Case No. 14-11884

To be argued by:
Paul Alexander Bravo

United States Court of Appeals

for the

Eleventh Circuit

MARLENE DORTA,

Appellant,

v.

WILMINGTON TRUST NATIONAL ASSOCIATION, as successor trustee to CITIBANK NATIONAL ASSOCATION, AS TRUSTEE FOR BNC MORTGAGE LOAN TRUST 2007-3,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA

MARLENE DORTA'S INITIAL BRIEF

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Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel for Defendant-Appellee Wilmington Trust National Association, as successor trustee to Citibank National Association as Trustee for BNC Mortgage Loan Trust 2007-3.

Maloney, Taraneh, counsel for Defendant-Appellee Wilmington Trust National Association, as successor trustee to Citibank National Association as Trustee for BNC Mortgage Loan Trust 2007-3.

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Cohen, Marcie, counsel for Plaintiff-Appellant Marlene Dorta.

Citibank National Association as Trustee for BNC Mortgage Loan Trust 2007-3, former Defendant.

Dorta, Marlene, Plaintiff-Appellant.

Hodges, Hon. William Terrell, U.S. District Judge, Middle District of Florida.

Starks, Michael D., and Joshua Tropper, counsel for Defendant-Appellee Wilmington Trust National Association, as successor trustee to Citibank National Association as Trustee for BNC Mortgage Loan Trust 2007-3.

Wilmington Trust National Association, as successor trustee to Citibank National Association as Trustee for BNC Mortgage Loan Trust 2007-3, Defendant-Appellee, a wholly owned division of M&T Bank Corporation (MBT).

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PRELIMINARY STATEMENT

This is an appeal from a final order entered by the Hon. Wm. Terrell Hodges, Senior Judge, dismissing an amended complaint filed by Appellant, Marlene Dorta, against Appellee, Wilmington Trust National Association ("Wilmington"), which is the successor trustee to Citibank National Association ("Citi") as the trustee for BNC Mortgage Loan Trust 2007-3. The case was originally filed in state circuit court in Marion County, Florida, but was subsequently removed by the named defendant in the original complaint, Citi, on the basis of diversity of citizenship. The operative complaint for the purposes of this appeal (the "Amended Complaint") sought a final judgment declaring a mortgage held by Wilmington (the "Mortgage"), and encumbering real estate owned in fee simple by Dorta, to be unenforceable under the five year statute of limitations applicable to "[a]n action to foreclose a mortgage" set forth in section 95.11(2)(c) of the Florida Statutes.

JURISDICTIONAL STATEMENT

Dorta is citizen of Florida and Wilmington is a citizen of Delaware. Amended Complaint ¶¶ 3-4. The amount in controversy in this case exceeds $75,000. Amended Complaint ¶ 7. This Court has jurisdiction because the appeal is taken from a final order of a United States district court having federal diversity jurisdiction. *See* 28 U.S.C. § 1332; 28 U.S.C. § 2107; F. R. App. P. 3(a).

STATEMENT OF THE ISSUES ON APPEAL

The overarching issue on this appeal is whether the lower court erred when it dismissed the Amended Complaint with prejudice after finding that "Dorta has failed to properly allege that the December 21, 2007 foreclosure action invalidates the Note and the Mortgage and bars any future attempts to enforce both," and that "there are no set of facts that could revive Ms. Dorta's theory for relief." In order to determine whether the dismissal constitutes reversible legal error, this Court need only answer the following two questions:

(1) Can a successful acceleration of all future installment payments due under a promissory note and mortgage, which acts as an advancement of the maturity date of each instrument, be undone so that the loan is reinstated without the consent of (or even explicit notice to) the borrower in order to avoid the absolute bar to recovery of a money judgment on the note (at law) and foreclosure of the mortgage (in equity) provided by the statutes of limitations in sections 95.11(2)(b) and 95.11(2)(c) of the Florida Statutes?;

and,

(2) Once the five year statute of limitations in 95.11(2)(b) and 95.11(2)(c) have expired on an accelerated promissory note and mortgage, can the mortgage ever be enforced under Florida law? (In other words, if the lien of the mortgage cannot be foreclosed by the courts of Florida, can it be said to exist at all – or does it become a legal nullity subject to judicial cancellation upon adjudication of the expiration of the statute of limitations)?

As explained more specifically within the argument sections of this brief, the answer to both of these questions is a resounding no. The law in Florida since January 1, 1975 (the day historical and monumental legislative changes to Chapter 95 went

into effect) has been that once the remedy for breach of a promissory note is barred at law, the corresponding remedy on a mortgage securing its repayment is similarly barred. Additionally, in 1974, when Chapter 95 was completely overhauled by the Florida legislature,[1] not a single appellate decision existed in the state of Florida holding that acceleration could be unilaterally undone under any circumstances, much less in order to avoid the absolute bar of a statute of limitations. In fact, all of the reported appellate decisions that existed at the time, including controlling Florida Supreme Court precedent from as early as 1929, explicitly addressing the law governing the exercise of an optional acceleration clause have held that the exercise of the option by its holder would "accelerate the *maturity* of the debt" and that "the institution of a suit for foreclosure *is* the exercise of the option of the mortgage to declare the whole of the principal sum and interest secured by the mortgage due and payable."[2]

Finally, since the enactment of section 95.051, which codified the then existing common law tolling provisions in Florida and eliminated any doubt that the issue of tolling had become the exclusive province of the Florida legislature, the Florida Supreme Court has consistently ruled that once a cause of action accrues and the

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[1] *See* CS/HB 895 Section Summary ("Section 7 Limitations other than for the recovery of real property. – This section is the heart of the bill. It contains all the time periods for limitations other than for the recovery of real property."). Add. 2 at Pg. 4.

[2] *Kreiss Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 1013-1015 (Fla. 1929) (emphasis added).

statute of limitations begins to run, the *only* way that the "clock" started at the moment of accrual can be stopped, is by the claimant establishing the existence of one of the explicit reasons listed in section 95.051. Because that list does not include dismissal of a cause of action, the Florida Supreme Court would decline any invitation to apply the concept of acceleration described in *Singleton v. Greymar Assocs.,* 882 So. 2d 1004 (Fla. 2004) in the way the lower court here did when it dismissed the Amended Complaint. With that analysis in mind, the first question can safely be answered in the negative.

The answer to the second question also requires that the Court consider legislative intent in light of the law as it existed when section 95.11(2)(c) was enacted and the remainder of the provisions of Chapter 95 were either repealed, amended or moved. And as is the case with the first question, long-standing and well-settled Florida Supreme Court precedent provides the answer: once the remedy of mortgage foreclosure is barred, the lien ceases to exist as a matter of law and the mortgage holder has no claim against (or any right to) the property. This conclusion follows from the simple fact that the Florida Supreme Court has interpreted Florida law to follow the lien theory of mortgages, which means that a mortgage lien is simply a species of personal property (as opposed to an interest in real property) providing the right to have the real estate security auctioned off to the highest bidder once the claim for foreclosure is proven to be valid and enforceable and adjudicated as such by a Florida court of competent jurisdiction. So, in light of that reality, once a court

adjudicates the issue of whether the statute of limitations in section 95.11(2)(c) has expired and the mortgage cannot be foreclosed, the holder of the mortgage not only loses the remedy of foreclosure, but the very property (which, after all, is only a right to a judicially sanctioned sale) it once owned.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case began on January 29, 2013 when Dorta, who now owns the property encumbered by the Mortgage but who is not the maker of the promissory note, filed a *pro se* complaint against Citi in state circuit court in Marion County, Florida. After removal to the federal district court, Dorta filed a motion to add Wilmington as a defendant. Plaintiff's Motion to Add a Party Defendant ¶¶ 6-7. The district court granted Dorta'a motion on November 07, 2013 and permitted Dorta to substitute Wilmington in place of Citi. Order granting Plaintiff's Motion ¶ 1. On November 21, 2013, Dorta filed the Amended Complaint, which named Wilmington as the successor trustee to Citi, and alleged that the statute of limitations in section 95.11(2)(c) prevented enforcement of the Mortgage because Citi accelerated the mortgage on December 21, 2007 when it filed a complaint in a failed foreclosure action (*Citibank v. William Junquera*, et. Al, 5th Judicial Circuit Case No. 07-4000 CA-B). As alleged in the Amended Complaint, the acceleration of the mortgage occurred more than five years prior to the filing of Dorta's state court complaint seeking cancellation of the mortgage. Amended Complaint to Quiet Title ¶¶ 2, 3, 13-16.

On December 05, 2013, Wilmington moved to dismiss the Amended Complaint. In its motion, Wilmington relied almost exclusively on *Singleton* to argue that the statute of limitations in section 95.11(2)(c) has not expired, and that therefore the Mortgage can be foreclosed until the lien expires by operation of law under section 95.281 of the Florida Statutes (until 2042 under Wilmington's theory). Wilmington's Motion to Dismiss Amended Pgs. 5-12. Dorta, who was still *pro se*, did not file a response in opposition to Wilmington's motion to dismiss. Dismissal Order Pg. 2. On March 24, 2014, the district court entered an order dismissing the Amended Complaint with prejudice and the clerk entered final judgment on March 25, 2014. Dismissal Order Pg. 15 ¶ 4. On April 23, 2014, Dorta filed a notice of appeal seeking review of the dismissal order by this Court.

For the reasons set forth in this brief, Dorta respectfully requests that the Court enter a mandate reversing the district court below and remanding the case with instructions consistent with this Court's decision. Alternatively, if the Court finds that justice is better served for the litigants before this Court, as well as for the countless others whose rights might be affected by this Court's decision, by having the questions presented answered by the Florida Supreme Court, Dorta asks graciously that the Court certify the questions set forth in the section of this brief above articulating her understanding of the issues on this appeal.[3]

SUMMARY OF THE ARGUMENT

The district court committed reversible legal error when it dismissed the Amended Complaint with prejudice because the court's decision is based on a misapplication of the law in Florida as it has existed since January 1, 1975. The district court's mistake of law stems from its failure to consider the legislature's intent when it enacted section 95.11(2)(c) of the Florida Statutes (referred to in this brief as either section 95.11(2)(c) or simply the "Statute"), which unmistakably was to subject the availability of the equitable remedy of foreclosure of mortgages to the same time limitation applicable to the legal remedy of a money judgment for breach of the promissory notes that underlie them. The lower court's failure to do so resulted in the court applying dicta from the *Singleton* opinion in a way that avoids the result the legislature intended and that eviscerates the Statute's purpose altogether. The ultimate result of the district court's analysis and ruling is that the very change in law the Florida legislature intended when it passed the Statute was wholly disregarded as if the Florida legislature had done nothing at all in 1974.

As explained in more detail below, the amendments to Chapter 95 of the Florida Statutes enacted in 1974 manifest the legislature's intent to completely overhaul the various statutes of limitations in Florida as wbortell as the way they are to be applied by Florida courts. Among the sweeping changes in law were the following: (1) the introduction of an *exclusive* list of reasons (termed "disabilities" in the statute) that toll any of the statutes of limitations found in Chapter 95; (2) the

shortening of the statute of limitations *explicitly* applicable to mortgage foreclosure actions from twenty years to five years; (3) the introduction of unequivocal language replacing the common law applicable to the equitable defense of laches in all cases where an action is not "commenced within the time provided for legal actions concerning the same subject matter;" and (4) the abolishment of the twenty year statute of limitations applicable to written instruments under seal, which had existed as part of Chapter 95 since 1872.[4]

Prior to these fundamental and comprehensive changes to Chapter 95, the law in Florida was absolutely clear that even where a remedy was barred at law by a legislatively enacted statute of limitations, a court sitting in equity could still provide a distinct equitable remedy if no statute of limitations in the Florida Statutes explicitly barred that particular remedy.[5] Specifically, the Florida Supreme Court had ruled in an unbroken line of decisions beginning since at least 1880, and spanning more than

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[4] *Browne v. Browne*, 17 Fla. 607, 1880 WL 3073 *1 (1880) (brief of appellant) ("Under the statutes of Florida, a mortgage, being an instrument under seal, is not barred until after the lapse of twenty years. Acts 1872, (chap. 1869,) 22").

