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2017 Bell Ranch Residential v. Burrill, Case No. 2D17-4871 (Fla. 2d DCA 2019).
The statutory presumption under Florida Statute Section 45.033(1) (that the owner of the real property at the time of the filing of the lis pendens is entitled to surplus foreclosure funds) may be rebutted only by proof of either a voluntary or involuntary transfer, or assignment from the record owner to the claimant of the right to collect the surplus.

Gundel v. AV Homes, Inc., Case No. 2D18-899 (Fla. 2d DCA 2019).
Certiorari relief is permitted to seek review of an order denying a motion to dismiss under the Anti-SLAPP statute (Florida Statute section 768.295(3)) because the statute itself seeks to avoid unnecessary litigation.

Nationstar Mortgage LLC v. LHF Hudson, LLC, Case No. 3D18-443 (Fla. 3d DCA 2019).
Bartram v. U.S. Bank, N.A., 211 So. 3d 1009 (Fla. 2016), did not change then-existing law and applies retroactively to revive claims.

Laptopplaza, Inc. v. Wells Fargo Bank, NA, Case No. 3D18-2190 (Fla. 3d DCA 2019).
Attorney's fees may be an element of damages in actions such as fraudulent conveyances and orders determining liability, but amount of damages are not appealable as the order is not yet final.

Davis v. Bailynson, Case No. 4D18-1040 (Fla. 4th DCA 2019).
An attorney alone, not the attorney and his client, may be sanctioned under Florida Statute section 57.105(3)(c). Additionally, fees may be awarded when a suit asserts a theory of liability using more than one, but separate, factual scenarios in support of the theory, and only one of the factual scenarios is not supported by law.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

2017 BELL RANCH RESIDENTIAL LAND TRUST, Appellant, v. CAROL BURRILL and WELLS FARGO FINANCIAL SYSTEM FLORIDA, INC., Appellees.	)	Case No. 2D17-4871

Opinion filed February 1, 2019.

Appeal from the Circuit Court for Hillsborough County; Robert A. Foster, Jr., Judge.

Ivan D. Ivanov of The Ivanov Law Firm, P.A., Tampa, for Appellant.

Kimberly S. Mello and Joseph H. Picone of Greenberg Traurig, P.A., Tampa, and Michele L. Stocker of Greenberg Traurig, P.A., Ft. Lauderdale, for Appellee Wells Fargo Financial System Florida, Inc.

No appearance for Appellee Carol Burrill.

NORTHCUTT, Judge.

Following a mortgage foreclosure, the judicial sale of the encumbered property resulted in a surplus. The circuit court directed the clerk to disburse the surplus sale proceeds to the mortgagor rather than to the owner of the property, and the owner has appealed. We reverse because the order violated statutes governing the distribution of such funds.

In June 2005, Carol Burrill gave a promissory note and attendant mortgage to Wells Fargo Financial System Florida, Inc.,[1] for the purpose of buying property in Brandon, Florida. In December 2012, the 2017 Bell Ranch Residential Trust purchased the property subject to Wells Fargo's mortgage, and it recorded a quitclaim deed from Burrill. In June 2014, Wells Fargo recorded a notice of lis pendens against the property and filed a complaint to foreclose its mortgage. The complaint named Burrill and the Trust as defendants, the former as the debtor and the latter as the property owner. It alleged that Burrill had defaulted on the note by failing to make any monthly payments beginning in July 2010. Burrill did not respond to the complaint, and she was defaulted.

In August 2016, the circuit court entered a consent final judgment of foreclosure and ordered a public sale of the property. The sale resulted in a surplus after payment of the judgment amount, postjudgment interest, and associated fees. Both Burrill and the Trust filed motions for disbursement of the surplus funds, each claiming to have been the owner of the property at the time Wells Fargo recorded its notice of lis pendens. The Trust attached to its motion a copy of the recorded quitclaim

[1]Wells Fargo Financial System Florida, Inc., appeared but did not participate in this appeal.

deed reflecting its ownership since December 2012—seventeen months before the lis pendens was recorded.

After a hearing, the circuit court ordered the surplus disbursed to Burrill. The court acknowledged that the Trust was the title owner. But it awarded the funds to Burrill based on the following reasoning:

> a. [Trust representative], acting on behalf of 2017 Bell Ranch Residential Land Trust paid Carol Burrill $1500 cash and promised Carol Burrill that he would pay her taxes, insurance[,] and mortgage for the property in exchange for title to the property.
>
> b. [Trust representative], acting on behalf of 2017 Bell Ranch Residential Land Trust failed to make any taxes, insurance[,] or mortgage payment for the property as promised.
>
> c. 2017 Bell Ranch Residential Land Trust had a duty to pay the taxes, insurance[,] and mortgage for the property.
>
> d. [Trust representative], acting on behalf of 2017 Bell Ranch Residential Land Trust had been renting the property for a profit.

On its face, the circuit court's order was contrary to the law governing the disbursement of a surplus after a judicial sale. Section 45.031(7)(d), Florida Statutes (2017), states, "If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided in this section and ss. 45.0315-45.035." Section 45.032(2) in turn provides:

> There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to

> the court that such person is entitled to the funds. At any hearing regarding such entitlement, the court shall consider the factors set forth in s. 45.033 in determining whether an assignment is sufficient to overcome the presumption.

(Emphases added.)

Section 45.033(1) iterates that there is "a rebuttable presumption that the owner of record of real property on the date of the filing of a lis pendens is the person entitled to surplus funds." Significantly, under section 45.033(2) the presumption may be rebutted "only by" proof of either a voluntary or involuntary transfer or assignment from the record owner to the claimant of the right to collect the surplus. (Emphasis added.) In this case, no such assignment was alleged or found. Thus, having determined that the Trust was the record owner of the property, the various other circumstances recited by the circuit court were legally superfluous and insufficient to overcome the Trust's entitlement to the surplus. The order contravened the plain and unambiguous language of sections 45.032 and 45.033. See All Ctys. Surplus LLC v. Flamingo S. Beach I Condo. Ass'n, 211 So. 3d 1096, 1097 (Fla. 3d DCA 2017) (determining that the language of section 45.032 is plain and unambiguous).

Accordingly, we reverse the order under review. On remand, the circuit court shall award the surplus funds to the Trust.

Reversed and remanded with instructions.

MORRIS and BLACK, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NORMAN GUNDEL; WILLIAM MANN; and BRENDA N. TAYLOR, individually and on behalf of all similarly situated persons,

Petitioners,

v.

AV HOMES, INC. and AVATAR PROPERTIES, INC.,

Respondents.

Case No. 2D18-899

Opinion filed February 1, 2019.

Petition for Writ of Certiorari to the Circuit Court for Polk County; Andrea Teves Smith, Judge.

Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa; and Kenneth G. Turkel and Shane B. Vogt of Bajo Cuva Cohen & Turkel, P.A., Tampa, for Petitioners.

Daniel J. Fleming and Christian M. Leger of Gray Robinson, P.A., Tampa, for Respondents.

BLACK, Judge.

Norman Gundel, William Mann, and Brenda N. Taylor (the Residents) seek a writ of certiorari quashing the trial court's order denying their motion to dismiss the counterclaim filed by Avatar Properties, Inc., in the Residents' class action lawsuit against Avatar Properties and its parent company, AV Homes, Inc. The Residents assert that by failing to adhere to the language of sections 720.304 and 768.295, Florida Statutes (2017), and by not dismissing the counterclaim as a Strategic Lawsuit Against Public Participation (SLAPP) suit the court departed from the essential requirements of law. We grant the petition and quash the order denying the Residents' motion to dismiss.

I. Background

The Residents filed a class action complaint against AV Homes and Avatar Properties alleging violations of Florida's Homeowners' Association Act, §§ 720.301-720.407, and Florida's Deceptive and Unfair Trade Practices Act, §§ 501.201-501.213, Fla. Stat. (2017), and seeking declaratory relief, injunctive relief, and damages. A brief discussion of the claims in the Residents' complaint and Avatar Properties' counterclaim is necessary to provide context to our decision.

Avatar Properties is the developer of Solivita, the community in which the Residents own homes. In their complaint, the Residents claimed that Avatar Properties and AV Homes violated the law when they created both the Solivita Community Association and the Club Plan, each of which require Solivita homeowners to pay fees.[1]

[1]Membership in both the Solivita Community Association and the Club Plan are mandatory for Solivita homeowners. The association fee is an assessment. The Club Plan governs the "Club amenities" and establishes the "Club dues" or Club fees, which include both expenses, similar to common-area upkeep expenses, and "Club membership fees." The Club amenities are exclusively owned by the "Club

The Residents claim that the imposition of both of these fees is not legal and that certain marketing for the community was deceptive. In creating Solivita, Avatar Properties also established two community development districts (CDDs) to fund infrastructure within the community through additional assessments on homeowners.

