed to the prevailing borrower:

Similarly, in *Nudel v. Flagstar Bank*, 60 So.3d 1163 (Fla. 4th DCA 2011), we relied on *Ross [v. Hacker]*, 284 So.2d 399 (Fla. 3d DCA 1973)], and held that a bank could not take inconsistent positions with respect to the applicability of a mortgage so as to avoid attorney's fees. There, Flagstar sued to foreclose *Nudel*'s mortgage and then sought attorney's fees. *Nudel* moved to dismiss on grounds that the mortgage had not been assigned to Flagstar until after the suit had been filed. The court granted the motion to dismiss and *Nudel* sought an award of attorney's fees which were denied. We reversed the denial of fees, because Flagstar sought affirmative relief under the mortgage and could not subsequently take

the position that the provisions of the mortgage did not apply to it.

Id. Thus, consistent with the *MCG* court's reading of *Nudel*, Respondent should be estopped from denying that Respondent is a party to the contract that it sued upon in order to avoid attorney's fees that Glass should recover under section 57.105(7), as applied to the attorney's fees provisions in the Debt Instrument and Reverse Mortgage. The Court should reject the rationale of *Opinion, Fitzgerald* and *Alexander* as inconsistent with principles of litigation estoppel as set forth in *Hodkin, Nudel* and *MCG*.

In all fairness to Respondent, Respondent has not disavowed its standing nor opposed either the original fees motion or the renewed motion. Rather, the Fourth District unilaterally decided to deny these unopposed motions based on an argument that Respondent itself declined to make. Admirably, Respondent declined to make what can only be deemed to be a "duplicitous" argument, as defined in *Alhassid v. Bank of America*, 2015 WL 11110557 (S.D. Fla. Nov. 4. 2015). The *Alhassid* court awarded attorney's fees against Nationstar Mortgage, LLC as an element of damages in the borrowers' action for filing a wrongful foreclosure:

[T]he Court again reiterates the duplicitous nature of [Nationstar's] position: that it can bill its borrower for attorneys' fees spent pressing an unfounded foreclosure and then reverse those charges in order to claim that the money its borrower spent defending the improper action are not recoverable damages for breach of contract.

Id. at *6. Just as it was duplicitous for Nationstar to have

argued that it was entitled to file suit for foreclosure and then deny the borrowers' fees claim arising in defending that wrongful action, it would have been duplicitous for Plaintiff/Appellant/Respondent to oppose the fees motion in this case based on lack of standing after it claimed standing in filing suit and on appeal. Respondent is to be lauded for declining to make such a duplicitous argument in this case. This Court should not, however, permit a ruling that rewards inherently duplicitous arguments and encourages filing unfounded claims.

If a plaintiff claims standing by filing suit, that plaintiff should not be permitted to disavow the legal status claimed in having filed suit in order to avoid a fees claim. *Fitzerald* and the Opinion encourage claimants to, at best, take inconsistent litigation positions in order to avoid section 57.105(7) fee claims, and at worst, to lie about their standing. The sole case supporting the privity requirement cited in those cases is *Alexander*, which is itself based on a lie. The claimant in *Alexander* sought to evade fees liability under section 57.105(7) by lying first to the county court, then to the circuit court, and then to the Fifth District. The bad facts in *Alexander* have made bad law.

In *Alexander*, the county court entered summary judgment holding that the claimant failed to prove that it was an assignee of a contract and thus had no authority to sue and granted the

defendant's motion for attorney's fees based on section 57.105(7). *Alexander*, 190 SO.3d at 1115. The circuit court affirmed, but the Fifth District reversed, adopting the claimant's argument that since the trial court's ruling meant that no contract existed between the claimant and the defendant, no basis existed for awarding fees to her pursuant to section 57.105(7), *Florida Statutes*. The Fifth District concluded that although the county and circuit courts applied the wrong law in awarding and upholding attorney's fees in favor of the defendant, the award may be sustainable under section 57.105(1), *Florida Statutes*, and remanded with instructions that the "county court may then determine whether Alexander complied with the safe harbor provisions or, in the alternative, whether that court wishes to act on its own initiative pursuant to section 57.105(1)." *Id.*