[5] *See, e.g., Lenfesty v. Cole*, 316 So. 277, 279 (Fla. 1894) (noting that the Florida Supreme Court "has held that a suit in equity to foreclose a mortgage will be sustained, notwithstanding an action at law upon the note secured by the mortgage is barred by the statute of limitations"); *see also, Danielson v. Line*, 185 So. 332, (Fla. 1938) (relying on the proposition that "[t]he authorities hold generally that even though the remedy on the debt be barred by the statute, a court of equity will not permit the debtor to recover the pledged property" in holding that a debtor that had pledged stock certificates as security for repayment of a bank loan was not entitled to recover them or be paid any damages for their sale).

eight decades, that although the enforcement of a note was barred at law in an action seeking a personal money judgment, Florida courts were compelled to allow foreclosure of the mortgage in equity.[6] A plain reading of the language in section 95.11(2)(c) considered against this historical backdrop, along with the other changes to Chapter 95 made in 1974, the legislative history of the bill that became the law that was enacted,[7] and even subsequent amendments to other provisions of the Florida Statutes, leads to the inescapable conclusion that the legislature intended to overturn and replace both the Florida Supreme Court decisional law initially allowing foreclosure after expiration of the statute of limitations on the underlying note and its own previous legislative enactment of a twenty year statute of limitations specifically applicable to mortgage foreclosure.[8] In short, the amendments were intended to

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[6] *See Browne v. Browne*, 17 Fla. 607, 1880 WL 3073, *2-5 (Fla. 1880) (adopting view of foreign jurisdictions "permitting the remedy at law upon the contract outside of the mortgage to be inoperative, because limited by lapse of time, and yet authorizing a remedy by foreclosure and sale under the mortgage"); *Hope v. Johnston*, 9 So. 830, 832-33 (Fla. 1891) (noting that "It is settled by the decisions of Browne v. Browne, 17 Fla. 607, and *Jordan v. Sayre*, 24 Fla. 1, 3 South. Rep. 329, that an action to foreclose a sealed instrument mortgaging real estate falls within the 20-year limitation").

[7] *See* Florida Law Revision Council, Project on Statute of Limitation, Some Policy Considerations, (April 8, 1972) ("A logical application of limitations policy suggests that the statute should extinguish the right of action as well as it (sic) remedy. Not to do so encourages self help after the statute has run which in turn threatens the security and stability of human affairs."). Add. "1" at 10

[8] Although this intent is not explicitly stated word-for-word in Chapter 95 or the 1974 amendments, "[a]s the [Florida Supreme Court] has often noted, [its] obligation is to honor the obvious legislative intent and policy behind an enactment, even where that

harmonize the limitations periods applicable to legal and equitable remedies available to claimants seeking relief for the same harm, including specifically defaults under promissory notes secured by mortgage liens.[9]

Nevertheless, and despite the simple, direct, and unequivocal language used in 95.11(2)(c) that would seemingly apply on its face to bar any foreclosure action not brought within five years of acceleration of the maturity of a mortgage, the lower court here,[10] two other federal district courts in Florida,[11] and two Florida district courts of appeals[12] have issued opinions relying on dicta in the Florida Supreme Court's decision in *Singleton v. Greymar Associates,* 882 So. 2d 1004 (Fla. 2004) to rule that a mortgage holder is not barred from foreclosing a mortgage even though the

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intent requires an interpretation that exceeds the literal language of the statute." *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989).

[9] *See* Florida Law Revision Council, Project on Statutes of Limitation, Some Policy Considerations, (April 8, 1972) ("F. If laches should remain, it should be applicable to both legal and equitable actions prior to the running of the statute of limitations (1) There seems to be no compelling substantive reason to treat the two actions separately. Uniformity is desirable so that public policy won't be thwarted."). Add. 1 at 6.

[10] Dismissal Order Pgs. 10-14.

[11] *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. November 05, 2013); *Romero v. Suntrust Mortgage, Inc.*, No. 1:13-CV-24491, 2014 WL 1623703 (S.D. Fla. April 22, 2014).

[12] *U.S. Bank Nat. Ass'n v. Bartram*, 39 Fla. L. Weekly D871 (Fla. Dist. Ct. App. April 25 2014); *Evergrene Partners, Inc. v. Citibank, N.A.*, No. 4D13-2236, 2014 WL 2862392, (Fla. Dist. Ct. App. June 25, 2014).

relevant mortgage had been accelerated and matured for more than five years. As explained in more detail below, each of these courts' reliance on the Florida Supreme Court's reasoning in *Singleton*, where it considered the applicability of the judicially created doctrine of res judicata,[13] is wholly misplaced when considering the application of the legislatively enacted statutory bar to enforcement of the mortgage lien displayed prominently in section 95.11. Furthermore, the very theory on which these courts have based their decisions is fundamentally unsound and illogical. To begin, the law is clear that acceleration requires an affirmative act and notice to the borrower, yet courts applying *Singleton* in this context are effectively ruling that the law imposes a legal fiction that reinstates the loan without any notice, and after there has been a meeting of the minds that borrower-creditor relationship is over and the parties have entered a litigation posture.[14] To make matters worse, the decisions completely disregard the basic principles of res judicata regarding accrual and tolling,

[13] In *Singleton*, the Florida Supreme Court found conflict between the Florida's Second and Fourth District Courts of Appeals regarding the preclusive effect of a dismissal with prejudice of a foreclosure action where default and acceleration were not adjudicated. It ultimately sided with the second district and held that res judicata should not be applied so strictly to mortgage foreclosure actions because of their *equitable* nature. Nothing in the opinion discusses the application of the statute of limitations or suggests that equity could be used to undermine its application.

[14] As a general matter, it should be noted that the *Singleton* Court based its decision on the theoretical adjudication of the first failed action in favor of the borrower to state in hypothetical terms that the parties were placed back in their original position. The lower court here pointed directly to *Singleton* (and only *Singleton*) in ruling that the acceleration is fictionally reversed "if the mortgagee's foreclosure action is unsuccessful for *whatever* reason." Dismissal Order Pg. 12.

including the fundamental and long-standing rule of American jurisprudence that the failure to prosecute a suit to judgment does *not toll* the running of the statute of limitations.[15]

With that said, because the Florida Supreme Court has not addressed either of the above questions directly (and has not opined on the import of the enactment of section 95.11(2)(c) at all) resolving the issues on appeal requires this Court to predict how the Supreme Court would rule if confronted with them.[16] In order to do so, this Court must look primarily to the language of the relevant statutes and the holdings of the relevant decisions of the Florida Supreme Court, including its decisions discussing

[15] *See Richards and others, Assignees of M'Kean, A Bankrupt, v. The Maryland Insurance Company,* 12 U.S. 84 (1814); *Riddlesbarger v. Hartford Insurance Company*, 74 U.S. 386 (1869) (rejecting the argument that a failed action could toll the statute of limitations"[b]ut in no case of a voluntary abandonment of an action, has an exception to the statute of limitations been supported."); *Riddlesbarger v. Hartford Insurance Company,* 74 U.S. 386 (1869) ("The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless such action, not some previous action, shall be commenced within the period designated.").

[16] Where the highest court has spoken on a particular topic, this Court is obligated to follow its rule. *Molinos Valle Del Cibao, C. por A v. Lama,* 633 F.3d 1330 (11th Cir. 2011). "Where that court has not spoken, however, this Court 'must predict how the highest court would decide this case.' Decisions of the intermediate appellate courts—here, the Florida District Courts of Appeal—"provide data for this prediction." Id at 1348. Generally, this Court follows the decisions of the intermediate courts, however, this Court "may disregard these decisions if persuasive evidence demonstrates that the highest court would conclude otherwise." *Id.*

the proper interpretation and application of statutes of limitations.[17] And, in accordance with well-settled Florida law and universally accepted principles of statutory construction, the Court must determine (as the Florida Supreme Court would be compelled to do) the intent of the Florida legislature when it enacted the relevant provision by considering the law in Florida as it existed in 1974 – the year section 95.11(2)(c) was enacted into law.[18] Because the intermediate Florida appellate courts that have ruled on these issues did not conduct any analysis of legislative intent, and did not consider the fundamental differences in purpose, source of law, and availability between the judicial doctrine of res judicata and the legislatively imposed bar of the statute of limitations, this court is not bound to follow them or adopt the reasoning they used to arrive at their results (and it should decline any invitation by Wilmington to do so).

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[17] *See, e.g., Bakersviille-Donovan Engin., Inc. v. Pensacola Executive House Condo. Assoc., Inc.*, 581 So.2d 1301 (Fla. 1991) (interpreting the meaning of the word "privity" used in 95.11(4)(a), which was first introduced by the same 1974 law that introduced the five year limitation period at issue in this case, the Florida Supreme Court unequivocally explained that "[t]he duty of this Court in construing statutory language is to determine what the legislature intended when it passed the statute" and that it "must also consider principles specifically governing statutes of limitations"); *see also, Holmes County School Bd., v. Duffell,* 651 So.2d 1176, 1179 (Fla. 1995) (finding that "[t]he legislature is presumed to know existing law when it enacts a statute.").

[18] *See, e.g., McKibben v. Mallory*, 293 So. 2d 48, 51 (Fla. 1974) (interpreting the legislature's substantial revision to the wrongful death statute and emphasizing that "[i]t is a fundamental rule of construction that a statute be construed in a way so as to effectuate legislative intent ...").

STANDARD OF REVIEW

Review of an order dismissing a complaint under Federal Rule of Civil Procedure 12(b)(6) is de novo.[19] Additionally, federal courts in diversity cases apply the law of the forum state and "the Supreme Court has conclude[d] that a court of appeals should review de novo a district court's determination of state law."[20] In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff.[21] "[T]he relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible."[22]

ARGUMENT

II. Since January 1, 1975, the law in Florida is that both the equitable remedy of foreclosure and the legal remedy of a money judgment on the note are barred by the statutes of limitations in section 95.11 at the exact same point in time – five years and one day after acceleration of the maturity date of the instruments.

Prior to January 1, 1975, and since at least 1897, it was "settled beyond any doubt or cavil in [Florida] that the fact that the remedy at law is barred by the statute

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[19] *See, e.g., Speaker v. U.S. Dept. of Health and Human Services Centers for Disease Control and Prevention*, 623 F.3d 1371 (11th Cir. 2010); *Rosenberg v. Gould*, 554 F.3d 962, 965 (11th Cir.2009).

[20] *Insurance Co. of North America v. Lexow*, 937 F. 2d 569, 571 (11th Cir. 1991).

[21] *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

[22] *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009); *Bell Atlantic Corporation et al., v. Twombly*, 550 U.S. 544, 564 (2007).

of limitations upon promissory notes secured by a mortgage under seal does not affect the lien of the mortgage."[23] Chapter 75-234, Laws of Florida, which repealed or amended every provision of Chapter 95 of the Florida Statutes, and went into effect on January 1, 1975, was enacted with the specific intent and purpose of changing this aspect of Florida law.