The Residents' lawsuit arose after Avatar Properties proposed to sell the Club amenities, as established by the Club Plan, to the CDDs at a cost of $73.7 million. The purchase would be financed through the issuance of bonds, to be repaid by Solivita homeowners including the Residents. The Residents expressed concerns about the proposed sale and publicly commented on the propriety of the $73.7 million suggested purchase price and bond validation proceedings.[2] They posted on Internet blogs, spoke at Solivita CDD meetings, distributed handouts at CDD meetings, commented at other local meetings at which Solivita homeowners were present, and circulated a petition to have the Club amenities appraised. The Residents obtained an appraisal setting the fair market value of the Club amenities at $19.25 million. The Residents also posted on the Internet information about the Bond Validation Case, the mechanism by which the CDDs would be granted the bonds to purchase the amenities. The posts included links to the court filings and summaries of the allegations.

After a failed motion to dismiss the Residents' lawsuit, Avatar Properties filed its answer and a counterclaim. The counterclaim raised three counts which the

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Owner," Avatar Properties, and as alleged by the Residents, the Club membership fees are collected "without deduction of expenses or charges in respect of the Club" as profit to Avatar Properties.

[2]The bond litigation (Bond Validation Case) remains pending below but has not been consolidated with the action at issue here.

Residents allege seek to hold the Residents liable for damages based on constitutionally protected conduct: engaging in free speech, defending and prosecuting lawsuits, and engaging in discourse with governmental entities, the CDDs. Count I of the counterclaim alleged that the Residents breached the purchase and sale agreements "by actively and vocally contesting the validity and enforceability of: (1) the mandatory nature of the membership in the Club; (2) the Club Dues and Membership Fees; and (3) [Avatar Properties'] right to sell the Club [amenities] at its sole discretion." Count II alleged that the Residents breached the affirmative covenant running with the land—the requirements of membership in the Club Plan—"by contesting the validity of the Club Plan, [Avatar Properties'] right to collect Club Dues, and [Avatar Properties'] right to sell the Club [amenities]." Count III of the counterclaim sought a declaratory judgment finding "that the Club [amenities] (and the fees associated therewith) are not subject to [chapter 720]." Count IV claimed tortious interference with contractual relations, alleging that the Residents "unjustifiably interfered with [Avatar Properties'] agreement with the CDDs by contesting the enforceability of the Club Plan." Each count realleged the paragraphs outlining the Residents' conduct: (1) engaging in "extra-judicial conduct aimed at frustrating" the sale of the Club amenities to the CDDs, including posting "misleading information" on the Solivita blog, "handing out fliers to residents that included inaccurate information[,] and contesting [Avatar Properties'] right to collect Club [d]ues"; (2) attending meetings of local clubs/classes for homeowners and contesting the sale of the Club amenities to the CDDs for the requested price; (3) asking residents "to sign petitions contesting [Avatar Properties'] right to sell the Club [amenities]"; and (4) "by virtue of this [lawsuit]" continuing to frustrate Avatar Properties'

"contractual interests." Avatar Properties claimed damages of "increased attorneys' fees in the Bond Validation Case, as well as the delay, frustration, and potential loss of the planned sale to the CDDs," and it argued that the Residents "unjustifiably interfered with [Avatar Properties'] agreement with the CDDs." The purchase agreement between Avatar Properties and the CDDs, dated December 1, 2016, was included in the attachments to the counterclaim.

In their answer, the Residents admitted that they posted information on the Solivita blog and that they "distributed handouts at CDD public meetings"; they admitted to attending classes for residents held by a local club and speaking about the proposed sale of the Club amenities to the CDDs; they admitted that they sought and obtained signatures on a petition for a fair market value appraisal of the Club amenities; and they admitted that Avatar Properties "is trying to sue [the Residents] for filing the above styled class action." The Residents also admitted that they "vocally contested the validity of certain aspects of the Club Plan and the proposed sale of the Club [amenities], as asserted in the official court records in the Bond Validation Case." The Residents filed the affidavit of Mr. Gundel, one of the Residents. Mr. Gundel averred that he made comments and distributed handouts about the proposed purchase of the Club amenities at public CDD meetings "in late 2015 or 2016"; that he posted on the Solivita blog about the Bond Validation Case; that he attended a February 10, 2017, CDD meeting and distributed information about the proposed purchase; that he attended a March 15, 2017, CDD meeting and presented the appraisal petition; and that he attended an April 19, 2017, CDD meeting and presented the appraisal report and

another handout. He further averred that after the class action lawsuit was filed, he attended three more meetings of the CDD and spoke about the proposed purchase.

II. The Anti-SLAPP motion

Simultaneously with their answer, the Residents also filed a "Motion to Dismiss, For Judgment on the Pleadings or For Summary Judgment on Counterclaim and For Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes." The motion alleged that Avatar Properties' counterclaim "openly violates Florida's Anti-SLAPP Statutes because it seeks damages from the [Residents] because they assembled, engaged in free speech, and sought redress before their government," citing sections 768.295 and 720.304.[3]

The Anti-SLAPP statute provides, in pertinent part:

> A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

§ 768.295(3). The Anti-SLAPP statute defines "[f]ree speech in connection with public issues" as

> any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a

[3]For purposes of this opinion, we will refer to section 768.295 as Florida's Anti-SLAPP statute. Both chapter 718 and chapter 720 also contain anti-SLAPP provisions, respectively related to condominium unit owners and parcel owners. §§ 718.1224, 720.304(4), Fla. Stat. (2017).

> governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

§ 768.295(2)(a). "Governmental entity" is defined as "the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof." § 768.295(2)(b).

The Residents' motion quotes the Anti-SLAPP statute and the operative paragraphs from the counterclaim, and it cites Mr. Gundel's affidavit. The Residents argued that "simply allowing SLAPPs to proceed violates the very constitutional rights Florida's Anti-SLAPP Statutes were implemented to protect" and that the trial court was tasked with determining two issues: (1) whether the counterclaim was brought "primarily" because the SLAPP defendants engaged in a protected activity, and (2) whether the counterclaim is "without merit." As to the first issue, the Residents argued that the counterclaim was based solely on protected activities relating to either the Bond Validation Lawsuit or the class action. As to the second issue, the Residents outlined in detail why Avatar Properties' claims were meritless. The Residents sought an expeditious hearing of the motion and dismissal of the counterclaim or judgment in favor of the Residents.

In response, Avatar Properties argued that the Residents expressly waived any constitutional protections afforded to them when they contractually agreed to the Club Plan. In essence, Avatar Properties argued that the contract paragraphs which the Residents claim are legally invalid are the paragraphs which form Avatar

Properties' defense. Avatar Properties did not argue that material facts remained in dispute.

Following a hearing, the trial court entered its order denying the Residents relief. The court treated the Residents' motion only as a motion to dismiss, stating that the Residents could not "substitute a motion to dismiss for either a motion for summary judgment or a motion for judgment on the pleadings." As a result, the court did not consider the motion as a motion for summary judgment or motion for judgment on the pleadings. Based only on the allegations of Avatar Properties' counterclaim, the court found that the Residents failed to show that their conduct fell within the protections of the Anti-SLAPP statute and that the Residents failed to establish that their conduct was made "in connection with" an existing judicial proceeding.

III. Analysis

A. Certiorari jurisdiction

"Before a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the following three elements: '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.' " Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)). The latter two elements are jurisdictional. Id.

Certiorari review has been limited "as a matter of policy to avoid piecemeal review of pretrial orders." Id. at 1134. "However, in numerous cases, Florida courts have permitted certiorari review to determine whether [a party] was afforded the proper process through procedural compliance with the statutory requirements." Id.;

see also Globe Newspaper Co. v. King, 658 So. 2d 518, 519 (Fla. 1995) ("[A]ppellate courts do have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72[, Florida Statutes (1993)] . . . ."). Moreover, certiorari review is appropriate where an "order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review." Rodriguez ex rel. Posso-Rodriguez v. Feinstein, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999); see also SP Healthcare Holdings, LLC v. Surgery Ctr. Holdings, LLC, 110 So. 3d 87, 91 (Fla. 2d DCA 2013) (citing Rodriguez for this standard).

Here, the Residents contend that "the legislature has made it a matter of Florida public policy to recognize and dismiss SLAPP suits expeditiously because the very filing and continuation of" SLAPP suits has the chilling effect on constitutional rights that the Anti-SLAPP statute was enacted to prevent and that, therefore, the jurisdictional prongs of the certiorari standard have been met. We agree.

The legislature enacted the Anti-SLAPP statute in 2000. In creating section 768.295, the legislature specifically found that

> "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their duties, and . . . these lawsuits are an abuse of the judicial process and are used to censor, intimidate, or punish citizens, businesses, and organizations for involving themselves in public affairs . . . .