The county court discharged its duties on remand, issuing a detailed 20 page "Order Granting Sanctions against HFC and Its Counsel," entered February 3, 2017, in the County Court in and for Orange County, Florida, Case No.: 2011 CC 5631 O, Filing # 52076133 (the "Sanctions Order"). The county court concluded that the claimant's counsel had failed to produce the "Palisades Assignment" that completed the chain of assignment from the original creditor to claimant:

11. Amanda Rolfe [claimant's counsel] testified that during the September 14, 2011 hearing on Defendant's Motion for Summary Judgment, she realized that they had mistakenly not produced the Palisades Assignment to the

Court or to Ms. Alexander.

12. Both Amanda Rolfe and Lawrence Rolfe testified that shortly after the September 14, 2011 hearing, they verified that HFC and Rolfe & Lobello had actual physical possession of the Palisades Assignment within their files, and had possessed it the entire time dating back to even before this lawsuit was filed.

13. Even though they knew they had physical possession of the Palisades Assignment the entire time this lawsuit was pending, and even though they knew by mid-September 2011 that they had failed to provide it to Ms. Alexander and to the Court, HFC and its counsel did not inform either the Court or Ms. Alexander about the existence of the Palisades Assignment.

14. On February 10, 2012, the Court heard argument on whether Ms. Alexander was entitled to recover reasonable attorney's fees. During that hearing, HFC and its counsel did not produce the Palisades Assignment, and did not inform the Court that they actually had the Palisades Assignment in their possession.

15. Instead, HFC argued that Ms. Alexander was not entitled to recover attorney fees because the lack of the Palisades Assignment meant that there was no contract between HFC and Ms. Alexander.

16. HFC, Rolfe & Lobello, Lawrence Rolfe and Amanda Rolfe all knew that they were advancing a false argument, in that they each had actual knowledge of the existence and their possession of the Palisades Assignment that proved the factual existence of the contract between HFC and Ms. Alexander.

17. The County Court conducted another hearing on Defendant's Motion to Award Attorney Fees and Costs on February 12, 2013. At that hearing, HFC and its counsel did not produce the Palisades Assignment and did not inform the Court of their knowledge and possession of that document.

Thus, the claimant argued that it should be excused from liability due to the lack of standing that the claimant knew it did in fact have. Having lied to the county court, claimant and its counsel

lied to the circuit court on appeal and then to the Fifth District:

23. HFC, Rolfe & Lobello, Lawrence Rolfe and Amanda Rolfe knew these representations in the briefs submitted to the Ninth Circuit Court were false, because they had actual knowledge and physical possession of the Palisades Assignment and actually knew that a contract existed between HFC and Ms. Alexander.

24. HFC and its counsel failed to produce the Palisades Assignment and failed to even inform the Ninth Circuit Court and Ms. Alexander that they actually had the Palisades Assignment that proved the existence of the contract between HFC and Ms. Alexander. This omission was highly material, in that it went to the core of the issue on appeal.

* * * *

27. In its Petition for Certiorari, HFC continued to argue that the missing Palisades Assignment mean that "Petitioner [HFC] was never a real party-in-interest and therefore lacked any evidence substantiating that any agreement existed between the parties."

During their testimony, claimant's counsel admitted that the claimant and counsel's firm "both had knowledge of, and possession of, the Palisades Assignment since before this lawsuit was filed" [*Id.* at ¶37] and that "the business records, including the Palisades Assignment, confirmed that HFC had been properly assigned the contract with Ms. Alexander." *Id.* at ¶39. Nonetheless, for almost 5 years, claimant argued that defendant was not entitled to recover attorney fees because the lack of the Palisades Assignment meant there was no contract between claimant and defendant. *Id.* at ¶44. The lack of candor was exposed during a September 13, 2016, evidentiary hearing; the claimant "and its counsel never apologized to this Court. Instead, they continued to insist they could not be

held liable for Ms. Alexander's attorney's fees." *Id.* at ¶57.