The legislature's intent is manifested primarily by the following changes to Chapter 95 made by 75-234: (1) the enactment of subsection six of 95.11, which explicitly provides that "[l]aches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his rights and whether the person sought to be held liable is injured or prejudiced by the delay;" (2) the shortening of the statute of limitations specifically applicable to mortgages from twenty to five years (so that for the first time in Florida history it was consistent with the five year limitations period applicable to promissory notes); (3) the enactment of section 95.051, which, for the first time in Florida, statutorily enumerated an *exclusive* list of reasons (termed "disabilities" in the statute) that could be applied to toll any of the statutes of limitations found in Chapter 95, and explicitly states that "[n]o disability or other reason shall toll the running of any statute of limitation except those specified in this section …;" and (4) the deletion from 95.11

[23] *Ellis v. Fairbanks*, 21 So. 107, 109 (Fla. 1897).

of the twenty year statute of limitations applicable to actions "upon any contract, obligation, or liability founded upon an instrument of writing under seal," which the Florida Supreme Court had relied on for over half a century (until the legislature enacted a specific twenty year limitations period applicable to mortgage foreclosure actions)[24] to hold that a mortgage could be foreclosed (for twenty years after accrual of the foreclosure claim) even though enforcement of the note would be barred under the shorter five year statute applicable to written contracts *not* under seal.

And although subsequent amendments to Chapter 95 introduced language explicitly subjecting mortgage foreclosures to the provisions of Chapter 95 (the first of them being enacted in 1945), the twenty year limitations period that was adopted suggests that the legislature's intent in doing so at the time was simply to codify the common law. So, in 1974, when the legislature made the significant revisions to Chapter 95 at issue in this case, it was still the law in Florida that a mortgage could be foreclosed in equity even though the corresponding remedy at law had been barred. As explained further below, the intent manifested by these fundamental changes in law, and expressed in the legislative history that preceded them, was to remediate the patent incongruence in the availability of legal and equitable relief for the same harm in Florida.

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[24] *See HKL Realty Corporation v. Kirtley,* 74 So. 2d 876, 877 (Fla. 1954) (explaining that in "1945 the legislature enacted Chapter 22560, Laws of Florida 1945, section 1 of which provides that … no action or proceeding of any kind shall be begun to enforce or foreclose the mortgage after the expiration of … twenty years after the date of such maturity …").

B. When the Florida legislature enacted section 95.11(2)(c) in 1974, Florida law was unequivocal that even though an action on a note was barred by the then existing equivalent to 95.11(2)(b), Florida Courts were compelled to allow foreclosure of the associated mortgage lien in equity.

In 1974, the law in Florida had long been settled that even though enforcement of a promissory note was barred by the statute of limitation on written contracts now found at section 95.11(2)(b), an action to enforce the separate and distinct remedy of foreclosure could be pursued in equity. As discussed in more detail later in this brief, the Florida Supreme Court first found this to be the law in Florida over 100 years ago in the seminal case of *Browne v. Browne*, 17 Fla. 607, 1880 WL 3073 (1880). In what was a monumental decision in the development of the law in Florida's young history at the time, the Florida Supreme Court rejected the argument made by a defendant to a mortgage foreclosure action that because the legislature did not enact a specific statute of limitations addressing the foreclosure of mortgages in the 1872 act that first codified the then existing statutes of limitations in Florida, a mortgage could no longer be foreclosed after the expiration of the most analogous statute of limitation – the statute applicable to written contracts.[25] Its decision was based explicitly on the common law notion that the promissory note provided the basis for the legal remedy of a money judgment *only*, and that the remedy of foreclosure was an equitable remedy that was founded upon the separate mortgage security instrument.[26] On that basis, the

[25] Browne v. Browne, 17 Fla. 607, 1880 WL 3073, *6-12.

[26] Id. at *8.

Florida Supreme Court ruled that because there were two distinct remedies available to the holder of a promissory note secured by a mortgage, the fact that one of the remedies was barred did not extinguish the other remedy.[27] From that premise, the Court then followed New York law in ruling that mortgages securing repayment of promissory notes were instruments under seal under the relevant Florida legislative act,[28] and, as was the case in New York,[29] the legislature had in fact explicitly set forth a statute of limitations on instruments under seal (though it was a much longer period of twenty years).[30]

The *Browne* decision was revisited by the Florida Supreme Court eight years later in the case of *Jordan v. Sayre*, 3 So. 329 (Fla. 1888). In another oft-cited opinion, the Florida Supreme Court approved of the decision in *Browne* after engaging in an extensive discussion of the nature of mortgages in Florida after the legislature abrogated the common law regarding mortgages and their foreclosure in 1853. In

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[27] Id. at *6-12.

[28]"[T]he statute of this State entitled 'An act to amend the laws now in force in relation to mortgages'" abrogated the common law relationship between mortgage holders and borrowers but did "not take away the legal right of possession from the mortgagee, but …. The possession of the mortgagor is subject to be controlled in a court of equity…." Id. at *8.

[29] New York law has long since done an about face and it is currently the case in that state that promissory notes and mortgages are barred by the statute limitations at the same time.

[30] Id. at *8, 12.

what has become horn-book law in the state, the *Jordan* court explained succinctly how the Florida Supreme Court had interpreted the legislature's initial venture into the realm of the law governing secured real estate transactions:

> "Originally, at common law, a mortgage conveyed the legal estate to the mortgagee and upon the mortgagor's default in paying the debt at the time specified for such payment, the estate became vested absolutely in the mortgagee. Equity, regarding the mortgage as security for a debt, rather than a sale of the land, came to the relief of the mortgagor, and permitted him to redeem by paying the debt; and, as equity gave this relief, the right to it was called the equity of redemption. It also gave the mortgagee a remedy by foreclosure, through which a limit to the right of redemption might be fixed by decree; and, if the redemption was not made as decreed, the mortgagor's equity was extinguished, and the estate was absolute in the mortgagee. This was called a strict foreclosure. This kind of foreclosure fell into disuse, and the practice of decreeing a sale of the mortgaged property at public outcry to the highest bidder has long obtained…"
>
> "In Florida a mortgage is not only in equity merely a lien, but under our statute it is nothing more than this at law. …"
>
> "The fact that 20 years are allowed to enforce a mortgage lien, whereas only seven are given to recover possession on the legal title against adverse holding, is not an anomaly in the statute. It allows 20 years for the enforcement of a common-law judgment or simple money-decree, which are by our statutes made also a lien on the interest of the defendant in any real estate. There is no more reason why the lien of a judgment should thus be preserved for 20 years, than that of a mortgage."[31]

By the time *Ellis v. Fairbanks*, 21 So. 107 (Fla. 1897) was decided nine years later, the Florida Supreme Court was sufficiently satisfied with the stability of its precedent in *Browne* and *Jordan* to declare that the issue had been "settled beyond any doubt or

[31] *Jordan v. Sayre*, 3 So. 329, 333 (Fla. 1888).

cavil." The Florida Supreme Court's interpretation of the 1853 statute had withstood the test of time, and the law in Florida was that mortgages could be foreclosed in equity without regard for whether or not the promissory notes they secured had been timely enforced.

B. The plain language of 95.11(2)(c), the nature and scope of the relevant amendments made to Chapter 95 in 1974, and legislative history preceding the amendments, establish that the legislature unambiguously intended to change the law regarding the then existing incongruent availability of remedies with respect to notes and mortgages.

Because this Court's duty is to predict how the Florida Supreme Court would rule on the issues in this case, the Court must approach the issues as that court would – by analyzing the legislature's purpose and intent in enacting 95.11(2)(c) – in light of the specific principles and other considerations specifically applicable to statutes of limitations.[32] The lower court, however, did not even mention the short and plain language of section 95.11(2)(c). Instead, it simply concluded without explanation or reliance on legal authority that "*Singleton* limits its discussion to the application of the doctrine of res judicata – however, the analysis applies with equal effect to the arguments before this Court."[33] In reality, the district court's dismissiveness of the differences between the bar of res judicata and the statute of limitations directly led to it deciding the case in a way that prevented the exact result that the legislature

[32] *See, e.g., Bakersviille-Donovan Engin., Inc. v. Pensacola Executive House Condo. Assoc., Inc.*, 581 So.2d 1301 (Fla. 1991)

[33] Dismissal Order Pg. 12.

intended when it enacted the Statute almost exactly 40 years before the district court's order dismissing the Amended Complaint.

As indicated in the legislative history preceding the significant changes to Chapter 95, which either amended or repealed every provision that had existed before then, the legislature's intent was to modernize the statute, shorten the longest limitations periods, and eliminate the previously existing discord between legal and equitable remedies, which resulted in the law treating certain rights as existing yet having no remedies.[34] And among the most drastically changed provisions was the one that formerly housed all of the limitations periods applicable to mortgages – section 95.281. The 1974 amendments removed the statute of limitations from 95.281 to 95.11 (where all other statute of limitations subject to accrual and tolling were placed), but left the statute of repose (which applies irrespective of accrual of a claim for foreclosure and is not subject to tolling) in the same provision. Both limitations periods, however, were shortened so that they would be consistent.[35] In other words, if a recorded mortgage showed its date of maturity on its face, the legislature intended that the law afford it the presumption as a matter of public record that it was still

[34] *See* Florida Law Revision Council, Project on Statute of Limitation, Some Policy Considerations, (April 8, 1972) ("Statutes of limitations should be applicable to equitable actions as well as actions at law".). Add. "1" at 4.

[35] *See* Florida Law Revision Council, Project on Statutes of Limitation, Some Policy Considerations, (April 8, 1972) ("There seems to be no compelling substantive reason to treat the two actions separately. Uniformity is desirable so that public policy won't be thwarted."). Add. "1" at 6.

enforceable for a shorter five year period (and if it didn't, the legislature intended that the longer twenty year period still apply), but that if it wasn't enforced it would be barred irrespective of the *actual* borrower creditor relationship. If, however, it was adjudicated in a court of law that the loan's maturity had been advanced and that it was not enforced within five years of that date, then it was unenforceable, irrespective of what it indicated on its face in the public record. This is the only way to coherently interpret the changes made in 1974 that would give effect to the legislature's intent that legal and equitable remedies be harmonized, as well as its corollary goal of maintaining uniformity and predictability as a matter of public record, which is central to real estate transactions.

C. Once a Florida court of competent jurisdiction adjudicates that a note and mortgage are barred in accordance with their respective statutes of limitations, the lien created by the mortgage ceases to exist given that the mortgage is nothing if not merely a right to foreclose the lien and have the security sold in satisfaction of the unpaid debt.

Upon determining the date of accrual of the foreclosure claim to be more than five years prior to the filing of the case in which the question is presented to a court. And the court's determines that the limitations period was not tolled at any time during its running, the lien of the mortgage seizes to exist as a matter of law. This conclusion follows from the simple fact that the Florida Supreme Court has interpreted Florida law to follow the lien theory of mortgages, which means that "[a] mortgage on real estate, under our system of law, is nothing more than a lien on the

land to secure the payment of money"[36] and the holder of a mortgage is "merely the owner of a chose in action."[37] In light of that point of law alone, simple logic dictates that the holder of a mortgage lien that is adjudicated by a Florida court to be barred under 95.11(2)(c) in reality owns nothing at all (neither an "interest" in the property or a "chose in action").[38]

Only one Florida appellate court has been squarely presented with the issue of whether a mortgage lien was still enforceable after an adjudication that it was barred under section 95.11(2)(c). Although the court stated in its opinion that it reviewed the legislative history underlying the 1974 amendments to Chapter 95, it apparently misapprehended the intent of the changes discussed in the legislative history described above because the court held quite illogically that the lien could still be enforced in the event the owner attempted to sell the property prior to the expiration of the statute of repose.[39] It appears that the *Houck* court's analysis overlooked the history of secured

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[36] *Coe v. Finlayson*, 169 So. 704, 708 (Fla. 1899).