Ch. 2000-174, § 1, Laws of Fla. The legislature further found that "it is essential in our democracy that the constitutional rights of citizens to participate fully in the process of government be uniformly, consistently, and comprehensively protected and encouraged" and that "the threat of financial liability, litigation costs, . . . and other

personal losses from groundless lawsuits seriously affects . . . individual rights," which courts have recognized as harming individuals' fundamental rights. Id.

The statutory language and its stated purpose, in addition to case law governing similar statutes, supports our conclusion that the jurisdictional prongs of the certiorari standard have been met. Section 768.295(3) creates a right not to be subject to meritless suits filed "primarily because [the defendant] has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state." Cf. Globe Newspaper, 658 So. 2d at 519 ("We read section 768.72 to create a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages.").

To the extent that Avatar Properties argues that the Residents have not established that this court may exercise certiorari jurisdiction because "an alleged error arising from a motion to dismiss is remediable on appeal regardless of whether the motion is granted or denied," Avatar Properties misconstrues the certiorari standard. As this court has stated, "certiorari may be precluded not by the availability of a mechanism for correcting the error itself; rather, the remedy must alleviate *the harm that results from the error*." Gawker Media, LLC v. Bollea, 170 So. 3d 125, 132 (Fla. 2d DCA 2015).

In the context of the Anti-SLAPP statute, the harm that results from the court's improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment and judgment on the pleadings is precisely the harm that the

Anti-SLAPP statute seeks to prevent—unnecessary litigation. See ch. 2000-174, § 1; cf. Williams, 62 So. 3d at 1133-34 ("The certiorari exception for the chapter 766 presuit requirements is premised on the purpose of the Medical Malpractice Reform Act—to avoid meritless claims and to encourage settlement for meritorious claims." (footnote omitted)); Globe Newspaper, 658 So. 2d at 520 ("[A] plenary appeal cannot restore a defendant's statutory right under section 768.72 to be free of punitive damages allegations in a complaint until there is a reasonable showing by evidence in the record or proffered by the claimant."); Fla. Hosp. Med. Servs., LLC v. Newsholme, 255 So. 3d 348, 350 (Fla. 4th DCA 2018) ("Certiorari jurisdiction lies to review whether a trial court has complied with the procedural requirements of section 768.72(1)." (citing Tilton v. Wrobel, 198 So. 3d 909, 910 (Fla. 4th DCA 2016))). In that way, the Anti-SLAPP statute bears some similarity to statutes providing for immunity from suit where the statutory protection cannot be adequately restored once it is lost through litigation and trial. See James v. Leigh, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014) ("When the trial court denies a motion to dismiss on immunity grounds, certiorari review of the non-final order is proper because absolute immunity protects a party from having to defend a lawsuit at all and waiting until final appeal would render such immunity meaningless if the lower court denied dismissal in error." (citing Fla. State Univ. Bd. of Trs. v. Monk, 68 So. 3d 316, 318 (Fla. 1st DCA 2011))); see also LoBiondo v. Schwartz, 970 A.2d 1007, 1020 (N.J. 2009) (discussing the two categories of anti-SLAPP statutes and citing Florida's as within the category that "include[s] a legislative declaration that a public participant who has exercised his or her free speech right, sometimes in statutorily defined manner, enjoys immunity"). That is, if certiorari review is not available, the

substantive right created by the Anti-SLAPP statute "is illusory and the very policy that animates the decision to" prevent SLAPP suits is frustrated such that the "statutory protection becomes essentially meaningless for the individual defendant." See Keck v. Eminisor, 104 So. 3d 359, 365-66 (Fla. 2012) (quoting Tucker v. Resha, 648 So. 2d 1187, 1190 (Fla. 1994)).[4]

B. Departure

1. Procedural mechanisms for resolution

The Residents contend that the trial court departed from the essential requirements of law by failing to adhere to the procedures set forth in the Anti-SLAPP

[4]We have found only two Florida state cases discussing SLAPP suits: Two Islands Development Corp. v. Clarke, 239 So. 3d 115 (Fla. 3d DCA 2018), and Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County, 616 So. 2d 562 (Fla. 5th DCA 1993). Neither case discusses whether certiorari relief is warranted in the context of SLAPP suits. Two Islands does, however, affirm the dismissal with prejudice of three counts of a lawsuit against homeowners who protested the development of land and "interfer[ed] in and prevent[ed] a settlement" of an ongoing action involving the vested rights of property owners, holding—without elaboration—that the trial court properly dismissed those counts "upon a determination that those counts were barred by Florida's anti-SLAPP statute, section 720.304, Florida Statutes (2015)." 239 So. 3d at 121, 126 n.10. Florida Fern Growers, in addressing the argument that a particular lawsuit was a SLAPP suit, stated, "[a] SLAPP suit has been described as 'one filed by developers, unhappy with the public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.' " 616 So. 2d at 570 (quoting Westfield Partners, Ltd. v. Hogan, 740 F.Supp. 523, 525 (N.D. Ill. 1990)). We note, too, that "[l]itigants' right to interlocutory appeal of anti-SLAPP motion decisions has been acknowledged in state courts in California, Georgia, Maine, Massachusetts, New Mexico, and Pennsylvania, and federal courts have allowed immediate appeal of holdings under the anti-SLAPP statutes of California, Louisiana, and Georgia." Carson Hilary Barylak, Note, Reducing Uncertainty in Anti-SLAPP Protection, 71 Ohio St. L.J. 845, 879-80 (2010) (footnotes omitted). The Maine Supreme Court has stated that it permits "interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP statute because a failure to grant review of these decisions at this stage would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights." Schelling v. Lindell, 942 A.2d 1226, 1229-30 (Me. 2008).

statute. They argue that the statute expressly permits resolution of SLAPP claims through a motion for summary judgment and that the court's failure to consider their motion as both a motion to dismiss and a motion for summary judgment constitutes a departure.

The Anti-SLAPP statute provides that

> [a] person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response.

§ 768.295(4).[5] The Anti-SLAPP statute plainly authorizes the filing of a motion to dismiss or motion for summary judgment. While it does not elaborate on a motion seeking dismissal, the statute expressly provides that once a motion for summary judgment, "together with supplemental affidavits," has been filed, the claimant (Avatar Properties) "shall thereafter file a response and any supplemental affidavits." Id. The statute then establishes the duty of the court to, "[a]s soon as practicable, . . . set a hearing on the motion, which shall be held at the earliest possible time after" the claimant files its response. Id. Therefore, the statute sets forth the procedural

[5]The language of sections 720.304(4)(c) and 768.295(4) are identical in terms of the procedure to be used by the parties and the trial court, as applicable to this case.

mechanisms by which a SLAPP defendant may invoke its substantive right—a motion seeking dismissal or summary judgment—as well as the requirement to hear such motions expeditiously.[6]

And although it is true that motions for dismissal and motions for summary judgment serve separate purposes, "are not interchangeable, and one may not be substituted for another," contrary to the trial court's determination not to hear the motion for summary judgment filed by the Residents with their motion to dismiss, motions filed in the alternative are permitted. See U.S. Bank Nat'l Ass'n on Behalf of Holders of the Home Equity Asset Tr. 2002-4 Home Equity Pass-Through Certificates, Series 2002-4 v. Doepker, 223 So. 3d 1083, 1084 (Fla. 2d DCA 2017) (citing Holland v. Anheuser Busch, Inc., 643 So. 2d 621, 622-23 (Fla. 2d DCA 1994)). That one motion cannot substitute for the other does not allow the court to decline to rule on an otherwise facially and substantively sufficient motion.

As relevant here, Florida Rule of Civil Procedure 1.510 governs summary judgment and provides that "[a] party against whom a claim [or] counterclaim . . . is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." Fla. R. Civ. P. 1.510(b). It further provides that "[t]he judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is

[6]We note that while the statute does not state that a SLAPP defendant may file a motion for judgment on the pleadings, as it does a motion for summary judgment, it provides that a defendant "may move the court for an order . . . granting final judgment." § 768.295(4).

entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The content of the document and its attachments must support the relief requested, thereby allowing the court to rule upon the motion based upon its respective purpose and standard. Cf. HSBC Bank USA, Nat'l Ass'n for Deutsche Alt-A Sec. Mortg. Loan Tr., Series 2007-OA5 v. Nelson, 246 So. 3d 486, 489 (Fla. 2d DCA 2018) ("[T]he character of a motion will depend upon its grounds or contents, and not on its title." (quoting Jones v. Denmark, 259 So. 2d 198, 200 n.1 (Fla. 3d DCA 1972))). The Residents' motion for summary judgment was supported by the contemporaneously filed affidavit of Mr. Gundel and sought judgment in favor of the Residents; Avatar Properties did not raise any material facts in dispute in its response to the motion, and it did not file any affidavits in opposition. That the Residents' motion was filed as a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings does not relieve the trial court of its statutory obligations to consider the motion under each standard where the motion was facially sufficient and in compliance with the rules of civil procedure and to set a hearing "[a]s soon as practicable" and "at the earliest possible time."