In opposing the motion for rehearing before the Fourth District, Respondent argued that stripping Glass and other defendants of their right to prevailing party fees under section 57.105(7) did not preclude a remedy because, citing *Alexander*, section 57.105(1) offered an alternative mechanism to recover fees. *Alexander* and its aftermath explain in part why the Legislature created a comprehensive and easy-to-apply prevailing party standard in section 57.105(7) that awards fees to the prevailing party on "any" action on a contract, "whether as plaintiff or defendant." Having started in county court, *Alexander* was presumably a claim for less than \$15,000; nonetheless, it spawned two tiers of review, a rehearing and a fact-finding process on remand necessitating a 20 page opinion, all to find out that the claimant lied on the issue of its standing. If plaintiffs can escape liability for fees under section 57.105(7) by disavowing the very standing they claimed in filing suit, disavow they shall do. The defendant is then in the untenable position of trying to prove that the plaintiff does in fact have standing, an untenable position because the plaintiff controls the documents and evidence establishing assignments and other proof of standing. The claimant's lack of candor in *Alexander* was only exposed after five years of litigation in what started as a less than \$15,000 credit card claim. Section 57.105(7) created an alternative statutory fees provision that obviated the need for

satisfying the higher sanctions standard imposed by section 57.105(1).

The protracted litigation in *Alexander* is not an outlier. It is the natural outcome of the Fifth District's misreading of section 57.105(7) and shall become the rule and the norm. All fees claims that had been awarded by trial courts to prevailing defendants under section 57.105(7)² shall devolve into section 57.105(1) sanctions litigation, with collateral litigation as to whether the sanction extends to counsel and the collateral appeal as to satisfaction of the more stringent standard, the winner being the litigant with the resources to withstand six years of litigation and an appeal. The Legislature, in its infinite wisdom, created a simple-to-apply prevailing party statute that awards fees to the contracting party that would otherwise be liable for fees when that party prevails on "any" action on the contract, whether as plaintiff or defendant. That new statutory right was created because the sanctions remedy under section 57.105(1) was not adequate to defend a class of contracting parties on the receiving end of debtor/landlord litigation. To effect its remedial purpose, the prevailing defendant must be allowed to recover fees regardless of the rationale for having prevailed. Imposing a privity

²*Alexander*, *Fitzgerald* and *Glass* are all cases in which the trial court was reversed for having awarded fees to the prevailing defendant. Awarding fees when the defendant procured a voluntary or involuntary dismissal has been the accepted and only pragmatic practice.

requirement whereby a defendant is deprived of fees when a plaintiff lies its way into court by claiming standing it does not have or lies its way out of fees liability by disavowing standing it actually has ignores the statutory text and its remedial purpose and simply defies logic.

Conclusion

Glass requests the Court read section 57.105(7), *Florida Statutes*, in accordance with its express terms as affording a prevailing party, whether as plaintiff or defendant, in "any action" brought on a contract having a one-way fees provision the right to recover fees from the opponent that brought the action on that contract. That statutory right accrues whether the losing plaintiff was actually a party to the contract or not. That is the only reading that comports with the text and remedial purpose of the statute. To read it otherwise is to defeat the remedial purpose and equitable principles of litigation estoppel, encourage litigation by parties that lack lawful standing and cripple the ability of defendants to defend those wrongful actions. The Court should reject a reading that creates a new tier of litigation on the issues of why an action is dismissed involuntarily or voluntarily, which will open the floodgates of collateral litigation on the issue of actual standing (with the parties assuming opposite ends of the issue) as well on section 57.105(1) sanctions claims.

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Certificate of Service

I HEREBY certify that the foregoing has been served by E-mail to Marc James Ayers, Esq., Bradley Arant Boult Cummings LLP, One Federal Place, 1819 Fifth Avenue North, Birmingham, AL 35203-2104 (mayers@babbc.com) on this 15th day of March, 2018.

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Certificate of Compliance

I HEREBY CERTIFY that this Jurisdictional Brief complies with the font requirements of Rule 9.210(a)(2), *Florida Rules of Appellate Procedure*.

/s/ Amy L. Fischer

Attorney