[37] *Shavers v. Duval County*, 73 So. 2d 684, 687 (Fla. 1954); *see also, City of Gainesville v. Charter Leasing Corp.*, 483 So. 2d 465, 467 (Fla. 1st DCA 1986) (holding that a mortgage does not create an interest in real estate and instead is only a "species of intangible property").

[38] *See e.g, Allie v. Ionata*, 503 So.2d 1237, 1241 (Fla. 1987) (explicitly holding "that dismissals based on limitation statutes are adjudications on the merits for res judicata purposes.").

[39] *Houck Corp. v. New River, Ltd., Pasco,* 900 So.2d 601 (Fla. 2nd DCA 2005) ("[p]ursuant to section 95.11(2)(c), the statute of limitations to file the foreclosure action expired"…..however, under section 95.281(1)(b), the mortgage lien was enforceable

real estate transactions in the state of Florida, including the fundamental import of the Florida Supreme Court's adoption of the lien theory of mortgages. In doing so, it abstractly examined the interplay between 95.11(2)(c) and 95.281(1)(b), instead of against the backdrop of the long line of Florida Supreme Court decisions holding that mortgages are mere liens, described sometimes as intangible property, and that therefore they can only be enforced by way of a foreclosure decree and subsequent sale. The court's failure to do so resulted in the absurd conclusion it suggested regarding the survivability of a mortgage lien after an adjudication that 95.11(2)(c) barred the mortgage from being enforced.

The *Houck* court's reasoning not only ignores and does away with the intent and purpose of the 1974 amendments to Chapter 95 but ostensibly (were it not for the actual reality that the mortgage holder would have no way to enforce its lien even if the debtor sold or otherwise transferred the property) would result in a situation where a debtor could be held prisoner in his own home. In effect, the Second District Court of Appeal's decision requires that a mortgagor must abstain from freely alienating themselves of their home simply to retain their already vested constitutionally protected interest to the defense of the statute of limitations after it

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until November 1, 2004. Thus, when the mortgage was assigned to Houck in 2003, Houck had no legal recourse to collect the debt secured by the mortgage; its only recourse would have been to enforce the lien in the event New River attempted to sell the property before November 1, 2004).

has accrued.[40] As explained above, the only logical reading of the 1974 amendments to Chapter 95 that effectuate the legislature's intent requires that a lien found to be barred under 95.11(2)(c) terminates the lien and its enforcement under 95.281 as well. Otherwise, the legislature's amendments to Chapter 95 are rendered a nullity.

II. The lower court erred when it relied on the Florida Supreme Court's dicta in *Singleton* because nothing in the opinion indicates a departure from existing law and the Florida Supreme Court would not apply its reasoning to allow a party to avoid the statutory bar imposed by 95.11(2)(b) or 95.11(2)(c) because it would analyze those provisions in light of the manifest intent underlying the changes to Chapter 95 the legislature effected.

The Florida Supreme Court's opinion in Singleton was carefully and explicitly limited to the specific facts of the case. And it is undeniably the case that the issues before the *Singleton* court turned solely on the application of the judicial doctrine of res judicata, a form of judicial estoppel, which (unlike statutes of limitations) are subject to discretionary judicial application in light of the equities of a particular case, and that the court did not conduct an analysis of the legislative intent underlying the passage of 95.11(2)(c) (or any statute). So, it can't be said that the Florida Supreme Court gave any indication that its decision was meant to be applied broadly, or that its

[40] *Wiley v. Roof,* 641 So.2d 66, 68 (Fla. 1994) ("The law does not prioritize rights over remedies. Once the defense of the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest.").

dicta regarding acceleration and accrual was meant to effectuate *any* change in Florida law or apply to any provision of the Florida Statutes.

Once these points are recognized and acknowledged, the confusion caused by the *Singleton* dicta is removed, and the answer to the question of how the Florida Supreme Court would rule on the issues before this Court becomes readily apparent: the Florida Supreme Court would not rely on the reasoning in *Singleton* as the sole basis for finding 95.11(2(c) inapplicable. This conclusion flows naturally and directly from the inescapable reality that if the Florida Supreme Court were to do so, it would necessarily have to hold that one of the following two propositions is the law in Florida: either, (1) the filing of a complaint that explicitly accelerates and matures a promissory note and mortgage does not result in accrual of a cause of action for mortgage foreclosure and does not trigger the running of the Statute; or, (2) that a dismissal of a case initiated by a complaint exercising an optional acceleration clause and triggering the Statute tolls the five year limitations period on the already accrued cause of action.[41] Upon examination of the many Florida Supreme Court decisions

[41] *See, e.g., Hearndon v. Graham*, 767 So. 2d 1179, 1184-1185 (Fla. 2000) (explaining that the "determination of whether a cause of action is time-barred may involve the separate and distinct issues of when the action accrued and whether the limitation period was tolled …we extrapolate, therefore that while accrual pertains to the existence of a cause of action which then triggers the running of a statute of limitations, tolling focuses directly on imitations periods and interrupting the running thereof" and that "both accrual and tolling may be employed to postpone the running of a statute of limitations so that an action would not become time barred should not cause confusion between these distinct concepts").

applicable to the issues in this case it becomes readily apparent that neither proposition has *any* bases under Florida law.

This conclusion follows seamlessly from the following two points: (1) it has been over 100 years since the Florida Supreme Court first ruled, as it has consistently ruled on every occasion the issue has been before it prior to *Singleton* (in which, again, the *holding* does not itself turn on the dicta regarding acceleration), that the filing of a complaint for foreclosure of a note and mortgage *is* itself the *effective* exercise of an optional acceleration clause and represents (as a matter of law) the acceleration of the due dates of *all* future installments (so that they become immediately due and owing) and the maturity date of the mortgage itself;[42] and (2) because in the 40 years since the legislature's enactment of Chapter 75-234 the Florida Supreme Court has consistently

[42]*See Clay v. Girdner,* 103 Fla. 135, 143, 138 So. 490 (Fla. 1931)(holding that "the mortgagee cannot just in his own mind determine to exercise the option and make it effective, but he must either communicate his decision to the payor or manifest his election by some outward act.") (internal quotations omitted); *Jaudon v. Equitable Life Assur. Soc. Of United States,* 102 Fla. 782, 136 So. 517 (Fla. 1931) (stating that "filing of suit to enforce the mortgage by foreclosure may sufficiently show his election to exercise his option to accelerate."); *Liles v. Savage,* 121 Fla. 83, 163 So. 399 (Fla. 1935)(explaining that "the object of alleging or showing an election to declare the unmatured mortgage due is to put the mortgagor on notice that the mortgagee intends by the foreclosure to recover principal, interest, and all other amounts due and recoverable under the mortgage."); *Seligman v. Bisz,* 123 Fla. 493, 167 So. 38 (Fla. 1936)(holding that "the institution of a suit for foreclosure is the exercise of the option to declare the whole of the principal sum and interest secured by the mortgage to be due and payable.") (Internal citations omitted); *T. & C. Corp. v. Eikenberry,* 178 So. 137, 138-9 (Fla. 1938) (referring to allegations in the complaint and holding that [t]hese paragraphs sufficiently allege breach of the covenant of the mortgage, the right of acceleration in the mortgagee, and the exercise of the option to accelerate.")

treated the tolling reasons enumerated in section 95.051 as *exclusive*, and so it is a matter of settled Florida law that Florida courts do not have the power to create or otherwise add additional reasons for tolling any statute of limitations found in Chapter 95.[43]

A. The confusion surrounding the *Singleton* opinion, and the misapplication of its dicta, arises from an almost natural yet familiar tendency in the interpretation and application of law to apply the meaning of a word or concept to multiple legal rules without regard for the differences in each rule's purpose, intent or source of power.

The fundamental error committed by the lower court, and by all of the other courts that have relied on dicta in *Singleton* regarding the exercise of an optional acceleration clause and accrual of a mortgage foreclosure claim to find that the Statute was not applicable, is that it treated the statute of limitations as *in pari materia* with res judicata, which resulted in the court overlooking the "discrete offices of those concepts."[44] In fairness to the district court and the other courts that have similarly ruled, it is a mistake repeated so often by practitioners and jurists alike that the

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[43] *See Major League Baseball v. Morsani,* 790 So. 2d 1071, 1080 (Fla. 2001) (acknowledging that "Section 95.051 delineates an exclusive list of conditions that can 'toll' the running of the statute of limitations"); *Federal Insurance Company v. Southwest Florida Retirement Center*, 707 So.2d 1119, 1122 (Fla.1998) (holding that "when construing statutes of limitations, courts generally will not write in exceptions when the legislature has not").

[44] *Wachovia Bank, NA v. Schmidt*, 546 US 303, 318 (2006) (holding that by "[t]reating venue and subject matter jurisdiction prescriptions as *in pari material*, the Court of Appeals majority overlooked the discrete offices of those concepts" and made an error of law in its interpretation of the word "located").

Supreme Court of the United States recently called the following passage from a 1933 Yale Law Journal article by Walter Cook "a staple of our opinions":[45]

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all legal discussions. It has all the tenacity of original sin and must constantly be guarded against."[46]

This risk of this danger is surely not a foreign concept to the Florida Supreme Court, which has on more than one occasion been invited by one litigant or another to apply the definition of a word, or analysis of a concept, the Court previously used in a different context, or with respect to a different rule of law. For instance, in a case that is particularly salient to the issues on this appeal, the Florida Supreme Court was presented with the issue of whether the use of the word privity as it was used in the four year statute of limitation found in section 95.11(4)(a).[47] Each side of the dispute called for a different definition of the term, with one side basing its argument on the way the Court had used the term in cases discussing third-party beneficiary principles. In rejecting that argument, the Court held that the term must be interpreted in accordance with the Florida decisions existing at the time of 95.11(4)(a), and that

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[45] *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

[46] Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933).

[47] *Baskerville-Donovan Eng's, Inc., v. Pensacola Exec. House Condominium Ass'n, Inc.*, 581 So. 2d 1301 (Fla. 1991).

"[t]hat to the extent our recent cases may have applied a different gloss to the concept of privity for these limited circumstances, the legislature would have been unaware of it when enacting the law in 1974."[48]

In 1974, the law in Florida regarding the effect of the dismissal of an action to foreclose a mortgage containing an optional acceleration clause was controlled by *Stadler v. Cherry Hill Developers, Inc.*, 150 So.2d 468 (Fla. 2nd DCA 1963)[49]. In *Stadler*, the Second District Court of Appeals found it "axiomatic that 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 payments in issue and forecloses successive suits." Although the argument is not significantly articulated in this brief, there may be authority for the proposition that in light of *Stadler* and the Florida Supreme Court precedent preceding that the Court could conceivably be constitutionally prohibited from applying *Singleton* to an otherwise barred claim.[50]

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[48] *Id* at 1304.

[49] *See also, Travis Co. v. Mayes,* 160 Fla. 375, 376 (Fla. 1948) ("The rule is also settled that when a mortgage in terms declares the entire indebtedness due upon default of certain of its provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately the default takes place or the time intervenes.")