Because the statute allows for the filing of either or both a motion to dismiss and a motion for summary judgment, and because the motions may be filed within one document under an alternative heading, the trial court departed from the essential requirements of the law in declining to consider the Residents' motion as a motion for summary judgment. The motion should be heard on the evidence and pleadings on record as of the date of the hearing on the motion to dismiss.

2. Dismissal

The Residents also contend that the trial court departed from the essential requirements of law in denying the motion to dismiss based on its application of an "inapt" dismissal standard, that applied to motions to dismiss for failure to state a cause of action. See, e.g., Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008). The Residents argue that the motion to dismiss was not based on Avatar Properties' failure to state a cause of action because the Anti-SLAPP statute focuses not on whether a cause of action has been sufficiently alleged but on whether the activity that is alleged to have given rise to the cause of action is protected activity; they contend that the trial court's failure to consider Mr. Gundel's affidavit and Avatar Properties' failure to file any conflicting evidence constitutes a departure. The Residents' argument suggests that a motion to dismiss based on the Anti-SLAPP statute requires the trial court to do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant. We agree.

As discussed above, the Anti-SLAPP statute authorizes the filing of a motion seeking dismissal and a motion seeking summary judgment. Whereas the statute sets forth the procedures for considering a motion for summary judgment, the statute is silent as to the burden or procedure for considering a motion to dismiss. The language of the statute does, however, attach the action to the claimant rather than the SLAPP defendant: "[a] person or governmental entity in this state may not file," thus prohibiting the claimant from taking action, rather than "a person or entity may not be sued by a governmental entity or another person." § 768.295(3). The statutory language supports requiring the claimant to meet a burden.

Placing the initial burden on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies and then shifting the burden to the claimant to demonstrate that the claims are not "primarily" based on First Amendment rights in connection with a public issue and not "without merit" serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. See, e.g., Volkswagen Aktiengesellschaft v. Jones, 227 So. 3d 150, 155 (Fla. 2d DCA 2017) (discussing the shifting burden for motions to dismiss based on lack of personal jurisdiction); Becker v. Clark, 722 So. 2d 232, 233 (Fla. 2d DCA 1998) (discussing the shifting burden for motions to dismiss based on qualified immunity). In considering motions to dismiss as to its anti-SLAPP statute, the Maine Supreme Court has stated that "the defendant carries the initial burden to show that the suit was based on some activity that would qualify as an exercise of the defendant's First Amendment right to petition the government" such that the anti-SLAPP statute applies and then "the burden falls on the plaintiff to demonstrate that the defendant's activity" is actionable. Schelling v. Lindell, 942 A.2d 1226, 1229 (Me. 2008) (quoting Title 14 M.R.S. § 556). The trial court here found that the Residents (1) "failed to show that [their] alleged conduct . . . constitute[d] protected statements before government entities" based on the "[in]sufficient context" in Avatar Properties' counterclaim and (2) "failed to show that their alleged conduct was made 'in connection with' or 'in the course of' an existing judicial proceeding" based on the conduct being "limitedly described [and] lack[ing] sufficient context and temporality" in Avatar Properties' counterclaim. The effect of placing the burden exclusively on the SLAPP defendant based only on the

claimant's allegations allows the claimant to avoid dismissal by being intentionally vague, thus thwarting the purpose of the statute.

Here, the vagueness of Avatar Properties' allegations as to the dates of specific conduct and as to the conduct itself prevents the trial court from determining from the face of the counterclaim that the Residents' actions constitute "free speech in connection with public issues" or instruction of representatives of government. Thus, while it may be clear from the face of the counterclaim that Avatar Properties has based some part of its claims on the filing of the class action and on the Residents' opposition to the Bond Validation Case, the trial court could not determine that Avatar Properties' claims were primarily based on protected activities, as the Anti-SLAPP statute requires. The Residents' motion and supporting affidavit attempt to provide the facts necessary to support dismissal. The trial court must expeditiously address the merits of the Residents' motion under the appropriate standard. See § 768.295(4).

IV. Conclusion

The petition for writ of certiorari is granted. The order denying the Residents' "Motion to Dismiss, For Judgment on the Pleadings or For Summary Judgment on Counterclaim and For Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes" is quashed for the reasons stated herein.

Petition granted; order quashed.

MORRIS and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed January 30, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-443
Lower Tribunal No. 15-18327

Nationstar Mortgage LLC,
Appellant,

vs.

LHF Hudson, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Akerman LLP, and Nancy M. Wallace (Tallahassee); Akerman LLP, and Marc J. Gottlieb and William P. Heller (Fort Lauderdale); Akerman LLP, and Celia C. Falzone (Jacksonville); for appellant.

Wallen | Kelley, and Todd L. Wallen, for appellee.

Before LOGUE and MILLER, JJ., and SUAREZ, Senior Judge.

SUAREZ, Senior Judge.

Nationstar Mortgage LLC ("Nationstar") appeals from the trial court's final summary judgment entered in favor of LHF Hudson, LLC ("Hudson") on Hudson's statute of limitations and estoppel affirmative defenses against Nationstar's foreclosure action. For the reasons discussed herein, we reverse the final summary judgment and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 26, 2006, Teudis Herrera ("the original borrower"), who is not a party to this appeal, executed a note worth $252,000 on behalf of Nationstar, secured by a mortgage on the original borrower's condominium in Miami-Dade County. The mortgage was recorded on May 31, 2006. On January 1, 2008, the original borrower stopped making monthly payments as required under the note. Thereafter, on May 14, 2008, Nationstar filed its first foreclosure action against the original borrower, alleging that the original borrower had failed to make the January 1, 2008, payment, and all subsequent payments, and declaring the full amount payable under the note and mortgage to be due. For reasons not in the record, Nationstar's first foreclosure action was dismissed without prejudice on February 11, 2013.

In January 2014, at a foreclosure auction following the entry of final judgment in a separate foreclosure action brought by the original borrower's condominium association, Hudson purchased the condominium for a total of $66,794.60, including

auction fees. After acquiring the condominium, Hudson invested $80,276.60 into the property for rehabilitation and condominium association assessments.

On August 11, 2015, Nationstar filed the instant foreclosure action. In its complaint, Nationstar alleged that Hudson, as owner of record of the property secured by Nationstar's mortgage, had "defaulted under the Note and Mortgage by failing to pay the payment due January 01, 2008 and all subsequent payments." In response, Hudson raised several affirmative defenses, including: (1) that Nationstar's foreclosure action was barred by the statute of limitations, as the limitations period expired in May 2013 and the Florida Supreme Court's decision in Bartram v. U.S. Bank, N.A., 211 So. 3d 1009 (Fla. 2016), changed the law and should not apply retroactively to revive Nationstar's claim; and (2) that Nationstar was estopped from enforcing the mortgage against Hudson because, at the time Hudson purchased the property, "the law was clear that the statute of limitations barred any further efforts to enforce the note and mortgage," Hudson relied on this law in purchasing and investing in the property, and it would be inequitable to enforce the mortgage against Hudson in this case. Then, on December 27, 2017, Hudson moved for summary judgment on these two affirmative defenses.

After a hearing on Hudson's motion for summary judgment, the trial court granted the motion and entered final judgment in favor of Hudson on Nationstar's foreclosure claim. This timely appeal ensued.

II. STANDARD OF REVIEW

We review the trial court's order entering final summary judgment de novo. Wells Fargo Bank, N.A. v. Rendon, 245 So. 3d 917, 919 (Fla. 3d DCA 2018).

III. ANALYSIS

On appeal, Nationstar argues that the trial court erred in granting final summary judgment on both Hudson's statute of limitations and estoppel defenses. We agree.

With respect to the statute of limitations defense, Nationstar contends that the trial court erred by agreeing with Hudson's position that the law changed concerning the application of the statute of limitations in foreclosure actions with the Florida Supreme Court's decision in Bartram v. U.S. Bank National Association, 211 So. 3d 1009 (Fla. 2016), as well as this Court's en banc decision in Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d 938 (Fla. 3d DCA 2016) (en banc), and these two decisions should not "revive" Nationstar's foreclosure action. In Bartram, the Florida Supreme Court held that "with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage" and that a "mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a 'separate and distinct' default." 211 So. 3d at 1019. In reaching this conclusion, the Florida Supreme Court examined its

decision in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), which concluded that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata," regardless of the mortgagee's decision "to accelerate payments on the note in the first suit," id. at 1006-07. See Bartram, 211 So. 3d at 1016-18. The Bartram court explicitly stated that the "holding in Singleton was based on the conclusion that an 'acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue' than a foreclosure action and acceleration based on the same default at issue in the first foreclosure action," id. at 1017 (quoting Singleton, 882 So. 2d at 1007), and acknowledged that "because foreclosure is an equitable remedy, '[t]he ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage,'" see id. (quoting Singleton, 882 So. 2d at 1008).

Although Singleton was decided on the basis of res judicata, the Florida Supreme Court "agree[d] with the reasoning of both [Florida] appellate courts and the federal district courts that [its] analysis in Singleton equally applies to the statute of limitations context," and thus "reaffirmed [its] prior holding in Singleton and the application of its reasoning to a statute of limitations context." Bartram, 211 So. 3d at 1019; see also Beauvais, 188 So. 3d at 944; Nationstar Mortg., LLC v. Brown,

175 So. 3d 833, 834-35 (Fla. 1st DCA 2015) (noting that "the principles set forth in Singleton . . . apply" in the statute of limitations context and that "[a]s a matter of law, appellant's 2012 foreclosure action, based on breaches that occurred after the breach that triggered the first complaint, was not barred by the statute of limitations"); Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954, 955 (Fla. 4th DCA 2014) (holding that under Singleton, where "the statute of limitations has not run on all of the payments due pursuant to the note, . . . the mortgage is still enforceable based upon subsequent acts of default"). For example, in Beauvais, this Court held en banc that Singleton, "while made in the context of a res judicata defense," applied to statute of limitations defenses in foreclosure actions, and concluded that "dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default if the subsequent default occurred within five years of the subsequent action." 188 So. 3d at 944. Therefore, "[u]nder Singleton, subsequent defaults allow for subsequent accelerations regardless of the nature of a prior dismissal." Id. at 945; see also PNC Bank, N.A. v. Neal, 147 So. 3d 32 (Fla. 1st DCA 2013) ("[T]he dismissal with prejudice of PNC Bank's foreclosure action against the Neals does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action."); Star Funding Sols., LLC v. Krondes,

101 So. 3d 403 (Fla. 4th DCA 2012) ("A new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action.").

Hudson, however, argues that the law at the time the statute of limitations had expired to bring suit for the default alleged in the initial foreclosure action did not permit Nationstar to bring a second foreclosure action based on a subsequent default after the dismissal of its initial foreclosure action, as Nationstar accelerated the note and mortgage and the statute of limitations had expired. Thus, as Hudson contends, the application of Singleton in the Bartram and Beauvais decisions created a "sea change in the law" in the application of the statute of limitations to foreclosure actions and should not apply retroactively to revive Nationstar's "extinguished" claim. Cf. Rose v. Sonson, 208 So. 3d 136, 139 (Fla. 3d DCA 2016). We reject Hudson's argument and characterization of the law prior to the issuance of Bartram and Beauvais. First, we note that in deciding Singleton, the Florida Supreme Court expressly disapproved of Hudson's characterization of the law as expressed by Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2d DCA 1963). See Singleton, 882 So. 2d at 1008. In Stadler, the Second District Court of Appeal determined that "[w]hile it is axiomatic that a suit for one installment payment does not preclude suit for a later installment on a divisible contract, the scant authority found seems unanimous in the view that an election to accelerate puts all future installment payments in issue and forecloses successive suits." 150 So. 2d at 472.

In rejecting Stadler, the Court recognized "the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship" and "envision[ed] many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable results." See Singleton, 882 So. 2d at 1007; see also Beauvais, 188 So. 3d at 952 ("Thus, while we do not question that several courts across the country have adopted reasoning different from that accepted in Florida, the point is *our* Supreme Court has rejected that different analysis [in Stadler]." (emphasis in original)). Moreover, this Court has previously determined that its "analysis of Singleton neither undermines nor contradicts prior Florida Supreme Court or other Florida precedent" and that "[t]he decision in Singleton gives rise to no inconsistency in the law, and does nothing to change when the clock starts ticking for statute of limitations purposes." Beauvais, 188 So. 3d at 942 n.3; see also Bartram, 211 So. 3d at 1019-20 ("[I]t is entirely consistent with, and follows from, our reasoning in Singleton that each subsequent default accruing after the dismissal of an earlier foreclosure action creates a new cause of action, regardless of whether that dismissal was entered with or without prejudice."). Indeed, "[t]his resolution is in keeping with the long held practices of the Florida mortgage industry." Beauvais, 188 So. 3d 953.

As Bartram and Beauvais did not change the law in Florida regarding the application of the statute of limitations in foreclosure actions, we therefore hold that

it was error for the trial court to grant summary judgment on Hudson's statute of limitations defense. Nationstar's complaint alleges that Hudson "defaulted under the Note and Mortgage by failing to pay the payment due January 01, 2008 and ***all subsequent payments***." (emphasis added). As alleged, some of these missing payments occurred within the five-year limitations period for filing a foreclosure action and after the dismissal of Nationstar's initial foreclosure action in 2013.

In holding so, we additionally find that the trial court erred in granting summary judgment on Hudson's estoppel affirmative defense. As a general principle, "[e]quitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position." Fla. Dep't of Health & Rehab. Servs. v. S.A.P., 835 So. 2d 1091, 1096 (Fla. 2002). A party claiming estoppel must prove that: "(1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it." Goodwin v. Blu Murray Ins. Agency, Inc., 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006). Here, Nationstar made no representation to or took steps to mislead Hudson regarding the status of the note and mortgage secured by the property after Nationstar's initial foreclosure complaint was dismissed without prejudice.

Furthermore, Hudson's mistake as to the application of Florida law regarding the statute of limitations in a foreclosure action is not a proper basis for estoppel. See Clifton v. Clifton, 553 So. 2d 192, 194 (Fla. 5th DCA 1989) ("However, [the appellant] took no steps to mislead [the appellee] or the intervenor as to her title or claims. Further, her mistake (as well as everyone else's involved in this case) was one of law—the misapplication of Florida law to the facts and circumstances which took place. This is not a proper basis for an estoppel." (citations omitted)). Therefore, it was improper for the trial court to grant summary judgment on Hudson's estoppel defense.

IV. CONCLUSION

Accordingly, because the trial court erred in granting final summary judgment in favor of Hudson on both its statute of limitations and estoppel defenses, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

Third District Court of Appeal

State of Florida

Opinion filed January 30, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2190
Lower Tribunal No. 14-12224

Laptopplaza, Inc., etc., et al.,
Appellants,

vs.

Wells Fargo Bank, NA,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Law Offices of Charlton Stoner, P.A., and Charlton Stoner, for appellants.

The Lehman Law Firm, PLLC, and Gary E. Lehman; Nelson Mullins Broad and Cassel, and Beverly A. Pohl (Fort Lauderdale), for appellee.

Before SALTER, FERNANDEZ and SCALES, JJ.

ON MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS APPEAL

SCALES, J.

Wells Fargo Bank, N.A., the defendant/counter-plaintiff below, seeks reconsideration of this Court's November 20, 2018 order denying Wells Fargo's motion to dismiss the appeal in appellate case number 3D18-2190. The underlying order on review grants Wells Fargo's motion for partial summary judgment on its two counterclaims for fraudulent transfer against the plaintiffs/counter-defendants below, Laptopplaza, Inc. and Iwebmaster.net, Inc. Because we agree with Wells Fargo that the partial summary judgment order determines liability only – reserving jurisdiction to set the amount of damages awardable to Wells Fargo on its fraudulent transfer counterclaims at a future date – we conclude that the appeal in appellate case number 3D18-2190 must be dismissed because it is taken from a non-final, non-appealable order.[1]

I. Relevant Facts and Procedural Background

In December 2007, 345 Carnegie Avenue LLC, as the borrower, executed a promissory note secured by a mortgage encumbering certain commercial property located in Miami-Dade County. Wells Fargo is the lender and mortgagee; Iwebmaster.net is one of the guarantors of the loan. The loan documents contained a prevailing party attorney's fee provision.

[1] On December 7, 2018, this Court entered an order directing that appellate case number 3D18-2190 travel together with the related appeal in appellate case number 3D18-131 and be heard by the same merits panel. In light of our dismissal of the appeal in appellate case number 3D18-2190, we hereby vacate that December 7, 2018 order.

In 2014, the appellants and others sued Wells Fargo seeking certain equitable relief relating to loan payoff issues.[2] Wells Fargo asserted several counterclaims.

In the two counterclaims at issue here, Wells Fargo generally alleged that Iwebmaster.net (the guarantor) had fraudulently transferred Iwebmaster.net's monies and property to Laptopplaza (the transferee) with the intent to defraud its creditors (including Wells Fargo) in violation of sections 726.105 and 726.106 of Florida's Uniform Fraudulent Transfer Act (the "Act"). Specifically, Wells Fargo sought a declaration that certain transfers from Iwebmaster.net to Laptopplaza were fraudulent and, as damages, Wells Fargo sought, in part, to recover from both Iwebmaster.net and Laptopplaza "reasonable attorney's fees and costs in this action pursuant to the Loan Documents."