[50] *See generally, Williams v. Jones*, 326 So.2d 425, 429 (Fla. 1975) (emphasizing that the "Court has held that once a claim is extinguished by the statute of limitations, it cannot be revived as a result of a subsequent court decision")

[1] *Williams v. Jones,* 326 So.2d 425, 429 (Fla. 1975).

B. The *Singleton* holding does not represent any change in Florida law as its *holding* is entirely consistent with the seemingly little-known yet unremarkable notion that Florida courts have the power to refuse to apply the judicial bar of res judicata where its application would work an injustice.

The limited holding in *Singleton* was explicitly that "[w]e approve the decision in *Singleton* and hold that a dismissal with prejudice in a mortgage foreclosure action *does not necessarily* bar a subsequent foreclosure action on the same mortgage." This holding was explicitly based on the Florida Supreme Court's reliance on the well-settled principle in Florida that "the doctrine [of res judicata] will not be invoked where it will work an injustice...."[51] Just

A close inspection of the facts before the *Singleton* Court suggests that, if the decision is relevant in a statute of limitations analysis at all, it lends support to the argument that the Florida Supreme Court is powerless to undermine the legislature's intent by lengthening the limitations period in the Statute. This support follows from the somewhat counterintuitive realization that if the Florida Supreme Court had applied the bar of res judicata in *Singleton*, it could be said that it abrogated legislative authority in that the court would have effectively terminated the mortgage lien less than five years after acceleration of its maturity.[52] Doing so would hardly offend the conscious of any jurist if the reason that the first action was adjudicated in favor of

[51] *Singleton*, 882 So. 2d at 1008 (quoting *deCancino v. Eastern Airlines, Inc.*, 283 So.2d 97, 98 (Fla.1973)).

[52] *Singleton v. Greymar Associates*, 840 So. 2d 356 (Fla. 2003) (Fla. Dist. App. 1966).

the borrower is that the debt was not owed or there was some other legal defense that was shown to prevail on the facts before the trial court. But where the first action was dismissed on what could be analogized with a technicality – that the plaintiff's lawyer did not appear for a court noticed status conference – a Florida Supreme Court mandate to a trial court in Florida that it must apply the judicial bar of res judicata to prevent enforcement of an otherwise valid claim to an unpaid debt not yet barred by the statute, would by judicial fiat shorten the enforceable life of the mortgage lien. And it is precisely because the enforceable life of the mortgage lien is within the exclusive province of the Florida legislature that the Florida Supreme Court does not have the power to apply its own judicial rules to undermine the intent of the law defining the length of that life.

An analogous (though in reverse) situation was presented to the Florida Supreme Court over eight decades ago in *Craig v. Ocean & Lake Realty Co.*, 133 So. 569, 573-574 (Fla. 1931). In that case, res judicata would have barred an equitable remedy but a statute allowed recovery of a money judgment at law. In holding that its own rule would have to yield to the law of the legislature, the Court stated:

> "It is the duty of the courts to give effect to the legislative intention as thus shown, even though it infringes to some extent upon the doctrine of res judicata. Statutes should, when reasonably possible, be so construed as not to conflict with the Constitution or with long and well settled legal principles, but the language of this statute, considering it as a whole, cannot be given its apparent meaning and purpose without upsetting to some extent the principle of res judicata, and thus creating a somewhat anomalous situation, which will in some cases require a circuit judge to grant to a party a judgment at law on a cause of action, which,

> sitting as chancellor in a court of equity, he had already held such party was not, in equity and good conscience, entitled to enforce."

The rule articulated by the *Craig* court also negates the casual assumption by the court below, as well as the several other courts that have similarly ruled, that "the analysis applies with equal effect" to a statute of limitations analysis. As the holding in *Craig* demonstrates by its very nature (that the results achieved under the application of the rule and that of the law of the statute was different under the circumstances of the case), the result that would attain by applying each to a particular set of facts can most certainly be different.

C.. The Florida Supreme Court would not apply the *Singleton* dicta to allow a mortgage holder to avoid the bar imposed by section 95.11(2)(c) because the reasoning in *Singleton* relied heavily on equities in that case, and the Florida Supreme Court has consistently held that equitable considerations cannot be used to avoid the bar of the statutes of limitations in recognition of the fact that doing so would abrogate legislative authority.

Even if the Florida Supreme Court were inclined to consider any of the dicta articulated by the *Singleton* court despite the fact that the opinion's discussion of accrual and acceleration in the context of the exercise of an optional acceleration clause represented a significant departure from the law that exited in 1974 when the legislature enacted the Statute, if it were to do justice to the principle of stari decisis and afford due respect and accord for the policies and fundamental principles that

underlie that judicial doctrine, [53] it would be compelled to reject any invitation to adopt a similar mechanical application of those terms to the issues before this Court.[54] In fact, to the extent that the doctrine is relevant to this case in any way other than that this Court should anticipate that the Florida Supreme Court would rule on the issues here as it uniformly has when applying statutes of limitations in cases of first impression (by ensuring they are applied in accordance with legislative intent), it is because the lower court here, and several other courts sitting in Florida, found the *Singleton* decision to be binding precedent. Although it is not argued here that that is the case, were found to be the case, then it would be argued that the judicial doctrine of stari decisis should be flexibly applied to the issues before this Court in accordance with well settled principles articulated by the Florida Supreme Court.[55]

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[53] This is not meant as a suggestion that the Florida Supreme Court would depart from its adherence to that fundamental doctrine of jurisprudence. See, e.g., *State v. J.P.*, 907 So.2d 1101, 1108 (Fla.2004)("This Court adheres to the doctrine of stare decisis"); *State v. Gray*, 654 So.2d 552, 554 (Fla. 1995)(the stare decisis doctrine is important in "provid[ing] stability to the law and to the society governed by that law.")

[54] And even if the *Singleton* court's reasoning could properly be applied to sections 95.11(2)(b) or 95.11(2)(c), the district court's application of the opinion's reasoning to the Amended Complaint is premature at the pleadings stage because of the *Singleton* court's explicit acknowledgement that its holding was based on the equities of the particular case before it.

[55] *State v. J.P.*, 907 So.2d at 1109 ("Stare decisis bends where ... there has been an error in legal analysis"); *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1096 (Fla.1987) (Ehrlich, J., concurring in part, dissenting in part)("Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court.").

But, in any event, the notion that the Florida Supreme Court would ignore its uniform application of statutes of limitations can almost entirely be expelled by simply turning to the very words carefully chosen by the *Singleton* court in explaining its decision. The *Singleton* court was clear that its ruling was based on its belief that "justice would not be served if the mortgagee was barred from challenging the subsequent default payment *solely* because he failed to prove the earlier alleged default."[56] Continuing its discussion of the equitable nature of its ruling, the Supreme Court went on to explain as follows:

> "We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to able to challenge multiple defaults on a mortgage. We can find valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note *solely* because they did not prevail in a previous attempted foreclosure based upon a separate alleged default."[57]

These passages demonstrate rather conclusively that the *Singleton* court's refusal to apply the bar of the judicial rule of res judicata, which would seemingly otherwise apply to all litigants in all cases, was fundamentally founded upon the equitable nature of a mortgage foreclosure action and the well settled principle discussed in the section of this brief immediately preceding this one that all forms of judicial estoppel may be

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[56] *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1008 (Fla. 2004). (Internal citations omitted) (Quotations omitted).

[57] *Id.* (citation omitted) (emphasis added).

flexibly applied as justice may require in a given case. Additionally, the Florida Supreme Court emphasized that the unjustness turned on the fact that application of the bar of res judicata effectively terminated the lien based "solely" on the failed action. And, although at least one of the district courts of appeals in Florida that has applied the *Singleton* reasoning to find a previously accelerated mortgage was not barred by the Statute has held that Singleton represented a reversal or fundamental change in law in Florida, the *Singleton* opinion was not the first time the Court had applied similar reasoning in declining to find that res judicata barred a previously dismissed claim. In at least one other case, which was ironically decided in 1974, the Florida Supreme Court held, although admittedly more carefully than it did in *Singleton*, that:

> "To allow the earlier dismissal of the complaint with prejudice to stand would have the effect of depriving the appellants of their rights under the statute by virtue of dismissal of an action that had not accrued[20] as of the time of dismissal. Under such an interpretation, the dismissal in the instant cause would bar all recovery despite qualification thereafter to sue. We find such a construction untenable and hold that the plaintiff may sue for such damages once the "threshold" has been crossed, so long as it is *within* the statute of limitations."[58]

The *Lassky* Court's warning that although the bar of res judicata could be forgiven by the Court, the legislature's bar of the Statute could not is indicative of how the Florida Supreme Court would rule on the issues in this case.

[58] *Lasky v. State Farm Insurance Company,* 296 So.2d 9 (Fla. 1974).

But assuming for the sake of argument that the Court would entertain any of the *Singleton* reasoning in a case evaluating the applicability of the Statute, it is not likely the Court would not take equitable considerations into account in resolving the issues before this Court for at least two reasons: (1) The Florida Supreme Court has consistently recognized that it does not have the power to write exceptions into a statute or to undermine a statute's legislative intent irrespective of how it views the equitableness of the consequences of applying a given statute in a particular case;[59] and (2) even if it did take equity into account, the Florida Supreme Court would find that the equitable maxims do not favor exempting a mortgage holder that has slept on its rights from application of a statute of limitation that applies on its face.[60]

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[59] In a case decided prior to the 1974 enactment of 95.051, the Florida Supreme Court declined to exempt a claim to which the statute applied on its face from the statutory limitations bar because:

> "The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof."

See, e.g., Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952)

[60] *See, e.g., Blocker v. Ferguson,* 47 So.2d 694, 701 (Fla.1950) (reversing a trial court that had awarded an ex-wife damages against her former husband's estate for unpaid alimony despite the seeming inequity because "equity rewards the vigilant and not those sleeping upon their rights").

With respect to the first point, the Florida Supreme Court has consistently declined the invitation of litigants to rule in a way that would undermine the intent of a legislative enactment or that would exempt a party from its intended application regardless of the reason provided. In fact, even before the 1974 amendments to Chapter 95 were enacted into law, in a case where the twenty year statute of limitations on actions to enforce instruments under seal were applicable to mortgage foreclosure claims, the Court declared it "well-settled … that unless strong equities compelling the application of a different rule are made to appear, a court of equity will apply the statute of limitations in an equity suit with the same substantial effect and same construction as it would receive in a court of law".[61]

With respect to the second point, in the very words of the Florida Supreme Court itself nearly 60 years ago "[n]o rule is better settled than that equity aids the vigilant and not the indolent."[62] In *Singleton*, the Florida Supreme Court found that equity demanded the result that res judicata not be applied because it could "envision many instance" in which its application "would result in unjust enrichment or other inequitable results." But that conclusion can only have been reached precisely

[61] *HKL Realty Corporation v. Kirtley*, 74 So. 2d 876, 878 (Fla. 1954).

[62] *Lanigan v. Lanigan*, 78 So.2d 92, 96 (Fla.1955); *accord DeHuy v. Osborne*, 96 Fla. 435, 442, 118 So. 161, 163 (1928) (holding that "if the purchaser would seek the aid of a court of equity, he must act with appropriate diligence in asserting his rights ..."); *Nussey v. Caufield*, 146 So.2d 779, 783 (Fla. 2nd DCA 1962) (emphasizing that "it is not the office of equity to shield a litigant from that which results from his own improvidence").

because, and not in spite of the fact, that the statute of limitations on the original acceleration of the mortgage and advancement of the maturity date had not yet expired.

D. Although at least two intermediate appellate courts of Florida have ruled on the issues before this Court, the Court is not bound by the holdings of those courts and is not required to adopt their reasoning because there is an abundance of evidence suggesting that the Florida Supreme Court would rule otherwise.