Wells Fargo moved for partial summary judgment on its two fraudulent transfer claims against Iwebmaster.net and Laptopplaza. At the September 27, 2018 summary judgment hearing on Wells Fargo's motion, consistent with its pleading, Wells Fargo argued that it was entitled to, *as a measure of damages under the Act*, reasonable attorney's fees and costs that were awardable under the fee provision contained within the loan documents. Indeed, Wells Fargo's counsel argued that,

[2] The trial court entered a partial final judgment on December 12, 2017, dismissing the appellant's Second Amended Complaint with prejudice. The appellants have separately appealed that judgment (appellate case number 3D18-131).

under the Act[3], it could recover attorney's fees and costs against the transferee, Laptopplaza, who was not a party to the loan documents, as a component of available damages:

> [WELLS FARGO'S COUNSEL]: The only thing I want to say to the Court, just as an administrative point, is, under 726.108 and 109, you're entitled to two remedies. If you're attacking the actual assets transfer, your [sic] entitled to those assets, whatever they are, or the amount to satisfy the claim, whichever is less.
>
> So, if we prevail today, we would be entitled to an order, and then the Court would hold its attorney's fee hearing**.** It would take an unliquidated sum and make it liquidated, which would be the amount of the claim, and **that would be the amount, in a final judgment, that the Court would order that Laptopplaza, Inc. is responsible for** --
>
> THE COURT: Right.
>
> [WELLS FARGO'S COUNSEL]: -- **based upon the fact that those assets were transferred, and we could execute against them.**
>
> But that would liquidate the claim. I'm just trying to make it easy for the Court, procedurally.

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[3] The Act provides, in relevant part:

> (2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 726.108(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), *or the amount necessary to satisfy the creditor's claim*, whichever is less. The judgment may be entered against:
> (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
> (b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

§ 726.109(2), Fla. Stat. (2014) (emphasis added).

THE COURT: I got it. I got it. Okay, thank you.

(Emphasis added).

Immediately following this discussion, the trial court took a short recess before reconvening the hearing and granting Wells Fargo's motion for partial summary judgment. That same day, September 27, 2018, the trial court entered the subject order on review granting Wells Fargo's motion. Therein, the trial court found that "[p]ursuant to the loan documents, Wells Fargo Bank, N.A. is entitled to recover its reasonable attorney's fees and costs in this litigation" and that "Final Judgment will be entered following the Court's determination as to amount of reasonable fees and costs."

On October 17, 2018, Wells Fargo filed a "Motion for Final Judgment Awarding Reasonable Attorney's Fees and Taxing Costs" in the lower court.[4] Therein, Wells Fargo requested that the trial court, after conducting a hearing, enter a final judgment awarding its reasonable fees and costs consistent with the September 27, 2018 partial summary judgment order. Before the trial court had the opportunity to conduct a fee hearing, Laptopplaza and Iwebmaster.net filed the

[4] In addition to Iwebmaster.net and Laptopplaza, the motion was directed at other parties to the underlying litigation against whom Wells Fargo had obtained a separate order granting partial judgment.

instant appeal challenging the trial court's September 27, 2018 partial summary judgment order.

On October 31, 2018, Wells Fargo moved to dismiss the instant appeal, claiming that the subject order is a non-appealable, non-final order. Laptopplaza and Iwebmaster.net responded that the order on review is a final judgment and that the award of attorney's fee is an ancillary issue that does not affect the finality of the order appealed. See Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 979 (Fla. 1987) ("[T]he recovery of attorney's fees is ancillary to the claim for damages. A contractual provision authorizing the payment of attorney's fees is not a part of the substantive claim because it is only intended to make the successful party whole by reimbursing him for the expense of litigation."). On November 20, 2018, this Court denied Wells Fargo's motion in an unelaborated order. Wells Fargo seeks reconsideration of that unelaborated order, which we now grant.

II. Analysis and Conclusion

Our review of the trial court record – particularly, Wells Fargo's pleadings, the September 27, 2018 hearing transcript, and the September 27, 2018 order granting Wells Fargo's motion for partial summary judgment – reveals that the trial court determined that both Iwebmaster.net and Laptopplaza are liable to Wells Fargo for damages (i.e., attorney's fees) on Wells Fargo's fraudulent transfer counterclaims, but that the lower court reserved for another day the calculation of

those damages. It appears therefore, that, under the unique circumstances of this case, the trial court is considering awarding attorney's fees as a component of damages under the Act, rather than merely as an award ancillary to a final judgment. Hence, the order on review is, indeed, a non-final, non-appealable order as to Laptopplaza and Iwebmaster.net. See Aaoep USA, Inc. v. Pex German OE Parts, LLC, 202 So. 3d 470, 471-72 (Fla. 1st DCA 2016) (concluding that an "order determining liability in favor of Appellee, but reserving the determination of the amounts of damages on the various causes of action alleged in the complaint for future proceedings" was a non-final, non-appealable order under Florida Rule of Appellate Procedure 9.130(a)(3)); Saidin v. Korecki, 202 So. 3d 468, 469-70 (Fla. 1st DCA 2016) (concluding that the appellate court's jurisdiction to review portions of an order granting injunctive relief under rule 9.130(a)(3)(b) did not extend to those portions of the order "determining liability in favor of the Koreckis, but reserving the determination of the amounts of damages for future hearings").

The instant appeal is premature. Thus, we grant Wells Fargo's motion for reconsideration and dismiss the instant appeal without prejudice to seek review once the trial court enters a final judgment on Wells Fargo's fraudulent transfer counterclaims.[5]

[5] We express no opinion on the propriety of using the Act to enter an award of attorney's fees and costs against the appellants based on the fees provision contained in the subject loan documents.

Appeal dismissed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

HARVEY LEE DAVIS and **ERIC MCCABE,**
Appellants,

v.

KENNETH I. BAILYNSON, STEPHEN M. COHEN, and **LAW OFFICES OF STEPHEN M. COHEN, P.A.,**
Appellees.

No. 4D18-1040

[January 30, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 50-2016-CA-009072-XXXX-MBAJ.

William H. Pincus and Melanie L. Campbell of Pincus & Currier LLP, West Palm Beach, for appellants.

Stephen M. Cohen of Law Offices of Stephen M. Cohen, P.A., Palm Beach Gardens, for appellees.

CONNER, J.

Appellants, Harvey Lee Davis and Eric McCabe, appeal the trial court's order denying their motion for attorney's fees pursuant to section 57.105(1), Florida Statutes (2017), seeking fees against Appellees, Stephen M. Cohen and the Law Offices of Stephen M. Cohen, P.A. (collectively, "Cohen"). In this appeal, we address whether: (1) a section 57.105(1) fee motion can be brought solely against an attorney; and (2) a section 57.105(1) fee motion can properly seek an award where a single cause of action asserts more than one factual scenario for liability, and the fee motion attacks only one of those factual scenarios as unsupported by law. We reverse, concluding the trial court erred in denying fees based on both issues.

Background

Appellants collectively own four units in a residential condominium complex. Appellants brought an injunction action against the

condominium association and its board of directors. Appellee Kenneth I. Bailynson ("Bailynson") was a board member who owned thirty-eight units in the condominium. In the injunction action, Appellants sought an injunction to: (1) prohibit the association from spending, using, lending, committing or otherwise disposing of the proceeds of a $1.5 million loan that the association took out from a company managed and indirectly owned by Bailynson; (2) prohibit the association from making any material alterations or substantial additions to the property or common area of the condominium without proper approval; and (3) invalidate a special assessment and roll monthly assessments back to the 2014 level. After a hearing, a temporary injunction was entered which "prohibited the [association] from imposing any special assessments and from increasing the 'regular monthly assessments to the unit owners until further Court order or agreement of the parties.'"

Subsequently, Bailynson filed suit appeal against Appellants, for breach of fiduciary duty, which is the subject of this appeal. Suit was filed and Bailynson was represented by Cohen. Cohen alleged that Appellants brought the injunction suit as a derivative action on behalf of the condominium association, and as the derivative plaintiffs, they "are representatives of the Association . . . and must act in the Association's best interest." Paragraph 18 of the complaint contains the allegations which frame the issues in this appeal:

> 18. Despite having a fiduciary duty to the Association and its members, the Defendants [(Appellants)] have, individually and collectively, taken action that has directly harmed the Association and its members. Specifically, the Defendants [(Appellants)] have each:
>
> > a. failed and/or refused to pay their regular maintenance assessments in the amounts established prior to any increases suspended by the Court in Case No. 502015CA002803XXXXMB; and
> >
> > b. failed and/or refused to allow for a modification of the Temporary Injunction obtained by the Defendants [(Appellants)] in Case No. 502015CA002803XXXXMB to allow the Association to increase assessments in an amount sufficient to pay for regular operating expenses of the Association, including but not limited to the payment of the water bills due to the City of West Palm Beach.

Cohen also alleged that Appellants' conduct in bringing the injunction action resulted in the association's inability to pay its water bill, that the water was subsequently turned off to the condominium, and that the City of West Palm Beach posted notices on the unit doors advising the occupants to vacate due to unsafe conditions.

Appellants sent a safe harbor notice to Cohen, attaching a motion for attorney's fees, specifically citing to sections 57.105(1)(b) and (3)(c), Florida Statutes, seeking attorney's fees from Cohen, but not Bailynson. Appellants asserted in the fee motion that the breach of fiduciary duty action "is untenable as a matter of law," and therefore, they sought sanctions against Cohen. They specifically argued that Bailynson's claim in Paragraph 18(b), as alleged by Cohen, wholly lacked merit because: (1) there can be no tortious liability for pursuing one's legal rights; and (2) actions taken within judicial proceedings are protected by the litigation privilege. Notably, the fee motion made no allegations regarding Paragraph 18(a).

Cohen moved to strike or dismiss the fee motion, arguing that: (1) he did not receive a copy of the fee motion until the day it was filed, in violation of the requisite safe harbor period; (2) it was improper for Appellants to seek attorney's fees solely from him and not also Bailynson; and (3) the "complaint was not without legal support."

A hearing was held on the fee motion. The parties made the same arguments asserted in the fee motion and the responsive motion to strike or dismiss, however, notably, Cohen conceded that the claim in Paragraph 18(b) was improper. Cohen then further argued that because "[t]here is no attack that my theory that their failure to pay their maintenance fees was a breach of fiduciary duty [asserted in Paragraph 18(a)]," Bailynson had "a colorful claim . . . [and] sanctions should not be imposed." At the end of the hearing, the trial court indicated it would take the issue under advisement, but then asked Cohen, "where did you get any authority that one of the owners of a condo has the right to sue another owner of a condo because they haven't paid their fees?" Cohen responded that the suit was filed against Appellants not as individuals, but as the "representatives" of the association, based on their status as derivative plaintiffs in the injunction action.

The trial court entered an order denying Appellants' motion for attorney's fees citing two reasons: (1) simply citing to *Sexton v. Ferguson*, 79 So. 3d 51 (Fla. 4th DCA 2011); and (2) it did "not find that the action was so frivolous or devoid of merit as to be completely apprehensible,"

citing to *Trust Mortgage, LLC v. Ferlanti*, 193 So. 3d 997 (Fla. 4th DCA 2016). Thereafter, Appellants gave notice of appeal.

Appellate Analysis

"In determining whether to award attorney's fees under section 57.105, Florida Statutes (2001), the trial court applies an abuse of discretion standard." *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615, 618 (Fla. 4th DCA 2006). "The trial court's finding must be based upon substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the trial court record." *Id.* (quoting *Weatherby Assocs., Inc. v. Ballack*, 783 So. 2d 1138, 1141 (Fla. 4th DCA 2001)). However, "[t]o the extent the trial court's determination on a motion for attorney's fees is based on an issue of law, our standard of review is de novo." *Paul v. Avrahami*, 216 So. 3d 647, 649 (Fla. 4th DCA 2017).

Appellants challenge the trial court's reasons for denying their fee motion after it determined that: (1) a 57.105(1) fee motion cannot be brought solely against an attorney; and (2) the breach of fiduciary duty count was not devoid of merit. We address the trial court's reasons separately.

57.105 Fee Motion Solely Against Attorney

The trial court's first reason for denying the fee motion simply cited our opinion in *Sexton*. We presume that the trial court read our prior opinion to hold that categorically a 57.105(1) fee motion cannot be brought solely against an attorney and not the client, where the attorney is not a "party."

In *Sexton*, the appellants, pursuant to a settlement agreement, withdrew their fee motion against the client, but argued that the fee motion still applied to the client's prior attorney. *Sexton*, 79 So. 3d at 53. The lower tribunal denied the fee motion after determining that withdrawing the fee motion against the client meant the appellants no longer had a claim against the attorney. *Id.* at 54. On appeal, we said that "[t]he plain language of section 57.105(1) is clear and unambiguous; it does not authorize attorney's fees to be awarded solely against a party's attorney." *Id.* We also distinguished our prior opinion in *Avemco Insurance Co. v. Tobin*, 711 So. 2d 128 (Fla. 4th DCA 1998), where we held that a lawyer can be held liable for attorney's fees under section 57.105 even if the lawyer's client is not also held liable for such fees. *Sexton*, 79 So. 3d at 54. We reasoned that

> [b]ecause the lawyers in *Avemco* sought proceeds in a court registry for compensation allegedly due to them from the client, the lawyers "[h]aving so made themselves parties . . . came under the statutory term 'party' in section 57.105(b) by their own conduct and were thus properly liable for fees even though their nominal client in the litigation was not liable for such fees."

Id. at 55 (alteration in original) (quoting *Avemco*, 711 So. 2d at 130-31). However, in *Sexton*, we concluded that the attorney did not "[make] himself a party in this proceeding or act[] in a manner that would have raised his status to a 'party' as did the lawyer in *Avemco*." *Id.* at 55.

Sexton is inapposite for resolution of the fee motion in this case for two reasons. First, *Sexton* relies largely on waiver analysis. Second, and more importantly, in 2010, section 57.105 was amended, adding, among other things, section 57.105(3)(c). *See* 2010 Fla. Sess. Law Serv. Ch. 2010-129. Therefore, because subsection (3)(c) was not part of the applicable statute in *Sexton*, the holding there does not apply to the instant case, where the statute has now been amended to include the subsection.

The applicable version of section 57.105 provides:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party *in equal amounts by the losing party and the losing party's attorney* on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> . . . .
>
> (3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
>
> . . . .

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

§ 57.105(1) and (3), Fla. Stat. (2017) (emphases added). Appellants argue that because their motion was filed under subsection (1)(b) asserting the action was not *supported by law*, the applicable version of the statute makes clear that sanctions *cannot* be awarded against a *represented party* for such a claim, pursuant to subsection (3)(c) of the statute. We agree with the argument.

"A 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts' and is not to be read in isolation, but in the context of the entire section." *Charles v. Sn. Baptist Hosp. of Fla., Inc.*, 209 So. 3d 1199, 1207 (Fla. 2017) (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)). Although section 57.105(1) states that the award of fees must be awarded "in equal amount by the losing party and the losing party's attorney," this is limited by section 57.105(3)(c). Section 57.105(3)(c) clearly states that attorney's fees cannot be levied upon a *party*, where the basis for attorney's fees pursuant to section 57.105 is subsection (1)(b) and the claim or defense is not supported by the application of then-existing *law* to the material facts.

We, as well as our sister courts, have consistently held that under 57.105(1)(b), *only* a party's attorney may be ordered to pay attorney's fees under section 57.105(3)(c). *See Paul*, 216 So. 3d at 651 n.3 (stating that, "Appellee's counsel, and not Appellee, must pay the attorney's fees," citing to section 57.105(3)(c)); *Wells v. Halmac Dev., Inc.*, 189 So. 3d 1015, 1021 (Fla. 3d DCA 2016) ("The fee award shall be taxed solely against counsel representing Castro at that time."); *Santiago v. Sunset Cove Invs., Inc.*, 198 So. 3d 658, 661 (Fla. 2d DCA 2015) ("[B]ecause we base the award of appellate attorneys' fees on section 57.105(1)(b), the fees may only be awarded as against [appellant]'s counsel."); *Robbins v. Rayonier Forest Res., L.P.*, 102 So. 3d 737, 738 (Fla. 1st DCA 2012) ("Attorneys [sic] fees awarded under [section 57.105(1)(b)] may be assessed against only the losing partys [sic] attorney."); *Fla. Houndsmen Ass'n, Inc. v. State*, 134 So. 3d 999, 1001 (Fla. 1st DCA 2012) ("Because our decision is based on the lack of legal, rather than factual, merit, only Appellants' attorneys shall be responsible for paying this award."); *Waddington v. Baptist Med. Ctr. of Beaches, Inc.*, 78 So. 3d 114, 117 (Fla. 1st DCA 2012) ("Finding that this appeal satisfies section 57.105(1)(b), we award Appellee its reasonable appellate attorney's fees to be paid in full amount by Appellant's counsel.").

Cohen argues *Sexton* does apply to the post-2010 version of section 57.105, because we cited to the "2010" version of section 57.105 in the opinion. However, this argument is incorrect. As Appellants correctly argue, since the statute was amended in 2010, there were two separate versions of the statute during that year. The amended, and current version, went into effect on July 1, 2010. *See* § 11.2421, Fla. Stat. (2018). As Appellants point out, our *Sexton* opinion indicates that the fee motion in that case was filed *prior* to July 1, 2010. *See Sexton*, 79 So. 3d at 53. Therefore, the version of the statute *prior* to the 2010 amendment would have been the applicable statute in *Sexton*.

We conclude that the trial court erred in denying the fee motion based on the fact that it sought attorney's fees solely against the law firm and not the client, where the fee claim is limited by section 57.105(3)(c). Thus, we reverse the trial court on this issue.