Although an intermediate appellate court decision in Florida is binding if it doesn't conflict with a decision of another district court or the Florida Supreme Court, this Court "may disregard these decisions if persuasive evidence demonstrates that the highest court would conclude otherwise."[63] In doing so, this Court's "objective is to determine issues of state law as [it] believe[s] the Florida Supreme Court would, therefore a federal court attempting to forecast state law must consider whatever might lend it insight, including relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.,* 420 F.3d 1317 (11th Cir. 2005) (quoting *McKenna v. Ortho Pharmaceutical Corp.,*622 F.2d 657, 663 (3d Cir.1980)) (internal quotations omitted).

1. The recent decisions of Florida's Fourth and Fifth District Courts of Appeals conflict with an unbroken line of Florida District Court

[63] *Molinos Valle Del Cibao, C. por A v. Lama,* 633 F.3d 1330 (11th Cir. 2011).

> decisions issued since the 1974 amendments that have analyzed whether 95.11(2)(c) barred an action solely by focusing on the date of acceleration of the note and mortgage without regard to whether or not an action to foreclose was ever filed.

Since 1974, and prior to the recent decisions applying the dicta from the *Singleton* decision, which all trace their reliance on that theory back to the United States District Court for the Middle District of Florida's decision in *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. November 05, 2013), Florida district courts of appeals analyzing the effect of the exercise of an optional acceleration clause had consistently found that acceleration of the future installments due under the promissory note and mortgage initiated the running of the Statute.[64]

As one example, only six years after the enactment of the amendments to Chapter 95, Florida's Fifth District Court of Appeals (which was the first of the two intermediate appellate courts in Florida to apply *Singleton* to find that the Statute did not bar foreclosure of a mortgage accelerated by the filing of a complaint in a subsequently dismissed foreclosure action), decided a case that turned on whether a particular letter sent to the debtor was an effective exercise of an optional acceleration

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[64] *See, Central Home Trust, Co. of Elizabeth v. Lippincott,* 392 So.2d 931, 933 (Fla. 5th DCA 1980)("[t]he statute of limitations may commence running earlier on an installment note for payments not yet due, if the holder exercises his right to accelerate the total debt."); *Spencer v. EMC Mortgage, Corp.,* 97 So.3d 257, 260 (Fla. 3rd DCA 2012)(" Spencer is also correct that enforcement of the note and mortgage was likely barred by the five-year statute of limitations, section 95.11(2)(c), Florida Statutes"….. "[i]t appears on the face of the existing record, then, that acceleration likely occurred over five years before this lawsuit was filed.").

clause. The *Lippincott* court explicitly stated that examples of acceleration included "a creditor's sending written notice to the debtor, making an oral demand, and alleging acceleration in a pleading filed in a suit on the debt."[65] The holding in *Lippincott* was that the Statute did not bar foreclosure of the relevant mortgage because the letter at issue did not give notice of the mortgage holder's election to exercise the optional acceleration clause. As a result, the holding turned *solely* on the court's finding that there was "no basis to conclude in this case that the note was accelerated" and that "no such demand or notice [of acceleration] was given in this case." [66] The very fact that the *Lippincott* court conducted an analysis of the language used in the letter at issue necessarily means that the court would have found the Statute to have barred the claim to foreclose the mortgage had the letter sufficiently given notice of acceleration. [67]

More recently, in *EMC Mortgage,* Florida's Third District Court of Appeals (in a case decided eight years after *Singleton*) considered an appeal from a final judgment of foreclosure brought by the holder of a mortgage that had taken it by assignment. The prior holder of the mortgage had filed a foreclosure action that was ultimately

[65] *Id* at 933 (emphasis added).

[66] *Id* at 933 (emphasis added).

[67] Interestingly, despite its apparent conflict with the opinion issued by the fifth district in *U.S. Bank v. Bartram*, 39 Fla. L. Weekly D871 (Fla. Dist. Ct. App. April 25 2014), the fifth district panel that handed down the decision did not discuss the *Lippincott* case in the issued per curiam opinion.

dismissed for lack of prosecution. The district court concluded that the second case should have also been dismissed for lack of prosecution, and that if it wasn't for that ruling "Ms. Spencer would be entitled to a remand for fact-finding regarding the date of acceleration, a date which plainly occurred before the maturity date of the note and mortgage."[68] In a special concurring opinion, Senior Judge Schwartz wrote separately to state:

> "Because of the stumbling, bumbling, and general ineptitude of the mortgagee and its representatives, the appellant has managed to remain in the mortgaged premises without payment for over fifteen years after defaulting in 1997. While it therefore pains me deeply to do so, I concur in the reversal of the summary judgment of foreclosure against her…."
>
> "I agree that the action should have been dismissed for lack of prosecution under Florida Rule of Civil Procedure 1.420(e)…."
>
> "Even if this were not so, the summary judgment should not be affirmed. Far from establishing the right to that relief beyond genuine issue on the statute of limitations defense, the record contains unrebutted affirmative evidence from the plaintiff's representative that a prior owner of the mortgage had appropriately accelerated it, thus triggering the limitations period under section 95.11(2)(c), Florida Statutes, well more than five years before the commencement of this action. If anything, only the appellant was entitled to judgment on this record.
>
> As someone — probably either St. Thomas More or George Costanza — must have said, the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served."

These opinions support the conclusion that the decisions of the two district courts of appeals in Florida that have relied on *Singleton* fundamentally departed not

[68] *Spencer v. EMC Mortgage, Corp.,* 97 So.3d 257(Fla. Dist. Ct. App. 2012).

only from established Florida Supreme Court precedent regarding (1) the effect of the exercise of an optional acceleration clause in a note and mortgage, but (2) other district court decisions and even the law applied by a panel of its own district (at least in the case of the fifth district). This sudden, rapid, and confusing departure from the established law in Florida regarding the accrual of a cause of action for foreclosure should not instill much confidence in this Court that the Florida Supreme Court would follow either of the Florida district courts of appeals that have applied the *Singleton* reasoning to the Statute.

2. Additional persuasive evidence can be found by reviewing the Florida Supreme Court's own recent views on the foreclosure crisis, including specifically the Florida Supreme Court Foreclosure Taskforce Report.

In approximately 2009, the Florida Supreme Court commissioned a taskforce (the "Taskforce") to address the crisis experienced by the Florida courts over the previous year as a result of the unprecedented number of mortgage foreclosure filings. Although the story is familiar to almost every American, it bears reminder that this rush to the courthouse was brought about initially by a spike in mortgage loan defaults that most have attributed to lax lending standards and other failures in internal controls and regulatory compliance. In response, national banks initially responded quickly to default and file foreclosure against borrowers but as the defaults increased, the speed at which lenders processed defaults and prosecuted mortgage foreclosure claims slowed, and the backlog of cases in Florida's courts grew.

On August 17, 2009, the Taskforce issued its report (the "Report"), which can still be found on the Florida Supreme Court's website. As one would expect, the Report laid much of the blame for the crisis on the negligence of the lenders and their lawyers. The Taskforce reported that "cases sit on the docket and plaintiff's lawyers fail to affirmatively progress the cases" and "[t]here are rampant complaints about unreturned phone calls, emails and difficulties in communicating with firms that handle a particularly large volume of the foreclosure plaintiffs' work."[69] The Report also raised the question of whether these plaintiff's firms are "candid, clear, and truthful and accurate in connection with pleadings and affidavits filed with the Courts."[70]

The appropriate remedy for negligence on the part of Plaintiff's counsel is a malpractice lawsuit brought by the Plaintiff, not a judicial extension of the statute of limitations beyond the clear intent of the legislature. "At this point, the vast majority of foreclosure cases in the state of Florida are brought by a very limited pool of plaintiffs' firms, who handle approximately 90% of the cases state-wide. Two of the

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[69] *See* Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases: Final Report and Recommendations on Residential Mortgage Foreclosure Cases (August 17, 2009), at 20, available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf.

[70] *Id.* at 20-21 ("Judges continue to see affidavits of amounts due and owing signed by law firm employees, and cost affidavits charging very high service of process fees for process serving firms owned by the law firm principals. To some extent, it is fair to be concerned whether the press of the case load is interfering with a judge's ability to police the conduct of the firms before them.".)

firms control approximately 60% of the cases. However, a recently developed business practice affects the filing of the complaint. … plaintiff lawyers told the Task Force, the firms frequently do not have the note in hand at the time the action is brought."[71] The taskforce further explained that "[t]he top foreclosure filers in Florida are Deutsche Bank, U.S. Bank, Wells Fargo, Chase Home Finance, SunTrust Mortgage, Bank of New York, Bank of American and Countrywide Financial Corporation, J.P.Morgan and CitiMortgage."[72] A lender's decision to use these firms should not be resolved by creating a moving target which removes the five-year limitation, and essentially becomes a statute without limitation.

CONCLUSION

Although the largest lenders in the nation have universally flocked to *Singleton* and clung to its dicta in hopes of having the Florida courts save them from the natural consequences the Statute imposes upon them for their failure to diligently preserve their rights and enforce their claims, the Florida Supreme Court's holding and reasoning in *Singleton* is entirely inapplicable to the ancient, universally accepted statutory time-bars that permeate every corner of the law and intrinsically define the

[71] *Id.* at 21.

[72] *Id.* at 37, n. 2.

contours of nearly every legal right.[73] The unfortunate irony of the situation is that the national banks that are now seeking to displace the will of the Florida legislature are the very same entities that occupy the envious, if not privileged, position in society of having their interests more than adequately represented in the political process. Few would call it exaggeration to say that the largest financial institutions in this country exert a disproportionate influence over the work done within the legislative houses of the various states of the nation, as well as that of the United States Congress.[74] Yet, having suffered a political setback in 1974, and not having successfully lobbied the legislature to reverse itself since, mortgage lenders are now unabashedly turning to the courts of Florida to undo what the legislature explicitly accomplished in Tallahassee

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[73] Over a hundred years ago the Supreme Court of the United States succinctly described statutes of limitations in the following terms:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

Wood v. Carpenter, 101 U.S. 135, 139 (1879).

[74] This point was not lost on the Florida Supreme Court itself in 1974. In the seminal case of *Lasky v. State Farm Insurance*, 296 So. 2d 9 (Fla. 1974), which was decided on April 17, 1974, only a month before the floor debates on House Bill 895, which eventually became Chapter 75-234, Laws of Florida, Justice Ervin wrote a separate opinion concurring in part, and dissenting in part, in which he noted that "there have been many complaints in latter years that the courts are being replaced by bureaucratic administration; trial by jury is 'old hat,' and that special interests *run rampant*."

almost exactly 40 years ago. And this they would do by having the courts unprecedentedly expand mere dicta from an opinion addressing just one particular type of judicial estoppel and that does not even include the word "statute," much less the term "statute of limitations."