Whether the Action Was Supported by Law

The trial court's second reason for denying the fee motion was that it found "that the action was [not] so frivolous or so devoid of merit as to be completely apprehensible," citing to *Ferlanti*, 193 So. 3d at 1000. In attacking the trial court's second reason, Appellants' arguments encompass three sub-issues: (1) whether the trial court relied upon an incorrect standard; (2) whether the trial court could award fees for one factual scenario of liability asserted in a count asserting two separate factual scenarios for liability; and (3) whether Paragraph 18(b) was supported by law. We address the three sub-issues sequentially.

Wrong Standard

Appellants argue that the trial court relied upon the wrong standard because the order denying the fee motion stated that the trial court did "not find that the action was so frivolous or so devoid of merit as to be completely apprehensible." More specifically, Appellants argue that "completely apprehensible" is not the applicable standard.

> Section 57.105(1) provides for attorney's fees for the prevailing party on a claim or defense in a civil proceeding if the court determines that the losing party or the losing party's attorney knew or should have known that the claim or defense was not supported by the material facts or the application of the law.

Blinn v. Fla. Power & Light Co., 189 So. 3d 227, 229 (Fla. 2d DCA 2016). As the First District discussed in *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So. 2d 520 (Fla. 1st DCA 2003):

> [The] statute was amended in 1999 as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost imposed on the civil justice system by broadening the remedies that were previously available. Unlike its predecessor, the 1999 version of the statute no longer requires a party to show a complete absence of a justiciable issue of fact or law, but instead allows recovery of fees for any claims or defenses that are unsupported. However, this Court cautioned that section 57.105 must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings.

Id. at 523 (internal citations omitted).

In denying fees in this case, the trial court cited to *Ferlanti*, which relied upon a correct statement of the standard. Although we agree "completely apprehensible" is not articulated in section 57.105(1) or the case law, we are satisfied that the trial court simply misspoke in its finding that Bailynson's breach of fiduciary action against Appellants was not "so devoid of merit . . . as to be *completely untenable*." *Id.* at 1000 (emphasis added) (quoting *Wapnick v. Veterans Council of Indian River Cty., Inc.*, 123 So. 3d 622, 624 (Fla. 4th DCA 2013)). Therefore, we conclude the trial court relied upon the correct standard.

Fees for One Factual Scenario of Liability Where the Action Alleges Two Factual Scenarios

A unique aspect of application of section 57.105(1) to this case is that Bailynson brought only one count alleging breach of fiduciary duty, but asserted two different factual scenarios to support the count: Paragraph 18(a), alleging a failure to pay maintenance assessments, and Paragraph 18(b), alleging a failure or refusal to allow a modification of the temporary injunction. Because it was not referred to in the safe harbor notice, Paragraph 18(a) could not be a basis for awarding fees. Thus, this appeal raises the issue of whether 57.105(1) fees can be awarded for "part" of an action. Cohen argues that there was one claim asserting separate bases, and because one part of the claim was not asserted in the safe harbor notice, fees cannot be awarded for the other part of the claim. Appellants on the other hand, argue that after section 57.105(1) was amended in 1999, the new "version of the statute no longer requires a party to show a *complete absence of a justiciable issue of fact or law*, but instead allows recovery of fees for *any claims* or defenses that are unsupported." *Yakavonis*, 934 So. 2d at 619 (emphases added) (quoting *Vandergriff*, 865 So. 2d at 523).

We agree with Appellants that if an action asserts a theory of liability using more than one, but separate, factual scenarios in support of the theory, and one of the factual scenarios meets the criteria for a 57.105(1) fee sanction because it is not supported by law, the sanction must be ordered. Our conclusion is based on the change in the statute, and how courts have interpreted the language of the amended statute. Under the previous version of the statute, "[e]ven if a portion of the complaint is frivolous, an award of attorney's fees is not appropriate so long as the complaint alleges some justiciable issues." *Langford v. Ferrera*, 823 So. 2d 795, 796 (Fla. 1st DCA 2001). However, "the revised statute *expanded* the number of circumstances in which fees should be awarded." *Read v. Taylor*, 832 So. 2d 219, 222 (Fla. 4th DCA 2002) (emphasis added). "Unlike the prior version [of section 57.105], the current version of the statute does not apply only to an entire action, but now applies to *any claim or defense*." *Id.* (emphasis added). "Because the statute refers to 'any claim or defense,' it does not require that the entire action be unsupported by material facts or the application of then-existing case law." *Santiago*, 198 So. 3d at 661.

"The central purpose of section 57.105 is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts." *Mullins v. Kennelly*, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003). Thus, the post-1999 version of section 57.105 has expanded the circumstances where fees should be awarded and the purpose is to deter meritless *filings*. Our supreme court has also stated that section 57.105 "creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or amendment of meritless *allegations* and claims." *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011) (emphasis added) (quoting *Walker v. Cash Register Auto Ins. Of Leon Cty., Inc.*, 946 So. 2d 66, 71 (Fla. 1st DCA 2006)). Therefore, it appears that our supreme court has viewed even individual allegations as part of what section 57.105(1) seeks to deter. By "individual allegations," we are referring to a series of allegations framing a theory of liability based on a factual scenario that is not supported by law.

Our view of the statute also makes sense practically. If it were the case that a party could assert multiple factual scenarios of liability pled as part of "one count," and such pleading practice could shield the party from section 57.105(1) fees because at least one scenario was supported in law and fact, then it would elevate form over substance with creative pleading. Additionally, whereas here the factual scenarios in Paragraph 18(a) and Paragraph 18(b) are distinct, they could have been asserted in two separate counts. To define a "claim" under section 57.105(1) as an entire count, would mean that Cohen in this case would avoid fees because the

complaint contained only one count, as opposed to bringing two separate counts for Paragraph 18(a) and Paragraph 18(b). We conclude that such an interpretation would defeat the purpose of section 57.105(1).

Paragraph 18(b) as Grounds for Fee Sanction

Paragraph 18(b) essentially alleged that Appellants would not agree to modify a court order. Appellants argue that Paragraph 18(b) was not supported by then-existing law because there can be no tortious liability for assertion of a legal right, due to the litigation privilege.

Appellants are correct that there is no tortious liability for assertion of a legal right because "[a] privilege exists as a matter of law to engage in reckless or even outrageous conduct if there is sufficient evidence that shows the defendant did no more than assert legal rights in a legally permissible way." *Rivers v. Dillards Dep't. Store, Inc.*, 698 So. 2d 1328, 1332 (Fla. 1st DCA 1997) (quoting *Canto v. J.B. Ivey & Co.*, 595 So. 2d 1025, 1028 (Fla. 1st DCA 1992)). "The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin." *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007). "[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994). Because the decision of whether to agree to a modification of the injunction in this case was clearly related to the injunction action, we agree that the litigation privilege applied to Appellants' refusal to agree to a modification of the injunction, and Cohen should have known it applied.

Even more telling here, however, is that Cohen *conceded* that there was no basis in law for his allegations in Paragraph 18(b). At the fee hearing, he stated that "the case law is clear as to that point," referring to the propriety of the allegation that Appellants "failed and refused to allow for [a] modification." Cohen also later admitted that "the case law is clear as to the one area of law," again referring to the lack of a legal basis to support Paragraph 18(b). The trial court then asked why Cohen "thr[e]w that in there," and Cohen said he "didn't recognize it at the time," and cited case law for the standard for section 57.105 fees. Cohen continued to then argue: (1) that there was no attack on the allegations in Paragraph 18(a), and therefore, there was "nothing presented . . . that that part of the claim was without merit"; and (2) there had been no action in the case between the safe harbor letter and dismissal of the case.

We conclude that the trial court was persuaded by Cohen's argument that because Paragraph 18(a) was not attacked for sanctions and Paragraph 18(b) was part of the same count, the count for breach of fiduciary duty was not "so devoid of merit . . . as to be completely untenable," and it was appropriate to deny fees on that basis, despite Cohen's concession at the fee hearing that there was no legal basis for asserting liability under Paragraph 18(b). However, Cohen should have known the litigation privilege applied to Paragraph 18(b) and his concession establishes there was no competent substantial evidence supporting the denial of 57.105(1) fees.

Conclusion

Although we are satisfied the trial court used the correct standard in applying section 57.105(1), we conclude the trial court erred by ignoring the application of section 57.105(3)(c) to section 57.105(1)(b). We hold that under proper circumstances, section 57.105(3)(c) permits the filing of a section 57.105(1)(b) fee motion solely against an attorney, and not the client. We further hold that under the current version of section 57.105(1), if an action asserts separate factual scenarios for liability and one of the scenarios meets the criteria for a 57.105(1) fee sanction because it is not supported by law, the sanction must be ordered. Because the record establishes that Appellants are entitled to a fee award and the trial court erred in denying their fee motion, we reverse and remand for further proceedings.

Reversed and remanded for further proceedings.

TAYLOR and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.