In reality, the *Singleton* reasoning could not be more inapplicable to the situation at hand. If anything, the decision only lends support to the well-established principle that courts are powerless to substitute their judgment on matters of policy for that of the legislature – had the Florida Supreme Court ruled that Florida courts were bound by a judicial rule to prohibit the foreclosure of mortgages that had been matured for less than five years, it would have effectively abrogated the legislature's intent that mortgage liens survive and can be enforced in the courts of Florida for five years after they are matured (whether on their face - as unambiguously expressed in the repose language used in section 95.281 - or after unequivocal acceleration). It must be assumed as a matter of law that the Florida legislature made a policy judgment after balancing the various competing interests when it set the five year limitations period prescribed by the Statute.[75] And the policy of the State of Florida that emanates from the plain language of the Statute, when properly considered in light of the history that

[75] *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-4 (1975) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

preceded it as well as the other relevant changes to Chapter 95 that occurred in 1974, is that mortgage liens attached to Florida real estate securing non-performing loans must be foreclosed within five years of a default being declared, and maturity being accelerated, or forever be lost. The legislature spoke clearly and loudly in 1974. It is the duty of the Florida courts, and correspondingly of this Court in predicting how the Florida Supreme Court would rule, to acknowledge its voice and to faithfully apply the law as it was intended to apply. Any other result would offend, if not violate, the explicit separation of powers provision of the Florida Constitution, and would effectively silence the people of Florida with hardly more than the proverbial stroke of a judge's pen.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,984 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Garamond font.

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STATEMENT AS TO ORAL ARGUMENT

In accordance with Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rule 34-3, Dorta respectfully requests that the Court allow oral argument of the issues in this case. Her request is based on the reasoned and studied professional judgment of this author that, given the widespread and apparently growing confusion caused by the Florida Supreme Court's opinion in *Singleton*, which was relied on by the district court in this case, and by Florida's Fifth District Court of Appeals in a case where it in turn relied on the district court's unpublished decision and certified two questions to the Florida Supreme Court as passing on issues of great public importance, oral argument would be of particular assistance to this Court in adjudicating the respective rights of the parties to this appeal.

CERTIFICATE OF SERVICE

I certify that on July 16, 2014, a true and correct copy of the foregoing was sent via email to counsel for Appellee at (1) ols-eservice@bakerdonelson.com; (2) tmaloney@bakerdonelson.com; (3) jtropper@bakerdonelson.com; and, (4) mstarks@bakerdonelson.com.

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ADDENDUM

1. Florida Law Revision Council, Project on Statutes of Limitations, Some Policy Considerations (April 8, 1972).

2. CS/HB 895 Section Summary

ADDENDUM "1"

FLORIDA LAW REVISION COUNCIL

PROJECT ON STATUTES OF LIMITATION

SOME POLICY CONSIDERATIONS

Thomas E. Bevis

April 8, 1972

I. General Policy Considerations

A. Objectives of current statutes of limitations.

(1) To compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while the evidence is still fresh.

(2) Protect potential defendants from the protracted fear of litigation.

(3) Promote security and stability in human affairs by stimulating activity and punishing negligence. 51 Am. Jur. 2d Limitation of Actions §§17-19.

B. Possible objectives for revising the current statutes of limitation.

(1) Create more uniformity of application thereby increasing the attorney's power to predict results in varying factual situations.

(2) Adjust prescription periods to reflect present policies and realities rather than historical ones.

(3) Simplify this area of the law by stating underlying principles applicable to all statutes of limitation.

II. Should the statute of limitations be applicable to equitable actions as well as actions at law? If so, should the doctrine of laches be abolished? If laches is not abolished should it be applicable to both legal and equitable actions prior to the running of the statutes of limitations?

A. Historical background

(1) When the first English statute of limitations was enacted in 1275, the courts of chancery were not yet in existence. By the time the chancery were firmly established, the second statute of limitations had been passed, which expressly exempted equitable actions from its purview. Consequently, the chancery courts adopted the doctrine of laches to deal with untimely actions. 3 U. of Fla. Law Review 351.

(2) Philosophically and in application, there is very little difference between the final result obtained when an action is barred by the statute of limitations or when one is barred by laches. The inapplicability of the statute in equitable actions can probably best be explained by the historical jurisdictional jealousy between the courts of chancery and law and not by any real substantive difference in the two doctrines.

B. Substantive differences between the statute of limitations and the doctrine of laches.

(1) The main difference is that the mere passage of the prescribed time is sufficient to bar the action under the statute of limitations, whereas laches requires that there be some potential prejudice to the defendant because of the passage of time in order to bar the action. 51 Am. Jur.2d, Limitation of Actions, §6; 44 No. Carolina Law Review 202.

(2) The primary effect of this distinction is to give chancery judges added discretion in barring untimely actions, thus exposing a defendant to a greater amount of unpredictability as to how long he may be exposed to prosecution in equitable cases.

C. Limitations and laches in practice

(1) There is no question that statutes of limitations have profound effect on the application of the doctrine of laches in equity cases. Some jurisdictions have applied limitation statutes to equity actions by case law; others have done it by statute. Most, however, still apply the doctrines separately.

(2) In cases where there is a comparable action at law

to the one advanced in equity, the court will in most jurisdictions, use the statute of limitations for the comparable law action as a guide in applying laches in the equitable action. The same has been true in Florida. 21 Fla. Jur. Limitation of Actions §13.

(3) Also in cases of concurrent jurisdiction between courts of equity and law, the court of equity will generally apply the statute of limitations applicable to the legal remedy in holding the equitable claim barred by laches. This is to provide for uniform results where plaintiff can elect either an equitable or legal action. 3 U. of Fla. Law Review 351, 353.

(4) It is possible for laches to be applied in equitable actions both before and after the limitation time has run on a comparable action at law, but most jurisdictions won't apply laches after the statute has run.

D. Statutes of limitations should be applicable to equitable actions as well as actions at law.

(1) Public policy considerations (see section I) of both statutes of limitations and the doctrine of laches

are identical.

(2) The trend in modern law is to unite the courts of law and equity and to de-emphasize their differences.

(3) The difference between limitations and laches seems to be more historical than substantive.

(4) Current Florida rules of civil procedure have abolished the distinction between law and equity.

E. Assuming that the statute of limitations is applicable to equitable actions, a good case can be made for abolishing the doctrine of laches for the following reasons:

(1) Operation of the limitations statutes would preclude its application after the statute had run.

(2) Its use would then be limited to equitable actions before the statutory time period had run. Since mere passage of time is not enough to invoke laches, other prejudicial action on plaintiff's part must be shown for which there are other remedies. These include equitable estoppel, promissory estoppel and estoppel in pais.

F. If laches should remain, it should be applicable to both legal and equitable actions prior to the running of the statute of limitations.

(1) There seems to be no compelling substantive reason to treat the two actions separately. Uniformity is desirable so that public policy won't be thwarted.

III. Should Florida continue to follow the theory that the statute of limitations bars only the remedy for the action but not plaintiff's right to bring it?

A. Current legal theory

(1) In the great majority of jurisdictions today, statutes of limitations are held to bar only the remedy and not the right sued on, absent any express statutory provision. 51 Am. Jur. 2d Limitation of Actions §22.

(2) Some states have held the statute to extinguish the right as well as the remedy by case law. Maryland Casualty Co. v. Beleznay, 245 Wis. 390, 14 NW 2d 177.

(3) The Supreme Court of the United States has adopted the position that the remedy only and not the right is barred by the statute. Chase Security Corp. v. Donaldson, 325 U.S. 304.

(4) The practical effect of barring the remedy in most cases is to extinguish the right because a right without a means of enforcing it is a useless thing. There are instances where the distinction is important, however.

B. Situations where the effect of the statute in barring the right or remedy may be important.

(1) Where other remedies are available to plaintiff, a statute that extinguishes the right would preclude the use of these other remedies. For instance, many jurisdictions allow foreclosure of a lien securing property for a debt which has been barred by the statute of limitations. This is accomplished in some cases because the statute is inapplicable to equitable actions. Apparently this is the law in Florida. 21 Fla. Jur. Limitation of Actions §86. It is questionable whether the objectives of the statute of limitations are forwarded by such a practice. It seems to be a way of avoiding the statute by selecting the right remedy to sue on.

(2) Another problem arises in the conflict of laws area. Suppose a cause of action arising in France is barred by a 1 year statute of limitations which extinguishes the right to sue as well as the remedy. Can the cause then be sued on in the United States, assuming the applicable statute here is 2 years? It has been suggested that if the French statute barred the

remedy only the suit could be entertained in the U.S. but since the right was barred by French Law, the action could not be brought in the U.S. 8 Am. Journal of Comparative Law 263. These problems could be eliminated by express provisions of the borrowing statute.

(3) Since most states hold that the moral obligation still exists on a barred debt, a new promise to pay the barred debt will revive it. There is some question whether this would continue under a remedy extinguishing statute. It is suggested that an express statutory provision could eliminate this worry.

(4) The question also arises as to whether the court can raise the statute on its own motion where its effect is to extinguish the right. Now, of course, limitations is a defense raisable only by the defendant. Here again, an express statutory provision that the defendant must raise the statute in order to enjoy its benefits can allay any fears to the contrary.

C. Conclusion

(1) A logical application of limitations policy suggests that the statute should extinguish the right of action as well as it remedy. Not to do so encourages self help after the statute has run which in turn threatens the security and stability of human affairs.

IV. What limitations should be applicable to the state and its political subdivisions?

A. Current and historical legal status

(1) It is the rule in most jurisdictions that the statute of limitations does not run against the state. The premise most often set forth in support for this rule is that the public should not suffer for the negligence of its employees. As so many "doctrines", this one had its origin at early common law, at which time the king could do no wrong, and evolved into today's rule, the justification for which has been supplied after the fact.

(2) Conversely, political subdivisions of the state do not enjoy the benefits of the rule. It has been suggested that since counties, cities and school districts operate more in the nature of private corporations, they should be subject to the same limitations.

B. Suggestions

(1) If the rule that limitations cannot run against the state is justified in its application to the state,

it should also be justified when applied to the political subdivisions of the state.

(2) It has been suggested and I agree, that this rule has outlived any possible historical justification and that if the policies behind the statutes of limitation have any meaning at all, the state and all its political subdivisions should not be exempt from their provisions. 38 Northwestern University Law Review, 418.

(3) Any possible negligence of a state employee can be guarded against by a simple performance bond.

V. Should excuses of absence from the state and disabilities remain, and if so, should they be modified?

A. Balance of Policies

(1) In considering whether or not a limitations statute should be tolled, you must weigh the public policy considerations favoring the statute against a policy which prevents a plaintiff through no fault of his own or through the fault of defendant from redressing the wrong done him in a court of law.

(2) Where the plaintiff cannot proceed through no fault of his own, the statute has historically been tolled and should continue to be.

(3) If action is prevented through some act of defendant, he should then be estopped from raising the statute in his defense.

(4) Even if tolling is allowed, there will be some point in time where the policy to prevent stale claims will outweigh the injustice of barring a claim.

B. Absence from the state

(1) It is suggested that absence from the state toll the statute of limitations only if the plaintiff is unable to serve process on the defendant or his property (through a long arm statute) or is unable to invoke extradition laws for his return. Only then can it be said that action was prevented through no fault of the plaintiff. Examples of this would be imprisonment in another jurisdiction, or a defendant whose whereabouts is unknown.

C. Disabilities

(1) Infancy-- It has been suggested that since parents and guardians ad litem can easily enforce an infant's rights at law, that the justification for its tolling the statute of limitations has been outlived. 31 Montana Law Review, 263. I tend to agree with this hypothesis and would suggest a modification in this area.

(2) Insanity-- Insanity poses a more difficult problem, especially where the testimony of the insane person is needed to make his case. Since he may be incompetent to testify, the statute should be tolled even though his guardian may be qualified to sue in his behalf.

(3) Imprisonment-- Current law provides in most jurisdictions that the statute will be tolled during the time of a person's imprisonment if it is less than a life term. Normally if the cause of action arose while the plaintiff was in prison, the statute is tolled. If it arose before he was imprisoned, it will continue to run. This is a reasonable application of basic principles and need not be changed in my estimation.

VI. When does the cause of action accrue?

A. General rule.

(1) The statute of limitations does not begin to run, of course, until the cause of action sued upon accrues. For the vast majority of the cases, the action accrues when event giving rise to the damage occurs. Examples are: when the trespass occurs on land, when a contract is breached or repudiated, or when the collision occurs in an auto accident.

B. Special problems.

(1) Special problems arise in certain tort and fraud cases where the plaintiff cannot readily discover the injury done him. In these cases the action is delayed through no fault of the plaintiff and should be given special consideration.

(2) Medical malpractice theories of when the action accrues. 1 Washburn Law Journal, 257

(a) Upon the occurence of the event giving rise to the injury. This is the harshest rule, especially in the "missing sponge" cases where

the article may not be discovered until several years after the operation.

(b) Continuing negligence-- Here the courts hold that the negligence giving rise to the injury continued until the time of the doctor's last treatment of the plaintiff and the statute runs from there.

(c) Discovery theory-- the most liberal of the theories--the statute runs from the time the instrument, a cause of the injury, is recovered.

(d) I might suggest as an alternative that the statute require action within one year from discovery of the injury, but not to exceed five years from the date of last treatment by the physician. This puts an absolute limit on the doctor's liability while at the same time encouraging the plaintiff to discover his injury and act on it.

(3) Fraud cases

(a) The discovery rule is less prevalent in fraud or fraudulent concealment cases perhaps because the courts have used some form of estoppel to prevent the defendant from raising the statute. A provision such as the alternative suggested above would seem most appropriate in fraud cases.

C. Conclusion

(1) The same balance of policies is necessary here as it was in the areas of tolling. Each action must be analyzed to produce the most equitable statutory result.

BIBLIOGRAPHY

"Absence From State as a Basis for Tolling the Statute of Limitations Despite Availability of Service under Nonresident Motorist Statute.", Vanderbilt Law Review, 12:295.

"Admiralty--The Doctrine of Laches.", Tulane Law Review, 37:811.

American Jurisprudence 2d, Limitation of Actions, §§ 1 et. seq.

"Criminal Law--Limitation of Actions--Intent to Avoid Justice." Minnesota Law Review, 57:1140.

"Developments in the Law--Statutes of Limitation.", Harvard Law Review, 63:1177.

"Disabilities Tolling the Statute in Montana.", Montana Law Review, 31:263.

"Disorder of the Statutes of Limitation," John D. Falconbridge, The Canadian Bar Review, 21:669.

"Equity--Effect of Statutes of Limitation on Equity Suits.", University of Florida Law Review 3:351.

"Estoppel and the New York Statute of Limitations.", Albany Law Review, 26:38.

Florida Jurisprudence, Limitation of Actions, §§ 1 et. seq.

"Limitation of Actions--Equitable Remedies--Repudiation.", North Carolina Law Review, 44:202.

"Limitation of Actions--Statute Governing When Action is Deemed Commenced Within the Statute of Limitations.", Kansas Law Review, 10:450.

McClintock on Equity, Henry L. McClintock.

"Medical Malpractice: When Does the Statute Begin to Run?", Missouri Law Review, 35:559.

ADDENDUM "2"

CS/HB 895 - Section Summary

Section 1 Applicability. - This section declares that a civil action shall be barred unless begun within the time prescribed in this Chapter (or a different time if prescribed elsewhere in the Florida Statutes), and specifically includes within this language an action brought by the state, a public officer or a political subdivision of the state.

Section 2 Language Modernization Only.

Section 3 Computation of Time. - Traditionally, at common law, ignorance of the wrongful act or damages of another is no excuse for not filing a timely law suit, and the tardy claim is barred by the running of the Statute of Limitations. Three exceptions to this general rule currently exist in Florida law, and this section of the bill codifies the general rule ~~and~~ the exceptions into one section. The exceptions are for actions based on: (1) fraud (Section 95.11(5)(d) currently); (2) professional malpractice (currently Section 95.11(6) for medical malpractice, and see also Downing v. Vaine, 228 So. 2d 622 (Fla. 1st Dist. Ct. App. 1969)); and (3) products liability (see Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969)).

Traube (813) 366-0660

In the areas of products liability and fraud the House Judiciary Committee decided to put a twelve-year maximum on the "discovered or should have discovered" rule. Therefore, the only area where there would be a chance for long term liability would be for professional malpractice.

Under existing law in each of these areas, the plaintiff has the full statutory period in which to bring suit from the time he "discovers or should have discovered" the negligence or wrongful act. In the case of fraud, the plaintiff who discovers a fraud five years from its perpetration may prove that he was unable to discover it previously, and then has four years to bring suit from the discovery date. In the case of professional malpractice under 95.11(4) the plaintiff would have two years from the date of discovery of the malpractice. The proposed statute continues this process but with an outside limit of twelve years for products liability and fraud.

Section 4 When Limitations Toll. - This section is a consolidation of several previous sections providing that certain events will toll the running of the statute. This section prevents a defendant from concealing himself within the state, or absenting himself from the state, in order to avoid the consequences of his wrongful act by setting up the technical defense of the Statute of Limitations. However, if the defendant can be served with

process outside the state, or through service by publication within the state, his absence will not prevent the running of the statute since the plaintiff may proceed with his law suit without the defendant's presence at trial. This section also incorporates the Council's policy decision to limit the common-law disabilities which serve to toll the statute. At common law if the plaintiff were adjudicated incompetent or insane, or were an infant, or were in prison, when the cause of action arose, the statute would not begin to run until the disability was overcome, such as by an infant reaching the age of twenty-one. The Council in its proposed revision decided to limit the disability section to incompetency, with an outside limit of seven years. It was thought by the Council that the other disabilities could be afforded adequate protection through existing procedures, such as the appointment of a guardian in the case of an infant, and the greater access to legal assistance afforded inmates in correctional institutions. It should be noted that the infant is still protected from fraudulent acts of the guardian or others by the "discovered or should have discovered" rule of the preceding section.

Section 5 Language Modernization only.

Section 6 Language Modernization only.

Section 7 Limitations other than for the recovery of real property. - This section is the heart of the bill. It contains all the time periods for limitations other than for the recovery of real property.

The first change was to abolish the effect of the seal by eliminating the special category for instruments under seal. The Council felt that the use of the seal was an anachronism with its only remaining effect being the extension of the statute of limitations from five to twenty years. The only policy reason advanced for retaining the effect of the seal was that when one used a seal he was somehow more impressed with the consequences of his actions and therefore should be bound for a longer period of time than on an ordinary unsealed document. The seal is a holdover from medieval days when it was a substitute for the signature of men who couldn't sign their names, and its effect has already been abolished in a majority of jurisdictions.

The Council eliminated entirely two categories of limitations periods: The seven-year period and the three-year period. These actions were transferred to other periods. For example, the only subject covered in the seven-year period was an action on a foreign country judgment. This was put into the five-year category. Intentional torts and wrongful death actions, with two-year periods were shifted into the four-year period, along with negligence actions.

Several statutes of limitation of general applicability were shifted from the context of other chapters into Chapter 95, such as negligence actions, formerly found in chapter 768.04, and actions arising out of bulk transfers formerly found in chapters 676.111. In addition, the equitable doctrine of laches was incorporated into this section, requiring that courts exercising equity jurisdiction apply the doctrine of laches in accord with the legal limitation period for actions of an equivalent nature. The doctrine may still be applied at an earlier time, according to equitable principles.

Section 8 Language Modernization only.

Section 9 Language Modernization only.

Section 10 Language Modernization only.

Section 11 Language Modernization only.

Section 12 Language Modernization only.

Section 13 Language Modernization only.

Section 14 Language Modernization only. Note: The deletion of subsection (3) was made because the clause is covered in section 95.18, which requires that the tax return be filed within one year of entering possession for the statute to commence on a claim of adverse possession. The inclusion of this requirement in this section was unnecessary repetition.

Section 15 Language Modernization only.

Section 16 Limitation upon claims by remaining heirs when deed made by one or more. - This section limits claims against property conveyed by the heirs or decedent owners, with the customary seven year limitation. It does not bar other heirs from contesting the transfer, however. The revision strikes the disability exception for minors, in keeping with the Council's policy decision to limit the disability exceptions to incompetence. Subsection (4) was a grandfather clause dating from the enactment of the statute in 1925, and is no longer necessary.

Section 17 Limitation where deed or will on record for five years or twenty years. - This section consolidates two previous sections of the current law and serves to limit the time in which a conveyance can be attacked when the conveyance has been duly recorded so as to give notice to potential buyers. The time for attacking a conveyance on technical grounds has been reduced from ten to five years, in keeping with the Council's policy to insure the marketability of title. This combination should serve as a supplement to the recording act. Subsections two, three and four of 95.26 have been stricken as unnecessary verbage in the revision.

Section 18 Limitations; instruments encumbering real property. - This section consolidated the various sections

dealing with limitations on instruments encumbering real estate. Instruments which have a definite termination date must be enforced within five years of the date of maturity, as opposed to the current twenty-year period. This is true whether the instrument be a mortgage or the extension of a mortgage as provided in the statutes. The Council felt that when the termination date is ascertainable from the mortgage, the mortgagee should enforce his rights thereunder within the same time as under any written instrument. In the case of the mortgage the cause of action arises when the breach occurs initially.

Section 19 Termination of contracts to purchase real estate in which there is no maturity date. - This is a curative act relating to the recording acts and updating the original act. The stricken sections were the grandfather clauses which clearly have no current application as they were only necessary for due process considerations in the original enactment of the curative act.

Section 20 Limitation on taxes. - This section contains the first general limitation on tax liens ever imposed by statute. Excluded from the coverage under this section are chapter 198 (estate taxes) and chapter [illegible] (corporate income tax). The main consideration b[illegible]nd t[illegible]s section was to eliminate the unlimited duration of tax liens under chapter 192, relating to ad valorem taxes on real and personal property. These liens have been the cause of

considerable consternation to title examiners, because the liens continued as clouds on title, and are superior to all others until paid. This section should serve to facilitate the marketability of titles in Florida and guarantee that governmental units enforce their claims promptly. This section demonstrates the Council's policy decision that government ought to be on an equal footing with citizens in their duty.

Section 21 Limitation after death of a person served by publication. - This section is a holdover from the day of the separate jurisdiction of courts at law and equity, relating to chancery judgments. This section may be of no effect since the combination of law and equity. However, the Council was unable to make a conclusive determination that this section was useless. Therefore, it decided to include the section in the revision should it still be viable. The period was shortened from five years to one year, however, to correspond with the equivalent effect of a final judgment at law.

Section 22 ~~Notice of claim to municipalities~~. - This section ~~repeals~~ s 95.241, which required that a ~~90-day notice~~ be served upon cities as a ~~condition precedent~~ to suit against a municipality for the so-called "slip and fall" cases. The ~~repeal~~ of the notice requirement, which acted as a ~~ninety-day statute of limitations~~, can be justified

by the general principle that the Council was attempting to eliminate special exceptions and exemptions under the revised statute. Under this repealer the cities will be on the same standard as everyone else in a negligence suit, and the failure to bring a special notice to the tortfeasor will not bar suit by an injured plaintiff.

Section 23 Roads presumed to be dedicated. - This section was transferred to chapter 95 with no substantive changes.

Section 24 Language Modernization only.

Section 25 Claims against the state. - This section is the one exception to the process of consolidation of the statutes of limitation. This section deals with the filing of a claim in the Florida Legislature, and it was felt by the Council that the limitations period should be placed in the chapter on legislative organization and procedures rather than in the statute of limitations.